

<b>Title:</b> <b>Consumer redress for misleading and aggressive commercial practices</b> <b>Lead department or agency: Law Commission</b>	<b>Impact Assessment (IA)</b>
	<b>IA No:</b>
	<b>Date:</b> 12 April 2011
	<b>Stage:</b> Consultation
	<b>Source of intervention:</b> Domestic
	<b>Type of measure:</b> Primary legislation
<b>Contact for enquiries:</b>	

## Summary: Intervention and Options

### What is the problem under consideration? Why is government intervention necessary?

Almost two thirds of adults claim to have experienced a misleading or aggressive trade practice in the last two years. The Consumer Protection from Unfair Trading Regulations 2008 changed public regulation in this area. However, the Regulations do not change private law rights. The law giving consumers redress for misleading actions is too complex, and uses concepts which are confusingly different from the Regulations. The law on aggressive practices leaves gaps in consumer protection. This makes it more difficult to combat aggressive practices which undermine the operation of the legitimate market.

### What are the policy objectives and the intended effects?

To provide simpler, clearer routes of redress for consumers who have suffered misleading and aggressive trade practices.

- Simpler law will reduce costs to businesses and remove inconsistencies between criminal and civil law.
- Clearer law will complement the public regulation of commercial practices, deterring wrongful behaviour. It will therefore help support a competitive consumer market place, underpinned by confident consumers.

### What policy options have been considered? Please justify preferred option (further details in Evidence Base)

*Option 0: Do nothing*

*Option 1: Limited private right of redress:* Introduce a limited right providing redress to consumers who have entered into a contract or made a payment to a trader as a result of misleading or aggressive practices. This is the preferred option as it will target rogue traders without encouraging unmeritorious claims for minor problems.

*Option 2: Comprehensive private right of redress:* Introduce a private right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008. We do not favour this option because of its uncertainty and potential costs on businesses.

**When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved?**

The Law Commission does not implement legislation.

**Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?**

Review is a matter for the implementing Department.

**SELECT SIGNATORY Sign-off** For consultation stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the Chairman, Law Commission: ..... Date:.....

# Summary: Analysis and Evidence

# Policy Option 1

**Description:** A limited private right of redress for misleading and aggressive commercial practices

Price Base Year	PV Base Year	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£3.35m	£0.34m	
High	£6.6m	£1.73m	
Best Estimate	£5m	£1.1m	

### Description and scale of key monetised costs by 'main affected groups'

*Business* will bear one-off familiarisation costs of around £3.25 to £6.5m. A few unmeritorious claims may be brought, leading to annual costs between £330,000 and £1.65m.

For the *public sector*, transitional costs are around £100,000, and ongoing costs are between £14,750 and £75,600.

### Other key non-monetised costs by 'main affected groups'

Consumer advice agencies would need to incur the costs of familiarisation with the new law and training.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low		£16.7m	
High		£33.4m	
Best Estimate		25	

### Description and scale of key monetised benefits by 'main affected groups'

*Businesses* would benefit from simpler complaints handling (around £3.5m per year) and greater sales resulting from increased consumer confidence (£10m to £20m).

*Consumers* would receive more compensation (between £5m to £10m).

### Other key non-monetised benefits by 'main affected groups'

The reforms would deter misleading and aggressive practices, leading to less consumer detriment.

Consumers would find it easier to resolve disputes, saving time and experiencing less stress.

### Key assumptions/sensitivities/risks

Discount rate (%)

The reforms may lead to more court cases, through it is difficult to know how many. We have assumed 1000 to 5000 additional court cases in England and Wales and 100 to 500 in Scotland. More court cases would lead to higher costs, while less use of the new law would result in fewer benefits.

We have assumed that the lack of effective redress against aggressive practices leads to a lack of confidence. The illustrative figures suggest that this lack of confidence depresses sales by 1% in the mobility aids market and 0.5% in the doorstep glazing market.

Direct impact on business (Equivalent Annual) (£m):			In scope of OIOO?	Measure qualifies as
Costs: £1.5m	Benefits: >£2.5m	Net: +£1m	Yes	Out

## Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?		Great Britain			
From what date will the policy be implemented?		To be decided			
Which organisation(s) will enforce the policy?		Consumers and the courts			
What is the annual change in enforcement cost (£m)?		No direct effect			
Does enforcement comply with Hampton principles?		Yes			
Does implementation go beyond minimum EU requirements?		Yes			
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)		Traded: no effect		Non-traded: no effect	
Does the proposal have an impact on competition?		Yes			
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?		Costs:		Benefits:	
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	Micro	< 20	Small	Medium	Large
Are any of these organisations exempt?	No	No	No	No	No

## Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
<b>Statutory equality duties</b> <sup>1</sup> <a href="#">Statutory Equality Duties Impact Test guidance</a>	Yes	29
<b>Economic impacts</b>		
Competition <a href="#">Competition Assessment Impact Test guidance</a>	Yes	29
Small firms <a href="#">Small Firms Impact Test guidance</a>	Yes	30
<b>Environmental impacts</b>		
Greenhouse gas assessment <a href="#">Greenhouse Gas Assessment Impact Test guidance</a>	No	
Wider environmental issues <a href="#">Wider Environmental Issues Impact Test guidance</a>	No	
<b>Social impacts</b>		
Health and well-being <a href="#">Health and Well-being Impact Test guidance</a>	No	
Human rights <a href="#">Human Rights Impact Test guidance</a>	No	
Justice system <a href="#">Justice Impact Test guidance</a>	Yes	30
Rural proofing <a href="#">Rural Proofing Impact Test guidance</a>	No	
<b>Sustainable development</b>		
<a href="#">Sustainable Development Impact Test guidance</a>	No	

<sup>1</sup> Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

## Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

### References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
1	Consumer Protection from Unfair Trading Regulations 2008 (SI 1277/2008).
2	Consumer Focus, <i>Waiting to be Heard</i> (August 2009).
3	OFT, <i>Doorstep Selling</i> (May 2004).
4	OFT, <i>Annual Report 2009-2010</i> (July 2010).
5	OFT, <i>Consumer Detriment</i> (April 2008).
6	BERR, <i>Impact Assessment: The Consumer Protection from Unfair Trading Regulations</i> (March 2008).
7	Ministry of Justice and ONS, <i>Judicial and Court Statistics 2009</i> (October 2010).
8	J Baldwin, <i>Small Claims in the County Courts in England and Wales</i> (Clarendon Press, September 1997)
9	IFF Research, <i>Consumer Experience of the Small Claims Court</i> (October 2010)
10	Scottish Government Statistician Group, <i>Civil Judicial Statistics</i> (December 2010).
11	Scottish Office Central Research Unit, <i>Small Claims in the Sheriff Court in Scotland</i> (1991).
12	Scottish Government, <i>Criminal Proceedings in Scottish Courts</i> , (Statistical Bulletin) (March 2010).

### Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

#### Annual profile of monetised costs and benefits\* - (£m) constant prices

	Y <sub>0</sub>	Y <sub>1</sub>	Y <sub>2</sub>	Y <sub>3</sub>	Y <sub>4</sub>	Y <sub>5</sub>	Y <sub>6</sub>	Y <sub>7</sub>	Y <sub>8</sub>	Y <sub>9</sub>
<b>Transition costs</b>	5.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
<b>Annual recurring cost</b>	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
<b>Total annual costs</b>	6.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
<b>Transition benefits</b>	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
<b>Annual recurring benefits</b>	25.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00
<b>Total annual benefits</b>	25.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00

\* For non-monetised benefits please see summary pages and main evidence base section

## EVIDENCE BASE

### INTRODUCTION

- 1.1 The proposal is to reform the law of 1) misleading commercial practices and 2) aggressive commercial practices.
- (1) For *misleading practices*, the complexity and uncertainty of the private law of misrepresentation leads to an unnecessary administrative burden on business. At present, traders need to understand two systems of law: one applying to public regulation and one to private.
  - (2) For *aggressive practices*, private law leaves many gaps and uncertainties. This allows aggressive practices to continue, in a way which undermines the correct operation of the market in some areas, particularly in sales to vulnerable consumers.
- 1.2 This impact assessment is published alongside the Law Commission and Scottish Law Commission's joint Consultation Paper on consumer redress for misleading and aggressive practices. It provides an indication of likely costs and benefits, as a basis for comment and discussion. A full impact assessment will be published alongside the Law Commissions' final recommendations in March 2012.
- 1.3 Below we start with the background and the nature of the problem. The main gaps in the current law relate to aggressive practices. We describe the nature of the problems, using a case study: the mobility aids market. We then look at the available data on how often consumers experience misleading or aggressive practices. Subsequently, we consider the rationale for intervention, the policy objectives and the options, before outlining the costs and benefits of the preferred option.

