

The Law Commission
Consultation Paper No 199
and
The Scottish Law Commission
Discussion Paper No 149

**CONSUMER REDRESS FOR MISLEADING
AND AGGRESSIVE PRACTICES**

A Joint Consultation Paper

THE LAW COMMISSIONS: HOW WE CONSULT

About the Commissions: The Law Commission and the Scottish Law Commission were set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

- The Law Commissioners are: The Rt Hon Lord Justice Munby (*Chairman*), Professor Elizabeth Cooke, Mr David Hertzell, Professor David Ormerod and Frances Patterson QC. The Chief Executive is Mark Ormerod CB.
- The Scottish Law Commissioners are: The Honourable Lord Drummond Young (*Chairman*), Laura J Dunlop QC, Professor George L Gretton, Patrick Layden QC TD and Professor Hector L MacQueen. The Chief Executive is Malcolm McMillan.

Topic: We ask how far consumers should be given a right to redress when a trader acts in a misleading or aggressive way, in breach of the Consumer Protection from Unfair Trading Regulations 2008. A summary of this paper is available from our websites.

Geographical scope: England and Wales, Scotland.

An impact assessment is available on our website, and is summarised in Part 16.

Previous engagement: In March 2010, we published a short paper outlining the issues. We then held a series of meetings with stakeholders, and summarised our findings in October 2010.

Duration of the consultation: 12 April 2011 to **12 July 2011**.

How to respond

Send your responses either –

By email to: commercialandcommon@lawcommission.gsi.gov.uk or

By post to: Jessica Ugucioni, Law Commission,
Steel House, 11 Tothill Street, London SW1H 9LJ
Tel: 020 3334 0282 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, where possible, you also sent them to us electronically (in any commonly used format).

After the consultation: We plan to publish final recommendations in early 2012 and present them to Parliament. It will be for Parliament to decide whether to change the law.

Freedom of information: We will treat all responses as public documents. We may attribute comments and publish a list of respondents' names. If you wish to submit a confidential response, it is important to read our Freedom of Information Statement on the next page.

Availability: You can download this consultation paper and the other documents free of charge from our websites at: <http://www.lawcom.gov.uk> (See A–Z of projects > Misleading and Aggressive Practices) and http://www.scotlawcom.gov.uk/download_file/view/672/.

CODE OF PRACTICE ON CONSULTATION

The Law Commission is a signatory to the Government's Code of Practice described below.

THE SEVEN CONSULTATION CRITERIA

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercise

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Clarity and scope of impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

CONSULTATION CO-ORDINATOR

The Law Commission's Consultation Co-ordinator is Phil Hodgson.

You are invited to send comments to the Consultation Co-ordinator about the extent to which the criteria have been observed and any ways of improving the consultation process.

Contact:

Phil Hodgson, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ

Email: phil.hodgson@lawcommission.gsi.gov.uk

Full details of the Government's Code of Practice on Consultation are available on the BIS website at <http://www.bis.gov.uk/policies/better-regulation/consultation-guidance>.

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THE LAW COMMISSION

THE SCOTTISH LAW COMMISSION

**CONSUMER REDRESS FOR MISLEADING AND
AGGRESSIVE PRACTICES**

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OUTLINE

1. The Consumer Protection from Unfair Trading Regulations 2008 (the Regulations) prohibit misleading and aggressive trade practices. The Regulations implemented a European directive, replacing 23 previous UK consumer protection measures, including most of the Trade Descriptions Act 1968. They are enforced mainly by the Office of Fair Trading and by trading standards services.
2. Under current law, consumers do not have a right to compensation if a trader breaches the Regulations. Instead consumers must rely on a variety of private causes of action: some statutory, some based on case law. These are complex, confusing and patchy.
3. This Consultation Paper aims to:
 - (1) simplify redress for misleading commercial practices;
 - (2) simplify redress for aggressive commercial practices; and
 - (3) fill gaps in protection, where a consumer is unable to gain redress for serious breaches of the Regulations.
4. A more comprehensive summary is available on our websites at <http://www.lawcom.gov.uk> (See A–Z of projects > Misleading and Aggressive Practices) and <http://www.scotlawcom.gov.uk>. Here we list some of our main provisional proposals and indicate where to find more information about them in the Consultation Paper.

HOW TO RESPOND

5. We have created responses forms, which can be downloaded from our website at the address below, to assist consultees in submitting their views (although we welcome responses in other formats). Two forms are available, if you wish to use them:
 - (1) A summary responses form, with a shorter set of questions for consultees who have only read the summary of this Consultation Paper; and
 - (2) A full responses form. This is for consultees who have read the Consultation Paper as a whole and wish to comment on our full set of provisional proposals.

Please send responses by 12 July 2011 either –

By email to: commercialandcommon@lawcommission.gsi.gov.uk or

By post to: Jessica Uguccioni, Law Commission, Steel House, 11 Tothill Street,
London, SW1H 9LJ
Tel: 020 3334 0282 / Fax: 020 3334 0201

Responses forms are available at: <http://www.lawcom.gov.uk> (See A–Z of projects > Misleading and Aggressive Practices)

THE NEED FOR REFORM

6. Rogue traders use a wide range of misleading or aggressive commercial practices, including misrepresenting products, pressure selling and aggressive debt collection.

Misleading practices

7. The current law of misrepresentations provides redress in most cases of consumer detriment but the problem is that the rights are fragmented, complex and unclear. We consider seven possible routes to a remedy that may apply where a trader has misled a consumer. Many of these causes of action depend on proving the trader was fraudulent or negligent, which is difficult in consumer cases. The definition of a misrepresentation is also overly complicated (see *diagrams at pages 57 and 58*).
8. Although the statutory remedies for misrepresentation in England and Scotland provide a good balance of protection, they are perceived as inaccessible. The remedies are uncertain and consumers rarely know what they are entitled to. Overall the current law confuses traders, consumers and their advisers alike and hinders private ordering.

Aggressive practices

9. Aggressive practices pose more intractable problems because the current law is ill-suited to cover pressure selling tactics. The law is primarily found in case law doctrines which are inaccessible to consumers, traders and non-legal advisers. The law of duress provides a remedy where a consumer is threatened with physical violence or damage to property, but it is less clear whether it would extend, for example, to doorstep salespeople who ignore the consumer's requests to leave. The Protection from Harassment Act 1997 applies to a "course of conduct" by a trader which "amounts to harassment", but a single incident cannot give rise to relief, even if it is serious (see *summary tables at pages 90 and 91*).
10. We have looked at the mobility aids market, where there is strong evidence that doorstep sellers target some of the more vulnerable members of society adopting unethical, highly aggressive and misleading practices. Aggressive practices are a particular problem for older consumers living alone. Whereas these practices are usually criminal offences, it is much less clear whether individual consumers have a right to compensation under current law (see *paras 10.34 to 10.41*).

Misleading and aggressive debt collection

11. If debt collection follows a sale to a consumer and is conducted in an aggressive or misleading way, the trader can be prosecuted under the Regulations.

12. However, if a trader engages in the same conduct in pursuing a *non-contractual* demand for payment, it is less clear whether they are covered. For example, consumers accused of parking offences, copyright infringement or shoplifting might be misled or pressured into paying significant sums of money. Alternatively, traders may demand payment from the wrong person, such as someone who was never a customer. If the demands persist and become aggressive, is the consumer protected by the Regulations? In these cases, the current law is not as clear as it should be (see *paras 3.65 to 3.70*).

Remedies

13. A right without a remedy is of little use to consumers. Our review of the remedies available for both aggressive and misleading practices has highlighted three main problems.
 - (1) The right to unwind is the central remedy for both aggressive and misleading practices. However the right is relatively narrow and precarious. It may be lost through delay, or because used goods cannot be returned in the same state (see *paras 8.15 to 8.25*);
 - (2) Quantifying damages is a complicated and uncertain exercise. It is unclear whether damages are available at all for aggressive practices (see *paras 8.33 to 8.50*).
 - (3) Distress and inconvenience are an important part of consumer detriment for aggressive practices in particular, and yet the availability of this head of damages is open to doubt (see *paras 8.57 to 8.65*).

OUR PROPOSED REFORMS

14. We propose a limited and cautious reform. We do not suggest 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, particularly the prohibitions on misleading omissions and the general prohibition against commercial practices which are “contrary to the requirements of professional diligence”.¹
15. Our aim is to clarify and simplify the current law on misleading practices, and to improve the law on aggressive practices by filling in the existing gaps and providing better protection to vulnerable consumers. We propose to do so by recommending a new consumer Act.
16. The new Act would not replace the Regulations, which will continue to govern criminal liability. In addition, the new Act would cover the private law consequences where traders act in ways that are aggressive or misleading. It would only apply to dealings between businesses and consumers (“B2C” transactions). It would not affect transactions that are solely between businesses, or between consumers.

¹ Reg 3(3).

17. The new Act would cover:
- (1) The liability of traders. Our proposals largely adopt the existing legal tests under the Regulations, but with some important exceptions; and
 - (2) A new stand-alone scheme of remedies for consumers.

LIABILITY FOR MISLEADING AND AGGRESSIVE PRACTICES

18. We have followed the definitions of liability used in the Regulations as much as possible. This means that if a trader acts in a way that would lead to criminal liability, it may also lead to civil redress. However, the scope of civil redress would be more restricted than the Regulations (*see paras 12.1 to 12.14*).
19. In particular we suggest that under the new Act:
- (1) The consumer must have entered into a contract with the trader or made a payment to them (*see paras 13.24 to 13.28*);
 - (2) Land sales and financial services should not be covered (*see paras 13.54 to 13.62*); and
 - (3) There should be no liability for omissions or for the general prohibition on unfair trading under the Regulations. The list of banned practices under the Regulations would also not give rise to automatic redress (*see paras 13.80 to 13.83*).
20. However, the proposed new Act would apply where a consumer made a payment to a trader in response to a demand for payment that arose outside the context of a contract. It would cover wheel-clamping and demands for compensation for shoplifting or copyright infringement if the demands were made in an aggressive or misleading way (*see Part 3 and paras 13.63 to 13.66*).

Defining a misleading practice

21. Under the new Act, a trader's misrepresentations would be actionable whether they are express or implied. The focus is on the "overall presentation" as perceived by the average consumer. This follows the definition of misleading actions under the Regulations and, in substance, covers much the same ground as the current law.
22. 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 act or omissions, which is unhelpful given that often a trader's conduct does not fall clearly in either category (*see paras 13.71 to 13.76*).

Defining an aggressive practice

23. The definition of aggressive practices under the new Act would mirror the Regulations and move away from domestic doctrines such as duress and intimidation. 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 power”. We suggest that some of the blacklisted aggressive practices may provide helpful examples illustrating the coverage of the new Act. Pressure selling and doorstep salespersons overstaying their welcome could, for example, be expressly covered (*see paras 13.90 to 13.94*).

The “average consumer”

24. Our proposals adopt the concept of “an average consumer”, as used in the Regulations. Whether a commercial practice is aggressive or misleading should be judged by an objective standard. This standard, however, would be modified for vulnerable consumers, again tracking the definition in the Regulations.
25. The fact that an aggressive or misleading practice has occurred under the Regulations would not however be enough to obtain relief. The individual consumer must show that the commercial practice was a significant factor in their choice (*see paras 13.99 to 13.107*).

A NEW SCHEME OF CONSUMER REMEDIES

26. We propose a new scheme of remedies that would apply once a consumer had proven that an aggressive or misleading practice had taken place and affected them individually. The scheme tries to replace legal terminology with every-day language. But the change in language is not only about labels: the legal implications of traditional remedies are also left behind. (*see paras 12.15 to 12.20 and the diagram at page 206*).
27. The new scheme of remedies places a premium on clarity and simplicity; many grey areas have been swept aside in favour of bright-line rules. Our proposed remedies aim to restore the consumer to the position they would have been in had the aggressive or misleading practice not happened (*see paras 14.3 to 14.8*). We are proposing two tiers of remedies, set out below.

Tier 1 remedies

28. The standard Tier 1 remedies would be provided in all cases where the consumer establishes a misleading or aggressive practice, with no additional proof of loss. The primary focus would be on returning the consumer to their pre-contract position.

29. We propose two types of Tier 1 remedies:
- (1) The right to unwind the contract: the consumer receives a refund of money paid and is not required to meet any future obligations. Consumers would be entitled to unwind if they meet two tests:
 - (i) Consumers must return the goods or reject the services. To minimise difficult questions of degree, returning or rejecting any part of the goods or services would be enough (*see paras 14.34 to 14.39*).
 - (ii) Timing: the consumer must act quickly. We tentatively suggest a consumer must complain within three months of the delivery of the goods or services (*see paras 14.21 to 14.31*).
 - (2) A discount on the price: If unwinding is no-longer possible, the consumer may nonetheless get a discount on the purchase price. We propose bands of discounts, from zero to 100%, depending on the seriousness of the misleading or aggressive practice. This is a discretionary exercise and guidance with examples and relevant factors would be needed (*see paras 14.49 to 14.55*).
30. Tier 1 remedies would be available even for an innocent misrepresentation. This mirrors the current law of misrepresentation.

Tier 2 remedies

31. Tier 2 remedies resemble traditional damages. They would apply only if a consumer could prove they had suffered actual loss over and above their Tier 1 recovery.
32. Tier 2 remedies would cover losses in two categories:
- (1) Indirect economic loss: consumers may have suffered additional losses because of an unfair practice, such as throwing away an old, perfectly adequate product to make space for the new one. If the consumer can prove this type of loss, it should be recoverable (*see paras 14.58 to 14.60*).
 - (2) Distress and inconvenience: we think that damages for distress and inconvenience should be available for misleading and aggressive practices. We suggest an approach similar to that adopted by the Financial Ombudsman Service, which uses three bands of damages: (1) nominal, for example, making an apology, sending flowers or vouchers; (2) significant, £300 - £900; and (3) exceptional, £1,000 plus (*see paras 14.61 to 14.65*).
33. Under our proposals, a trader could rely on a due diligence defence to avoid Tier 2 remedies. The due diligence defence would mirror the analogous defence in the Regulations. (*see paras 14.66 to 14.69*).

34. We provide some brief worked examples to illustrate how the remedies under the proposed new Act would apply in practice. (see *paras 14.71 to 14.95*).

CREDITOR LIABILITY

35. Under section 75 of the Consumer Credit Act 1974, a consumer who has a claim for *misrepresentation* or breach of contract against the supplier may sue either the creditor or the supplier. Both are liable to the same extent, and there is no limit on potential liability. Notably, the section does not cover aggressive practices. The consumer's purchase must be more than £100 and not more than £30,000.
36. We provisionally propose that the protection given to consumers under section 75 should be amended in two main respects:
- (1) Connected lenders should be liable for the supplier's *aggressive* acts as well as their misleading acts; and
 - (2) The connected lender's liability for the supplier's act should be capped at the amount of the loan, plus interest (see *paras 15.49 to 15.58*).

CONCLUSION

37. It is not possible in an outline of this length to introduce all of our proposals. Consultees are therefore encouraged to refer to both the fuller summary available on our websites and the relevant sections in this paper.
38. Part 10 provides an overview of the problems with the current law. Part 12 summarises our proposals for reform. Part 17 sets out a full list of questions.
39. **We look forward to receiving views by 12 July 2011** sent to the address at page xiii above, and also reproduced at the front of this Consultation Paper.

TABLE OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
BERR	Department for Business, Enterprise and Regulatory Reform
BIS	Department for Business, Innovation and Skills
<i>Chitty</i>	<i>Chitty on Contracts</i> (30th ed 2008)
<i>Clerk & Lindsell</i>	<i>Clerk & Lindsell on Torts</i> (20th ed 2010)
DCFR	Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law (2009)
<i>Delict</i> (SULI)	<i>Delict</i> by Gordon Cameron and others (consultant editor, Joe Thomson). Published under the auspices of the Scottish Universities Law Institute Ltd (2007)
DTI	Department for Trade and Industry
Ervine	WCH Ervine, <i>Consumer Law in Scotland</i> (4th ed 2008)
European Commission's Guidance	Commission Staff Working Document, Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices (Brussels, 3 December 2009)
FOS	Financial Ombudsman Service
FSA	Financial Services Authority
Gloag & Henderson	Gloag & Henderson, <i>The Law of Scotland</i> (12th ed 2007)
LBRO	Local Better Regulation Office
Lincoln Report	Representative Actions and Restorative Justice: A report for the Department for Business, Enterprise and Regulatory Reform. University of Lincoln (2008)
MacQueen & Thomson	Hector L MacQueen & Joe Thomson, <i>Contract Law in Scotland</i> (2 nd ed 2007)
McBryde	W W McBryde, <i>The Law of Contract in Scotland</i> (3rd ed 2007)
<i>McGregor</i>	<i>McGregor on Damages</i> (18th ed 2010)
OFT	Office of Fair Trading
OFT Guidance	Office of Fair Trading, Consumer Protection from Unfair Trading. Guidance on the UK Regulations (OFT 1008, May 2008) implementing the Unfair Commercial Practices Directive

Reid & Blackie	Elspeth C Reid & John W G Blackie, <i>Personal Bar</i> (2006)
<i>Stair Memorial Encyclopaedia</i>	<i>The Laws of Scotland (Stair Memorial Encyclopaedia)</i>
<i>SME Reissue</i>	<i>The Laws of Scotland (Stair Memorial Encyclopaedia)(Reissue)</i>
The Directive	Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (Unfair Commercial Practices Directive)
The Regulations	Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277)
Thomson	Joe Thomson, <i>Delictual Liability</i> (4th ed 2009)
<i>Treitel</i>	Treitel, <i>The Law of Contract</i> (12th ed 2007)
TPA	Trade Practices Act (Australia)
TSS	Trading standards services
1967 Act	Misrepresentation Act 1967
1974 Act	Consumer Credit Act 1974
1979 Act	Contractual Remedies Act 1979 (New Zealand)
1985 Act	Law Reform (Miscellaneous Provisions) (Scotland) Act 1985
2000 Act	Financial Services and Markets Act 2000
2007 Act	Consumer Protection Act 2007 (Ireland)

PART 1

INTRODUCTION

- 1.1 This paper considers how far consumers should have redress against traders who break the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations). The Regulations came into effect in May 2008 and implement the Unfair Commercial Practices Directive¹ into UK law. They protect consumers from misleading actions, misleading omissions, aggressive practices and some other unfair business practices.
- 1.2 However, the Regulations 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 The Regulations do not give consumers a private right of redress. Consumers who have been victims of unfair commercial practices in breach of the Regulations have no direct avenue to compensation for losses suffered. Instead, they must rely on existing private law doctrines, such as the law of misrepresentation, duress or harassment. These doctrines are complex and difficult to enforce, and leave gaps in protection.

AGGRESSIVE AND MISLEADING PRACTICES: A SERIOUS PROBLEM

- 1.4 Research by Consumer Focus found that almost two-thirds of the population had been the target of a scam within the last two years.² The list of scams is wide-ranging:
 - (1) Some are misleading practices: around a third of people had been misled by fake “wins” and a fifth by “free” goods which are far from free. Traders also misled consumers by, for example, falsely claiming to be members of a trade association or approved scheme, or by selling “miracle products” which falsely claim to cure illness or restore youth.
 - (2) Other scams are aggressive: a fifth of people were worried about persistent sales calls; one in twenty had experience of a salesperson who ignored requests to leave; and one in twenty-five had attended “presentations” where intimidating doormen made it difficult to leave.
 - (3) Some scams involve a mix of both aggressive and misleading tactics: such as the salesman who gains entrance by claiming to work for the council, and then refuses to leave.

¹ Directive 2005/29/EC. A directive is a legislative instrument of the European Union. According to article 288 of the Treaty on the Functioning of the European Union, “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

² The main sample for this study related to 1,051 respondents invited through an online survey. The study therefore relies on a considerable degree of extrapolation to achieve correct weightings. We also note that the figures include persons who were subjected to scams but did not fall for them and lost no money.

1.5 Both aggressive and misleading practices are criminal offences under the Consumer Protection Regulations 2008. However, as we discuss in this paper, they are treated differently under private law.

- (1) Misleading practices are covered by the law of misrepresentation. The law provides a remedy, but is overly complex and arcane. It was developed mainly in response to business disputes, brought before the appeal courts with the help of legal representation. By contrast, consumers rarely have access to legal help, or the ability to bring test cases before the courts.
- (2) For aggressive practices, private law often fails to provide a remedy at all. Although the law of duress protects consumers against the threat of violence, it does not necessarily extend to more subtle high-pressure sales tactics, which may involve an implied threat that the consumers will not be left alone until they sign a contract.

1.6 In our initial discussions with consumer groups we were given the following typical examples of aggressive selling.

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.

- 1.7 As we explore in Part 10, aggressive practices are a particular problem for housebound or vulnerable consumers, especially the very old. In England and Scotland there are currently 630,000 people aged 85 or over who live alone. This is set to rise to 1.4 million by 2033.³ Consumer protection law has yet to adapt to the needs of an ageing population.
- 1.8 We were also given many examples of unfair debt collection, including persistent demands for time limited debts, wheel-clamping, and “civil recovery” for alleged shop-lifting. In Part 3 we discuss how the Regulations apply to misleading and aggressive tactics to collect payment from individuals.

CALLS FOR A PRIVATE RIGHT OF REDRESS

- 1.9 In 2009, Consumer Focus said to us that the existing private law is overly complex, too difficult to use and leaves many gaps.⁴ They called for a new right to provide compensation for all consumers who have suffered loss through a breach of the Regulations.
- 1.10 In 2009/10, TSS brought 173 prosecutions under the Regulations.⁵ Consumer Focus suggests that the level of enforcement “pales into insignificance” compared with the extent of the problem. 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.⁶
- 1.11 These calls have been 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”.⁷ 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.⁸

³ 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.

⁴ Consumer Focus, *Waiting to be heard* (August 2009) pp 17 to 23.

⁵ OFT, Annual Report 2009-2010, Annex G, Table G-7.

⁶ Consumer Focus, *Waiting to be heard* (August 2009) p 3.

⁷ European Parliament Resolution on the Transposition, Implementation and Enforcement of Directive 2005/29/EC and Directive 2006/114/EC (13 January 2009).

⁸ 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.

THE BACKGROUND TO THE PROJECT

1.12 This project is part of the Government's consumer law reform agenda,⁹ along with other policy initiatives.¹⁰ In 2006, the Government recognised that there might be merit in the consumer groups' case for a private right, but expressed concern that adopting such a right for the whole of the Directive

might have unintended and adverse consequences by potentially providing consumers with undesirable latitude to sue traders and by impacting on the law of misrepresentation.¹¹

1.13 Concerns about unintended consequences were also expressed by businesses: since the Regulations are uncertain, they might encourage consumers to bring small and unfounded actions. This would impose litigation costs on traders which would ultimately be passed back on to consumers not involved in the litigation.

1.14 In November 2008, the Law Commission published preliminary advice on the issue.¹² Noting that in Ireland the implementation of the Directive had included a private right to damages,¹³ 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. We noted:

If changes were made within existing structures, it seems less likely that unforeseen consequences would cause significant problems.¹⁴

TERMS OF REFERENCE

1.15 In February 2010, the Department for Business, Innovation and Skills 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 Regulations;

⁹ HM Government, *A Better Deal for Consumers. Delivering real help now and change for the future* (July 2009) p 77.

¹⁰ Department for Business, Innovation and Skills, *Consolidation and Simplification of UK Consumer Law* (November 2010). The European Commission has also proposed a new Consumer Rights Directive: see http://ec.europa.eu/consumers/rights/cons_acquis_en.htm

¹¹ See *Response to the Consultation Paper on Implementing the UCPD* (December 2006), available at <http://www.berr.gov.uk/files/file35750.pdf>, p 7.

¹² Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department for Business, Enterprise and Regulatory Reform*, available at http://www.lawcom.gov.uk/unfair_commercial.htm

¹³ See the Irish Consumer Protection Act, s 74.

¹⁴ Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to BERR on the issues raised*, para 4.19.

- (2) to consider the law of duress in order to clarify whether aggressive commercial practices under the Regulations should be automatically 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.
- 1.16 The project considers 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.

PRELIMINARY CONSULTATION

- 1.17 This project is evidence-based. We started by asking stakeholders to submit evidence of cases where consumers suffered loss due to unfair commercial practices but currently have no effective right of redress.¹⁵ We also spoke to business groups about the likely costs of reform.
- 1.18 Between March and August 2010, we met ten representative groups and received written submissions from nine other stakeholders. Appendix 1 lists those who gave evidence to us. Citizens Advice also allowed us to search their Evidence Retrieval Tool, looking for examples of unfair commercial practices which had been submitted by local CAB bureaux. Furthermore, Jane Williams and Caroline Hare of Queen Margaret University, Edinburgh provided us with the initial results from their research into Scottish trading standards officers' views of the Regulations.
- 1.19 In October 2010, we published a paper in which we summarised stakeholders' views.¹⁶ There was general consensus that the law of misrepresentation is too complicated for consumers to use. Stakeholders told us that aggressive practices, usually connected with commission-based selling and targeting vulnerable groups like the elderly, were a major problem. Often there was no clear avenue of redress. We were told that consumers needed a simpler scheme of private remedies.

¹⁵ Law Commission, *Misrepresentation and Unfair Commercial Practices: Some Initial Questions* (February 2010), available at http://www.lawcom.gov.uk/misrepresentation_commercial.htm

¹⁶ Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), available at http://www.lawcom.gov.uk/misrepresentation_commercial.htm

GUIDING PRINCIPLES

- 1.20 The feedback we received from stakeholders has guided our work since the start of the project. Stakeholders have told us they have become more used to the Regulations. By contrast, the current private law of misrepresentation and of duress are fundamentally too complex and obscure for consumers to use. We have maintained a dialogue with the Department of Business, Innovation and Skills as the project has developed and evolved from our original terms of reference. We have therefore structured our proposals around the Regulations, with modifications where they appeared appropriate, instead of using the current law as our starting point as originally suggested.
- 1.21 Furthermore, when facing choices between simplicity on the one hand, and flexibility on the other, we have opted for simplicity. We need to ensure that the law is suited to the forum in which it is enforced. Our terms of reference do not extend to reforming court procedures or access to advice. But we are aware that our proposed remedies will be enforced in a variety of settings: through compensation orders, ancillary to criminal proceedings; through civil sanctions, applied in pilot schemes; and through small claims proceedings, without lawyers present. This suggests a need for simple, standardised remedies.
- 1.22 We propose a limited and cautious reform. We do not suggest that consumers should have a right of redress for all breaches of the Regulations. Businesses told us that some elements of the Regulations were too uncertain for such a right – particularly the prohibitions on misleading omissions, and the general prohibition against commercial practices which are “contrary to the requirements of professional diligence”.¹⁷
- 1.23 Our aim is to clarify and simplify the current law on misleading practices, and to improve the law on aggressive practices by filling in the existing gaps and providing better protection to vulnerable consumers. We propose to do so by recommending a new statute.
- 1.24 In developing and simplifying the current legal framework, we have tried to adopt the framework and terminology of the Regulations where appropriate. Where there are differences, we have sought to incorporate the best aspects of English and Scots law. The main innovation in our reforms concerns remedies, where we have sought to introduce a simplified scheme for redress.

¹⁷ Art 5, implemented by Reg 3(3).

THE STRUCTURE OF THIS CONSULTATION PAPER

1.25 The Consultation Paper is divided into four main sections:

- (1) We start by looking at **public regulation**. In Part 2, we provide an overview of the Consumer Protection Regulations 2008. Part 3 then considers a controversial issue: how far do the Regulations apply to misleading and aggressive practices to collect debts and other payments from individuals? Part 4 looks at how the Regulations are enforced. Although the main sanction is a criminal prosecution, there is also the possibility of consumer redress, either through compensation orders or the new civil sanction pilots. Trading standards officers asked for more guidance about how such redress should be assessed;
- (2) Next, we summarise the **current private law**. We deal, in turn, with misleading actions (Part 5); misleading omissions (Part 6); and aggressive practices (Part 7). We then provide an overview of how the current law approaches causation and remedies (Part 8). Finally, Part 9 discusses the way in which consumers can enforce their private law rights. Again this shows the need for standard, easy-to-apply remedies;
- (3) The following Parts look at **the case for reform**. Part 10 summarises the problems with the current law, setting out the case for reform. Part 11 discusses lessons from other jurisdictions. We look briefly at how misleading and aggressive practices are dealt with in Ireland, Australia, the USA and New Zealand. We also consider the Draft Common Frame of Reference, which draws on academic work to distil the general principles of European civil law; and
- (4) We then make **proposals for reform**. Part 12 gives a broad overview. The subsequent Parts then provide more detail. Part 13 looks at liability and Part 14 looks at remedies. Part 15 then discusses the difficult issue of how far a connected creditor should be held liable for a trader's wrongdoing. Finally, Part 16 considers the economic impact of our proposals.

1.26 Part 17 lists our questions for consultees.

A PRESENTATIONAL POINT

1.27 The subject matter of this consultation covers a vast sweep of law, some of which is rather arcane and underdeveloped. Given that most of our audience are not lawyers, this could discourage consultees from engaging with the questions we raise.

1.28 We have therefore sought to summarise the law to its key principles, without much context or caveat. We have tried to balance this by giving appropriate references to the leading text books so that readers who want to investigate further have a source to refer to. Those who are already aware of the current law may wish to start with Part 10, which provides a summary of problems with the existing law.

- 1.29 Finally, to assist in explaining the law we have tried to include as many examples as possible. We have mainly drawn our examples from case summaries submitted by consumer groups, together with newspaper and other reports, to illustrate the types and scope of practices which the Consumer Protection Regulations address, and highlight any perceived needs for simpler or more extensive rights of redress. However, we have not attempted to verify whether the case histories are true. The trader will often have a different view of what has taken place. We provide examples simply to illustrate what the law is or might be, on the assumption that the facts are the ones given.

ACKNOWLEDGEMENTS

- 1.30 Our pre-consultation discussions with stakeholders have been integral to shaping our approach to this Consultation Paper. We would like to thank all those who took time and trouble to respond to our questions and to provide us with evidence. A full list is given in Appendix 1.

PART 2

THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008: AN OVERVIEW

INTRODUCTION

- 2.1 Unfair commercial practices come in all shapes and sizes: from the misleading advertisement for a miracle cream, to the aggressive sales person who just will not take no for an answer. Unfair commercial practices appear widespread¹ and they harm consumers in two ways. They may cause direct harm to individuals. They may also impede the functioning of the economy as a whole by undercutting honest businesses and reducing consumer confidence in the market. The legal system's response to unfair commercial practices reflects the different types of interests affected: one private, one public.
- 2.2 In this Part we outline the public response. This is based on the 2005 Unfair Commercial Practices Directive (the Directive),² as implemented by the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations). We start by giving the background to the Directive, before summarising the main concepts of the Regulations.

THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE

- 2.3 The Directive introduced a single set of standards to combat "sharp practices", applicable across all 27 member states. It aimed to replace a patchwork of different protections with broad, general standards to protect consumers from unfair practices. It identifies the following practices by traders as potentially harmful to consumers:
- (1) Misleading actions;³
 - (2) Misleading omissions;⁴
 - (3) Aggressive practices;⁵ and
 - (4) A blacklist of examples of practices which are always unfair.⁶

¹ Consumer Focus, *Waiting to be heard* (August 2009) p11; Office of Fair Trading, *Implementing the EU Directive on Unfair Commercial Practices and amending existing consumer legislation* (March 2006); Department for Business, Enterprise & Regulatory Reform, *Implementation of the Unfair Commercial Practices Directive* (February 2008).

² Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, 2005 OJ L 149 22-39. Any other directives mentioned in the text will be distinguished appropriately.

³ Art 6 of the Directive, implemented by Reg 5.

⁴ Art 7 of the Directive, implemented by Reg 6.

⁵ Art 8 of the Directive, implemented by Reg 7.

⁶ Annex 1 of the Directive implemented by sch 1 of the Regulations.

- 2.4 To fall into the first three categories, a commercial practice needs to meet two tests. First, it must be misleading or aggressive within the meaning of the Regulations. Second, it must be likely to affect an average consumer’s “transactional decisions” in respect of a product. This is not the case with the 31 blacklisted examples, where the mere occurrence of the practice is enough to trigger liability, regardless of its effects.⁷
- 2.5 In addition, the Directive contains a general prohibition against commercial practices which are “contrary to the requirements of professional diligence”.⁸ This is a catch-all provision, designed to cover practices which are harmful yet do not fall within the more specific categories discussed above.⁹ The general prohibition is designed to make the Directive “future-proof”.¹⁰ Its terms are deliberately vague, to allow regulators to deal with unfair practices which do not yet exist, but which unscrupulous traders may invent in due course. As the Law Commission noted in its preliminary advice, “given the unclear limits of the scope of this prohibition, extending a new right could have unexpected consequences”.¹¹ The general prohibition is so uncertain that we consider it intrinsically unsuited to form the basis of private law rights. It is therefore of limited relevance to this paper.
- 2.6 The scheme of the Directive can also be illustrated as follows.

ACT	OMISSION	AGGRESSIVE
MISLEADING		
BANNED BLACKLIST		
THE SAFETY NET: THE GENERAL PROHIBITION AGAINST TRADING UNFAIRLY		

⁷ Annex 1 of the Directive.

⁸ Art 5, implemented by Reg 3(3).

⁹ For the overlap between the general prohibition, and the other provisions in the Directive, see the European Commission’s Explanatory Memorandum, COM (2003) 365, para 57: misleading and aggressive practices “are considered in themselves to be distortions of consumer behaviour rather than legitimate influence and, as such, contrary to the requirements of professional diligence”.

¹⁰ See OFT Guidance, para 10.1.

¹¹ Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department of Business, Enterprise and Regulatory Reform on the issues raised* (November 2008) para 2.98.

- 2.7 The Directive is a full harmonisation measure, meaning member states cannot adopt measures that impose higher standards of consumer protection than the Directive.¹² Financial services¹³ and immovable property were however carved out of full harmonisation, allowing member states to impose more restrictive or prescriptive requirements in these sectors.¹⁴
- 2.8 Some industry sectors are also subject to additional, more specific informational duties and these continue to apply alongside the Directive.¹⁵
- 2.9 The Directive only provides for public enforcement.¹⁶ Contract matters are excluded from the Directive.¹⁷ This means that the Directive does not affect private law rights. The fact that a contract was induced by an unfair commercial practice does not automatically make it unenforceable against a consumer. Member states are at liberty to add civil law remedies, but so far the UK has not done so.¹⁸

THE CONSUMER PROTECTION REGULATIONS 2008

- 2.10 The Regulations replaced some major UK consumer protection legislation,¹⁹ including most of the Trade Descriptions Act 1968 and the provisions against misleading price indications in the Consumer Protection Act 1987. The Regulations only provide for public enforcement, and consumers' private rights of action were left unaltered.

¹² Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I - 2949. There is a temporary derogation from maximum harmonisation under Art 3.5 of the Directive which allows member states to retain higher standards of protection until 11 June 2013 in specified circumstances.

¹³ Defined as "any service of a banking, credit, insurance, personal pension, investment or payment nature", in accordance with Directive 2002/65/EC .

¹⁴ Art 3(2).

¹⁵ See for example, the directive concerning misleading and comparative advertising, 2006/114/EC; the Payment Services Directive, Directive 2007/64/EC came into force in 1 November 2009, and covers traders providing payment services, like banks, but also phone companies for example; and protects consumers from unintelligible information. It provides that consumers must be given key information "in easily understandable words and in a clear and comprehensible form...". (Article 41); and the Air Services Regulation (EC) No 1008/2008 which sets out the pre-contractual information that air carriers must give consumers. This information includes a break-down of the final price to show taxes, charges, surcharges and fees.

¹⁶ Art 11.

¹⁷ Recital 9 states that the Directive is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice.

¹⁸ But see the proposed Civil Sanctions Pilot, discussed in Part 4.

¹⁹ The Regulations repealed 23 enactments in total.

- 2.11 The Regulations, like the Directive, apply to most dealings between traders and consumers. These are referred to as “business-to-consumer” or “B2C” transactions. Importantly, the Regulations do not apply to dealings that are purely between businesses (“B2B”) or purely between consumers (“C2C”).²⁰
- 2.12 Overall, the Regulations closely track the provisions of the Directive, as we discuss below. We start by describing the first case to interpret the Regulations and their scope. We then discuss a core concept: namely that the practice must cause or be likely to cause the average consumer to take a transactional decision. The next sections consider, in turn, misleading actions, misleading omissions, and aggressive practices. Finally, we outline the due diligence defence.

OFT v PURELY CREATIVE

- 2.13 In *OFT v Purely Creative*,²¹ Mr Justice Briggs provided the first judicial interpretation of the Consumer Protection from Unfair Trading Regulations 2008. The case provides a valuable example of how the Regulations can be applied in practice. The judgment is of particular interest in how it considers the meaning of “transactional decision”, the test of inducement under the Regulations, and the scope of omissions liability.²²
- 2.14 The Office of Fair Trading (OFT) sought an enforcement order under the Enterprise Act 2002 to stop the defendants from continuing to distribute their promotions to consumers. The order was also sought against individual officers of the companies involved.
- 2.15 The defendants conducted “you’ve won” promotions which the OFT alleged to be misleading and in breach of Regulations 5 and 6 (misleading actions and omissions); as well as banned practice 31 under Schedule 1 of the Regulations.²³

²⁰ See Art 3 and Recital 6 of the Directive; and the European Commission’s Guidance, p 14. This distinction becomes important in how we define consumers, see paras 2.25 to 2.26 of this Consultation Paper.

²¹ [2011] EWHC 106 (Ch), [2011] WLR (D) 34.

²² See paras 2.34 to 2.35 (“transactional decisions”), 2.40 to 2.41 (“cause or likely to cause”) and 2.61 (misleading omissions) of this Consultation Paper.

²³ Banned practice 31, sch 1 prohibits: “Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either: (a) there is no prize or other equivalent benefit, or taking any action in relation to claiming the prize or (b) other equivalent benefit is subject to the consumer paying money or incurring a cost”.

- 2.16 The defendants' promotions were conducted through personalised and non-personalised letters and scratch card inserts in magazines. For example, the first promotion considered by the court was a personalised letter sent to nearly 1.5 million consumers drawn from a database of persons who had responded to earlier promotions. 99% of consumers were informed they had won a "Zurich watch". The watch had nothing to do with Switzerland. The consumer would have to spend money in order to claim the "prize". The profitability of the promotion depended on the bulk of consumers choosing the more expensive means of responding (by a premium line call). The costs of making these calls were not clear. Overall the transaction was in substance one of purchase, rather than winning, and therefore misleading.
- 2.17 The court considered five specific promotions carried out in 2008 and found they breached the Regulations. Each promotion was analysed individually, and the court found breaches of the Regulations through a combination of banned practice 31 (misleading prize draws); misleading actions; and misleading omissions taken together.

SCOPE

- 2.18 In this section we consider some of the key concepts used in the Regulations, which determine the range of situations they may apply to.

Interpreting the Regulations

- 2.19 In *OFT v Purely Creative* Mr Justice Briggs noted:

Domestic regulations designed to implement EU directives, and in particular maximum harmonisation directives, must be construed as far as possible so as to implement the purposes and provisions of the directive. The interpretation of words and phrases is neither a matter of grammars nor dictionaries, nor even a matter of the use of those phrases (or of the underlying concepts) in national law. If similar words and phrases are used in the directive itself, then they must be interpreted both in the directive and in the implementing regulations by means of a process of interpretation which is independent of the member state's national law and, for that matter, independent of any other member state's national law. For that purpose the primary recourse of the national court is to the jurisprudence of the ECJ.²⁴

- 2.20 The proper interpretation of the Regulations requires a purposive, rather than a literal approach.

²⁴ [2011] EWHC 106 (Ch), [2011] WLR (D) 34, para 40.

“Commercial practices”

2.21 The Regulations apply to “commercial practices”. The European Court of Justice has stated that the concept of commercial practice is “particularly wide”.²⁵ It covers

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.²⁶

2.22 The Regulations cover practices which occur “before, during or after a commercial transaction (if any) in relation to a product”.²⁷

2.23 The European Court of Justice has held that combined offers (where the offer of certain goods is tied to other goods or services)²⁸ are a “commercial practice” because they are “commercial acts which clearly form part of an operator’s commercial strategy and relate directly to the promotion thereof and its sales development”.²⁹ Similarly, promotional campaigns which enable consumers to take part in a lottery free of charge only if they purchase certain goods, have been found to be “commercial practices”.³⁰

²⁵ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I – 2949, para 49.

²⁶ Reg 2(1). This language largely mirrors art 2(d) of the Directive.

²⁷ Reg 2(1).

²⁸ The cases the court considered related to providing a breakdown service to customers who bought petrol from the trader’s fuel station; and the other case involved magazine vouchers that provided a discount at the trader’s lingerie store. Both these practices were held to be “combined offers” and unfair commercial practices under art 2(d) of the Directive.

²⁹ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I – 2949, para 50. Belgium’s law prohibiting combined offers, subject only to a few exceptions was therefore incompatible with the Directive which required instead a case-by-case analysis of whether the practice was unfair in accordance with articles 5 to 9.

³⁰ Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2010] 2 CLMR 24 (ECJ 1st Chamber). German rules which ban such promotional campaigns subject only to an exception, were held to be incompatible with the maximum harmonisation nature of the Directive. The practice was deemed unfair because consumers’ decision-making freedom would be “unreasonably influenced by exploitation of their propensity to gamble” (see point 66 of the Advocate General’s opinion).

- 2.24 The Regulations apply to promotions, sales and supplying products “to or from” consumers.³¹ This additional wording is absent from the Directive, and widens the scope of the Regulations to traders who purchase products from consumers.³² Thus, unlike the Directive, the Regulations apply to traders who buy second-hand goods from consumers, such as second-hand car dealers, antique shops or internet “cash for gold” firms.³³

Who is a “consumer”?

- 2.25 The Regulations define a consumer as “any individual who in relation to a commercial practice is acting for purposes which are outside his business”.³⁴ This is very similar in substance to the definition used in other regulations which implement EU Directives.
- 2.26 There is some doubt about how this affects “mixed use” contracts, where an individual buys a product partly for pleasure and partly for work. An example would be a person who buys a laptop, intending to use it both for playing games and for sending work emails. A judgment by the European Court of Justice appears to suggest that mixed use contracts should be classified as consumer contracts only if the business link was “so slight as to be marginal”, so that it played only “a negligible role”.³⁵

“Products”

- 2.27 The Regulations have no sector-specific exclusions. A “product” is defined as “any goods or service and includes immovable property, rights and obligations”.³⁶ The definition applies across the spectrum of consumer transactions, from buying a sandwich, house, or pension, to utilities and services, including holidays.
- 2.28 The meaning of “product” includes “rights and obligations”.³⁷ In Part 3 we consider whether this extends to the activities of firms which receive money in return for settling rights and obligations. We think it probably includes wheel clamping and so-called “civil recovery” (whereby those accused of minor shop-lifting are asked to pay fixed sums in compensation).

³¹ See the definition of “commercial practice” in Reg 2(1).

³² The Regulations replaced the relevant sections of the Trade Descriptions Act 1968 which gave this wider protection (see *Fletcher v Budgen* [1974] 1 WLR 1056).

³³ See Office of Fair Trading, *Annual Report 2009-10*, Annexe A, Table A5: ongoing investigation of Goldpost opened 21/01/2010.

³⁴ Reg 2(1). This is similar to the Directive, which instead refers to “any natural person who, in commercial practices covered by [the] Directive, is acting for purposes which are outside his trade, business, craft or profession”, art 2(a).

³⁵ Case C-464/01 *Gruber v Bay Wa AG*, [2005] ECR I-439, paras 39 to 41.

³⁶ Reg 2(1). This is the same definition used in the Directive on Misleading and Comparative Advertising (2006/114/EC) and the draft Consumer Rights Directive (COM 2008) 614 final).

³⁷ Reg 2(1).

“Directly connected”

- 2.29 The Regulations can apply to traders who do not engage with the consumer directly. It is enough that the practice is “directly connected” with the promotion, sale or supply of a product. This broadens the scope of the Regulations to cover parties higher up the chain of distribution, such as manufacturers.
- 2.30 The lateral reach of the Regulations is less clear: for example, are professionals who advise on the quality of products “directly connected” with the supply of a product? In its preliminary advice the Law Commission thought that auditors and credit rating agencies would not be covered by the Regulations,³⁸ even if consumers rely on their judgements when buying financial instruments such as shares or bonds.

CORE CONCEPTS

- 2.31 Unless it is a banned practice,³⁹ any breach of the Regulations will only be actionable if it triggers or is likely to trigger a “transactional decision” by the “average consumer”.⁴⁰ These are core concepts, which we consider below.

A “transactional decision”

- 2.32 A “transactional decision” is defined as:

any decision taken by a consumer, whether it is to act or to refrain from acting, concerning-

- (a) whether, how and on what terms to purchase or make payment in whole or in part for, retain or dispose of a product; or
- (b) whether, how and on what terms to exercise a contractual right in relation to a product.⁴¹

- 2.33 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”. The European Commission’s Guidance makes it clear that many pre-purchase decisions would be included, such as the decision to travel to a sales outlet, to enter a shop, or to spend longer on the internet engaged in a booking process.⁴² It also covers post-purchase decisions, such as whether to cancel a contract or to change a product.
- 2.34 In *OFT v Purely Creative*,⁴³ the court expressed some doubt about the potential breadth of meaning of a “transactional decision”:

³⁸ Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department of Business, Enterprise and Regulatory Reform on the issues raised* (November 2008) paras 2.17 to 2.18.

³⁹ Sch 1 of the Regulations.

⁴⁰ Reg 3 (the general prohibition) refers to “economic behaviour” of the average consumer. This is not defined, but may be broader than a “transactional decision”.

⁴¹ Reg 2(1).

⁴² European Commission’s Guidance, p 23.

⁴³ [2011] EWHC 106 (Ch), [2011] WLR (D) 34.

Although it may be debatable whether the Commission's guidance that this includes a decision to step into a shop after viewing an advertisement in the window goes too far, it was common ground that any decision with an economic consequence was a transactional decision, even if it was only a decision between doing nothing or responding to a promotion by posting a letter, making a premium rate telephone call or sending a text message.⁴⁴

- 2.35 The suggestion that a transactional decision should have an “economic consequence” is also difficult to square with the language of the Regulations which expressly covers decisions “to refrain from acting”.⁴⁵
- 2.36 Post-purchase decisions expressly include “whether, how and on what terms to exercise a contractual right in relation to a product”.⁴⁶ This covers misleading statements by a trader which discourage consumers from bringing legal action. This might cover putting up notices which say that faulty goods will not be replaced after 30 days, or that consumers take part in an activity ‘at their own risk’, and cannot sue if they are injured through a breach of contract.
- 2.37 A transactional decision also includes whether, how and on what terms to make payment in respect of a product. Again, this covers debt collection. Thus a consumer who is finding it difficult to meet debts may make “a transactional decision” about which creditor to pay first, or how much to offer to each. This raises questions about how far the Regulations cover payment collection activities, which we discuss in more detail in Part 3.
- 2.38 One difficult issue is whether the Regulations cover abuses by the trader once the consumer is already tied into a transaction, and does not need to make any further “decisions”. Do the Regulations cover traders who unilaterally change their terms and conditions halfway through a contract? Suppose, for example, a trader states that it intends to provide a 24 hour help-desk. At the time, the statement is true: the trader does intend to provide it. However, later the firm finds it cannot afford the help-desk and dismisses the staff. The European Commission’s Guidance states that this would be an unfair practice.⁴⁷ However, it is difficult to identify the transactional decision which would be affected. By the time the trader decides to renege on its promise, the consumer is already locked into the contract.⁴⁸

⁴⁴ Above, para 68.

⁴⁵ Reg 2(1).

⁴⁶ Reg 2(1).

⁴⁷ European Commission’s Guidance, pp 7 to 8.

⁴⁸ For a general discussion, see Dr C Twigg-Flesner, D Parry, Prof 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 2.39.

“Cause or likely to cause”

- 2.39 The Regulations do not require proof that consumers have actually made transactional decisions because of a commercial practice. They only require that the commercial practice is likely to have that effect on the average consumer. Provided the enforcement authority is satisfied there is a real risk of consumers being induced to make a transactional decision, the test is fulfilled.⁴⁹
- 2.40 In *OFT v Purely Creative*, the court considered the question of inducement under the Regulations in some detail. In light of the imperative not to create barriers to trade between member states, the court favoured a higher hurdle of causation so that a “but for” test of inducement would apply.

It was common ground that the phrase "causes or is likely to cause" is equivalent to the English standard of the balance of probabilities. The phrase "to take a transactional decision he would not have taken otherwise" suggests a *sine qua non* test, namely, whether but for the relevant misleading action or omission of the trader, the average consumer would have made a different transactional decision from that which he did make.⁵⁰

- 2.41 The court stressed that the “but for” test of causation under the Regulations imposes a more stringent test than that applied under domestic law. As will be discussed later, under existing private law a consumer is entitled to relief if the misrepresentation was a “significant factor” in their decision to enter a contract.

The “average consumer”

- 2.42 Commercial practices are judged by their effect on the (hypothetical) average consumer. This concept is used widely across EU law, particularly in free movement of goods and trademark cases.
- 2.43 In these contexts, the European Court of Justice’s case law sets a robust standard, describing the average consumer as someone “reasonably well informed, reasonably observant and circumspect”.⁵¹ For example, the court held that a flash on a chocolate bar wrapper advertising it to be 10% larger was not misleading just because the advertisement itself was larger than 10%.⁵² Reasonably circumspect consumers would be aware of this.

⁴⁹ European Commission’s Guidance, p 24.

⁵⁰ [2011] EWHC 106, [2011] WLR (D) 34, paras 69 to 71.

⁵¹ Reg 2(2), mirroring the European Court of Justice’s approach in Case C-210/96 *Gut Springenheide GmbH, Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung* [1998] ECR I-4657.

⁵² Case C-470/93 *Verein gegen Unwesen in Handel and Gewerbe Köln eV v Mars GmbH* [1995] ECR I-1923.

2.44 The European Court of Justice⁵³ has emphasised that national courts should exercise their own judgment regarding how an average consumer would be affected: the issue does not depend on statistical evidence of how consumers actually behave. Social, linguistic and cultural factors peculiar to member states may also be taken into account.⁵⁴ The European Commission's Guidance refers to these cases, emphasising that the average consumer is "a critical person, conscious and circumspect in his or her market behaviour".⁵⁵ However, "the average consumer's level of attention is likely to vary according to the category of goods and services in question".⁵⁶ In *OFT v Purely Creative*, the High Court of England and Wales noted that the Directive

exists to protect from being misled consumers who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer.⁵⁷

2.45 The court also highlighted that the question whether a promotion could be misleading to the average consumer was highly fact-intensive. It was not capable of resolution as an "invariable or irrebuttable presumption".⁵⁸

2.46 The legal description of the average consumer has been criticised as unrealistic. Recent studies in behavioural economics indicate that a model of consumer behaviour based on rational decision-making is inadequate.⁵⁹ Instead, consumers are often influenced by subconscious, emotional factors. In an era of information overload, consumers deal with too much information by reading it selectively, interpreting it subjectively, and relying on their memory in making decisions. It has been suggested that the test may leave many consumers unprotected.⁶⁰

"Vulnerable consumers"

2.47 The test for the average consumer is relaxed in certain circumstances where:

- (1) the commercial practice was "directed to a particular group" of consumers; 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.

⁵³ The court's interpretation is binding on national courts, see recital 18 of the Directive.

⁵⁴ Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH*. [2000] ECR I-0117, para 29.

⁵⁵ European Commission's Guidance, p 25.

⁵⁶ See Joined Cases T-183/02 and T184/02 *El Corte Inglés v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2004] ECR II-00965, para 68.

⁵⁷ [2011] EWHC 106 (Ch), [2011] WLR (D) 34, para 62.

⁵⁸ Above, para 67.

⁵⁹ R Incardona and C Poncibó, "The average consumer, the unfair commercial practices Directive, and the cognitive revolution" (2007) 30(1) *Journal of Consumer Policy*, 21.

⁶⁰ S Weatherill, "The role of the informed consumer in European community law and policy" (1994) 2 *Consumer Law Journal* 49.

2.48 The modified “average consumer” test recognises that certain groups of consumers will be particularly susceptible to certain commercial practices. Although such practices may reach the majority of consumers, for example through spam emails, they are designed to exploit weaknesses in specific groups. However not all weaknesses count, and the modified test only applies if the consumer’s added vulnerability arises from:

- (1) infirmity;
- (2) age;⁶¹ or
- (3) credulity.

2.49 The list of just three factors has been criticised as arbitrary.⁶² Cathcart and Williams contend that the modified average consumer test is not entirely satisfactory because it overlooks economic vulnerability due to economic factors such as low income or degree of financial pressure.⁶³

2.50 Whereas vulnerability due to infirmity or age is relatively straightforward, vulnerability due to “credulity” is more 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”.⁶⁴ An independent report considered that language skills could make a group identifiable as 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.⁶⁵

⁶¹ Particularly the elderly, children and teenagers, see European Commission’s Guidance, pp 29 to 30.

⁶² 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.

⁶³ 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.

⁶⁴ European Commission’s Guidance, p 30.

⁶⁵ See Dr C Twigg-Flesner, D Parry, Prof 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.

- 2.51 Take an example which was put to us in preliminary discussions. A slimming tea is said to cause fantastic weight loss without the bother of a calorie-controlled diet. Unfortunately, this claim is false. While a false claim would have breached the Trade Descriptions Act 1968,⁶⁶ the position under the Regulations is less certain. Under the Regulations it is not enough that the claim be false: it must also be likely to affect the average consumer. Most “critical”, “circumspect”, consumers would be unlikely to be influenced by these outlandish claims. But could persons who are severely overweight argue they are more susceptible to such misleading behaviour? Weatherill suggests that credulity can be used to take account of consumers’ emotional foibles. Thus the Regulations may be breached “where a commercial practice is aimed at consumers generally but evidently designed to exploit only the vulnerable”.⁶⁷ On this basis, misleading claims about slimming teas are likely to be unlawful under the Regulations, but this remains to be tested in the courts.
- 2.52 There is no clear boundary showing when the vulnerable consumer test should displace the average consumer test. To be workable, the test must be applied pragmatically, with all circumstances taken into account.⁶⁸

MISLEADING ACTIONS

- 2.53 An action by a trader will be misleading under Regulation 5 if:
- (1) it contains false information; or
 - (2) the product itself or its overall presentation in any way deceives or is likely to deceive the average consumer... even if the information is factually correct.
- 2.54 According to the European Commission’s Guidance, evidence of how consumers behave in the marketplace is relevant to whether a practice is misleading. For example, some airlines provide travel insurance as a default option when buying a ticket. If there is evidence that many consumers pay the extra fee unwittingly, that may be a misleading practice. It may also be misleading to provide unnecessarily complex information which confuses consumers into accepting terms they cannot understand.⁶⁹
- 2.55 The deception must relate to any one or more of the matters listed in Regulation 5(4). The list is long and detailed. It covers aspects relating to the product (such as its existence, price and main characteristics), the trader (including their identity, assets and affiliations), and the way the product is marketed.⁷⁰

⁶⁶ S 1 puts a blanket prohibition on making false trade descriptions.

⁶⁷ S Weatherill, “Who is the ‘average consumer?’” in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, p 137.

⁶⁸ See Dr C Twigg-Flesner, D Parry, Prof 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 2.66.

⁶⁹ European Commission’s Guidance, pp 32 to 33.

⁷⁰ Reg 5(4) of the Consumer Protection from Unfair Trading Regulations 2008. All references to the Regulations shall refer to these regulations unless otherwise specified.

- 2.56 An action will also be “misleading” under the Regulations 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”,⁷¹ or
 - (2) non-compliance with codes of practice which the trader has undertaken to comply with.⁷²
- 2.57 A misleading action will breach the Regulations if it causes, or is likely to cause, the average consumer to make a “transactional decision”.⁷³
- 2.58 Alternatively, if a misleading action falls within the list of banned practices under Schedule 1, it will automatically be unfair in all circumstances.⁷⁴ It is not necessary to show the effect on an average consumer. Practices 1 to 23 are examples of misleading actions, and include misrepresentations about the trader’s professional affiliations; bait advertising; false limited-time offers and closing-down sales; pyramid schemes; falsely describing products as “free” and traders posing as consumers.

MISLEADING OMISSIONS

- 2.59 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.
- 2.60 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. It also includes any information which must be provided to consumers under European law.⁷⁵ Failure to identify the commercial intent of a practice is also a material omission: a price tag or saying “this is an advertisement” are ways in which the commercial intent can be clarified.⁷⁶

⁷¹ Reg 5(3)(a).

⁷² Reg 5(3)(b).

⁷³ See paras 2.32 to 2.38 of this Consultation Paper.

⁷⁴ Reg 3(4)(d).

⁷⁵ Reg 6(3).

⁷⁶ See OFT Guidance, para 7.13.

2.61 In *OFT v Purely Creative*, the court rejected a literal reading of “materiality” which might impose “something approaching an utmost good faith obligation” on traders:

It cannot have been the intention of the framers of the UCPD to require that level of disclosure, and to do so would indeed cause barriers to the free movement of goods and services beyond that necessary to achieve a high degree of consumer protection. In my judgment the key to understanding this paragraph is the concept of “need”. The question is not whether the omitted information would assist, or be relevant, but whether its provision is necessary to enable the average consumer to take an informed transactional decision.⁷⁷

2.62 The Regulations set out specific requirements for “invitations to purchase” which describe the product and its price and enable consumers to make purchases.⁷⁸ Here, the Regulations go into more detail about what is “material information”, 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
- (5) rights of withdrawal or cancellation.⁷⁹

2.63 As with misleading actions, the omission must cause, or be likely to cause, the average consumer to make a “transactional decision”.⁸⁰

⁷⁷ [2011] EWHC 106 (Ch), [2011] WLR (D) 34, para 74.

⁷⁸ As defined in Reg 2(1). Products include services, so the invitation to purchase provisions apply equally to services. However this interpretation is not uniform across the EU. In Austria and Italy for example, invitations to purchase do not apply to services; see Directorate General for Internal Policies, Internal Market and Consumer Protection, *Misleading Advertising on the internet*, para 2.1.2.

⁷⁹ Reg 6(4).

⁸⁰ Reg 6(1).

- 2.64 Context qualifies what the trader is reasonably expected to disclose. The Regulations take all the circumstances into account, including limitations of space and time.⁸¹ The OFT gives the example of a trader who advertises a special offer on a cereal bar: it will generally be enough to make clear that terms and conditions apply, and where to find these.⁸² Professor Hugh Collins observes that this is an important qualification on traders' duty to disclose material information.⁸³
- 2.65 The guidance issued by the OFT supports a broad view of "materiality", beyond factors affecting quality. For example, a seller of a television with an analogue tuner would be required to disclose the consequences of the shift to digital-only television.⁸⁴ This has potentially far-reaching consequences. Products quickly become obsolete: whether it be a fashion item, software package, or recent book edition. Arguably, a trader would sometimes need to inform the consumer of such developments.
- 2.66 But just how far does the meaning of "material information" go? For example, does it require traders to offer information about the prices charged by competitors? This seems unlikely given the view taken in *OFT v Purely Creative*.⁸⁵ Although such information is "material" in the sense that it would affect the consumer's decision to buy, the duty of disclosure is probably limited to information about the product itself. The Unfair Commercial Practices Directive makes no reference to market conditions in defining what shall be regarded as "material" for the purposes of misleading omissions.⁸⁶ This contrasts with misleading actions, where the Directive expressly prohibits misleading consumers about "a specific price advantage"⁸⁷ and makes it a banned practice to give inaccurate information about market conditions.⁸⁸

AGGRESSIVE PRACTICES

- 2.67 The Regulations refer to three forms of aggressive practices:⁸⁹ (1) "coercion", defined to include "the use of physical force";⁹⁰ (2) "undue influence", which involves "exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force";⁹¹ and (3) "harassment" which is not defined.

⁸¹ Reg 6(2).

⁸² OFT Guidance, para 7.19.

⁸³ H Collins, "Harmonisation by Example: European Laws against Unfair Commercial practices" (2010) (73)1 *Modern Law Review* 89, 105.

⁸⁴ OFT Guidance, para 7.18.

⁸⁵ [2011] EWHC 106, [2011] WLR (D) 34.

⁸⁶ Art 7.4 of the Directive.

⁸⁷ Art 6.1(d) of the Directive.

⁸⁸ Annex I para18 of the Directive.

⁸⁹ Reg 7(2).

⁹⁰ Reg 7(3)(a).

⁹¹ Reg 7(3)(b).

2.68 Under the Regulations all the features and circumstances of a commercial practice are relevant to deciding whether it is aggressive.⁹² The Regulations also set out specific factors to be taken into account when deciding whether a practice is aggressive. These include:

- (a) its timing, location, nature or persistence;
- (b) the use of threatening or abusive language;
- (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 where a consumer, for example, wishes to terminate a contract or switch to another trader; and
- (e) a threat to take any action which cannot legally be taken.⁹³

2.69 The terminology used in the Regulations is wide and general. The European Commission's Explanatory Memorandum notes that:

Where a consumer is already in debt to a trader and behind with payments, the trader would be using undue influence if he said he would reschedule the debt on condition that the consumer bought another product.⁹⁴

2.70 Again, the aggressive practice must be likely "significantly to impair the average consumer's freedom of choice in relation to the product", thereby causing or likely to cause the average consumer to take "a transactional decision".⁹⁵

2.71 A practice may also be unlawfully aggressive if it falls within the list of banned practices under Schedule 1. If the trader's behaviour matches one of the specific examples it will automatically be unfair in all circumstances.⁹⁶ These include:

- (1) creating the impression that the consumer cannot leave the premises until a contract is formed;⁹⁷
- (2) home selling, where the trader ignores the consumer's requests to leave or not return;⁹⁸
- (3) persistent and unwanted solicitations in non face-to-face dealings;⁹⁹ and

⁹² Reg 7(1).

