



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to the Law Commissions' joint consultation on consumer redress for misleading and aggressive practices (CP199 and DP149)

May 2011

About Consumer Focus

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

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CP199 For the Law Commission

DP149 For the Scottish Law Commission

Executive summary

Technology is set to radically change the way in which consumers make purchasing decisions and interact with businesses, but at the same time the UK population is starting to age and become more vulnerable. Also public enforcement agencies such as Trading Standards Officers are facing severe resource constraints, whilst the majority of civil legal cases brought before the courts are of higher value and limited to claims for fraud or negligence.

With these developments in mind Consumer Focus welcomes the Law Commissions' recommendation to improve consumers' rights of redress for misleading and aggressive practices through a new consumer Act – something we called for in our report *Waiting to be heard*¹. By giving consumers stronger rights to claim redress for misleading and aggressive practices, consumers will have new empowerment tools with which to help cleanse markets of bad practice. However we feel the proposals need to go further.

The new Act should:

- provide a civil remedy for all misleading and aggressive practices
- clarify that a statement may be misleading if, in its overall presentation, it would be likely to mislead the average consumer
- impose a duty on traders to disclose all material information to the consumer
- extend private law claims to material omissions for property sales
- expand the definition of an aggressive practice beyond physical or persistent threats or violence and so that the specific needs of vulnerable consumers can also be taken into consideration
- include aggressive demands for payment (debt collection)
- include demands for unfair payment collection
- provide private rights of redress for the general duty
- provide private rights of redress for all 31 banned practices in the black list
- provide the remedies of rescission/unwinding, compensatory damages and consequential losses
- extend liability under section 75 of the Consumer Credit Act 1974 to misleading and aggressive practices

We look forward to further engagement with the Law Commissions and others as Government proposals for reforming consumer law start to take shape.

¹ *Waiting to be heard*. Giving consumers the right of redress over Unfair Commercial Practices, August 2009

Introduction

Technological advances are enabling consumers to have quick access and greater levels of interaction with providers of goods and services. In turn, businesses are starting to realise that the ‘conversations’ enabled by social media and the web can no longer be ignored. It is only those businesses with consumer loyalty or ‘stickiness’ who will be able to compete effectively, irrespective of the markets they inhabit. In other words, good service is cheaper than poor service; with businesses having to invest in what consumers most value if they are to generate lasting consumer relationships.

As part of its wider *Better choices, better deals. Consumers powering growth* strategy, the Government has recognised this critical new role played by consumers in demanding better products or services, and is committed to innovative policy tools such as ‘choice architecture’. This includes making public the complaints data held by regulators and ombudsmen, and putting consumers in charge of their transaction histories and personal data through the ‘Mydata’ initiative.

Yet, just at the time technology is set to change the way in which consumers make their purchasing decisions and interact with businesses, so too is the UK population starting to age and become more vulnerable. Government statistics suggest that in England and Scotland there are currently 630,000 people aged over 85 or over who live alone², and this is set to rise to 1.4 million by 2033. This societal shift is especially pertinent to considerations of how best to empower consumers, but without leaving wider society open to exploitation by unscrupulous traders who employ harmful, misleading and aggressive sales practices or see themselves as beyond the law.

It is with these two things in mind that Consumer Focus welcomes the Law Commissions’ joint consultation on consumer redress. By giving consumers stronger rights to claim redress for misleading and aggressive practices, consumers will have new tools with which to help cleanse markets of bad practice. Without credible consequences for unfair trading practices, consumer empowerment and protection is significantly weakened.

But, the proposals need to go much further. We are especially mindful of the enforcement gap that currently exists owing to the resource constraints of public (criminal) enforcement agencies such as Trading Standards Officers, while the majority of civil legal cases brought before the courts are of higher value and limited to claims for fraud or negligence arising under a breach of contract or ‘special relationship’.

² Law Commissions’ Joint Consultation, *Consumer redress for misleading and aggressive Practices*, May 2011, para 10.34 (hereafter referred to as the LC Paper)

The need for legal reform

Should the law of misrepresentation and duress be simplified?

Do you support the broad approach for a cautious and limited reform?

We have long supported the aims of both the EU Unfair Commercial Practices Directive and the Consumer Protection from Unfair Trading Regulations 2008. We commissioned depth research into the prevalence in the marketplace of unfair commercial practices from Harris Interactive and an independent consultant in March 2009. We then followed up this research in August 2009 by calling for additional consumer rights of redress in our report *Waiting to be heard*³.

Unlike other jurisdictions, private rights of redress and civil remedy are currently not available under the Regulations despite these being available under the existing law of misrepresentation and duress. The Law Commissions have set out a thorough-going analysis of the complex interplay between the Regulations and the law of misrepresentation and duress. They also usefully suggest how the laws could be simplified and brought into line with one another, as well as private rights of redress extended to cover all aggressive practices. Consumer Focus welcomes the constructive approach adopted by the Law Commissions in their consideration of these important issues and we look forward to further engagement with them and others, as Government proposals for reforming consumer law start to take shape.