### BACKGROUND

- 1.4 The Consumer Protection from Unfair Trading Regulations came into effect in 2008, and implement the Unfair Commercial Practices Directive in UK law. The Regulations replaced 22 pieces of legislation, including most of the Trade Descriptions Act 1968. They aim to prevent traders from distorting the market through misleading actions, misleading omissions, aggressive practices and some other unfair behaviour. They also list 31 "banned practices", which are considered unfair in all circumstances.
- 1.5 The Regulations are enforced by the Office of Fair Trading (OFT) and trading standards services (TSS), which have the power to bring both criminal proceedings and civil enforcement actions.<sup>2</sup> They do not give consumers a private right of redress where they have suffered from an unfair commercial practice. Instead, consumers seeking compensation have to rely on existing private law doctrines, such as the law of misrepresentation, duress and harassment.
- 1.6 Most misleading practices are covered by the law of misrepresentation. However, this is a technical area of law, which uses concepts that are confusingly different from the Regulations.

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<sup>2</sup> In Scotland, criminal proceedings are conducted by the Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate.

- 1.7 The Regulations also prohibit aggressive practices. These include doorstep salespersons who ignore requests to leave, or traders who put intimidating “bouncers” on the doors of sales presentations, to give the impression that consumers cannot leave the premises. Private law does not provide clear redress in these circumstances. For example, the law on duress (in England and Wales) or “force and fear” (in Scotland) developed in response to threats of violence to the person or goods, and does not necessarily provide remedies to those who suffer the effect of other more subtle forms of pressure.

### THE PROBLEM OF AGGRESSIVE PRACTICES

- 1.8 There are many complaints of aggressive practices within the mobility aids market. We use this as a case study to illustrate the nature of such practices and discuss their effect on the proper functioning of the market. It is important to stress, however, that this is only an illustration. Aggressive practices may be used in a wide variety of settings.

#### A case study: the mobility aids market

- 1.9 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. We estimate that there are up to **450 firms** involved in this market.<sup>3</sup>
- 1.10 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.<sup>4</sup> This is set to rise to 1.4 million by 2033.
- 1.11 There is an increasing number of 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.<sup>5</sup> The OFT are currently undertaking a study of the market.
- 1.12 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.
- 1.13 Most complaints in Derbyshire were about a few firms. Two traders selling mobility products generated 300 and 100 complaints respectively.<sup>6</sup>

<sup>3</sup> According to Government figures, around 300 companies provide assistive technology and another 150 companies or so companies operate in the mobility access sector. For details of the assistive technology sector, see BIS, UKTI and Department of Health, *Strength and Opportunity: The landscape of the medical technology, medical biotechnology and industrial biotechnology sectors in the UK* (December 2010), available at <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/s/10-p90-strength-and-opportunity-bioscience-and-health-technology-sectors>. For details of the mobility access sector, see <http://www.bis.gov.uk/files/file51409.PDF>, p 18, fig 7.

<sup>4</sup> These figures combine data from the Office of National Statistics with the household figures produced by the Department for Communities and Local Government and the General Register Office for Scotland. Unfortunately, the figures for Northern Ireland and Wales do not include a breakdown by age group, so are not included.

<sup>5</sup> <http://www.ofc.gov.uk/news-and-updates/press/2010/120-10>.

<sup>6</sup> Derbyshire County Council report (10 January 2011).

1.14 The BBC television programme *Rogue Traders* sent one of its team to train undercover as a salesperson for a company. Trainees were instructed how to obtain the highest possible prices, for example by selling a product retailing for less than £500 for £2100. The commission structure was designed to achieve this result. For example, if a particular product retailed at £1000, the salesperson received a 12% commission on the first £1000 and 50% commission on anything over £1000.

1.15 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.

1.16 In May 2004, the OFT published a report on the doorstep selling market,<sup>7</sup> as part of which it specifically examined price variability in the mobility aids market. As illustrated in Table 1, the report showed substantially higher prices for door-step selling.

**Table 1: Price variability for mobility aids relative to sales channel**

Product	Doorstep price	
	% more than the in-store price	% more than the internet price
Mobility scooters	31	63
Adjustable beds	58	NO DATA PROVIDED
Reclining chairs	144	

Source: OFT, *Doorstep Selling: Annexe I (May 2004)*, pp 14 and 17.

1.17 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, which amount to criminal offences under the Consumer Protection Regulations. These include:

- (1) Implying a connection with social services or an old-age charity;
- (2) Preying on the elderly'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.

1.18 An example of expensive credit arrangements was given by a viewer of the *Rogue Traders*' item:

<sup>7</sup> OFT, *Doorstep Selling: Annexe I – Price Variability for Mobility Aids (May 2004)*.

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.

- 1.19 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.<sup>8</sup>

### Existing avenues of redress

#### *The right to cancel*

- 1.20 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.

- 1.21 Other ways of discouraging cancellation were to deliver the items as quickly as possible and to help to unpack the items when they arrived. Even without such tactics, however, it is common for elderly people who live alone to be unaware of their rights, and embarrassed about what has happened. By the time family and friends find out about the problem, the cancellation period has passed.

#### *Criminal prosecution*

- 1.22 The practices described amount to criminal offences under the Consumer Protection from Unfair Trading Regulations 2008. There have been several high profile prosecutions. For example, in June 2010, Craftmatic was fined £30,000 by Abertillery Magistrates.<sup>9</sup> 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.<sup>10</sup>
- 1.23 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 may re-emerge as phoenix companies.

<sup>8</sup> [http://www.bbc.co.uk/blogs/Rogue\\_Traders/2009/11/rogue\\_traders\\_updates.html](http://www.bbc.co.uk/blogs/Rogue_Traders/2009/11/rogue_traders_updates.html).

<sup>9</sup> [http://www.southwalesargus.co.uk/news/8196799.Bed\\_company\\_fined\\_for\\_aggressive\\_selling\\_to\\_OAP/](http://www.southwalesargus.co.uk/news/8196799.Bed_company_fined_for_aggressive_selling_to_OAP/).

<sup>10</sup> <http://www.bbc.co.uk/news/uk-northern-ireland-11220767>.



- 1.24 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.<sup>11</sup> Nonetheless, another company incorporated by the same director, Lifestyle Plus (UK) Limited, started to trade.
- 1.25 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*

- 1.26 TSS and the OFT also have the power to obtain remedies similar to injunctions and interdicts under Part 8 of the Enterprise Act against rogue traders. This, however, can result in multiple court hearings over a prolonged period.
- 1.27 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 comments 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.<sup>12</sup>

#### *Compensation orders*

- 1.28 Following a criminal conviction, the court may also issue a compensation order. In England and Wales, section 130 of Powers of Criminal Courts (Sentencing) Act 2000 enables the court to order "such amount as the court considers appropriate" after hearing evidence and representations.
- 1.29 However, only limited use is made of this power. The 173 prosecutions brought by TSS in 2009 to 2010 resulted in compensation orders of £25,940 (an average of £150 a case).<sup>13</sup> Studies have highlighted the relatively low use made of compensation orders within the criminal justice system generally.<sup>14</sup> Research in 2008 by Peysner and Nurse found that trading standards officers regard compensation claims as a burden:

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

<sup>12</sup> [http://www.derbyshire.gov.uk/news\\_events/news/2010/december/news\\_items/judge\\_rules\\_mobility\\_company\\_owner\\_in\\_contempt.asp](http://www.derbyshire.gov.uk/news_events/news/2010/december/news_items/judge_rules_mobility_company_owner_in_contempt.asp).