⁹³ Reg 7(2).

⁹⁴ Proposal for a Directive of the European Parliament and of the Council concerning unfair-to-consumer commercial practices in the internal market COM (2003) 356 final, para 71.

⁹⁵ Reg 7(1).

⁹⁶ Reg 3(4)(d).

⁹⁷ Banned practice 24, sch 1, Regulations.

⁹⁸ Above, banned practice 25.

- (4) a trader is also banned from explicitly saying that their livelihood would be in danger if the consumer does not buy their product.¹⁰⁰
- 2.72 Inertia selling¹⁰¹ and “you’ve won” prize scams¹⁰² are also covered. Breach of any of the aggressive banned practices is also a criminal offence, except banned practice 28 (advertisements aimed at children).

THE “DUE DILIGENCE” DEFENCE

- 2.73 Traders found guilty of an unfair commercial practice under the Regulations can nonetheless escape liability if they can show that the offence was due to a cause beyond their control¹⁰³ and that they “took all reasonable precautions and exercised all due diligence” to avoid committing the offence.¹⁰⁴
- 2.74 The fault of the trader is therefore relevant to the Regulations, but the burden of proof lies on the trader. The standard is a high one and requires taking *all* reasonable precautions and due diligence.¹⁰⁵
- 2.75 Where the Regulations are breached by an advertisement, there is a specific defence available to publishers and other traders who receive adverts in the ordinary course of their business. If the publisher can show they had no reason to suspect the publication was an offence under the Regulations, they will not be liable.¹⁰⁶

CONCLUSION

- 2.76 The Regulations, and the Directive on which they are based, apply to a wide variety of unfair practices by traders in their dealings with consumers. However, they provide only for public enforcement. Consumers’ rights to redress continue to depend on a variety of common law and statutory causes of actions. Professor Hugh Collins has argued that the principles of the Directive would provide a helpful model for the convergence and simplification of private law.¹⁰⁷

⁹⁹ Above, banned practice 26.

¹⁰⁰ Above, banned practice 30.

¹⁰¹ Above, banned practice 29.

¹⁰² Above, banned practice 31.

¹⁰³ These causes are listed in Reg 17(1)(a): “(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”.

¹⁰⁴ Reg 17(1)(b).

¹⁰⁵ See also Dr C Twigg-Flesner, D Parry, Prof 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.

¹⁰⁶ Reg 18.

¹⁰⁷ See H Collins, “Harmonisation by Example: European Laws Against Unfair Commercial Practices” (2005) 73(1) *Modern Law Review*, 89-118.

- 2.77 We have used the Regulations to structure our analysis of the current law as well as our proposals for reform. In Parts 4 to 7 we look at how far the existing law provides a private right of redress to consumers in situations where there would be a breach of the Regulations by way of a misleading action, misleading omission or aggressive practice. As we shall see, private rights in this area are complex and uncertain. In Parts 12 to 14, we propose ways in which to bring private rights of redress closer to the concepts used in the Regulations.
- 2.78 In the next Part we consider one particular controversy about the Regulations: how far they extend to unfair practices to collect debts. We then look at how the Regulations are enforced.

PART 3

UNFAIR PAYMENT COLLECTION

INTRODUCTION

- 3.1 Part 2 gave a general overview of the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations). Here we look in detail at one controversial area: how far do the Regulations apply to misleading and aggressive practices to collect debts and other payments from individuals?
- 3.2 As we have seen, 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.¹ 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” (practice 26).
- 3.3 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.²
- 3.4 There is no doubt that where the consumer has bought a product, traders’ activities in obtaining payment fall within the scope of the Regulations. However, there is some debate about how far the Regulations extend. On a narrow view, it might be said that the Regulations only cover demands made to enforce a contractual debt for a product which has actually been bought. On this basis they would not apply where no goods have been supplied, or where money is claimed as compensation for an alleged wrongful act, such as parking fines, illegal downloads or shoplifting.

¹ Reg 2 states that a “transactional decision” includes “whether, how and on what terms to... make a payment in whole or in part”.

² European Commission’s Guidance, pp 7 to 8.

- 3.5 For the reasons we explore below this interpretation may be open to question. It is arguable that the Regulations cover all commercial demands for payment made to private individuals. The Regulations are designed to be general and far-reaching. It could be seen as artificial to make distinctions between whether the money is claimed for a contractual debt, or as compensation for wrongful acts.
- 3.6 In this Part, we start by summarising the evidence consumer groups provided about this issue. Misleading and aggressive debt collection is perceived to be a widespread and sometimes serious problem. We then consider the interpretation of the Regulations in more detail. In Part 13 we provisionally propose that payment collection should be within the scope of our new Act. In other words, those who act commercially in making demands for payment should not behave in a misleading or unduly aggressive way.

EVIDENCE OF PROBLEMS

- 3.7 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: as the European Commission put it, the debt collection was an “after-sales” practice to enforce a consumer debt.
- 3.8 However, we also found several examples where the demand did not follow a sale. These included:
- (1) Utility companies who sent demands for payment to people who had never been customers of that company;
 - (2) Private car-clampers who demanded payment before the car would be released;
 - (3) Debt collection agents who chased unpaid parking fines on behalf of local authorities;
 - (4) Companies who demanded standard fixed sum settlements for illegal downloads; and
 - (5) Agents acting for retailers who wrote to alleged shop-lifters demanding fixed penalties for “civil recovery”.
- 3.9 In some of the above cases the demands made unjustified threats to take action which could not legally be taken.
- 3.10 We discuss these problem areas in more detail below.

Utility companies chasing non-customers for unpaid bills

- 3.11 A common complaint was that traders sent out persistent demands for money where the debt was not owed.³ There were particular complaints about utility providers. We were given several examples of firms who chased people for money, even though the recipient had never been a customer. In such cases the money was clearly not owed at all.

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.

- 3.12 Consumers who are wrongly pursued for payment often face the added problem of an adverse impact on their credit rating. Section 159 of the Consumer Credit Act 1974 allows an individual to have wrong and prejudicial information removed from the credit rating register.⁴

Parking, clamping and towing

- 3.13 In Scotland, wheel-clamping on private land is illegal.⁵ However, in England and Wales it is considered lawful if certain conditions are met. For example, the charges must be reasonable and the warning signs must be clear. The courts have interpreted the basis of the clamping charge not as a payment for a service but as damages in tort. 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.⁶
- 3.14 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. This is a typical example.

³ For example Ofcom's investigation into TalkTalk and Tiscali in July 2010. This resulted in almost £2.5 million in refunds and good will 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/>

⁴ Where the credit rating agency complies, it must give the consumer a notice stating that it has done so and must send a copy of the amended entry. Where the agency and the consumer cannot reach agreement on the issue, either side may apply to the Information Commissioner who will resolve the matter.

⁵ Wheel-clamping on private land in Scotland amounts to extortion and theft, see *Black v Carmichael* 1992 SLT 897.

⁶ [1997] QB 564.

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.

- 3.15 In 2010, the Government announced that it would introduce legislation to prohibit clamping a vehicle or towing it away on private land.⁷ In the meantime, several trading standards services (TSS) have successfully used the Regulations to prosecute wheel-clampers who use misleading actions, omissions and aggressive practices. Thus 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 fines and employed bouncers to intimidate victims”.⁸
- 3.16 Similarly, Brent TSS are reported to have prosecuted a wheel-clamper accused of intimidating motorists into paying unreasonable charges. He was found guilty of a variety of offences, including an offence under the Regulations. The clamper was sentenced to a total of 26 weeks' imprisonment (suspended for 18 months) was ordered to carry out 120 hours' unpaid work and required to reimburse his victims.⁹
- 3.17 The courts appear to 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 fines

- 3.18 *The Times* investigated complaints by its readers about debt collectors using persistent letters to chase people for unpaid parking fines on behalf of local authorities.¹⁰ Some recipients denied being the drivers of the car and asked for more information about the “contravention” to little avail.

⁷ 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).

⁸ See: http://www.wolverhampton.gov.uk/business/trading_standards/rogue/clamper_jailed.htm

⁹ *Evening Standard*, 3 November 2010.

¹⁰ 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 2011.

- 3.19 The British Parking Association guidelines state that correspondence for recovering unpaid parking fines should give the recipient information on how to challenge the fine, yet in many cases, no such information is given. The demands for money would be passed on from one agency to another. This could lead to repeated demands, and the amounts claimed would escalate. The article noted that fixed fees would be added to the original amount claimed as administration costs. Former employees of the same debt collection agencies also raised concerns about their practices in collecting council tax arrears. For example, they noted that bailiff charges would be added as standard to the amounts originally owed even where there was no evidence that the visit had actually occurred.
- 3.20 Another problem is that sometimes debt collectors may 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, even after explaining the error to the debt collectors, people have reported being harassed and threatened.¹¹
- 3.21 In the above cases there is no contractual relationship between the parties. Although the initial correspondence may arise out of an error, the persistence in pursuing the people involved and not having systems in place to rectify the situation are perceived as a problem. The practice of demanding fixed amounts in addition to the original (disputed) debts is also a cause of concern. The question arises whether these demands are commercial practices within the meaning of the Regulations. If they are covered, then the collection must not be carried out in a misleading or aggressive way.

Online file sharing and illegal downloads¹²

- 3.22 There has been considerable media attention about internet users of peer to peer networks receiving demands for payment for alleged copyright infringement in pornographic films.¹³ The law firms making these demands have come under judicial criticism for using certain misleading and aggressive tactics.
- 3.23 In the case considered below, for example, the law firm making demands for payment on behalf of its client, Media CAT, was not prosecuted under the Regulations. Rather, Media CAT was suing individuals for copyright infringement, and that is how the matter came to be before the court.

¹¹ See for example thisismoney.co.uk, *Hetherington: this is not our debt, but we fear the bailiffs*, 5 February 2011. See also several threads on the consumer online forum of www.consumeractiongroup.co.uk

¹² More generally, see also the Digital Economy Act 2010 which makes provision about the online infringement of copyright.

¹³ See for example BBC News, 8 February 2011, <http://www.bbc.co.uk/news/technology-12396443>

Court Case: *Media CAT Ltd v Adams and others*¹⁴

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.¹⁵

Consumer group *Which?* said it had found several instances where plainly innocent people had received the demands.

3.24 Media CAT's letters misrepresented its standing to bring copyright proceedings.¹⁶ 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. Any such assertion would need to be tested in court. The better view was that the recipients of the letters were potential copyright infringers.

3.25 The letters sent to ordinary members of the public were long, and contained complex legal and technical discussion of the issues. There was no breakdown of the figure demanded as compensation. The letters also relied on untested points of intellectual property law and news reports and case law in a misleading way.¹⁷ The letters ended by citing a non-existent pre-action protocol for intellectual property disputes. The court noted the strong impact which the letters had on members of the public:

This court's office has had telephone calls from people in tears having received correspondence from ACS:Law on behalf of Media CAT.¹⁸

3.26 One of the recipients described it as "extortion via legal process".¹⁹ As the court commented, many would simply pay to avoid embarrassment and publicity given that the allegation was about pornography. Others might pay just to avoid a costly legal fight they could not afford.

3.27 Of the over ten thousand letters threatening legal action, only 27 cases were actually pursued in the courts. Media CAT attempted to discontinue these proceedings yet it continued writing letters to persons that were not (yet) before the court. His Honour Judge Birss QC noted:

¹⁴ [2011] EWPC 6.

¹⁵ The percentages were not entirely consistent. Some evidence suggested the copyright owners would get 20%, but others referred to 30%.

¹⁶ The senders stated they were a "copyright protection society" and that they represented the owners of copyright, whereas it merely had agreements in place with certain copyright owners.

¹⁷ [2011] EWPC 6, paras 21 and 52 to 55.

¹⁸ Above, para 21.

¹⁹ Above, para 34.

It is very difficult not to draw the inference that this was nothing more than a last ditch attempt to make some money from the letter writing exercise.²⁰

3.28 The judge also commented:

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?²¹

3.29 The court found no evidence that Media CAT would press cases beyond applications for a default judgement.²² The proceedings were overtaken by events, as Media CAT became insolvent and ceased trading, and its lawyers, ACS:Law also permanently closed in January 2011.

3.30 Wholesale letter writing campaigns that generate revenue by threatening legal proceedings raise a number of problems, as the Media CAT case so starkly illustrates. The question we consider further below is whether the Regulations can cover such behaviour in the context of regulating aggressive and misleading commercial practices.

“Civil recovery”

3.31 Similar concerns to those discussed above in relation to alleged copyright infringement arise in the context of alleged shoplifting. Consumer groups are becoming increasingly concerned about so-called “civil recovery” for alleged shoplifting. Typically, the retailer sends details of alleged shoplifters to agents, who write 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.

²⁰ Above, para 58.

²¹ Above, para 100.

²² Above, para 101.

- 3.32 Citizens Advice reports that it has received over 10,000 complaints about “civil recovery” since 2007, and has investigated 300 cases in detail.²³ In most cases, there was no criminal prosecution or police action. If someone has stolen goods, there can be no objection to a demand that they should pay for the goods which have been stolen. However, “civil recovery” is problematic. One problem is that the recipients often deny that they have committed any theft. Another is that agents demand that the recipient pays a fixed sum for “investigation”, “security” or “administration” costs.
- 3.33 These “fixed sums” have no legal basis. If the theft caused significant disruption to the retailer’s business, then the law allows the store to claim for the staff time diverted to dealing with the effects of the disruption.²⁴ However, the store would need to prove that the disruption was significant, and that staff time was actually diverted.²⁵ The law does not generally allow fixed sum penalties. Nor does it allow stores to apportion the overheads incurred for security and surveillance to individual shoplifters.
- 3.34 If the consumer does not pay, we understand that the demands are usually dropped. Citizens Advice commented:
- Among the more than 10,000 such cases dealt with by Citizens Advice Bureaux since 2007, including more than 300 cases examined in detail by Citizens Advice, there is one common feature: if the sum demanded is not paid, the threatened county court action does not materialise. And the most prolific civil recovery agent – Retail Loss Prevention – has confirmed that it has *never* successfully litigated a fully contested county court claim in respect of an unpaid demand.²⁶
- 3.35 However, some people do pay. People fear court action. Letters may threaten to put the recipient on a dishonesty register, and people worry that this will affect their employment prospects or credit rating. Furthermore, recipients are often vulnerable. Citizens Advice reports that out of the cases it has received, one in four recipients were teenagers, typically aged 14 to 16. Others suffered from mental health problems.²⁷

²³ CAB Evidence Briefing, *Uncivil Recovery* (December 2010).

²⁴ *Aerospace Publishing v Thames Water* [2007] EWCA Civ 3.

²⁵ Above, para 86.

²⁶ Citizens Advice Evidence Briefing, *Uncivil Recovery* (December 2010), p 3.

²⁷ As above.

- 3.36 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,²⁸ or threaten “action which cannot legally be taken”.²⁹ In some cases, letters may claim that “civil recovery” has endorsement from a public body (such as the police or Ministry of Justice) which it does not have.³⁰

WHAT COLLECTION ACTIVITIES ARE COVERED BY THE REGULATIONS?

- 3.37 It is clear that if a consumer has bought goods and services, any action by the retailer to collect the debt falls within the scope of the Regulations. The debt collection must not be conducted in a misleading or aggressive way.
- 3.38 A more difficult issue is where the collection activity does not follow from the purchase of goods and services but demands damages for alleged wrongdoing. This category includes wheel-clamping, “civil recovery”, and compensation claims for alleged illegal downloads.
- 3.39 We are not suggesting that demands for compensation from trespassers and other wrongdoers are necessarily unfair in themselves. The question is whether such demands fall within the scope of the Regulations, so that (like other commercial practices) they must be conducted in a way which is not misleading or unduly aggressive.

The policy behind the Directive

- 3.40 In *OFT v Purely Creative*,³¹ 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. Rather, the proper interpretation of the Regulations depended on a purposive approach, in accordance with the decisions of the European Court of Justice.³² 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.³³
- 3.41 We think that the policy behind the Unfair Commercial Practices Directive is that all commercial payment collection activities should be covered. Apart from the over-arching aims discussed above, we say this for three reasons:

²⁸ Regulation 5(4)(k).

²⁹ Regulation 7(2)(e).

³⁰ A banned practice under the Regulations, sch 1, para 4.

³¹ [2011] EWHC 106 (Ch) [2011] WLR (D) 34.

³² Above, para 40.

³³ [2011] EWHC 106 (Ch), [2011] WLR (D) 34, paras 27 to 28.

- (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 behaviour by them, which would undermine the single regulatory framework.
- (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”.³⁴
- (3) The Directive is aimed at commercial practices which 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.

3.42 That said, the Directive definitions are complex and untested. Its scope is controversial and not beyond doubt.

Section 40 of the Administration of Justice Act 1970

3.43 Before 2008, in England and Wales, the main protection against misleading and aggressive debt collection was set out in section 40 of the Administration of Justice Act 1970. Subsection (1) provided:

A person commits an offence if, with the object of coercing another person to pay money claimed from the other as a debt due under a contract, he

(a) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation;

(b) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it;

(c) falsely represents himself to be authorised in some official capacity to claim or enforce payment; or

³⁴ Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I – 2949, para 49.

(d) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not... .

- 3.44 The section covered many of the same issues as the Consumer Protection Regulations, but it suffered from two problems. First it covered only a limited range of activities: claiming debts due under a contract. Secondly, it covered only a limited range of false representation and harassment.
- 3.45 The purpose of the Directive was to replace these piecemeal provisions with a more general, principled provision, which would cover a fuller range of misleading and aggressive practices over the full range of commercial practices. The Regulations now replace section 40, in respect of commercial practices affecting consumers.³⁵
- 3.46 It would be odd if an aggressive demand for payment pursuant to a legitimate contractual debt that was clearly owed should be subject to the Regulations, but that an equally aggressive demand in pursuit of a dubious claim should fall outside the Regulations. This would appear to run counter to the policy behind the Directive, which aimed to do away with fragmented legislation dealing with specific instances of aggressive and misleading practices.

Areas of controversy

- 3.47 The discussion of whether the Regulations can apply to demands for payment in settlement of legal obligations has focused on the specific instances of wheel-clamping and “civil recovery”. However it is clear that the practices discussed above, such as demands for copyright infringement and parking offences, are problematic for similar reasons and should be dealt with in a consistent manner.
- 3.48 On the one hand, the courts have been happy to accept that private wheel-clampers who intimidate motorists into paying unreasonable charges have committed criminal offences under the Regulations.
- 3.49 On the other hand, the same issue has proved more controversial in the context of “civil recovery”. In December 2010, a major agent, Retail Loss Prevention Ltd (RLP), received and publicised a legal opinion from Richard Mawrey QC. Mr Mawrey described the idea that “civil recovery” falls within the scope of the Regulations as “untenable”.³⁶ He concluded:

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:

³⁵ Administration of Justice Act 1979, s 40(3A).

³⁶ Opinion provided to Retail Loss Prevention Ltd (dispute with the Citizens Advice Bureau), 1 December 2010, para 55. We are very grateful to RLP for allowing us to quote the opinion. A summary of the opinion can be found at <http://www.lossprevention.co.uk/RichardMawreyArticle.aspx>

- (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”.³⁷

3.50 We examine these issues in more detail below.

The definitions

3.51 The first question is whether “civil recovery” is a “commercial practice”, as defined by the Regulations. The definition of “commercial practice” refers to two other defined terms: “consumer”, and “product”. They are all set out in Regulation 2.

“A commercial practice”

3.52 A “commercial practice” is broadly 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 the product. (emphasis added).³⁸

3.53 Sending a letter would constitute an act or representation. Note too that there is no need for a commercial transaction to take place: the consumer does not need to buy or sell anything.

3.54 This leads to two further questions regarding “civil recovery”:

- (1) Is it “directly connected with the promotion, sale or supply of a product”? This depends on the definition of a “product”.
- (2) Are individual wrongdoers “consumers” within the meaning of the Regulations?

³⁷ Above, para 59.

³⁸ Reg 2(1).

Directly connected with the supply of a “product”

- 3.55 The crucial issue is whether wheel-clamping or “civil recovery” can be considered to be a “product”. While a commercial practice must be “directly related to the supply of goods and services”,³⁹ this is not the whole story. Article 2(c) adds that goods and services may include “rights and obligations”. There is an arguable case that exchanging rights and obligations for payment may be considered a product within the extended meaning of the Directive.
- 3.56 The definition of “product” is deliberately wide, to include the many different types of transaction entered into by consumers. Our initial view is that settling rights and obligations in return for payment could amount to a “product”, if done commercially. Essentially “civil recovery” may be regarded a transaction: the agent receives a payment from the consumer in return for settling all the consumer’s obligations towards the trader. Similarly, wheel-clamping settles the trespasser’s obligation to the landowner in return for payment.
- 3.57 On this view, settling obligations commercially is a “product”. Thus practices directly connected to the “supply” of settlement contracts to private individuals are covered by the Regulations. This does not suggest that settlement contracts are illegitimate. It simply means that commercial organisations demanding payment from private individuals to settle debts and damages would be subject to the general duty on all traders to act fairly, in ways which are not misleading or unduly aggressive. Thus, in general, negotiated settlements, especially those involving the parties’ legal representatives, would be unlikely to fall within the scope of the Regulations.
- 3.58 On the other hand, interpreting the settlement of legal obligations as a “product” raises complex issues, and the terminology does not accord with conventional understandings of the words. For example, there is a question whether there can be a true exchange where the effect of the settlement transaction is to extinguish the product (interpreted as the legal obligations involved). Although there is an exchange of *value*, this may not be the same thing.⁴⁰

To or from “consumers”

- 3.59 A consumer is defined as “any individual who in relation to a commercial practice is acting for purposes which are outside his business”.⁴¹

³⁹ Above, para 62.

⁴⁰ Domestic law is not strictly relevant in interpreting the Regulations, as noted in *OFT v Purely Creative* [2011] EWHC 106 (Ch); [2011] WLR (D) 34 discussed above. However problems in interpreting national law can highlight some of the difficulties. In English criminal law for example, the definition of “obtaining” property for the purposes of the Theft Act 1968 does not include cases where a chose in action is extinguished. See *R v Preddy* [1996] AC 815.

⁴¹ Reg 2(1).

- 3.60 It is right that “consumer’ is not a status: it is a function”.⁴² Thus “whether a person is a consumer depends not on who he is but on what he is doing”.⁴³ A shop-lifter would not be a “consumer” in relation to the theft, but may be a consumer in relation to the demand for payment. We think that if “civil recovery” is a “product”, then an individual recipient acts as a consumer in relation to the product. There is no need for the individual to be in a contractual relationship with the trader: Recital 13 specifically states that the Directive “should apply equally to unfair commercial practices which occur outside any contractual relationship”.
- 3.61 The only requirement imposed by the Regulations is that the recipient of the product is a private individual who is not in business. We do not think that an individual minor shoplifter could be said to be “in business”, though it may be different for employee theft.

Likely to cause a transactional decision

- 3.62 We think the suggestion that a “transactional decision is, of course, a decision whether to acquire goods and services” is a misreading of both the Regulations and the Directive.⁴⁴ As we have seen, a “transactional decision” is widely defined, and includes “whether, how and on what terms to... make a payment in whole or in part”.⁴⁵
- 3.63 When a consumer receives a demand for payment, two questions arise. First, is the demand misleading or aggressive? If so, would the average consumer who received the demand be more likely to pay as a result? This “average consumer” test means that minor inaccuracies would not be caught. However, the Regulations would cover seriously misleading or threatening statements, which are usually made *because* they encourage consumers to pay.
- 3.64 If the demand were to contravene a banned practice, the requirement for a transactional decision is bypassed. For example, if a letter falsely claimed that “civil recovery” were endorsed by the police or other public body, then there would be no need to show that that average consumer would be more likely to pay as a result.

CONCLUSION

- 3.65 The central issue is whether wheel-clamping, “civil recovery” and other demands for damages amount to “products” within the meaning of the Regulations. If they are “products”, then all acts directly connected with demands made to private individuals fall within the ambit of the Regulations. If they are not “products”, then the Regulations do not apply. This would mean that wheel-clampers who have been convicted of offences under the Regulations have been wrongly convicted.

⁴² Opinion provided to Retail Loss Prevention Ltd (dispute with the Citizens Advice Bureau), 1 December 2010.

⁴³ Above, para 40.

⁴⁴ Above, para 57.

⁴⁵ Reg 2.

- 3.66 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.
- 3.67 There is an arguable case that demands for damages against alleged wrongdoers are products within the meaning of the Directive. We say this for two reasons.
- (1) The definition specifically includes “rights and obligations”, suggesting settling obligations for payment is intended to be a product.
 - (2) It accords with the purpose behind the Directive. The Unfair Commercial Practices Directive is intended as a general measure, which can respond to abuses as they arise. Although it would be possible to enact sector-specific regulations for wheel-clampers, “civil recovery” agents pursuing alleged shoplifters and others, this will inevitably follow the event. If a new practice arises (for example claiming compensation from individuals for breaches of copyright), the intention is that the new practice should be subject to the same duty to trade fairly as applies to all other traders.
- 3.68 We note however that there are arguments against the above interpretation, and that the language of the Directive does not readily lend itself to seeing the settlement of disputes as products.
- 3.69 If the Directive does cover the settlement of obligations as “products”, this is not to suggest that all demands for money are “products”. If a gang stops someone in the street and demands money at knife-point, we do not think that the Unfair Commercial Practices Directive is intended to apply. The Directive would only apply where there is a potentially legitimate reason for the demand. In the cases we have considered, there is a real possibility that the recipient has obligations to the trader which are legitimately compromised in the transaction. The Directive exists to ensure that essentially legitimate activities are carried out in a fair way – that is in a way which is not misleading or unduly aggressive.
- 3.70 That said, the issue is controversial and not beyond doubt. We therefore do not reach a final view on whether the Directive and Regulations cover wheel-clamping and “civil recovery”. However the proper interpretation of the Regulations is a separate question to whether the Regulations or other legislation *should* cover such practices. We turn to this policy question in the latter part of our Consultation Paper, Part 13, which discusses our proposals for reform. There we ask consultees for views on whether the new Act should be drafted to include demands for damages against alleged wrongdoers. This might cover some of the controversial areas above, from parking offences to illegal downloading, which may or may not already be criminal offences under the Regulations. We also ask whether it would be helpful if the Government were to clarify that the Regulations apply to demands for damages made against alleged wrongdoers.
- 3.71 In the next Part we consider the principles and practice of how public authorities enforce the Regulations.

PART 4

HOW THE REGULATIONS ARE ENFORCED

INTRODUCTION

- 4.1 Our remit is limited to recommending changes in the substantive law rather than court procedures. However, rights need to fit with the way consumer laws are actually enforced.
- 4.2 Traditionally, public enforcement has focused on deterring bad behaviour rather than compensating consumers for what has gone wrong. However, it is not a sharp divide. The criminal courts have long had powers to order wrongdoers to compensate victims. Recently, the Government has set up a pilot to test the use of other civil sanctions, which include an element of restorative justice.
- 4.3 In this Part we start by outlining the system of public enforcement through which the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations) are applied. We then look at recent initiatives, including the Department for Business, Innovation, and Skills (BIS) Civil Sanctions Pilot.
- 4.4 We support the use of civil and criminal sanctions to provide compensation to consumers. However, a major barrier to providing such compensation is that under the current rules, it is too difficult to value consumers' loss. There is a need for simple certain remedies, related to the price of the products involved. We return to this issue in Part 14, when we propose new standard remedies for misleading and aggressive practices.

WHO ENFORCES THE REGULATIONS?

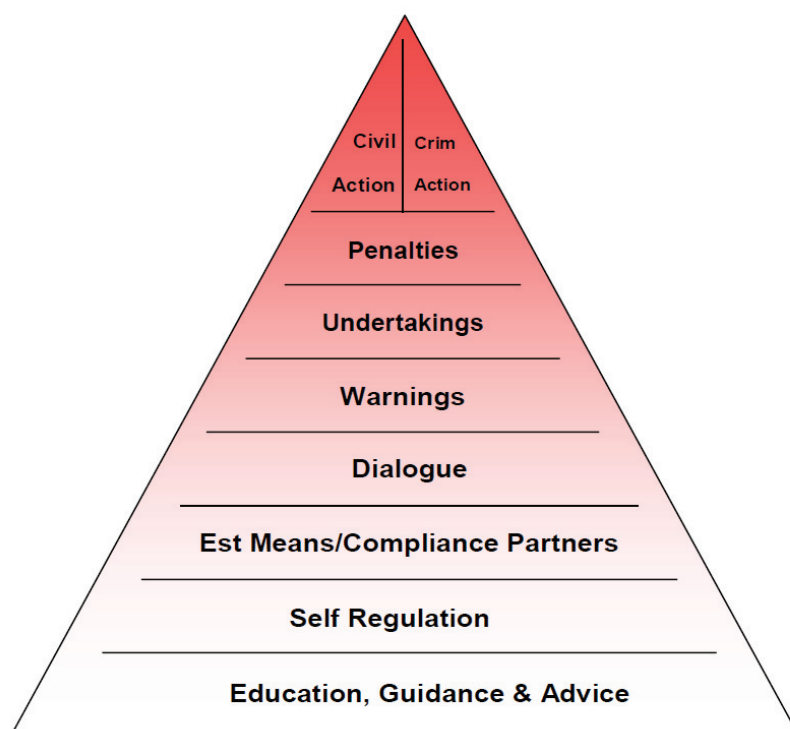
- 4.5 At present, in England and Wales, the Regulations can only be enforced by two public bodies: the Office of Fair Trading (OFT); and local authority trading standards services (TSS). In Scotland, this is the case in relation to civil proceedings under the Enterprise Act 2002. However all criminal prosecutions are conducted by the Crown Office and the Procurator Fiscal Service on behalf of the Lord Advocate.
- 4.6 The OFT is currently the national level enforcement agency. However, the Government has announced plans to merge it with the Competition Commission, to form a single competition and market authority.¹ The OFT will no longer enforce consumer protection laws. This task will be entirely devolved to local authorities. TSS will need to work together to deal with regional and national issues.

¹ See Statement by Vince Cable, Secretary of State, Department for Business, Innovation and Skills, 14 October 2010.

- 4.7 The Unfair Commercial Practices Directive expressly provides that “organisations regarded under national law as having a legitimate interest in combating unfair commercial practices” may enforce them if the relevant Member State chooses to enact legislation to that effect.² It would therefore be open to the UK government to introduce a wider category of enforcers for the Regulations.

THE ENFORCEMENT PYRAMID

- 4.8 The OFT’s statement of consumer protection enforcement principles emphasises that formal legal action is a last resort.³ The enforcement pyramid can be illustrated as follows:⁴



² Article 11(1).

³ OFT, Statement of consumer protection enforcement principles (OFT 1221, March 2010), see http://www.offt.gov.uk/shared_offt/reports/consumer_protection/OFT1221

⁴ Above, at p 12.

- 4.9 The starting point is education, guidance and advice. The OFT then works with self-regulatory bodies and other “compliance partners” or “established means”⁵ to put pressure on traders to put things right. The OFT explains that it seeks to encourage bodies such as OFT approved code sponsors and other trade associations to act as a first port of call for resolving compliance issues.⁶ The OFT looks to such other bodies, which they refer to as compliance partners, with “tried and tested systems for dealing with non-compliance” as alternatives to dealing with matters in the civil or criminal courts.⁷

FORMAL ACTION

- 4.10 If formal action is required, as illustrated in the top slice of the pyramid, there are two main alternatives:

- (1) using powers under Part 8 of the Enterprise Act 2002; or
- (2) directly through criminal prosecutions.

Part 8 of the Enterprise Act 2002

- 4.11 A breach of the Directive (which is implemented by the Regulations) is actionable under the Enterprise Act 2002.⁸ Part 8 replaced “Stop Now” orders under the Fair Trading Act 1973. Enforcement agencies may apply to the civil courts using a civil burden of proof. If the court finds that the trader is engaged, or is likely to engage, in conduct which infringes the law, it may order the trader not to engage in such conduct.⁹ These Enforcement Orders are similar to injunctions or interdicts: breach is a contempt of court,¹⁰ and the trader can be fined or imprisoned.
- 4.12 Again, the Enterprise Act is designed to provide opportunities for consultation¹¹ and voluntary compliance before any formal orders are made. It is common for the court to accept undertakings¹² rather than make a formal order. Breach of an undertaking can also put the trader in contempt of court.

⁵ “Est Means” in the diagram is shorthand for “established means”.

⁶ These trade associations include for example the Advertising Standards Authority and PhonepayPlus.

⁷ OFT, *Compliance Partnerships, Response to consultation* (July 2009), para 1.2,

⁸ Enterprise Act 2002, Schedule 13 (9C).

⁹ Above, s 217.

¹⁰ *OFT v MB Designs (Scotland) Ltd* 2005 SLT 691 at 697.

¹¹ Enterprise Act 2002, s 214.

¹² Above, s 219.

Criminal prosecutions

- 4.13 Breach of the Regulations is a criminal offence. The only provisions which are excluded from criminal liability are “advertorials”¹³ and practices targeted at children.¹⁴ The maximum penalties are two years imprisonment or an unlimited fine.¹⁵ The OFT states that criminal prosecutions will be pursued where there is serious consumer harm or where other factors are present, such as fraud or dishonesty.¹⁶
- 4.14 From 2009 to 2010 TSS brought 173 prosecutions, resulting in fines totalling £94,070.¹⁷ This is a substantial increase from the previous year, when only 23 court actions were brought. It is still a small number, however, in comparison with the level of detriment found by Consumer Focus.¹⁸
- 4.15 At a national level, the OFT’s 2009-10 annual report refers to five ongoing investigations, ranging from pyramid schemes to misleading gym memberships. For that same period, however, seven out of eight cases brought by the OFT under the Regulations were closed for reasons of administrative priority.¹⁹
- 4.16 Resources are clearly limited, and likely to reduce further. Consumer Focus has argued that this is a strong reason why public enforcement should be complemented by private redress, so that public authorities and consumers work “in tandem”.²⁰

COMPENSATION ORDERS IN CRIMINAL PROCEEDINGS

- 4.17 In England and Wales, where there is a criminal conviction, the court may also issue a compensation order under section 130 of Powers of Criminal Courts (Sentencing) Act 2000. The compensation order can cover “personal injury, loss or damage”, which would appear to exclude any mental distress. Section 130(4) 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.

¹³ Banned practice 11, sch 1 prohibits “Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)”.

¹⁴ Banned practice 28, sch 1 of the Regulations.

¹⁵ Reg 13.

¹⁶ OFT, *Statement of consumer protection enforcement principles* (March 2010).

¹⁷ OFT Annual Report 2009-2010, Annex G, Table G-7.

¹⁸ *Waiting to be Heard: Giving Consumers the Right of Redress over Unfair Commercial Practices*, August 2009. The survey found that 61% of the population had experienced an unfair commercial practice in the last two years (p 9). See also Les Rose and John Garrow, “False Claims in Health Care: Outlawed at Last?” (2009) 77(2) *Medico-Legal Journal* 66-68.

¹⁹ OFT Annual Report 2009-10, Annex A Table A-4.

²⁰ Consumer Focus, *Waiting to be heard* (August 2009) p 3.

- 4.18 The 173 prosecutions brought by TSS in 2009 to 2010 resulted in compensation orders of £25,940 (an average of £150 a case).²¹ Given that prosecutions tend to be brought only in cases of serious consumer harm, the use made of compensation orders is limited.
- 4.19 Studies have highlighted the relatively low use made of compensation orders within the criminal justice system generally.²² The courts tend to interpret their powers restrictively: if a claim for compensation is challenged, the courts must hear evidence to determine the extent of the loss.²³ The delay and extra expense required to resolve the matter can discourage prosecutors from raising the point.
- 4.20 Research by Peysner and Nurse found that trading standards officers regard compensation claims as an additional burden:
- Identifying the extent of harm caused to consumers sometimes requires additional investigation and represents a very different investigation from simply establishing a breach of regulations and seeking the co-operation of the consumer in providing evidence of the offence. Instead it places the investigator in the position of assessing the level of loss, harm and damage caused to a consumer which sometimes involves the use of additional experts to evaluate the “value” of the consumer detriment and to prepare evidence of this for subsequent court proceedings.²⁴
- 4.21 The research cites an example in which the defendant disputed the value of a car. The trading standards 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.
- 4.22 The research also emphasised that magistrates are often uncomfortable in dealing with the complexities of civil liability, believing that the county courts are “better trained to deal with it”.²⁵ In order to increase the use made of compensation orders the rules on how to value loss need to be as clear as possible.

²¹ OFT Annual Report 2009-2010, Annex G, Table G-7.

²² See Lincoln Report, para 7.4, whose 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-1990s” (1998) Home Office.

²³ See *R v Vivian* [1979] 1 WLR 291 and *R v Horsham Justices, ex p Richards* [1985] 2 All ER 1114.

²⁴ Lincoln Report, para 7.4.

²⁵ Magistrate, quoted by C Flood-Page and A Mackie, “Sentencing practice, an examination of decisions in magistrates’ courts and the Crown Court in the mid-1990s” (1998) Home Office, at p 64.

- 4.23 Similarly, in Scotland, where a person is convicted of an offence, the court may make a compensation order requiring that compensation be paid to the victim. The compensation order can cover any personal injury, loss or damage caused directly or indirectly, or alarm or distress caused directly, to the victim.²⁶ The compensation order can be instead of or in addition to dealing with the offender in any other way. Scottish courts have also made relatively low use of compensation orders across the board. For example, the use of a compensation order as a main penalty fell to 1,150 in 2008/09, 13 per cent lower than in 2007-08. The average compensation order imposed, either as a main or secondary penalty, was £378 in 2008-09.²⁷

REVIEWS OF REGULATORY ENFORCEMENT

- 4.24 In recent years the thrust of Government policy on regulatory enforcement has been to move away from an automatic reliance on prosecutions towards a more “risk-based” approach.
- 4.25 In 2005, the Hampton report stressed that enforcement should be targeted and risk-based, to direct “regulatory resources where they can have the maximum impact on outcomes”.²⁸ The report recommended increasing the quality of advice to traders and eliminating unnecessary enforcement activities.
- 4.26 This was followed by a review by Professor Macrory in 2006.²⁹ Macrory found that although prosecution was “the primary formal sanction available to most regulators”,³⁰ it was often ineffective in securing regulatory compliance by businesses. The review emphasised the importance of making reparation to victims and endorsed restorative justice mechanisms to redress wrongs.³¹ It recommended that enforcers should have a wider range of sanctions available to them.
- 4.27 The Law Commission Consultation Paper on criminal liability in regulatory contexts also recommended a shift away from the use of criminal prosecutions in regulatory contexts.³² Three principles are particularly relevant:
- (1) The criminal law should only be used to deal with wrongdoers who deserve the stigma associated with criminal conviction. It should not be used as the primary means of promoting regulatory objectives.³³

²⁶ Criminal Procedure (Scotland) Act 1995, s 249.

²⁷ The Scottish Government, “Criminal Proceedings in Scottish Courts”, (Statistical Bulletin, Crime and Justice Series), March 2010, at p16.

²⁸ P Hampton, “Reducing administrative burdens: effective inspection and enforcement”, HM Treasury, (March 2005) para 8.

²⁹ RB Macrory, *Regulatory Justice: Making Sanctions Effective*, November 2006.

³⁰ Above, para 1.16.

³¹ See in particular the fifth principle in the Macrory Review.

³² Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195. Although this is not a joint project, it is one with significant implications for Scotland since many of the relevant regulatory regimes apply throughout the UK.

³³ Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, proposal 1, para 8.1.

- (2) Harm done or risk should be regarded as serious enough to justify criminalisation only if:
 - (a) in some circumstances (not just extreme circumstances), an individual could justifiably be sent to prison for a first offence, or
 - (b) an unlimited fine is necessary to address the seriousness of the wrongdoing in issue, and its consequences.³⁴
- (3) Low-level criminal offences should be repealed in any instance where the introduction of a civil penalty (or equivalent measure) is likely to do as much to secure appropriate levels of punishment and deterrence.³⁵

Restorative justice

4.28 Professor Macrory explained that principles of “restorative justice” focus on what needs to be restored or repaid and what needs to be learned and strengthened in order for the harm not to re-occur”.³⁶ In the consumer context, restorative justice may involve:

- (1) securing an apology;
- (2) fostering a dialogue between the consumer and the trader;
- (3) achieving reparation for the consumer; and
- (4) achieving an end to the complaint.³⁷

³⁴ Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, proposal 2, para 8.2.

³⁵ Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, proposal 3, para 8.3.

³⁶ Prof R B Macrory, *Regulatory Justice: Making Sanctions Effective* (November 2006) para 4.32.

³⁷ Lincoln Report, paras 5.5 to 5.9.

Civil sanctions under the Regulatory Enforcement and Sanctions Act 2008

- 4.29 The Regulatory Enforcement and Sanctions Act 2008 (the “RES Act”) implemented Professor Macrory’s recommendations to give enforcers a wider range of civil sanctions as alternatives to court action.³⁸ The powers under RES Act do not apply to enforcing the Regulations.³⁹ However, the government is considering a pilot scheme where the powers under the RES Act could be used in respect of the Regulations.⁴⁰ We consider this further below.⁴¹
- 4.30 The RES Act has a firm ethos on securing future compliance through consensual means, as well as restorative justice. These reflect the bottom half of the enforcement pyramid, illustrated above.⁴²
- 4.31 The fixed and variable monetary penalties are designed to punish and deter wrongdoers, rather than compensate consumers. However, enforcement undertakings and restoration notices may be used to compensate consumers, and we consider them further below.

Enforcement undertakings

- 4.32 Enforcement undertakings are consensual agreements where businesses offer to undertake specific actions within a specific timeframe. This might include compensating consumers who have been affected by the breach of the alleged infringement.⁴³ Other, more innovative restorative remedies could require the trader to do community service “such as funding or implementing a compliance education program”.⁴⁴ Once the undertaking is accepted, the trader cannot be prosecuted or receive an administrative penalty for the original breach of the Regulations.

³⁸ These sanctions are set out in Part 3 of the RES Act, which applies in Scotland to consumer protection matters as these are reserved to the UK Parliament. There are, however, provisions in the Act which ensure that powers to take civil action do not interfere with any matters which are devolved to the competence of the Scottish Parliament. An order made in relation to the granting of any civil sanction may not be made in any matter which is within the legislative competence of the Scottish Parliament (s 56). Also, a Minister of the Crown must obtain the consent of the Lord Advocate before making an order in relation to any offence in Scotland (s 58(1)). A Minister of the Crown must also consult Scottish Ministers before making an order in relation to a regulator which is a local authority in Scotland (s 58(2)).

³⁹ The Regulations are not included in Schedule 3 of the RES Act. An amendment, adding the Regulations to the list, would be required.

⁴⁰ See Department for Business, Innovation & Skills, Civil Sanctions Pilot, A consultation on the pilot operation of civil sanction powers for consumer law enforcers (March 2010); and Civil Sanctions Pilot – A Joint consultation by the OFT and LBRO on the operation of the BIS Civil Sanctions Pilot (December 2010).

⁴¹ At paras 4.35 to 4.44 of this Consultation Paper.

⁴² At para 4.8 of this Consultation Paper.

⁴³ Section 50(3)(c) RES Act.

⁴⁴ Prof RB Macrory, *Regulatory Justice: Making Sanctions Effective* (November 2006), para 4.27.

Restoration notices

- 4.33 A restoration notice may require the trader, within a specified time, “to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed”.⁴⁵
- 4.34 Before imposing a restoration order, the enforcer must issue the trader with a “notice of intent” and allow it to make representations.⁴⁶ If the enforcer is satisfied beyond reasonable doubt that the offence has been committed it may issue a “final notice”.⁴⁷ The trader may appeal to the First-tier Tribunal.⁴⁸ If the trader refuses to comply, the enforcer may impose a penalty for non-compliance. Alternatively it may move to more formal sanctions, including civil injunctions or criminal prosecutions.

THE CIVIL SANCTIONS PILOT

- 4.35 There has been widespread support for introducing restorative aspects into the enforcement process, both because it would offer redress to consumers and provide better compliance in the future. However, Peysner and Nurse suggest that it will not be easy. It requires TSS officers to engage not only with traders but with consumers, who will often have their own, varied demands from the system. Many TSS officers did not feel that it was their role to obtain compensation, and were worried at being “judge, jury and executioner” in the system.⁴⁹
- 4.36 For this reason, Peysner and Nurse recommended that the Government should proceed cautiously, and experiment with pilot schemes. Following this recommendation, the Government is considering a pilot scheme to test how civil sanctions under the RES Act could be used to enforce the Regulations, along with other consumer legislation.⁵⁰ The OFT and the Local Better Regulation Office issued a joint consultation on the operation of the civil sanctions pilot which closed on 14 February 2011.⁵¹ At the time of writing, the pilot is due to start later in 2011 and is set to last two years.⁵² Seventeen TSS (including three from Scotland) have signed up to participate in the pilot.

⁴⁵ Regulatory Enforcement and Sanctions Act 2008, s 42(3)(c).

⁴⁶ Above, s 43.

⁴⁷ Above, s 42(2).

⁴⁸ Above, s 54. This expressly excludes ordinary courts of law, Section 54(2) RES Act.

⁴⁹ Lincoln Report, para 6.2.

⁵⁰ Under the Pilot the use of civil sanctions will be sanctioned through a new statutory instrument made under the European Communities Act 1972. The new statutory instrument will mirror the provisions of Part 3 of the RESA for offences under the Regulations and the General Product Safety Regulations 2005. The Pilot will also deal with offences under the Weights and Measures Act.

⁵¹ Civil Sanctions Pilot: A joint consultation by the OFT and LBRO on the operation of the BIS Civil Sanctions Pilot (December, 2010), www.of.gov.uk/OFTwork/consultations/current/civil-sanctions

⁵² The Pilot was due to start in spring 2011, however, at the time of writing, it has been delayed.

- 4.37 The Confederation of British Industry stressed that our project must fit with these initiatives, to provide some coherent way of valuing loss and to prevent traders from facing multiple actions from both TSS and individual consumers. Clearly, it would be undesirable if the amount of compensation granted to consumers differed markedly depending on whether redress came under the pilot or under a private right of action. We were therefore interested in understanding more about how compensation might be provided under the pilot.

TSS views

- 4.38 In October 2010 the Law Commission ran a workshop in conjunction with the OFT and Local Better Regulation Office (LBRO) to engage with some TSS participating in the civil sanctions pilot. The workshop focussed on restorative remedies. We used examples of consumer problems from the Law Commissions' preliminary consultations to see how TSS might deal with them under the pilot.⁵³
- 4.39 The overwhelming view of TSS officers participating in the workshop was that the rules should be kept as simple as possible. They had two main concerns. The first was the difficulty of obtaining evidence. The victims would often be vulnerable and not report the incidents at all, and if they did, they were often unwilling or unable to act as witnesses in formal proceedings. Simplifying the way unfair practices are defined and how the burden of proof is allocated cannot resolve this issue but it could help address it.
- 4.40 The second concern was how to assess the appropriate level of compensation. As we have seen, the law on this issue is complex, and has generated several thick books.⁵⁴ TSS officers told us the traditional private law approach is unworkable in the context of delivering compensation to consumers. They wanted simple, certain rules, if possible related to the ticket value of the products involved. If the current private law system for measuring compensation is too complicated for TSS officers, consumers are unlikely to fare any better.

The limits of civil sanctions for achieving redress

- 4.41 Civil sanctions can provide a valuable means by which consumers who are victims of unfair commercial practices may obtain redress. However, they are not a complete solution.
- 4.42 Resources are limited. TSS must pursue consumer protection objectives alongside other competing interests, such as health and safety and protecting the environment. This means that they will need to target their activities for maximum results. Civil sanctions work better in some cases than in others:
- (1) It is easier to justify the intervention when many consumers are affected. This means that TSS are unlikely to become involved where only one or two individuals have been harmed.

⁵³ Law Commissions, *Summary of Evidence on Unfair Commercial Practices and Private Redress: Feedback from stakeholders* (October 2010).

⁵⁴ See for example *McGregor*; A I Ogus, *The Law of Damages*; D M Walker, *Civil Remedies* (1974).

- (2) Civil sanctions work best when traders are solvent and willing to engage with the system. Sanctions are unlikely to be effective where traders refuse to co-operate, prove difficult to trace, or go into liquidation.
 - (3) Civil sanctions are difficult to apply if the trader disputes that a breach has occurred. In Part 3, for example, we discussed the uncertainties over how the Regulations apply to payment collection activities. Sometimes test cases will need to be brought before a court.
- 4.43 We think that effective enforcement requires a range of techniques. Some rogue traders are best dealt with by prosecution. Civil sanctions under the pilot scheme can potentially provide a combination of the advantages of public and private enforcement. On the one hand, as public enforcers are involved, the dialogue with businesses happens at a more centralised level and avoids duplication and reduces the risk of inconsistent decisions. The emphasis is on dialogue and future compliance where the business cooperates, and formal measures where it does not. On the other hand, it also provides the possibility of compensating consumers who may have been harmed as part of enforcement undertakings or restoration notices for example.
- 4.44 There will also be cases where a private right of redress, allowing consumers to pursue their own rights when they have suffered loss, is the preferable solution. This is a separate question to whether a criminal prosecution is justified. A private right may be important for example, where only a few consumers have been damaged by an unfair practice. In other cases the loss may be comparatively small although it may be important to the consumer in question.

CONCLUSION

- 4.45 We are mindful that laws on compensation for misleading and aggressive practices may need to be applied in a variety of settings. They may be applied by judges granting compensation orders after criminal proceedings; by TSS applying civil sanctions; or by consumers and traders negotiating by themselves or with the help of advisers without legal training. As we discuss in Part 14, we think that the emphasis needs to be on “getting one’s money back” (usually a clear, obvious amount) rather than on sophisticated measures of other kinds of loss.
- 4.46 In the next Part we begin our discussion of the current law as it applies between individual traders and consumers. We start by considering private redress for misleading actions.

PART 5

PRIVATE REDRESS FOR MISLEADING ACTIONS

INTRODUCTION

- 5.1 Misleading actions occur where the consumer was told something which was untrue, or where information was presented in a misleading way. These examples, taken from the initial evidence presented to us, illustrate the range and variety of misleading statements. Some may be 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.¹

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 See Society of Trust and Estate Practitioners (STEP), *Cowboy will writing, Incompetence and dishonesty in the UK wills market*, Policy Briefing (January 2011). 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 *Regulating non-lawyer will writers*, Consultation report, The Scottish Government, May 2010, <http://www.scotland.gov.uk/Resource/Doc/925/0099371.pdf>

- 5.2 In this Part we discuss the range of claims which might apply against a trader who is guilty of a misleading action. In private law, these misleading actions are referred to as “misrepresentations”. The law of misrepresentation was not developed as a single body of law. Rather, specific causes of actions deal with particular sets of circumstances. The result is a large and varied family of rules, so that a consumer wishing to bring a claim in “misrepresentation” is forced to navigate an uncertain and intimidating sea of causes of action. Faced with this confusion, many consumers may decide not to set sail at all.
- 5.3 The causes of action we consider apply across all sectors, including real property and financial products; and between all kinds of parties, whether purely business or consumer transactions. It is striking, however, that the leading cases in this area do not involve consumers. Instead, the law has developed in response to claims between businesses. Disputes are typically about high value transactions, and the parties are legally represented.² The result is a sophisticated set of rules which is often unsuited to consumers’ needs.

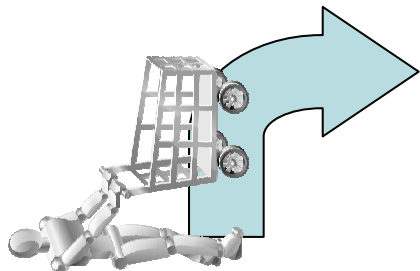
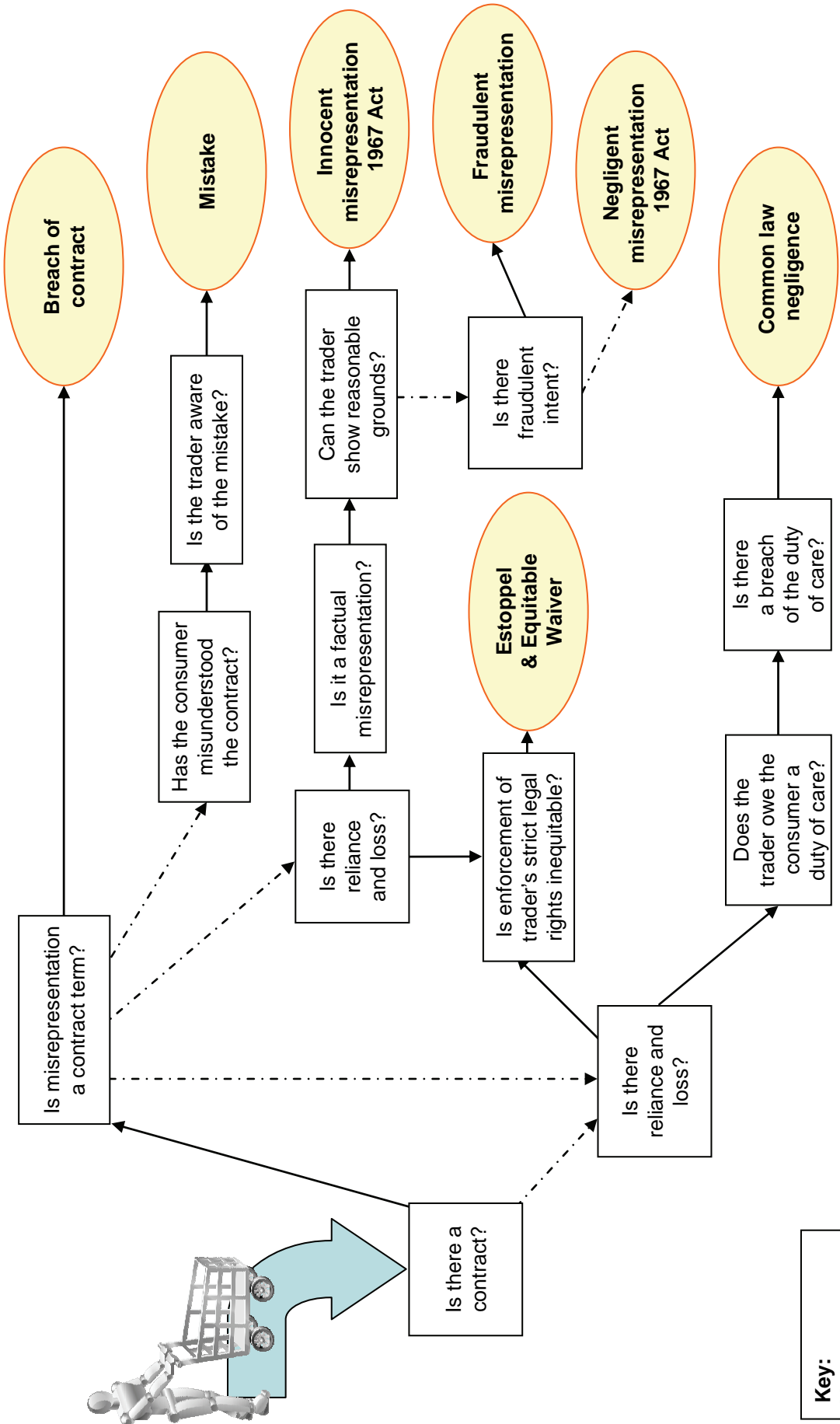
SEVEN POSSIBLE ROUTES TO A REMEDY

- 5.4 Our analysis looks at the existing law through a “consumer lens”, focussing on the aspects of current law that are most likely to affect consumers. We describe seven possible routes to a remedy. These are:
- (1) fraudulent misrepresentation;
 - (2) negligent misrepresentation at common law;
 - (3) negligent misrepresentation under statute;
 - (4) innocent misrepresentation and, in Scotland, error;
 - (5) mistake (in England and Wales);
 - (6) breach of contract; and
 - (7) estoppel, equitable waiver and personal bar.
- 5.5 In some areas (such as fraud and breach of contract) the rules are essentially the same in England and Wales and in Scotland. In other areas, however, there are differences. The statutory remedies vary: the law in England and Wales is governed by the Misrepresentation Act 1967 (the 1967 Act) and the law in Scotland by section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) 1985 (the 1985 Act). There are also differences in the treatment of innocent misrepresentation and between estoppel and equitable waiver (in England and Wales) and the law of personal bar (in Scotland). We highlight differences between the two jurisdictions in the discussion that follows.

² For an extreme example, see the misrepresentation litigation between BSkyB and HP Enterprises, worth £270 million in damages, and claimant’s legal fees for £49 million; *BSkyB Ltd, Sky Subscribers Services Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 862 (TCC).

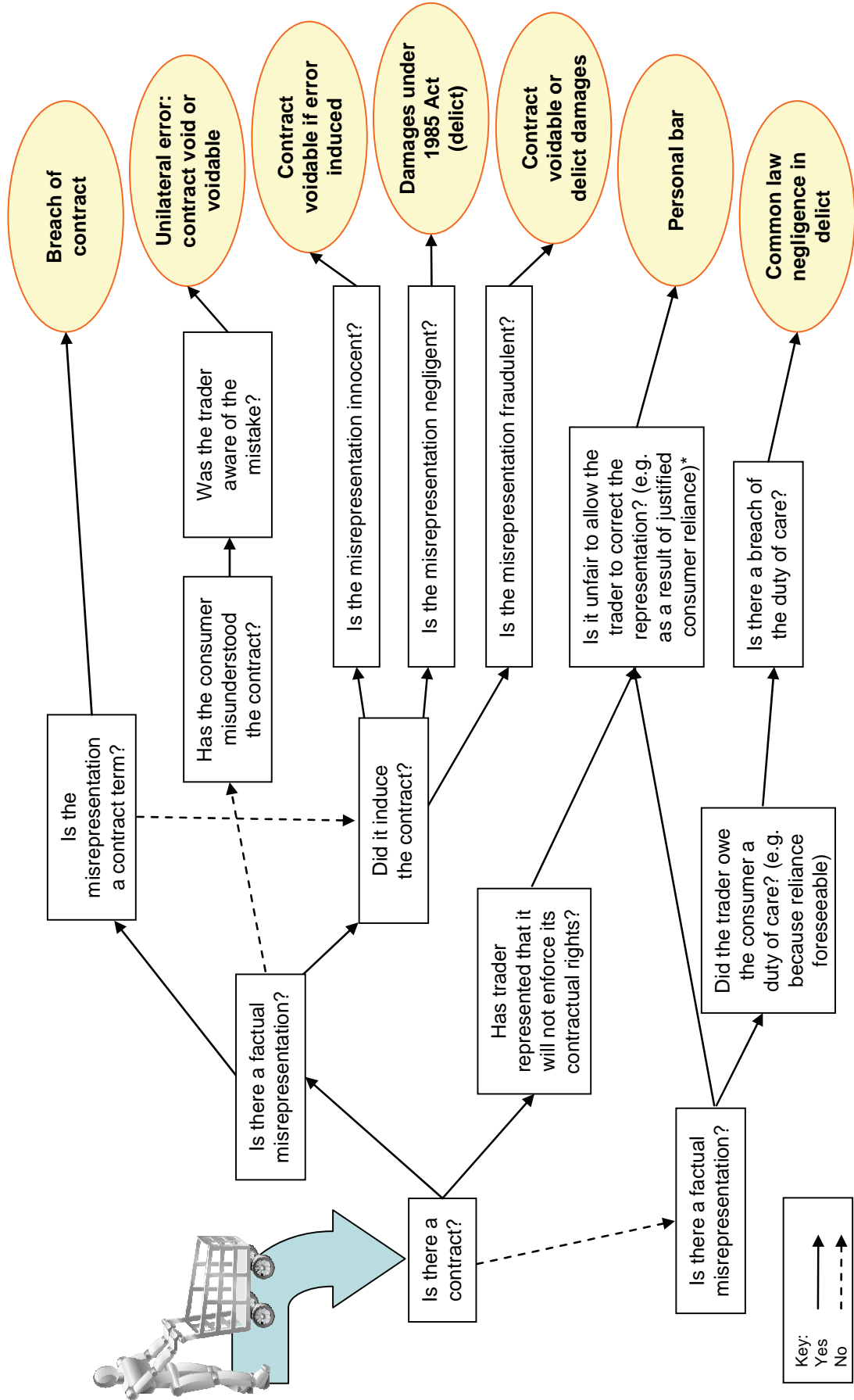
5.6 Although the causes of action for misrepresentation have largely developed independently, they share some key concepts. These key concepts are illustrated in the two diagrams overleaf for England and Wales and Scotland respectively.

KEY CONCEPTS IN THE LAW OF MISREPRESENTATION IN ENGLAND & WALES



Key:
 Yes ———→
 No - - - ->

KEY CONCEPTS IN THE LAW OF MISREPRESENTATION IN SCOTLAND



* See Reid & Blackie, 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."