<sup>13</sup> OFT Annual Report 2009-2010, Annex G, Table G-7.

<sup>14</sup> See 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.

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.<sup>15</sup>

- 1.30 An additional problem is that 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.<sup>16</sup> While the courts have some leeway to make approximations where the evidence is patchy,<sup>17</sup> it now seems that a victim of a crime will only get the minimum amount they can prove they are strictly entitled to in the civil law.<sup>18</sup> The criminal courts are not well equipped to assess this entitlement. Peysner and Nurse’s research 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”.<sup>19</sup>
- 1.31 Similar powers exist in Scotland.<sup>20</sup> 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.<sup>21</sup>
- 1.32 If the use made of compensation orders is to expand, the rules on how to value loss need to be as clear as possible. Unfortunately, the existing law in this area is confused. It appears that in order to unwind a contract, the victim is required to restore the trader to substantially the same position they were in previously. This leads to complex questions about how much use the victim has had from the mobility aid, and whether the item has deteriorated since it was sold. Neither TSS nor magistrates have the time or resources to determine difficult factual disputes about whether (for example) an item was or was not stained when it was returned. This deters prosecutors from asking for compensation and the courts from providing it.

#### *Civil sanctions*

- 1.33 A final possibility is that TSS may negotiate with traders to seek compensation in lieu of other enforcement activity. This has met with some success: in August 2010, the Local Government Association reported that Hampshire Council had recovered £227,000 from mobility traders;<sup>22</sup> Derbyshire County Council reported securing refunds of £57,000 for vulnerable residents; Nottinghamshire County Council obtained £24,000.<sup>23</sup>

<sup>15</sup> Professor J Peysner and A Nurse, *Representative Actions and Restorative Justice: A report for the Department for Business, Enterprise and Regulatory Reform* (2008) University of Lincoln, p 76.

<sup>16</sup> See *R v Vivian* [1979] 1 WLR 291 and *R v Horsham Justices, ex p Richards* [1985] 1 WLR 986.

<sup>17</sup> *Ex p Richards* [1985] 1 WLR 986, p 993.

<sup>18</sup> *R v James* [2003] EWCA Crim 811.

<sup>19</sup> 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, p 64.

<sup>20</sup> Criminal Procedure (Scotland) Act 1995, s 249.

<sup>21</sup> The Scottish Government, “Criminal Proceedings in Scottish Courts”, (Statistical Bulletin, Crime and Justice Series), March 2010, p16.

<sup>22</sup> LGA media release 25 August 2010.

<sup>23</sup> Derbyshire County Council Report 4 October 2010.

- 1.34 The Government is considering formalising this approach through the use of the civil sanctions, as set out in the Regulatory Enforcement and Sanctions Act 2008. The Act is not yet in force, but a pilot scheme is being considered to test how civil sanctions can be used to enforce the Regulations, along with other consumer legislation.<sup>24</sup> The pilot may start in 2011 and would last two years.<sup>25</sup>
- 1.35 In October 2010 the Law Commission participated in a workshop to discuss restorative remedies with TSS in the pilot.<sup>26</sup> TSS officers told us the traditional private law approach is unworkable in the context of delivering compensation to consumers. If compensation were to be delivered effectively through civil sanctions, there needed to be clear, simple rules about how compensation was determined, related to the price paid for the products, rather than the individual circumstances of the consumer.

*The effect of aggressive practices on legitimate traders*

- 1.36 Legitimate mobility aid traders are clearly 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.<sup>27</sup> Among other things members have agreed not to use the following selling techniques:
- (1) An unreasonably long stay in the customer's home, which should not exceed three hours unless there are exceptional circumstances;
  - (2) A discount on condition that the customer agrees to the sale that day;
  - (3) Withholding price information until the end of the sales discussion/visit.
- 1.37 All members must have a speedy complaints handling system in place.<sup>28</sup> If the customer is not satisfied, they can notify the BHTA in writing, who will consider whether there has been a breach of the Code.<sup>29</sup> If this fails, the customer is given the option of having the matter referred to BHTA's independent arbitrator, which is binding on both parties.<sup>30</sup> Where the arbitrator decides that there has been a breach, the Code empowers him to order that the member repay all money paid by the complainant and compensation to the customer (depending on the circumstances).<sup>31</sup>
- 1.38 The BHTA has over 400 members,<sup>32</sup> though this includes manufacturers and suppliers of health equipment other than mobility aids. We estimate that the membership includes around 295 retailers of mobility aids, or more than half of all market participants.

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<sup>24</sup> It is proposed that the use of civil sanctions might be sanctioned through a new statutory instrument made under the European Communities Act 1972 that will mirror the provisions of Part 3 of the Regulatory Enforcement and Sanctions Act 2008 for offences under the 2008 Regulations and the General Product Safety Regulations 2005. The Pilot could also incorporate offences under the Weights and Measures Act 1985. See also Department for Business, Innovation & Skills, Civil Sanctions Pilot, A consultation on the pilot operation of civil sanction powers for consumer law enforcers, March 2010 (the "Pilot Consultation Paper").

<sup>25</sup> See Civil Sanctions Pilot: A joint consultation by the OFT and LBRO on the operation of the BIS Civil Sanctions Pilot (December, 2010) at [www.of.gov.uk/OFTwork/consultations/current/civil-sanctions/](http://www.of.gov.uk/OFTwork/consultations/current/civil-sanctions/).

<sup>26</sup> Law Commissions, Summary of Evidence on Unfair Commercial Practices and Private Redress: Feedback from stakeholders (October, 2010).

<sup>27</sup> <http://www.bhta.net/resources/1/Code-of-Practice/BHTA-Code-of-Practice.pdf>.

<sup>28</sup> Above para 17.1.

<sup>29</sup> Above para 17.6 to 17.7.

<sup>30</sup> Above para 17.10.

<sup>31</sup> Above para 17.11.

<sup>32</sup> <http://www.bhta.net/default.aspx>.

*The economic effects of unfair practices on the market*

- 1.39 A competitive market requires informed consumers, able to make rational choices. Suppliers are entitled to price products as they wish, but consumers must be able to evaluate the price freely. A consumer faced with a sales person who refuses to leave is unable to consider other options. Consumers are not given the chance to shop around in the way that is necessary to make a market competitive. The result can be seen in the wide variation of prices for similar products.
- 1.40 Furthermore, the many horror stories about aggressive selling, such as those set out in this section, reduce consumer confidence. Housebound consumers who might benefit from mobility aids are reluctant to allow a sales person into their homes for fear of experiencing these tactics. This not only undermines the position of legitimate traders but reduces the size of the market as a whole.

**SCALE OF THE PROBLEM**

- 1.41 In 2009 Consumer Focus commissioned research into consumers' experience of unfair commercial practices generally. Consumer Focus helpfully provided us with the original tables used in the study, which we have used to estimate the scale of the problem.

*The Consumer Focus findings*

- 1.42 The study found that almost two-thirds (61%) of the population had been the target of an unfair commercial practice within the last two years.<sup>33</sup> The following tables list the main misleading and aggressive practices mentioned in the study.

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<sup>33</sup> Consumer Focus, *Waiting to be heard* (August 2009) p 3.