- 5.7 We start by describing common concepts, looking at what counts as a misrepresentation, and at whether a misrepresentation must be material. We then go through each of the seven routes in turn. We end with a worked example, illustrating how the law might apply to a particular case. The law of misrepresentation also raises difficult issues about causation and remedies. These are discussed in more detail in Part 8.

WHAT IS A MISREPRESENTATION?

- 5.8 There are three main requirements for a misrepresentation: it must be (1) false; (2) factual; and (3) not an omission. Each of these requirements has several exceptions and a large amount of relevant case law.
- 5.9 Under the Regulations a misrepresentation only counts if it relates to one of the matters specifically listed within it.³ In private law, a misrepresentation could be about anything. It will be rare for a misrepresentation to fall outside the matters listed in the Regulations, but the latter is potentially of narrower scope.

False

- 5.10 A representation must be untrue in order to be actionable.⁴ A representation that is merely “unclear, unintelligible, ambiguous or untimely”⁵ or is “likely to deceive an average consumer” in its overall presentation⁶ does not necessarily count as a misrepresentation. It may be actionable as misleading conduct or a half-truth as discussed later,⁷ but the scope of these exceptions is uncertain and difficult to apply.⁸ This leaves a potential gap in consumer protection where traders can use ambiguity and information overload to mislead consumers.

³ See Reg 5(4).

⁴ *Chitty*, 6-020; *Avon Insurance Plc v Swire Fraser Ltd* [2000] 1 All ER 573, paras 15 to 17 by Rix J. For Scots law, see *MacDonald v Fyfe, Ireland and Dangerfield* (1895) 3 SLT 124, OH.

⁵ This is the terminology used in respect of misleading omissions under Reg 6. The provision covers situations where material information is provided so inadequately that it counts as an omission of that information. See Reg 6(1)(c).

⁶ This is the terminology used in the Regulations, at Reg 5(2)(a).

⁷ See discussion in paras 5.14 to 5.18 of this Consultation Paper.

⁸ For discussion see *Chitty*, paras 6-015 to 6-018; J Cartwright, *Misrepresentation, mistake and non-disclosure* (2007), paras 3.04 to 3.11. For Scots law, see McBryde, paras 14-13 to 14-18.

Factual

- 5.11 It is sometimes said that a misrepresentation must be factual, rather than an opinion or a statement about future conduct. However, there are many exceptions. For opinions, there may be an implied representation that there is a reasonable basis for that opinion.⁹ For future conduct, there may be an implied representation about the defendant's current state of mind.¹⁰
- 5.12 At one stage, there was some doubt about whether a statement of law could amount to a misrepresentation.¹¹ However, it now appears that mis-statements of law can be actionable.¹²

Not an Omission

- 5.13 In general, an omission cannot count as a misrepresentation.¹³ However, the line between acts and omissions can be hard to draw.¹⁴ There are cases in which half-truths or misleading conduct have been held to be actionable misrepresentations.

Half-truths

- 5.14 Whereas the trader has not actually lied, the meaning of what they have said changes completely because of what they have failed to say. A half-truth carries the implication that the rest of what the defendant knows (and has omitted to say) does not invalidate what was said.¹⁵ The omission makes what was actually said "false".¹⁶

⁹ *Barings v Coopers* [2002] EWHC (Ch) 461. Suppliers in competitive tender projects might give over-optimistic opinions about their ability to deliver the project in order to win the job. If the supplier did not carry out a proper analysis of the time needed to complete the project, or have reasonable grounds for the time-line put forward, they could be liable for misrepresentation, see *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86.

¹⁰ But deceiving someone about one's current intentions can be a misrepresentation of fact. See *Edgington v Fitzmaurice* (1885) 29 (Ch) 459 at 483; and *East v Maurer* [1991] 2 All ER 733.

¹¹ *Eaglesfield v Marquis of Londonderry* (1875) 4 Ch D 693.

¹² The House of Lords abolished the bar to recovery for mistakes of law in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 following the similar decision, in Scots law, in *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151. See also J Cartwright, *Misrepresentation, mistake and non-disclosure* (2007) paras 3.20 to 3.21; and *Clerk & Lindsell*, para 18-15.

¹³ *Smith v Hughes* (1871) LR 6 QB 597; J Cartwright, *Misrepresentation, mistake and non-disclosure* (2007), para 16.02.

¹⁴ For example, under current law, these can include half-truths, representations implied by conduct, active concealment, representation falsified by later events.

¹⁵ See for example the trickery of the defendant who fraudulently induced a fellow-tradesperson to advance credit to someone he knew was not creditworthy but which he described as "honest", *Tapp v Lee* (1803) 127 ER 200.

¹⁶ *Chitty*, para 6-017.

- 5.15 In *Nottingham Patent Brick and Tile v Butler*,¹⁷ a solicitor acting for the seller of a property responded to enquiries by saying he was not aware of any restrictive covenants. While literally true, the representation as a whole was misleading and regarded as false because it implied that the solicitor had at least checked, whereas he had not.

Representations implied by conduct

- 5.16 Although a trader may not expressly say something, their actions may convey a clear meaning. If a trader advertises goods at a special price “subject to availability”, there is an implication that there are at least some goods at the discounted rate. If none are in fact available, the trader’s conduct would be “bait advertising” and count as a misrepresentation.¹⁸

Active concealment

- 5.17 A distinction is made between concealment in the sense of silence, and active concealment, for example covering over defects.¹⁹ In both jurisdictions, the latter is deemed a form of positive misrepresentation. In Scotland, pure silence can also lead to liability if it amounts to fraudulent concealment.²⁰

Representations falsified by later events

- 5.18 A representation can be continuing in time. There is a duty to correct it if subsequent events make it untrue.²¹

MATERIALITY

- 5.19 A representation will be “material” if it would affect the judgment of a reasonable person in deciding whether or not to enter a contract. It is suggested that if the misrepresentation is not material the courts will deny a remedy.²² The misrepresentation is judged objectively in accordance with the impact that it can be expected to have on:

a reasonable representee in the position and with the known characteristics of the actual representee.²³

¹⁷ [1886] 16 QBD 778.

¹⁸ See for example *Contex Drouzhba Ltd v Wiseman* [2007] EWCA Civ 1201 (misrepresentation as to solvency, by a bankrupt company entering credit transactions to purchase supplies). The practice would also be banned under the Regulations, sch 1, para 5.

¹⁹ See McBryde, para 14-13 and *Gibson v National Cash Register Co Ltd* 1925 SC 500.

²⁰ A failure in a duty to disclose, however, would not, by itself, be sufficient to found a case of fraud, and will remain subject to proving the requirements of fraudulent conduct; i.e. it must be part of a machination or contrivance to deceive. See McBryde at para 14-13.

²¹ *Slough Estates v Welwyn Hatfield DC* [1996] 2 PLR 50, and *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15.

²² See *Treitel*, para 9-013 “A misrepresentation generally has no legal effect unless it is material.”

²³ *MCI Worldcom International Inc v Primus Telecommunications Plc* [2004] EWCA Civ 957, [2004] 2 All ER (Comm) 833, by Mance LJ at para 30.

5.20 However, in England and Wales the need to show materiality as a separate requirement has been doubted.²⁴ Scottish sources rarely make mention of such a requirement.²⁵ Materiality fulfils a common sense test of relevance, and is closely linked with the factual inference of inducement. If the misrepresentation would not have affected a reasonable person, it may be harder to show it actually affected the claimant.

(1) FRAUDULENT MISREPRESENTATION

5.21 A person raising an action for deceit, or fraud, must show reliance on a false representation by the other party to the action.

5.22 In England and Wales, the defendant must have made the representation knowingly or recklessly, intending the claimant to rely on it. The leading case, *Derry v Peek*, stated that the representation must be been made knowingly; or without belief in its truth; or recklessly, careless of whether it be true or false.²⁶ The law developed from the common law action for deceit, which is based on two pillars: “fraud and deceit in the defendant and damage to the plaintiffs”.²⁷

5.23 Scots law is based on the approach of the English courts in *Derry v Peek*,²⁸ but uses a relatively wide definition of fraud as a “machination or contrivance to deceive”.²⁹

²⁴ *Chitty*, para 6-037 states there is no clear authority backing this as a separate requirement.

²⁵ *Cramaso LLP v Viscount Reidhaven’s Trustees* [2010] CSOH 62 does mention such a requirement.

²⁶ (1889) 14 App Cas 337. This state of mind is distinguished from acting carelessly, without any reasonable ground for believing the statement to be true, which would be negligent, but not necessarily fraudulent. See also *Edgington v Fitzmaurice* [1885] LR 29 ChD 459.

²⁷ *Pasley v Freeman* (1789) 3 Term Reports 51 by Buller J at 56, approved by Lord Blackburn in *Smith v Chadwick* (1883-84) LR 9 App Cas 187, 195.

²⁸ *Boyd & Forrest v Glasgow & South Western Railway Co* 1912 SC (HL) 93.

²⁹ See Erskine *Institute* III, I, 16. Scots law may recognise as fraudulent, a statement made without any faith, or belief, in its truth. If the least enquiry could have corrected the statement, the maker can be found liable. See *Western Bank of Scotland v Addie* (1867) 5 M 80, 87.

- 5.24 In both jurisdictions it is difficult to prove fraud. Fraud must be “distinctly alleged and distinctly proved”.³⁰ The standard of proof is the civil “balance of probabilities”³¹ but the evidence needs to be strong.³² It also requires the consumer to prove the trader’s subjective state of mind. A trader who had an honest but unreasonable belief in the truth of the representation will not be liable. Where the trader is a large corporate entity, the question of whose state of mind counts raises a whole set of other legal considerations.³³ For these reasons, actions for fraud are rare.
- 5.25 The victim of a fraudulent misrepresentation has the full array of remedies available, including damages.³⁴ The rules about causation are generally applied more harshly against fraudulent parties, so that they become responsible for all consequences, not just foreseeable ones.³⁵

(2) NEGLIGENCE AT COMMON LAW

- 5.26 A negligent misrepresentation is one which is made carelessly, or without reasonable grounds for believing it to be true.³⁶ A trader making a negligent misrepresentation may be liable at common law in tort or delict, but only if the consumer was owed a “duty of care”.³⁷

³⁰ *Davy v Garrett* (1877-78) LR 7 Ch D 473 by Thesiger LJ at 489. Under Scots law, the test is also difficult, see, for example *Gillespie v Russell* (1859) 3 Macq. 757 and *Welsh v Cousin* (1899) 2 F 277.

³¹ In England, Wales and Northern Ireland, a fraudulent misrepresentation may also be a criminal offence under the Fraud Act 2006 s 2. In Scotland, fraud and attempted fraud are criminal offences at common law. Attempted fraud is committed where the false pretence does not cause a practical result. See *SME Reissue Criminal*, para 364.

³² *Re B* [2008] UKHL 35, [2009] 1 AC 11.

³³ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

³⁴ *Attwood v Small* (1838) 6 Cl & Fin 232 and Gloag & Henderson, para 6.13.

³⁵ See *McGregor*, para 41-006. Also, and the discussion of “remoteness of damage” at paras 8.51 to 8.54 of this Consultation Paper.

³⁶ *Chitty*, para 6-067. On negligent misrepresentation in Scots law, see McBryde, para 15-74. See also para 5.23, note 29 of this Consultation Paper, on the possibility that, under Scots law, a statement made with no reasonable grounds for belief in its truth, may be construed as fraudulent misrepresentation.

³⁷ See *Delict* (SULI), para 5.16.

- 5.27 *Hedley Byrne v Heller*³⁸ was the first case recognising that a negligent misrepresentation could give rise to liability for economic loss, if the parties were in a “special relationship”. The case established the important principle that giving negligent advice outside of a contractual relationship could give rise to liability for pure economic loss.³⁹ Whereas the courts have been cautious not to take liability too far, negligence at common law has the advantage that it can apply to a wide range of non-contractual relationships.⁴⁰ The disadvantage is that it is purely based on case law which relies on vague concepts like “assumption of responsibility”, “proximity”, and the ultimate catch-all phrase of what is “fair, just and reasonable”.⁴¹ These concepts are continuously evolving, so its scope is uncertain.
- 5.28 Beyond the threshold question of whether a duty of care is owed to the consumer, a trader will only be liable if the consumer also shows breach of that duty of care,⁴² and loss. Consumers may find it difficult to show negligence, as typically only the trader knows why things went wrong.
- 5.29 Consider the example of a mobile phone retailer who tells a consumer that the network has “excellent reception” in her area when in fact the signal is very poor. How would a consumer who then bought the product go about showing that the trader breached their duty of care? The consumer must show that:
- (1) The statement was actually made. The retailer may argue the consumer misheard or misunderstood;
 - (2) The statement was false; and
 - (3) The statement was made negligently, even if the consumer has little idea why the salesperson made the error.
- 5.30 Some legal rules can help consumers discharge their burden of proof. The doctrine of “*res ipsa loquitur*”⁴³ means “the thing speaks for itself”. It has been described as

simply a convenient label for a group of situations in which an unexplained accident is, as a matter of common sense, the basis for an inference of negligence.⁴⁴

³⁸ [1964] AC 465.

³⁹ On the facts, the defendants escaped liability because they had a disclaimer.

⁴⁰ *Caparo v Dickman* [1990] 2 AC 605.

⁴¹ *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, 2009 SCLR 324.

⁴² *Qualcast v Haynes* [1959] AC 743. See also *Muir v Glasgow Corporation* 1942 SC (HL) 3.

⁴³ *Scott v London and St Katherine Docks* [1861-73] All ER Rep 246 by Erle CJ at 248.

⁴⁴ *Bergin v David Wickes Television Limited* [1994] PIQR P167 by Steyn LJ at 168.

- 5.31 The doctrine allows the consumer simply to show the result, without having to establish the underlying acts or omissions that led to it. In our example, it would allow the consumer to say “you misled me about the coverage. That should not happen if due care had been used”.⁴⁵
- 5.32 The doctrine of *res ipsa loquitur* is, however, narrow.⁴⁶ It will be displaced if the trader can provide an alternative, non-negligent explanation for the misstatement.⁴⁷ For example, the sales assistant may show that he or she checked maps provided by the network. Ultimately, the relevant standard of care, and whether it has been breached, are questions of fact to be decided using all the circumstances of the case.⁴⁸ This leaves consumers in a precarious position when it comes to establishing breach.
- 5.33 Negligence at common law is essentially about compensating loss, and damages are the usual remedy.⁴⁹

(3) NEGLIGENT MISREPRESENTATION UNDER STATUTE

- 5.34 In this section we consider liability for negligent misrepresentations under statute for both England and Wales, and Scotland. In both jurisdictions, statutory liability only applies if the parties have entered into a contract. A contractual relationship is therefore a crucial precondition to liability.

Misrepresentation Act 1967, section 2(1)

- 5.35 In England and Wales, the 1967 Act provides a remedy for pre-contractual misrepresentations. Section 2(1) states:

Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless 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.

⁴⁵ This way of putting the matter follows Lord Denning’s approach in *Cassidy v Ministry of Health* [1951] 2 KB 343 at 365. The original quote said “I went into the hospital to be cured of two stiff fingers. I have come out with four stiff fingers and my hand is useless. That should not have happened if due care had been used. Explain it, if you can”.

⁴⁶ See *Clerk & Lindsell*, para 8-172. In Scots law, *res ipsa loquitur* is similarly narrow, being regarded as less a legal principle and more a presumption of fact. See *Ballard v North British Railway Co* 1923 SC (HL) 43 and *O’Hara v Central SMT Co* 1941 SC 363. See also, for limitations generally in Scotland, Ross and Chalmers, *Walker and Walker: The Law of Evidence in Scotland* (3rd ed 2009), para 2.10.

⁴⁷ A fanciful alternative will not do, see *Widdowson v Newgate Meat Corporation* [1998] PIQR P138. If the other party presents an equally plausible alternative, it will defeat the doctrine, see *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298.

⁴⁸ *Qualcast v Haynes* [1959] AC 743. See also, for Scots law, *Stainsby v Fallon* [2010] CSIH 64, 2010 SC 773.

⁴⁹ *Clerk & Lindsell*, para 8-04; Thomson, paras 16.9 to 16.10.

- 5.36 Importantly, the section makes defendants liable unless they can show reasonable grounds for saying what they said. The burden of proof lies with the defendant. Another advantage is that the claimant does not need to show the defendant owes the former a duty of care.⁵⁰ The fact that the claimant has entered into a contract with the defendant is sufficient.
- 5.37 The main problem with section 2(1) is that it is defined by reference to fraud liability. It is not a free-standing provision. The fraud rules, such as what counts as a misrepresentation, and the test for causation are “imported” into the Act.⁵¹ This “fiction of fraud” has caused much trouble in the case law because judges disagree on how far the analogy should be carried. Does it mean that the measure of damages should be the same as for fraud? The leading case on this provision, *Royscott Trust v Rogerson*,⁵² says it does, but it has been heavily criticised and its status is far from certain.⁵³

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

- 5.38 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.

- 5.39 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*, which had denied the victim of a misrepresentation a remedy in delict against the perpetrator unless the representation was fraudulent.⁵⁴ Under section 10, the pursuer must still establish a case in negligence, which fundamentally involves establishing that the defender has breached a pre-existing duty of care owed to the pursuer.⁵⁵ But 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.

⁵⁰ *Howard Marine and Dredging Co v Ogden* [1978] QB 574.

⁵¹ *Chitty*, para 6-069.

⁵² [1991] 2 QB 297. See also *Cemp Properties v Dentsply Research Corp (No 2)* [1991] 2 EGLR 197.

⁵³ *Chitty*, para 6-070; *McGregor*, paras 41-043 to 41-048; *Treitel*, para 9-063.

⁵⁴ (1898) 1 F 171.

⁵⁵ 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 and the House of Lords. See 2006 SC 221 (IH 2 Div); [2007] UKHL 33, 2007 SC (HL) 142. See further, Thomson, para 4.14.

Common issues

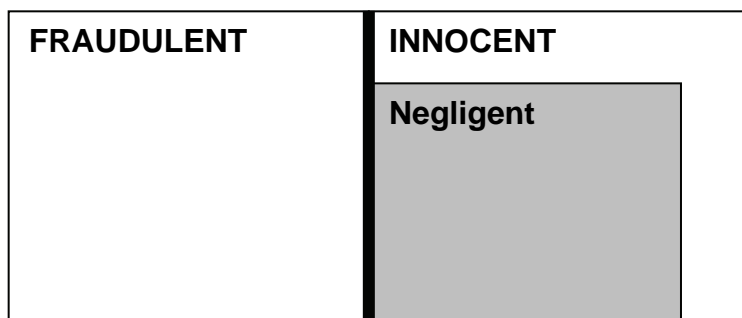
5.40 Criticisms can be made of the approaches in each jurisdiction. Whereas in theory the 1967 Act could be a powerful tool for consumers in England and Wales, the complexity in how liability is defined, and the uncertainty in the way damages should be calculated, mean that it is seldom used. Similar criticisms could also be levied at the Scottish approach, which 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.

(4) INNOCENT MISREPRESENTATION

5.41 The law of innocent misrepresentation in England and Wales has a different conceptual underpinning from the law in Scotland. In England and Wales the law of innocent misrepresentation and the law of mistake developed independently of each other. By contrast, in Scots law, innocent misrepresentation evolved as an aspect of the law of error.⁵⁶

5.42 We first consider innocent misrepresentation as a stand-alone doctrine under the law of England and Wales. This is followed by a description of the law of innocent misrepresentation in Scots law, which necessitates some corresponding discussion of the law of error. We discuss the independent concept of mistake as it has developed in England and Wales in the next section.

5.43 The concept of innocent misrepresentation emerged initially as simply the opposite of fraudulent misrepresentation. Negligent misrepresentation can therefore be seen as a sub-category, albeit a very substantial one, of innocent misrepresentation. Its effect is to add the remedy of damages to that of unwinding the contract which is available for all innocent misrepresentations meeting the requirements of the latter remedy in English and Scots law.



⁵⁶ McBryde, paras 15-59 to 15-60.

Innocent misrepresentation in England and Wales

- 5.44 In England and Wales, a statement which is made taking reasonable care but which turns out to be false gives the claimant a right to rescind the contract. When the contract is “rescinded”, both parties are released from their obligations both retrospectively and prospectively. The aim is to restore the parties to their positions as if the contract had never existed.⁵⁷
- 5.45 If a trader makes an innocent misrepresentation, the consumer’s right to rescind is however subject to the court’s discretion to award damages instead. Section 2(2) of the 1967 Act provides that:

Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

- 5.46 Section 2(2) gives the court the ability to award damages instead (“in lieu”) of rescission. This discretion is useful because rescission can have far-reaching consequences. If the misrepresentation is only minor (for example, the mechanic says the car would be repaired in a week when in fact it takes an extra day) it might be unfair to undo the whole deal, so damages might be awarded instead. The statute expressly directs the court to consider three factors: (1) the nature of the misrepresentation; (2) the loss to the consumer if the contract were upheld; and (3) the loss to the trader if the contract was undone. On top of the statutory factors, the remedy of unwinding the contract has additional requirements under the general law which limit its applicability.
- 5.47 Section 2(2) also applies to negligent misrepresentations in breach of section 2(1). This means that for any action brought under the 1967 Act, the court has the power to award damages instead of allowing the parties to unwind the contract if it would be equitable to do so.

Innocent misrepresentation and error in Scotland

- 5.48 The law of innocent misrepresentation and the law of error are interwoven under Scots law. Rather than developing as a ground of challenge in its own right, innocent misrepresentation has been used to extend the doctrine of error as a ground for avoidance of contracts.

⁵⁷ The meaning of “rescission” is considered in more detail in Part 8 which discusses causation and remedies, at paras 8.10 to 8.25.

- 5.49 At first sight, the notion of error in Scots law appears to set a wide scope for avoidance of contracts.⁵⁸ In practice, however, its scope is limited, as the doctrine depends on the nature of the error and an analysis of a complex inter-relationship of additional factors. It will be very difficult for a consumer to argue that a contract should be set aside on the grounds of error alone, unless the trader made a misrepresentation or (possibly) knew that the consumer had made an error but did not seek to correct it.
- 5.50 The general rule in modern law is that unilateral error is not in itself a ground for avoidance.⁵⁹ If, therefore, a consumer signs up to a purchase without fully understanding exactly what is being bought, it would seem that in general Scots law offers no remedy. For there to be any case for avoidance of the contract, error must be supplemented by some other factor.⁶⁰
- 5.51 The consumer may be able to show an error of fact or law which goes to the heart of the contract. The main example is an error over the identity of the other party to the agreement, where the true identity is crucial to the decision to contract. This may be enough to show that there was no consensus *ad idem* between the parties and, as such, no joint purpose upon which a contract could be said to have been formed. If this is the case, the contract is treated as invalid from the outset (void *ab initio*).⁶¹ The existence of consensus or not will be considered objectively by the courts.⁶²
- 5.52 Where a party is in error as to the contract, yet there is sufficient consensus to allow a contract to be formed, the resulting contract will be avoidable if further conditions are met.⁶³
- 5.53 Traditionally, it is said that for a contract to be avoidable, the party's error had to be in the substantial, that is, go to the root of the contract.⁶⁴ An error in the substantial was an error as to either: (i) the subject of the contract/ obligation; (ii) the person undertaking the engagement; (iii) the price or consideration; (iv) the quality of the thing engaged for; or (v) the nature of the contract itself.⁶⁵ Error in a substantial excludes consent, whereas error in a collateral matter will not. Deciding whether the error falls within one of these five categories could be thought of as a threshold requirement before a contract was avoidable for error.

⁵⁸ Stair's statement is frequently quoted: "those who err in the substantial of what is done, contract not". Stair, *Institutions*, I, 10, 3.

⁵⁹ For example, in *Scott v Craig's Reps* (1897) 24 R 462, 468, Lord Kincairney held that "the mere fact that a contracting party is ill informed of a subject matter has never, so far as I am aware, been held to be a reason for reducing it". See also McBryde, para 15-40.

⁶⁰ McBryde, para 15-23.

⁶¹ An example may be *Morrisson v Robertson* 1908 SC 332, where the error was about a party's true identity. This case contrasts with *Macleod v Kerr* 1965 SC 253.

⁶² See, for example, *Mathieson Gee (Ayrshire) Ltd v Quigley* 1952 SC (HL) 38.

⁶³ This Consultation Paper does not discuss the possibility of common error (that is, error shared by the contracting parties).

⁶⁴ *Stewart v Kennedy* (1890) 17 R (HL) 25, 28.

⁶⁵ Bell, *Principles of the Law of Scotland* (10th ed 1899), edited by William Guthrie, Advocate s.11. Error as to the nature of the contract is the nearest cognate in Scots law to the English doctrine of *non est factum*, for which see para 5.62 of this Consultation Paper.

- 5.54 Over and above this, the case law has developed a further requirement that one party must make a misrepresentation which causes the other party to fall into the error and enter the contract labouring under it. This idea was introduced into Scots law by *Stewart v Kennedy*.⁶⁶ Following this case, innocent misrepresentation became an essential part of a case of unilateral error in the substantial.
- 5.55 *Menzies v Menzies* made a further change to the law.⁶⁷ The House of Lords held that so long as an innocent misrepresentation caused its victim to enter a contract, that contract was voidable even if the victim's error was not in one of the substantial. Thus innocent misrepresentation became a powerful tool in the avoidance of contracts, going beyond the old-established doctrine of error in the substantial.
- 5.56 Apart from misrepresentation, the courts have recognised a right to avoid the contract in one other type of error. This is where a party who labours under an error is able to show that at the time of contracting the other party knew of that error but did not seek to correct it. Thus unfair advantage is taken of the first party's error.⁶⁸ The scope of this exception to the general rule against allowing avoidance for unilateral error is, however, controversial. Some argue that the cases concerned are wrongly decided.⁶⁹ Others say that they are about the risks that parties may be expected to undertake in contracting.⁷⁰ Yet others argue that the exception exists, but is very narrow: this kind of uninduced error must be about the meaning of the terms of the contract and relate to one of the substantial of the contract as defined in *Stewart v Kennedy* (error in transaction).⁷¹
- 5.57 It may be, therefore, that where a trader knows that a consumer is labouring under an error about the quality of the goods or services being sold but does nothing to correct that error, the consumer will be able to avoid the contract; but this will not be an easy claim to make.⁷²

⁶⁶ (1890) 17 R (HL) 25. It was recognised that the general rule requiring a misrepresentation was subject to unspecified exceptions.

⁶⁷ (1893) 20 R (HL) 108. It may be interesting, from a comparative point of view, to note that the final incorporation of the doctrine of innocent misrepresentation into Scots law in this case came under reference to the English case of *Adam v Newbigging* (1888) LR 13 App Cas 308, wherein Lord Watson held that one party "cannot rescind unless his error was induced by the representations of the other contracting party, or of his agent". See MacQueen & Thomson, paras 4.53 to 4.55.

⁶⁸ *Stewart's Trustees v Hart* (1875) 3 R 192; *Angus v Bryden* 1992 SLT 884.

⁶⁹ W M Gloag, *The Law of Contract in Scotland*, (2nd ed 1929), p 438; D M Walker, *The Law of Contract and Related Obligations in Scotland* (3rd ed 1995), para 14.41. But, as noted at para 5.54, note 66 of this Consultation Paper, the possibility of exceptions to the requirement of misrepresentation was recognised in the foundational case of *Stewart v Kennedy*.

⁷⁰ McBryde, paras 15-30 to 15-33.

⁷¹ 15 *Stair Memorial Encyclopaedia*, para 694; MacQueen & Thomson, paras 4.53 to 4.55; Gloag & Henderson, para 6.25.

⁷² For relatively recent examples of unsuccessful claims of this kind see *Brooker-Simpson Ltd v Duncan Logan (Builders) Ltd* 1969 SLT 304; *Steel's Trustee v Bradley Homes (Scotland) Ltd* 1972 SC 48; *Spook Erection (Northern) Ltd v Kaye* 1990 SLT 676.

- 5.58 Apart from the (rare) situations where there has been dissensus,⁷³ a consumer who has been induced to enter into a contract by an innocent misrepresentation is entitled to reduction of the contract, whereby the contract can be set aside.
- 5.59 Whilst in England, section 2(2) of the 1967 Act allows damages in place of rescission for innocent misrepresentation, there can be no claim for damages for innocent misrepresentation in Scots law unless it was also negligent.

(5) MISTAKE IN ENGLAND AND WALES

- 5.60 In England and Wales, the legal doctrine of mistake can have the effect of making a contract void from the start, as it means that the parties never properly reached an agreement. It goes a step beyond the law of misrepresentation because the contract is declared as having never existed at all (rather than just being unwound).⁷⁴ In sales contracts, this can be an important difference where the goods have been sold on to a third party. If the original contract was entered into by “mistake” rather than because of a “misrepresentation”, that third party cannot get ownership of the goods. To avoid this outcome, the courts interpret mistake very narrowly.⁷⁵
- 5.61 The law distinguishes between different types of mistake. In general, for the mistake to count, it has to be about the identity of the other party⁷⁶ or the content of the contract.⁷⁷ If, as is common, the misrepresentation is about the quality of what is sold, mistake will rarely provide any redress. The law makes a highly legalistic distinction between the consumer’s mistaken belief that “there is no joining fee” as opposed to thinking “*the contract says there is no joining fee.*” The consumer would not be able to avoid the contract in the first case, but might be able to do so in the second.

⁷³ In such cases, there was no agreement between the parties so the contract is treated as void from the outset and can be treated as having never existed.

⁷⁴ This distinction is also referred to as the difference between a void contract (which never existed) and a voidable contract (a contract which exists but can be set aside).

⁷⁵ *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919. Note that in Scots law the validity of a property transfer depends on the validity not of the underlying contract but of the conveyance itself (which is however usually closely connected with the former).

⁷⁶ See eg *Ingram v Little* [1961] 1 QB 31; *Lewis v Averay* [1972] 1QB 198 (mistake about counter-party’s identity).

⁷⁷ *Smith v Hughes* (1871) LR 6 QB 597; *Hartog v Colin & Shields* [1939] 3 All ER 566; *Harvey v Ventilatoren Fabrik Oelde GmbH* [1988] BTLR 138.

- 5.62 If the trader misleads the consumer about the nature of the document signed, the consumer may have a defence of “*non est factum*” (which means “it is not my deed”).⁷⁸ The essence of the defence is that the consumer signs a deed thinking it has with a particular legal effect when, in fact, the deed has a different legal effect. For example, the consumer may sign a document thinking it is merely an acknowledgement or receipt, whereas the document is actually a new contract. However, the doctrine is narrow, and the deception has to be a serious one, relating to the *type* of document.⁷⁹ Furthermore, it does not apply if the consumer was negligent.
- 5.63 Unfair commercial practices may concern unilateral mistakes, where a rogue trader takes advantage of a consumer’s error.⁸⁰ The law may provide a remedy but the case law is inconsistent. It is unclear whether it would be enough that the consumer’s mistake would be apparent to a reasonable person, even if the actual trader did not in fact realise.⁸¹
- 5.64 In the few cases where an argument of mistake succeeds, the primary remedy is a declaration that the contract is void. Alternatively, the court may grant rectification to correct errors in the document recording the agreement.

(6) BREACH OF CONTRACT

- 5.65 When a trader makes a misleading statement which leads to a contract, that statement may be interpreted in one of three ways. The misleading statement may be a mere puff and not be actionable at all. Second, it might be a misrepresentation that may be actionable in tort/delict or as a statutory misrepresentation. Finally, the statement may become a part of the contract. In these cases the statement becomes binding because it has been agreed, regardless of fault. Broadly, it becomes progressively harder for a term to cross the threshold from a non-actionable puff, all the way to being a contract term.
- 5.66 How do we determine which representations become contract terms, and which do not? Several legal rules are relevant to how to resolve this issue, and they are not entirely consistent with each other.
- 5.67 The representation becomes a contract term if it is incorporated into the contract. The starting point is the intention of the parties. The courts have developed a series of presumptions in order to determine the parties’ intentions.
- 5.68 In England and Wales, where a contract is in writing the so-called “parol evidence” rule states that the parties are generally not allowed to use external evidence to add to, vary or contradict the written document.⁸² There are several exceptions to this rule.⁸³

⁷⁸ *Grogan v Robin Meredith Plant Hire* [1996] CLC 1127.

⁷⁹ See *Saunders v Anglia Building Society* [1971] AC 1004.

⁸⁰ See for example *Chitty*, paras 5-074 and 5-088.

⁸¹ *OT Africa Line v Vickers* [1996] 1 Lloyds Rep 700; see *Chitty*, para 5-075.

⁸² *Chitty*, para 12-096.

⁸³ *Chitty*, para 12-097.

- 5.69 Scots law has modified the parole evidence rule: a contract which appears on its face to be complete will be presumed to include all relevant terms, but evidence may be led to prove the contrary, unless the parties have incorporated an entire agreement clause.⁸⁴
- 5.70 Whether a representation becomes a term of the contract is ultimately a question of fact. Importantly, an oral term that contradicts the written terms cannot be incorporated into it. A “contradicting” oral term can yet, however, gain contractual force if it becomes a separate, “collateral” contract. Arguably, the whole analysis of whether a representation becomes a contractual term is highly artificial.⁸⁵
- 5.71 In both jurisdictions, if the term to be incorporated is particularly onerous or unusual, it will be harder to show it has become part of the contract. The trader would have to show that it had been fairly brought to the consumer’s attention, for example by printing it in on the face of the document, with a red hand pointing at it.⁸⁶ Terms that are so onerous will typically be “unfair” within the meaning of the Unfair Contract Terms Act 1977 and under the Unfair Terms in Consumer Contracts Regulations 1999. These enactments provide that the unfair term is not binding on the consumer, but the rest of the contract stands, if it can.⁸⁷

(7) ESTOPPEL, EQUITABLE WAIVER AND PERSONAL BAR

- 5.72 Where a consumer relied on a false assurance by a trader in entering into a contract, the courts may prevent the trader from enforcing their strict legal rights.⁸⁸ These doctrines are known as estoppel and equitable waiver in England and Wales, and personal bar in Scotland.

Estoppel and equitable waiver in England and Wales

- 5.73 The principle of estoppel can be simply stated:

if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact.⁸⁹

⁸⁴ This is the position in relation to all proceedings brought from 21 June 1997 onwards, by virtue of the Contract (Scotland) Act 1997, s1(1) and (2).

⁸⁵ See H Beale, “Damages in lieu of rescission for misrepresentation” (1995) 111 *Law Quarterly Review* 60, 63-64. See, for Scots law, McBryde, paras 4-54 to 4-56.

⁸⁶ This is sometimes referred to as the “red hand rule”, see *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461, 466; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; and *Interfoto Picture Library v Stiletto Visual Programmes* [1988] 2 WLR 615. See also, in Scotland, *Montgomery Litho Ltd v Maxwell* 2000 SC 56.

⁸⁷ Reg 8, Unfair Terms in Consumer Contracts Regulations 1999.

⁸⁸ *Chitty*, para 5-082 and Reid & Blackie, para 2-19.

⁸⁹ *Re Bahia and San Francisco Railway Company* (1868) LR 3 QB 584, 595 by Cockburn CJ.

- 5.74 To succeed in a claim of estoppel by representation, there must be a representation of existing fact, which is “precise, unambiguous and unqualified.”⁹⁰ On the other hand, there is authority that an estoppel can arise from silence or acquiescence in another’s error.⁹¹ Estoppel is essentially defensive, and does not give rise to new rights.⁹²
- 5.75 *Curtis v Chemical Cleaning and Dying Co*⁹³ illustrates how an estoppel-like remedy could be used by a consumer to obtain redress. The claimant bride-to-be brought her wedding dress to the defendant dry cleaners. She was asked to sign a document, and when she queried it, the shop assistant said it excluded liability for specific risks like damage to sequins. In fact, the exclusion was much broader. The Court of Appeal held that the cleaners could not rely on the term to exclude liability for staining the dress. They were limited to relying on the narrower exclusion, as they had represented it to be.⁹⁴
- 5.76 Like estoppel, equitable waiver can prevent a trader from enforcing their contractual rights against a consumer.⁹⁵ This doctrine is also referred to as “promissory estoppel”.⁹⁶ The main difference between estoppel and waiver is that waiver can apply to promises and is not restricted to representations of existing fact.⁹⁷ There may be an additional requirement that the parties need to be in a pre-existing legal relationship.⁹⁸ The effect of equitable waiver is only temporary, suspending the defendant’s rights for a reasonable time.⁹⁹

⁹⁰ *Low v Bouverie* [1891] 3 Ch 82.

⁹¹ *Pacol Ltd v Trade Lines, The Henryk Sif* [1982] 1 Lloyd’s Rep 456, 465; *The Stolt Loyalty* [1993] 2 Lloyd’s Rep 281, 290; and *Republic of India v Indian Steamship Co, The Indian Grace (No.2)* [1994] 2 Lloyd’s Rep 331, 344. See *Chitty*, para 5-082.

⁹² See *Greenwood v Martins Bank* [1933] AC 51 and *Chitty*, para 3-098. Estoppel by representation is to be distinguished from proprietary estoppel, which can give rise to new rights in land. In Scots law, however, personal bar is not capable of giving rise to proprietary rights; see *Carron & Co v Henderson’s Trustees* (1896) 23 R 1042, where acquiescence was held incapable of extending a let in the absence of title.

⁹³ [1951] 1 KB 805.

⁹⁴ The case preceded statutory protection against unfair exclusion clauses under the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. But see *Axa Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] All E R (D) 206 para 104. Lord Justice Rix accepted that if the representation had been sufficiently clear to found an estoppel “it would come as no surprise that a party could not rely on an exemption which it had promised to the other party only operated in a certain way”. Overall, his lordship took the view that *Curtis* is better understood as a case where the misrepresentation prevented the exclusion of liability from being incorporated into the contract.

⁹⁵ Equitable waiver is not a source of new rights; see *Combe v Combe* [1951] 2 KB 215.

⁹⁶ See for example *Treitel*, 3-077. This usage has however been criticised, and the dominant view is that the two doctrines are distinct, see *Treitel*, 3-90; *Chitty*, paras 3-090 to 3-091.

⁹⁷ *Chitty*, para 3-090.

⁹⁸ *Chitty*, para 3-088, but this requirement has sometimes been ignored.

⁹⁹ *Chitty*, para 3-096. For another example of the doctrine, see *Central London Property Trust v High Trees House Ltd* [1947] KB 130.

The law of personal bar in Scotland

5.77 The Scots law of personal bar is of a more general nature, applying to inconsistent acts which include, but are not limited to, misrepresentation. A representation can form the basis of personal bar only if it is one of fact, as opposed to opinion. However, certain non-verbal communications have been held capable of conveying meaning.¹⁰⁰

5.78 In the most recent text on the subject, the principles of personal bar are expressed by way of the following table:¹⁰¹

(A) INCONSISTENCY	
(1)	A person claims to have a right, the exercise of which the obligant alleges is barred.
(2)	To the obligant's knowledge, the rightholder behaved in a way which is inconsistent with the exercise of the right. Inconsistency may take the form of words, actions, or inaction.
(3)	At the time of so behaving the rightholder knew about the right.
(4)	Nonetheless the rightholder now seeks to exercise the right.
(5)	Its exercise will affect the obligant.
(B) UNFAIRNESS	
In the light of the rightholder's inconsistent conduct, it would be unfair if the right were now to be exercised. Any of the following is an indicator of unfairness:	
(1)	The rightholder's conduct was blameworthy;
(2)	The obligant reasonably believed that the right would not be exercised;
(3)	As a result of that belief the obligant acted, or omitted to act, in a way which is proportionate;
(4)	The exercise of the right would cause prejudice to the obligant which would not have occurred but for the inconsistent conduct; and
(5)	The right is of little value.

¹⁰⁰ See Reid & Blackie, para 2-14.

¹⁰¹ As set down in Reid & Blackie, para 2-03. We are grateful to the authors and publishers for permission to reproduce this table here.

- 5.79 Waiver is seen as an aspect of personal bar, and not as a distinct doctrine in its own right.¹⁰² The inconsistency needed to establish the bar lies in appearing to abandon a right and then reasserting it. Distinctions are made in Scotland, however, between express and implied waiver, both of which can be conditional. Further, issues can arise in Scots law as to whether a waiver is temporary or permanent.¹⁰³ It has been suggested that, if the inference of abandonment can be drawn from the conduct in question, it will usually be difficult to avoid the further inference that the abandonment is permanent in effect.¹⁰⁴

A WORKED EXAMPLE

- 5.80 Below we use an example to illustrate how the different private law remedies would deal with a misrepresentation scenario. We give a hypothetical example, based loosely on the case of a mis-sold training course, mentioned at the beginning of this Part.

When Alan was made redundant, he was persuaded to sign up to a training course. He was told that the course was accredited by the Government, when it was not; that there was a shortage of qualified people, when there was not; and that he would easily get a job afterwards, paying at least £25,000 a year.

He paid a £1,000 deposit, and took a loan which would amount to almost £12,000. He also spent £720 travelling to the course. He was also unable to claim job seekers allowance as he was not available for work.

The course was extremely poor quality and virtually useless to him. He did not get a job at the end.

- 5.81 The different causes of action present different challenges. The law in this area is complex, and the comparative outcomes are only indicative.
- 5.82 We are mindful that our terms of reference ask us only to look at contracts between traders and consumers. Consumers are defined in the Regulations as individuals “acting for purposes which are outside” their business. We think that Alan qualifies as a consumer under this definition. At the time of entering the contract, he does not have a business. However, the issue is not entirely beyond doubt, and in Part 13 we seek views on this issue.

Option 1: Fraudulent misrepresentation

- 5.83 If the statements were fraudulent, Alan would have the fullest range of remedies and most generous measure of damages.

¹⁰² Reid & Blackie, para 3-02.

¹⁰³ For waiver generally, see Reid & Blackie, chapter 3.

¹⁰⁴ See Hector MacQueen, “Abandoned, Orphaned or Property For Ever? Copyright, Prescription and Personal Bar” (2010) 14(1) Edin LR, 97-102.

- 5.84 This can involve unwinding the contract, so the parties are put back into their original positions. Unwinding the contract is not possible in this case because Alan has completed the course. However, he could recover his full losses, including the initial price, interest on his loan and travel expenses. As fraud offers a generous measure of damages, there is also a strong case to recover an amount equivalent to job seekers allowance.
- 5.85 The difficulty is that fraud would be extremely hard to prove. Alan would not only have to show that the statements were untrue, but that the firm knew them to be untrue at the time.

Option 2: Negligence at common law

- 5.86 Alan has a contractual relationship with the course provider. This means that he can proceed under statute (Option 3 below). Although the course provider would also owe Alan a concurrent duty of care in tort/delict, there appears to be no advantage to Alan in pursuing this.¹⁰⁵

Option 3: Negligent misrepresentation under statute

- 5.87 If the misrepresentations were negligent, then Alan would have a remedy under the 1967 Act in England and Wales, or the 1985 Act in Scotland.
- 5.88 The 1967 Act has several advantages. First, it places the onus on the trader to show that the representations were not negligent: in the words of the statute, that the trader “had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true”.¹⁰⁶ Secondly, the Act imposes liability by analogy with fraud.¹⁰⁷ There is an argument that Alan could therefore recover everything he could claim had the misrepresentation been fraudulent. The disadvantage is that the Act is uncertain, confusing and little used.
- 5.89 In Scotland, Alan would need to prove that the statements had been made negligently. If he succeeded, he would probably get decree for damages in respect of the price, the loan interest and travel expenses.

Option 4: Innocent misrepresentation

- 5.90 If the misrepresentation were innocent, the standard remedy is to unwind the contract. However, as the parties cannot be returned to their pre-contract positions, this option is not available.
- 5.91 In England and Wales, the court has a discretion to award damages instead.¹⁰⁸ It is unclear if this option is lost when the right to unwind is lost.¹⁰⁹ If damages were available, it is also unclear on what basis they would be measured.

¹⁰⁵ See *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145.

¹⁰⁶ Misrepresentation Act 1967, s 2(1).

¹⁰⁷ *Chitty*, para 6-069.

¹⁰⁸ Misrepresentation Act 1967, s 2(2).

Option 5: Mistake (England and Wales) and Error (Scotland)

- 5.92 Unilateral mistakes have the potential to negate consent to the contract if they relate to the terms of the agreement or the identity of the trader.¹¹⁰ Alan's mistake does not fall in either of these categories, but is rather about the utility of the course. In England and Wales, the doctrine of mistake will therefore be of little assistance.
- 5.93 In Scotland, there is a possibility that the doctrine of error induced by misrepresentation may offer some assistance.¹¹¹ It has, however, been noted that the doctrine is limited and it is uncertain how receptive courts would now be to arguments based on essential error as to quality.¹¹²

Option 6: Breach of contract

- 5.94 Alan was told that he would obtain a job paying at least £25,000 a year. Can he get compensation for the salary he has lost? This would amount to "expectation damages", rather than "reliance damages". He would be compensated for the broken promise, rather than being returned to the position he would have been in had he not taken the course.
- 5.95 The answer is that Alan could only be given damages for his lack of a job if he could prove to the court that the promise of the job was intended to be a contract term. For this it would need to be firm and definite – and it would help if it had been put in writing.
- 5.96 In this example, it would be difficult to show that the untrue statements were contract terms, making this a difficult argument to run. A court is likely to find that the "promise" of a job is too speculative to form the basis of a contractual liability.
- 5.97 It is also important to note that one cannot obtain damages for both breach of contract and misrepresentation. Even if everything had gone right, Alan would only have obtained the job if he had paid for and attended the course, with all the costs that would have been involved. Thus he cannot obtain both expectation and reliance damages. He would need to choose one or the other.¹¹³

CONCLUSION

- 5.98 The law of misrepresentation presents a confusing patchwork of doctrines, based on case law which is inaccessible to consumers and non-legal advisers. There is often no clearly preferable route to establishing liability.
- 5.99 The most useful cause of action would appear to be the statutory remedies: the 1967 Act in England and Wales, and section 10 of the 1985 Act in Scotland.

¹⁰⁹ *Atlantic Lines & Navigation Co v Hallam* [1983] 1 Lloyd's Rep 188; *Zanzibar v British Aerospace* [2000] 1 WLR 2333; and *Floods of Queensferry v Shand Construction* [2000] Building LR 81. See *Chitty*, para 6-098.

¹¹⁰ J Cartwright, *Misrepresentation, mistake and non-disclosure* (2007), para 12.09.

¹¹¹ See discussion at para 5.48 to 5.59 of this Consultation Paper.

¹¹² McBryde, para 15-05; also see discussion at paras 5.48 to 5.59 of this Consultation Paper.

- 5.100 The advantage of the 1967 Act is that it does not require the consumer to prove that the trader was at fault: instead the trader must show that they were *not* negligent. However, it is not well known or well-used.¹¹⁴ It suffers from drafting flaws and has been subjected to academic criticism.¹¹⁵ Furthermore, there is considerable uncertainty over the three remedies it provides: rescission, damages and damages in lieu of rescission.
- 5.101 Meanwhile, section 10 of the 1985 Act requires the consumer to prove negligence and provides no remedies for the misrepresentation that is merely innocent and not negligent.
- 5.102 We return to these problems in Part 10. In the next Part, we consider traders who engage in misleading omissions, and when they may be made liable to consumers under existing law.

¹¹³ We do not consider an option 7 (estoppel, equitable waiver and personal bar) as it is not raised by the facts.

¹¹⁴ See Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), paras 2.6 and 2.8.

¹¹⁵ See for example P S Atiyah, G H Treitel, "Misrepresentation Act 1967" (1967) 30 *Modern Law Review* 369; and *McGregor*, para 41-047.

PART 6

PRIVATE REDRESS FOR MISLEADING OMISSIONS

INTRODUCTION

- 6.1 At common law there is, generally, no liability for omissions unless a specific duty has been breached. Traders have no general duty to disclose information to the consumer.¹ This is in sharp contrast with the position under the Consumer Protection from Unfair Trading Regulations 2008, which impose a duty on traders to disclose material information to consumers.² This situation is not unique to the UK. The European Parliament's Internal Market and Consumer Protection committee commented that the introduction of omissions liability is likely to have repercussions for the contract laws of many member states.³
- 6.2 In initial discussions, consumer groups provided examples of misleading omissions. Most concerned a lack of information about contract terms.⁴

Example: credit card charges

A consumer was not told that he would be charged if he did not use the credit card.

Example: mobile phone tariffs

A consumer was not told the mobile phone tariff was charged per minute or part minute, rather than per second. This meant that "free" call time was a lot less than expected.

- 6.3 The general rule is clear: traders have no liability for omissions, and the "buyer must beware". However, this is subject to many exceptions.
- 6.4 In this Part we provide a short overview of the main exceptions whereby a consumer may gain redress against a trader for an apparent omission. We discuss eight possible routes to redress for a misleading omission, under the following headings:
- (1) Omissions shading into positive misrepresentations;
 - (2) Contracts of "utmost good faith";

¹ *Chitty*, para 6-142. See for Scots law, *Broatch v Jenkins* (1866) 4 M 1030, which affirmed the proposition set out in *Irvine v Kirkpatrick* (1850) 7 Bell 186 that "a concealment, to be material, must be a concealment of something that the party was bound to tell" (at 232).

² See paras 2.59 to 2.66 of this Consultation Paper.

³ Directorate-General for Internal Policies, Internal Market and Consumer Protection (IMCO), *State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation*, July 2010, s 2.5.

⁴ Law Commission, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), para 4.10.

- (3) Fiduciary Relationships;
- (4) Implied terms in the sale of goods;
- (5) Services and the duty to take reasonable care;
- (6) Other implied terms;
- (7) Other statutory duties of disclosure; and
- (8) Unfair terms.

6.5 It is interesting to note that in England and Wales, criminal liability for fraud follows the civil law: it is only a criminal offence to fail to disclose information if the defendant was under a “legal duty” to disclose it.⁵

OMISSIONS SHADING INTO POSITIVE MISREPRESENTATIONS

6.6 In many situations an apparent omission is properly regarded as a positive misrepresentation. In Part 5 we discussed several exceptions to the rule that a misrepresentation must be positive, including half-truths, representations by conduct, cases of active concealment and representations which are falsified by later events.⁶ In all these situations, the omission colours a related action of the trader, making the trader liable to provide redress.

6.7 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”.⁷ The original statement could be considered positively misleading and therefore a “misrepresentation” in law.⁸

⁵ Fraud Act 2006, s 3. In Scotland, fraud is the bringing about of some practical result by means of a false pretence. False pretences can arise by implication where nothing is said or written. Fraud may also arise by omission; in such a case, the false pretence is the failure to disclose the true position when under a duty to do so. See *SME Reissue Criminal*, paras 360 to 366.

⁶ See discussion at paras 5.13 to 5.18 of this Consultation Paper.

⁷ Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), para 3.21.

⁸ See *Tapp v Lee* (1803) 127 ER 200. For Scots law, see *Patterson v Lansberg* (1905) 7 F 675.

6.8 We have also seen that in Scots law, it has sometimes been held that where a contracting party, A, is labouring under an essential error and this is known to the other party, B, who, nonetheless, does not correct A's error, the contract may be unwound ("reduced").⁹ If the failure to disclose is accompanied by a machination or contrivance to deceive, then it may found a case of fraud,¹⁰ for which damages are recoverable.¹¹ However, the scope of these rules is unclear and controversial.¹²

CONTRACTS OF "UTMOST GOOD FAITH"

- 6.9 The common law recognises that in some situations the contracting parties are under a specific duty to disclose material information. These are referred to as contracts of "utmost good faith".
- 6.10 Insurance contracts are contracts of utmost good faith.¹³ However, the duty of disclosure has not been used to protect consumers. Instead, the main obligation lies on the insured to disclose any information which "would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk".¹⁴ Under the strict letter of the law, if a consumer fails to disclose this information the insurer may avoid the contract and refuse to pay claims. This duty is no longer appropriate to a modern consumer insurance market, and we have recommended that it should be abolished for consumer insurance.¹⁵
- 6.11 A duty to disclose may also extend to contracts for the purchase of shares, guarantees and settlement agreements.¹⁶

⁹ *Steuart's Trs v Hart* (1875) 3 R 192; *Angus v Bryden* 1992 SLT 884.

¹⁰ McBryde, para 14-18.

¹¹ Above para 14-01.

¹² Above para 15-33.

¹³ *Chitty*, para 6-144 and Gloag & Henderson, para 21.05.

¹⁴ Marine Insurance Act 1906, s 18(2), codifying the common law applying to all insurance.

¹⁵ Law Commissions, *Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation* (2009) Law Com No 319; Scot Law Com No 219.

¹⁶ *Chitty*, paras 6-153 to 6-164. See, for discussion on various types of contract in Scots law and whether these are *uberrimae fidei*: *Bank of Scotland v Morrison* 1911 SC 593; *Manners v Whitehead* (1898) 1 F 171; *Ferguson v Mackay* 1984 SC 115; 1985 SLT 94 and *Walker v Greenock and District Combination Hospital Board* 1951 SC 464.

FIDUCIARY RELATIONSHIPS

- 6.12 A duty of disclosure is also imposed on fiduciaries. A fiduciary is someone required to act in the best interests of the other party. Some types of relationships automatically qualify, such as solicitors and their clients,¹⁷ trustees and beneficiaries,¹⁸ directors and their companies, and principals and agents.¹⁹ Fiduciaries are under a duty of full and frank disclosure to their beneficiaries.²⁰

IMPLIED TERMS IN THE SALE OF GOODS

- 6.13 The Sale of Goods Act 1979 states that contracts for the sale of goods are subject to implied terms that the seller has title to the goods,²¹ and that the goods are of satisfactory quality and fit for the buyer's purpose.²²
- 6.14 Thus the consumer has a remedy against a trader from whom stolen goods are purchased.²³ The Sale of Goods Act 1979 also 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.²⁴ 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.
- 6.15 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.²⁵ 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.

¹⁷ *Aitken v Campbell's Trs* 1909 SC 1217; *Gillespie v Garnder* 1909 SC 1053.

¹⁸ *Dougan v Macpherson* (1902) 4 F (HL) 7.

¹⁹ *English v Dedham Vale Properties* [1978] 1 W.L.R. 93; and *Macpherson's Trs v Watt* (1877) 5 R (HL) 9.

²⁰ See *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] British Company Cases 711. For Scots law, see Gloag & Henderson, para 3.03 and *Ferguson v Mackay* 1984 SC 115, 1985 SLT 94.

²¹ Sale of Goods Act 1979, s 12.

²² Sale of Goods Act 1979, s 14.

²³ If the seller does not mention that the goods are stolen, the buyer has a right of redress under Sale of Goods Act 1979 s12(1). The provision states that the seller makes an implied representation that he has a right to sell the goods. This discussion does not alter the fact that if the goods are stolen, the buyer cannot get good title.

²⁴ Sale of Goods Act 1979, s14(2C)(a).

²⁵ H Collins, *A private right of redress for unfair commercial practices*, A report for Consumer Focus (April 2009), p 23.

SERVICES AND THE DUTY TO TAKE REASONABLE CARE

- 6.16 In England and Wales, the Supply of Goods and Services Act 1982 requires a trader to carry out services with reasonable care and skill.²⁶ 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: their duty of reasonable care and skill may include a duty to disclose the side-effects of a treatment.²⁷
- 6.17 The duty of disclosure can also arise as part of the duty of care owed by a trader to the consumer. In England and Wales, this can arise at common law, through a “voluntary assumption of responsibility”.²⁸
- 6.18 In Scots law, the common law ties in with the law on implied terms.²⁹ There is an implied duty to exercise the ordinary standard of care and workmanship of the trade in question.³⁰ Indeed, there is authority to the effect that, if the workman does not have the requisite skill for the job in hand,³¹ or has a lesser ability than normally would be expected in that particular trade,³² there is a duty to let the customer know.³³

OTHER IMPLIED TERMS

- 6.19 Terms can also be implied into contracts at common law. This can be done on the basis of the facts of the particular case, or by custom.³⁴
- 6.20 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. 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.³⁵

²⁶ Supply of Goods and Services Act 1982, s 13. Part II of this Act does not apply to Scotland. See Ervine, para 6-04.

²⁷ H Collins, *A private right of redress for unfair commercial practices*, A report for Consumer Focus (April 2009), p 22.

²⁸ *Hedley Byrne v Heller* [1964] AC 465, 486 and 529, as discussed in *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, para 73.

²⁹ See Ervine, paras 6-13 to 6-26.

³⁰ *Dickson v Hygienic Institute* 1910 SC 352 and *Owen v Fotheringham* 1997 SLT (Sh Ct) 28.

³¹ *Brett v Williamson* 1980 SLT (Sh Ct) 56.

³² *Dickson v Hygienic Institute* 1910 SC 352.

³³ *Macintosh v Nelson* 1984 SLT (Sh Ct) 82.

³⁴ For Scots law, see McBryde, ch 9.

³⁵ Law Commission, *A private right of redress for unfair commercial practices?, Preliminary advice to the Department of Business, Enterprise and Regulatory Reform on the issues raised* (November 2008), para 2.51.

6.21 In both jurisdictions, the test for implying a term in the particular case is demanding: it is not enough to show that implying the term would be reasonable. Rather, it has to be *necessary* to give business efficacy of the contract.³⁶ This means that the contract could not really work without it. This type of term also needs to satisfy the so-called “officious bystander” test. This means the term to be implied:

Is something so obvious that it goes without saying; so that, if, while the parties were making their bargain an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common “Oh, of course”.³⁷

6.22 Implying a term “in fact” is therefore no easy matter, because if the term is in the least contentious and would have required negotiation, it cannot be implied.

6.23 On the other hand, a term may be implied by custom. For a term to become customary, it must be widely accepted within a particular industry or locality, so that it is easily discoverable (“notorious”), consistent and certain.³⁸ Trade usage is a particularly strong source of terms, so that if a trade association issues particular types of terms they can be incorporated into the specific contract even if they are not expressly referred to.³⁹

OTHER STATUTORY DUTIES OF DISCLOSURE

6.24 Statutory duties of disclosure also arise in specific sectors in the UK. This is the case for real estate agents for example. An estate agent needs to provide its clients with a detailed breakdown of its fees and charges.⁴⁰ The Property Misdescriptions Act 1991 makes it an offence to make misleading statements about matters relating to land. It expressly covers misleading by omission, if a reasonable person would make an inference from that omission, but the Act does not give rise to civil liability.⁴¹

6.25 Apart from the Regulations, other EU-driven consumer protection measures also impose informational duties on traders and are directly enforceable by consumers. Three important areas where informational duties are already imposed include door-step selling, distance contracts and timeshares.

³⁶ *The Moorcock* (1889) 14 PD 64 and *William Morton & Co v Muir Bros & Co* 1907 SC 1211.

³⁷ *Shirlaw v Southern Foundries Ltd* [1939] 2 KB 206, 207 by Mackinnon LJ. The officious bystander test was referred to with approval in *McCutcheon v MacBrayne* 1964 SC (HL) 28, 35 by Lord Reid.

³⁸ See for example *Turner v Royal Bank of Scotland* [1999] 2 All ER (Comm) 664; and “*Strathlorne*” *Steamship Co v Baird & Sons* 1916 SC (HL) 134.

³⁹ See for example *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303; *Baker v Black Sea & Baltic General Ins Co Ltd* [1998] 2 All ER 833; see also *Eunson v Johnson & Greig* 1940 SC 49 (terms may be incorporated by a course of dealing, and may imply a term which is different from the customary usage of the trade) and McBryde, paras 9-61 to 9-64.

⁴⁰ The Estate Agents Act 1979, s 18.

⁴¹ The Property Misdescriptions Act 1991, s 1(5).

6.26 In door-step selling⁴² and distance contracts,⁴³ traders must give consumers information about their right to cancel the contract in the “cooling off” period. Recent years have also seen many developments in the area of long-term holiday products, beyond timeshares, including scams about holiday clubs for example. The EU introduced a new Timeshare Directive to reflect these changes,⁴⁴ which the government proposes to implement by repealing current provisions⁴⁵ and introducing new regulations.⁴⁶ The new Timeshare Regulations require advance disclosure of key information to consumers in a set format (in so-called “standard information forms”).⁴⁷

6.27 In October 2008, the European Commission proposed a new Consumer Rights Directive.⁴⁸ This imposes new information disclosure requirements on distance and off-premises contracts and certain on-premises contracts. The draft proposed Consumer Rights Directive approved by the Member States in January 2011 requires traders to disclose the main characteristics of the product, the identity of the trader and the price, as well as information about cancellation rights.⁴⁹ In respect of distance and off-premises contracts for example, if a trader fails to provide information about cancellation rights, the consumer has one year to withdraw from the contract.⁵⁰ At the time of writing it is unclear what remedies a consumer may have if a trader fails to provide the required information.

UNFAIR TERMS

6.28 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.

⁴² See Reg 7 of the Cancellation of Contracts made in a Consumer’s Home or Place of Work Regulations 2008 (SI 2008/1816), replacing the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, implementing EU Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

⁴³ See Reg 7 of the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334), implementing Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

⁴⁴ EU Directive 2008/122/EC on timeshare, long-term holiday products, resale and exchange contracts.

⁴⁵ Including the Timeshare Act 1992 and the Timeshare Regulations 1997.

⁴⁶ See BIS, *Consultation on Implementation of EU Directive 2008/122/EC on timeshare, long-term holiday products, resale and exchange contracts*, July 2010, Annex A (new draft Timeshare Regulations).

⁴⁷ See new draft Timeshare Regulations, Regs 12 and 13, and Schedules 1 to 4.

⁴⁸ Proposal for a Directive of the European Parliament and of the Council on consumer rights, 2008/0196 (COD).

⁴⁹ Proposed Consumer Rights Directive, IMCO consolidated version (9 February 2011), informal working document – for information purposes only, Articles 5 and 9.

⁵⁰ Above, Article 13. The period starts to run after the initial, unconditional, withdrawal period of 14 days. Under current law, consumers have an initial withdrawal period of 7 days (rather than 14 days) in accordance with Directive 97/7/EC (Distance Contracts) and Directive.85/577/EEC (Doorstep Selling).

- 6.29 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”.⁵¹ In *Abbey National v OFT*,⁵² 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 they were entering. 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.
- 6.30 Take the example of the consumer who was not told that there would be a charge for a credit card even if it was not used. If the consumer had an opportunity to read the written contract, which included this term in plain intelligible language, then the charge could not be challenged. However, if the term was obscure, or there was no opportunity to read the contract, then it may be considered unfair and of no effect. A consumer might also be able to argue that the term was not incorporated into the contract and, therefore, not enforceable.⁵³
- 6.31 There have been initiatives to reform the law in this area. The Commission’s original draft of the proposed Consumer Rights Directive in 2008 included provisions to reform the Unfair Contract Terms Directive. These provisions are also included in the version that was formally adopted by the EU Member States in January 2011. At the time of writing, the proposed Consumer Rights Directive remains to be approved by the European Parliament and its scope is uncertain.⁵⁴ The Department for Business, Innovation and Skills had consulted on whether contingent or ancillary charges should be assessed for unfairness under the unfair contract terms provisions of the proposed directive. The Government took the view that the issues were finely balanced, and that it would await the results of the Credit and Personal Insolvency Review (which includes the issue of bank charges) before revisiting the issue.⁵⁵ At the time of writing, the question of how to deal with ancillary bank charges remains open.

CONCLUSION

- 6.32 In many cases, consumers are given 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. Hidden contract terms may be assessed for fairness.

⁵¹ Reg 6(2).

⁵² [2009] UKSC 6, [2009] 3 WLR 1215, [2010] 1 AC 696.

⁵³ See *Interfoto Picture v Stiletto* [1989] QB 433 and *Montgomery Litho Ltd v Maxwell* 2000 SC 56.

⁵⁴ Proposed consumer Rights Directive, IMCO consolidated version (9 February 2011), informal working document – for information purposes only, Chapter V.

⁵⁵ See Department for Business, Innovation & Skills, *Government response to the Call for Evidence on the Consumer Rights Directive: Allowing Contingent or Ancillary Charges to be Assessed for Unfairness*. (October 2010)

- 6.33 The context-driven approach to omissions liability which prevails in private law in the UK is narrower than under the Consumer Protection from Unfair Trading Regulations 2008, but has the benefit of greater certainty.
- 6.34 Concern has been raised that introducing general liability for omissions would be a major change, and introduce considerable uncertainty into the law. Businesses were particularly worried that they might be required to provide information that a product is about to become obsolete, or that better products are on the market, or that competitors are selling products more cheaply. As discussed in Part 2, we do not consider that the requirement to provide material information extends to information about other products on the market, but we accept that the boundaries are uncertain.
- 6.35 On the other hand, 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.⁵⁶ We return to this issue in Part 13.
- 6.36 In the next Part we consider the existing law that might apply to protect a consumer where a trader engages in an aggressive commercial practice.

⁵⁶ Under our proposals, the consumer would also have to show they were actually misled in order to obtain relief.

PART 7

PRIVATE REDRESS FOR AGGRESSIVE PRACTICES

INTRODUCTION

- 7.1 The word “aggressive” is often associated with violent or threatening behaviour. As we saw in Part 2, however, the Consumer Protection from Unfair Trading Regulations 2008 (the Regulations) define aggressive practices more widely. They cover, for example, creating the impression that the consumer cannot leave the premises until a contract is formed;¹ persistent and unwanted solicitations;² and home selling, where the trader ignores the consumer’s requests to leave.³
- 7.2 Consider the following example given by the National Consumer Council, the precursor to Consumer Focus:⁴

Example: doorstep selling to the elderly

An elderly lady... was visited, without invitation or appointment, by doorstep salesmen. They sold her a bed for £3,000 with various gadgets which were entirely inappropriate to her medical condition and far too complex for her to use. They stayed in her home for five hours, until she signed the contract.

- 7.3 A consumer in this position may feel considerable pressure, and signing the contract may be the only way of getting rid of the salesman. It may take a family member finding out what happened before anything is done about it. As discussed in Part 10 vulnerable consumers are more likely to fall prey to aggressive practices, and they are less able to deal with the emotional and economic consequences.
- 7.4 Another example, given to us in the course of this project is given below:

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.

- 7.5 In this Part we start by outlining four doctrines which may be available to a consumer who is a victim of an aggressive practice:

- (1) Duress (known in Scots law as “force and fear”);
- (2) Undue influence (including “facility and circumvention” in Scots law);

¹ Banned practice 24, sch 1, Regulations.

² Above, banned practice 26.

³ Above, banned practice 25.

⁴ Mr Waterson, House of Commons Standing Committee B, 23 April 2002, Column 228.

- (3) Unconscionable or extortionate bargains; and
- (4) Intimidation or “unlawful interference”.

7.6 These doctrines may enable the consumer to escape the resulting contract (if there is one), or, perhaps, seek damages.

7.7 Each doctrine emphasises a different aspect of the aggressive practice. Duress primarily deals with forcing another to do something by using threats. Undue influence focuses on the relationship between the parties and the risk of exploitation of the weaker party. The doctrine of unconscionable bargains – if it exists as a general principle – focuses on the substantive unfairness of the resulting transaction. The tort of intimidation emphasises the intent to cause damage to another. None of these rights of action has developed specifically with consumers in mind, and indeed, these actions are often ill-fitted to deal with the sorts of practices which occur in the marketplace.

7.8 Aggressive practices are a particular problem in debt collection. In the final section we consider two remedies which may provide protection against aggressive debt collection:

- (1) the Protection from Harassment Act 1997; and
- (2) the protection against unfair credit relationships under section 140A of the Consumer Credit Act 1974.

7.9 The tables below give an overview of the key characteristics of the different causes of action that might apply to aggressive traders.

AGGRESSIVE PRACTICES			
Causes of Action		Elements of liability	
		Acts by trader	Impact on consumer
Under the Regulations [by a public body only]	Reg 7	Use of “harassment, coercion or undue influence”. Non-exhaustive factors listed: timing, location, use of threatening or abusive language or behaviour...	Likely to: (1) significantly impair the average consumer's freedom of choice and (2) cause a transactional decision
	List of Banned practices (24 to 31)	Conduct falling in the specific examples (like targeting children or creating the impression that the consumer cannot leave the premises until a contract is formed)	No impact (actual or likely) needed
Duress (England and Wales)		Threats to the person	Presumption that the threat influenced the consumer
		Threats to goods	Threat probably needs to be a “but for” cause
		Threats to hurt the consumer’s financial interests (“economic duress”)	Threat must be a “but for” cause. Important but not decisive factors: (1) did the consumer protest? (2) were there realistic alternatives to submitting to the threat? (3) did the consumer take steps to avoid the contract after the pressure was removed?
Force and Fear (Scotland)		Improper or illegitimate pressure	Consumer must prove consent not freely given or was deprived of the rational exercise of will

Causes of Action	Elements of liability	
	Acts by trader	Impact on consumer
Undue influence (England and Wales)	Use of actual pressure against the consumer	The consumer is unable to exercise an informed and independent judgement
	If there is a relationship of trust and confidence with the consumer (beyond the standard commercial relationship) and the transaction cannot be explained by ordinary motives	There is a presumption that the consumer was unduly influenced
Undue influence (Scotland)	Abuse of a position of confidence and trust by inducing the other party to contract and benefiting therefrom	Consumer must prove the contract has been entered into as a result of the undue influence. Not much is required, however, to shift the burden of proof
Facility and circumvention (Scotland)	Fraud and circumvention	A “facile” (vulnerable) consumer is induced to enter a disadvantageous contract
Unconscionable or exorbitant bargains [<i>but scope and existence of doctrine highly uncertain</i>]	Unconscionable conduct/ exorbitant contract terms	An oppressive bargain with a consumer suffering from a particular disadvantage (akin to factors making a consumer “vulnerable” under the Regulations)
Intimidation/ causing loss by unlawful means	To threaten unlawful acts against the consumer	The threat causes the consumer to do or refrain from doing something they are entitled to do, and results in damage to the consumer
Harassment	A course of conduct (on at least two occasions) which the trader knows or ought to know amounts to harassment of another	A civil remedy is available for actual or apprehended harassment
“Unfair relationships” under the Consumer Credit Act 1974, s 140A	The court can declare that the relationship between a creditor and a borrower is “unfair” for several reasons, including the way in which the lender has exercised or enforced its rights under the credit agreement	The court can order a wide range of remedies including changing the terms of the credit agreement or requiring the creditor to make a refund

7.10 There are gaps in these remedies. The private law fails, in general, to provide vulnerable consumers with a remedy for high pressure sales techniques which breach the Regulations but do not amount to “duress”.⁵ In Part 12 we argue for reform to provide more extensive remedies for aggressive practices.

(1) DURESS

7.11 Here we cover the doctrine of duress in England and Wales and the principle of force and fear in Scotland. Scots law generally employs the term “force and fear” in this area of the law, though this is often used interchangeably with “extortion”, “duress”, “threats” or “coercion”. For present purposes, “duress” refers to both England and Wales and Scotland, unless otherwise stated.

⁵ But see paras 7.45 to 7.47 of this Consultation Paper, on the Scots law of facility and circumvention.

- 7.12 In cases of duress, the trader uses actual pressure or an illegitimate threat to gain a benefit from the consumer.⁶ This benefit will usually be a payment under a contract, but it does not have to be.⁷ Duress “deflects without destroying, the will of one of the contracting parties”⁸ so that the law does not accept the contract as valid.⁹ The level and nature of the required duress is difficult to define. It appears that the standard is of threats sufficient to annul consent to the transaction. The important factor is their effect on the mind of the victim.¹⁰ This is a difficult test, and duress will only apply to more serious unfair commercial practices.
- 7.13 Duress requires a threat, and the threat must be “illegitimate”. “Illegitimate” is not the same as “unlawful”, although lawfulness is of course relevant. Threats of breaches of contract have caused particular difficulty in this respect. In English law, the cases can be divided into three categories, depending on the type of threat used. Did the threat relate to (1) persons, (2) things, or (3) financial issues (economic duress)? Scots law does not adopt such distinct sub-categories.

(1) Duress of the person

- 7.14 Threats of violence to the person are the clearest examples of duress.¹¹ Both jurisdictions cover threats to the victim or to close relatives of the victim.¹² The test of causation is generous: it is enough if the threat influenced the victim, even if they would have acted the same way regardless of the threat.¹³ In England and Wales, the burden of proof is reversed: influence will be assumed unless the defendant proves the threat had no effect on the consumer at all.¹⁴ In Scots law, however, a case of force and fear always requires to be specifically averred and clearly proved.¹⁵
- 7.15 For example, the BBC reported that Leicestershire trading standards received 12 complaints about a double-glazing firm:

⁶ MacQueen & Thomson, para 4.24.

⁷ *CTN Cash and Carry Ltd v Gallaher* [1994] 4 All ER 714, 717, by Steyn LJ. In that case, the claimants made a payment for goods they never received and which they were not contractually obliged to pay for.

⁸ *Lynch v DPP of Northern Ireland* [1975] AC 653, 695 by Lord Simon (in a criminal law case).

⁹ See also *Hislop v Dickson Motors (Forres) Ltd* 1978 SLT (Notes) 73, 75 where Lord Maxwell said that “the pressure must be such as would overpower the mind of a person of ordinary firmness so that there is no true consent”.

¹⁰ McBryde, para 17-03 and *Hislop v Dickson Motors (Forres) Ltd* 1978 SLT (Notes) 73.

¹¹ 1 Roll.Abr. 687; Coke 2 Inst. 482. See also *Earl of Orkney v Vinfra* 1606 Mor 1648; and more recently *Russo v Hardy* 1997 GWD 6-246.

¹² *McIntosh v Farquharson* (1691) Mor. 16485; and *Priestnell v Hutcheson* (1857) 19 D 495.

¹³ *Barton v Armstrong* [1976] AC 104, 120.

¹⁴ *Chitty*, para 7-025.

¹⁵ *Priestnell v Hutcheson* (1857) 19 D 495 at 500 and *Wolfson v Endleman* 1952 SLT (Sh Ct) 97, 98.

Trading standards said some people were threatened with fines, "green taxes" and even death... .

Paul Shipman, 68, from Broughton Astley, said: "The salesman started out saying that there were new British standards and I needed new windows but when I showed no interest, he threatened me with a green tax.

"When that didn't work, he threatened to put my head in a vice and watch me bleed to death.

"He was very threatening - in the end, he said he'd come round and kill me".¹⁶

- 7.16 The salesman's behaviour is clearly duress. Threats to imprison may also be brought under the heading of duress to the person.¹⁷ It may also include illegitimate threats to prosecute or to bring civil proceedings against the victim.¹⁸

(2) Duress to goods

- 7.17 If the trader threatens unlawfully to seize, retain or damage property belonging to the consumer,¹⁹ the consumer can avoid the contract on the basis of duress to goods.²⁰ The threat probably needs to be a "but for" cause of the consumer agreeing to the contract, but the authorities are not clear and it may be sufficient that it was one cause among others.²¹
- 7.18 Consider the following example that was put to us during our collection of evidence:

Builders offered to resurface an elderly consumer's driveway. The consumer said "no thanks", but the builders started work regardless. They caused so much damage that the consumer had to agree to them completing the work, otherwise the consumer would have had to pay for another trader to repair the damage. When the work was completed, the builders drove the consumer to a cash point to obtain payment.²²

¹⁶ See BBC News Leicester, *Death threat sales in Leicestershire probed* (16 February 2011).

¹⁷ Such threats have also been held as grounds for undue influence in equity. See further discussion of undue influence at paras 7.30 to 7.51 of this Consultation Paper.

¹⁸ See, for Scots law, *Hislop v Dickson Motors (Forres) Ltd* 1978 SLT (Notes) 73 and *Euan Wallace & Partners v Westcot Homes plc* 2000 SLT 327. However, where the purpose of the threat is to extract payment of a debt which is lawfully owed, the Scottish courts are likely to uphold the underlying agreement and such threats will not therefore fall foul of the laws against duress: see J E du Plessis, *Compulsion and Restitution* (The Stair Society, 2004), para 4.2.1(ii)(c).

¹⁹ If the goods are seized in good faith execution of legal proceedings, then no duress can be claimed.

²⁰ *Astley v Reynolds* (1731) 2 Str 915; *The Siboen* [1976] 1 Lloyds Rep 293. See also, in Scotland, *Wiseman v Logie* (1700) Mor. 16505; and *Foreman v Sheriff* (1791) Mor. 16515.

²¹ *Chitty* para 7-026. The terminology of "significant" cause is used, see *Dimskal Shipping Co SA v ITWF* [1992] 2 AC 152.

²² Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), para 5.5.

7.19 Unlike the earlier example, the builders' conduct applies pressure on the consumer but does not necessarily do so by means of threats. Whereas this may be duress, it is not clearly covered by current law.

(3) Economic duress

7.20 The scope of economic duress is the most uncertain of the three types of duress, as most of the cases have been about threatened breaches of contract. This is an undeveloped area of Scots law.²³ This category of duress is also the most likely to occur in the consumer context.

7.21 For example, home-improvement contracts can often raise economic duress problems for consumers. Where the contractor demands more money half way through a job the consumer may have little choice but to accept. This may or may not be "illegitimate pressure" depending on all the facts.

7.22 It is clear however that not all threatened breaches of contract are "illegitimate" pressure. Factors like the fairness of the demand and good faith of the trader will be relevant,²⁴ and the compulsion must go beyond normal commercial pressure.²⁵ For example, an imminent breach of contract may not be "illegitimate" pressure if the originally agreed price was so low that the trader cannot realistically afford to complete the work unless they are paid more money.²⁶

7.23 Three factors have emerged as particularly significant in deciding whether a claim of economic duress can succeed:

- (1) Did the consumer protest?²⁷
- (2) Did the consumer have realistic alternatives to submitting to the threat?²⁸
- (3) Did the consumer take steps to avoid the contract as soon as the pressure was removed?²⁹

²³ There are no Scottish cases on the subject but it is thought that, in principle, the concept of force and fear could extend to economic duress. See McBryde, para 17-05, where the difficulty of proving economic duress is noted.

²⁴ *Chitty*, paras 7-041 to 7-042.

²⁵ A person is entitled to use their full economic power to strike the best possible bargain when negotiating a contract. See MacQueen & Thomson, para 4.25.

²⁶ See for example *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

²⁷ See *Maskell v Horner* [1915] 3 KB 106, 111 by Rowlatt J, where "the protests passing into a standing joke passed out of the sphere of effective protests; they came to indicate a grumbling acquiescence"; *Universe Tankships of Monrovia v ITWF* [1983] 1 AC 366; and *Chitty*, para 7-034.

²⁸ *Chitty*, para 7-032, and *Hennessy v Craigmyle* [1986] ICR 461.

²⁹ *North Ocean Shipping v Hyundai Construction Co* [1979] QB 705. See also *Ormes v Beadel* (1860) 2 De GF & J 333.

- 7.24 The third factor set out above has dual significance: (1) at the liability stage, delay tends to show the consumer was not acting under duress; and (2) at the remedies stage, delay can mean that the right to get out of the contract has been lost. In the first case the consumer will have no remedy at all. In the second case although rescission is not possible, damages might still be available.³⁰
- 7.25 None of these factors is determinative, but if they are present, they make the consumer's case stronger. In practice, duress will also be less likely if the victim was independently advised.³¹
- 7.26 The link between the threat and the demand for payment can be subtle and not even involve a breach of contract. In *CTN Cash v Gallaher*³² the trader decided to withdraw finance facilities from their customer unless the customer agreed to pay a disputed invoice. The trader was entitled to do this without breaching any contractual obligations. The Court of Appeal accepted that the trader could be guilty of duress, although the claim failed on the facts. The court's reasoning in *Gallaher* indicates that had the case concerned a consumer-trader relationship, the result may have been different.³³
- 7.27 Overall, the scope of so-called "lawful act duress" remains uncertain. The outcomes are very fact-specific, so it is difficult to predict when a person's behaviour might cross the line into illegitimate compulsion.

Duress and third parties

- 7.28 Duress by a third party may enable a consumer to avoid a contract, if the contracting party knew or ought to have known about the duress.³⁴
- 7.29 Some of the worst abuses of vulnerable consumers involve signing them up to credit agreements they cannot afford. We discuss the liability of connected creditors for threats made by suppliers in Part 15.

(2) UNDUE INFLUENCE

- 7.30 Undue influence is an equitable doctrine which allows a contract to be set aside in circumstances where there is a special relationship of trust and confidence between the parties.³⁵ If this relationship is abused, and the weaker party is exploited, the contract can be set aside.

³⁰ See more detailed discussion of remedies in Part 8 of this Consultation Paper.

³¹ This will rarely be the case for run-of-the-mill consumer transactions.

³² [1994] 4 All ER 714.

³³ *CTN Cash v Gallaher* [1994] 4 All ER 714, 719 by Steyn LJ.

³⁴ *Chitty*, para 7-052. Note that Scots law specifically recognises that the threat can be made by someone other than the other party to the contract. *Trustee Savings Bank v Balloch* 1983 SLT 240.

³⁵ *Chitty*, 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.

- 7.31 Many cases of undue influence have involved husbands and wives,³⁶ spiritual advisers and fiduciary-like relationships arising in respect of particularly vulnerable individuals who are either very old, or young and impressionable.³⁷
- 7.32 In England and Wales, case law has traditionally been divided between cases of “actual” and “presumed” undue influence.³⁸ Whereas this division has been criticised as confusing and unhelpful, it is nonetheless reflected in the case law.³⁹ The Scots law of undue influence does not use these categories, and is discussed separately later in this section.

Actual influence

- 7.33 In England and Wales, the doctrine requires proof that the defendant had influence over the claimant and exercised that influence, causing the claimant to enter a contract they would not have agreed to otherwise.⁴⁰ The doctrine was developed as a softer “equitable” counterpart to the common law of duress. For example, the pressure can be implicit, provided it results in the claimant not being able to exercise an independent and informed judgment.⁴¹
- 7.34 There is no requirement to show the transaction was manifestly disadvantageous to the victim, nor that it calls for an explanation.⁴² These factors however will be powerful evidence of undue influence where they are present.

Presumed undue influence

- 7.35 There are two key ingredients in a claim of presumed undue influence in England and Wales. If they are satisfied, there is a presumption that the consumer acted under undue influence:
- (1) a relationship of “trust and confidence” between the parties; and
 - (2) a “transaction that calls for an explanation”.

³⁶ See eg *Bank of Montreal v Stuart* [1911] AC 120; *BCCI v Aboody* [1989] 2 WLR 759; *Barclay's Bank Plc v O'Brien* [1994] 1 AC 180; *Royal Bank of Scotland v Etridge (No2)* [2001] UKHL 44, [2002] 2 AC 773.

³⁷ See eg *Morley v Loughnan* [1893] 1 Ch. 736 and *Allcard v Skinner* (1887) 36 Ch D 145.

³⁸ See in particular *Barclay's Bank Plc v O'Brien* [1994] 1 AC 180 with Class 1 (actual undue influence) and Class 2 (presumed undue influence); further subdivided into Class 2A (presumed relationships of trust and confidence); and 2B (relationships of trust and confidence proved on the facts of each particular case).

³⁹ *Royal Bank of Scotland v Etridge (No2)* [2001] UKHL 44, [2002] 2 AC 773, paras 92 to 93 by Lord Clyde.

⁴⁰ *Chitty*, 7-068; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923.

⁴¹ *Chitty*, para 7-065.

⁴² *CIBC Mortgages v Pitt* [1994] 1 AC 200.

A relationship of trust and confidence

- 7.36 This ground for avoiding the contract will not usually apply to consumers because their relationship with traders is typically commercial and self-interested. These qualities are normally inconsistent with a relationship of confidence between the parties.⁴³ However the consumer-trader relationship may overlap with other professional relationships of trust and confidence, such as solicitor-client, or a bank manager with an elderly client for example.⁴⁴
- 7.37 In *Morley v Loughnan*⁴⁵ an elderly person who suffered from ill health including depression, transferred over £140,000 to his carer in the last years of his life.⁴⁶ The carer had taken over control of Mr Morley's affairs and even converted him to his own religious sect. The size of the transfers, the vulnerability of the victim and the parties' close relationship all merged together as factors indicating influence.⁴⁷

A transaction that calls for an explanation

- 7.38 Such transactions cannot reasonably be explained "on the grounds of friendship, relationship, charity or other ordinary motives"⁴⁸ on which ordinary persons act. Most cases have involved relationships of trust and confidence proved on the particular facts⁴⁹ where, for example, a wife gave a guarantee for her husband's (possibly disastrous) business ventures.⁵⁰ Transactions which call for an explanation have also included other contracts like sales at an undervalue⁵¹ or otherwise one-sided contracts.⁵²

Rebutting the presumption of undue influence

- 7.39 The defendant can disprove the presumption of undue influence by showing the claimant exercised independent judgement, for example, if the claimant had the benefit of independent advice.⁵³ There may be an additional requirement that the advice is of a certain quality, although it is not necessary for the claimant to actually follow the advice.⁵⁴

⁴³ See Dr C Twigg-Flesner, D Parry, Prof 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), paras 4.41 and 4.46. However, if the trader is otherwise in a fiduciary relationship with the consumer, through being their solicitor for example, presumed undue influence could apply on that basis.

⁴⁴ *Lloyds Bank v Bundy* [1975] QB 326.

⁴⁵ [1893] 1 Ch 736.

⁴⁶ *Morley v Loughnan* [1893] 1 Ch 736.

⁴⁷ See also *R v Hinks* [2000] UKHL 53, [2001] 2 AC 241, where the House of Lords upheld a conviction for theft on similar facts. The Fraud Act 2006, Section 4 (fraud by abuse of position) would also likely apply on these facts.

⁴⁸ *Allcard v Skinner* (1887) 36 Ch D 145, 185.

⁴⁹ So-called class 2B relationships.

⁵⁰ *Chitty*, para 7-091.

⁵¹ *Mahoney v Purnell* [1996] 3 All ER 61.

⁵² See *Cheese v Thomas* [1994] 1 WLR 129 for example.

⁵³ *Morley v Loughnan* [1893] 1 Ch 736, 752; and, in Scotland, *Smith v Bank of Scotland* 1997 SC (HL) 111.

⁵⁴ *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127.

- 7.40 Overall, there is no single touchstone of liability. As noted at the outset, the utility of using presumptions of undue influence has been doubted. Instead, courts may ask the more direct question of whether there is “reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other.”⁵⁵

Undue influence in Scots law

- 7.41 In Scots law, generally, undue influence cannot be presumed; it must be proved. There are, however, certain relationships (such as doctor and patient) where the very existence of the relationship calls for examination of any unequal transaction between the parties.⁵⁶
- 7.42 The elements required in order to give rise to undue influence in Scots law are expounded in the case of *Gray v Binny*.⁵⁷ Here the Lord Ordinary identified:

The existence of a relation between the granter and grantee of the deed which creates a dominant or ascendant influence, the fact that confidence and trust arose from that relation, the fact that a material and gratuitous benefit was given to the prejudice of the granter, and the circumstance that the granter entered into the transaction without the benefit of independent advice or assistance.

- 7.43 This suggests that the existence of a relationship of trust and confidence, together with a transaction which appears to give unequal benefit to one side, may give rise to a finding of undue influence. It therefore seems that, whilst there is no presumed undue influence in the sense found in English law, not much is required to shift the burden of proof in Scots law.
- 7.44 Various types of relationship have been considered by the Scottish courts,⁵⁸ including relationships between individuals and their fine art dealers,⁵⁹ housekeepers⁶⁰ and chauffeurs.⁶¹ The categories are not closed and others may be added.⁶² It does seem, however, that enquiry must be made into all of the facts and that a decision cannot be made upon written pleadings alone.

⁵⁵ *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, para 11 by Lord Nicholls. See also *Chitty*, para 7-078, questioning the value of the presumption of undue influence.

⁵⁶ See *McBryde*, paras 16-25 to 16-26.

⁵⁷ (1879) 7 R 332.

⁵⁸ See *McBryde*, paras 16-28 to 16-32.

⁵⁹ *Honeyman's Exrs v Sharp* 1978 SC 223.

⁶⁰ *Horne v Whyte* 2004 SCLR 197.

⁶¹ *Gaul v Deerey* 2000 SCLR 407.

⁶² *Honeyman's Exrs v Sharp* 1978 SC 223.

Facility and circumvention

- 7.45 Scots law offers some protection for the vulnerable consumer where there is no prior relationship with the other party as a contract can be annulled on the ground of facility and circumvention.⁶³ Facility and circumvention was an offshoot of common law fraud in its pre-*Derry v Peek* form. The doctrine allows a contract to be annulled where a “facile” person (that is a 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 to act in a manner other than would be usual) is induced to enter a contract as a result of fraud and circumvention.
- 7.46 In order to have a contract reduced on grounds of facility and circumvention, it must be proved that an individual was “facile”, the contract was to the disadvantage of that individual and there was an inducement to enter the contract as a result of fraud and circumvention. The degree of facility depends on the degree of circumvention. The greater the one, the lower the standard required of the other.⁶⁴
- 7.47 Facility and circumvention differs from undue influence in that there is no need to show any relationship of influence between the parties but, in practice, the two are often pleaded together.

Undue influence and third parties: England and Wales

- 7.48 Much of the case law in both jurisdictions is about wives who allege they were unduly influenced by their husbands to guarantee business debts.⁶⁵ If a bank has notice that a guarantee was procured by undue influence, it will not be able to enforce it against the victim. This is the case even if the bank played no part in exerting the pressure. The courts have developed detailed rules about when a bank will be affected by undue influence exercised on a surety agreement for example.
- 7.49 If the bank is on notice that there may be undue influence⁶⁶ the bank can still enforce the agreement if it took reasonable steps to ensure the surety’s consent was properly obtained. Generally, the creditor’s burden will be satisfied by showing the surety obtained independent legal advice. However, it is difficult to extend principles about sureties to other contexts.

⁶³ See McBryde, Part 16.

⁶⁴ McBryde, para 16-15.

⁶⁵ See for example *Barclays Bank v O’Brien* [1993] 4 All ER 417; *CIBC Mortgages v Pitt* [1993] 4 All ER 433; *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705.

⁶⁶ The bank will be on notice if the transaction which the wife is guaranteeing cannot reasonably be accounted for on “ordinary motives”. If the risks far outweigh the benefits that should put the creditor on notice, but the edges remain unclear.

Undue influence and third parties: Scotland

- 7.50 In Scotland, where an individual agrees to guarantee the debts of another in this way, it is known as a “cautionary obligation”, and the individual undertaking the guarantee is referred to as a “cautioner”.⁶⁷ Scots law in this area does not require notice, and is instead based upon the concept of good faith.⁶⁸
- 7.51 As was made clear in *Royal Bank of Scotland v Wilson*,⁶⁹ the detailed rules set down in English cases are not followed in Scotland.⁷⁰ The Scottish courts have declined to set down specific rules governing what the creditor must do where a close personal relationship exists between the debtor and cautioner. The main consideration is that a creditor should not take security from a debtor where, looking objectively, there is reason to think that the caution being given may be tainted by misrepresentation, undue influence or some other wrongful act committed by the creditor.⁷¹

(3) UNCONSCIONABLE BARGAINS

- 7.52 In England and Wales, as well as Scotland, there exist specific doctrines dealing with abuses of bargaining power where the courts have held agreements to be unenforceable. However whether there exists a general, independent ground of relief against unconscionable or exorbitant bargains remains unclear.⁷²

Unconscionable bargains in England and Wales

- 7.53 In *Lloyds Bank v Bundy*,⁷³ an elderly farmer granted the bank more than 100% security over his home to secure the debts of his only son’s ailing business. On the facts the Court of Appeal found that the elderly farmer had acted under undue influence. However, Lord Denning MR 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.⁷⁴

⁶⁷ For Scots law on cautionary obligations, see Gloag & Henderson, para 17.01. Pronounced “cay–shun–ary” obligation and “cay–shun–er”.

⁶⁸ The decision in *Smith v Bank of Scotland* 1997 SC (HL) 111, was similar in effect to that of *Barclays Bank v O’Brien* [1993] 4 All ER 417, but based upon good faith.

⁶⁹ 2004 SC 153.

⁷⁰ *Royal Bank of Scotland v Wilson* 2004 SC 153 also severely cast doubt on the reasoning set out in *Smith v Bank of Scotland* 1997 SC (HL) 111.

⁷¹ See Gloag & Henderson, para 17.17.

⁷² In England and Wales it has been recognised in several cases, such as *Fry v Lane* (1888) 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*, para 7-126. In Scotland, see McBryde, para 17-12.

⁷³ [1975] QB 326.

⁷⁴ Above, 339.

7.54 Whereas Lord Denning MR's interpretation of a general principle of unequal bargaining power has been criticised,⁷⁵ the court's jurisdiction to grant relief for unconscionable bargains is not doubted. The issue lies in the scope of this jurisdiction. Chitty identifies three factors from the case law:

- (1) an oppressive bargain;
- (2) a victim suffering from a particular disadvantage; and
- (3) unconscionable conduct.⁷⁶

7.55 The claimant has the burden of showing there has been an unconscionable bargain. However, even once that is satisfied, the defendant has an opportunity to defend the claim by showing the transaction was in fact "fair, just and reasonable" and not oppressive.⁷⁷ Equity will not set aside a transaction just because it is harsh. Overall, it is difficult for consumers and their advisers to predict where the line will be drawn.

Lesion in Scots law

7.56 Under Scots law, if a contract contains exorbitant terms (sometimes described as a leonine bargain), the injury to the aggrieved party is generally described as lesion. Lesion may feature as one element in a case of defective consent, such as force and fear or undue influence. It is very doubtful, however, as to whether lesion by itself would be sufficient to invalidate consent to a contract.⁷⁸ For example, Scottish courts have enforced extortionate bargains made in contracts with those who were of lower than average intelligence, or who had declined to take legal advice.⁷⁹

7.57 There are, however, certain specific situations in which Scots law has attempted to control extortionate provisions, for example in cases about contractual penalties.⁸⁰ In two old cases, promissory notes granted by debtors to moneylenders were not enforced because the demands were extortionate. These are perhaps the closest Scots common law has come to applying a general control of oppressive conditions.⁸¹

7.58 In 1948, Lord President Cooper suggested that where, as the result of an exclusion clause of "amazing width" a consumer took all the risks and the supplier had no obligations, there might be a "leonine" (that is, unenforceable) bargain. He noted that:

⁷⁵ See for example *National Westminster Bank v Morgan* [1985] AC 686, 708 by Lord Scarman.

⁷⁶ *Chitty*, paras 7-129 to 7-132. See also *Alec Lobb v Total Oil (Great Britain)* [1983] 1 WLR 87, 94 to 95 by P Millett QC.

⁷⁷ *Aylesford v Morris* (1873) 8 Ch App 484, 490-491.

⁷⁸ *McBryde*, para 17-12.

⁷⁹ *AB v Joel* (1849) 12 D 188; *MacLachlan v Watson* (1874) 1 SLR 549; *Tennent v Tennent's Trs* (1870) 8 M (HL) 10; *Mathieson v Hawthorns & Co Ltd* (1899) 1 F 468; and *Welsh v Cousin* (1899) 2 F 277.

⁸⁰ *McBryde*, paras 17-17 to 17-20.

⁸¹ *Young v Gordon* (1896) 23 R 419; and *Gordon v Stephen* (1902) 9 SLT 397, as discussed in *McBryde*, para 17-21.

It was not argued that the conditions were contrary to public policy, nor that they were so extreme as to deprive the contract of all meaning and effect... and I reserve my opinion upon these questions.⁸²

The implicit invitation to argue these points in future cases has not been taken up.

(4) INTIMIDATION

- 7.59 Intimidation was recognised as a so-called economic tort in 1964, by the House of Lords' decision in *Rookes v Barnard*.⁸³ Party A commits the tort of intimidation if they threaten unlawful acts against a Party B, which causes B to do or refrain from doing something they are entitled to do, and results in damage to B or a third Party C.⁸⁴
- 7.60 Following the House of Lords' decision in *OBG Ltd v Allan*,⁸⁵ it is unclear whether the tort of intimidation still exists independently, or has been entirely subsumed into the more general tort of "causing loss by unlawful means". *Clerk & Lindsell*, a leading treatise on tort liability, comments that:⁸⁶

Since no doubt was expressed as to the correctness of the decision in *Rookes v Barnard*, it is still appropriate to consider the elements of intimidation as a separate tort, notwithstanding the possibility that facts which give rise to liability for intimidation may also satisfy the requirements of the wider unlawful interference or causing loss by unlawful means tort.

- 7.61 Importantly, intimidation is a tort of intention, and the defendant must intend to injure the person who ultimately suffers the damage.⁸⁷ The victim who can bring the action is the person who ultimately suffered the damage (either B or C). Like duress, the tort of intimidation is focussed on actual compulsion and will usually arise in similar circumstances. However, unlike the causes of action considered so far, the tort of intimidation is one of specific intention to harm, and the primary remedy is damages rather than rescission.

⁸² *McKay v Scottish Airways* 1948 SC 254, 263.

⁸³ [1964] AC 1129 (HL).

⁸⁴ *Clerk & Lindsell*, para 24-57.

⁸⁵ [2007] UKHL 21, [2008] 1 AC 1.

⁸⁶ *Clerk & Lindsell*, para 24-58.

⁸⁷ *Rookes v Barnard* [1964] AC 1129, 1208 to 1212 by Lord Devlin.

- 7.62 Mere abuse will not do,⁸⁸ nor will a warning.⁸⁹ On the other hand, lawful acts, or threats to do something lawful, will not be a ground for intimidation even if they cause damage.⁹⁰ A key question is therefore what counts as “unlawful” in this context. Threats to bring vexatious civil litigation⁹¹ have been held not to count as intimidation unless they are so serious as to be an abuse of the legal process, which is a very high and uncertain threshold.⁹² As with duress, the question whether threatening a breach of contract can be “unlawful means” remains a grey area.⁹³ Finally, it is essential that the victim actually submitted to the threat and complied with the demand.⁹⁴
- 7.63 There may be a defence of justification to intimidation. The scope of this defence is at best unclear, but it may arise if the trader acted in order to pursue a legitimate aim and in good faith, like removing trouble-makers.⁹⁵
- 7.64 It is unclear how Scots law would approach this issue. It is likely that *OBG Ltd v Allan*⁹⁶ would be influential in its generalising approach.⁹⁷ Prior to that case, intimidation was treated in textbooks as an actionable wrong in Scots law also,⁹⁸ albeit that case law was non-existent. In principle, Scots law would be consistent with the notion expressed in *OBG Ltd v Allan*, as it encompasses general principles against intentional wrongdoing and, perhaps, accepts force and fear as a delict.⁹⁹

PROTECTION FROM AGGRESSIVE DEBT COLLECTION

- 7.65 Under private law, where a threat or deception leads to consumers paying money which is not owed, the consumer is entitled to the return of the payment. This follows from the law of unjust enrichment or, in Scots law, unjustified enrichment.¹⁰⁰ However, if the same actions lead to a consumer paying money which is owed, the common law offers little in the way of redress.

⁸⁸ *News Group Newspapers Ltd v Society of Graphical and Allied Trades (SOGAT) 1982*, [1987] ICR 181, 204 by Stuart-Smith J.

⁸⁹ For the difficulties with the distinction between a threat and warning, see *Hodges v Webb* [1920] 2 Ch 70, 87 by Peterson J. This is the same problem encountered in respect of economic duress.

⁹⁰ *Rookes v Barnard* [1964] AC 1129, 1168 to 1169 by Lord Reid.

⁹¹ *Allen v Flood* [1898] AC 1, 105.

⁹² *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 467 to 473.

⁹³ The leading case on intimidation concerned a threatened breach of contract, *Rookes v Barnard* [1964] AC 1129, 1168 to 1169.

⁹⁴ *Stratford v Lindley* [1965] AC 269, 283 by Lord Denning MR.

⁹⁵ *Cory Lighterage Ltd v TGWU* [1973] ICR 339, 356 to 357 by Lord Denning MR.

⁹⁶ *OBG Ltd v Allan* [2008] 1 AC 1.

⁹⁷ For discussion of the implications of the case, see JM Thomson, “Redrawing the Landscape of the Economic Wrongs” (2008) 12 Edin LR 267.

⁹⁸ See *Delict* (SULI), para 5.34.

⁹⁹ On elements required for wrongdoing in Scots law, see Gloag & Henderson, para 26.05.

¹⁰⁰ Except where the context requires otherwise, hereinafter, “unjust enrichment” will be taken to include “unjustified enrichment”.

7.66 There are two statutory provisions which a consumer might use. The Protection from Harassment Act 1997 provides for damages against a person who pursues “a course of conduct” which “amounts to harassment of another”. If the demand arises in the context of consumer credit, there are also potential remedies under section 140A of the Consumer Credit Act 1974.

Harassment

7.67 The Protection from Harassment Act 1997 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”.¹⁰¹ Section 3 provides a possible civil remedy, including damages for (among other things) anxiety and financial loss.¹⁰²

7.68 As we noted in our Feedback from Stakeholders:

Although the Act is usually used against “stalkers”, it has also 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. Her various complaints and appeals had no effect.¹⁰³ The Court of Appeal said that there was a case to answer, at which British Gas settled. However, the judge commented that the consumer had been brave to take the case:

Because [the claimant] funds the claim out of her personal resources, she does so at considerable risk: were she ultimately to lose she would probably have to pay British Gas's considerable costs.¹⁰⁴

Consumer groups argued that clearer, more certain law would reduce the risks of litigation in these circumstances.¹⁰⁵

7.69 Moreover, the 1997 Act is expressly listed as one of the provisions designed to prevent harm to the collective interests of consumers.¹⁰⁶ The Act provides for both criminal and civil remedies.¹⁰⁷

¹⁰¹ Protection from Harassment Act 1997, s 1 (England and Wales) and s 8 (Scotland).

¹⁰² For the equivalent Scottish provision, see Protection from Harassment Act 1997, s 8 (5) and (6).

¹⁰³ *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.

¹⁰⁴ *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46, [2010] 1 WLR 785, 787 by Jacob LJ.

¹⁰⁵ Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), paras 6.18 to 6.19.

¹⁰⁶ Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003, (SI 2003/1593) identifies breach of the 1997 Act as a “domestic infringement” within the meaning of s 211 of the Enterprise Act 2002.

7.70 The OFT has produced guidance on what type of practices can constitute harassment.¹⁰⁸ The guidance says it is wrong to exploit the debtor's lack of knowledge,¹⁰⁹ or to contact debtors at unreasonable times.¹¹⁰

Consumer Credit Act 1974: unfair relationships

7.71 Since reforms introduced in 2006, the court has a broad power to declare a consumer credit relationship to be unfair. The provision, set out in section 140A of the Consumer Credit Act 1974, applies to consumer credit agreements.

7.72 Under section 140A, the relationship may be unfair to the debtor because of the way in which the creditor has exercised or enforced any of their rights under the agreement. If so, the courts have considerable discretion to offer a remedy, including requiring the creditor to repay any sum paid by the debtor, in whole or in part.¹¹¹ So far, only limited use has been made of this provision.¹¹²

7.73 In a recent case, the High Court considered the relationship between the Regulations and the Consumer Credit Act 1974.¹¹³ The bank had failed to provide a claimant with the required statements under the Act, rendering the agreement unenforceable while the bank was in default. The question was whether this also precluded the bank from passing the debtor's details to a credit reference agency. The court found that it did not.

¹⁰⁷ S 2 and s 3 respectively, in England and Wales, and ss 8 and 9 in Scotland. In Scots law, the 1997 Act does not create a criminal offence of harassment *per se*, but section 9 creates a criminal offence for the breach of a non-harassment order made under section 8. Note also, the effect of the Domestic Abuse (Scotland) Bill, which passed Stage 3 in the Scottish Parliament on 16 March 2011. This will amend the Protection from Harassment Act 1997 by making provision in relation to harassment amounting to domestic abuse and making breach of an interdict relating to domestic abuse, with power of arrest attached, an offence.

¹⁰⁸ Office of Fair Trading, *Debt collection guidance, final guidance on unfair business practices* (July 2003, updated December 2006).

¹⁰⁹ Above, example 2.2(b).

¹¹⁰ Above, example 2.2(f).

¹¹¹ Consumer Credit Act 1974, s 140B.

¹¹² For example, *Patel v Patel* [2009] EWHC 3264 concerned a private loan between two friends. The court found that the relationship was unfair because of the high interest rate, the lack of written records, the fact that the outstanding sums were to be repaid only as and when requested by the claimant; and the fact that the defendant (a less educated man) had trusted the claimant. See also *MBNA Europe Bank Ltd v Thorius* [2010] ECC 8 (CC (Newcastle)). See further, in Scotland, *Nicol v Nine Regions Ltd (t/a Log Book Loans)* 2008 SLT (Sh Ct) 123 (which was an unsuccessful challenge).

¹¹³ *McGuffick v The Royal Bank of Scotland Plc* [2009] EWHC 2386 (Comm), [2010] 1 All ER 634.

7.74 The debtor then tried to argue that the bank's actions constituted a breach of the Regulations. The court rejected this argument. The court held that the Regulations were irrelevant: debtors had no standing to bring actions under the Regulations, and there was no requirement to interpret the Consumer Credit Act 1974 in line with the Regulations.¹¹⁴ In other words, the fact that a debt collection agency has breached the Regulations does not necessarily give debtors a claim under any section of the 1974 Act. There is no "read across" between the two legislative provisions.

7.75 That said, we think that the 1974 Act does provide some protection to debtors under consumer credit agreements. If a creditor behaved in a seriously misleading or aggressive way, this would also be relevant to the separate issue of whether the relationship is unfair under section 140A. For example, in a recent case, the court noted that the debtor had been

hounded by telephone calls seeking payment of what was said to be due. The calls were a form of torture oppressively frequent in amount and often without attribution to an identifiable number.¹¹⁵

7.76 The original creditor had not provided certain information to the debtor as required by the Consumer Credit Act.¹¹⁶ The debt was then sold on to a debt collection firm. The judge concluded:

It seems to me that such conduct has no proper function in the recovery of consumer debt. Whatever the strength of the suggestion that the courts should only be a last resort, I can see no legitimate comparison between a series of measured warnings which, after full opportunity for response, lead to legal proceedings and what took place.¹¹⁷

7.77 The creditor's aggressive manner of pursuing repayment of the debt was a key factor in the court's decision to write off the outstanding amounts owed.¹¹⁸

CONCLUSION

7.78 The current civil law on aggressive practices lacks a coherent framework. Furthermore, it is difficult to define the boundaries of what counts as illegitimate pressure. Many examples of high-pressure selling would slip through the gaps, such as salespersons who refuse to go away.

¹¹⁴ Above, paras 93 and 97.

¹¹⁵ *Harrison v Link Financial Ltd* [2011] EWHC B3 (Mercantile), para 53.

¹¹⁶ The creditor failed to provide copies of the terms and conditions to the debtor in breach of sections 62 and 63 of the Consumer Credit Act. On the other hand, the court found there had not been a breach of section 78 as the terms and conditions were supplied subsequently.

¹¹⁷ *Harrison v Link Financial Ltd* [2011] EWHC B3 (Mercantile), para 83.

¹¹⁸ The court relied on its powers under both section 127 (enforcement orders in cases of infringement for the improperly executed agreements) and section 140.

- 7.79 Currently, the Regulations have no impact on interpreting consumers' private law rights (even where credit has been sold in breach of the Regulations). Reforming the law of aggressive practices in light of the Regulations could help set a more uniform and transparent benchmark of what can count as "illegitimate" or "unfair" pressure in private law.
- 7.80 In the next Part we consider how the findings in respect of a trader's potential liability considered so far in Parts 5 to 7 can result in a tangible outcome for consumers. This depends on the consumer's ability to prove that the misleading or aggressive practice actually had an impact on them ("causation"), and that they are entitled to a recognised remedy.

PART 8

CAUSATION AND REMEDIES

INTRODUCTION

- 8.1 A consumer who successfully argues that a trader is guilty of an aggressive or misleading practice has won only half the battle. Next, the consumer must show that the unfair practice caused them loss, and identify an appropriate remedy.
- 8.2 In this Part we start by considering causation. We then look at the main remedies available: the consumer's right to "unwind" the contract, and the award of damages. As we see, the right to unwind a contract may be lost rather easily. Damages are available for fraudulent and negligent misrepresentation, but there is no clear authority for whether they are available for duress.
- 8.3 We then consider the measure of damages, focussing on how the law measures economic losses, and when damages may be awarded for distress and inconvenience.

CAUSATION

- 8.4 Questions of causation raise difficult issues. Take the example of a consumer, Emma, who bought tickets for a play which displayed misleading information on the billboard outside the theatre. Clearly she should not have a claim if she did not read the billboard, or if she ignored it. But is it enough that it influenced her so that she took the misrepresentation into account in her decision? Or does she need to show that it was a decisive influence: "but for" the misrepresentation she would not have bought the tickets?
- 8.5 In England and Wales, the courts have not adopted entirely consistent approaches on these issues. In some cases, where the misrepresentation was "material" in the sense that it would have influenced a reasonable person, the burden shifts to the defendant to show that the misrepresentation did not in fact influence the claimant.¹ The misrepresentation does not have to be the only inducement.² In other cases, the courts have imposed a more stringent test, requiring claimants to show that but for the misrepresentation, they would not have entered into the contract.³

¹ *Treitel*, para 9-024 and *Chitty*, para 6-036. In *Downs v Chappell* [1997] 1 WLR 426, for example, Hobhouse LJ commented that where lies had been "material and successful", the judge was wrong to ask how the claimants would have acted if they had been told the truth.

² *Chitty*, para 6-034. In *JEB Fasteners v Marks Bloom* [1983] 1 All ER 583, the Court of Appeal said that the misrepresentation must play "a real and substantial" but not necessarily decisive part in the decision.

³ *Chitty*, para 6-035, quoting *Barings Plc v Coopers & Lybrand* [2002] EWHC 461 (Ch).

- 8.6 Where the misrepresentation is fraudulent, the courts are prepared to take a more lenient approach. This is especially the case where the claimant is asking for rescission rather than damages. Here it is enough that the misrepresentation had some impact on the claimant's thinking.⁴
- 8.7 In Scotland there has been little discussion of misrepresentation and causation.⁵ The important issue is whether the misrepresentation induced its victim to enter a contract, with reliance otherwise being a consideration going mainly to the extent of the victim's recoverable loss.
- 8.8 The courts ask what was more likely than not to occur had the misrepresentation not been made. Once such a possible outcome and any detriment in comparison with the pursuer's actual position have been identified, the latter is treated as caused by the defender's conduct.⁶

REMEDIES

- 8.9 Where there has been a misrepresentation or aggressive practice, the primary remedy is to allow the victim to escape the contract. As a secondary remedy, damages may also be available. These remedies are summarised in the following tables, and explained below.

MISLEADING PRACTICES				
Causes of action		Unwinding the contract	Damages	
			Economic	Distress
Fraudulent Misrepresentation		Yes	Yes	Yes
Negligent Misrepresentation at Common Law		No ⁷	Yes	No
England & Wales: 1967 Act	negligent	Yes	Yes	Yes
	innocent	Yes	Only if unwinding the contract is inequitable	No
Scotland: negligent under 1985 Act		Yes	Yes	No authority
Scotland: innocent but not negligent misrepresentation, inducing error		Yes	No	No
Breach of contract		No ⁸	Yes	Yes
Mistake		Yes	No	No

⁴ *Chitty*, para 6-035.

⁵ See however Martin A Hogg, "The role of causation in delict", [2005] *Juridical Review* 89, 130 to 131, 134 to 135.

⁶ Above, 131; *Cramaso LLP v Viscount Reidhaven's Trustees* [2010] CSOH 62, paras 109-113; and *Zurich CSG Ltd v Gray & Kellas* 2007 SLT 917, paras 32 to 34.

⁷ In Scots law, in principle, every negligent misrepresentation is an innocent misrepresentation (see commentary by Professor Black in 15 *Stair Memorial Encyclopaedia*, paras 684 to 685). Unwinding would therefore be competent here in relation to Scots law.

⁸ We take no account here of the possibility of termination for breach of contract.

AGGRESSIVE PRACTICES			
Causes of action	Unwinding the contract	Damages	
		Economic	Distress
Duress	Yes	Possibly yes	Possibly yes
Undue influence	Yes	No – but “equitable compensation” may be awarded in England and Wales ⁹	No
Facility and circumvention (Scotland)	Yes	No	No
Unconscionable or extortionate bargains	Yes	Possibly yes	Possibly yes
Intimidation/causing loss by unlawful means	No	Yes	Probably yes
Harassment	No	Yes	Yes
“Unfair relationships” under the Consumer Credit Act 1974, s 140A	Yes	Yes	No

UNWINDING THE CONTRACT

Terminology: “rescission” and “reduction”

- 8.10 The primary remedy attempts to unwind the contract, putting both parties back into the position they would have been in had the contract never existed. This is referred to as “rescission” in England and Wales, and “reduction” in Scotland.
- 8.11 Somewhat confusingly, in both Scots and English law, the term “rescission” can also refer to the remedy where the injured party chooses to “terminate” the contract and is released from future performance. However, a leading English treatise notes:

Since the decision of the House of Lords in *Johnson v Agnew*¹⁰ a much clearer and sharper distinction has been drawn between rescission of a contract *ab initio* [from the start] and termination of the contract for subsequent breach. The former generally has retrospective effect, while the latter does not; indeed, termination usually affects only some of the obligations under the contract and it is strictly incorrect to speak of the contract ceasing to exist through termination.¹¹

- 8.12 This distinction has, however, generally been clear in Scots law.¹²

⁹ *Chitty*, 7-101.

¹⁰ [1980] AC 367.

¹¹ *Chitty*, para 6-106; see also *Treitel*, para 18-001.

¹² Gloag, *The Law of Contract*, (2nd ed 1929), pp 620 to 622.

- 8.13 In England and Wales, rescission can occur by agreement without a court order.¹³ In Scotland, “reduction” is a remedy granted by a court. 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.¹⁴ A condition of reduction will be that the parties can be restored to their original pre-contractual position (*restitutio in integrum*). The extent to which an aggrieved party may withdraw from (or rescind) a contract for misrepresentation or induced error, without seeking a decree of reduction, is uncertain in Scots law.¹⁵
- 8.14 Given the potential for confusion between variable uses of law-laden terminology such as rescission, reduction and termination, we attempt to adopt neutral language, such as “unwinding” the contract where possible.

Limits on unwinding the contract

- 8.15 There are several ways in which the right to unwind the contract may be lost. As we discuss below, the contract can be unwound only if it is possible to restore both parties to their pre-contract position. The right may also be lost if the consumer delays action or if the property has passed to a third party.

Restoring both parties to their original positions

- 8.16 In both jurisdictions, the remedy of unwinding the contract for misrepresentation is only available where both parties can be returned to their original positions before the contract was made: “there ought... to be a giving back and a taking back on both sides”.¹⁶
- 8.17 It follows that an order to unwind the contract will only be made if it is also possible to make restitution on both sides (*restitutio in integrum*).¹⁷ This can be a significant bar in consumer claims for services: one cannot, for example, give back a journey or a hair-cut that has already happened. This problem also applies to products that are perishable or have been consumed.

¹³ *Chitty*, para 22-030.

¹⁴ See in general on the remedy of reduction 13 *Stair Memorial Encyclopaedia*, para 25 *et seq.*

¹⁵ McBryde, 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” (*ibid.*). See, for example, *MacLeod v Kerr* 1965 SC 253, where however the issue is not addressed satisfactorily.

¹⁶ *Newbigging v Adam* (1886) 34 Ch 582, by Bowen LJ at 595. An indemnity payment can be awarded alongside rescission, as part of the process of restoring both parties to their pre-contract position. It only covers obligations that necessarily arise from the contract itself, like payments or liabilities to third parties which the contract *required* the consumer to incur, see *Chitty*, para 6-117. An indemnity payment is narrower and simpler than damages, see *McGregor*, paras 41-062 to 41-070.

¹⁷ See eg the Scottish case *Boyd & Forrest v Glasgow & South-Western Railway Co* 1915 SC (HL) 21, where a railway line was constructed under a contract voidable for misrepresentation. Since it was not practicable to dismantle the line, it was held that the contract could not be reduced.

- 8.18 The English courts have taken a flexible approach, so that substantial, if not identical, restitution appears to be enough.¹⁸ In *Smith New Court v Citibank NA* the claimant could not return the very same shares he had originally bought, having sold them in the meantime (at a loss). Lord Browne-Wilkinson favoured a broad view of restitution and returning substitute shares sufficed.¹⁹
- 8.19 That said, there is some disagreement whether goods that have deteriorated can be returned.²⁰ The court may order a consumer to pay compensation to the trader if the product has depreciated in value through use. However, if the trader was guilty of fraud in inducing the contract, the court may be less willing to ask a consumer to pay compensation.²¹
- 8.20 Restoring services is an even greater problem. It is possible that the courts would require the consumer to make an allowance for services received. This is sometimes referred to as a “quantum meruit”, which involves paying a party “what they deserve” for their services. The rationale is that if a party received a valuable service, they would be unjustly enriched unless they paid something for it.²²
- 8.21 The Scottish courts have tended to adopt a more literal approach to restitution.²³ There is also Scottish House of Lords authority that a quantum meruit is not available as part of restoration for rescission.²⁴ However, this preceded later developments in the Scots law of unjustified enrichment and a more flexible approach now appears more likely in practice.²⁵

Delay

- 8.22 A consumer who finds out about a misrepresentation and does nothing may be deemed to have accepted, or “affirmed”, the transaction.²⁶

¹⁸ *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218; see also *Chitty*, para 6-116.

¹⁹ *Smith New Court v Citibank NA* [1997] AC 254, 261.

²⁰ *Chitty* argues they can, see *Chitty* para 6-114, but *McGregor* suggests the contrary, see *McGregor*, para 41-069. See also McBryde, para 13-22, note 104.

²¹ *Hulton v Hulton* [1917] 1 KB 813. See also the parallels with the Proposed Consumer Rights Directive, IMCO consolidated version (9 February 2011), informal working document – for information purposes only. It provides that a consumer shall not be under an obligation to compensate a trader for the use of faulty goods (recital 41).

²² *Chitty*, para 6-119; unjust enrichment is also sometimes referred to as “restitution”.

²³ This is despite some encouragement towards a more flexible approach from the House of Lords in *Spence v Crawford* 1939 SC (HL) 52. See discussion in Scottish Law Commission Consultative Memorandum No 42 on Defective Consent and Consequential Matters (1978), vol 1, paras 4.1 to 4.5 (no Report followed this Memorandum) and McBryde, para 15-73.

²⁴ *Boyd and Forrest v Glasgow & South-Western Railway Co* 1915 SC (HL) 20.

²⁵ For an argument that *restitutio in integrum* is and should be based upon principles of unjustified enrichment in Scots law see R Evans-Jones, *Unjustified Enrichment I: Enrichment by Deliberate Conferral: Condictio* (2003), para 9.125-9.132. For *quantum meruit* as a remedy based on implied contract in Scots law see McBryde, para 20-147.

²⁶ In Scots law parties may *adopt* a void contract in some circumstances (McBryde, paras 13-15 to 13-17), or be personally barred from seeking rescission or reduction of a voidable contract through lapse of time, homologation or waiver (McBryde, para 13-22).

- 8.23 This is closely linked with another bar to unwinding the contract, which is the passage of time.²⁷ Unwinding a transaction after a long time may disrupt the rights of third parties and be generally undesirable for the certainty of transactions.

Innocent third party

- 8.24 If unwinding the contract would interfere with the rights of an innocent third party, the remedy will not be granted.²⁸ Consider the following scenario:

A consumer who sold a car to a second-hand car dealer complains about receiving less money than the car was worth because the dealer misrepresented what its value was. Rescission or reduction would involve returning the vehicle to the consumer.

By the time the dispute gets to court, however, the dealer has sold the car to an innocent third party.

- 8.25 Where it is not possible to return the car without interfering with the rights of a third party, the courts will not do it. In such a case, the consumer would be limited to damages.

DAMAGES: WHEN ARE THEY AVAILABLE?

- 8.26 Given the ease with which the right to unwind the contract can be lost, a right to damages could be important to consumers. Damages will usually be available for misleading practices, but there is much less authority on whether damages are available for aggressive practices.

Damages for misrepresentation

- 8.27 As discussed in Part 5, and summarised in Table 8.9 above, it is clearly established that damages are available for fraudulent and negligent misrepresentation. Damages are not generally available for innocent misrepresentation. However, in England and Wales, a limited measure of damages may be granted on a discretionary basis instead of rescission under section 2(2) of the Misrepresentation Act 1967.

Damages for aggressive practices

- 8.28 Damages are available under the Protection from Harassment Act 1997, and for intimidation. But it is difficult to say whether they are available for duress.

²⁷ *Leaf v International Galleries* [1950] 2 KB 86.

²⁸ *Chitty*, para 6-129; *McBryde*, para 13-22.

- 8.29 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, on the grounds that damages have been awarded for the tort of intimidation and intimidation and duress are based on the same principles.²⁹ However, in a House of Lords case, the Law Lords expressed differing views on the issue.³⁰
- 8.30 In Scotland, the question of whether the doctrine of force and fear can give rise to a delictual remedy is also contentious. There is institutional authority to suggest that the use of force and fear gives rise to an obligation to redress loss and damage caused thereby.³¹ McBryde notes, however, that force and fear has not been treated by the courts as if it were a delict.³² On the other hand, Professor du Plessis has observed that:³³

There is no modern case law which deals with force and fear... as a delict. Neither do textbooks display much enthusiasm for doing so... .
However, this does not mean that a delictual claim cannot lie.

- 8.31 It seems, therefore, that in Scotland the possibility of a successful recovery of damages by a consumer on the grounds of force and fear by a trader may not be completely closed.
- 8.32 In both jurisdictions, damages are not available for undue influence, so that consequential losses suffered as a result of the transaction will not be recoverable.³⁴ However in England and Wales “equitable compensation” is the closest equivalent, and may be awarded even where unwinding the contract is no longer possible.³⁵

THE MEASURE OF DAMAGES

- 8.33 We now turn to the different types of damages a trader can be made liable for. Different legal principles apply depending on the type of damage for which the consumer is being compensated. Personal injury and physical damage, for example, are the most serious type of damage. Claimants can generally recover for these types of losses.

²⁹ *Chitty*, para 7-055.

³⁰ In *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).

³¹ *Stair*, I, ix, 8.

³² McBryde, para 17-01.

³³ J E du Plessis, *Compulsion and Restitution* (2004) *The Stair Society*, para 4.4.

³⁴ The courts could in principle award damages under Lord Cairns' Act, but there is no case law reflecting this. Duress is a common law doctrine, yet there is similarly little clarity about whether it can give rise to a damages remedy.