**Table 2: Misleading practices**

TYPE OF PRACTICE	% population experiencing practice
<b>Lucky winner:</b> consumer told they had won a prize, but then finds that the prize does not exist.	31
<b>Absolutely free:</b> product described as free, but consumer is required to pay.	12
<b>Offer must end Monday:</b> rushed into buying something because trader falsely says that product only available for a very limited time or that favourable terms will end soon.	11
<b>Closing down sale:</b> rushed into buying something because trader falsely claims that they are about to close or move.	9
<b>Trader not who they said they were:</b> trader claimed a quality mark they were not entitled to, or falsely claimed membership of a trade association (or other approved scheme).	5
<b>Fake goods:</b> product claimed to be made by well-known manufacturer when it was not.	5
<b>Miracle products:</b> product falsely claimed to cure illness, disease or malformations.	4
<b>Pyramid selling:</b> scheme promises huge returns if the consumer enrolls other people.	4
<b>Other:</b> eg other misleading information about product characteristics or price.	5

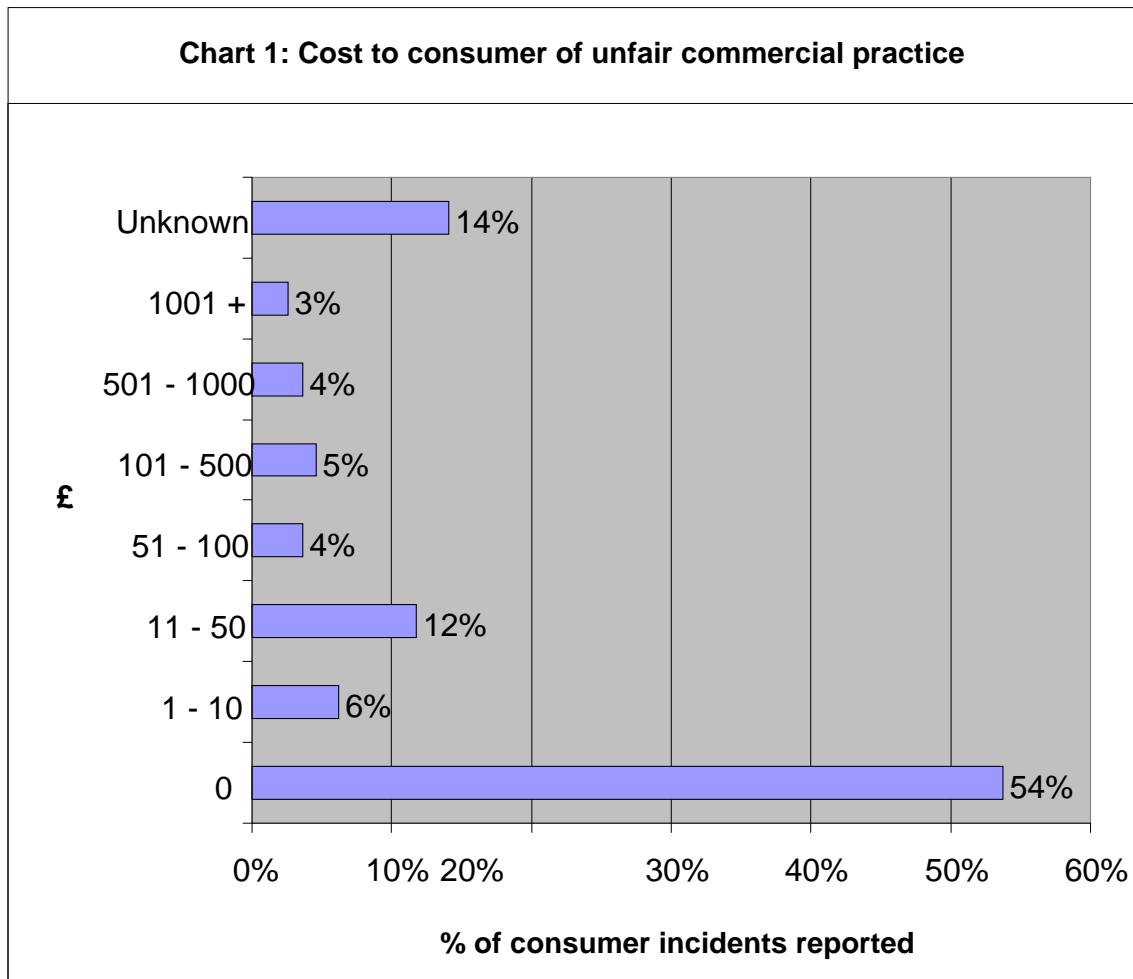
Source: *Consumer Focus, Waiting to be heard (August 2009) p 9.*

**Table 3: Aggressive practices**

TYPE OF PRACTICE	% population experiencing practice
<b>Persistent sales calls:</b> received persistent and unwanted calls, faxes, emails or texts, and consumer ending up buying something due to feeling pressurised.	20
<b>Sales person overstaying their welcome in your home:</b> trader ignores requests to leave. Consumer ends up buying something to get rid of them or due to feeling pressurised.	5
<b>Intimidation:</b> coerced into buying something because the consumer felt unable to leave the premises without doing so (eg a sales presentation with intimidating doormen).	4

Source: *Consumer Focus, Waiting to be heard (August 2009) p 9.*

- 1.43 Most unfair commercial practices were minor. As chart 1 (overleaf) shows, in over half of all cases the consumer suffered no loss. Issues such as persistent sales calls and fake wins are one of life's irritations rather than a source of loss. However, some misleading and aggressive practices can cause considerable loss. 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. Consumer Focus calculated that the total detriment suffered by consumers as a result of misleading and aggressive practices was around £3.3 billion.



- 1.44 The practices most likely to lead to serious loss are shown below. Discussions with consumer groups suggested consumers were particularly worried when they had bought expensive home improvements through traders who claimed to be members of trade bodies (and to offer guarantees or dispute resolution services) only to find that the trader had lied to them. As we have seen, high pressure door to door selling may also lead to high losses.

**Table 4: Breakdown of cases where consumer claimed losses of more than £500**

Practice	% of all cases in category where consumer claimed losses of more than £500
Trader not who they said they were	28
Pyramid selling	14
Miracle products	14
Offer must end Monday	11
Sales person overstates welcome	10

Source: *Consumer Focus study on unfair commercial practices (2009), unpublished tables.*

- 1.45 Given that many people suffered no loss, it is unsurprising that 57% took no action. However, 43% did make a complaint: with 34% complaining to the trader, and 9% approaching someone else.
- 1.46 Of those who approached a trader, just under half (48%) felt that the issue had been satisfactorily resolved. Of those who remained dissatisfied, most did nothing except to give the trader a bad word-of-mouth reputation. However, just over a third of people who remained dissatisfied (36%) contacted someone else at this stage.

- 1.47 The final outcome is shown in the table below. Overall, more than half of respondents (58%) reported that they had resolved the matter satisfactorily, though for some this had involved several actions.

**Table 5: Summary of satisfactory resolution of the unfair commercial practice**

When was dispute resolved?	Complaining initially to trader	Complaining initially to other body	Total
Dispute resolved after first complaint	289	101	390
Dispute resolved after taking further action	36	6	42
Dispute resolved after third action	11	-	11
<b>Total</b>	<b>336 (56%)</b>	<b>107 (66%)</b>	<b>443 (58%)</b>
Weighted Sample: Number of occasions of unfair commercial practices	603	162	765

Source: Research report on unfair commercial practices for Consumer Focus (2009) p 17.

- 1.48 In 2008, the OFT published the results of a study into consumer detriment based on a survey of over 10,000 people.<sup>34</sup> This 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”.<sup>35</sup> This suggests just over £1 billion of consumer detriment from misleading practices. 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.

*The volume of disputes*

- 1.49 There are a large number of disputes over misleading and aggressive practices each year. 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. This would lead to a total of **7.7 million complaints** to traders a year.<sup>36</sup>
- 1.50 Furthermore, the survey found many instances where people contacted a third party – either initially, or after failing to resolve the matter with the trader. There were 272 cases in the study where the consumer claimed to have contacted another organisation (equivalent to 7 contacts for every 100 adults in the population each year). This suggests around **3.4 million complaints** to other organisations.
- 1.51 The most common choices were TSS, advice agencies (including Citizens Advice or Consumer Direct) or the Office of Fair Trading, though some people approached trade bodies or dispute resolution schemes.

<sup>34</sup> Office of Fair Trading, Consumer Detriment (April 2008).

<sup>35</sup> Above, p 32.

<sup>36</sup> Based on a total population in England, Wales and Scotland of 48.147 million adults.

- 1.52 Many complaints will be resolved quickly and easily. Many may be misguided. However, it is clear from the examples we have been given that some disputes can generate considerable bad feeling and may take several hours of a trader's time. Given the volume of complaints, it is particularly important that the law on private redress is clear and easy to understand.

#### **RATIONALE FOR INTERVENTION**

- 1.53 Misleading and aggressive practices undermine competition by reducing consumers' access to information. Misleading traders misdirect consumers through misinformation. Aggressive traders act in the same way as monopoly suppliers, restricting the consumer's ability to shop around and to choose freely from other traders. Both practices lead to market failure and justify Government intervention.
- 1.54 The existing law in this area does not work as well as it should. The complexity and uncertainty of the private law on *misleading practices* leads to an unnecessary administrative burden on business. At present, traders need to understand two systems of law: one applying to public regulation and one to private redress. The costs to businesses in complaint handling would be reduced if the private law were better aligned with the Consumer Protection from Unfair Trading Regulations, and the remedies simplified.
- 1.55 For many *aggressive practices*, the current private law does not provide a clear route to consumer redress. This makes it more difficult to combat aggressive practices, which undermine competition, distort the market and impose costs on both consumers and legitimate traders.
- 1.56 At present, the onus of combating aggressive practices falls entirely on the public sector (through TSS and the OFT and, in Scotland, the Crown Office and Procurator Fiscal Service). Public regulation is resource intensive, and resources are reducing as local authorities cut their budgets for TSS. There is a need for a wider range of sanctions in this area. This would include the greater use of compensation orders and clearer remedies for individuals bringing action on their own behalf. This requires the civil law to provide clearer, simpler remedies.

#### **POLICY OBJECTIVES**

- 1.57 The policy objectives are to:
- (1) Reduce administrative costs on businesses through clearer, simpler law;
  - (2) Combat aggressive practices which undermine competitive markets; and
  - (3) Provide consumers with more avenues for redress against rogue traders.

#### **OPTIONS FOR REFORM**

- 1.58 We have considered three options:
- (1) Do nothing.
  - (2) Introduce a private right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008. We do not favour this option because of its uncertainty and potential costs on businesses.



- (3) Introduce a limited right providing redress to consumers who have entered into a contract or made a payment to a trader as a result of a misleading and aggressive practice. This is the preferred option as it will target rogue traders, without encouraging unmeritorious claims for minor problems.

### **A private right of redress for all breaches of the 2008 Regulations?**

- 1.59 In 2008, the Law Commission commented that introducing a private right of redress for all breaches of the Regulations would have three advantages. It would provide a simple remedy; it would ensure full protection against all breaches; and it would have an important deterrent effect.<sup>37</sup>
- 1.60 The problem, however, is that such a right would impose unpredictable costs on traders:
- The Directive and subsequent regulations were deliberately drafted in an open-ended way, so as to cover potential and unknown practices that might arise in the future. It is therefore impossible to provide an account of how they might be used, or the costs they would impose on traders. Introducing a private right of redress would involve a leap of faith, which could never be fully costed.<sup>38</sup>
- 1.61 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.
- 1.62 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” or “bait and switch tactics” on any individual consumer. Automatic liability for banned practices could result in small, frivolous claims.
- 1.63 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”.<sup>39</sup> The Regulation lists factors that will be relevant to helping decide about materiality where the commercial practice is an “invitation to purchase”.<sup>40</sup> Nonetheless, the criterion is still extremely vague and leads to considerable uncertainty.<sup>41</sup> 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.
- 1.64 We are unable to cost this option adequately. Given its potential to impose considerable costs on businesses, we do not recommend this option.

### **The preferred option: a limited right**

- 1.65 There are six ways in which the proposed new right would be more limited than the Regulations:

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<sup>37</sup> 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 4.1 to 4.5.

<sup>38</sup> Above, para 4.9.

<sup>39</sup> Reg 6(3).

<sup>40</sup> Reg 6(4).

<sup>41</sup> H Collins, “Harmonisation by example: European laws against unfair commercial practices” (2010) 73(1) *Modern Law Review* 93, pp 105 to 106.

- (1) It would provide redress only to those who have entered into a contract or made a payment. It would not, for example, provide redress to those induced by a misleading advertisement to visit a shop, if they failed to make a purchase.
  - (2) It would provide redress only against the other party to the contract (or the trader to whom a payment was made). It would not provide redress against third parties, such as producers.
  - (3) It would not cover land transactions or financial services. These often involve large sums, and are unsuited to the standardised remedies we are proposing. Moreover, these areas are already covered by tailored alternative dispute resolution systems.
  - (4) It would not make traders liable for pure omissions. 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. For example, the practice would have to have been a significant factor inducing the average consumer to enter into the contract or make a payment.
  - (6) It would not provide redress for breach of the general prohibition against practices which are “contrary to the requirements of professional diligence”.<sup>42</sup> We think this is too uncertain to form the basis of private law rights.
- 1.66 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 would be a significant factor in inducing the average consumer to enter the contract or make the payment; and
  - (3) It was a significant factor in this consumer’s decision to enter the contract or make the payment.
- 1.67 The proposals adopt the definitions of misleading practice, aggressive practice and average consumer, with only minor alterations. As with the Regulations, in some cases the test of an average consumer would be replaced with a test of the average vulnerable consumer.
- 1.68 The uncertain remedies under current law would be replaced with more certain, standardised measures. Those who complained within three months would have the right to unwind the contract and obtain a refund, provided they could return the goods, or reject at least some of the service. They would not need to make an allowance for the use they had had from the product. If the consumer waits more than 3 months, or if the goods or service are fully consumed, then the consumer can claim a discount on the price.

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<sup>42</sup> Article 5, implemented by Reg 3(3) of the Regulations.

## COSTS AND BENEFITS OF THE PREFERRED OPTION

### Benefits

- 1.69 We would anticipate three benefits to 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.
  - (3) Combating aggressive practices more effectively would increase consumer confidence, and therefore lead to increased sales.
- 1.70 We consider each in turn.
- Easier complaint handling*
- 1.71 As discussed above, complaints about misleading and aggressive actions appear common. 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.
- 1.72 It is difficult to calculate the benefit of this simplification. However, the evidence suggests that around **7.7 million complaints** about misleading or aggressive practices are made to traders each year.<sup>43</sup> If clearer and simpler law were to save traders 5 minutes of time for each complaint, this would reduce the costs of complaints-handling by 90p. 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. 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.
- 1.73 The study by Consumer Focus also suggested that consumers made **3.4 million complaints** to other organisations, such as TSS, Citizens Advice or Consumer Direct. Again, assuming that clearer law made each complaint easier to deal with (by 50p to £1), this would suggest savings of **£1.7 to £3.4 million**. 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.
- 1.74 We would welcome feedback on these figures. We would be particularly interested in evidence about the number of complaints businesses received, the cost of handling these complaints, and the savings that might be anticipated.
- 1.75 We would also welcome information about the volume of complaints received by TSS and other advice agencies. Will the proposals reduce the work involved in handling these complaints? If so, by how much?

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<sup>43</sup> Based on a total population in England, Wales and Scotland of 48.147 million adults.

*More consumer compensation*

- 1.76 As we have seen, surveys by Consumer Focus and the OFT suggest that misleading and aggressive practices lead to considerable consumer detriment. We do not suggest that law reform will eliminate the problem. However, clearer simpler rules will make it easier for consumers to obtain compensation and deter some practices.
- 1.77 The simplified remedies would be intended to apply in a variety of settings: compensation orders in criminal proceedings; restoration orders as part of civil sanctions; and individual redress in the shadow of county court or sheriff court action.
- 1.78 The use made of compensation in criminal proceedings appears particularly low. In 2009 to 2010, TSS brought 173 prosecutions for breaches of the Consumer Protection Regulations, which led to less than £26,000 in compensation orders.<sup>44</sup> We hope that the simpler standardised remedies would increase this sum, possibly by up to £100,000.
- 1.79 There is an increasing interest in the use of civil sanctions, which TSS could use as an alternative to criminal prosecution. These include mechanisms to provide compensation to consumers through enforcement undertakings and restoration orders. These will also be easier to obtain in the light of simpler, standardised remedies. We welcome views on the amount of compensation that might be provided in this way. It is possible that the proposals may add to the amount by £100,000 to £500,000.
- 1.80 Finally, the reforms would provide better redress for consumers, who bring actions on their own behalf. The law of misleading actions would be easier to understand, making claims less stressful and difficult to pursue, and the law on aggressive practices would provide more redress. We do not estimate more initial complaints. However, those who do complain will be more likely to be successful, and where a trader refuses compensation, consumers may be more likely to pursue the claim.
- 1.81 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 county court or sheriff court action, without the necessity of a summons.
- 1.82 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. This includes compensation through compensation orders, civil sanctions and individual court actions, but most compensation would be gained through individual negotiation in the shadow of the law. We would welcome comments on this figure.
- 1.83 Consumers would also receive less quantifiable benefits in terms of fewer hours spent pursuing claims and less stress and aggravation.