³⁵ *Chitty*, para 7-101 (undue influence), which refers to *Mahoney v Purnell* [1996] 3 All ER 61 where equitable compensation was awarded in respect of undue influence, based on damages for breach of fiduciary duty.

- 8.34 The issue of economic loss is more difficult. What is a consumer's loss for having bought a product because of a misrepresentation? This will vary according to circumstances. In some cases, the goods or service will be worthless, in others they might have some value – just not what was expected. And what would have happened if the consumers had not been misled? Some may have bought a similar product elsewhere (perhaps for less money); some may have bought a different product (perhaps more expensively). Some may not have bought anything at all.

Different ways of measuring economic loss

- 8.35 The consumer has the burden of proving their losses on a balance of probabilities.³⁶ There is no unified legal test for determining which losses can, and which losses cannot be recovered. Four main approaches emerge from the case law, depending on the cause of action pursued.

(1) DIMINUTION OF VALUE

- 8.36 A consumer can be compensated for the diminution in value of the product or service caused by the misrepresentation. This will usually be the difference between the price paid for the product, and what the product was actually worth.³⁷ The actual value of the product can be determined by looking at other similar products on the open market at the date of the transaction.³⁸ This is the standard measure in tort/delict actions.

(2) LOSS OF BARGAIN

- 8.37 A consumer can be compensated for their loss of bargain. The consumer can recover the market value of the benefit of which they have been deprived. Here, “the object of damages is to put the plaintiff in as good a position, as far as money can do it, as if the promise had been performed”.³⁹

³⁶ See generally discussion in Devenney and Poole, “Reforming damages for misrepresentation: the case for coherent aims and principles” *Journal of Business Law* (2007) 269.

³⁷ This is also known as the rule in *McConnell v Wright* [1903] 1 Ch 546. See generally *McGregor*, para 1-036. In Scotland, see *McBryde*, para 22-107. See further, *Paul v Ogilvy* 2001 SLT 171.

³⁸ *Smith New Court v Scrimgeour Vickers* [1997] AC 254, 284. Where the product purchased is shares for example, see *McGregor*, paras 41-008 to 41-020.

³⁹ *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, 167 by Lord Denning MR. See, in Scotland, *Houldsworth v Brand's Trs* (1877) 4 R 369, 374 by Lord Ormidale.

- 8.38 The value of the consumer's benefit will usually be the difference between the market value of what was promised and what was received.⁴⁰ If the contract has not yet been performed so the claimant has not received anything, the loss of bargain will be the difference between the market value of what was promised, and the contract price.

Example: the “half price” camcorder

An online store advertises a camcorder at half price, for £100. In fact, the store has no such camcorders in stock, and the advertisement was a misrepresentation. A consumer orders the product and, pays for it. Comparable camcorders retail for £190.

A loss of bargain measure means the consumer could claim not only their outlay of £100, but also the extra £90 by which they would have been better off had the store kept its promise.

A reliance measure would limit the consumer to claiming back the original £100.

- 8.39 This is the hallmark measure of contract damages. Here, the law is compensating the consumer for not obtaining what was promised. Even if the consumer is no worse off, the law intervenes to ensure the fact the trader promised they would deliver a benefit means they are bound to deliver it.

(3) COST OF CURE

- 8.40 The cost of cure is what it takes the consumer to obtain performance of the original (misrepresented) promise. For goods for example, this is the cost of repair. This is a contractual remedy. Whether the courts will give the cost of cure or the difference in market value depends on a variety of factors, including whether the consumer actually intends to carry out the repairs for example.⁴¹ However, if the cost of repair is out of all proportion to the benefit obtained, the court may refuse to grant it.⁴²

(4) RECOVERY OF WASTED EXPENSES

- 8.41 The consumer may in some cases recover out-of-pocket expenses suffered because of the misrepresentation. This is a type of consequential loss, but sometimes it will be the only damage a consumer can demonstrate.

⁴⁰ *McGregor*, paras 2-002. See, in Scotland, *McBryde*, paras 22-91 to 22-92.

⁴¹ See, for Scots law on replacement cost, *McBryde*, para 22-114.

⁴² *Ruxley v Forsyth* [1996] AC 344.

- 8.42 The courts seek to avoid the risk that the consumer may be “overcompensated or enjoy a windfall gain by avoiding a loss which they would probably have suffered even if no tort had been committed.”⁴³ Indirect economic losses are recoverable as standard in claims based on tort or delict. By contrast, consumers can usually only recover wasted expenses in contract if the loss of bargain cannot be quantified because it is too speculative.⁴⁴ Importantly, they will not be awarded just because the consumer made a bad bargain.⁴⁵

Worked examples

- 8.43 These different measures may be illustrated through worked examples.

Goods not available

A toy store misrepresents the cost of a Buzz Lightyear action figure as £20. Such toys retail in other stores at a minimum of £42. If the toy store never stocked Buzz and fails to deliver it in accordance with the contract, what might the consumer be entitled to?

- 8.44 Here a diminution of value model only yields a remedy if the consumer has relied on the misrepresentation. If nothing has yet been paid under the contract, the consumer is not entitled to anything. If the consumer has paid in advance, there would be an entitlement to a refund.
- 8.45 If the consumer can recover for loss of bargain, £22 would be recovered as the consumer would have been better off by that amount had that which was promised been delivered. In this scenario the cost of cure is also £22, as that is the extra amount of money the consumer will need in order to buy Buzz from a different store.
- 8.46 The alternative measure of wasted expenses would instead cover the time wasted in going to the store only to find no Buzz was available, and associated costs such as transport for example.⁴⁶

A misrepresented holiday

Bill is promised a four star luxury hotel experience. In fact, the publicity misrepresented the facilities, and it was only a two star hotel.

Apart from the “direct” loss of having overpaid for the hotel, Bill paid for the train fare, and feels he has wasted a precious week of his holiday.

⁴³ *Downs v Chappell* [1997] 1 WLR 426, 443 by Hobhouse LJ.

⁴⁴ *Collins v Howard* [1949] 2 All ER 324. See also *Fielding v Newell* 1987 SLT 530; and *Dawson International Plc v Coats Paton Plc* 1993 SLT 80.

⁴⁵ *C & P Haulage v Middleton* [1983] 1 WLR 1461.

⁴⁶ These consequential losses are subject to limits, under the remoteness of damage rules considered below.

- 8.47 Bill's measure of damages will vary significantly depending on what would have happened had the misrepresentation not been made. One possibility is that Bill would have remained at home instead of going on holiday anywhere. If that is the case, Bill should recover all wasted expenditure caused by going on holiday. Bill's damages should be limited only by general rules on remoteness.⁴⁷ He could, for example, claim the train fare. This is sometimes referred to as the "no transaction" method.
- 8.48 This approach is taken in cases of fraud, and in some cases of negligent misrepresentation.⁴⁸ The courts have awarded damages for "all expenditure properly and not prematurely and extravagantly incurred" because of the misrepresentation.⁴⁹
- 8.49 Another possibility is that had the misrepresentation not been made, Bill would have gone on holiday anyway but perhaps would have paid less for it. The travel charges are consequential losses that would have been incurred anyway and would therefore not be recoverable.⁵⁰
- 8.50 The economic losses discussed above are not the only type of damages the consumer may recover. As we explore below, in cases of ruined holidays where a consumer has lost limited, and valued, holiday time, the courts have been prepared to award moderate damages for distress and inconvenience.

Limits on damages

Remoteness of damage

- 8.51 If a consumer relies on a misrepresentation, this can have a knock-on effect, causing indirect, consequential losses. For example, a consumer who was misled into booking a horrible hotel will have wasted other expenditure, including paying tips and expensive meals. Can these indirect losses be recovered? Obviously not all. The line has to be drawn somewhere, and the law uses the rules of "remoteness of damage" to achieve this.
- 8.52 Below is an overview of how the different measures of remoteness of damage apply to the different actions for misrepresentation.

⁴⁷ *Banque Bruxelles Lambert v Eagle Star Insurance Co* [1995] QB 375, 419. See also, *Douglas v Stuart Wyse Ogilvie Estates Ltd* 2001 SLT 689 (although cf *Cochrane v Graham & Sibbald* 1987 SC 63).

⁴⁸ *Esso v Mardon* [1976] QB 801.

⁴⁹ *F and H Entertainments v Leisure Enterprises* [1976] 120 SJ 331; and *Cemp Properties (UK) v Dentsply Research Corp* [1991] 2 EGLR 197, 202.

⁵⁰ For discussion, see *Banque Bruxelles Lambert v Eagle Star Insurance Co* [1995] QB 375, 419. See, for Scots law generally, McBryde, paras 22-56 to 22-118.

MISLEADING PRACTICES		
Causes of action	Remoteness Rule	Extent
Fraudulent Misrepresentation	Tort and Delict	All damages “directly flowing” from the misrepresentation, whether or not foreseeable
Negligent Misrepresentation at Common Law	Tort and Delict	Reasonably foreseeable losses
England & Wales: 1967 Act	Negligent	Tort
	Innocent	Unclear
		Fiction of fraud: apply the same rules as for fraudulent misrepresentation
		Contractual or special measure: less than negligent misrepresentation, likely tortious and limited to an indemnity
Scotland: negligent under 1985 Act	Delict	Reasonably foreseeable losses
Breach of Contract	Contract	Damages in the reasonable contemplation of the parties at the time the contract was agreed

8.53 Translating these abstract standards of remoteness of damage into practice is not easy. The courts have stressed that damages are primarily questions of fact to be determined in the particular case. Rules about calculating damages should not be applied mechanistically, but flexibly depending on the facts of each case.⁵¹ Whereas the court’s wide discretion allows fair outcomes to be reached in individual cases, it also breeds considerable uncertainty. Difficult questions include the point in time when damages should be assessed; and what counts as consequential loss.

8.54 Apart from damages, English courts can award an “indemnity” alongside rescission, as part of restoring the parties to their pre-contract position. An indemnity is narrower than damages and only covers losses necessarily arising from the contract itself.⁵²

Contributory negligence

8.55 If a loss is partially due to the consumer’s own fault, there is said to have been contributory negligence and the law will take this into account in assessing the damages the trader must pay. This principle is embodied in the Law Reform (Contributory Negligence) Act 1945. The 1945 Act only applies to misrepresentations if they are negligent or innocent; and it does not apply to aggressive practices at all.⁵³

⁵¹ *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 WLR 916, 925 926 by Bingham LJ. For Scots law, see *Duke of Portland v Wood’s Trs* 1926 SC (HL) 1.

⁵² *Chitty*, paras 6-121 to 6-122; *McGregor*, paras 41-062 to 41-070; and *Whittington v Seale-Hayne* (1900) 82 LT 49.

⁵³ In Scotland, the 1945 Act applies to negligent misrepresentations. Furthermore, it appears that the definition of “fault” used in the Scottish provision of the 1945 Act is wider than the English provision, with the result that the Act can apply to a breach of contract when the claim could have been framed in terms of delictual liability to which contributory negligence might be relevant. *McBryde*, paras 22-33 to 22-36.

The need to mitigate

- 8.56 Consumers are also expected to “mitigate” their losses, so that if they fail to take reasonable steps to cut their losses, those additional losses will not be recoverable. This is a rule of general application and applies to all damages claims.⁵⁴

DAMAGES FOR DISTRESS AND INCONVENIENCE

- 8.57 A consumer who is a victim of a misrepresentation will often suffer significant vexation and injured feelings as a result. For example, in the context of buying a holiday, comparing the market values of what was represented to the consumer and what was actually received may not be an actual indication of the loss.
- 8.58 The general position in contract is that damages are not recoverable for injured feelings.⁵⁵ However, this general rule has been doubted,⁵⁶ and is now subject to an increasing number of exceptions. Scots law also recognises these exceptions.⁵⁷

Contracts for pleasure and peace of mind

- 8.59 The most important exception is that mental distress damages are allowed where the main purpose of the contract is to provide pleasure, or to avoid distress.⁵⁸ The key cases in this area concern contracts for entertainment, and particularly spoiled holidays.⁵⁹
- 8.60 The courts have set informal tariffs, which are typically low. In a case concerning a dream-cruise-turned-nightmare, the Court of Appeal noted that “awards in this area should be restrained and modest”.⁶⁰

⁵⁴ In England, see *McGregor*, Ch 7 (Mitigation of Damage). In Scotland, see McBryde, paras 22-37 to 22-55.

⁵⁵ *Addis v Gramophone* [1909] AC 488, 491; *Watts v Morrow* [1991] 1 WLR 1421, 1445; *Johnson Gore Wood & Co* [2002] 2 AC 1, 49; followed in Scotland, but not uncritically: see McBryde, paras 22-101 to 22-103.

⁵⁶ The rule in *Addis v Gramophone* has not been followed in other jurisdictions, including Canada (*Honda Canada v Keays* [2008] 2 SCR 362) and New Zealand (*Whelan v Waitaki Meats* [1991] 2 NZLR 74). Lord Millett’s comments in *Johnson v Unisys* [2003] 1 AC 518, para 71, indicate that the exclusion of mental distress damages should only apply to “ordinary commercial contracts entered into by both parties with a view to making a profit”. See also *Johnson v Gore Wood* [2002] 2 AC 1.

⁵⁷ See Scottish Law Commission Report No 174 on Breach of Contract (1999), para 3.3; McBryde, paras 22-98 to 22-105. See also *Mack v Glasgow City Council* 2006 SC 543, Extra Division.

⁵⁸ As in *Heywood v Wellers* [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. In Scotland, see also *Diesen v Samson* 1971 SLT (Sh Ct) 49 and *Colston v Marshall* 1993 SCLR 43 and *Gary McKay v Stakis Ltd t/a Hilton Coylumbridge*, reported in Scottish Legal News 27th January 2011.

⁵⁹ *Jarvis v Swan Tours* [1973] QB 233 CA; *Jackson v Horizon Holidays* [1975] 1 WLR 1468 CA; and *Milner v Carnival* [2010] EWCA Civ 389, [2010] All ER (D) 119.

⁶⁰ *Milner v Carnival* [2010] EWCA Civ 389, [2010] 3 All ER 701, para 41 by Ward LJ, echoing the words of Lord Steyn in *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732, para 28 and Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445.

Damages for physical discomfort

- 8.61 Damages are also available where the consumer has suffered some physical inconvenience and discomfort caused by the breach.⁶¹ Damages for physical inconvenience are common where the landlord has failed to repair the consumer's home.⁶²
- 8.62 Given that many consumer contracts and transactions are not pursued for profit, the possibility of damages for distress and inconvenience is important to avoid under-compensation.

When are distress damages available?

- 8.63 Distress damages are usually provided for breach of contract and it is not wholly clear whether they may be awarded for misrepresentation. It appears that damages for injured feelings are recoverable for deceit,⁶³ but not for negligence in English law.⁶⁴ However, in cases of negligence, distress damages can be recovered if they are linked with physical inconvenience and discomfort.⁶⁵
- 8.64 The Protection from Harassment Act 1997 states that:
- damages may be awarded for (among other things) any anxiety caused by the harassment and any financial loss resulting from the harassment.⁶⁶
- 8.65 In addition, a consumer who suffered harassment can apply for an injunction restraining the trader from pursuing any conduct which amounts to harassment.⁶⁷ This could be particularly valuable, as consumer groups have told us that many consumers fear that the trader will return, which deters them from taking action.⁶⁸

⁶¹ *Watts v Morrow* [1991] 1 WLR 1421,1445 by Bingham LJ, cited with approval (in this respect) by the House of Lords in *Farley v Skinner* [2001] UKHL 49; [2002] 2 AC 732.

⁶² See, for example, *Wallace v Manchester City Council* [1998] 3 EGLR 38.

⁶³ *Archer v Brown* [1985] QB 401; see *Chitty*, para 6-061.

⁶⁴ *Clerk & Lindsell*, paras 8.84 to 8.85. In Scotland, however, distress has, on occasion, been the subject of an award of solatium even in the absence of physical injury or mental illness. See *McLelland v Greater Glasgow Health Board* 2001 SLT 446 and Thomson, para 16.12, note 5. See further discussion in Niall R Whitty and Reinhard Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) 237 to 241.

⁶⁵ *Mafo v Adams* [1970] 1 QB 548.

⁶⁶ Section 3(2) in England and Wales. Damages are also available in Scotland under section 8(5)(a). In *Robertson v Scottish Ministers* [2007] CSOH 186, Lord Eassie held that damages could be awarded under the 1997 Act for both anxiety and distress and more serious psychiatric illness. See Thomson, para 1.11, note 1.

⁶⁷ Section 3A. Section 8(5)(b)(i) gives the courts power to grant interdict or interim interdict in Scotland.

⁶⁸ See Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), para 2.12.

OTHER FORMS OF DAMAGES

Damages for “loss of amenity”

- 8.66 In *Ruxley v Forsyth*,⁶⁹ where builders constructed a pool that was 6ft deep, instead of the agreed 7ft 6in deep, the court refused to award the cost of repair, which exceeded the contract-price. The pool was still perfectly safe for diving, so there was no diminution in the market value of the pool. Using conventional contract damages, the claimant had no recoverable loss. Yet the trial judge awarded the claimant £2,500 for “loss of amenity”.
- 8.67 Recovery for loss of amenity, also referred to as the “consumer surplus”, is a rare example of a consumer-driven legal development in contract law. It “represents a personal, subjective, and non-monetary gain”.⁷⁰ Loss of amenity may present a valuable protection for consumers.⁷¹

Exemplary damages

- 8.68 In English law, exemplary damages do not seek to compensate the claimant but rather to punish the defendant for their behaviour. Scots law does not recognise such damages.
- 8.69 *Rookes v Barnard*⁷² set out the three categories of case where exemplary damages could be awarded:
- (1) oppressive and arbitrary conduct by a public official;
 - (2) where the defendant’s conduct was calculated to make a profit above and beyond the claimant’s loss; or
 - (3) where statute had expressly authorised such damages.
- 8.70 Although exemplary damages will be rare in the context of consumer contracts they may be available in actions for deceit.⁷³

⁶⁹ [1996] AC 344.

⁷⁰ D Harris, A Ogus and J Phillips, “Contract remedies and the consumer surplus” (1979) 95 *Law Quarterly Review*, 581.

⁷¹ But see *McGregor*, para 3-026: “The decision may not have a very wide range; it could be limited to cases of the *Ruxley* type where reinstatement is not allowed and, without an award for non-pecuniary loss, the claimant is going to be confined to nominal damages against a defendant who has failed to fulfil his contractual promise”.

⁷² [1964] AC 1129.

⁷³ *McGregor*, para 41-040.

Account of profits

- 8.71 An account of profits aims to “strip away some or all of the gains made by a defendant from a civil wrong”.⁷⁴ This type of remedy will rarely be appropriate as part of a private right of redress for consumers, as it departs from the overriding compensatory objective.⁷⁵ Scots law currently recognises no equivalent liability outside fiduciary relationships.⁷⁶ It should be noted, however, that unjustified enrichment claims may arise from the use of another person’s property without any legal basis for so doing, and possibly from other legal wrongs as well.⁷⁷

CONCLUSION

- 8.72 An easy-to-understand and easy-to-use system of remedies is the cornerstone of effective consumer protection. Unfortunately, the law in this area is uncertain and confused. There are four main problems:
- (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, and does not give much guidance about how economic loss should be measured in a consumer context.
 - (3) The law fails to provide a clear right to damages for consequential losses caused by aggressive practices.
 - (4) The law on distress damages has developed on a piecemeal basis, and is not readily accessible to those who have fallen victim to misleading and aggressive practices.
- 8.73 We return to these issues in Part 10, when we consider the problems with the current law. In Part 14 we make recommendations for reforming remedies for consumers. In the next Part we consider how the private law remedies discussed so far can be enforced by consumers both through the courts and alternative dispute resolution systems.

⁷⁴ *Aggravated, Exemplary and Restitutionary Damages* (1997) Law Com No 247, para 1.4.

⁷⁵ See also Law Com No 247 (1997), para 1.46. It may, however, be appropriate as part of enforcement actions taken by public bodies on behalf of consumers. In England and Wales, an account of profits may exceptionally be awarded for a breach of contract, see *AG v Blake* [2000] UKHL 45, [2001] 1 AC 268.

⁷⁶ See *Teacher v Calder* (1899) 1 F (HL) 39, which has never been overruled. Accounts of profits are also recognised by statute in intellectual property infringement cases in Scots law.

⁷⁷ See John Blackie and Ian Farlam, *Enrichment by Act of the Party Enriched*, in Reinhard Zimmermann, Daniel Visser and Kenneth Reid (Eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford, 2004), 469 to 497.

PART 9

PRIVATE ENFORCEMENT

INTRODUCTION

- 9.1 The vast majority of consumer complaints are resolved informally, either by consumers acting on their own or with the help of an adviser.¹ Very few consumers go to court. However, parties negotiate “in the shadow of the law”.² Both sides need to be aware of their options should negotiations fail.
- 9.2 Consumer groups pointed out how difficult it is for consumers to go to court, even when small claims procedures are available. Consumers are frightened of the court process, and often lack the resources and stamina to proceed. Oral misrepresentations are difficult to prove, rogue traders difficult to trace and judgments difficult to enforce.
- 9.3 We cannot solve these problems. However, it is clear that consumer-enforced law needs to be streamlined and simple: somewhat “rough and ready”. By contrast, the current private law provides sophisticated and flexible rules, designed to be handled and interpreted by lawyers, and beyond the reach of ordinary consumers.
- 9.4 In this Part we give a brief overview of the way in which individual consumers may bring a claim. The first section discusses court procedure. We then look at alternative dispute resolution systems, such as the Financial Ombudsman Service, The Property Ombudsman and the Advertising Standards Authority. Finally, we briefly consider New Zealand’s disputes tribunals, which provide an altogether different forum for resolving consumer disputes.

COURT ACTION IN ENGLAND AND WALES

- 9.5 The court procedure depends on the value of the claim. There are three tracks:³
- (1) The small claims procedure, for claims not exceeding £5,000.
 - (2) The fast track, for claims between £5,000 and £25,000.
 - (3) The multi-track, for claims exceeding £25,000.
- 9.6 The majority of county court claims which are allocated to a track are small claims.⁴

¹ For further details on how consumers resolve disputes, see P Pleasance and others, *Civil Justice in England and Wales*, Legal Services Research Centre (2009). In the study 48% acted alone, and 39% obtained advice. Others did nothing, or attempted to act alone or find advice, but failed.

² There is considerable deployment of this metaphor in relevant literature; see, for an early example, Robert N Mnookin & Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” 1979 (88) *Yale LJ* 950.

³ Civil Procedure Rules 26.1 and 26.6.

⁴ See Ministry of Justice, *Judicial and Court Statistics 2009* (2010).

The small claims procedure

- 9.7 The small claims procedure aims to be user-friendly, and to save consumers time and costs. The Civil Procedure Rules provide that:⁵
- (1) hearings are to be informal;
 - (2) the strict rules of evidence do not apply;
 - (3) the court need not take evidence on oath; and
 - (4) the court may limit cross-examination.
- 9.8 The theory is that the parties should be able to represent themselves without the assistance of lawyers.⁶ Therefore, unlike other forms of litigation, the losing party is not required to pay the winning party's legal costs.⁷
- 9.9 There have been several studies of the small claims procedure since it was established in 1973,⁸ including research by Consumer Focus in 2010.⁹ These found that the small claims procedure succeeds, up to a point. It is more informal than normal court procedure, and many consumers speak well of it. Consumer Focus found that 78 per cent of those using the procedure were satisfied with it.¹⁰
- 9.10 However, many problems remain. Although the small claims procedure was designed for individuals, it is mainly used by companies chasing debts. Consumer Focus found that a quarter of consumers regard the procedure as intimidating. The procedure is too slow, taking over six months on average from summons to a court hearing.¹¹ Consumers frequently reported problems in enforcing judgments.¹² Adducing evidence may also be difficult for litigants.¹³

⁵ Civil Procedure Rules 27.8.

⁶ Practice Direction 27 (3.2).

⁷ Civil Procedure Rules 27.14. Initiatives such as Money Claim Online (MCOL), Her Majesty's Courts Service Internet based service for claimants and defendants, are examples of user friendly claims procedures. See <https://www.moneyclaim.gov.uk>

⁸ See, in particular, J Baldwin, *Small Claims in the County Court in England and Wales: The Bargain Basement of Civil Justice?* (1997).

⁹ L Bello, *Small claims, big claims. Consumers' perceptions of the small claims process*, Consumer Focus (October 2010).

¹⁰ Above, p 17.

¹¹ L Bello, *Small claims, big claims. Consumers' perceptions of the small claims process*, Consumer Focus (October 2010), p 30.

¹² N Madge, "Small claims in the county court" (2004) *Civil Justice Quarterly* p 210; L Bello, *Small claims, big claims. Consumers' perceptions of the small claims process*, Consumer Focus (October 2010), pp 31 to 32.

¹³ P Lewis, "Litigants in person and their difficulties in adducing evidence: a study of small claims in an English county court" (2007) *International Journal of Evidence and Proof* 46.

9.11 Consumer Focus found that “the process is not a lawyer free zone”. A fifth of consumers decide to use a lawyer, even if they are unable to recoup their costs. A further third said that they would have liked to have been represented by a lawyer but were put off by the cost.¹⁴

9.12 Research by Professor Baldwin in the 1990s found that many county court judges reach decisions on the basis of what is fair more than on strict legal grounds:

a majority [of judges] felt that they could disregard the law in making decisions if in their view the law would produce an unjust outcome. Rightly or wrongly, many judges felt that, when they were dealing with small claims, it was more appropriate to seek solutions that would provide a standard of justice that would be understood and accepted as fair by the parties, even if this meant disregarding the law.¹⁵

9.13 This is also the practice of the Financial Ombudsman and the Property Ombudsman, as discussed below.¹⁶

Legal aid

9.14 Legal aid is rarely available for consumer disputes. It is not granted for claims under £5,000 which could be heard by the small claims procedure, or claims which are within the jurisdiction of the Financial Ombudsman Service or other ombudsman scheme, as described below.¹⁷ Legal aid may be available in some circumstances - for large court claims with a good prospect, provided that the consumer meets the legal aid means test.

9.15 However, in November 2010, the Ministry of Justice proposed to withdraw legal aid for all consumer disputes, except for rent or mortgage disputes where the consumer’s home is at risk.¹⁸ Even large claims will need to be resolved without recourse to lawyers.

COURT ACTION IN SCOTLAND

9.16 The available court procedures in the sheriff court¹⁹ are also value dependent, and are as follows:

- (1) Small claims procedure, for claims not exceeding £3,000,²⁰

¹⁴ L Bello, *Small claims, big claims. Consumers’ perceptions of the small claims process*, Consumer Focus (October 2010) p 29.

¹⁵ J Baldwin, *Small claims in the county courts in England and Wales*, (Oxford 1997), pp 71 to 72.

¹⁶ See paras 9.30 to 9.41 of this Consultation Paper.

¹⁷ Legal Services Commission Funding Code, para 5.4.

¹⁸ Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales*, Consultation Paper CP12/10, November 2010, at para 2.28.

¹⁹ The Court of Session has jurisdiction in respect of claims exceeding £5,000 (although a party raising an ordinary cause action for more than £5,000 can elect to raise this in the sheriff court).

- (2) Summary procedure, for claims between £3,000 and £5,000;²¹ and
 - (3) Ordinary procedure, for claims over £5,000.²²
- 9.17 A case may be remitted to ordinary procedure on grounds of complexity. The latest available statistics indicate that of the 111,737 actions initiated in the sheriff court in 2009-10, 42,823 were ordinary causes, 27,464 were summary causes and 41,450 were small claims.²³
- 9.18 In small claims procedure, there is normally a limit on expenses based on the value of the claim; in summary procedure, expenses are decided on the basis of an approved table and, in ordinary procedure, expenses are subject to taxation (the process by which the court auditor determines what expenses of the action are to be awarded).

The small claims procedure

- 9.19 Similarly to England and Wales, the small claims procedure in Scotland is designed to operate as informally as the circumstances of the claim permit.²⁴ A deliberate attempt is made to settle any disputed case at the first hearing.²⁵ The sheriff will therefore typically adopt a more inquisitorial attitude than in other types of procedure, particularly where lay litigants are involved. Again, similar to the procedure in England and Wales, the strict rules of evidence in relation to admissibility and corroboration do not apply.²⁶
- 9.20 In terms of representation, litigants can represent themselves. Alternatively, they have a choice of either instructing a solicitor or having a lay representative such as a member of Citizens Advice, a trading standards employee or a relative.

²⁰ The Small Claims (Scotland) Order 1988, art 2, as amended by The Small Claims (Scotland) Amendment Order 2007, art 2(2). Forms for small claims procedure are available online, although, unlike in England and Wales, there is not a facility to claim online.

²¹ The Sheriff Courts (Scotland) Act 1971, s 35(1), as amended by The Sheriff Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 2007, art 3. Forms for summary procedure are available online, although, unlike in England and Wales, there is not a facility to claim online.

²² Ordinary procedure applies automatically where the above provisions for small claims and summary procedure do not apply.

²³ Civil Judicial Statistics Scotland 2008 - 2009 and 2009 - 2010, Table 4.

²⁴ Act of Sederunt (Small Claim Rules) 2002, SSI 2002/133, Rule 9.2. (Personal injury claims are excluded from the small claims procedure.)

²⁵ Rule 9.2.2(b).

²⁶ Sheriff Courts (Scotland) Act 1971, s 35; and Civil Evidence (Scotland) Act 1988, ss. 1 and 2.

- 9.21 The small claims procedure in Scotland has received favourable feedback, in terms of dealing with cases swiftly, and in terms of the performance and fairness of sheriffs involved.²⁷ The procedure has, however, been criticised on various grounds, including the argument that it is inconsistent and produces variable results, which undermines the development of consumer confidence in the system.²⁸

Legal aid

- 9.22 In Scotland, legal aid, in the form of representation, is not available for small claims in the sheriff court. Small claims litigants can, however, apply for help under the advice and assistance scheme, through which a solicitor can, for example, help parties prepare for cases and give advice on negotiating settlements. Eligibility for the scheme is means tested, with income and savings being taken into account.
- 9.23 The fact that cases can be remitted from the small claims procedure to the ordinary cause procedure on grounds of complexity, has resulted in difficulties in relation to disputes over bank charges in Scotland in recent years. In an effort to stop consumers pursuing such actions, leading banks successfully asked for cases on bank charges to be remitted to the ordinary cause procedure (where liability for the other party's expenses is potentially unrestricted in the event of lack of success). Leading banks have succeeded in having such cases remitted to the ordinary cause procedure on the grounds of complexity, often therefore making it no longer financially viable for consumers to pursue their claims.²⁹

SMALL CLAIMS PROCEDURE AT EU LEVEL

- 9.24 The European Union has also established a small claims procedure to deal with cross-border claims with a value of €2,000 or less.³⁰ It acts as an alternative to the courts in Member States.
- 9.25 The procedure deals with cases in writing. Oral hearings occur only if the court thinks it necessary.³¹ Again, costs are generally not recoverable.³²

²⁷ Irvine, para 12-12.

²⁸ Above para 12-13.

²⁹ See, for example, *Walls v Santander UK plc*, Glasgow Sheriff Court, July 2010, SA2182/10. For further background, see the website of the Govan Law Centre at www.govanlc.com

³⁰ Regulation No 861/2007 available at http://europa.eu/legislation_summaries/consumers/protection_of_consumers/

³¹ Regulation No 861/2007, Art 5(1).

³² Regulation No 861/2007, Art 16.

THE NEED FOR SIMPLICITY

- 9.26 Professor Baldwin points out that simplified small claims procedures struggle to cope with complex law:

It is not enough ... to simplify court proceedings, to make hearings more relaxed and informal, or to encourage judges to play a facilitatory and interventionist role at hearings. The truth is that the law itself is complex, it does not by any means always conform to lay notions of justice, and it certainly cannot be conveyed to lay people in a few simple explanatory leaflets written in straightforward English.³³

- 9.27 It is clear that we need to design a law which can be explained in leaflets and telephone advice, without relying on lawyers.³⁴

ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

- 9.28 Alternative dispute resolution (ADR) systems are designed to be informal, user-friendly systems of settling disputes more cheaply and effectively than litigation. In this section we outline ADR mechanisms, for:

- (1) Financial services;
- (2) House sales and lettings; and
- (3) Advertising.

- 9.29 The UK's approach to alternative dispute resolution systems for consumers is largely sector-driven. A different way of dealing with consumer disputes is to have a separate tribunal system dedicated to consumer issues. This is the approach taken in New Zealand, which we consider in the final section.

The Financial Ombudsman Service³⁵

- 9.30 The Financial Ombudsman Service (FOS) was set up under the Financial Services and Markets Act 2000 (the 2000 Act) to resolve disputes with minimum formality.³⁶ In 2009/10, it received over 160,000 new cases. It works throughout the UK.

³³ J Baldwin, *Small claims in the county courts in England and Wales* (1997) p 19.

³⁴ Internet-based claims procedures, such as MCOL noted above at fn 7, should be encouraged as much as possible.

³⁵ We thank Caroline Mitchell, Lead Ombudsman, for her help with this section.

³⁶ S 225 of the Financial Services and Markets Act 2000.

- 9.31 FOS deals with complaints against the main providers of financial products (such as banks, building societies and insurers) and complaints against intermediaries (including brokers and independent financial advisers). The FOS can also consider complaints about loan agreements regulated under the Consumer Credit Act 1974 (the 1974 Act). This includes rights under section 75 of the 1974 Act, which can make a creditor jointly and severally liable for the misrepresentation (or breach of contract) of a supplier of goods.³⁷
- 9.32 Complaints are determined by reference to what is in the opinion of the Ombudsman fair and reasonable in all the circumstances of the case.³⁸ Rules made under the 2000 Act state that in considering what is fair and reasonable, “the Ombudsman will take into account relevant law and regulations, codes of practice and (where appropriate) good industry practice at the relevant time”.³⁹ Importantly, the law is *relevant* to ombudsmen's decisions, but they are not *bound* to take decisions in accordance with the law.⁴⁰
- 9.33 The Ombudsman has wide powers to award remedies to consumers of up to £100,000.⁴¹ The Ombudsman may recommend that the financial service provider pay more, but such recommendations are not binding. The award may be:
- (1) a money award for such amount as the Ombudsman considers fair compensation for the loss or damage suffered by the complainant; and/or
 - (2) a direction that the respondent take such steps in relation to the complainant as the Ombudsman considers just and appropriate.⁴²
- 9.34 A money award may be for:
- (1) financial loss (including consequential or prospective loss);
 - (2) pain and suffering;
 - (3) damage to reputation; and/or
 - (4) distress or inconvenience.⁴³

³⁷ See discussion in Part 15 of this Consultation Paper.

³⁸ Financial Services and Markets Act 2000, s 228.

³⁹ DISP 3.6.4 of the Financial Services Authority Handbook.

⁴⁰ *R (Heather Moor & Edgcomb Ltd) v FOS* [2008] EWCA Civ 642.

⁴¹ DISP 3.7.4 of the Financial Services Authority Handbook. In September 2010, the Financial Services Authority consulted on whether the limit should be increased to £150,000.

⁴² Financial Services and Markets Act 2000, s 229.

⁴³ DISP 3.7.2 of the Financial Services Authority Handbook.

9.35 In Part 13 we consider whether any new Act should extend to financial services. We provisionally conclude that the existing protections (Financial Services Authority rules and access to the FOS) provide adequate redress. However, we would welcome views.⁴⁴

The Property Ombudsman

9.36 Under the Estate Agents Act 1979, estate agents dealing with residential property must be members of an approved redress scheme.⁴⁵ The Office of Fair Trading has approved two schemes for operation throughout the UK: the Property Ombudsman and Ombudsman Services: Property. Both may make financial awards not exceeding £25,000.

9.37 The Property Ombudsman must have regard to the law, Codes of Practice and any internal rules. However, like the FOS, it is not bound by the law. Instead, it is required to reach decisions “on common sense” and what appears “to be fair and reasonable under the circumstances”.⁴⁶

9.38 The Code of Practice for Residential Estate Agents (2006) includes provisions on misleading and aggressive commercial practices. For example, estate agents should not seek business by methods that are oppressive or involve dishonesty, deceit, misrepresentation or harassment.⁴⁷ They must not directly or indirectly harass any person in order to gain instructions.⁴⁸ They must also comply with the Property Misdescriptions Act 1991, and take all reasonable steps to make sure that all statements that are made about a property, whether oral, pictorial or written, are accurate and are not misleading.⁴⁹

9.39 The Property Ombudsman has also issued guidance for dealing with vulnerable consumers. Vulnerability is defined as including anything that may have an impact on a person’s ability to make a sound decision, for example:

- (1) Unfamiliarity with or difficulty in understanding the house buying and selling process.
- (2) Physical disabilities.
- (3) Language barriers.⁵⁰

⁴⁴ See paras 13.59 to 13.62 of this Consultation Paper.

⁴⁵ S 23A(1), inserted by the Consumers, Estate Agents and Redress Act 2007. Note that the 1979 Act does not apply to things done “in the course of his profession by a practising solicitor or a person employed by him; see the 1979 Act, s1(2)(a).

⁴⁶ Rule 24, Terms of Reference for The Property Ombudsman (2008).

⁴⁷ Rule 1d of the Code of Practice for Residential Estate Agents.

⁴⁸ Above, rule 3b.

⁴⁹ Above, rule 4h. We note that the Department of Business, Innovation and Skills is undertaking a consultation on whether to repeal the Property Misdescriptions Act 1991 due to its perceived overlap with the Regulations, see *Consultation on the repeal of the Property Misdescriptions Act 1991* (January 2011).

⁵⁰ Rule 3 of the Guidance for Dealing with Vulnerable Consumers.

- 9.40 The definition of vulnerability used by the Property Ombudsman overlaps with the concept in the Regulations, but it is more specific to its setting.
- 9.41 Again, in Part 13 we consider whether any new Act should extend to sales of land. We provisionally conclude that the current law is adequate, but we would welcome views.⁵¹

Advertising: the Advertising Standards Authority

- 9.42 The Advertising Standards Authority (ASA), which operates throughout the UK, is the independent body responsible for maintaining advertising standards across all media.⁵² Since advertisements may constitute unfair commercial practices, the ASA has a role in maintaining the standards set by the Regulations.
- 9.43 The ASA enforces codes of practice for both broadcast and non-broadcast media.⁵³ The two codes largely track the Regulations' provisions in prohibiting misleading and aggressive advertising.⁵⁴
- 9.44 When the ASA receives a complaint that a code of practice has been breached, it may attempt to resolve the problem informally, obtaining assurances that the communication will be changed or withdrawn. The ASA may also carry out formal investigations: the rulings are published weekly and this tool for "naming and shaming" traders is considered a crucial sanction.⁵⁵
- 9.45 The ASA can also administer sanctions through its Committee of Advertising Practice (CAP).⁵⁶ These include:
- (1) issuing alerts to its members, including the media, advising them to withhold access to advertising space;
 - (2) requiring members to withdraw trading privileges from offending traders; and
 - (3) pre-vetting, so that offenders have to have their marketing communications vetted before being published.
- 9.46 These sanctions provide a strong disincentive towards future breaches, but they are not geared to compensating consumers for the losses they may have suffered.

⁵¹ See paras 13.54 to 13.58 of this Consultation Paper.

⁵² See the ASA website at <http://www.asa.org.uk>

⁵³ The CAP Code, the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (12th ed 2010); and the BCAP Code, the UK Code of Broadcast Advertising (1st ed 2010).

⁵⁴ The Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing, s 3 (background); the UK Code of Broadcast Advertising s 3 (background). Note that the ASA may take the Regulations into account in its adjudication.

⁵⁵ The Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing, p 102.

⁵⁶ The CAP is an industry body which is also responsible for producing the Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing.

NEW ZEALAND DISPUTES TRIBUNALS⁵⁷

9.47 In New Zealand disputes tribunals were set up under the Disputes Tribunals Act 1988 to replace the previous small claims tribunals. The Government gave two reasons for the change:

to correct the common misapprehension that tribunals are available for debt-collecting, when their true function is to resolve disputes, either by assisting parties to resolve them for themselves, or, when it is not appropriate, to resolve the dispute for them;

the term "small" can be misleading, because the stakes involved, although modest compared with those litigated in the ordinary courts, will often be significant to the parties.⁵⁸

9.48 Disputes tribunals can hear disputes founded on contract, quasi-contract and tort⁵⁹ where the value does not exceed NZ\$15,000 (or just over £7,000).⁶⁰ If the value is between NZ\$15,000 and NZ\$20,000, the disputes tribunals can hear a dispute only if the litigants agree to it.⁶¹

9.49 Disputes tribunals are designed to be cheap, time-saving and user-friendly. The main advantage is that a complaint can be made in general terms and the tribunal will assist the consumer in expressing the specific issues. Unlike the UK courts, the parties are not entitled to have legal representation unless authorised by the tribunal.⁶² They are also much quicker. Tribunals seek to have all hearings heard within six weeks.

9.50 In some ways the tribunals are similar to ombudsman schemes, in that each case is decided according to the substantial merits and justice of the case. Referees must have regard to the law and are not bound by it. The substantive decision is not subject to appeal.⁶³

⁵⁷ We thank Lord Drummond Young, Chairman of the Scottish Law Commission, for providing some of the information in this section. He has discussed the system in New Zealand with Kate Tokeley of Victoria Law Faculty, Wellington; Sue Chetwin of the Consumers' Institute of New Zealand; and Liz MacPherson, Evelyn Cole, Joanne Kearney and Debbie Bidlake of the Ministry of Economic Development. Useful information can also be found at <http://www.consumer.org.nz/reports/disputes-tribunals/how-they-work>

⁵⁸ Dispute Tribunal Bill: Second Reading, Parliamentary Debate (14 June 1988), Hon Philip Woollaston, Associate Minister of Justice, New Zealand Hansard. The speech is available at <http://www.vdig.net/hansard>

⁵⁹ Disputes Tribunals Act 1988 s 10.

⁶⁰ As above.

⁶¹ Disputes Tribunals Act 1988 s 13. Claimants may also decide to bring their claims within the jurisdiction of a disputes tribunal by abandoning so much of their claims so as not exceed the prescribed cap (see s 14).

⁶² Disputes Tribunals Act 1988 s 38.

⁶³ For further discussion of this, see www.consumer.org.nz/reports/disputes-tribunals

- 9.51 Hearings generally take place in private.⁶⁴ Like the UK small claims procedures evidence need not be given on oath,⁶⁵ tribunals are encouraged to promote the settlement of claims,⁶⁶ and costs are not generally awarded against the losing party.⁶⁷
- 9.52 In discussions with local experts, Lord Drummond Young, Chairman of the Scottish Law Commission, was told that most people consider that the tribunal works well. However it was suggested that more legal training for referees would be desirable.⁶⁸
- 9.53 There is also a separate tribunal for motor vehicle disputes where the referees are all legally qualified and can hear disputes where the value does not exceed NZ \$100,000, or more if the litigants consent.⁶⁹

CONCLUSION

- 9.54 Laws on compensation for misleading and aggressive practices need to be applied without lawyers in a variety of settings. Attempts have been made to provide informal small claims and ADR procedures to resolve consumer disputes. However, there is a mis-match between the simplicity of the procedures used for consumer disputes, and the laws which they apply (which are extremely complicated). Simplifying consumer law on aggressive and misleading practices can help to align better the content of the rules and the procedure for enforcing them.
- 9.55 In the next Part we outline our case for reform, starting with a discussion of the problems with the current law.

⁶⁴ Disputes Tribunals Act 1988 s 39.

⁶⁵ Above, s 40.

⁶⁶ Above, s 18.

⁶⁷ Above, s 43.

⁶⁸ Private conversation with Kate Tokeley of Victoria Law Faculty, Wellington.

⁶⁹ See the website of the Motor Vehicle Disputes Tribunal at <http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal>

PART 10

PROBLEMS WITH THE LAW

- 10.1 In this Part we summarise the main problems with the current law and set out the case for reform.
- 10.2 The problems are different for misleading and for aggressive practices. At first sight the law appears to give consumers adequate redress for misleading statements. In Part 5, we identify seven separate causes of action. The problem is not a shortage of law but a superabundance. Consumers can become lost in a bewildering array of remedies, all with their own complexities and uncertainties.
- 10.3 For aggressive practices, on the other hand, there are serious gaps in the law. We use the example of the mobility aids market as a case study to illustrate the problems caused by aggressive practices. The existing causes of action (duress, undue influence and harassment) do not address the specific problems experienced by consumers. We conclude that there is a need for reform.
- 10.4 Finally, we consider whether there should be a right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008. This would be an uncertain step, which may impose substantial costs on businesses. In Part 12 we outline a more cautious and limited approach.

PROBLEMS WITH THE LAW ON MISLEADING PRACTICES

- 10.5 The law of misrepresentation has not developed with consumers in mind. As we have seen, most of its doctrines are based on the common law, established through cases litigated in court. Yet consumers rarely go to court because it is not financially viable for them to do so. The case law is dominated by disputes between businesses. This means that consumer disputes are governed by laws shaped without reference to consumer interests or problems.
- 10.6 Of the seven routes to a remedy we have identified, 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).
- 10.7 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 they were *not* negligent. However, the 1967 Act is not well known or well-used.¹ It uses obscure and tortuous language and has been subject to academic criticism.² Furthermore, there is considerable uncertainty over the three remedies it provides: rescission, damages and damages in lieu of rescission.

¹ See Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), paras 2.6 and 2.8.

² See for example P S Atiyah, G H Treitel, "Misrepresentation Act 1967" (1967) 30 *Modern Law Review* 369.

10.8 Meanwhile, section 10 of the 1985 Act requires the consumer to prove negligence. It also lacks transparency. Whilst in England and Wales the 1967 Act created a new statutory liability for negligent misrepresentation; in Scotland, section 10 of the 1985 Act simply abolished the rule laid out in previous case law³ 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.

10.9 In summary, our review of the current law highlights four problems faced by consumers attempting to obtain a remedy for a misrepresentation:

- (1) Uncertainties regarding the definition of a misrepresentation;
- (2) Difficulties in proving fault;
- (3) Difficulties in proving causation; and
- (4) Problems with remedies. The right to “rescission” is too easily lost, while the right to damages under the 1967 and 1985 Acts has raised legal uncertainties.

10.10 Below we consider each of these in turn.

(1) The definition of a “misrepresentation”

10.11 Where a statement is an opinion or a statement that is not false, or relates to future conduct it cannot usually count as a misrepresentation.⁴ But then the rule is subject to several exceptions. This is confusing. The Regulations take a different approach, and provide that a commercial practice is misleading if “its overall presentation in any way deceives or is likely to deceive the average consumer”.⁵ This definition covers many of the instances of “exceptional” liability for misrepresentations already covered by current law.⁶ The reasonableness of reliance appears to be the real issue rather than the nature of the statement.

10.12 We think there is a need for greater clarity in this area.

(2) Fault

10.13 Generally, the causes of action which give a consumer a right to damages require proof that the trader was at fault. This is the case for fraudulent misrepresentation, negligent misrepresentation at common law and probably cases of unilateral mistake. Scottish consumers must also prove negligence to bring a claim under section 10 of the 1985 Act.

³ *Manners v Whitehead* (1898) 1 F 171, discussed at para 5.39 of this Consultation Paper.

⁴ See paras 5.8 to 5.18 of this Consultation Paper. Rules stating that that these issues are not covered are subject to exceptions. For opinions, it is the implied representation that there is a reasonable basis for that opinion. For future conduct, it is the implied representation about the defendant’s current state of mind. See J Cartwright, *Misrepresentation, mistake and non-disclosure* (2007) paras 3.20 and 3.21.

⁵ Reg 5(2)(a).

⁶ For example half-truths are statements reasonably interpreted and relied upon by the consumer. Similarly, representations implied by conduct fall into this category.

10.14 Three factors make proof of fault difficult for consumers:

- (1) Where fraud is alleged, the courts tread carefully, as it is a very serious allegation. Any recklessness by the trader needs to amount to an actual disregard for the truth; and in practice the evidence needs to be robust.⁷
- (2) Demonstrating a state of mind is inherently challenging. Traders are often corporations, so this requirement becomes doubly challenging.
- (3) Evidence of fault will usually be within the sole control of the trader, as it relates to the trader's internal processes. The consumer will know what has gone wrong, but probably have little idea of why this happened and little means of finding out.

10.15 By contrast, innocent misrepresentations do *not* generally give consumers the right to damages. Instead, under current law, the victim of an innocent misrepresentation has a right to unwind the contract. In England and Wales (but not in Scotland), the court has a discretion to award a sum of money instead of unwinding the contract. Our proposals aim to approximate the outcomes consumers could expect already under current law, but using more user-friendly concepts.

(3) Causation

10.16 In practice, it may be difficult to show why a consumer acted in a particular way. Research in behavioural economics shows that consumers do not necessarily act rationally on information given. Long-standing buying habits co-exist with last-minute purchasing decisions, and conscious and subconscious factors operate together to affect a consumer's decision to go ahead with a transaction.⁸

10.17 The misleading commercial practice may have had an influence on the consumer's decision, but it is often difficult to tell how much. Where, for example, a trader has displayed a quality mark without right to do so, some consumers will have been influenced by this, but it is difficult to know which ones. Again, we think the causation test needs to be clarified.

(4A) Remedies in England and Wales

Rescission

10.18 Consumer representatives told us that the most valuable remedy for consumers was the ability to get out of the contract and obtain a refund of their purchase price. In theory rescission provides this. Unfortunately, however, it is an uncertain remedy which may easily be lost.⁹

⁷ See *Re B* [2008] UKHL 35, [2009] 1 AC 11.

⁸ R Incardona, C Poncibó, "The average consumer, the Unfair Commercial Practices Directive, and the cognitive revolution" (2007) 30 *Journal of Consumer Policy* 21, discussed at para 2.46 of this Consultation Paper.

⁹ See discussion in *Chitty*, paras 6-123 to 6-129.

- 10.19 The first difficulty is the requirement of mutual restitution, so that the consumer must restore non-money benefits to the trader as a condition of obtaining rescission. The courts have adopted a flexible approach so that restitution must be “substantial”, not identical. Yet with flexibility comes uncertainty. What happens if the goods have deteriorated? Does the consumer have to give an allowance for use? And can services ever be restored? Circumstances vary so widely that there is no clear, unified answer to these questions.¹⁰
- 10.20 Secondly, the ability to rescind is, by nature, a short-term remedy. If too much time has gone by it becomes meaningless to try and “undo” a transaction. In *Clough v London and North Western Railway* the court noted that “when the lapse of time is great it probably would in practice be treated as conclusive evidence”¹¹ of a decision to affirm the contract. However, this leaves consumers and traders with little practical guidance on how long the right lasts in any given situation.

Damages in lieu of rescission

- 10.21 At first sight, section 2(2) of the 1967 Act appears to offer an answer to these problems by providing a right to claim damages “instead” of rescission. However, the remedy has been severely undermined by the uncertainty of its scope. The drafting of section 2(2) is ambiguous. As Treitel and Atiyah note, the section provides that a person may have a remedy if they:

“would have been entitled, by reason of the misrepresentation, to rescind the contract”. What is the effect of these words? Can the court award damages if the representee once had the right to rescind but lost it? One possible view is that this fact should not affect the court’s discretion on the ground that the words quoted above mean “*would at any time* have been entitled... to rescind”. But more probably they merely mean “would be entitled to rescind *if the court did not exercise its discretion to award damages.*”¹²

- 10.22 Case law also suggests that the right to damages under section 2(2) may be lost if the original right to rescind is lost.¹³ We do not think that this was intended,¹⁴ and there is academic support to abolish this restriction on the award of damages.¹⁵

¹⁰ See discussion at paras 8.16 and 8.21 of this Consultation Paper.

¹¹ (1871) LR 7 Ex 26, 34 to 35.

¹² P S Atiyah, G H Treitel, “Misrepresentation Act 1967” (1967) 30 *Modern Law Review* 369, 377.

¹³ *Atlantic Lines & Navigation Co v Hallam* [1983] 1 Lloyd’s Rep 188.

¹⁴ 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 741 HC Official Report (5th series) cols 1388-1389, 20 February 1967; and Hugh Beale, “Damages in lieu of rescission for misrepresentation” [1995] 111 *Law Quarterly Review* 385.

¹⁵ Hugh Beale, “Damages in lieu of rescission for misrepresentation” [1995] 111 *Law Quarterly Review* 385.

10.23 There is also uncertainty about the proper measure of damages for innocent misrepresentations. The provision does not specify whether the measure of damages is contractual or tortious. Although there is general agreement that damages under section 2(2) should be lower than under section 2(1), the basis of an award under section 2(2) is uncertain. The judges in the leading case, *Williams Sindall v Cambridgeshire County Council*,¹⁶ did not come to a single view.¹⁷ 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.¹⁸

Damages for negligent misrepresentation and “the fiction of fraud”

10.24 Liability under section 2(1) of the Misrepresentation Act 1967 provides damages for loss caused by negligent misrepresentation. It is superficially simple and has the potential to work well for consumers. Yet consumer groups have indicated that this provision is not particularly helpful to them in practice.¹⁹ Part of the under-use stems from general factors, such as difficulties over what counts as a misrepresentation. Part of the problem relates to the clumsy fiction of fraud used to define liability.

10.25 Section 2(1) makes the defendant liable as if the misrepresentation had been made fraudulently. This roundabout wording causes considerable confusion. The leading case²⁰ suggests a defendant who has not acted fraudulently should pay damages designed for fraud, even though this harsher measure seems inapposite.²¹

10.26 We think it is right to provide damages for loss caused by negligent misrepresentation. However, section 2(1) is neither as clear nor as well-used as it should be.

¹⁶ [1994] 1 WLR 1016.

¹⁷ For discussion, see *Chitty*, para 6-101.

¹⁸ *Thomas Witter v TBP Industries* [1996] 2 All ER 573, 591.

¹⁹ Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010) paras 1.11 and 2.6; L Bello, *Waiting to be heard*. Consumer Focus (August 2009), p 17.

²⁰ *Royscott Trust v Rogerson* [1991] 2 QB 297.

²¹ J Cartwright, *Misrepresentation, mistake and non-disclosure* (2007), paras 7.17 to 7.18 and 7.34.

(4B) Remedies in Scotland

- 10.27 In Scotland, the remedy of reduction may only be granted by a court.²² The extent to which an aggrieved party may withdraw from (or rescind) a contract for misrepresentation or induced error, without seeking a decree of reduction, is uncertain.²³ 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.²⁴
- 10.28 The requirement under Scots law that *restitutio in integrum* must be possible before a transaction can be avoided is inflexible, capable of producing 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 be restored in terms of money. This would not represent damages, but would be a surrogate for restitution.²⁵ The need for a more flexible approach is particularly apparent in the consumer context.
- 10.29 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.
- 10.30 As for the fiction of fraud, it is now thought that section 10 of the 1985 Act does not equate negligent misrepresentations with those which are fraudulent.²⁶ However, the consumer must still establish a case in negligence.

PROBLEMS WITH THE LAW ON AGGRESSIVE PRACTICES

- 10.31 The law of misrepresentation provides redress for misleading practices, but it is overly complex and uncertain. By contrast, the 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. In short, the current law provides little redress for unscrupulous, and often commission-based, hard selling.

²² 13 *Stair Memorial Encyclopaedia*, para 25 and the following.

²³ McBryde, 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” (ibid). See, for example, *MacLeod v Kerr* 1965 SC 253, where however the issue is not addressed satisfactorily.

²⁴ This is the position in England and Wales, where no formality requirements attach to rescission. See *Chitty*, para 22-030.

²⁵ Scottish Law Commission, *Defective Consent and Consequential Matters*, CM 42, 1978, paras 4.2 to 4.4.

²⁶ See opinion of Lord Carloway in *Hamilton v Allied Domecq plc* 2001 SC 829 and Joe Thomson, “Misrepresentation”, 2001 SLT (News) 279, 281; see also discussion at para 5.39, fn 55, of this Consultation Paper.

- 10.32 The Consumer Protection from Unfair Trading Regulations 2008 highlight problems such as “creating the impression that the consumer cannot leave the premises until a contract is formed”,²⁷ or “conducting personal visits to the consumer’s home and ignoring the consumer’s requests to leave or not to return”.²⁸ The law does not provide adequate redress in these circumstances.
- 10.33 We have been told that these high-pressure techniques are common, and an increasing problem for elderly consumers, especially when the selling took place in their homes. Below we look at the problems that have arisen in the mobility aids market, as a case study in the effects and difficulties of aggressive practices, though the problems are by no means confined to this area. We then examine the gaps in the current law.

A CASE STUDY: THE MOBILITY AIDS MARKET

- 10.34 In 2008, the market for mobility aids was estimated at around £500 million and rising. It includes mobility scooters, adjustable beds, recliner chairs, stair lifts and bath hoists. Purchasers are typically older residents. Many live alone, are socially isolated and vulnerable by reason of physical or mental disabilities. With an ageing population this market 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.²⁹ This is set to rise to 1.4 million by 2033.
- 10.35 There are increasing complaints about misleading and aggressive practices in this sector. For example, in 2009, 5,000 complaints about companies selling mobility aids were made to Consumer Direct, a 20% increase on the previous year.³⁰ The Office of Fair Trading (the OFT) are currently undertaking a study of the market.³¹
- 10.36 Derbyshire County Council received 603 complaints in 2010, and describes the problems as follows:

A significant minority of unscrupulous traders will take advantage of vulnerable residents by implying that they are from or working on behalf of Social Services or the Health Service and will use high pressure sales techniques to sell products at inflated prices which are of little benefit to the user.³²

²⁷ Banned practice 24, sch 1, Regulations.

²⁸ Above, banned practice 25.

²⁹ 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.

³⁰ See <http://www.offt.gov.uk/news-and-updates/press/2010/120-10>

³¹ See OFT press release 16 February 2011.

³² Derbyshire County Council, *Meeting with Cabinet Member – Communities, Report of the Strategic Director Cultural and Community Services, Action taken against rogue traders selling mobility aids* (4 October 2010), para 2.1.

10.37 The BBC television programme *Rogue Traders* sent one of its team to train undercover as a salesperson for a company. The programme illustrated how the company concentrated on gaining the maximum prices for its goods. In a training exercise trainees were instructed how to sell a product retailing for less than £500 for £2100. The commission structure was designed to encourage high prices. For example, if a particular product was sold for £1000, the salesperson received a 12% commission on the first £1000 and 50% commission on anything over £1000. A salesperson provided the following anecdote, to set the tone of the training:

I went to this house, it was the scruffiest smelliest awful house you've ever seen in your life. So I sold him a dual Balmoral bed for £5300. Went back [... and] sold him a Midi 4 Plus for £5200 [a scooter which the company sold for only £3200] and then a couple of days later I went back to deliver his scooter and managed to sell him a rise and recline chair for £4600. So all together I got £15000 out of that one customer.³³

10.38 In May 2004, the OFT published a report on the doorstep selling market,³⁴ which found that doorstep prices were significantly higher than the in-store price, with recliner chairs, for example, being sold on the doorstep for 144% of the store price.

10.39 Clearly, in a free market, traders are entitled to charge whatever they wish. The problem arises when the process is accompanied by high pressure sales techniques. These include:

- (1) Implying a connection with social services or an old-age charity;
- (2) Preying on the elderly person's fear of losing their independence;
- (3) Writing out cheques and order forms for the victim when the victim is unsure as to the amount that will be payable or the terms of the agreement; and
- (4) Coupling expensive products with credit agreements to make the price appear more palatable by pointing out how "low" the monthly repayments are.

10.40 An example of expensive credit arrangements was given by a viewer of the *Rogue Traders*' item:

When my mother said she could not afford the whole price [£1,700 for an adjustable chair], he offered her a credit arrangement... . He never told her the total price or the interest rate, merely saying it would cost her 'just' £62 per month for five years, total cost £3,720. The market rate for similar chairs on the high street is around £600 - £800.

³³ See http://www.bbc.co.uk/blogs/watchdog/2010/06/rogue_virgo_healthcare.html

³⁴ OFT, *Doorstep Selling: Annexe I – Price Variability for Mobility Aids* (May 2004).

- 10.41 However, the most common tactic is simply to wear down the consumer by staying for two to four hours, ignoring requests to leave. In October 2007, the BBC's *Rogue Traders* investigated another mobility firm. As the BBC website observed:

We invited one of their salesmen to our house filled with secret cameras. The actress playing the part of a potential customer had to object more than 20 times before the salesman finally left two and a half hours after he'd arrived.³⁵

Existing avenues of redress

The right to cancel

- 10.42 Consumers' main redress in these circumstances is the right to cancel the contract within 7 days (which will soon be extended to 14 days). This applies to all door-step sales. However, some tactics are aimed specifically at reducing the likelihood of consumers exercising this right. In a 2009 edition of *Rogue Traders*, the undercover reporter attending training was told to encourage purchasers to delay informing their family of their purchase. An example was given:

Do you want to fall out with your son? Course you don't tell him. Now after a couple of weeks you might feel guilty. Then you can say to him, do you know what I did, I've bought a Craftmatic bed.

- 10.43 Other ways of discouraging cancellation were to deliver the items as quickly as possible and to help to unpack the items when they arrived.
- 10.44 However, 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. Elderly people 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.