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<sup>44</sup> OFT Annual Report 2009-2010, Annex G, Table G-7.

*Improved consumer confidence leading to increased sales*

- 1.84 As discussed above, the effect of horror stories about aggressive selling reduces consumer confidence, and makes consumers less prepared to buy the product. This appears to be a problem in the mobility aids market, though it applies more widely. 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 schemes when they are not, which undermines the whole concept of a code of practice.
- 1.85 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.
- 1.86 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.
- 1.87 As we said, we are only able to suggest an order of magnitude. 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.

**Costs***Transitional costs*

- 1.88 In 2008, when the Consumer Protection from Unfair Trading Regulations were introduced, the Department for Business, Enterprise and Regulatory Reform estimated that businesses would incur one-off familiarisation costs in understanding the Regulations, which could amount to £12 - £27 million.<sup>45</sup>
- 1.89 This was based on 770,000 enterprises (an estimate based on the number of retail, hotel and restaurant, automotive, and personal services enterprises), of which about 99% are small businesses (the majority of which employ less than 5 people). It assumed that between one and two hours of a manager's time would be spent on this function. BERR also assumed those employing more than 50 people may take longer than two hours, and employ legal advisors for this purpose.

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<sup>45</sup> BERR, Impact Assessment: The Consumer Protection from Unfair Trading Regulations, March 2008, p 99.

- 1.90 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 that 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. 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.
- 1.91 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, suggesting familiarisation costs of between **£3.25 million and £6.5 million**. We welcome comments on this figure.
- 1.92 We have considered whether judges would need to receive training in the reforms. Most legal changes are notified to judges in a monthly e-letter circulated by the JSB. However, major changes may require special training. We do not think these proposals would justify a special course on their own, but if they were enacted alongside other simplification of consumer law, they could be included in a day's course on all the consumer law changes. There are around 700 District Judges in England and Wales. If one assumed a cost of £600 training per judge per 6 hour day, an hour's session would cost £70,000. In Scotland, there are around 140 sheriffs. The Judicial Studies Committee estimate the average hourly cost of training at £275 an hour. On this basis the total cost of judicial training in the two jurisdictions may be in the region of **£100,000**.
- 1.93 There would also be costs for training consumer advisers and we would welcome comments on what these would be.

*On-going costs*

- 1.94 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.
- 1.95 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. 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. It may also result in misguided complaints, which would produce costs for businesses.
- 1.96 We have therefore attempted to estimate the number of additional court cases which may result from the reforms. This is difficult to do. Successive studies have shown that consumers are extremely reluctant to go to court.<sup>46</sup> The Consumer Focus study on unfair commercial practices, for example, 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.

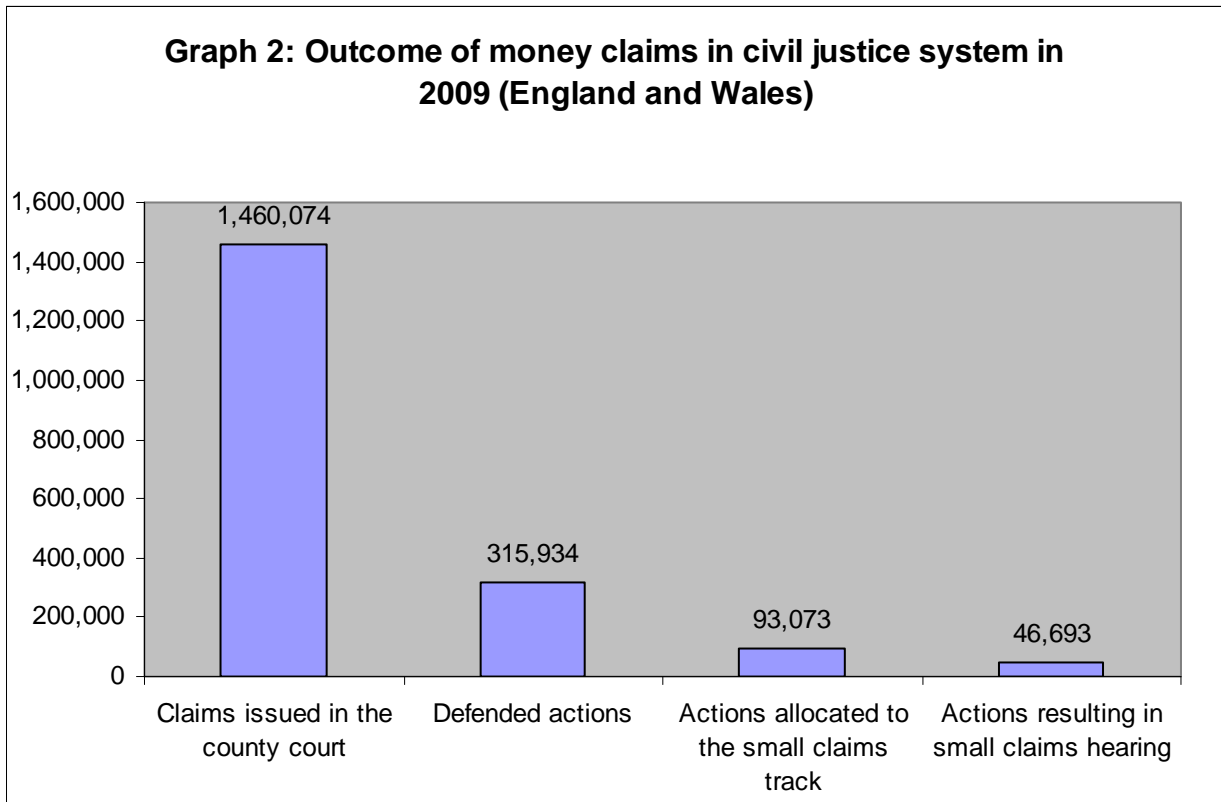
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<sup>46</sup> See, for example, H Genn, *Paths to Justice* (1999) and P Pleasence and others, *Civil Justice in England and Wales 2009*, Legal Services Research Centre (2010).

1.97 The number of people who do go to court is so low that it cannot be reliably estimated from surveys of the general population. Therefore, rather than use survey evidence of the number of potential complaints, we have started by looking at court data to see how many consumer claims are brought to the county court (in England and Wales) or the sheriff court (in Scotland). We think that at most the proposals will add a small percentage to these figures. They will not change the whole way in which consumers view court action.

*England and Wales: how many small claims?*

1.98 The Judicial Statistics show that in 2009,<sup>47</sup> 1.46 million money claims were issued in the county court. Most were paid, settled or abandoned at an early stage. There were 315,934 defended actions, of which 93,073 were allocated to the small claims track, and 46,963 resulted in small claims hearings.



1.99 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.<sup>48</sup> 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**.

<sup>47</sup> <http://www.justice.gov.uk/publications/docs/county-courts-chp1-jcs-2009.xls>.

<sup>48</sup> J Baldwin, Small Claims in the County Courts in England and Wales (1997).

1.100 Research for Consumer Focus investigating a sample of 525 such cases indicates that at least a quarter of such cases are not about consumer claims as normally understood. Some are claims for unpaid wages or money in lieu of notices (9%); others involve damage to property (8%); some will be disputes with landlords, often about the return of a tenancy deposit (10%).<sup>49</sup> However, many small claims involve problems with builders and other trades people over bad workmanship, faulty goods, undelivered items, or second hand cars. Although most claims are breaches of contract, rather than misrepresentation or duress, these areas have the potential to involve misleading or aggressive trade practices. Table 7 replicates the findings of this research.

1.101 Table 7: Breakdown of different types of claim in the small court

<b>Nature</b>	<b>Percentage of Small Claims Court claims</b>
<b>NON-CONSUMER TYPE CLAIMS</b>	
Claims for unpaid wages or money in lieu of notice	9
Damage to property	8
Disputes with landlords	10
<b>Total</b>	<b>27</b>
<b>CONSUMER-TYPE CLAIMS</b>	
Problems with builders or tradespeople over bad workmanship or payment	26
Unfair parking tickets or bank charges	11
Non-delivery of products purchased	9
Problems with repairs	8
Problems with other services	6
Faults with consumer durables e.g. TVs or washing machines	5
Faults with a second-hand car	5
Contract issues with an internet or phone provider	4
<b>Total</b>	<b>74</b>
<b>Value of cases</b>	
Under £250	18
£251 to £999	48
£1,000 to £4,999	31
£5,000 or more	3

*Source: IFF Research, Consumer Experience of the Small Claims Court, p. 24.*

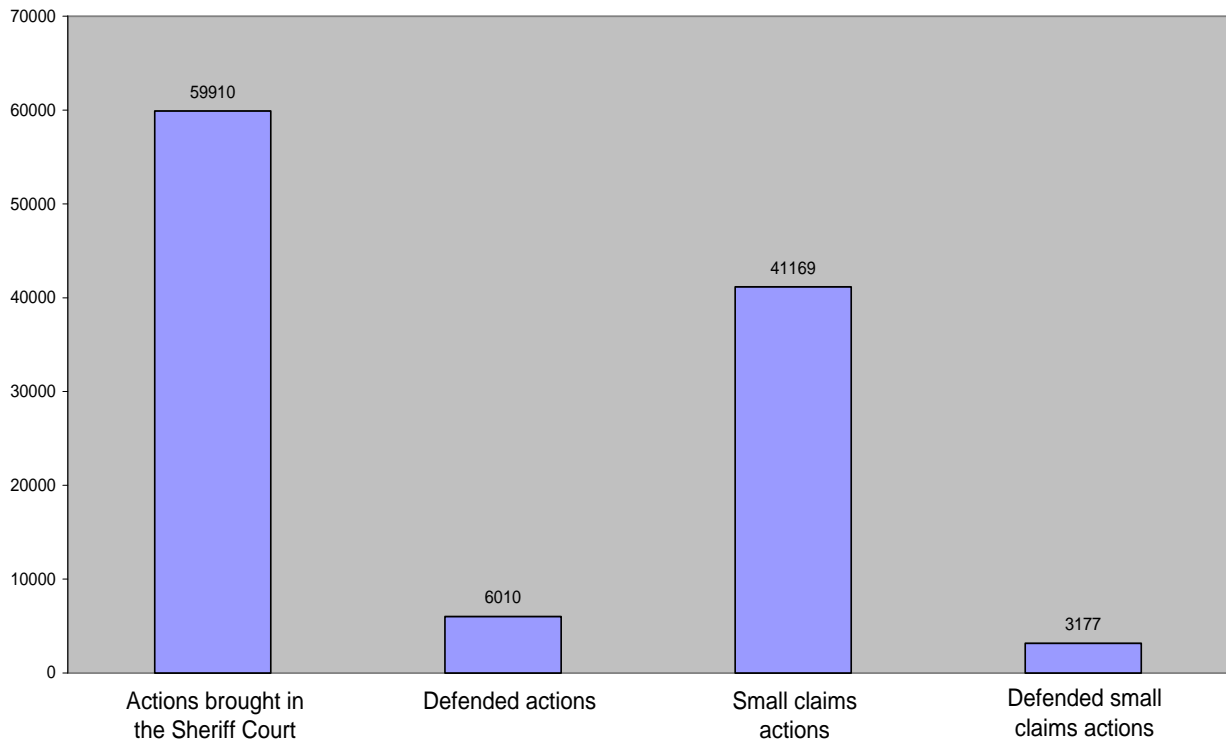
*Scotland: how many small claims?*

1.102 The Civil Judicial Statistics show that in 2009-2010, 59,910 actions for payment were raised in the sheriff court. This resulted in 6,010 defended actions. Of the total number of actions for payment raised in the sheriff court, 41,169 were raised as small claims actions, and 3,177 of these were defended, as shown in the graph below.

<sup>49</sup> Research Report, Consumer Experience of the Small Claims Court, prepared for Consumer Focus by IFF research (October 2010).



## Outcome of money actions in civil justice system in 2009/2010 (Scotland)\*



\*Excludes personal injury, commercial and family. Statistics taken from Civil Judicial Statistics, Scottish Government Statistician Group, December 2010.

- 1.103 As with England and Wales, the Civil Judicial Statistics for Scotland do not indicate how many of these claims were brought by consumers against businesses. The best available statistic, although now considerably dated, is provided in a study published in 1991 on small claims in sheriff courts.<sup>50</sup> As part of this publication, the types of actions raised in 6 study courts were measured from December 1988 to November 1989, which resulted in a finding that approximately 30% of small claims actions were raised by individuals against businesses. Using this figure, it might be the case that, in 2009/10, consumer actions accounted for around 12,350 small claims actions raised. This may have resulted in around 950 defended small claims actions.
- 1.104 The Scottish figures appear to be considerably lower than the equivalent English figures. Allowing for population differences, the number of Scottish defended “money claims” in the sheriff court appears to be only 20% of the number of money claims in the county court in England and Wales. It is not clear why there should be such substantial differences in litigation rates north and south of the border.

*An estimate of the number of additional claims*

- 1.105 We do not think that the proposed change will lead to consumers developing a radically different approach to court proceedings. However, one would anticipate some increase in court cases.
- 1.106 It is not possible to calculate what the effect may be. However, in order to illustrate the cost of our proposals, we have calculated costs on the basis of **1,000 to 5,000 new actions in England and Wales**. On this basis, one would anticipate between 150 and 750 additional hearings.

<sup>50</sup> *Small Claims in the Sheriff Court in Scotland, An assessment of the use and operation of the procedure*, Scottish Office Central Research Unit (1991).

- 1.107 Assuming that the effect of the reforms would be similar in Scotland, there may also be between **100 and 500 new actions cases raised in the sheriff court.**

*The effect on public funds*

- 1.108 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.

- 1.109 In 2009, PricewaterhouseCoopers LLP researched court fee remissions for the Ministry of Justice.<sup>51</sup> They found that from October 2007 to October 2008, full or partial remissions were provided in around 160,000 cases at a total cost of £23 million (or £143.75 per case). This was equivalent to 7.3% of all county court family and non-family actions started in 2008. If 10% of the new actions in England and Wales involve a remission of court fees, this would suggest between 100 and 500 grants of remissions, at a cost to the Ministry of Justice of between **£14,000 and £72,000.**

- 1.110 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. Assuming the same proportion of cases would involve a remission of fees at the same average cost, the cost to the Scottish Court Service would be between **£750 and £3,600.**

- 1.111 We welcome comments on the likely impact on court cases.

*The effect on traders*

- 1.112 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.<sup>52</sup> However, this suggests that 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.

**Summary of costs and benefits**

- 1.113 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.

*Costs and benefits to businesses*

- 1.114 The main costs on businesses will be the one-off familiarisation costs of finding out about the new law. We tentatively estimate transitional costs at between **£3.25 million and £6.5 million.** If the law generates additional court cases, there may also be some on-going costs where the trader eventually wins the case 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.

<sup>51</sup> *Is the 2007 Court Fee Remission System Working?* Ministry of Justice Research Series 15/09 (December 2009).

<sup>52</sup> Research Report, *Consumer Experience of the Small Claims Court*, prepared for Consumer Focus by IFF research (October 2010), p 46.