Criminal prosecution

- 10.45 There have been several high profile prosecutions. For example, in June 2010, Craftmatic was fined £30,000 by Abertillery Magistrates.³⁶ BBC Northern Ireland reported that the same firm was also fined £250 by Belfast Magistrates in September 2010 after subjecting an elderly couple to aggressive practices.³⁷
- 10.46 However, criminal prosecution may not be sufficient to prevent the problem. One difficulty is that the fines may be low in relation to the profits involved. Another problem is that firms which become insolvent may re-emerge as phoenix companies. The new firm therefore continues trading in much the same (aggressive) way as the former company.

³⁵ 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)

³⁶ See <http://www.southwalesargus.co.uk/news/>, *Bed company fined for aggressive selling to OAP* (2 June 2010).

³⁷ See <http://www.bbc.co.uk/news/uk-northern-ireland-11220767>

- 10.47 For example, in October 2007, the BBC's *Rogue Traders* investigated a mobility firm called Prestige Mobility Limited. Prestige Mobility went into liquidation, but the director had already incorporated another company, Instant Mobility Limited, which traded in the same field. Instant Mobility went into insolvent liquidation in 2008 owing in excess of £1 million.³⁸ Nonetheless, another company incorporated by the same director, Lifestyle Plus (UK) Limited, started to trade.
- 10.48 There are provisions for dealing with phoenix companies, but they require public resources to enforce. In December 2009, The *Mirror* reported that Leeds-based More Than Mobility Ltd was wound up on public interest grounds following an investigation by the Government Insolvency Service. *The Mirror* reported that company's victims ranged from 79 to 97, and had suffered many of the practices described above. Three directors who had been involved in two other companies that earlier went into voluntary liquidation were convicted of offences under the Directors' Disqualification Act 1986.

Part 8 Enterprise Act

- 10.49 Trading standards departments and the Office of Fair Trading also have the powers under Part 8 of the Enterprise Act 2002 against rogue traders. This, however, can result in multiple court hearings over a prolonged period.
- 10.50 In December 2010, Derbyshire County Council reported that the owner of a mobility company was given a suspended prison sentence for contempt of court, after breaching two successive orders under the Enterprise Act 2002. The council website states that the first order had been granted more than 12 months earlier but the trader had continued to use misleading and aggressive practices:

Derbyshire County Council was granted an interim injunction in October 2009 ordering Gill - trading as ABM Mobility - to trade legally and fairly. This followed more than 100 complaints to the county's trading standards from the public. Investigations by Derbyshire County Council revealed that the company was still using misleading and aggressive sales practices. A second injunction was granted in January 2010. The injunction barred Gill from deceiving customers, using aggressive practices, making claims that they were acting on behalf of a government body or that sales staff were medically trained.³⁹

The response of legitimate traders

- 10.51 Legitimate mobility aid traders are concerned about rogue traders, who threaten to undermine consumer confidence in the whole market. The response has been to establish the British Healthcare Trades Association, which has a Code of Practice approved by the OFT.⁴⁰ Among other things members have agreed not to use the following selling techniques:

³⁸ 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)

³⁹ See http://www.derbyshire.gov.uk/news_events/news/2010/december/news_items/judge_rules_mobility_company_owner_in_contempt.asp

⁴⁰ Available at <http://www.bhta.net/resources/1/Code-of-Practice/BHTA-Code-of-Practice.pdf>

- (1) An unreasonably long stay in the customer's home, which should not exceed three hours unless there are exceptional circumstances;⁴¹
- (2) A high initial price followed by a discount (and then possibly followed by a telephone call to the "manager"); and
- (3) Withholding price information until the end of the sales discussion/visit.

10.52 Customers have the right to take complaints to the British Healthcare Trades Association's independent arbitrator, who has power to order the member to repay all money paid by the complainant and provide compensation to the customer (depending on the circumstances).⁴²

Conclusion

10.53 Aggressive practices are a significant problem, and likely to become more of an issue as more elderly consumers live alone. Aggressive practices hurt vulnerable people, undermine legitimate traders and reduce consumer confidence. The practices of a rogue double-glazing firm investigated by Leicestershire trading standards starkly illustrate the problem:

David Bull, head of Leicestershire County Council's trading standards, said: "It is sickening that older people are being threatened with fictitious taxes or fines, the loss of benefits or even death.

We are very concerned that this firm is deliberately targeting older people and we would urge people and their relatives to report all cases to us via Consumer Direct... .

Reputable companies do not pressurise or threaten people".⁴³

10.54 Aggressive practices have proved difficult to eradicate. There is a case for a mixed strategy, using a variety of techniques, including criminal prosecution, orders under Part 8 of the Enterprise Act 2002 and civil sanctions under the proposed Pilot.⁴⁴ We think that enforcement action should, where possible, be accompanied by appropriate compensation (which may be ancillary to public enforcement action or brought independently through the civil courts).

10.55 As we explore below, the current civil law is inadequate to deal with aggressive practices. It is in need of reform.

⁴¹ Above, para 13.5 of the BHTA Code of Practice.

⁴² Above, para 17.11 of the BHTA Code of Practice.

⁴³ See BBC News Leicester, *Death threat sales in Leicestershire probed* (16 February 2011); also see discussion at para 7.15 of this Consultation Paper.

⁴⁴ See paras 4.35 to 4.37 of this Consultation Paper.

GAPS IN PROTECTION AGAINST AGGRESSIVE PRACTICES

England and Wales

- 10.56 As we say in Part 7, there are several potential causes of actions for those who have suffered from aggressive practices. However, they are all limited and unsuited to the type of consumer problem we are discussing. Below we provide a brief summary of the main problems with each.

Duress

- 10.57 Consumers' main protection against aggressive practices lies in the law of duress. This would appear to provide a remedy where there are threats of physical violence or damage to property. However when the pressure tactics do not include overt threats it is difficult to tell whether relief would be available.
- 10.58 Factors such as protests at the time of the threat, alternative courses of action, and steps taken to avoid the contract afterwards are prominent in the case law on duress. This appears inconsistent with the main thrust of duress, which is on the wrongfulness of the defendant's conduct. Moreover, vulnerable consumers are often unlikely to react at all, other than submitting to the threats, so that this approach to assessing duress prejudices their chances of succeeding. The lack of a clear remedy in damages may also cause hardship where the consumer has suffered consequential losses.
- 10.59 In English law, delay in taking action will be likely to bar a claim under the law of duress. The doctrine of duress demands that the consumer should usually take action to rescind the contract as soon as the duress ceases. This means that a consumer is required to take action as soon as the salesman leaves. If action is taken a month later, following advice from a relative, the right to rescind for duress will usually have been lost.⁴⁵

Undue influence

- 10.60 As with duress, undue influence does not provide a remedy in damages but only provides grounds for avoiding the contract.⁴⁶ Moreover, undue influence applies most clearly where there is a special relationship of trust and confidence between the parties. Many cases involved husbands and wives,⁴⁷ spiritual advisers and fiduciary-like relationships.⁴⁸ 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 a less than likely source of redress for consumers.

⁴⁵ See paras 7.23 to 7.24 of this Consultation Paper.

⁴⁶ This is subject to the possibility of "equitable compensation" discussed at para 8.32 of this Consultation Paper.

⁴⁷ See eg *Bank of Montreal v Stuart* [1911] AC 120; *National Westminster Bank Plc v Morgan* [1985] AC 686; *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 and *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773; *Royal Bank of Scotland Plc v Chandra* [2011] EWCA Civ 192, [2011] New Property Cases 26.

⁴⁸ See eg *Morley v Loughnan* [1893] 1 Ch 736 and *Allcard v Skinner* (1887) 36 Ch D 145, discussed at paras 7.36 to 7.38 of this Consultation Paper.

Unconscionable bargains

- 10.61 The doctrine of unconscionable bargains is potentially useful to consumers as it addresses three key concerns: (1) an oppressive bargain; (2) vulnerability of the victim; and (3) reprehensible behaviour by the trader. The thrust of this cause of action lies in curbing the defendant's abuse of power. Yet in order to be effective, the court's jurisdiction to grant redress on this basis needs to be certain. By contrast, the very existence of this form of relief is highly dubious so it cannot deliver effective consumer protection.⁴⁹

Harassment

- 10.62 The Protection from Harassment Act 1997 (which also applies in Scotland) is a potentially good tool for consumers. Whereas there are few reported cases, and the Act was directed principally at "stalkers", it provides a simple, clear cause of action against harassing behaviour in general. The drawback is the requirement for a "course of conduct", which means that a single, highly invasive incident will not be enough. Some of the worst abuses often involve a single incident.

Scotland

- 10.63 In Scots law, the equivalent to the doctrine of duress is known as "force and fear". The cases confirm that it must always be specifically averred and clearly proved.⁵⁰ It suffers from the same limitations discussed above for duress.⁵¹ In Scots law, generally speaking, a short period of delay is, however, unlikely to bar the exercise of a right unless there are strong indications of unfairness to the person pleading bar; but excessive, unexplained delay may form the basis of bar, even if such indications of unfairness are barely present.⁵²
- 10.64 As for undue influence, while Scots law is generally similar to English law, there is no presumption of undue influence.⁵³ In theory, the Scottish consumer has to prove the elements needed for any case based on these grounds. Closer analysis of Scots law, however, shows that the law comes quite close in effect to having a presumption in undue influence cases, since they involve the existence of some relationship of dependence before the parties formed their contract.⁵⁴ But again, this does not arise in many consumer cases.

⁴⁹ See paras 7.52 to 7.58 of this Consultation Paper.

⁵⁰ *Priestnell v Hutcheson* (1857) 19 D 495 at 500 and *Wolfson v Endleman* 1952 SLT (Sh Ct) 97 at 98.

⁵¹ Although force and fear may give rise to a damages claim: see paras 7.11 to 7.29 of this Consultation Paper.

⁵² See Reid and Blackie, para 3-07.

⁵³ See paras 7.32 and 7.41 of this Consultation Paper.

⁵⁴ Above, paras 7.43 to 7.44.

- 10.65 Scots law has an undeveloped doctrine to deal with extortionate contracts, known as “lesion”. Like the English law of unconscionable bargains, this 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.⁵⁵ 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.
- 10.66 Again there is a need to simplify and widen the scope of consumer protection. We do note, however, that the doctrine of facility and circumvention, with its underlying idea that vulnerable people need stronger protection against exploitation, provides at least a pointer towards the balance that might be struck.⁵⁶

THE NEED FOR REFORM

A right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations?

- 10.67 In Part 11 we will consider the Irish approach, which has granted consumers a private right of redress for all breaches of the Unfair Commercial Practices Directive.⁵⁷
- 10.68 In 2008, the Law Commission warned that simply adding a private right of redress 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.⁵⁸

This might be especially true for property developers and financial services.

- 10.69 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 consumers not involved in the litigation.

⁵⁵ *AB v Joel* (1849) 12 D 188; *MacLachlan v Watson* (1874) 1 SLR 549; *Tennent v Tennent's Trs* (1870) 8 M (HL) 10; *Mathieson v Hawthorns & Co Ltd* (1899) 1 F 468; and *Welsh v Cousin* (1899) 2 F 277.

⁵⁶ For the law of facility and circumvention, see paras 7.45 to 7.47 of this Consultation Paper.

⁵⁷ See Consumer Protection Act 2007 (Ireland), s 75, discussed at paras 11.4 to 11.9 of this Consultation Paper.

⁵⁸ Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department of Business, Enterprise and Regulatory Reform on the issues raised* (November 2008), para 4.9.

- 10.70 It was also pointed out that public and private enforcement have different goals. Some banned practices, in particular, may undermine the market generally, while imposing few costs on individual consumers. For example, it is often difficult to determine the effect of false “closing down sales”⁵⁹ or “bait and switch tactics”⁶⁰ on any individual consumer. Automatic liability for banned practices could result in small, frivolous claims.
- 10.71 Businesses were particularly worried about being made liable for omissions. The Regulations impose a duty to disclose material information. “Material information” is defined as what an average consumer would require to make “an informed transactional decision”.⁶¹ The Regulations list factors that will be relevant to helping decide about materiality where the commercial practice is an “invitation to purchase”.⁶² Nonetheless, the criterion is still extremely vague and leads to considerable uncertainty.⁶³ Businesses were concerned that whilst they could easily agree to provide more information, it would be more difficult to react to a multitude of varied consumer claims.
- 10.72 We accept that many of the concepts within the Regulations are new and uncertain, and unsuited to a private right of redress. In Parts 12 to 15, we outline a limited and cautious reform.
- 10.73 We are proposing a new consumer statute. The proposed Act would provide redress for misleading and aggressive acts which would be a decisive factor in influencing the average consumer to enter a contract or make a payment. However, it does not include liability for omissions, for banned practices, or for breach of the general prohibition on practices which are “contrary to the requirements of professional diligence”.⁶⁴

⁵⁹ Banned practice 15, sch 1, Regulations: Claiming that the trader is about to cease trading or move premises when he is not.

⁶⁰ In these cases, the trader does not reasonably believe they will be able to supply the product on the terms promised to consumers. See banned practice 6, sch 1, Regulations: 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).

⁶¹ Reg 6 (3).

⁶² Reg 6(4).

⁶³ H Collins, “Harmonisation by example: European laws against unfair commercial practices” (2010) 73(1) *Modern Law Review* 89, 105 to 106.

⁶⁴ Article 5 of the Directive, implemented by Reg 3(3).

Question 1

Do consultees agree that there is a need for statutory reform to:

- (1) Simplify and clarify private redress for misleading practices?**
- (2) Extend private redress for aggressive practices?**

Question 2

Do consultees agree that there should not be a private right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008?

- 10.74 In the next Part, we consider how the law protecting consumers from misleading and aggressive practices has developed in other jurisdictions. The law that is potentially applicable in respect of any one jurisdiction is vast, spanning most areas of private law from contract, to tort and unjust enrichment. We therefore only consider some of the more salient aspects of foreign law which more closely mirror UK legal doctrines.

PART 11

LESSONS FROM OTHER JURISDICTIONS

- 11.1 This Part considers private rights for misleading trade practices in other jurisdictions. We look at developments in Ireland, Australia, the USA and New Zealand. We also consider the principles set out in the Draft Common Frame of Reference (DCFR), which formulates model rules for European private law. We hope that these varied solutions will contribute to the UK debate by highlighting the advantages and disadvantages of alternative systems.
- 11.2 These examples cover a range of approaches. Some are very general. For example, Irish law provides damages for any breach of the Unfair Commercial Practices Directive, leaving the details to the discretion of the courts. Others, such as the DCFR, are more specific.
- 11.3 Another difference is that in Australia misleading statements are considered similar to torts: the law aims to restore consumers to the position they were in before the loss took place. Similarly, in the US, the emphasis is on giving back the purchase price, with enhanced damages in egregious cases. By contrast, New Zealand takes a contractual approach, aiming to put consumers into the position they would have been had the statement been true. The DCFR also puts emphasis on fulfilling consumers' "reasonable expectations".

IRELAND

- 11.4 The Republic of Ireland has granted consumers a private right of redress for all breaches of the Unfair Commercial Practices Directive.¹ The Directive was implemented into Irish law by means of the Consumer Protection Act 2007 (the 2007 Act).² Under the 2007 Act, misleading and aggressive practices are both civil wrongs and criminal offences.³
- 11.5 Under section 74 of the 2007 Act, a consumer may bring an action for damages against:
- (1) any trader committing or engaging in a prohibited practice; or
 - (2) in the case of a corporate body, "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".⁴

¹ For a list of the other EU countries that granted a private right of redress, see Directorate-General for Internal Policies, Internal Market and Consumer Protection (IMCO), *State of play of the implementation of the provisions on advertising in the unfair commercial practices legislation*, July 2010, s 2.6.1.

² The text of the Act is available at <http://www.irishstatutebook.ie>

³ 2007 Act, ss 42, 43, 47 (misleading practices), 52, 53 and 54 (aggressive practices).

⁴ Above, s 74(2).

- 11.6 The court may also award exemplary damages.⁵ It seems, however, that so far no case under section 74 has reached the superior courts.
- 11.7 Under the 2007 Act, the National Consumer Agency has responsibility for enforcing the Act and encouraging compliance.⁶ It may seek an order prohibiting a trader from committing a misleading or aggressive practice.⁷ It may also issue compliance notices,⁸ and accept undertakings from traders.⁹
- 11.8 The National Consumer Agency also has the power to obtain compensation on behalf of consumers. For example, undertakings may be aimed at compensating “consumers or a class of consumers, including reimbursing any money or returning any other property or thing received from consumers”.¹⁰ Moreover, if a trader is found guilty of an offence under the 2007 Act, the National Consumer Agency may seek a compensation order on behalf of a consenting consumer.¹¹ In such a case, the compensation may not “exceed the amount of damages that ... the aggrieved consumer would be entitled to recover in an action under section 74”.¹²
- 11.9 Given the width and potential impact of section 74, it seems to have generated surprisingly little interest. We have not been able to find any academic discussion of the section.

AUSTRALIA

The Trade Practices Act 1974

- 11.10 As in the UK, misleading and aggressive practices are governed by both common law and statute. The legal tool most commonly used to deal with misleading practices is the Trade Practices Act 1974 (the TPA).¹³ This is a federal Act, which provides for both public and private enforcement.
- 11.11 The States and Territories have also enacted consumer protection legislation providing for actions for damages.¹⁴

⁵ Above, s 74(3).

⁶ Above, ss 7 and 8: for example, the National Consumer Agency can take prosecutions.

⁷ Above, s 71.

⁸ Above, s 75.

⁹ Above, s 73.

¹⁰ Above, s 73(4)(c).

¹¹ Above, s 81(1).

¹² Above, s 81(3)(b).

¹³ For a general overview of the Act, see Russell V Miller, *Annotated Trade Practices Act* (15th ed 1994); G Q Taperell, R B Vermeesch, D J Harland *Trade Practices and Consumer Protection. A Commentary on the Trade Practices Act 1974* (2nd ed 1978); B Lloyd “An overview of trade practices law in Australia”(1999) *International Company and Commercial Law Review* 138; D Harland, “The statutory prohibition of misleading or deceptive conduct in Australia and its impact on the law of contract” *Law Quarterly Review* (1995) 100.

¹⁴ By way of illustration, see the Fair Trading Act 1999 (Victoria) s 159(1); Fair Trading Act 1987 (New South Wales) s 68(1); Fair Trading Act 1989 (Queensland) s 99(1).

Misleading practices under section 52

- 11.12 Under section 52(1) of the TPA, “a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”. The intent of the defendant is not relevant.¹⁵
- 11.13 The TPA provides a wide range of remedies for a breach. These include “public remedies”, such as community service orders,¹⁶ and adverse publicity orders.¹⁷ It also includes private law remedies such as:
- (1) Damages;¹⁸
 - (2) An order declaring the whole or part of a contract void;¹⁹
 - (3) An order varying a contract in such a manner as the court thinks fit;²⁰ and
 - (4) An order refusing to enforce any or all of the provisions of a contract.²¹
- 11.14 The most important remedy is damages, which we consider in more detail below.

Damages under section 82

- 11.15 Section 82(1) gives consumers the right to claim damages for losses caused by breaches of the TPA:
- A person who suffers loss or damage by conduct of another person that was done in contravention of [the relevant provisions] may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.²²
- 11.16 The phrase “by conduct” has been interpreted to mean that the loss or damage must be caused by the contravening conduct.²³ Harland explains that:

¹⁵ *Hornsby Building Information Centre Pty v Sydney Building Information Centre Pty Ltd* [1978] HCA 11.

¹⁶ TPA, s 86C.

¹⁷ Above, s 86D.

¹⁸ Above, s 82.

¹⁹ Above, s 87(2)(a).

²⁰ Above, s 87(2)(b).

²¹ Above, s 87(2)(ba).

²² Part V of the Act focuses on unfair practices, including misleading or deceptive conduct (s 52) and false or misleading representations (s 53).

²³ *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

It has not infrequently happened that, although misleading or deceptive conduct has been established, an action claiming damages under section 82 has nonetheless failed because the applicant was unable to prove that he or she suffered any loss or damage as a result of that conduct.²⁴

This will be the case where, for example, the misleading conduct did not in fact induce the applicant to enter into the contract.

11.17 The TPA does not prescribe the measure of damages recoverable for contravention of section 52. Accordingly, it is a matter of judicial interpretation to determine the appropriate measure of damages.²⁵

11.18 The courts have repeatedly held that damages under section 82 are assessed on a tortious rather than contractual basis.²⁶ The rationale behind this line of decisions is that misleading and deceptive conduct is similar both in character and effect to torts, particularly fraudulent misrepresentation and negligent misstatement.²⁷ As the court put it in *Brown v Southport Motors*:

the question... is not how much better off the applicant would have been if she had entered the contract and the representations had been true. Rather, the question is how much worse off is the applicant by reason of the contract induced by the misrepresentations than she would have been if she had not entered that contract at all.²⁸

11.19 However, the courts are not confined by the case law on actions in contract or tort.²⁹ Nor are they bound to make a definitive choice between the two measures of damages.³⁰

11.20 "Loss or damage" in section 82(1) plainly includes economic or financial loss.³¹ Damages for mental distress may also be awarded in appropriate cases.³² Evans observes that "claims have been made by travel clients for damages for disappointment or distress following alleged breaches of s 52 of the TPA".³³

²⁴ D Harland, "The statutory prohibition of misleading or deceptive conduct in Australia and its impact on the law of contract" (1995) *Law Quarterly Review* 100, 119.

²⁵ *Gates v City Mutual Life Assurance Society Ltd* [1983] FCA 23. See also S Writer, L Castle "A trying process: enforcing private rights under the Australian Trade Practices Act 1974: Part 1" (2002) *International Trade Law & Regulation* 19.

²⁶ See *Brown v Hooker (Vic) Limited* [1981] FCA 35; *Mister Figgins v. Centrepoint* [1981] FCA 15; and *Gates v City Mutual Life Assurance Society Ltd* [1983] FCA 23.

²⁷ See eg *Gates v City Mutual Life Assurance Society Ltd* [1983] FCA 23.

²⁸ [1982] FCA 134.

²⁹ *Marks v GIO Australia Holdings* [1998] HCA 69.

³⁰ *Gates v City Mutual Life Assurance Society Ltd* [1983] FCA 23.

³¹ *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514.

³² D Harland, "The statutory prohibition of misleading or deceptive conduct in Australia and its impact on the law of contract" (1995) *Law Quarterly Review* 100, 121.

³³ P Evans, "Spoiled Holidays: Damages for Disappointment or Distress" (2004) 6 *The Tourism Industry* 1, 6.

- 11.21 The private right of action under section 82 is premised on the idea that private litigation is more effective than public enforcement. In a 1994 report the Australian Law Reform Commission concluded that:

The TPA is a vital piece of economic legislation. *Private enforcement is likely to be the most effective way of enforcing the Act and is essential to its success.* [emphasis added]³⁴

- 11.22 However, commentators have observed that businesses themselves have taken advantage of the statute, and consumers have been relegated to a lesser role, largely because of litigation costs.³⁵

Academic views on the Trade Practices Act 1974

- 11.23 According to Carter and Skapinker, the Act has had a wide impact.³⁶ They argue that the reform is “more sweeping than that which took place in England with the enactment of the Misrepresentation Act 1967”. Thus, in Australia, “the relevance of the general law of misrepresentation has diminished considerably in the past 20 years”.³⁷
- 11.24 Different commentators have pointed to the wide range of activities that may potentially be caught by the TPA. These include property transactions,³⁸ auditors³⁹ and universities’ marketing practices.⁴⁰

³⁴ Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68, (1994) paras 1.4, 5.1 and 7.1. The report is available at <http://www.austlii.edu.au>

³⁵ A Terry “Consumer Protection for Business Interests: the Application of section 52 Trade Practices Act to Commercial Negotiations” (1987) 10 *University of New South Wales Journal* 260 – 261; B Kercher, R Thomas “The Reform of Insurance Law: Caveat Emptor survives” (1987) 10 *University of New South Wales Journal* 173.

³⁶ See also D Harland, “The statutory prohibition of misleading or deceptive conduct in Australia and its impact on the law of contract” (1995) *Law Quarterly Review* 100 at 125. See also W D Duncan “Is silence still golden? Misrepresentations in land dealings and the Trade Practices Act 1974 (Cwth)?” (1988) 4 *Queensland University of Technology Law Journal* 31.

³⁷ J W Carter, D Skapinker, “Breach of contract and misleading or deceptive conduct in Australia” (1997) *Law Quarterly Review* 294, 295.

³⁸ D M Collins “The disclosure of stigma events in property transactions” (2008) *Conveyancer and Property Lawyer*, 55; D Skapinker “The Liability of Non-Corporate, Private Vendors of Land under section 52 of the Trade Practices Act 1974 (Cth)” (1991) 13 *Sydney Law Review* 197.

³⁹ M Rajacic, P Rajapakse and E Webb, “The Impact of the Trade Practices Act 1974 (Cth) on the Liability of Auditors” (2000) 19(2) *University of Tasmania Law Review* 236.

⁴⁰ F Rorke, “The Application of the Consumer Protection provisions of the Trade Practices Act 1974 (Cth) to Universities” (1996) 12 *Queensland Institute of Technology Law Journal* 176.

THE UNITED STATES⁴¹

The Federal Trade Commission (FTC)

11.25 The FTC's role is to protect US consumers from unfair business practices. Under the Federal Trade Commission Act:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.⁴²

11.26 The Act does not define "unfair or deceptive acts or practices". However, the FTC Policy Statement on Deception (1983) sets out three criteria for determining whether a practice is deceptive:⁴³

- (1) *There must be a representation, omission or practice that is likely to mislead the consumer.* The issue is whether the practice is likely to mislead, rather than whether it causes actual deception.
- (2) *The act or practice must be considered from the perspective of the reasonable consumer.* It must be likely to mislead reasonable consumers under the circumstances. Where practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group.
- (3) *The representation, omission or practice must be material.* A material misrepresentation or practice is one which is likely to affect a consumer's choice or conduct regarding a product. There is a presumption that certain categories of information are material, including claims about the safety or the central characteristics of the product.⁴⁴

11.27 The FTC has a range of powers to address acts and practices which are unfair and deceptive. For example, it can make "cease and desist orders", order infringers to disclose information to consumers, and impose corrective advertising.⁴⁵

11.28 The FTC may also apply to the court for injunctions and temporary restraining orders. The statute does not expressly refer to monetary remedies. However, the courts have held that injunctive relief may include different forms of monetary recovery, such as disgorgement of profits and restitution.⁴⁶

⁴¹ The leading text relied on in this section is American Bar Association (ABA) Section of Antitrust Law, Consumer Protection Law Developments (2009).

⁴² Federal Trade Commission Act, s 5(1). The statute was originally enacted in 1914.

⁴³ This Policy Statement can be read at <http://www.ftc.gov>. See also ABA Section of Antitrust Law, Consumer Protection Law Developments (2009) pp 2 to 6.

⁴⁴ See the FTC Policy Statement on Deception. ABA Section of Antitrust Law, Consumer Protection Law Developments (2009) p 3.

⁴⁵ ABA Section of Antitrust Law, Consumer Protection Law Developments (2009) pp 257 to 266.

⁴⁶ Above, p 277.

State legislation

11.29 State legislatures have enacted legislation prohibiting unfair commercial practices. These laws either reproduce the provisions of the Federal Trade Commission Act, or take the form of “Uniform Deceptive Trade Practices Acts”.⁴⁷

11.30 Most States confer a private right of redress on consumers. As the American Bar Association comments:

Almost every state provides a right of recovery by consumers of actual monetary damages for UDAP [unfair and deceptive acts and practices] violations. The purpose behind most deceptive practices is to induce consumers to purchase a product or service; accordingly, monetary damages are most often computed as the amount spent by consumers on these products or services. Many states also provide for enhanced damages in egregious cases. The most common formula is to increase damages, at the court’s discretion, often trebling the actual monetary damages.⁴⁸

11.31 Most States also allow their attorney generals to obtain restitution for consumers,⁴⁹ and provide for class actions.⁵⁰

11.32 An example is New York’s General Business Law,⁵¹ Article 22-A (Consumer Protection from Deceptive Acts and Practices), which prohibits “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service”.⁵² The Act gives consumers a private right of redress:

... any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section.⁵³

⁴⁷ Above, p 375.

⁴⁸ Above, pp 383 to 384.

⁴⁹ Above, p 382.

⁵⁰ Above, p 383.

⁵¹ Part of the consolidated laws of the state of New York.

⁵² See in particular s 349, available at <http://public.leginfo.state.ny.us>

⁵³ S 349(h). See also ABA Section of Antitrust Law, Consumer Protection Law Developments (2009) p 521.

NEW ZEALAND

Background to the Contractual Remedies Act 1979

11.33 Before 1979, the position in New Zealand was similar to UK law.⁵⁴ However, the Contractual Remedies Act 1979 (the 1979 Act) takes a wholly different approach. It treats misrepresentations as contract terms, abolishing the distinction between contractual and non-contractual misrepresentations.

11.34 The 1979 Act was based on a report by the Contracts and Commercial Law Reform Committee. The Committee made a cutting critique of the complexity of the existing law, which:

constrained the courts to run through the gamut of classification from a statement without contractual intention through misrepresentation both innocent and fraudulent, in passing to ruminate upon the concept of a collateral contract, to the result that there was a misdescription amounting to a breach of condition.⁵⁵

11.35 The Committee thought that the answer was to treat all representations as undertakings under the contract:

The law of contract has as its basic aim the enforcement of undertakings, using the term "undertaking" in a broad sense to include representations. It is beside the point whether an undertaking was given on reasonable grounds or not; it suffices that it was given. The proper as well as the traditional approach is to look not at whether there was any fault on the part of the representor but at the expectations of the representee that naturally arise from the undertaking.⁵⁶

The main provisions of the 1979 Act

11.36 Section 6 of the 1979 Act states:

If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract –

- (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken;

11.37 Note that, unlike English and Scots law, the 1979 Act makes no distinction between innocent, negligent and fraudulent misrepresentations. Furthermore, the measure of damages for misrepresentation is contractual, not tortious.

⁵⁴ Misrepresentation and breach of contract. Report of the Contracts and Commercial Law Reform Committee (March 1967) chapters 5 and 6.

⁵⁵ Misrepresentation and breach of contract. Report of the Contracts and Commercial Law Reform Committee (March 1967) para 7.2, p 30.

⁵⁶ Contracts and Commercial Law Reform Committee, Report on Misrepresentation and Breach of Contract (March 1967) para 9.43, pp 34 to 35.

11.38 The victim of a misrepresentation has the right to cancel the contract. Under section 7, a party who has been induced to enter into a contract by the other party's misrepresentation may cancel the contract, provided certain conditions are met. The main condition is that the misrepresentation must "substantially reduce the benefit" or "increase the burden" of the contract to the cancelling party.⁵⁷ Under section 7(5), the right to cancel a contract for misrepresentation is lost if the innocent party affirms the contract.

11.39 Note that under the 1979 Act, cancellation is different from rescission. Section 8(3)(b) provides that:

So far as the contract has been performed at the time of the cancellation, no party shall, by reason only of the cancellation, be divested of any property transferred or money paid pursuant to the contract.

Thus only future obligations are discharged. No restitution takes place. As McLauchlan observes:

A representee is not entitled as of right upon "cancellation" to recover what he has parted with. Nor, indeed, is he obliged to return what he has received.⁵⁸

11.40 The 1979 Act also abolishes the previous actions for negligent and fraudulent misrepresentations.⁵⁹ McLauchlan states that this was seen as essential to meet the objective of simplifying the law.⁶⁰

11.41 Under section 9 the courts have wide discretionary powers to grant relief.⁶¹ The Court may grant relief, if it is "just and practicable to do so".⁶²

Criticisms of the 1979 Act

11.42 McLauchlan's evaluation of the 1979 Act is not positive:⁶³

The Act has not achieved its main objective of rationalizing and simplifying the law relating to misrepresentation and breach of contract.

⁵⁷ 1979 Act, s 7(4). Under section 7(5) of the same Act, the right to cancel a contract for misrepresentation is lost if the party entitled to cancel decides to affirm the contract.

⁵⁸ D W McLauchlan, "Contract law reform in New Zealand: the Contractual Remedies Act 1979" (1981) *Oxford Journal of Legal Studies* 284, 288.

⁵⁹ 1979 Act, s 6(b).

⁶⁰ D W McLauchlan, "Contract law reform in New Zealand: the Contractual Remedies Act 1979" (1981) *Oxford Journal of Legal Studies* 284.

⁶¹ McLauchlan is very critical of the courts' discretionary powers under s 9.

⁶² 1979 Act, s 9(1).

⁶³ D W McLauchlan, "Contract law reform in New Zealand: the Contractual Remedies Act 1979" (1981) *Oxford Journal of Legal Studies* 284, 289.

11.43 The contractual measure of damages under section 6 is criticised for three reasons:

- (1) The Act has not clarified what the position is in relation to non-disclosure.
- (2) The contractual measure poses problems when the tortious measure would be more favourable to the claimant. In some cases, section 6 deprives consumers of damages to which they were previously entitled.
- (3) There may be cases in which the contractual measure is unjust to the defendant: in these situations compensation of expectation loss may be questionable.⁶⁴

THE DRAFT COMMON FRAME OF REFERENCE⁶⁵

11.44 The Draft Common Frame of Reference (DCFR) is a document prepared by a distinguished group of academics for the European Commission. The DCFR will, as its title suggests, be the basis of the Common Frame of Reference (CFR). The CFR is intended to be a legislative “toolbox” to be used as an aid to produce consistent and coherent European Union legislation. It may also become the basis of an “optional instrument” that parties can chose instead of national law. The European Commission plans to complete the CFR during 2011.⁶⁶

11.45 The DCFR covers not only general contract law but also provides model rules for specific contracts, such as sale of goods, services, commercial agency, franchise and loans. Subsequent parts deal with other areas of law, including tort or delict, security in movable assets, unjustified enrichment and trusts. It is currently anticipated that the CFR will extend only to general contract law and sale of goods.

11.46 The DCFR adopts elements of existing EU legislation including the Unfair Commercial Practices Directive.⁶⁷ However the Directive is not incorporated as it stands. Instead it forms a source alongside other directives such as the Distance Selling Directives from which a more generalised set of rules on “information duties” has been constructed. These go alongside general provisions on mistake and misrepresentation in contract and tort or delict. The DCFR does not deal directly with liability for aggressive practices but these may be covered by general rules about the effect of coercion and unfair exploitation in contract law. It is also possible that the rules on tort or delict could apply.

⁶⁴ Above, pp 289 to 290.

⁶⁵ The full title of this document is Principles, Definitions and Model Rules of European Private Law.

⁶⁶ An Expert Group was appointed to review the DCFR in May 2010 and the European Commission published a Green Paper on European Contract Law in July 2010, COM(2010) 348.

⁶⁷ DCFR Book II Section “Information Duties” Chapter “Marketing and Pre-Contract Duties”.

Information duties

- 11.47 The DCFR has nine articles which deal with information duties.⁶⁸ The first imposes an obligation on a business to disclose information about the contract subject matter to the other party whether or not the other party is a consumer. When a business is marketing goods or services to a consumer the second article sets out specific duties not to mislead by misrepresentation or omission. The third article deals with a business' duty to provide information when concluding a contract with a consumer at a particular informational disadvantage (such as transacting on-line). Two other articles impose information duties on businesses when a contract is initiated by telephone or where a contract is formed electronically without individual communication. Further articles deal with clarity and the form in which information should be supplied; the duty to provide information about additional charges; and the duty to provide the identity and address of the business. A final article sets out the remedies available for breach of the information duties.
- 11.48 Of the nine articles, Article II.-3:102 (the duty not to provide misleading information) and Article II.-3:109 (remedies) are the most relevant to this project. Article II.-3:102 imposes a duty on a business when marketing "goods, other assets or services" to a consumer not to give misleading information. Information is misleading if it "misrepresents or omits material facts which the average consumer could expect to be given" when deciding whether to enter the contract. The article goes on to give examples of information which would be material including the main characteristics of the goods or services, the price, payment terms, delivery and complaint handling.
- 11.49 Article II.-3:109 states that if a business has breached Article II.-3:102 and the contract has been concluded then "the business has such obligations under the contract as the other party has reasonably expected as a consequence of the absence or incorrectness of the information." Furthermore, "whether or not a contract is concluded, a business which has failed to comply with any duty imposed by the preceding Articles of this section is liable for any loss caused to the other party to the transaction by such failure." Article II. 3:-109 cannot be excluded or varied to the detriment of a consumer.
- 11.50 If a contract has been concluded in breach of Article II 3:-102 a consumer is entitled to specific performance in accordance with the terms reasonably expected, or to termination, restitution, price reduction and damages with interest. Whether or not a contract has been concluded the consumer can recover any loss caused by the misleading actions including damages for suffering and impairment of the quality of life.⁶⁹
- 11.51 The DCFR goes further than many EU member states currently do (including the UK) in giving consumers a direct and specific right to remedies for breach of those information duties that are inspired by the Directive. This is especially the case with its provision of a right to damages whether or not the transaction between the trader and consumer has resulted in a contract.

⁶⁸ DCFR II.-3:101 to 3:109.

⁶⁹ DCFR, Definitions, "Loss".

Relevant rules in general contract law

- 11.52 Although the DCFR does not directly address the issue of aggressive commercial practices it does deal with coercion or threats (DCFR II.-7:206) and unfair exploitation (DCFR II.-7:207). In addition Article II-7:201 provides rules on mistake. All these grounds allow the wronged party to avoid the contract. The wronged party must give notice of avoidance within a reasonable time. Reasonable time is based on a period when the victim knew or could reasonably be expected to have known of the relevant acts and was capable of acting freely.⁷⁰ The victim may also claim damages provided the other party knew or could reasonably be expected to have known of the ground for avoidance.⁷¹ Damages are to place the victim in the position in which they should have been had the contract not been concluded.⁷² However if the contract has not been avoided then the measure of damages is the sum that will place the victim in the same position as if the contract has been properly performed.⁷³ Damages for breach of the DCFR on these grounds are similar to ordinary damages for breach of contract. Finally if mistake has occurred the party at fault may “cure” the error by performing the contract as understood by the other party. In that event the victim’s notice of avoidance becomes ineffective.⁷⁴
- 11.53 Mistake does not have to be based upon a misrepresentation to allow avoidance. Instead the mistake must be such that, but for it, the mistaken party would have concluded the contract on fundamentally different terms and the other party knew or could reasonably be expected to have known this.⁷⁵ Failure to comply with a pre contract information duty, in particular the duty not to provide misleading information, may ground a claim of mistake in this context.⁷⁶ A trader who caused a mistake or who knowingly allowed a contract to be concluded in mistake would also be covered. It does not matter whether the mistake arose because of an active misrepresentation or an omission.
- 11.54 The DCFR specifically deals with fraud. A fraud may be caused by misrepresentation by words or by conduct or by non-disclosure “of any information which good faith and fair dealing, or any pre-contractual information duty, required [the party concerned] to disclose”.⁷⁷ A non-disclosure is fraudulent if it is intended to induce the other person to make a mistake.⁷⁸ In the event of fraud the wronged party is entitled to avoid the contract and seek damages for any loss caused.

⁷⁰ DCFR II.-7:209-210.

⁷¹ DCFR II.-7:214(1).

⁷² DCFR II.-7:214(2).

⁷³ DCFR II.-7:214(2).

⁷⁴ DCFR II.-7:203.

⁷⁵ DCFR II.-7:201(1)(a).

⁷⁶ DCFR II.-7:201(1)(b)(iii).

⁷⁷ DCFR II.-7:205(1).

⁷⁸ DCFR II.-7:205(2).

11.55 Article II.7:204 provides for damages when “incorrect information” is supplied in pre contract negotiations. It does not matter whether the incorrect information is supplied negligently or fraudulently. A party who has concluded a contract in reasonable reliance on incorrect information given by the other party in the course of negotiations has a right to damages for loss suffered as a result if the provider of the information (a) believed the information to be incorrect or had no reasonable grounds for believing it to be correct; and (b) knew or could reasonably be expected to have known that the recipient would rely on the information in deciding whether or not to conclude the contract on the agreed terms.⁷⁹ Damages can be awarded whether or not there is a right to avoid the contract.

Other remedies

11.56 Where the parties have not concluded a contract the DCFR provides rules in books VI and VII dealing with tort or delict and unjustified enrichment. Amongst the heads of “legally relevant damage” which give rise to tortious or delictual liability under the DCFR is loss caused by reliance on incorrect advice or information or by fraudulent misrepresentation.⁸⁰ Another general rule in the DCFR is that a person who obtains an unjustified enrichment attributable to another’s disadvantage is obliged to that other to reverse the enrichment.⁸¹ An enrichment is unjustified unless the “disadvantaged person consented freely and without error to the disadvantage”⁸² and the disadvantaged person does not consent freely if that consent is affected by “incapacity, fraud, coercion, threats or unfair exploitation”.⁸³

⁷⁹ DCFR II.-7:204(1).

⁸⁰ DCFR VI.-2:207, 210.

⁸¹ DCFR VII.-1:101.

⁸² DCFR VII.-2:101(1)(b).

⁸³ DCFR VII.-2:103(1).

Other European Union Member States

- 11.57 The notes to DCFR II.-3:102 offer useful comparative information on the enforcement of the Unfair Commercial Practices Directive in the Member States of the European Union.⁸⁴ A number of Member States choose (including the United Kingdom at present) to proceed mainly through enforcement by a public authority.⁸⁵ Such public authorities do not necessarily work with, or only with, the criminal law; in line with article 11(2) of the UCPD, a more effective remedy may be by way of court injunctions or administrative orders requiring traders to desist from activities infringing consumers' rights under the Directive.⁸⁶ But other Member States instead emphasise private enforcement by competitors or consumer organisations.⁸⁷ Competitors' actions seem often to be based upon unfair competition law, for example in Germany and Italy. Enforcement by individual consumers is highlighted by the notes only for Belgium and Denmark; and only in the latter is damages the consumer's main remedy, with "cease and desist" orders being described as "the most common sanction" in Belgium. It seems that in France and Italy civil remedies are largely dependent upon the general civil law of delict,⁸⁸ while in Germany, apart from unfair competition, private claims depend upon the rules of *culpa in contrahendo*.⁸⁹
- 11.58 It is thus apparent that in a number of Member States the consumer's right to any civil remedy has been left to the general law rather than made the subject of specific provision. Further, the general law has not necessarily been adapted in any way to accommodate the structure of the UCPD. Adaptation is of course difficult in a codified system of law such as is found in the majority of the Member States of the EU; but there may be flexible tools to hand, such as the good faith articles in many of the codes, by which the general law can be adapted by the courts to meet new kinds of claim.

⁸⁴ See DCFR, vol 1, 211-212 for all that follows in this paragraph, including direct quotations. See also for comparative material Ruth Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (2004).

⁸⁵ The notes list Denmark, Finland, Sweden, Italy, Malta, Portugal, and Romania. Ireland is also mentioned but the notes must have been written before that country allowed a right of civil action by consumers/competitors to enforce the duties of traders: Consumer Protection Act 2007 (Ireland), s 74.

⁸⁶ The notes give examples of this from Belgium, Denmark, Italy and Portugal. See also Consumer Protection Act 2007 (Ireland), s 71.

⁸⁷ Austria, Belgium, France, Germany and the Netherlands are listed in this category. In Ireland "any person", including the Consumer Protection Agency, may bring an action for a prohibition order: Consumer Protection Act 2007 (Ireland), s 71.

⁸⁸ The notes cite the French Code Civil arts 1382, 1383 and Code de la Consommation art L 121-14, along with the Italian Codice Civile art 2600.

⁸⁹ The notes cite BGB §§ 241(2), 280(1), and 311(2).

Summary

- 11.59 The DCFR would create civilly enforceable rights for consumers when traders provide misleading information. Rather than reliance on misrepresentation as a ground for liability, the DCFR treats the reasonable expectations engendered in the consumer by the misleading information as having contractual effect against the trader. The consumer then has a range of remedies including termination and specific performance as well as damages for breach of contract. Where there is no contract, or the consumer avoids the contract, then damages can be awarded.
- 11.60 Alternatively, the consumer may avoid the contract for mistake or fraud. The consumer will then have a right to damages, but limited to the sum that will restore the consumer to their pre-contract position rather than providing a monetary substitute for the full performance of the contract. The DCFR also recognises a specific damages claim for pre-contractual misrepresentation as well as the possibility of claims for damages in tort or delict and for restoration in cases of unjustified enrichment.

CONCLUSION

- 11.61 All the jurisdictions we have looked at provide some form of private redress to consumers for misleading commercial practices. However, they provide different types of remedies. In Australia and the US, the primary emphasis is on restoring consumers to the position they were in before they were misled. On this basis, the remedy is to unwind the transaction, give back the purchase price and provide some limited compensation for consequential loss. By contrast, in New Zealand and under the DCFR, misleading statements are treated as contractual promises. Under the DCFR, for example, the emphasis is on fulfilling consumers' reasonable expectations.
- 11.62 The difficulty is that many scams work by exploiting consumers' *unreasonable* expectations. It is not reasonable for consumers to believe that a face cream will make them look 20 years younger; that a diet tea offers effortless weight loss; that a psychic can talk to a dead loved-one; or that Eastern massage provides a cure for cancer. But people want to believe, so these things continue to be sold. Scammers work by exploiting consumers' vulnerabilities. In these circumstances, it is not possible to provide specific performance. The best the law can do is to attempt to return the consumer to the position they were in before entering the contract.

- 11.63 We note McLauchlan’s observation that the New Zealand Contractual Remedies Act 1979 may both under and over-compensate consumers.⁹⁰ The following example outlines the policy choices involved:

Example: unrealistic broadband speeds

An internet service provider advertises fantastic broadband schemes for a mere £10 a month. In truth the speeds are not achievable over copper wires. The only way such speeds could be achieved would be if the provider installed fibre-optic cables. For remote locations, this would cost at least £10,000 per customer.

- 11.64 The question is whether the law should attempt to give consumers back the money they have spent on a misleading product, or whether it should force traders to fulfil their promises. Although a moral case can be made that traders should fulfil promises, in many cases this is unrealistic, and will simply lead to the trader’s insolvency.⁹¹
- 11.65 In Part 14 we return to this issue when discussing remedies. In our view the emphasis should be on unwinding the transaction, and giving back the purchase price. We think that this is simpler and fairer, and less likely to result in the insolvency of the provider. In the next Part we set out an overview of our proposals for reform.

⁹⁰ D W McLauchlan, “Contract law reform in New Zealand: the Contractual Remedies Act 1979” (1981) *Oxford Journal of Legal Studies* 284, 289.

⁹¹ On the other hand, this may not be a bad outcome where the trader is in the habit of using aggressive practices.

PART 12

PROPOSALS FOR REFORM: OVERVIEW

- 12.1 We propose a new Act to protect consumers from misleading and aggressive practices in their dealings with traders. Unlike the current private law, the statute would be designed specifically with consumer problems in mind. The aim is to clarify and simplify the law on misleading practices, and to extend protection against aggressive practices. The new Act would not replace the existing criminal regime, and prosecutions for aggressive and misleading practices would continue to be brought under the Regulations.
- 12.2 In this Part, we provide a brief overview of our proposals. In the next three parts we discuss our proposals in more detail and seek consultees' views. Part 13 sets out the elements of liability; Part 14 discusses remedies; and Part 15 considers the liability of a creditor under a connected credit agreement.

A CAUTIOUS REFORM

- 12.3 As discussed in Part 10, we are proposing a limited and cautious reform. We accept the arguments put to us by business groups that it would be too uncertain and potentially costly to provide a remedy for all breaches of the Consumer Protection from Unfair Trading Regulations 2008.
- 12.4 The new statute would not replace the Regulations. The Regulations will continue to govern criminal liability for aggressive and misleading practices. By contrast, the proposed new statute would cover the private law consequences of traders who are found to act in ways that are aggressive or misleading. The overlap in coverage between the Regulations and the proposed new Act lies in the underlying conduct by the trader. However, there are six ways in which our proposed new statute would be more limited than the Regulations:
- (1) It would provide redress only to those who have entered 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. These often involve large sums, and are unsuited to the "rough and ready" standardised remedies we are proposing. 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.

- (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 met the other elements of the test for liability. It must, for example, be such as would likely induce the average consumer to enter into the contract or make a payment they would not otherwise have made.
- (6) It would not provide redress for breach of the general prohibition against practices which are “contrary to the requirements of professional diligence”.¹ We think this is too uncertain to form the basis of private law rights.
- 12.5 On the other hand, the proposed statute would cover all commercial demands for payment made to private individuals, even if the debts did not arise under a contract. This would cover payment collection where the money is not owed at all, or where the payment is classified as settlement of damages for a tort or delict. Examples include wheel-clamping charges,² demands in respect of parking offences, requests for compensation for alleged copyright infringements and “civil recovery” against alleged shoplifters.

RECONCILING PRIVATE AND PUBLIC REMEDIES

- 12.6 The Regulations are becoming an important part of consumer protection legislation. After some initial misgivings, trading standards officers, consumer advisers and traders are becoming familiar with the Regulations, and are increasingly categorising issues in terms of misleading and aggressive practices.³ Enforcement of the Regulations can also result in consumers obtaining redress indirectly. This can happen through compensation orders made on the back of a criminal prosecution. Alternatively, a trader may agree to give restoration to consumers who were harmed by a breach of the Regulations as part of the informal compliance dialogue between the enforcer and the trader.⁴ To preserve consistency and contain cost, we propose that the statute should incorporate some of the concepts used in the Regulations.
- 12.7 Thus our proposals adopt the definitions of misleading practice, aggressive practice and average consumer, with only minor alterations. We also propose to provide traders with a due diligence defence (taken directly from the Regulations) when faced with a claim for indirect loss.

¹ Article 5, implemented by Reg 3(3).

² For wheel-clamping in Scots law, see discussion at para 3.13 of this Consultation Paper.

³ J Williams & C Hare, “Early Experiences of the Enforcement of the Unfair Commercial Practices Directive in Scotland”, (2010) 33(4) *Journal of Consumer Policy* 377-401.

⁴ See paras 4.8 to 4.9 of this Consultation Paper. Under the proposed Civil Sanctions Pilot, the process of obtaining restoration for consumers would be more structured, as part of Enforcement Undertakings, and Restoration notices; see paras 4.29 to 4.34 of this Consultation Paper.

THE ELEMENTS OF LIABILITY

- 12.8 The proposed new Act would provide a 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, within the meaning of regulation 5 or 7 of the Regulations;
 - (2) This causes or is likely to cause the average consumer to take a decision to enter a contract or make a payment they would not have taken otherwise; and
 - (3) This caused the consumer to take the decision to enter a contract or make a payment they would not have taken otherwise.
- 12.9 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 rights would lie against the party to whom the payment was made.
- 12.10 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.⁵

A REPLACEMENT STATUTE

- 12.11 The proposed new Act covers substantially the same ground as the Misrepresentation Act 1967 Act (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (in Scotland). We think the law should replace these provisions in so far as they cover business to consumer transactions within the ambit of the new Act.
- 12.12 We do not intend to repeal common law doctrines, such as the tortious/delictual liability for negligent mis-statements following *Hedley Byrne v Heller*.⁶ This would provide a potential remedy against third parties, outside the scope of the proposed Act. Claims in unjust enrichment and contractual remedies such as specific performance or specific implement would also continue to be available. Similarly, statutory remedies like those under the Sale of Goods Act 1979 would remain. The proposed new Act targets the *manner* in which the transaction was conducted, rather than the substance of what was agreed (and whether there was anything wrong with it).

⁵ Reg 2(5).

⁶ [1964] AC 465.

- 12.13 The remedies available to consumers under the new Act are intended to provide a clear, simple and straightforward route to redress compared to the tortuous paths provided under current law. Whereas we do not propose to bar a consumer from resorting to the general law, we anticipate that consumers will opt to pursue the simpler remedy. This does not mean that consumers could obtain double recovery for the same loss. To that extent, a consumer would have to choose between the consumer-focused remedies under the new Act, or instead pursue the remedies under the general law.
- 12.14 For example, a consumer misled by a trader claiming that a watch was made of quartz when in fact it was not, would have a claim for breach of the implied term of satisfactory quality under the Sale of Goods Act 1979.⁷ The consumer would also be likely to have a claim under the proposed new Act as the trader's statement was misleading. The consumer could plead both causes of action in the alternative. The consumer who succeeded on both would at this stage have to decide whether to use the remedy available under the Sale of Goods Act 1979; or instead, opt for a remedy under the proposed new Act (as described in the next Part). The consumer would not be entitled to cumulate both remedies, as the scheme we are proposing under the new Act is stand-alone, and uses concepts which have no direct counter-parts under current law. To that extent, the proposed new Act provides an exclusive scheme of redress.

REMEDIES

- 12.15 We were told that there was a need for certain, standardised remedies, even if these were sometimes "rough and ready". This was especially true for remedies which were ancillary to public enforcement, such as compensation orders, or restoration notices under the proposed Civil Sanctions Pilot⁸ for example. However, given that legal help is rarely available, consumers using the small claims procedures also needed clear, certain remedies.
- 12.16 The most important remedy is the right to unwind the contract and obtain a refund. As we explain in Part 8, 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.
- 12.17 Under the new Act consumers would have two tiers of remedies: (1) the standard remedy which would apply on a strict liability basis and be presumed to apply in all cases; and (2) optional remedies which would apply only if specifically raised and evidence of the relevant loss is specifically proved by the consumer. A due diligence defence would be available for Tier 2 remedies, but not for Tier 1.

⁷ Sale of Goods Act 1979, s 14. There may also be a claim under s 13 of the same Act for breach of the implied term as to description.

⁸ See paras 4.35 to 4.44 of this Consultation Paper.

12.18 The first tier remedy depends 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 sue,⁹ or if the goods or services are fully consumed, then the consumer can claim a discount on the price.

12.19 The second tier 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.

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

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

⁹ We discuss how long the period should last at paras 14.21 to 14.31 of this Consultation Paper.

CREDITOR LIABILITY

- 12.21 In Part 15 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.
- 12.22 In the case of misrepresentations by traders, section 75 of the Consumer Credit Act 1974 imposes joint and several liability on "connected lenders". The section applies where the loan is made under pre-existing arrangements between the supplier and the creditor, and the creditor knows that it will be used to finance the purchase. The items must be more than £100 and no more than £30,000. The section provides that a debtor who has a claim against the supplier has "a like claim against the creditor", who is jointly and severally liable to the debtor. Case law has established that this applies to credit card issuers, even if they deal with the supplier through an intermediary.¹⁰ It also applies to foreign transactions.¹¹
- 12.23 For aggressive practices, however, the creditor's liability is less clear cut.
- 12.24 We make two proposals:
- (1) Misleading and aggressive practices should be treated in the same way, providing consumers with a "like claim" against connected lenders for all breaches of the proposed new Act within the limits of section 75.
 - (2) However, the lender's liability would be limited to the amount of money lent (plus interest paid). This follows the recommendation of the Director General of Fair Trading in 1995.¹²
- 12.25 The proposal would not affect claims for breach of contract, which are outside the scope of this project.
- 12.26 In the next Part we set out our proposals for liability under the proposed new Act in more detail. Part 14 discusses the proposed remedies.

¹⁰ *OFT v Lloyds TSB Bank* [2006] EWCA Civ 268, [2007] QB 1.

¹¹ *OFT v Lloyds TSB Bank Plc* [2007] UKHL 48, [2008] 1 AC 316.

¹² Office of Fair Trading, *A second report by the Director General of Fair Trading on Section 75 of the Consumer Credit Act 1974* (1995).

PART 13

DETAILED PROPOSALS: LIABILITY

13.1 In the previous Part we provided a broad outline of a possible new Act, giving consumers a right of action against traders who sold products or obtained payment in a misleading or aggressive way. In this Part we consider the proposals in greater detail, focussing on the scope of the new Act and the main elements of liability.

13.2 Here we consider the following issues:

- (1) The definition of a business to consumer transaction;
- (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;
- (5) The definition of misleading practices;
- (6) The definition of aggressive practices;
- (7) The causation test;
- (8) The relevance of fault; and
- (9) The impact on existing law.

BUSINESS TO CONSUMER TRANSACTIONS

13.3 The Unfair Commercial Practices Directive only protects consumers in their dealings with traders. Our terms of reference were similarly constrained: we were asked only to look at the law as it applies between businesses and individuals.

13.4 It is intended that the proposed Act will only give redress to consumers in their dealings with businesses. It will not protect small businesses, or consumers dealing with other consumers. We start by considering the definitions of consumer and business.

The definition of “consumer”

- 13.5 UK consumer law uses two different definitions of “consumer”. The traditional approach is used (for example) in the Unfair Contract Terms Act 1977 and refers to a person who “deals as consumer”.¹ This has been interpreted widely to include businesses which enter into a one-off transaction, such as a brokerage company which buys a car.²
- 13.6 By contrast, the definition used in European directives, and the measures flowing from European directives, use a more restricted definition. It only covers individuals who are acting for purposes outside their business: businesses engaged in a one-off transaction (such as buying a car or a photocopier) are excluded. Thus the Regulations define a consumer as:
- Any individual who in relation to a commercial practice is acting for purposes which are outside his business.³
- 13.7 The proposed Consumer Rights Directive aims to provide a standard definition for consumer, to be used in all revised consumer directives.⁴ It states that “consumer” means:
- any natural person who, in contracts covered by this Directive, is acting for purposes which are primarily outside his trade, business, craft or profession.⁵
- 13.8 This definition is similar to the definition used in the Regulations: for example, individual means the same as natural person, and excludes companies from the provision. However, the reference to “trade” and “profession” as well as “business” makes it clearer that employees are not consumers if they are acting for purposes concerned with their “profession”.⁶
- 13.9 The word “primarily” helps to clarify that mixed use contracts, where an individual buys a product partly for pleasure and partly for work, are covered. An example would be a person who buys a laptop, intending to use it both for playing games and for sending work emails. Another would be buying a family car, with the intention of making some business trips in it.

¹ Unfair Contract Terms Act 1977, s 3 (England and Wales), and s 25 is the equivalent Scottish provision.

² In *R&B Customs Brokers v United Dominions Trust* [1988] 1 WLR 321 the transaction was not integral to the business of the company. Matters merely incidental to the running of the business were not part of the course of business unless they were a regular feature of its activity.

³ Reg 2(1).

⁴ Similarly, the aim of the Draft Common Frame of Reference (DCFR) is to produce standard definitions. It defines “consumer” as “any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.” DCFR I.-1:105(1).

⁵ Proposed Consumer Rights Directive, IMCO consolidated version (9 February 2011), informal working document – for information purposes only, Article 2.

⁶ For example, in *Prostar Management Ltd v Twaddle* 2003 SLT (Sh Ct) 11, a professional footballer who appointed an agent was held to act for the purposes of his profession, even though he was an employee.

13.10 In our report on consumer insurance law, we thought that it was important to include contracts which were mainly for consumer use, even if they include some element of business use.⁷ We think it would be helpful to take the same approach here.

13.11 We note that the academic study commissioned by BIS to simplify and streamline consumer contract law recommends using the European definition:

Any consolidated B2C [business to consumer] measure clearly has to be fully compatible with the Consumer Sales Directive (99/44/EC) and would be used as a vehicle for implementing any changes if the proposed Consumer Rights Directive is adopted. It would be necessary to use the European definition of “consumer”.⁸

13.12 We think the proposed new Act should use a definition of consumer that is compatible with the Regulations and any new statute on consumer contract law. This means that it must follow the European definition.

Training contracts

13.13 During our initial consultations, Citizens Advice highlighted many problems where unemployed individuals were sold training courses of doubtful value.⁹ Those desperate for a job are often particularly vulnerable to being mis-sold a training course which promises a future job. We would therefore wish to include these contracts within the scope of the scheme.

13.14 Where someone is not currently working or in business, and is mis-sold a product on the ground that it would help provide future business opportunities, we think that such an individual should qualify as a consumer.

13.15 We think that the general definition of a consumer is sufficiently wide to cover such cases, but would welcome views on this point.

Conclusion

13.16 We propose that the definition of consumer should generally follow other consumer legislation, in applying to any individual who is acting for purposes which are primarily outside their business, trade or profession.

Question 3

Should the definition of consumer generally follow other consumer legislation, in applying to an individual who acts for purposes which are primarily outside their business, trade or profession?

⁷ Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation (2009), Law Com No 319; Scot Law Com No 219, para 5.17.

⁸ G Howells and C Twigg-Flesner, *Consolidation and Simplification of UK Consumer Law*, Report for the Department for Business, Innovation & Skills (November 2010), para 6.38.

⁹ See Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010) para 3.12.

Question 4

Do consultees think 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 (employed or self-employed)?

The definition of “business”

- 13.17 The Unfair Commercial Practices Directive does not apply where two consumers deal with each other – for example, where an individual who is not in business sells a house or sells second hand goods on eBay.
- 13.18 A review prepared for the European Parliament commented that this can be problematic. One problem is that it may not be easy to decide what amount and frequency of sales qualifies as a business. Another is that businesses may have an incentive to pretend to be consumers, in particular when selling on the internet.¹⁰
- 13.19 The business does not have to be a full-time business, but it has to be more than an occasional hobby.¹¹ This leads to some uncertainty: for example, is someone who sells three, four or five watches a year on eBay conducting a business or a hobby? Many factors may affect the issue and we do not think that it is possible to provide a definitive answer. We think this is an issue best left to the courts.

THE TRANSACTIONAL DECISIONS WHICH SHOULD GIVE RISE TO REDRESS

- 13.20 As we have seen, under the Directive 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”. However, the concept of a transactional decision is a wide one. The most obvious decision is whether to buy a product, 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.¹²
- 13.21 The issue we have to consider is whether the proposed new Act should provide consumers with redress for all decisions – or only some. Clearly, the law should provide redress where a consumer has entered into a contract with a trader as a result of a misleading or aggressive practice. But should it go further than this? Take a case in which a misleading advertisement wrongly states that top-range TVs are available at an out-of-town shopping centre at a bargain price. A consumer travels many miles to the shop only to find that no such TVs are available, and they never had been. Should the consumer receive compensation for the cost of the wasted journey?

¹⁰ Directorate-General for Internal Policies, Internal Market and Consumer Protection (IMCO), *Misleading Advertising on the internet* (July 2010) p 12.

¹¹ Revenue law may shed some light on this, but the doctrines are highly fact-specific. The focus of our new Act would be on identifying “consumers”, and traders would largely fall by default in the category of non-consumers.

¹² European Commission’s Guidance, p 22.

- 13.22 We do not wish to encourage frivolous or vexatious claims. 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 they did not know, and with whom they had had no direct dealings. It would be difficult to assess the truth of the consumer's assertions in those circumstances.
- 13.23 We think that the proposed legislation should only cover clear and substantial transactional decisions. The cases brought to our attention as requiring redress mostly concerned consumers who had bought or sold products, or who had made payments. There were also a few cases in which consumers had been discouraged from exercising a legal right. Below we consider each in turn.

Entering into a contract

- 13.24 By far the most common transactional decision is to buy (or sell) a product. We propose that the proposed Act should apply where consumers have entered a contract following a misleading or aggressive practice.
- 13.25 This mirrors the current statutory law of misrepresentation. Both the Misrepresentation Act 1967¹³ and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 apply only where the claimant has entered into a contract.¹⁴

Making a payment

- 13.26 We think the proposed Act should also apply whenever a consumer makes a payment to the trader following a misleading or aggressive practice.
- 13.27 We were told about many cases in which consumers made payments as a result of unfair debt collection. Sometimes the debt was owed, and sometimes not. As we discuss in Part 3, sometimes the debt arose under a contract, as 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, as where illegal wheel-clampers demanded large payments; or utility companies demanded payment from people who had not in fact signed up to that supplier; or law firms sought payments for alleged copyright infringement.
- 13.28 Consumers who are misled or bullied into paying debts they do not owe have a right to reclaim the payment under the law of unjust enrichment. Consumer groups, however, regarded this as a particularly obscure branch of common law. They asked for a clear, statutory right in these circumstances. Below, in paragraphs 13.63 to 13.66, we consider whether the new Act should apply to misleading or aggressive payment collection.

¹³ The 1967 Act, s 2(1), applies only "where a person has entered into a contract after a misrepresentation has been made to him".

¹⁴ The 1985 Act, s 10(1), applies "where a party to a contract has been induced to enter into it by a negligent misrepresentation".

Question 5

Do consultees agree that the proposed Act should not provide redress for “transactional decisions”, such as the decision to visit a shop?

Question 6

Do consultees agree that the proposed Act should provide redress where the consumer has:

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

(2) made a payment to the trader?

Misleading or obstructing the consumer exercising a legal right

- 13.29 The definition of a “transactional decision” currently includes “whether, how and on what terms to exercise a contractual right in relation to a product”.¹⁵ A typical example would be where a consumer asks for a refund for faulty goods. The Regulations prevent the trader from acting in a threatening way, or from giving misleading information about the consumer’s rights.
- 13.30 In initial consultations we were told of a few examples where consumers had attempted to exercise a legal right and had then been misled. In one case, for example, a consumer bought a bike for £450 using a credit card, but the retailer failed to deliver it. The credit card company told the consumer that it had no responsibility, thereby misleading the consumer about its liability under section 75 of the Consumer Credit Act 1974. We have also been told of obstructions and difficulties being placed in the way of consumers seeking to exercise rights of repair or replacement in respect of faulty goods, for example by requiring them to make a lengthy series of telephone calls to reach complaints departments, or to incur significant time and expense to return the goods to the supplier or manufacturer. Alternatively, the retailer may have taken in goods for checking and then taken no action without significant prompting from the consumer.¹⁶ The courts do not currently provide a secondary cause of action in respect of the misleading statement or obstructive behaviour of the trader in such cases.
- 13.31 We can 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 can see no clear way of quantifying the loss involved in being misled about legal rights. And in many cases the consumer would not necessarily wish to unwind the transaction: for example, where the principal remedy sought is repair or replacement of the goods supplied.

¹⁵ Reg 2(1).

¹⁶ For an example of the last of these situations see *Douglas v Glenvarigill Co Ltd* [2010] CSOH 14, 2010 SLT 634.

- 13.32 We provisionally think that the new Act should not attempt to cover this issue. However, we recognise that this may leave an important gap in the armoury of remedies against traders reluctant to recognise consumer rights. We welcome views on this.

Question 7

Do consultees agree that the proposed 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?

Question 8

If the proposed Act is to cover traders who mislead consumers about their legal rights, how should the difficulties such as quantifying the losses be overcome?

THE PERSON AGAINST WHOM THE REDRESS SHOULD BE AVAILABLE

- 13.33 The next issue is against whom should the claim be made? Should the consumer only be entitled to bring a claim against the 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?
- 13.34 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 (namely the retailer) or also be entitled to claim directly against the producer?
- 13.35 There is a substantial divergence between the approach taken by private contract law and by public enforcement law, which we explore below.

Contract law and misleading statements by producers

- 13.36 Private law has traditionally confined contract remedies to the contracting parties. Thus where goods are not of satisfactory quality, the consumer's primary remedy is against the seller, not the producer.
- 13.37 There are five exceptions to this principle.
- (1) Where the producer provides a specific guarantee. Regulations provide that the guarantee takes effect when the goods are delivered "as a contractual obligation owed by the guarantor".¹⁷

¹⁷ Sale and Supply of Goods to Consumers Regulations 2002, reg 15. This implements Directive 1999/44/EC on the Sale of Consumer Goods and Associated Guarantees, Art 6. In Scotland, at common law, such a guarantee can be seen as an enforceable unilateral promise. See D J Cusine, "Manufacturers Guarantees and the Unfair Contract Terms Act" 1980 Juridical Review 185.

- (2) Where an advertisement makes an unambiguous promise. The courts may interpret it as giving rise to a collateral contract.¹⁸ However, as Scott and Black point out, “the courts do not regard most statements in advertisements as being intended to create legal relations”.¹⁹ In Scots law, the promise would be enforceable as it stood.²⁰
- (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”.²¹ Express rights for consumers in producer/retailer contracts are extremely rare. However, it has been suggested that a consumer might be able to claim against a producer under the second limb where the retailer orders goods to be delivered or made at the consumer’s specific request.²² In Scotland, if it seems that 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.²³
- (4) Under the doctrine in *Hedley Byrne v Heller*,²⁴ the trader 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.²⁵

13.38 These exceptions are limited. In most cases, the consumer’s claim is against the seller. This is the case even though statements made by a producer are often highly relevant to whether goods are of satisfactory quality. Under the Sale of Goods Act 1979, the court must have regard to

any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.²⁶

13.39 The seller is given a defence in three circumstances:

¹⁸ The leading case is *Carlill v Carbolic Smokeball Co* [1893] 1 QB 256, where the manufacturer offered to pay £100 to anyone who caught influenza after buying and using the smokeballs. Furthermore, the advertisement claimed that the firm had deposited £1000 with the bank “shewing our sincerity in the matter”. The court found that this showed an intention to create legal relations, and gave rise to a collateral contract between the manufacturer and the buyer.

¹⁹ C Scott and J Black, *Cranston’s Consumers and the Law* (3rd ed 2000), p 174.

²⁰ MacQueen & Thomson, para 2.13.

²¹ S 1(1)(a).

²² C Scott and J Black, *Cranston’s Consumers and the Law* (3rd ed 2000), p 175.

²³ MacQueen & Thomson, para 2.69. This branch of contract law is known as *ius quaesitum tertio* (right acquired by a third person).

²⁴ [1964] AC 465.

²⁵ A creditor can become liable under the Consumer Credit Act 1974; and third parties may incur liability for negligence at common law, see *Donoghue v Stevenson* 1932 SC (HL) 31; [1932] All ER Rep 1; [1932] AC 562.

²⁶ Sale of Goods Act 1979, s 14(2D).

- (1) if the statement was withdrawn;
- (2) if the consumer's decision to buy could not have been influenced by the statement; or
- (3) if the seller can show that

at the time the contract was made, he was not, and could not reasonably have been, aware of the statement.²⁷

13.40 Note that under this final defence, the retailer must be unaware that the statement was made. It is not enough for the retailer to be unaware that the statement was false. Retailers are expected to be aware of labels on the goods they sell. This means that where labels turn out to be misleading (so as to render the goods unfit for the purpose for which they were bought, for example), retailers are held liable, even if they were unable to open the packets to check the goods.

13.41 However, where sellers succeed in showing that they were unaware of the statement, consumers have no commensurate rights against the producer who made the statement. Thus if a producer makes a false claim about a product, which the retailer has no reason to know about, then the consumer does not have any clear statutory rights against either the seller or the producer.

The approach in public enforcement law

13.42 The Regulations take a quite different approach. Most provisions make no distinction between the obligations on retailers (who deal directly with consumers) and others further up the supply-chain who promote products.²⁸ Thus a "commercial practice" is broadly 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 to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.²⁹

13.43 A trader means any person "who is acting for purposes relating to his business", and "anyone acting in the name of or on behalf of the trade", irrespective of the business involved.

13.44 This means that prosecutions for unfair commercial practices may be brought against sellers, producers or their agents.³⁰

²⁷ Sale of Goods Act 1979, s 14(2E)(a).

²⁸ The main exception is Reg 6(1) which imposes obligations on invitations to purchase, but not on other less direct forms of commercial communications.

²⁹ Reg 2(1).

³⁰ See for example OFT press release "In precedent-setting enforcement action, the OFT has received undertakings from Handpicked Media, an operator of a commercial blogging network, requiring them to clearly identify when promotional comments have been paid for" (13 December, 2010).

Claims under the proposed new Act

13.45 For the purposes of the proposed new Act, we think consumers' first point of redress should be against the other party to the transactional decision. Thus, if a consumer has taken a transactional decision to enter a contract, the redress should be against the other party to that contract. If a consumer has made a payment, the redress should be against the trader to whom the payment has been made.

13.46 We say this for 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.³¹ 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 the next part of our detailed proposals, Part 14, 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, most certain solution. They should be easy to identify, and consumers will be prevented from bringing overlapping claims against multiple parties.³²

Question 9

Do consultees agree 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?

Question 10

Should there be a secondary right to redress against entities higher up in the supply chain such as producers, if they are proven to be at fault?

A right against directors and other officer-holders?

13.47 In Ireland, where a consumer contracts with a limited company, section 75 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.³³

³¹ Misleading statements about the quality of goods would likely breach s 14 of the Sale of Goods Act 1979 for example.

³² But see also connected lender liability discussed below in Part 15.

³³ Consumer Protection Act 2007 (Ireland), s 74(2).

- 13.48 We are not proposing such a wide right. We are 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.
- 13.49 On the other hand, rogue traders often hide behind limited liability. In some of the worst scams, such as pyramid schemes, the company proceeds towards inevitable insolvency. In these circumstances, consumers would have an action against individual directors and officers for deceit or fraud, but not under our proposed Act.
- 13.50 We are proposing that consumers would have a remedy against the party with whom they have a contract. That will normally be the company rather than its directors. However 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. The same argument applies to limited liability partnerships. We are interested in receiving views about whether our proposed Act should allow consumers a right of action against the directors and officers of a limited liability company or the partners in a limited liability partnership.

Question 11

Should consumers be given a limited right to proceed against company directors or other office-holders, where the trading company or limited liability partnership is in liquidation, administration or receivership?

Question 12

If consumers had a limited right to proceed against company office-holders, what factors should apply to allow consumers to claim against a director or officer? In particular:

(1) Should the director or officer-holder actually be at fault or should they be liable as an officer of the company?

(2) Should consumers be able to recover only where the misrepresentation of the director or officer-holder was fraudulent, or is negligence sufficient?

(3) Should directors and office-holders be liable for aggressive practices and if so what degree of fault is required?

THE PRODUCTS THAT SHOULD BE COVERED

- 13.51 The Regulations have a very wide scope. They cover all products, defined as meaning any goods or service, “including immoveable property, rights and obligations”.³⁴
- 13.52 That said, the Unfair Commercial Practices Directive accepted that for land and financial services, consumers may need additional protection. In these sectors member states are permitted to retain autonomy to provide increased protection. As Recital 9 explained:

³⁴ Reg 2(1).

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.³⁵

- 13.53 We have considered whether the proposed new Act should apply to all products (like the Regulations), or whether some sectors require different treatment. The new Act is intended as a simple solution, to everyday problems, which in some cases trades certainty for fairness. Below we consider whether it should apply to potentially high value, complex items such as land and financial services.

Land

- 13.54 When we consulted consumer groups about problems with the current law, no-one raised any problems with misleading or aggressive practices in the sale of land.³⁶ It was pointed out that consumers who buy houses are usually advised. The conveyancing system is well established and the law is reasonably clear. There is not a duty to disclose material information. Instead, buyers are expected to ask questions and sellers should provide honest and correct answers.³⁷ If the seller's answers are false, the buyer will usually have a claim for misrepresentation.
- 13.55 Where misleading statements are made by estate agents, consumers are given additional protection. The Property Misdescriptions Act 1991³⁸ requires estate agents to take all reasonable steps to ensure that the information they provide is accurate and not misleading. Furthermore, estate agents involved in residential sales must be members of an approved redress scheme.³⁹ Most consumers are able to complain to the Property Ombudsman, who will award redress in appropriate cases.
- 13.56 There are two reasons for not including land sales in the scope of the new Act:

³⁵ Recital 9 of the Directive.

³⁶ See Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010) paras 2.24 to 2.30.

³⁷ In Scots law, while the seller must provide a good and marketable title, the buyer will generally examine title before transfer. See George L Gretton and Kenneth G C Reid, *Conveyancing* (3rd ed 2004), ch 7. The seller does not, however, warrant the physical state of the property. See David A Brand *et al*, *Professor McDonald's Conveyancing Manual* (7th ed 2004), para 28.12 (the rule of *caveat emptor*) and R Rennie, "Conveyancing", *SME Reissue Conveyancing*, para 100.

³⁸ This Act applies in Scotland too. However, as also discussed above at para 9.38, fn 49 of this Consultation Paper we note that the Department of Business, Innovation and Skills is undertaking a consultation on whether to repeal the Property Misdescriptions Act 1991 due to its perceived overlap with the Regulations, see *Consultation on the repeal of the Property Misdescriptions Act 1991* (January 2011).

³⁹ 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. Note that the Estate Agents Act 1979 does not apply to things done "in the course of his profession by a practising solicitor or a person employed by him; see s 1(2)(a) of the same Act.

- (1) The proposed Act is 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.
 - (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.
- 13.57 Our preliminary view is that that the proposed new Act should not apply to land transactions. Instead, such sales should continue to be governed by the present law, including the existing statutory provisions.⁴⁰ However, we would welcome views on this issue.
- 13.58 The same considerations do not apply to lettings where there is no capital value because there is no pre-contractual enquiry process and the consumer generally has not engaged a legal adviser. We think lettings could be dealt with alongside other services within the scope of the Regulations.

Financial services

- 13.59 There have been several high-profile examples of financial services being sold in a misleading or inappropriate way. For example, in 1999, the Financial Services Authority (FSA) launched a major review into the selling of personal pensions, which included producing detailed rules about how consumers should be compensated for the loss.⁴¹ More recently, the FSA has reviewed problems with the way payment protection insurance has been sold. It has proposed detailed measures about how firms should handle complaints from consumers who may have suffered loss as a result.⁴²
- 13.60 There are several reasons to treat these issues differently from other misleading selling of goods and services.
- (1) There are already sophisticated mechanisms in place to protect consumers. For example, the FSA issued detailed guidance about how firms should deal with complaints over pension mis-selling. Consumers who remained dissatisfied may complain to the Financial Ombudsman Service.

⁴⁰ These are the 1967 Act (in England and Wales) and 1985 Act, s 10 (in Scotland).

⁴¹ Financial Services Authority, *The FSA's approach to setting prudential standards* (November 1999).

⁴² Policy Statement 10/12, *The Assessment and Redress of Payment Protection Insurance Complaints* (August 2010).

- (2) Financial services complaints may merit a more generous measure of compensation from the simple, broad-brush approach we are proposing. For example, the FSA did not simply require firms who had mis-sold personal pensions 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. This may be much higher than 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) Complaints over financial services are not decided according to the letter of the law. The FOS may instead come to a decision that is “fair and reasonable in all the circumstances”.⁴³
- (4) However, 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.

13.61 We do not think that it is necessary for the proposed new Act to deal with misleading or aggressive selling by financial services firms (such as banks, investment advisers or insurers). Furthermore, in some cases, the approach taken by the new Act may be unhelpful. For example, we would not wish parties to a judicial review of FSA rules to debate how far the rules did or did not follow the redress mechanisms set out in the Act.

13.62 Our preliminary view, therefore, is that financial services should be excluded from the ambit of the proposed new Act.

Question 13

Do consultees agree that the proposed new Act should exclude:

- (1) Land sales; and**
- (2) Financial services?**

Payment collection

13.63 In Part 3 we discussed the current uncertainty about how far the Regulations cover misleading or aggressive debt collection. It is clear that the Regulations cover any action taken to recover a contract debt. However, there is some uncertainty over how far the Regulations cover debts which do not arise under a contract – either because the money is not owed at all, or because the payment is classified as damages for a tort or delict. Possible examples are wheel clamping charges or “civil recovery” against alleged shoplifters.

⁴³ Financial Services and Markets Act 2000, s 228.

- 13.64 Consumer groups gave many examples of misleading or aggressive demands for payment. Consumers would benefit from clearer and more certain rights to redress in such cases. In our view, the legislation should not attempt to impose arguably arbitrary distinctions between demands for payments for goods and services, and other demands for payments. We therefore propose that any future legislation should include all commercial demands for payment made to private individuals.
- 13.65 As a general rule, our policy is that the proposed new Act should only cover practices of the kind struck at by the Directive. As we discussed in Part 3, 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. However, we accept that the issue is not beyond doubt. We think it may be helpful for both the civil and criminal liability to be co-extensive on this issue. We therefore also ask whether the Regulations should be amended to clarify this issue.⁴⁴
- 13.66 Where a claimant makes a payment in response to a misleading or aggressive demand, they should be entitled to the remedies discussed in Part 14. Under our proposals we envisage the following remedies might be available: (a) if no debt is owed, the consumer can get a refund of amounts paid; and can prove consequential economic damages and damages for distress; and (b) if a debt is in fact owed, the consumer's right to a refund will be set-off against the trader's right to demand the debt. The consumer could however still succeed in showing damages for distress caused by the wrongful way in which the debt was pursued. Economic damages would by contrast be highly unlikely, as money (and debts) are fungible. This means that paying off the aggressively pursued debt, so the consumer had less cash left in general (as opposed to not having cash that was supposed to be dedicated to a particular purpose such as insurance), does not have any legally recognised consequences.

Question 14

Do consultees agree that the proposed new Act should include misleading or aggressive demands for payment?

Question 15

Do consultees agree that demands for damages against alleged wrongdoers should be covered by the proposed new Act?

⁴⁴ 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. By contrast, if the issue already falls within the Directive, the UK would not be allowed to enact any other form of protection. At this stage, we have not considered how an amendment to the Regulations would be effected. This may not be possible under the European Communities Act 1972, s 2, and may require primary legislation.

Question 16

In particular, should demands for payment following parking offences, alleged copyright infringements, wheel-clamping and “civil recovery” also be covered?

Question 17

Should the Regulations be amended to state that all commercial demands for payment are included with the definition of commercial practices?

THE DEFINITION OF MISLEADING COMMERCIAL PRACTICES

- 13.67 What should count as a “misleading commercial practice”? We start by considering how far any new right of redress should cover misleading omissions, as opposed to misleading actions. We then consider the definition of “misleading”.

Redress for misleading omissions?

A duty to disclose?

- 13.68 The Regulations prohibit commercial practices which omit or hide “material information” defined as:

the information which the average consumer needs, according to the context, to take an informed transactional decision.⁴⁵

- 13.69 The Regulations then list information which an invitation to purchase should provide, such as the main characteristic of the product, the identity and address of the trader, the price and unusual arrangements for delivery. However, the duty to provide information is not limited to this list, and is not confined to invitations to purchase. It has a general application.

- 13.70 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 it would introduce uncertainty and encourage vexatious claims. Retailers, for example, expressed particular concern about whether shop staff should inform consumers that the goods will soon become obsolete, or that a better alternative is available. If so, it was suggested that the duty would be impossible to perform. In the electronics market an improved alternative was always about to be introduced.

⁴⁵ Reg 6(3)(a).

Liability for actual and implied representations

- 13.71 Our preliminary view is that the new statute should not provide consumers with redress for omissions specifically. However, the division between acts and omissions is not clear cut. As we discussed in Part 5, the law currently recognises many examples where traders are held liable for half-truths, deliberate ambiguities or opinions which have no factual basis. If the consumer labours under a unilateral misapprehension and the other party knows this but does nothing to correct it, current law may provide relief.⁴⁶
- 13.72 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. An example would be the plumber who advertises “no call-out charge” but does impose a “diagnosis charge”. Alternatively, the consumer’s reasonable expectations may be undermined by a hidden exclusion, as where a holiday advertises a “five star hotel”, without mentioning that the small print permits the firm to substitute a three star hotel at will.
- 13.73 We propose that misleading representations may be either *express* or *implied*. An implied representation arises where an average consumer would reasonably expect the product, contract or the trader to have certain characteristics, and the trader fails to contradict that reasonable expectation.⁴⁷
- 13.74 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; it could be through expressing an opinion where the consumer reasonably believes the trader has a basis for holding that opinion.
- 13.75 In practice, the less the degree of intervention by a trader (closer to what may be described as a “pure” omission) the stronger the other factors would need to be in order to find there had been an implied representation.
- 13.76 The concept of implied representations is not intended to extend the scope of what can count as a misrepresentation. We do not propose to introduce a general duty of disclosure in respect of material information. “Omissions” would continue not to be covered as a category. However, our proposals move away from omissions terminology altogether. Instead, they focus on the “overall presentation” of the product as experienced by the average consumer. Our proposals aim to use a more transparent label for the mixed bag of existing cases giving rise to liability under current law such as half truths and representations by conduct for example. They reflect the fact that whether something is misleading ultimately depends on context.

⁴⁶ See discussion at paras 5.60 to 5.64 (England) and 5.48 to 5.59 (Scotland) of this Consultation Paper.

Question 18

Do consultees agree that traders:

(1) should not be liable for omissions as such?

(2) but should be liable for implied representations, where the overall presentation means that a consumer would expect the product, contract or the trader to have certain characteristics, and the trader fails to contradict that reasonable expectation?

The definition of “misleading”

13.77 Under the Regulations, 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.⁴⁸

13.78 Under Regulation 5, the misleading information must relate to one of the listed matters, but the list is a long one. 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.

13.79 We provisionally propose to follow this definition in substance. However, we are not sure whether the lists in Regulation 5 would be helpful in a private law context. On the one hand, they seem overly detailed. On the other hand, they risk the possibility of excluding some material issue. We welcome views on whether the new Act should reproduce the lists in Regulation 5.

Question 19

Do consultees agree that the new Act should follow the substance of this definition?

Question 20

Should the new Act reproduce the lists of matters about which misleading representations may be made in Regulation 5(4) to (6) of the Consumer Protection from Unfair Trading Regulations 2008?

⁴⁷ This is also similar to the approach taken in the Property Misdescriptions Act 1991, which makes it an offence to make a false or misleading statement as part of an estate agency or property development business. Under s 1(5)(b) of the 1991 Act for example, “a statement is misleading if (though not false) *what a reasonable person may be expected to infer from it, or from any omission from it, is false*” (emphasis added).

⁴⁸ Reg 5(2)(a).

Banned misleading practices

- 13.80 As discussed in Part 2, 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, the first 23 can be thought of as misleading, and the remaining 8 as aggressive.
- 13.81 It is not our intention to reproduce the concept of a banned practice which is automatically unfair. A practice will only be actionable if it caused the consumer to enter into a contract or make a payment that would not have otherwise been made, and if it would have had the same effect on the hypothetical average consumer. Some banned practices may lead to little direct loss, such as false “closing-down” sales.⁴⁹ Others go to the root of the transaction, such as falsely claiming that a product is able to cure illness.⁵⁰
- 13.82 Some of the banned practices are helpful examples of the sort of problem which the new Act is intended to cover. Examples include:
- (1) Claiming to be a signatory to a code of conduct when the trader is not.⁵¹
 - (2) Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.⁵²
 - (3) Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.⁵³
- 13.83 We would be interested in whether consultees think that the new Act should include any of the banned practices as examples of practices which are misleading unless the contrary is shown. This may be a helpful way of illustrating the range of misleading practices. Alternatively, it may add an unnecessary complexity and limit the scope of the provision.

Question 21

Do consultees think that it would be helpful for the legislation to include examples of practices which are misleading (unless the contrary is shown)?

Question 22

If so, what misleading practices should be included?

⁴⁹ Banned practice 15, sch 1, Regulations.

⁵⁰ Above, banned practice 17.

⁵¹ Above, banned practice 1.

⁵² Above, banned practice 21.

⁵³ Above, banned practice 22.

THE DEFINITION OF AGGRESSIVE COMMERCIAL PRACTICES

What is an “aggressive” practice?

- 13.84 Aggressive practices cover a wide range of behaviour. These vary from actual compulsion, to the abuse of a powerful bargaining position, to wearing down tactics.⁵⁴
- 13.85 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 apply pressure”.

Harassment is not defined.

- 13.86 Regulation 7(2) sets out factors which may be taken into account. These include “the timing, location, nature or persistence” of the actions; “the use of threatening or abusive language or behaviour”; the exploitation of the consumer’s specific misfortune; terminating the contract in response to the consumer exercising a contractual right; or threatening legal action which cannot be taken.

Banned aggressive practices

- 13.87 Further guidance about what would count as an aggressive practice is provided by the banned practices, which serve as illustrations of the sort of problems that were envisaged by the Directive. The banned practices include:
- (1) Creating the impression that the consumer cannot leave the premises until a contract is formed.⁵⁵
 - (2) Conducting personal visits to the consumer’s home and ignoring the consumer’s legitimate request to leave or not to return.⁵⁶
 - (3) Making persistent and unwanted solicitations by telephone, fax, email or other remote media except in circumstances and to the extent justified to enforce a contractual obligation.⁵⁷

⁵⁴ See also Part 7 of this Consultation Paper.

⁵⁵ Banned practice 24, sch 1, Regulations.

⁵⁶ Above, banned practice 25.

⁵⁷ Above, banned practice 26.

- 13.88 These multiple layers of definition are not as clear as they could be. Some of the language may be confusing. For example, as discussed in Part 7, in private law the term “undue influence” has a different meaning. It implies the abuse of a special relationship of trust and confidence between the parties. Cases typically involve husbands and wives, spiritual advisers, or vulnerable individuals who are either very old, or young and impressionable. This is very different from the way that traders may exploit a position of power, and we think the term is best avoided in a private law statute.
- 13.89 That said, the definition does seem workable on a practical level. We think that it could be incorporated in any new Act with only minor modifications. As discussed below, our proposals abandon the traditional distinction between “duress” and “undue influence”, adopting everyday terminology instead.

Our proposal

- 13.90 We think that a consumer should be entitled to a remedy if a trader engages in an aggressive commercial practice. Our preferred option tracks the Regulations with some modifications to avoid confusion with existing domestic doctrines (such as undue influence). A commercial practice is aggressive if it uses coercion, abuse of power or harassment.
- (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.
- 13.91 Note that the definition of harassment does not follow the requirement in the Protection from Harassment Act 1997 that there must be “a course of conduct” with at least two separate instances of harassing behaviour. We think there are examples where a single instance of conduct may be sufficient if it results in the consumer entering a contract or making a payment.
- 13.92 We do not propose to refer to non-contractual barriers that prevent switching to other providers, as the new Act will only provide redress when someone has entered a contract or made a payment as a result of the aggressive practice. It will not cover aggressive practices which prevent contracts with other providers: these will be subject to public enforcement only.

13.93 Factors to be taken into account in determining whether a commercial practice is aggressive 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 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.

13.94 Examples of aggressive commercial practices 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, email or other remote media except in circumstances and to the extent justified to enforce a contractual obligation.

Question 23

Do consultees think that:

- (1) The proposed new Act should provide redress for aggressive practices?**
- (2) The definitions of coercion, abuse of power and harassment collectively cover the appropriate situations?**
- (3) It is helpful to have a list of examples of aggressive practices? If so, are these examples appropriate?**

THE CAUSATION TEST

The average consumer

13.95 We propose that the new Act should also follow the Directive in requiring some objective link between the trader's conduct and the consumer's subsequent actions. We think that the trader's liability for misleading or aggressive commercial practices should satisfy an objective level of seriousness: would the misleading or aggressive practice be likely to cause the average consumer to enter the contract or make the payment?⁵⁸ This terminology tracks the wording of the Regulations in relation to the average consumer and we think consistency in approach is essential in order to avoid confusion.

⁵⁸ See *OFT v Purely Creative* [2011] EWHC 106 (Ch), [2011] WLR (D) 34 at paras 69 to 71 where the court held that a "but for" test of inducement applies to the average consumer under the Regulations.

- 13.96 The objectivity of the average consumer test is similar to the “materiality” test of the current law of misrepresentation. By contrast, in respect of equivalents to aggressive commercial practices, the case law has traditionally adopted a completely subjective approach.
- 13.97 We think it would be helpful to have an objective benchmark for assessing significance of the commercial practice for two reasons. From the trader’s point of view, it ensures that the practice was genuinely misleading or aggressive, rather than a trivial issue to which the consumer over-reacted. It also eliminates cases in which the misrepresentation was unimportant, and where it is unlikely that the consumer suffered any real loss as a result.
- 13.98 We think it would also be helpful for consumers. As explored below, we think that once consumers have proved that the aggressive or misleading commercial practice was likely to cause *the average consumer* to enter 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 do not need to show that they would not have entered the contract or made the payment if the practice had not occurred.

Our proposal: adopting the average consumer test

- 13.99 Under the Consumer Protection Regulations the average consumer is said to be “reasonably well informed, reasonably observant and circumspect”.⁵⁹ If only an extremely naïve consumer would have misunderstood or felt pressured by the trader’s behaviour, they may not be able to recover under an objective test.
- 13.100 When the Regulations were first introduced, the concept of “an average consumer” was new and unfamiliar, and there was considerable debate about what it meant.⁶⁰ However, research by Jane Williams and Caroline Hare, showed that trading standards officers’ early experience of enforcing the Regulations was that they were becoming more comfortable in interpreting the test in accordance with “common sense” notions of justice.⁶¹ As one officer put it, if “your gut says it’s unfair, then nine times out of ten you can actually fit it into something”.⁶²

Question 24

Do consultees agree that a trader should only be liable for a misleading or aggressive practice if it would have affected an “average consumer”?

- 13.101 In some cases, however, the Regulations substitute a test looking at how an average vulnerable consumer would react:

⁵⁹ Reg 2(2).

⁶⁰ See discussion at paras 2.42 to 2.46 of this Consultation Paper.

⁶¹ J Williams & C Hare, “Early Experiences of the Enforcement of the Unfair Commercial Practices Directive in Scotland”, (2010) 33(4) *Journal of Consumer Policy* 377-401.

⁶² Law Commissions, *Unfair Commercial Practices and Private Redress. Feedback from stakeholders* (October 2010), para 2.22.

- (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;⁶³ 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.⁶⁴
- 13.102 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. In respect of aggressive practices for example, the courts in England and Wales have gone further than this, and adopted a purely subjective test for duress. In Scots law, the concept of “facility and circumvention” offers greater protection to more vulnerable categories of consumers.⁶⁵
- 13.103 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. Thus the use of an average consumer test in private law would have the benefit of giving traders more clarity regarding what standards can be expected of them, yet retaining specific protection for more vulnerable consumers.

Question 25

Do consultees agree that the definition of “average consumer” should include provision for vulnerable consumers mirroring the Regulations?

The effect on the individual consumer

- 13.104 Clearly, consumers should only be entitled to a remedy if the misleading or aggressive commercial practice had an actual impact on them. But there are two possible approaches to what the causation test should be. Was the aggressive or misleading commercial practice:
- (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?

⁶³ Reg 2(4).

⁶⁴ Reg 2(5).

⁶⁵ In particular see McBryde, para 16-08, “circumvention could be inferred from the circumstances of a bad bargain made by a facile person”.

13.105 We think 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. On the other hand, putting no weight on this factor at all would be inconsistent with the essentially compensatory aim of private rights.

Our proposal: a significant factor

13.106 We think that requiring the aggressive or misleading practice to be a "significant factor" in the consumer's choice would be a satisfactory compromise. We think this is in line with existing law, particularly in Scotland.⁶⁶

13.107 In practice this means that the consumer will need to provide some evidence that they saw the misleading statement, or experienced the aggressive practice before making the decision to buy or pay. And if the misleading or aggressive practice is sufficiently serious to be a significant factor for a reasonably well informed, observant and circumspect consumer, that will normally be enough. Consumers are not required to provide proof about what they may or may not have done in a hypothetical set of circumstances, where no unfair practice took place.

Question 26

Do consultees agree that traders should only be liable if the misleading or aggressive practice:

(1) would be likely to cause the average consumer to make a decision that they would not have made otherwise to enter a contract or make a payment? *and*

(2) was a significant factor in this consumer's decision to enter the contract or make the payment?

THE RELEVANCE OF FAULT

13.108 The elements of liability will vary between misleading and aggressive commercial practices; however a fundamental policy choice is whether liability should depend upon the fault of the trader. The options include:

- (1) Proof of fault necessary for liability. Varying degrees of fault attract different remedies;
- (2) No-fault, strict liability; or
- (3) No-fault liability with a due diligence defence.

⁶⁶ See our discussion at paras 8.7 to 8.8 of this Consultation Paper.

- 13.109 Typically, consumers will know that they were misled, but have little idea why they were misled. It is extremely difficult to show that the trader was at fault. Where corporations are involved the question is further complicated by the question of whose fault needs to be proved. On the other hand, strict liability might be excessively harsh on traders that make a genuine effort to avoid using misleading or aggressive practices in their business. Mistakes can happen even in well-run businesses. The question is how the risks and the burden of proving fault should be allocated between consumers and businesses.
- 13.110 Under our proposals, the consumer does not need to prove fault in order to get first tier remedies. In such cases, the trader can only escape liability by showing that the misleading or aggressive practice did not affect the actual consumer. However, if the consumer is claiming losses for consequential loss under the Tier 2 remedies, the trader can escape liability by showing due diligence. We explore the details of this defence in Part 14.⁶⁷
- 13.111 We think that no-fault liability with a due diligence defence allocates the burden of proof to the parties best-placed to satisfy it. The consumer can say whether they experienced misleading or aggressive behaviour, and the trader can demonstrate what measures they took to avoid being at fault. This allocation of the burden of proof reflects the current position under the Regulations (substituting the public authority for the consumer). It also reflects the statutory liability of traders for negligent misrepresentation under the law of England and Wales, although the provision is made confusing by its use of the fiction of fraud.

THE IMPACT ON EXISTING LAW

- 13.112 We have considered how far the new statute should exist alongside the current law and how far it should replace existing legal rights.
- 13.113 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.

Common law doctrines

- 13.114 We do not intend to repeal common law doctrines, such as the tort/delictual liability for negligent mis-statements, following *Hedley Byrne v Heller*.⁶⁸ As discussed above, the new Act will not cover this sort of mis-statement. It will only provide redress against the party who enters into a contract with the consumer, or who receives a payment.
- 13.115 This suggests that there might continue to be a role for the law of negligent mis-statements. There are some examples where we think this doctrine may still be needed:

⁶⁷ See in particular questions 44(5) and 45 of this Consultation Paper, at page 219.

⁶⁸ [1964] AC 465.

Example: misrepresentation by the manufacturer

A consumer emails a manufacturer to ask if building materials are suited to their needs. The manufacturer assures them (falsely) that the materials are entirely suitable. The consumer then buys them from a retailer on the strength of the manufacturer's mis-statement.

- 13.116 If the retailer was not aware of the manufacturer's statement, and did not know about the consumer's needs, the consumer would not have a remedy against the retailer under the Sale of Goods Act 1979. These cases are rare, but we think the doctrine should continue to exist to cover them.

Contract remedies

- 13.117 Under our 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.
- 13.118 For example, a consumer purchases a car on the strength of a representation that the VAT payable on the transaction will be charged at the rate prevailing on the date of the representation but is then told, when the dealer seeks payment, that the new higher rate that has just come into effect will be the one charged. The consumer who likes the car and other aspects of the deal may well wish to carry through the transaction but at the lower rate of VAT.⁶⁹
- 13.119 Another case may be the purchase of a product such as a computer or an item of software on a representation that the supplier provides an after-sales service of advice and support which, as it turns out, is not the case. In this case it is worth noting that in Scots law the remedy of specific implement is not only an order to perform against the other contracting party; the court has discretion to make alternative orders to enable a party to obtain performance.⁷⁰ It has been suggested that this may give the court power to order performance by third parties, to be paid for by the contract-breaker.⁷¹ At common law the court may ordain a defender to carry out work at the sight of a person appointed by the court.⁷² So in our example it might be possible for the consumer to obtain the expected after-sales service but at least at the expense of the supplier. Interim orders of implement are also possible, and may be of some use in consumer cases.⁷³

⁶⁹ If the dealer has subsequently sent the customer a standard form contract saying that the VAT is that prevailing at the time of delivery of the car, there may be questions (a) whether the form has been incorporated into the contract of sale; (b) even if so, whether it is anyway challengeable for unfairness under Unfair Contract Terms Act 1977 ss 3(2)(b) (England, Wales and Northern Ireland) and 17(1)(b) (Scotland).

⁷⁰ Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s 1(2).

⁷¹ MacQueen & Thomson, para 6.8.

⁷² McBryde, para 23-24.

⁷³ Court of Session Act 1988 ss 46, 47(2); *Church Commissioners for England v Abbey National plc* 1994 SC 651; McBryde, para 23-23.

13.120 Under our proposals, a consumer's right to claim specific performance or implement would remain unchanged. Remedies for unjust enrichment would also continue to be available.

Statutory provisions

13.121 On the other hand, the proposed new Act covers substantially the same ground as the Misrepresentation Act 1967 (in England and Wales) and section 10 of Law Reform (Miscellaneous Provisions) Act 1985 (in Scotland).

13.122 Our proposals can only affect business to consumer transactions. The two misrepresentation Acts will continue to exist independently of our proposals, in order 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.

13.123 There are cases in which liability under the Misrepresentation Act 1967 may offer consumers greater rights: the measure of liability for fraud is more extensive under the 1967 Act, and it is possible that the "fiction of fraud" also provides consumers with this greater level of redress in respect of negligent acts.

13.124 Overall, we propose that the new Act would provide a new, user-friendly alternative for consumers to be added alongside existing law. We think consumers would opt for the simpler solution of suing under the new Act. The provisions under the scheme of the new Act could be added alongside existing remedies; or it could partially replace existing law such as the Misrepresentation Acts.

Question 27

Should the Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 continue to apply to consumers in transactions covered by the new Act?

13.125 In the next Part we consider the remedies which would be available to a consumer under the proposed new Act.

PART 14

DETAILED PROPOSALS: REMEDIES

- 14.1 In Part 12, we provided an overview of our proposals. This included the remedies which we provisionally propose should be available to consumers under a possible new Act dealing with misleading and aggressive practices. Here we discuss the remedies in greater detail, and ask for consultees' views.
- 14.2 We start by looking at the underlying policy choices, and explain why we favour a "reliance approach" to remedies, and think that specific standardised remedies would be helpful. We then describe our proposed two tiers of remedies, beginning with the right to unwind the contract.

THE UNDERLYING POLICY CHOICES

Unwind the transaction or enforce it like a contract?

- 14.3 What should the law aim to do when faced with a consumer who has experienced a misleading or aggressive practice? There is a fundamental policy choice. As we discussed in Part 11, in Australia and the USA, the law concentrates on unwinding the transaction, attempting to restore the parties to the position they were in before the practice. By contrast, in New Zealand, the law views misrepresentations as contractual promises, and attempts to put the consumer into the position they would have been in had the representation been true. The Draft Common Frame of Reference (DCFR) also provides a remedy based on enforcing consumers' reasonable expectations.¹
- 14.4 These two measures of damages are often referred to as "reliance damages" and "expectation damages". A simple case 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 £1,000.²

- 14.5 Our view is that the reliance measure is the more appropriate. Our proposed remedies focus on unwinding the transaction rather than trying to put consumers in the position they would have been in had the misleading statement been true. We say this for five reasons:

¹ DCFR, Article II.-3:109.

² 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.

- (1) Although the courts are prepared to enforce promises, they impose a relatively high test for showing that statement was intended to create legal relations. Most statements in advertisements, for example, would fail this test. The thresholds for liability proposed in Part 12 are lower. Consumers would have a cause of action for any misleading statement which would have induced the average consumer to enter the contract or to make a payment that would not otherwise have been made.
 - (2) Rogue traders often make claims they have no practical means of fulfilling. As we discussed in Part 8, the law cannot value a completely speculative gain. 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) Consumers need clear, simple remedies. As discussed in Part 4, when losses are difficult to quantify, the criminal courts often respond by not providing any compensation at all. Trading standards officers taking part in the proposed civil sanctions pilot also stressed that the amount of the remedy should be clear and simple, preferably related to the price paid.
 - (4) Consumer groups confirmed the advantages of “cheap and cheerful” remedies. With the reductions in legal aid, even large claims will need to be resolved without lawyers. In the absence of legal help, any approach which requires consumers to quantify expectations is likely to be too complex and uncertain to be workable. In providing a reliance measure of loss, we are following the current law on misrepresentation.
 - (5) For aggressive practices, there is no promise to enforce, there is no “missed benefit” over and above the consumer’s (unwilling) reliance. The reliance approach is the only option. We think there are advantages in having a single remedy for both misleading and aggressive practices.
- 14.6 There may be some cases where expectation damages provide a suitable remedy. *Which?* told us that consumers often used traders who claimed to be members of trade bodies, only to discover that the claim was untrue. The consumer could not use the complaints or arbitration scheme, and may be left without a guarantee or certificate for the work done. Consumers wish to be compensated for their loss in not being able to use the arbitration scheme or not receiving a certificate.

- 14.7 In these cases, consumers would have a choice. They could bring a claim for breach of contract, including specific performance for example, on the basis that membership of the trade body was a term of the contract. Alternatively, they could use the proposed Act on the basis that the trader has made a misleading representation. As we discuss below, we think that the remedies under the Act would work, attempting to approximate the outcomes under current law but in a simplified way. We suggest that our scheme of remedies should be self-contained. Consumers would not be able to recover *both* contractual remedies and redress under the new Act. This aims to promote simplicity, and to avoid difficult questions about what might count as double recovery for the same loss.³
- 14.8 Nevertheless we are mindful that reliance damages may not be suited to all cases, and we ask for examples of cases where expectation damages in the contractual measure would be more suitable. A more general consideration is that where the amounts involved are small, like the £16 in our example, it is unlikely that any consumer would sue in the courts. This must be right, but clarifying the individual's rights may help in the informal resolution of such disputes in the shadow of the laws we are proposing.⁴

Question 28

Do consultees agree that remedies under the proposed new Act should aim to restore consumers to the position they were in before the misleading or aggressive action took place?

Question 29

Are there any examples where an expectation measure of loss would be more appropriate?

General principles or specific guidance?

- 14.9 It is common for legislation on unfair practices to provide the courts with a wide range of remedies, and leave the details to judicial discretion. For example, the Australian Trade Practices Act 1974 provides a list of possible remedies, including damages, enforcement orders and variation orders. The way that these remedies are applied is left to the courts.⁵

³ See paras 12.15 to 12.20; and 13.117 to 13.120 of this Consultation Paper.

⁴ Where the misleading or aggressive practice is serious or widespread, there may be a prosecution under the Regulations. In such cases, our scheme of remedies could be enforced through compensation orders made by criminal courts. Given the simplicity of our scheme, judges may be more willing to use these powers. See paras 4.17 to 4.23 of this Consultation Paper.

⁵ See para 11.17 of this Consultation Paper.

- 14.10 Whether or not this form of flexibility works well for business disputes, we are concerned that it is ill-suited to consumer claims. First, very few consumer cases reach the courts. There is therefore a dearth of authority on how the principles are to be applied in consumer disputes. Second, consumers are easily deterred by uncertainty. They often feel at a disadvantage in their dealings with traders, and want to be able to point to “chapter and verse” about what they are entitled to. Third, trading standards officers who are at the helm of enforcing the Regulations and civil sanctions under the pilot scheme, told us they prefer certainty.⁶
- 14.11 We have therefore attempted to give a greater steer about the appropriate remedies than is common in legislation of this type. We are mindful that this may be at the expense of some flexibility. Misleading and aggressive practices come in all shapes and sizes, and in some cases the specified remedy may over- or under-compensate consumers for their loss.
- 14.12 We have tried to keep the potential problems to a minimum. We think that any measure of over-compensation is small and can be justified in the circumstances. We have also provided some discretion for second tier remedies, to prevent under-compensation in hard cases. However, we accept that it is a scheme, which values certainty over flexibility. At the end of this Part we ask consultees if the proposed scheme achieves an appropriate balance between certainty and flexibility.

TWO TIERS OF REMEDIES

- 14.13 We are proposing two tiers of remedies:
- (1) The standard, first tier remedies (Tier 1) 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, civil sanctions, criminal court compensation orders, and after intervention from an advice agency. They are of 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 seriousness of the misleading or aggressive practice.

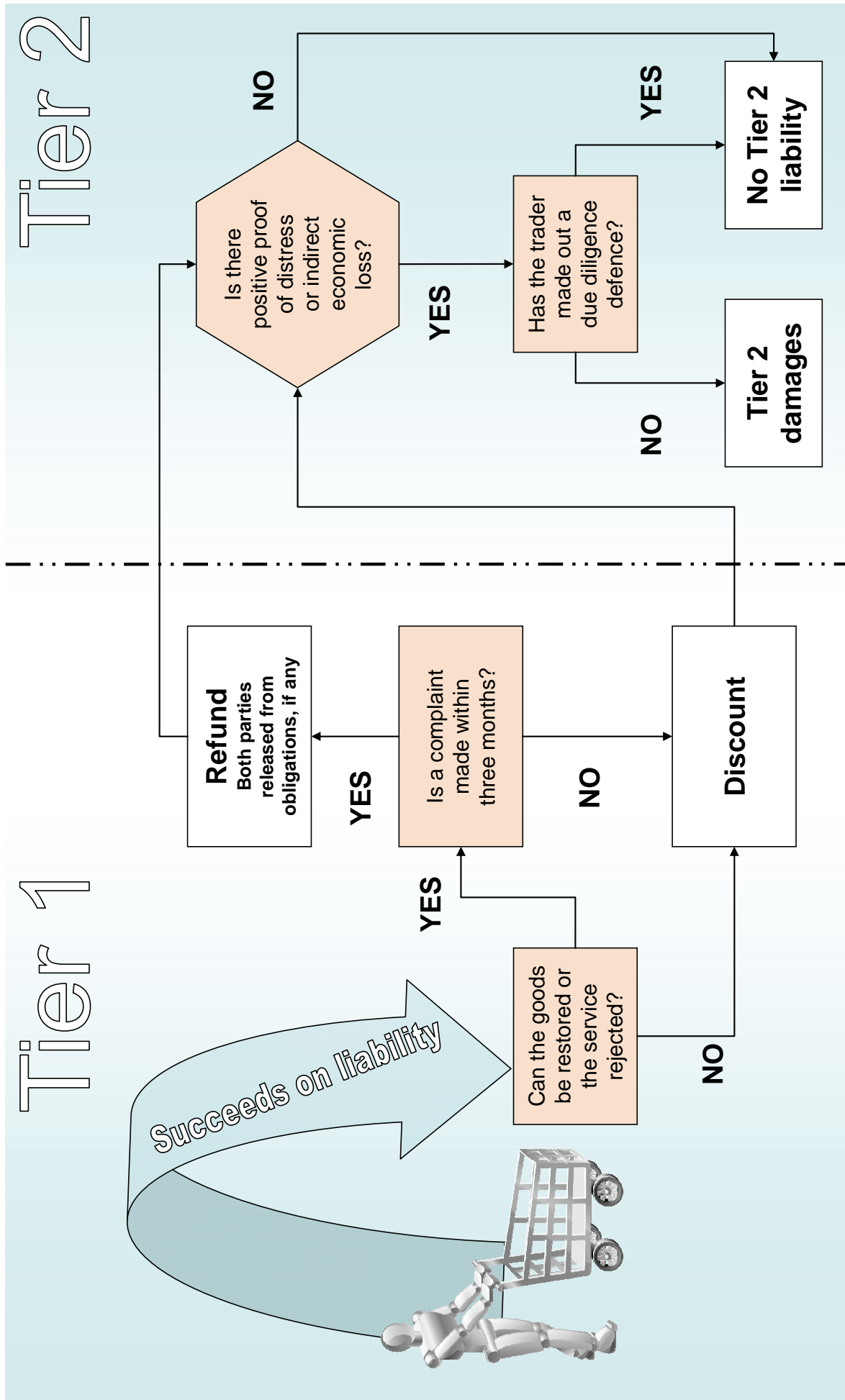
⁶ We refer to comments arising from the Civil Sanctions Pilot Workshop that the Law Commission held in conjunction with the Office of Fair Trading, Local Better Regulation Office and certain trading standards services, on 28 October 2010.

- (2) The second tier remedies (Tier 2) would be provided only if the consumer can prove that the practice caused actual loss.⁷ In these circumstances, the consumer may claim damages for:
 - (a) indirect economic losses; and/or
 - (b) distress and inconvenience.

14.14 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.

⁷ Tier 2 remedies would also be subject to a due diligence defence, as discussed at paras 14.66 to 14.69 of this Consultation Paper.

PROPOSED NEW REMEDIES FOR CONSUMERS



14.15 Below we consider each of these remedies in turn.

TIER 1 REMEDIES

14.16 The Tier 1 remedies are the standard remedies which consumers would receive upon showing that a trader engaged in a misleading or aggressive practice affecting them. We look first at the right to unwind in the archetypal case in which the consumer has received goods or services in return for payment. We then consider how it works in cases where the consumer has sold goods to the trader or made a payment. We then consider the alternative Tier 1 remedy where unwinding is not possible: the right to a discount.

THE “RIGHT TO UNWIND”

Terminology

14.17 This remedy is similar to “rescission” in England and Wales or “reduction” in Scotland. However, the current terms are confusing: “rescission”, for example, has different meanings in Scotland and England. Legal texts often use words such as “restitution” or “*restitutio in integrum*”, which non legally qualified advisers find particularly baffling.

14.18 We wish to use a new term that does not carry any existing legal baggage. We also wish, as far as possible, to use everyday language. We think the word “unwind” would be generally understood as meaning to restore the parties to the position they were in before entering the contract or making the payment.

What do we mean by “unwinding” a contract to buy goods or services?

14.19 “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 brings the contract to an end, releasing both parties from any further obligations.

14.20 As we have seen, the current remedy for unwinding the contract may be lost easily, and there is uncertainty over how long it lasts. Our intention is to provide clarity over these issues. We start by considering how long the right should last, and then at how far the consumer must return the goods or services. Finally we consider whether consumers should make an allowance for their use of the product.

How long should the right to unwind last?

14.21 There are two approaches one could take to this issue. The first would be to say that the right lasts for a reasonable time, depending on the circumstances of the case. The second would be to specify a set time.

- 14.22 We considered a similar issue in our report on consumer remedies for faulty goods. The current law requires consumers to act within “a reasonable time”. We thought this was too uncertain. Instead, we recommended that consumers should normally exercise the right to reject within 30 days.⁸ This would give consumers greater confidence in their negotiations with traders and reduce the need to rely on ambiguous case law.
- 14.23 We think the same arguments apply here. Consumers would be more confident in asserting their rights if they could rely on a fixed time, rather than ambiguous concepts of reasonableness.
- 14.24 If we are to fix a period, how long should that period be? We think there are only three realistic alternatives: one month (30 days), three months (90 days) or six months (180 days).
- 14.25 The advantage of 30 days is that it would be the same as the period we recommended for consumers to reject faulty goods. It would reduce confusion between different time periods, and give the consumer less to learn.
- 14.26 The problem is that the time is short for the types of problem involved. We recommended 30 days as sufficient time for consumers to inspect the goods and to test them for a short period in actual use. In the case of clothes, for example, it is intended to give enough time to wear the clothes, wash them and, if they fall apart, return them to the shop. But consumers must act quickly. It may take longer to find out that what the trader said was untrue.
- 14.27 The length of the period needs to be discussed in the light of when it starts. As discussed below, we suggest the period should start when the goods are delivered or service begins. This means that time can start to run before the consumer could reasonably discover anything was wrong.⁹ If, for example, the trader has lied about their membership of a trade body, the consumer may only discover this after making a complaint to the trade body. If the trader has lied about the technical details of the product, the consumer may only realise this when told by an expert.
- 14.28 We are particularly concerned that 30 days may not be sufficient for 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 try to hide what has happened. It often takes relatives some time to discover the scam. Relatives may then need to take advice, which adds further delay. This suggests that three months would be more appropriate.

⁸ Law Commissions, *Consumer Remedies for Faulty Goods* (2009) Law Com No 317; Scot Law Com 216, Recommendation 8.2.

⁹ In such cases the consumer would not be without a remedy as Tier 2 remedies, which can be up to 100% of the purchase price remain a possibility. However, the simple refund and unwinding of obligations would no-longer be an option.

- 14.29 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. It might encourage frivolous claims, where consumers have been reasonably happy with the purchase.
- 14.30 On balance, we think that three months (90 days) is an appropriate period, but we welcome views on this.
- 14.31 There is also the option of having a fixed period, but with the possibility of extending it in some circumstances, such as where the consumer is vulnerable. This option would allow greater flexibility, and means that a shorter standard period (like 30 days) could be appropriate. However it adds a layer of complexity, because different periods of time would apply in different cases. We are concerned that the added flexibility of a discretionary period would undermine the certainty we are seeking to establish for Tier 1 remedies.

Question 30

Do consultees agree that the right to unwind should last for a fixed period?

Question 31

Do consultees think that the unwinding period should last for three months (90 days)? If not, what other period would be preferable?

Question 32

Should there be a discretion to extend the fixed period in some circumstances, such as those involving vulnerable consumers?

When should the unwinding period start and how can the consumer exercise their right to unwind?

The start

- 14.32 Where the consumer has entered a contract,¹⁰ we think that the unwinding period should start on the latest of the following alternative dates:
- (1) when the consumer enters the contract;
 - (2) when the goods are delivered; or
 - (3) when the performance of the service is started.

¹⁰ We consider payments separately, at paras 14.46 to 14.48 of this Consultation Paper.

Exercise of the right to unwind

- 14.33 We propose that the clock should stop running for the purposes of the unwinding period when the consumer makes a complaint, indicating a desire to reject the remaining goods or services. As most consumers act without advice, we do not propose any formal requirements. For example, we do not propose that the complaint must be in writing.

Question 33

Do consultees agree that the period for the right to unwind should start from the later of the following dates: when the contract is formed; the goods are delivered; the service is started?

Question 34

Do consultees agree that 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

- 14.34 One problem with the current law is that the right to unwind the contract can be lost too easily. It is unrealistic to expect the consumer to restore the trader to a pre-contract position: consumers are rarely able to return goods in an unused state, and it is the nature of a service that once it is started it cannot be undone. Given that the trader has committed a misleading or aggressive practice, we think that total restoration is unnecessary. 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.
- 14.35 In the case of goods, it is already common for consumers to return faulty goods in a used (and unsalable) state. 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.¹¹

- 14.36 However, the concept is less familiar for services. We are suggesting that the right to unwind should last until the services have been fully consumed. Thus consumers who are misled about a theatre performance have a right to full refund at any time up to the final curtain call. Consumers who are misled about a holiday may obtain a full refund if they leave at any time before the final day. Where the service is on-going (such as an internet service provider contract) the deadline will be the three months: the consumer must seek to undo the contract within three months.

¹¹ *Consumer Remedies for Faulty Goods, A Joint Consultation Paper* (2008) Law Commission Consultation Paper No 188 and Scottish Law Commission Discussion Paper No 139, para 8.57.

- 14.37 We are conscious that it takes a lot for consumers to reject services in mid-performance. People are generally reluctant to walk out of a restaurant or theatre, or to leave a package holiday 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.
- 14.38 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 at fixed intervals. Or the misleading quality of a statement may only become reasonably apparent well after three months from the time the service was provided. Under our proposals, a consumer who cannot return or reject the goods within three months does not remain without a remedy: consumers would still have access to a discount on the purchase price.
- 14.39 The difference in treatment is not because such consumers are in principle any less deserving of a generous and easy remedy. Indeed in the worst cases the discount may well be 100% and identical in kind to a refund. However the physical impossibility of making mutual restoration on both sides and the fact that the service was not rejected so that the consumer received the full "benefit" of the service means that a refund is less appropriate as a blanket response in all cases. The same is true of the passage of time, which can make unwinding a transaction unrealistic. In these cases, the alternative "discount" approach provides a remedy with more scope for variation depending on the circumstances.

Question 35

Do consultees agree that 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?

- 14.40 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?
- 14.41 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.¹² When we researched this issue as part of our work in remedies for faulty goods, we found that this concept was very unpopular with consumers: "in fact, it was a rather inflammatory subject". As we said:

¹² 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".

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.¹³

14.42 We think that the same is true here. If a consumer is misled about a week's holiday, and endures 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 petrol 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.

14.43 We are conscious that in some cases this may over-compensate consumers. Take the example of a mobile phone contract which makes misleading statements about the service overseas. A consumer may have used the phone without problems within the UK for over two months. The right to unwind would effectively give the consumer free phone calls. However, we think that any over-compensation will be limited, as the complaint must be made within three months. Given that the trader has acted in a misleading or aggressive way, we do not think that this level of over-compensation is wholly inappropriate. The equities between the parties are not equal because the trader has by definition acted either misleadingly or aggressively to begin with. The consumer is required to at least reject or return the product or service. Overall, we think that possible over compensation of up to three months' use of a product or service is a price worth paying for a simpler, clearer remedy.

Question 36

Do consultees agree that a consumer who exercises the right to unwind a contract within three months should not be required to make an allowance for their use of the product?

Unwinding the contract where the consumer has sold goods

14.44 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 value.

14.45 Clearly, if possible, the trader should return the item, and the consumer should return the price paid. If this is no longer possible, we think the trader should make a money payment equivalent to the value of the item, offsetting any payment already made to the consumer.

¹³ *Consumer Remedies for Faulty Goods, A Joint Consultation Paper (2008) Law Commission Consultation Paper No 188 and Scottish Law Commission Discussion Paper No 139, para 8.152.*

Question 37

Do consultees agree that consumers who have sold goods as a result of misleading or aggressive practices should be entitled to the return of the goods within three months, in exchange for the price paid?

Question 38

Do consultees agree that where this is not possible, the trader should provide a monetary equivalent?

The right to unwind a payment

Where the payment was not owed

- 14.46 Clearly, if someone has been misled or threatened into making a payment which was not owed, they are entitled to their money back. That is uncontroversial, and already part of the law on unjust enrichment. Consumer groups told us that the law of unjust enrichment is complex and difficult. We think that it might be helpful to provide a statutory remedy to make the law more accessible.
- 14.47 We see no reason to limit the right to three months. Consumers should have a right to return of the payment at any time within the normal contractual limitation or prescriptive periods (six years in England and Wales, and five years in Scotland respectively).¹⁴

Where the payment was owed

- 14.48 The more difficult issue is where someone has been misled or threatened, and as a result has paid money which was owed. The principles of “unwinding” a payment suggest that a consumer who receives the return of a payment should nonetheless pay the debt. In most cases, this means that the trader would retain the money. As we shall see, the consumer may be entitled to Tier 2 remedies, including damages for distress and inconvenience, but will receive no benefit from the right to unwind.

Question 39

Where a consumer makes a payment which was not owed as a result of a misleading or aggressive practice, would it be helpful to provide a new statutory right to the return of the payment?

¹⁴ In England and Wales, the limitation period starts to run from the time the right of action arises. See eg Limitation Act 1980, s 4 (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).

Question 40

Where the payment was owed, should the debt be offset against the payment, permitting the trader to retain the money paid?