- 1.115 The costs 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). The simplification of the law of misleading practices would make it easier to deal with complaints. We have tentatively estimated the savings to businesses as a result at **£3.5 million a year**. The greater private redress for aggressive practices would help combat the problem, leading to increased consumer confidence and therefore increased sales. On a conservative estimate, deterring aggressive practices may increase the market by between **£10 and £20 million**.
- 1.116 We have not included the costs which fall on rogue traders involved in paying greater compensation payments. The aggressive practices covered by the reforms already amount to criminal offences, and are not carried out by legitimate traders.

*Other costs and benefits*

- 1.117 The proposals would bring benefits to consumers, who would receive greater levels of compensation for the detriment suffered from aggressive practices. We tentatively suggest that the reforms may increase compensation payments by between **£5 and £10 million**. There is also likely to be a deterrent effect, with fewer misleading or aggressive practices taking place.
- 1.118 Consumer advice agencies would need to incur initial costs of familiarisation and training. They would then receive the benefits of a simpler system. We have not been able to cost these with precision and would welcome evidence of the effect of the changes on advice agencies.
- 1.119 As far as costs to the public purse are concerned, we suggest that training judges may cost around **£100,000**. If consumers bring additional cases through the small claims procedure, this may lead to between 100 and 500 grants of remissions, at a cost to the Ministry of Justice of between **£14,000 and £72,000**. The equivalent figures for Scotland are between **£750 and £3,600**.

**ASSUMPTIONS AND SENSITIVITIES**

- 1.120 It is clear that misleading and aggressive practices are a significant problem, leading to considerable consumer detriment and reducing consumer confidence. However, it is less easy to predict the effect of law reform on consumer behaviour. It is particularly difficult to tell how many consumers will use the new law to obtain compensation.
- 1.121 The impact assessment has made assumptions about the number of additional small claims brought by consumers. Consumers' recourse to the new rights may be lower than predicted, leading to less benefit to consumers, but also fewer costs to the public purse, and fewer losing claims. The costs of dealing with complaints and claims are also tentative estimates, and we welcome comments.

**QUESTIONS**

- 1.122 The accompanying consultation paper asks the following questions on the costs and benefits of the proposed reforms.
- (1) How many complaints about aggressive practices do traders receive? What is the cost of handling these complaints, and what savings might be anticipated?
  - (2) How many complaints are received by TSS and other advice agencies? Will the proposals reduce the work involved in handling these complaints? If so, by how much?

- (3) How many additional claims might be anticipated as a result of the reforms? What additional compensation may be generated as a result?
- (4) How far do aggressive practices by rogue traders undermine consumer confidence and reduce sales?
- (5) How long would businesses need to spend to become familiar with the new law?
- (6) What costs would be involved in training judges and consumer advisers about the changes?
- (7) How many more court cases may be generated by the reforms?
- (8) If the consumer loses in the small claims court, what costs would this impose on the trader?

1.123 We seek responses to these questions by 12 July 2011 to Jessica Ugucioni, Law Commission, Steel House, 11 Tothill Street, London, SW1H 9LJ, tel: 020 3334 0282 / fax: 020 3334 0201, [commercialandcommon@lawcommission.gsi.gov.uk](mailto:commercialandcommon@lawcommission.gsi.gov.uk)

**SPECIFIC IMPACT TESTS****Statutory equalities**

- 1.124 We do not think our proposals will have any adverse equality impact on any social group as defined by their race, religion or belief, sexual orientation, gender, age, or disability.
- 1.125 As we have noted above, our proposals may be particularly beneficial to the very elderly, many of whom will be particularly susceptible to misleading and aggressive practices. We think the same considerations apply to those with learning disabilities.

**Competition**

- 1.126 We anticipate that our proposals will enhance competition in the market in two ways. First, the deterrent effect of our proposals will reduce distortions in the market caused by unfair commercial practices. Secondly, consumer confidence generally will be enhanced by the knowledge that, with relative ease, consumers can avoid contracts which they have been misled or bullied into making.
- 1.127 Misleading and aggressive practices exploit information asymmetries and consumers' vulnerabilities to force them into an adverse selection of goods or services. Traders who secure custom by resorting to these practices deny those who do not transaction opportunities to which they would otherwise have access. While these practices are already prohibited by the criminal law, the commission of an offence does not entail that enforcement action will necessarily be taken by trading standards officers. The introduction of a civil right to damages will serve as a useful additional deterrent, reducing these distortions of the market.
- 1.128 However, the principal benefit of our proposals would be a reduction of consumer uncertainty about the availability of legal redress in the event that they are misled by a trader. We think that such uncertainty unduly magnifies the effect of non-price competition to the detriment of small and medium enterprises.
- 1.129 While niche markets are different, it is a fair assumption that in mass markets for goods and services, most small and medium enterprises are not in a position to compete with large firms other than on price. Large companies have goodwill and brand value to protect. The retention of that goodwill and brand value depends on consumers having repeated positive experiences of the goods or services provided by that company under that brand. Large companies therefore have an incentive to resolve a complaint about an unfair commercial practice to the consumer's satisfaction irrespective of its strict legal merits. While smaller firms may have goodwill to protect, their comparatively smaller resources make it harder to absorb the cost of resolving complaints.
- 1.130 Suppose then that the hypothetical self-interested rational consumer is faced with a choice between goods or services sold under a brand and those sold by a small trader. Conscious that the company needs to preserve the brand experience, consumers will always opt for the branded offering unless there is a sufficient price difference. Moreover, the lower search costs provide a further incentive to purchase the branded product. This position is not in itself objectionable, as the surplus the large company is able to extract partly reflects its investment in its brand and the goodwill it has built up.
- 1.131 At present, however, the small trader and the vendor of the unbranded product or service are doubly disadvantaged by the existing law. When considering whether to buy goods or services that are unbranded, the consumer is likely to seek more information about those goods or services than it would if it were considering a branded one. It is this part of the sales process at which our proposals are principally directed.

- 1.132 The problem we see is that the consumer is not only uncertain as to whether the trader's offering will fulfil the expectations it has engendered, but also cannot be sure that the transaction will be reversible where those expectations are not met. This provides an additional disincentive for the consumer to transact with the small trader and will result in a lower sale price.
- 1.133 The logical assumption has to be that the lower the producer surplus a trader can extract for the provision of goods or services, the lower the incentive there is to attempt to enter the market. The more robust the legal remedies available to consumers, the greater the confidence of the consumer and therefore the greater the price the small trader can extract. We believe, therefore, that implementing our proposals will help foster an environment favourable to entrepreneurialism and enhance competition.

### **Small firms**

- 1.134 As we have described above, the principal benefit for small firms will be the enhancement of competition. However, this is not the sole benefit we foresee for small firms. The opportunity cost involved in dealing with a complaint will often be significantly higher for small firms than for large ones. While larger and more sophisticated firms will have mechanisms in place to deal with customer complaints, smaller firms may not have the staff to handle them. Small firms stand to save more than larger ones if the process of complaints handling can be expedited.
- 1.135 Compare, for example, a sole trader mechanic and a chain of car dealerships. The chain of dealerships will presumably have dedicated customer service staff. We have assumed above that the median pay for customer service occupations is £8.17 per hour. According to the Warranty Direct Labour Rates Survey 2010, the national average labour rate for a mechanic is £55.90.<sup>53</sup> On these figures, the independent sole trader mechanic loses almost seven times as much per hour as the dealerships when dealing with a complaint.
- 1.136 We do not anticipate that there will be any particular negative effect on small firms beyond minimal familiarisation costs.

### **Justice system**

- 1.137 It may be necessary to train District Judges and sheriffs in the overall simplifications to consumer law. We estimate the cost to be around £100,000. As discussed above, if consumers bring additional cases through the small claims procedure, this may lead to between 100 and 500 grants of remissions, at a cost to the Ministry of Justice of between £14,000 and £72,000. The equivalent figure for Scotland is between £750 and £3,600.

### **Other impacts**

- 1.138 We do not consider that the proposals have any impact on greenhouse gas emissions; wider environmental impact; health and well-being; human rights; rural proofing or sustainable development.

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<sup>53</sup> <http://www.motor-trade-insider.com/index.php/2010/11/survey-reveals-mechanic-costs-are-coming-down-but-franchised-dealers-still-40-higher/>.