A DISCOUNT ON THE PRICE

- 14.49 Where the right to unwind the transaction has been lost, a remedy should still be available under Tier 1. Under the proposed scheme, where the goods or services have been fully consumed, or the three month period has expired, the consumer would receive compensation in the form of a discount on the price.
- 14.50 We propose that the new Act should use broad bands of detriment, leading to the discounts on the purchase price. Attempts at precision may give a false impression of accuracy, or involve greater costs than the increased accuracy is worth. As the Tier 1 remedies apply in all cases, they need to provide for the full range of detriment which consumers may actually suffer, from none, to 100%. We suggest the following discounts:
- (1) 0% if negligible;
 - (2) 25% if minor;
 - (3) 50% if serious; and
 - (4) 100% if very serious.
- 14.51 We suggest that the level of seriousness of the detriment suffered because of an aggressive or misleading commercial practice should depend on all the circumstances, including:
- (1) The impact 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.
- 14.52 The discount is intended to provide compensation for the diminution in value which the consumer has suffered, but in a simple and transparent way. The advantage of this approach is that the consumer would not need to produce evidence of their loss. It would be suited to a wide variety of procedures, including compensation orders following criminal conviction, restoration orders applied as a civil sanction, or small claims.
- 14.53 We suggest including a 0% band to cater for cases where although there has been a misleading or aggressive practice and the consumer has been affected, the detriment suffered is negligible, or the delay is significant. At paragraphs 14.93 to 14.95 below, we discuss a case in which a consumer has bought a £5 T-shirt, worth about £5, in a false closing-down sale, but delays taking action for more than 3 months. We think that with such a negligible loss, and so long a delay, it may be appropriate to deny a remedy altogether.

- 14.54 Without the 0% band, an adjudicator may be tempted to reject an unmeritorious claim by a consumer on the ground of liability instead. This would be undesirable as it could lead to a strained interpretation of the new Act, rather than transparently acknowledging that in some cases a money remedy of 25% may be too much.
- 14.55 It will be essential for the Department of Business, Innovation and Skills to provide Guidance on how these discounts should apply, akin to guidance on other forms of intangible damages. Examples will help apply the criterion of reducing the price in a more transparent and consistent way.¹⁵ The approach to damages for distress and inconvenience which are not capable of precise measurement can also provide a helpful model.

Question 41

Where the right to unwind has been lost, should consumers be compensated by a discount on the price?

Question 42

If so, should the discounts be in pre-set bands?

Question 43

Are the proposed bands (0%, 25%, 50% and 100%) set in the right place?

TIER 2 REMEDIES

- 14.56 The Tier 2 remedies are intended as additions to the Tier 1 remedies. Tier 2 remedies would, however, only be used in serious cases where the misleading or aggressive practice caused actual loss beyond the value of a refund or standard discount. While Tier 1 provides standard remedies, Tier 2 provides individualised remedies. The consumer would need to prove both that the loss occurred, and that it would not have happened but for the misleading or aggressive practice. Furthermore, the trader could avoid this consequential liability with a due diligence defence.
- 14.57 There are two types of Tier 2 remedies. The first compensates the consumer for further economic losses they may have suffered because of the aggressive or misleading practice. The second provides redress if the consumer has suffered distress as a result of the trader's conduct.

¹⁵ The Ogden Tables (6th Ed) are published by the Government Actuary's Department to assist courts in the calculation of future losses in personal injury and fatal accident cases.

DAMAGES FOR INDIRECT ECONOMIC LOSS

- 14.58 The law already provides damages for indirect losses caused by misrepresentations. In a consumer context, examples of indirect losses might include the costs of installation or travel, or disposing of an existing product – such as the consumer who is sold a new bed in an aggressive way and then throws away their old bed to make room for it. 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.
- 14.59 We intend this to be a fairly high hurdle. Take a case where theatre tickets were mis-sold. The consumer hired a babysitter, travelled to the theatre and bought over-priced interval drinks. The costs of babysitter and travel could only be claimed if the consumer could show that, had the misleading statement not been made, the performance would not have been attended, nor any other performance. Optional expenses, such as the interval drinks, could not be claimed as they would be considered too remote.
- 14.60 The courts are already used to providing damages for indirect losses for misrepresentations and other torts. We think that most issues raised by indirect losses can be left to general legal principles.

DAMAGES FOR DISTRESS AND INCONVENIENCE

- 14.61 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,¹⁶ or to avoid distress.¹⁷ The key cases in this area concern contracts for entertainment, particularly spoiled holidays.¹⁸
 - (2) Where some physical inconvenience and discomfort have been caused by the breach.¹⁹ Damages for physical inconvenience are common where the landlord has failed to repair the consumer's home.²⁰
- 14.62 Scots law also recognises these exceptions.²¹ Given that many consumer contracts and transactions are not pursued for profit, the possibility of damages for distress and inconvenience is important to avoid under-compensation.

¹⁶ *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732.

¹⁷ For example, *Heywood v Wellers* [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.

¹⁸ *Jarvis v Swan Tours* [1973] QB 233 CA; *Jackson v Horizon Holidays* [1975] 1 WLR 1468 CA; *Milner v Carnival* [2010] EWCA Civ 389.

¹⁹ *Watts v Morrow* [1991] 1 WLR 1421, 1445 by Bingham LJ, cited with approval (in this respect) by the House of Lords in *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732.

²⁰ See eg *Wallace v Manchester City Council* [1998] 3 EGLR 38.

- 14.63 The courts have set informal tariffs, which are typically low. In a case concerning a dream-cruise-turned-nightmare, the Court of Appeal noted that “awards in this area should be restrained and modest”.²² Thus the courts have suggested that the inconvenience of living in a house in disrepair may be appropriately compensated by around £1,000 to £2,000 per person per year.²³ The Financial Services Ombudsman takes a similar approach. It has established three bands of damages: (1) nominal, for example, making an apology, sending flowers or vouchers; (2) significant, £300 - £900; and (3) exceptional, £1,000 plus.
- 14.64 We think 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.
- 14.65 The consumer would need to show either that an important object of the contract was to give pleasure, relaxation or peace of mind, or that they have suffered some alarm, distress, physical inconvenience or discomfort from the practice. The damages would be modest, and in defined bands.

THE “DUE DILIGENCE” DEFENCE

- 14.66 Under our proposals, a trader could only rely on a due diligence defence to avoid Tier 2 remedies. Tier 1 remedies would be available even for an innocent misrepresentation. This reflects the current law.²⁴ Where a consumer has relied on an innocent misrepresentation, neither the trader nor the consumer may be at fault, but something has gone wrong and the loss has to fall somewhere. As it is the trader who made the misleading statement or acted aggressively, it appears right that the consumer should at least be able to get out of the contract. We would not wish to restrict consumer rights in this regard, and our proposals preserve the standard right to unwind (albeit for a limited time) regardless of fault.

²¹ See *Report on Remedies for Breach of Contract* (1999) Scottish Law Commission No 174, para 3.3; McBryde, 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.

²² *Milner v Carnival* [2010] EWCA Civ 389, [2010] 3 All ER 701, para 41 by Ward LJ, echoing the words of Lord Steyn in *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732, para 28 and Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445.

²³ See *Wallace v Manchester City Council* [1998] 3EGLR 38 and *AXA Insurance UK v Cunningham Lindsey UK* [2007] EWHC 3023 (TCC).

²⁴ At common law a trader might sometimes have a defence to repayment. In cases of unjust enrichment for example, the trader could assert a change of position defence. See *Lipkin Gorman v Karpnale* [1988] UKHL 12; [1991] 2 AC 548; *Credit Lyonnais v George Stevenson & Co Ltd* (1901) 9 SLT 93. The applicability and scope of these defences is, however, highly uncertain.

14.67 A trader who acted with due diligence would not be liable for the indirect losses suffered by the consumer. The trader's liability would be capped at the ticket price of the goods or services. Under the current law, damages are not available as of right if the trader can show that the misrepresentation was innocently made. Under section 2(1) of the Misrepresentation Act 1967, 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.

14.68 The Regulations also 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

(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.

14.69 We have considered whether to base the defence on section 2(1) of the Misrepresentation Act 1967 or regulation 17 of the Regulations. Our current thinking is that it should replicate the wording of regulation 17. Traders will already be familiar with that defence, and we think it would be simpler to use the same concept for both misleading and aggressive practices.

Question 44

Do consultees agree that:

(1) Damages for indirect economic loss should be available, provided that the consumer proves that they would not have incurred the loss but for the misleading or aggressive practice?

(2) 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?

(3) Damages for distress and inconvenience should be modest, and in defined bands?

(4) Damages for indirect economic loss and distress and inconvenience should not be available if the trader can establish a due diligence defence?

(5) The due diligence defence within the proposed new Act should mirror the due diligence defence in the Consumer Protection from Unfair Trading Regulations 2008?

- 14.70 In summary, the scheme of remedies under the proposed new Act provides for two tiers of remedies, with the Tier 1 remedies geared at unwinding the transaction, and the Tier 2 remedies focussing on compensation. We have departed from traditional legal terminology in favour of a free-standing scheme that uses every day language. Guidance on how the remedies should be applied will be important to help ensure consistency and transparency. However, we recognise that issues surrounding misleading and aggressive practices will often be highly context-specific and cases will rarely go to the higher courts. Useful precedent may therefore be less likely to develop. We expect that the rules of the proposed new Act will mostly be used by non legal advisers and traders and consumers themselves in the informal resolution of disputes.

Question 45

Do consultees think the remedies we propose as a whole offer an appropriate balance between certainty and flexibility?

WORKED EXAMPLES

- 14.71 We provide some brief examples, also drawn from earlier in this paper, to illustrate how these principles would apply in practice.
- 14.72 In all these cases, the first question is whether there is a misleading or aggressive practice. If so, the second question is whether it would likely induce the average consumer to enter the contract or make a payment they would not otherwise have made. The individual consumer must show the aggressive or misleading practice was a significant factor in a decision to make a payment or enter a contract. Provided the consumer can satisfy these requirements, we consider how Tier 1 and Tier 2 remedies might apply in the cases below.

Aggressive doorstep selling to the elderly

Brandon, an elderly house-bound man was sold a £3,000 bed. The salesman stayed with the consumer in the latter's house for three hours, giving the impression that he would only leave if the consumer agreed to buy.

- 14.73 Tier 1 remedies: if Brandon complains within three months, he is entitled to return the bed and obtain a refund of the £3,000 paid.
- 14.74 If Brandon complains after three months, he is entitled to a discount on the price paid. This would depend on the trader's behaviour and its impact on the value of the product. If moderate, the consumer would be entitled to a 50% refund.
- 14.75 Tier 2 remedies: if the consumer can show he has thrown away his old bed as a direct result of the aggressive practice, he may also be entitled to compensation for the value of the old bed.
- 14.76 The consumer may also be entitled to damages for distress and inconvenience, though these will likely be moderate.

Mobile phone reception

Chris took out a two-year contract with a mobile phone company, after being told by the salesperson that the network and phone had "excellent reception" in his area. However the reception turned out to be poor.

- 14.77 This case involves two contracts: one with the retailer and one with the network provider. Both appear to have made misleading statements.
- 14.78 Tier 1 remedies: if Chris complains within three months, he is entitled to unwind both contracts, returning the phone to the retailer. This will release him from further obligations under the contract and entitle him to a full refund of money paid.
- 14.79 If Chris does not act within three months, he may be entitled to a discount. However, the court would scrutinise the reasons for delay, and ask what impact the misrepresentation had on the value of the product. The court might give a discount of 25% or even 0%.
- 14.80 Tier 2 remedies: the example provides no indication of any further economic loss or distress which he may have suffered, and it is unlikely any such losses will have been suffered.

“Civil recovery” for alleged shoplifting

Donna, 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 paid for the drink.

She later received a letter from a “civil recovery” company, claiming (falsely) that under a scheme endorsed by the Home Office, they were entitled to £90 for staff and management time, administration costs, and security costs. The letter threatened court action if she did not pay.

The mother paid £90.

- 14.81 Tier 1 remedies: if Donna complains within 3 months of paying the demand, she would be entitled to a refund of £90 as the money was not owed.
- 14.82 If Donna does not complain within 3 months, she can get a discount. A 100% discount would appear justified in these circumstances as the demand was groundless.
- 14.83 Tier 2 remedies: this is not the type of case where indirect economic loss is likely to be recoverable. This is because money is fungible, so it would be difficult to show causation in respect of indirect losses.
- 14.84 Donna would likely be entitled to moderate damages for distress and inconvenience. It would depend on the level of persistence and the nature of the correspondence for example.

The misleading theatre poster

A theatre issues billboards quoting a critic as saying “an exuberant fun-packed evening”, omitting the rest of the sentence lamenting how bad the production proved to be. Emma sees the billboard and buys a ticket.

- 14.85 Tier 1 remedies: if Emma has not yet attended the theatre, she would be entitled to return the ticket and obtain a full refund.
- 14.86 If Emma walked out before the performance ended, complaining about the show, she would also be entitled to a full refund.
- 14.87 However, if Emma sat through the performance she could not be regarded as having rejected the service. Emma could not claim a refund, but rather, would be entitled to a discount on the price. If the misleading practice was minor, she might receive a 25% discount on the ticket price.

- 14.88 Tier 2 remedies: could Emma recover indirect economic loss? Emma might be able to recover for additional losses, like travel expenses or baby-sitting charges, if she is able to show, on the balance of probabilities, that she would not have incurred them “but for” the misleading practice. It is unlikely that Emma will be able to do this, as the more likely inference is that she would have gone to the show notwithstanding the misleading review. In this case, she would have incurred these extra expenses anyway. She may have been willing to pay less for the ticket, but this is already reflected in the Tier 1 remedies.
- 14.89 Might distress damages be available for Emma? Given how subjective the experience of a theatre play is, and that a theatre play does not impact a consumer’s core interests, distress damages in this case are likely to be inappropriate, or nominal.

Membership of trade bodies

Fred bought double-glazing for his family home in the spring. The firm he used had held itself out as a member of the Glass and Glazing Federation.

Fred realised the firm’s work was of inferior quality in the winter. When he sought to complain, he discovered he had been misled by the firm, as it was not in fact a member of any trade body. This meant that he could not use the trade body’s free conciliation service.

- 14.90 Tier 1 remedies: the consumer cannot claim a refund because he was not in a position to reject the goods within three months of the service being performed because he did not realise anything was the matter until over three months later. Fred could seek a discount on the price paid, taking into account all the circumstances. Not being part of a trade body may be regarded as a serious detriment, leading to a 50% discount.
- 14.91 Tier 2 remedies: Fred may have incurred extra expenses, for example, if he employed a reputable double-glazing firm to fix some of the problems caused by the defective work. These may be recoverable as indirect economic loss. Distress damages are unlikely to be appropriate in this case.
- 14.92 Contractual remedies: Fred may prefer to pursue a contractual remedy and show that membership of the trade body was a term of the contract. Fred might seek specific performance of this promise although it is unlikely. The court could order that the firm seek accreditation, and offer him access to the free conciliation service or an equivalent.

Closing down sale

Gina buys a T-shirt in a closing down sale, paying £5. A large sign in the store says "everything must go – closing in one week!".

The T-shirt is worth about £5 but the store is not in fact closing down. One month later, Gina passes by the store and finds the sale is continuing

- 14.93 Tier 1 remedies: if Gina complains within three months, she should be able to return the T-shirt (whether it was used or not) and get a refund of the purchase price. If more than three months had gone by, Gina would only be entitled to a discount. As the impact on the value of the T-shirt is minimal, any discount is more likely negligible, leading to nil compensation.
- 14.94 Tier 2 remedies: this is not the type of case where indirect economic losses or distress damages appear to be relevant.
- 14.95 The next Part explores the question of creditor liability where a consumer has been a victim of an aggressive or misleading commercial practice, and has paid for the product using credit facilities.

PART 15

CREDITOR LIABILITY

- 15.1 This Part considers the liability of the creditor when a consumer has entered into a credit agreement to buy goods and services which have been sold in a misleading or aggressive way. How far should the creditor be liable for the supplier's wrongful actions?
- 15.2 The issue is an important one. Rogue traders are often difficult to trace or insolvent, so consumers find it easier to claim against the creditor than against the original supplier. The Consumer Credit Act 1974 (the 1974 Act) imposes various liabilities on creditors. In the case of misrepresentations, the liability is onerous. For cases that fall within section 75, both the supplier and the creditor are liable to the consumer for any misrepresentation by the supplier. The consumer may choose to claim against either the supplier or the creditor. For aggressive practices, however, the creditor's liability is less clear cut.
- 15.3 The Government is consulting on the reform of the consumer credit regime.¹ Its preferred option is to transfer responsibility for consumer credit from the Office of Fair Trading (the OFT) to the new Consumer Protection Markets Authority. The 1974 Act would be repealed and consumer credit would be regulated instead under a new FSMA-style rulebook alongside other retail financial services. This would be a major overhaul of the consumer credit regime but the Government does not expect there to be any overall dilution of consumer protection. Our analysis in this Part is based on the current law, but the principles discussed would also be relevant to the revised regime. The Government noted that:
- 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 Consumer Credit Act 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.²
- 15.4 We start by outlining the current law. This in turn depends on the type of credit agreement. We then consider the policy behind the 1974 Act, before making proposals for reform.

¹ HM Treasury and Department for Business, Innovation & Skills, *A new approach to financial regulation: consultation on reforming the consumer credit regime* (December 2010).

² Above, para 2.9.

THE CURRENT LAW

15.5 For the purposes of this discussion, the 1974 Act distinguishes between three types of loans:

- (1) *Direct lending*, where the supplier is also the creditor. This is typically used for hire purchase or conditional sale contracts. The supplier sells the goods to the creditor, who then enters into a contract with the debtor. Although in practice the sale appears to be between the supplier and the debtor, in law the hire purchase or conditional sale contract takes place between the creditor and the debtor.
- (2) *Connected lending*, 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.³ Although the contract for goods or services is between supplier and debtor, the 1974 Act considers this to be a “debtor-creditor supplier agreement”. The Act imposes some of the supplier’s liabilities on the creditor.
- (3) *Unconnected lending*, where the loan is arranged by the debtor directly, or is independent of the sale. This is known as a debtor-creditor agreement.

15.6 As we discuss below, for direct lending, liability arises under section 56 of the 1974 Act. For connected lending, it arises primarily under section 75. For unconnected lending the creditor is not liable for what the supplier does, and we will not consider it further.

Direct lender’s liability: section 56

15.7 For hire purchase and conditional sale agreements, the supplier sells the goods to the creditor who supplies them to the debtor. Although the goods are physically provided by the supplier, in law they are supplied by the creditor. Thus the creditor bears all the responsibilities of the seller. Thus if the goods fail to meet the implied terms of the contract (for example, because they are not of satisfactory quality), the creditor is liable for breach of contract.

15.8 One problem is that, in practice, the debtor will have discussed the sale with the supplier, not the creditor. In the course of these negotiations the supplier may have made misrepresentations, or mis-described the goods, or have assured the consumer that the goods are fit for the consumer’s purpose when they were not. The policy behind the 1974 Act is that the creditor should be held responsible for things said by the supplier in the course of pre-contract negotiations.

A “deemed agency” for antecedent negotiations

15.9 For this reason, section 56 deems the supplier to be the creditor’s agent in some circumstances. Section 56(1)(b) applies to “antecedent negotiations” conducted by the credit-broker in relation to goods sold or proposed to be sold by the credit-broker to the creditor. In these circumstances, section 56(2) provides that:

³ The 1974 Act, s 12(b) and (c).

Negotiations with the debtor... shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity.

- 15.10 This means that the creditor is liable to the consumer for things said or done by the supplier during the “antecedent” negotiations. If the supplier made a misrepresentation, the creditor is also liable for that misrepresentation.

A potential loophole?

- 15.11 In 2007, the case of *Black Horse Ltd v Langford* exposed a potential loophole in this provision.⁴ The consumer and car-dealer had negotiated over the sale of a car, in which the dealer agreed to buy the consumer’s old car as part of the transaction. The 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 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 dealer had not sold the goods directly to the creditor, but had sold them through a third party.

- 15.12 The implication of the *Black Horse* case 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. 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.⁵ The consumer cannot bring a claim against the creditor, because the creditor did not make the misrepresentation. This contravenes the policy behind the Act, as set out by the House of Lords in *OFT v Lloyds TSB Bank Plc*,⁶ discussed below. We think the case is unlikely to be endorsed by the appeal courts.

The deemed agency in connected lending

- 15.13 Finally, it is worth mentioning that the deemed agency provision in section 56(2) also applies to connected lending (that is, where the supply contract is between the consumer and the supplier, but the loan is made under a pre-existing relationship between supplier and creditor).
- 15.14 However, in these cases the effect of section 56(2) is limited. The section does not impose contractual liability on the creditor, but only makes the creditor responsible for the supplier’s “antecedent negotiations”. As we discuss below, for connected lending, section 75 usually provides the consumer with far greater rights. Section 56(2) will only be relevant where section 75 does not apply. We return to discuss the effect of section 56(2) on connected lenders after considering section 75.

⁴ [2007] EWHC 907. [2007] Road Traffic Reports 38. See also Furniss, “Carte Blanche for hire purchase sharks?” (2007) 157 *New Law Journal* 734.

⁵ The consumer may however have a common law claim in negligence under the principle in *Hedley Byrne v Heller* [1964] AC 465 discussed at para 5.27 of this Consultation Paper.

⁶ [2007] UKHL 48, [2008] 1 AC 316.

Connected lending: the elements of section 75 liability

- 15.15 Section 75 of the 1974 Act provides consumers with valuable rights against connected lenders. The purchase must be more than £100 and not more than £30,000. In these circumstances, a consumer who has a claim for misrepresentation or breach of contract against the supplier may sue either the creditor or the supplier. Both are liable.
- 15.16 Importantly, the section applies to credit cards. Many consumers know that if they pay for expensive products using a credit card they have a right of recourse against the card issuer if the supplier fails to deliver. This avenue is not available to those using debit cards, charge cards or cheques.
- 15.17 We look at the elements of the right in more detail below.

When does section 75 apply?

- 15.18 Section 75 only applies in the following circumstances:
- (1) The credit agreement must be regulated within the meaning of the 1974 Act.
 - (2) The lending must be connected: it must be made under pre-existing arrangements between creditor and supplier, and the creditor must know that the loan will be used to finance the purchase.⁷
 - (3) It must be a commercial agreement. There is a special exemption for non-commercial agreements.
 - (4) In so far as the claim relates to any single item to which the supplier has attached a cash price, that price must be more than £100 and not more than £30,000.

What rights does it provide?

- 15.19 Section 75(1) 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.

⁷ See the definition of debtor-creditor supplier agreements in the 1974 Act, section 12(b) or (c).

15.20 In other words:

- (1) The section applies where the debtor has a claim against the supplier for “*misrepresentation or breach of contract*”. This appears to include statutory actions⁸ and the common law claims of deceit or fraud, or negligent misstatement; but not other torts or delicts committed by the supplier.⁹
- (2) It gives the debtor a “*like claim against the creditor*”. Both supplier and creditor are “jointly and severally liable”, so the debtor may pursue a claim against either. There is no requirement to bring a claim against the supplier first.

15.21 There is a considerable body of case law about the meaning of a “like claim”. Does it mean that a consumer who has a right to rescind the original sale contract also has a right to rescind the credit agreement? The Scottish sheriff court decision in *United Dominions Trust v Taylor*¹⁰ suggested that it did. However, this interpretation was disapproved in *Durkin v DSG Retail Ltd*,¹¹ where an Extra Division of the Court of Session interpreted “a like claim” as limited to money claims such as damages. This meant that the creditor continued to be bound by the credit agreement, notwithstanding that the contract with the supplier no longer stood. However, the court appeared to accept that the debtor could claim the return of the original price paid to the supplier,¹² which achieves substantially the same outcome as rescission.¹³ For negligent misrepresentations, the consumer may also have a claim for damages against the supplier for any interest paid to the trader, which would apply as a like claim against the creditor.

The creditor’s statutory recourse against the supplier

15.22 Section 75(2) gives the creditor a right to be indemnified by the supplier. It provides:

Subject to any agreement between them, the creditor shall be entitled to be indemnified by the supplier for loss suffered by the creditor in satisfying his liability under subsection (1), including costs reasonably incurred by him in defending proceedings instituted by the debtor.

15.23 Further, section 75(5) enables the creditor sued under section 75(1) to make the supplier a party to proceedings.

⁸ Under the Misrepresentation Act 1967 or the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

⁹ See also Goode, *Consumer Credit Law & Practice*, para 33.161.

¹⁰ 1980 SLT (Sh Ct) 28.

¹¹ [2010] CSIH 49; 2011 SLT 114.

¹² Above, para 59.

¹³ See discussion in H MacQueen, “Faulty Goods, Rejection and Connected Lender Liability” (2011) 15 *Edin LR* 111-115.

Connected lender liability for aggressive practices

- 15.24 What happens if an item has been sold through duress? Take a case in which a trader sells an overpriced bed to a vulnerable old person, suggesting that the consumer will suffer physical harm if they do not sign a contract for the bed, together with the associated credit agreement. Does the consumer have a claim for rescission against the creditor? As we saw in Part 7, the law on aggressive practices is under-developed, and we have not found any case law on this point. Therefore, we can only speculate on how a court might regard such a case.

A remedy under section 75?

- 15.25 Section 75 mentions “misrepresentation or breach of contract”, which does not appear to include a claim for duress. Therefore, at first sight, section 75 does not apply.

A remedy under section 56?

- 15.26 We do not think that the court would leave the consumer without redress. As discussed above, the 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 their 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. The problem, discussed in Part 8, is that rescission is not a total remedy. It may require the consumer to return the principal of the loan to the creditor.¹⁴

A remedy under section 140A?

- 15.27 Probably, in these circumstances the consumer’s most effective remedy would be under section 140A of the 1974 Act. 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)”.¹⁵
- 15.28 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.¹⁶

¹⁴ In Scotland it might be possible to claim damages if the supplier’s conduct amounted to force and fear but there is no modern authority to this effect (see above, para 8.30).

¹⁵ The 1974 Act, s 140A (inserted by the Consumer Credit Act 2006, s 19).

¹⁶ The 1974 Act, s 140B.

Limits on the remedy

- 15.29 Note that the remedy for an aggressive practice does not appear to be the same as the remedy for a misrepresentation. Above, we described a case in which a consumer was sold a bed for £3,000. Suppose that the trader took a down payment in cash of £1,000 and induced the consumer to enter into a credit agreement for £2,000. If the trader induced the contract by misrepresentation, the consumer has a “like claim” against the connected lender for £3,000. If the contract was induced by duress, the consumer will probably be discharged from the credit agreement for £2,000, but will still need to pursue the supplier for the £1,000 paid in cash. If the supplier is insolvent, the loss will fall on the consumer.
- 15.30 Below, we discuss the policy behind section 75. We do not think that this was an intended consequence. Rather, issues of aggressive selling were overlooked in the way the Act was drafted.

THE POLICY BEHIND SECTION 75

The Crowther Committee

- 15.31 The 1974 Act was based on the Report of the Committee on Consumer Credit, chaired by Lord Crowther. The Crowther Committee observed that several factors militate against a fair balance between the parties in consumer credit transactions.¹⁷ Thus “the abuses to which the consumer may be subjected are many and various and arise both before and after the conclusion of the transactions”.¹⁸ They included “deceptive advertising” and “false or misleading statements by salesmen, particularly in door-to-door selling”.¹⁹
- 15.32 Where a supplier had committed the wrong, both the consumer and the creditor might be innocent parties. However, the Committee commented:

In considering which two of the relatively innocent parties should bear the greater loss, it is much easier for the business creditor to do so than the individual debtor.²⁰

However, this could not be taken too far: “every restriction on a creditor’s remedy has to be paid for”.²¹

¹⁷ Report of the Committee on Consumer Credit (March 1971) Cmnd 4596, para 6.1.1.

¹⁸ Above, para 6.1.13.

¹⁹ Above, para 6.1.13.

²⁰ Above, para 6.1.16.

²¹ Above, para 6.1.16.

15.33 The Committee therefore distinguished connected from unconnected loans. The Committee described the former as involving situations where “the sale and loan aspects of the transaction are closely entwined” and the connected lender and the seller are “in effect engaged in a joint venture to their mutual advantage”.²² In these circumstances, the Committee recommended that the connected lender should incur a primary liability for the supplier’s misrepresentation or breach.²³ The report argued:

In reaching this conclusion we have been influenced by the additional fact that if the delinquent seller is worth powder and shot it ought to be easier for the lender to put pressure on him to deal with the complaint than it is for the borrower. The lender is not likely to be so inhibited by expense from suing the seller; and in most cases proceedings by the lender would be unnecessary because the lender is in a position to say to the seller that future financing facilities will be withdrawn unless the seller attends to the complaint and takes greater care of his business.²⁴

15.34 The Committee applied the same reasoning to impose liability on credit card issuers for defective goods and services:

There is in fact a close business relationship between an issuer and the suppliers who have agreed to accept the issuer’s credit cards. The issuer, through provision of the card, swells the turnover of the supplier, and for conferring this benefit usually receives by way of discount an agreed percentage of the invoice price of the goods or services supplied. Moreover, a cardholder dealing with a reputable issuer has every reason to assume that the issuer will list only reputable suppliers.²⁵

15.35 Thus the Committee thought that two factors justified imposing joint and several liability on connected creditors:

- (1) There was a joint venture between the creditor and the supplier.
- (2) The creditor controlled which suppliers could be used, and was in a stronger position to obtain recourse from them.

Areas of controversy

15.36 Although section 75 is a major plank of UK consumer protection legislation, it remains controversial, particularly with credit card issuers. Controversy has centred around three issues:

- (1) The creditor’s liability is unlimited.

²² Above, para 6.2.24.

²³ Above, para 6.6.29.

²⁴ Above, para 6.6.29.

²⁵ Above, para 6.12.9.

- (2) Credit card issuers argue that they no longer have a close relationship with suppliers, as the market works on a four-party structure.
- (3) Section 75 extends to foreign transactions.

15.37 Below we consider each in turn.

Unlimited liability

- 15.38 Under section 75, the creditor's liability may extend beyond the amount of the credit. Take a case in which the consumer spends £2,000 on furniture, paying a £1,000 deposit by credit card and the rest by cheque. If the retailer goes into liquidation without delivering the goods, the creditor is liable for the full £2,000.
- 15.39 Furthermore, the consumer may have a claim for consequential loss against the retailer: if a holiday fails to live up to the retailer's contractual promise, the consumer may also claim damages for distress and inconvenience. In some cases, a breach of contract claim may include damages for personal injury or property loss, which might extend to several million pounds.
- 15.40 In 1995, the Director General of Fair Trading reviewed this issue, and recommended that the liability of card issuers should be limited to the amount charged to the card account in respect of the purchase in question.²⁶ Following the Director General's reports, the Department of Trade and Industry (DTI) consulted with stakeholders on the scope of section 75.²⁷ The DTI took the view that the suggested reductions in connected lender liability could lead to a significant reduction in consumer protection.²⁸ The Director General's recommendations were not implemented.²⁹

Four-party structures

- 15.41 In today's market, the supplier and card issuer do not have a direct relationship. Instead, the supplier passes the consumer's details to a "merchant acquirer" who reimburses the supplier, less a commission. The merchant acquirer, in turn, passes the details to the appropriate card issuer, who pays the merchant acquirer. Given this structure, the card issuers argue that they are no longer in a joint venture with the supplier.
- 15.42 In *OFT v Lloyds TSB Bank*,³⁰ the courts were asked to decide two issues: whether section 75 extended to four-party credit card transactions, and whether it covered foreign transactions (discussed below). The first issue was decided by the Court of Appeal, though the second was appealed to the House of Lords.

²⁶ Office of Fair Trading, *A second report by the Director General of Fair Trading on Section 75 of the Consumer Credit Act 1974* (1995).

²⁷ *Connected Lender Liability in United Kingdom Consumer Credit Law: A Consultation Document*, DTI, London, December 1995.

²⁸ Above, Ch 5 para 7.

²⁹ See DTI press release on 28 October 1996 stating that the Government believed that the law required no clarification and that the law should not be changed.

³⁰ [2006] EWCA Civ 268, [2007] QB 1.

- 15.43 The banks argued that four-party transactions did not qualify as debtor-creditor supplier agreements, as the various statutory requirements were not fulfilled. The Court of Appeal rejected the banks' submissions. It held that the form of the transaction did not need to be a direct contractual arrangement between the card issuer and the supplier. Instead the language of "arrangements" used in the 1974 Act embraced the current relationships between card issuers, merchant acquirers and suppliers.

Foreign transactions

- 15.44 In *OFT v Lloyds TSB Bank*, the House of Lords³¹ found that section 75 covers transactions which take place and are performed abroad, and are governed by foreign law. It affirmed the Court of Appeal's decision.
- 15.45 The Law Lords were unanimous: the policy behind the 1974 Act was to protect consumers. The policies which argued for the imposition of liability in domestic transactions applied with equal force to foreign transactions. As Lord Hope explained:

The creditor is in a better position than the debtor, in a question with a foreign supplier, to obtain redress. It is not to be assumed that the creditor will always get his money back. But, if he does not, the loss must lie with him as he has the broader back. He is in a better position, if redress is not readily obtainable, to spread the cost. He is in a better position to argue for sanctions against a supplier who is not reliable. For his part, the debtor is entitled to assume that he can trust suppliers who are authorised to accept his credit card. These considerations, which support the right of recourse in relation to tripartite arrangements, are just as powerful in the case of four-party transactions.³²

OUR PROPOSALS

Direct lenders

- 15.46 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. Under section 56, the creditor is responsible for the supplier's misleading or aggressive actions, under a deemed agency.
- 15.47 We think this provides adequate protection for the consumer against the creditor, but we would welcome views on this.

³¹ [2007] UKHL 48, [2008] 1 AC 316.

³² Above, para 13.

- 15.48 In particular, we would welcome views on whether legislation is needed, in the light of *Black Horse Ltd v Langford*,³³ to confirm that the supplier acts as agent for the creditor even if the sale from supplier to creditor takes place through an intermediary.

Question 46

Do consultees 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?

Question 47

Is legislation needed to clarify that the supplier acts as agent for the creditor even if the sale from supplier to creditor takes place through an intermediary?

Connected lenders

- 15.49 In connected lending, the loan is made under pre-existing arrangements between creditor and supplier, and the creditor knows that it will be used to finance the purchase. As we have seen, the current law offers consumers strong protection against creditors in the case of sales induced by misrepresentations. However, the protection in respect of aggressive practices is more uncertain and limited.
- 15.50 We have proposed a new Act to protect consumers against both misleading and aggressive practices. What liability should connected lenders have for traders' breaches under the Act? There are three possible approaches:
- (1) *Leave the law as it currently stands.* This would give consumers strong protection under section 75 for misleading practices. However, it 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.
 - (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. However, the lenders' liability would be limited to the amount of the credit agreement, together with interest paid.

³³ [2007] EWHC 907. [2007] Road Traffic Reports 38, discussed at paras 15.11 to 15.12 of this Consultation Paper.

- 15.51 We do not think that leaving the law as it currently stands is a desirable option. This would give consumers strong rights in respect of misleading actions, but their rights against connected lenders for aggressive actions would be uncertain and limited. Often it is difficult to distinguish between misleading and aggressive actions, as cases often involve elements of both. Nor is there any policy reason to treat aggressive actions less favourably. Indeed some aggressive selling is particularly reprehensible. There are strong reasons to encourage creditors not to deal with such rogue traders.
- 15.52 We think that the second option accords with the policy behind the Crowther Committee's recommendations. The Committee specifically mentioned the need to protect consumers from the abuses which arise from "false or misleading statements by salesmen, particularly in door-to-door selling".³⁴ It would be within the policy of the report to extend this protection to aggressive practices.
- 15.53 That said, we are aware that creditors can face onerous liabilities under section 75. It is difficult to make provision for liabilities which are potentially open-ended. And in some cases, creditors may have little knowledge of how traders do business, and may deal with them only through an intermediary. We can see that there may be opposition to extending the effect of section 75 beyond its current boundaries.
- 15.54 The third option provides a 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). However, it would 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).
- 15.55 We stress that the third option would not affect claims for breach of contract. Such claims are not within our terms of reference, and we do not make any proposals in respect of them. Claims for breach of contract would continue to be covered by section 75 as before, and connected lenders would continue to be responsible for the whole claim against the trader.

³⁴ Report of the Committee on Consumer Credit (March 1971) Cmnd 4596, para 6.1.13.

- 15.56 Let us reconsider the example about aggressive pressure selling to the elderly set out in the previous Part, but modified so the bed is purchased using a credit card.

Example: pressure selling and credit

An elderly house-bound man was sold a £3,000 bed. The salesman stayed with the consumer in the latter's house for three hours, giving the impression that he would only leave if the consumer agreed to buy. The consumer pays using his credit card.

- 15.57 Under our proposals, the credit card company would be jointly and severally liable for the salesman's aggressive practice. The credit card company's exposure is capped at the maximum amount of a Tier 1 remedy (100% of the purchase price) plus interest. Any additional Tier 2 liability in respect of consequential economic losses (such as the value of replacing the man's old bed, if it had been thrown away) or distress damages, would therefore only be covered to the extent of the interest payments.
- 15.58 On balance, our favoured proposal is Option 3. We provisionally propose that section 75 should be amended. Where section 75 applies, consumers should have a like claim against the connected lender for any misleading or aggressive act by the trader. However, connected lenders' liability should be capped at the amount of the loan, plus interest. We welcome views on this proposal.

Question 48

Do consultees agree that:

- (1) Where section 75 applies, connected lenders should be liable for the supplier's misleading or aggressive acts?**
- (2) The connected lender's liability for the supplier's act should be capped at the amount of the loan, plus interest?**

- 15.59 In the next Part, we include an impact assessment which considers the economic implications of our proposals for reform.

PART 16

ASSESSING THE IMPACT OF REFORM

16.1 In this Part, we summarise the main benefits and costs of the proposed reforms set out in Parts 12 to 15. Alongside this Consultation Paper, we are also publishing a full impact assessment of our proposals,¹ and consultees are referred to the full assessment for further details.

16.2 We have two aims:

- (1) *To provide clearer, simpler law.* Our proposals would simplify the current law of misrepresentation as it affects consumers, bringing civil law concepts into line with those used in the Consumer Protection from Unfair Trading Regulations 2008; and
- (2) *To extend the law on aggressive practices,* by filling in the gaps left by the law of duress, and providing better protection to vulnerable consumers.

16.3 Simpler law would be easier to use, reducing costs to businesses and consumers alike. Clearer law would complement the public regulation of commercial practices, deterring wrongful behaviour. It would therefore support a more competitive consumer market place, underpinned by confident consumers.

BENEFITS

16.4 We would anticipate three benefits from the proposals:

- (1) Easier complaint handling. Legitimate traders and advice agencies would find it easier to deal with complaints of misleading practices; and TSS would benefit from simpler, easier ways of valuing consumer loss;
- (2) Consumers who have been the victim of misleading and aggressive practices would receive more compensation; and
- (3) Combating aggressive practices more effectively would increase consumer confidence, and therefore lead to increased sales.

16.5 Below we consider each in turn.

Easier complaint handling

16.6 Complaints about misleading and aggressive behaviour by traders are common. In 2009 Consumer Focus commissioned research into consumers' experience of unfair commercial practices generally. The study found that almost two-thirds (61%) of the population had been targeted by an unfair commercial practice within the last two years.²

¹ Available on our websites at <http://www.lawcom.gov.uk> (See A–Z of projects > Misleading and Aggressive Practices) and <http://www.scotlawcom.gov.uk>.

² Consumer Focus, *Waiting to be heard* (August 2009) p 3.

- 16.7 Consumer Focus helpfully provided us with the original tables to the study, which we have used to estimate the number of complaints made to traders about misleading or aggressive practices. Based on the information we were given we have calculated that traders receive 7.7 million such complaints a year.³

Benefits to traders

- 16.8 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 to avoid committing criminal offences. They also need to understand the law of misrepresentation to deal with individual complaints. The two systems use different concepts and rules to cover the same situations. The proposals would build the definitions and concepts of the Regulations into civil law.
- 16.9 It is difficult to calculate the benefit of this simplification for traders. However, if clearer and simpler law were to save traders 5 minutes for each complaint, this would reduce the costs of complaints-handling by 90p.⁴ Clearly, some complaints are dealt with very quickly, and the time they take would not change. However, 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.

Benefits to trading standards services and consumer advisers

- 16.10 The study by Consumer Focus also suggested that consumers made 3.4 million complaints to other organisations, such as trading standards services (TSS), Citizens Advice or Consumer Direct. Simpler law would therefore bring benefits to these organisations. Again, assuming that clearer law made each complaint easier to deal with (by 50p to £1), this would suggest savings of **£1.7 to £3.4 million** a year for consumer advisers. We also think that TSS may find the simpler standardised remedies reduce the work involved in seeking compensation orders before the criminal courts or restoration orders as part of civil sanctions under the proposed Pilot. We would welcome feedback on these figures.

Question 49

**How many complaints about aggressive practices do traders receive?
What is the cost of handling these complaints, and what savings
might be anticipated?**

³ 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.

⁴ 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.

Question 50

How many complaints are received by trading standards services and other advice agencies? Will the proposals reduce the work involved in handling these complaints? If so, by how much?

More consumer compensation

- 16.11 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 OFT conducted a broad survey of consumer detriment across all practices in which traders might treat consumers unfairly, whether accidentally or deliberately. Apart from misleading and aggressive practices, it also covered faulty goods for example. The OFT also found high levels of consumer detriment. In all, it calculated that consumers suffered £6.6 billion of consumer detriment, with 17% of financial losses resulting from “misleading claims and incorrect information”.⁵ This suggests just over £1 billion of consumer detriment from misleading practices alone.
- 16.12 Although many claims are relatively trivial, 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 in 3% of cases the consumer claimed to have suffered more than £1,000 worth of loss. 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.
- 16.13 We do not suggest that law reform will eliminate consumer detriment. However, clearer, simpler rules will make it easier for consumers to obtain compensation and deter some practices. The proposed remedies are intended to apply in a variety of settings: compensation orders in criminal proceedings; restoration orders as part of civil sanctions under the proposed Pilot; and individual redress in the shadow of county court or sheriff court action.
- 16.14 Below, we estimate that simpler, clearer law may encourage consumers to bring a possible 1,100 to 5,500 additional court cases, of which 70% would be successful at court. If each claim provided average payments of £750, this would suggest additional compensation payments of between £578,000 and £2.89 million. However, many more consumers would obtain payments by negotiating in the shadow of a possible court action, without the necessity of a summons. One would also anticipate additional compensation payments through criminal compensation orders and the civil sanctions.
- 16.15 On this basis we tentatively estimate 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. Consumers would also receive less quantifiable benefits in terms of fewer hours spent pursuing claims and less stress and aggravation. We would welcome comments on this figure.

⁵ Office of Fair Trading, *Consumer Detriment* (April 2008) p 32.

Question 51

How many additional claims might be anticipated as a result of the reforms? What additional compensation may be generated as a result?

Improved consumer confidence leading to increased sales

- 16.16 As discussed in Part 10, the press and TV stories about aggressive selling reduce consumer confidence, and make consumers less prepared to buy. This is a particular problem in the mobility aids market: older consumers may be particularly worried about letting a salesperson into their house, even if they would benefit from the product on offer. Although legitimate traders have promised to abide by a code of practice which goes beyond the law and to provide compensation if the code is breached, they may still be tarred with the same brush. Indeed, a relatively common misleading practice is for firms to claim to be members of trade associations when they are not, which undermines the whole concept of a code of practice.
- 16.17 The problem is not confined to mobility aids. The reduction in confidence produced by aggressive practices may affect all markets in which aggressive practices are known to be a problem, including all doorstep selling, time-shares and holiday clubs. 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.
- 16.18 It is not possible to provide a precise estimate of the effect of reduced consumer confidence on lost sales. However, we have tried to provide an order of magnitude. Given the major worries with the mobility market, it would not be unreasonable to assume that aggressive practices deterred 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.
- 16.19 As we said, we are only able to suggest an order of magnitude. And given the uncertainties involved, we have kept the estimate low. However, effective ways of preventing aggressive commercial practices may benefit legitimate traders and increase sales to the order of between £10 and £20 million. We would welcome comments on how far misleading and aggressive practices lead to reductions in these markets.

Question 52

How far do aggressive practices by rogue traders undermine consumer confidence and reduce sales?

COSTS

Transitional costs

- 16.20 All legal and regulatory changes require businesses to take time to become familiar with the new law. In 2008, when the Consumer Protection from Unfair Trading Regulations were introduced, the Department for Business, Enterprise and Regulatory Reform (BERR) estimated that businesses would incur one-off familiarisation costs in understanding the Regulations, which were likely to be between £12 and £27 million.⁶
- 16.21 This was based on 770,000 enterprises. BERR thought that between one and two hours of a manager's time would be spent on this function, though larger businesses would take longer, and might employ legal advisors for this purpose.
- 16.22 The transitional costs for this change would be less. Businesses are already familiar with the basic concepts behind the Regulations (such as the definition of misleading and aggressive practices). The main changes are the remedies granted to consumers if the business infringes the Regulations. Businesses which are confident that they comply with the Regulations would not need to be concerned. Only businesses which think they may infringe the Regulations would need to become familiar with these remedies.
- 16.23 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 enterprises operating at the margins of legality may need to spend longer reconsidering their business model. This would suggest one-off familiarisation costs of between **£3.25 million and £6.5 million.**⁷
- 16.24 There would also be costs for training judges and consumer advisers and we would welcome comments on what these would be.

Question 53

How long would businesses need to spend to become familiar with the new law?

Question 54

What costs would be involved in training judges and consumer advisers about the changes?

On-going costs

- 16.25 The main costs would fall on rogue traders, who would be forced to pay increased compensation to consumers. Better enforcement will bring some rogue traders into compliance, while others may no longer be able to continue trading. The loss to the rogues will be a gain to legitimate traders.

⁶ BERR, *Impact Assessment: The Consumer Protection from Unfair Trading Regulations, March 2008*, p 99.

⁷ 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.

- 16.26 We have not treated the cost to rogues as a regulatory cost. Under the Regulations, it is already a criminal offence to use misleading or aggressive commercial practices. A competitive market requires informed consumers, able to make free choices. Misleading and aggressive practices undermine competition, as consumers are unable to make free, rational, informed choices. The proposed changes do not alter the regulatory environment but aim to produce better compliance with the existing rules.
- 16.27 The main concern to legitimate traders is that the proposals might encourage consumers to make frivolous or ill-founded claims. We take this concern seriously and have addressed it in our proposals. Our proposals give only a limited right to redress, where the law already provides compensation (under the law of misrepresentation) or for the most serious and harmful of unfair practices: aggressive selling or payment collection.
- 16.28 We are mindful, however, that even these limited proposals may encourage more claims, some of which may be ill-founded. We have assumed that the number of initial complaints made to traders about misleading and aggressive practices will remain fairly static. However, if consumers fail to resolve the issue initially, more may take further action.
- 16.29 The proposal may therefore encourage more consumers to bring court proceedings before the civil courts. Where consumers are eligible for the remission of court fees this may result in costs to the state. Any proposal which encourages more claims may encourage some claims which turn out to be ill-founded. Below we consider the possible number of additional court cases, and the costs that might be involved.

How many additional court cases?

- 16.30 In England and Wales, the Judicial Statistics show that in 2009, 1.46 million money claims were issued in the county court. This resulted in 315,934 defended actions. Of these, 93,073 were allocated to the small claims track, and 46,963 resulted in small claims hearings.
- 16.31 However, the Judicial Statistics do not indicate how many of these claims were brought by consumers against businesses. The only reliable figure on this was provided by John Baldwin's major study of small claims, published in 1997.⁸ This showed that 16% of all defended money claims were brought by consumers against business. This suggests that in 2009 there were around 50,000 defended consumer cases, almost all of them small claims.

⁸ J Baldwin, *Small Claims in the County Courts in England and Wales* (1997).

- 16.32 Successive studies have shown that consumers are extremely reluctant to go to court.⁹ The Consumer Focus study on unfair commercial practices shows that if consumers did not obtain redress after contacting the trader and/or another organisation, they were very unlikely to take further action. They were put off by the time, trouble and risks involved, and were extremely nervous of the legal system. We do not think that this one change will produce a radically different approach to court proceedings. However, one would anticipate some increase in court cases. If the reforms resulted in **1,000 to 5,000 new defended actions**, one would anticipate between 150 and 750 additional hearings.
- 16.33 Assuming that the effect of the reforms would be similar in Scotland, there may also be between **100 and 500 new court cases raised in the sheriff court**.¹⁰

The effect on public funds

- 16.34 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.
- 16.35 In 2009, PricewaterhouseCoopers LLP researched court fee remissions for the Ministry of Justice.¹¹ 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 100 and 500 grants of remissions, at a cost to the Ministry of Justice of between **£14,000 and £72,000**.
- 16.36 In Scotland, figures provided by the Scottish Courts Service show that in 2009-10, 11% of cases involved a remission of court fees, at a cost per case of £65.80. On this basis, the cost to the Scottish Court Service would be between **£750 and £3,600**.

⁹ See, for example, H Genn, *Paths to Justice* (1999) and P Pleasence and others, *Civil Justice in England and Wales 2009*, Legal Services Research Centre (2010).

¹⁰ We consider the volume of consumer litigation in Scotland in greater detail in the accompanying impact assessment, available on our websites.

¹¹ *Is the 2007 Court Fee Remission System Working?* Ministry of Justice Research Series 15/09, December 2009.

The effect on traders

- 16.37 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. The Consumer Focus study of small claims found that 30% of claimants had the case 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 10.¹² However, this suggests that of out of the additional 1,100 to 5,500 new cases, between 330 and 1,650 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 **£330,000 to £1.65 million**. Again we welcome comments.

Question 55

How many more court cases may be generated by the reforms?

Question 56

If the consumer loses in the small claims court, what costs would this impose on the trader?

CONCLUSION

- 16.38 At this stage, any estimates of the costs and benefits can only be tentative. We have suggested some figures and would welcome further evidence on this issue.
- 16.39 The main costs on businesses will be the one-off familiarisation costs of finding out about the new law. If the law generates additional court cases, there may also be some on-going costs where the trader eventually wins the case in the small claims court. We have suggested costs of up to £1.65 million 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. It will be offset by the benefits to businesses of simpler law (around £3.5 million a year), and the increased sales generated by more confident consumers (which we suggest may be between £10 and £20 million a year).
- 16.40 Trading standards officers and consumer advisers would also incur one-off familiarisation costs, but also receive the on-going benefits of simpler, clearer law.
- 16.41 Finally, the proposals would benefit consumers in three ways. First, the proposals would be part of a strategy to provide better enforcement of the Regulations, with fewer misleading and aggressive practices. Consumers are less likely to suffer detriment. Second, consumers would receive more compensation for the detriment they have suffered. Third, the process of gaining redress would be less difficult, time-consuming and stressful.
- 16.42 The next and final Part sets out our list of provisional proposals and questions.

¹² Research Report, *Consumer Experience of the Small Claims Court*, prepared for Consumer Focus by IFF research (October 2010) p 46.

PART 17

LIST OF PROVISIONAL PROPOSALS AND QUESTIONS

THE NEED FOR REFORM

- Q.1 Do consultees agree that there is a need for statutory reform to:
- (1) Simplify and clarify private redress for misleading practices?
 - (2) Extend private redress for aggressive practices? *(page 150)*
- Q.2 Do consultees agree that there should not be a private right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008? *(page 150)*

LIABILITY - THE SCOPE OF THE NEW RIGHT TO CONSUMER REDRESS

The definition of “consumer”

- Q.3 Should the definition of consumer generally follow other consumer legislation, in applying to an individual who acts for purposes which are primarily outside their business, trade or profession? *(page 175)*
- Q.4 Do consultees think 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 (employed or self-employed)? *(page 176)*

THE TRANSACTIONAL DECISIONS WHICH SHOULD GIVE RISE TO REDRESS

- Q.5 Do consultees agree that the proposed Act should not provide redress for “transactional decisions”, such as the decision to visit a shop? *(page 178)*
- Q.6 Do consultees agree that the proposed Act should provide redress where the consumer has:
- (1) entered into a contract with the trader; or
 - (2) made a payment to the trader? *(page 178)*
- Q.7 Do consultees agree that the proposed 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? *(page 179)*
- Q.8 If the proposed Act is to cover traders who mislead consumers about their legal rights, how should the difficulties such as quantifying the losses be overcome? *(page 179)*

THE PERSON AGAINST WHOM THE REDRESS SHOULD BE AVAILABLE

- Q.9 Do consultees agree 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? *(page 182)*

- Q.10 Should there be a secondary right to redress against entities higher up in the supply chain such as producers, if they are proven to be at fault? (*page 182*)
- Q.11 Should consumers be given a limited right to proceed against company directors or other office-holders, where the trading company or limited liability partnership is in liquidation, administration or receivership? (*page 183*)
- Q.12 If consumers had a limited right to proceed against company office-holders, what factors should apply to allow consumers to claim against a director or officer? In particular:
- (1) Should the director or officer-holder actually be at fault or should they be liable as an officer of the company?
 - (2) Should consumers be able to recover only where the misrepresentation of the director or officer-holder was fraudulent, or is negligence sufficient?
 - (3) Should directors and office-holders be liable for aggressive practices and if so what degree of fault is required? (*page 183*)

THE PRODUCTS THAT SHOULD BE COVERED

- Q.13 Do consultees agree that the proposed new Act should exclude:
- (1) Land sales; and
 - (2) Financial services? (*page 186*)
- Q.14 Do consultees agree that the proposed new Act should include misleading or aggressive demands for payment? (*page 187*)
- Q.15 Do consultees agree that demands for damages against alleged wrongdoers should be covered by the proposed new Act? (*page 187*)
- Q.16 In particular, should demands for payment following parking offences, alleged copyright infringements, wheel-clamping and “civil recovery” also be covered? (*page 188*)
- Q.17 Should the Regulations be amended to state that all commercial demands for payment are included with the definition of commercial practices? (*page 188*)

THE DEFINITION OF MISLEADING COMMERCIAL PRACTICES

Redress for misleading omissions?

- Q.18 Do consultees agree that traders:
- (1) should not be liable for omissions as such?
 - (2) but should be liable for implied representations, where the overall presentation means that a consumer would expect the product, contract or the trader to have certain characteristics, and the trader fails to contradict that reasonable expectation? (*page 190*)

The definition of “misleading”

- Q.19 Regulation 5(2) of the Consumer Protection Regulations 2008 defined a misleading practice as *either* containing false information *or* likely to deceive the average consumer in its overall presentation. Do consultees agree that the new Act should follow the substance of this definition? (*page 190*)
- Q.20 Should the new Act reproduce the lists of matters about which misleading representations may be made in Regulation 5(4) to (6) of the Consumer Protection from Unfair Trading Regulations 2008? (*page 190*)

Banned misleading practices

- Q.21 Do consultees think that it would be helpful for the legislation to include examples of practices which are misleading (unless the contrary is shown)? (*page 191*)
- Q.22 If so, what misleading practices should be included? (*page 191*)

THE DEFINITION OF AGGRESSIVE COMMERCIAL PRACTICES

- Q.23 Do consultees think that:
- (1) The proposed new Act should provide redress for aggressive practices?
 - (2) The definitions of coercion, abuse of power and harassment collectively cover the appropriate situations?
 - (3) It is helpful to have a list of examples of aggressive practices? If so, are these examples appropriate? (*page 194*)

THE CAUSATION TEST

The average consumer

- Q.24 Do consultees agree that a trader should only be liable for a misleading or aggressive practice if it would have affected an “average consumer”? (*page 195*)
- Q.25 Do consultees agree that the definition of “average consumer” should include provision for vulnerable consumers mirroring the Regulations? (*page 196*)

The effect on the individual consumer

- Q.26 Do consultees agree that traders should only be liable if the misleading or aggressive practice:
- (1) would be likely to cause the average consumer to make a decision that they would not have made otherwise to enter a contract or make a payment? *and*
 - (2) was a significant factor in this consumer’s decision to enter the contract or make the payment? (*page 197*)

THE IMPACT ON EXISTING LAW

- Q.27 Should the Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 continue to apply to consumers in transactions covered by the new Act? (*page 200*)

REMEDIES – THE UNDERLYING POLICY CHOICES

Unwind the transaction or enforce it like a contract?

- Q.28 Do consultees agree that remedies under the proposed new Act should aim to restore consumers to the position they were in before the misleading or aggressive action took place? (*page 203*)
- Q.29 Are there any examples where an expectation measure of loss would be more appropriate? (*page 203*)

TIER 1 REMEDIES - THE “RIGHT TO UNWIND”

How long should the right to unwind last?

- Q.30 Do consultees agree that the right to unwind should last for a fixed period? (*page 209*)
- Q.31 Do consultees think that the unwinding period should last for three months (90 days)? If not, what other period would be preferable? (*page 209*)
- Q.32 Should there be a discretion to extend the fixed period in some circumstances, such as those involving vulnerable consumers? (*page 209*)

When should the unwinding period start and how can the consumer exercise their right to unwind?

- Q.33 Do consultees agree that the period for the right to unwind should start from the later of the following dates: when the contract is formed; the goods are delivered; the service is started? (*page 210*)
- Q.34 Do consultees agree that 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? (*page 210*)

Restoring benefits to the trader

- Q.35 Do consultees agree that 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? (*page 211*)

Should consumers give an allowance for their use of the product?

- Q.36 Do consultees agree that a consumer who exercises the right to unwind a contract within three months should not be required to make an allowance for their use of the product? (*page 212*)

Unwinding the contract where the consumer has sold goods

- Q.37 Do consultees agree that consumers who have sold goods as a result of misleading or aggressive practices should be entitled to the return of the goods within three months, in exchange for the price paid? *(page 213)*
- Q.38 Do consultees agree that where this is not possible, the trader should provide a monetary equivalent? *(page 213)*

The right to unwind a payment

- Q.39 Where a consumer makes a payment which was not owed as a result of a misleading or aggressive practice, would it be helpful to provide a new statutory right to the return of the payment? *(page 213)*
- Q.40 Where the payment was owed, should the debt be offset against the payment, permitting the trader to retain the money paid? *(page 214)*

TIER 1 REMEDIES - A DISCOUNT ON THE PRICE

- Q.41 Where the right to unwind has been lost, should consumers be compensated by a discount on the price? *(page 215)*
- Q.42 If so, should the discounts be in pre-set bands? *(page 215)*
- Q.43 Are the proposed bands (0%, 25%, 50% and 100%) set in the right place? *(page 215)*

TIER 2 REMEDIES

- Q.44 Do consultees agree that:
- (1) Damages for indirect economic loss should be available, provided that the consumer proves that they would not have incurred the loss but for the misleading or aggressive practice?
 - (2) 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?
 - (3) Damages for distress and inconvenience should be modest, and in defined bands?
 - (4) Damages for indirect economic loss and distress and inconvenience should not be available if the trader can establish a due diligence defence?
 - (5) The due diligence defence within the proposed new Act should mirror the due diligence defence in the Consumer Protection from Unfair Trading Regulations 2008? *(page 219)*
- Q.45 Do consultees think the remedies we propose as a whole offer an appropriate balance between certainty and flexibility? *(page 219)*

CREDITOR LIABILITY

Section 56 of the Consumer Credit Act 1974

- Q.46 Do consultees 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? (*page 234*)
- Q.47 Is legislation needed to clarify that the supplier acts as agent for the creditor even if the sale from supplier to creditor takes place through an intermediary? (*page 234*)

Section 75 of the Consumer Credit Act 1974

- Q.48 Do consultees agree that:
- (1) Where section 75 applies, connected lenders should be liable for the supplier's misleading or aggressive acts?
 - (2) The connected lender's liability for the supplier's act should be capped at the amount of the loan, plus interest? (*page 236*)

IMPACT ASSESSMENT

Benefits

- Q.49 How many complaints about aggressive practices do traders receive? What is the cost of handling these complaints, and what savings might be anticipated? (*page 238*)
- Q.50 How many complaints are received by trading standards services and other advice agencies? Will the proposals reduce the work involved in handling these complaints? If so, by how much? (*page 239*)
- Q.51 How many additional claims might be anticipated as a result of the reforms? What additional compensation may be generated as a result? (*page 240*)
- Q.52 How far do aggressive practices by rogue traders undermine consumer confidence and reduce sales? (*page 240*)

Costs

- Q.53 How long would businesses need to spend to become familiar with the new law? (*page 241*)
- Q.54 What costs would be involved in training judges and consumer advisers about the changes? (*page 241*)
- Q.55 How many more court cases may be generated by the reforms? (*page 244*)
- Q.56 If the consumer loses in the small claims court, what costs would this impose on the trader? (*page 244*)

APPENDIX 1 PEOPLE AND ORGANISATIONS WHO MET US OR SENT SUBMISSIONS FROM MARCH 2010 TO MARCH 2011

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Caroline Hare
Professor Geraint Howells
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Jane Williams

BUSINESS GROUPS

Advertising Standards Authority
British Retail Consortium
Confederation of British Industry
Finance & Leasing Association
UK Cards Association

CONSUMER GROUPS

Citizens Advice
Consumer Focus
Consumer Focus Scotland
Consumers' Institute of New Zealand
Institute of Consumer Affairs
National Consumer Federation
Which?

GOVERNMENT AND OMBUDSMEN

Department for Business, Innovation and Skills
Financial Ombudsman Service
Home Office
Local Better Regulation Office
Ministry of Economic Development, New Zealand
Ministry of Justice
Property Ombudsman

LAW ENFORCEMENT AGENCIES

Office of Fair Trading
Local Authorities Coordinators of Regulatory Services
Birmingham City Council
Cardiff City Council
Devon County Council
Durham County Council
Glasgow City Council
Hertfordshire County Council
Knowsley Council
Liverpool City Council
Milton Keynes Council
North Lanarkshire Council
Portsmouth City Council
Redcar & Cleveland Borough Council
Slough Borough Council
Stafford County Council
Suffolk County Council
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