In brief, the Regulations create three principal or general offences: misleading actions, misleading omissions and aggressive practices. There is also a general offence of practices that are contrary to the requirements of professional diligence, which materially distort the economic behaviour of the average consumer. And finally, an extensive black list of 31 practices that are always to be regarded as unfair.

In contrast to the Regulations, whether a civil remedy or private right of redress is available in the law of misrepresentation⁴ depends on whether there is a contract or 'special relationship'⁵ between the trader and the consumer – from which to determine 'reliance and loss' – as well as the misrepresentation being (a) false, (b) factual and (c) not an omission; with the different legal pathways to redress further requiring satisfaction of different legal doctrines which, in turn, hold several exceptions and a large amount of corresponding case law.

Under the common law and statute then consumers have seven different pathways to redress, namely:

- i. fraudulent misrepresentation
- ii. negligent misrepresentation at common law
- iii. negligent misrepresentation under statute
- iv. innocent misrepresentation and, in Scotland error

³ *Waiting to be heard. Giving consumers the right of redress over Unfair Commercial Practices*, August 2009

⁴ Misrepresentation consists of an unambiguous false statement or present fact conveyed by words or conduct (or both). Unclear, unintelligible ambiguous or untimely statements are not covered

⁵ Akin to a contract or an assumption of responsibility by the defendant towards the claimant, before liability may arise. *Hedley Byrne & Co Ltd V Heller Partners Ltd* [a964] AC 465

- v. mistake (in England and Wales)
- vi. breach of contract
- vii. estoppel, equitable waiver and personal bar

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

This area of the private law of obligations is thus extremely complex, uncertain and leaves gaps in the scheme of redress. Not only does this give rise to a lack of awareness and understanding of consumer remedies, but, the legal ‘tests’ themselves, by contrast to the Regulations, set a high formalistic bar making remedy largely inaccessible. Unless a consumer has a fairly straightforward claim for breach of contract by a trader, consumers and their advisers are discouraged from pursuing a remedy.

The Law Commissions have opted for a limited and cautious reform owing to business reports that some elements of the Regulations are too uncertain. However, Trading Standards Officers report that in practice there is little evidence that the Regulations have created any real difficulties for traders so we question this approach.

We are pleased the Law Commissions have sought to simplify and clarify the law of misrepresentation and duress. It is eminently sensible to close the gaps between the common law and statutes, and the Regulations. The proposals, however, need to go much further so that civil remedy is available for all misleading and aggressive practices across the piece.

In saying this, we do not consider it necessary to entirely overhaul the Misrepresentation Act 1967, which applies to all contracts. Instead, we think it would be sufficient to ‘switch off’ the Misrepresentation Act for business to consumer contracts and where the trader’s practice clearly fell within the scope of the Regulations.

Misleading actions

What should be the definition of 'misleading'?

Should the definition of 'misleading' be reflective of that used in the Regulations?

Under Regulation 5, 'an action by a trader will be misleading if

- (a) it contains false information; OR
- (b) the product itself or its presentation in any way deceives or is likely to deceive the average consumer ... even if the information is factually correct'⁶

The type of information to be provided by traders is further defined by Regulations 5 (4) and (5). These set out extensive informational lists including the main characteristics of a product or service; the price; and the consumer's rights or risks that may be encountered; as well as information that creates confusion with any products, trademarks or trade names of competitors.

The Regulations seek to identify marketing practices that cause harm to consumers, and thus are likely to distort fair competition in the market place. Current private law remedies, are only triggered where a consumer can point to an actual loss incurred personally, such as an unwanted transaction or wasted expenditure.

This is a markedly different approach to that of the common law where the law of misrepresentation excludes liability for 'ambiguous statements, statements that are literally true but misleading, statements of opinion, immaterial statements, statements about the law, and statements about future facts such as predictions, plans for future action, or promises to perform an action in the future'⁷.

Viewed from the perspective of the Regulations these are rather blunt distinctions. The more fundamental or deeper question being whether or not it is reasonable⁸ in the circumstances to rely on a trader's statement; with reasonable reliance not merely depending on the statement's content but more the context in which it is made. In particular, this means whether a consumer 'ought' to be able to rely on the statement such that it then becomes irrelevant whether there is a contract or 'special relationship' between the trader and consumer. For instance, the information must 'cause or is likely to cause the average consumer into making a transactional decision'⁹.

Statements made by traders which are over-enthusiastic, over-hyped and fail to meet expectations, or where the trader is 'conservative' with the truth, are used as 'manipulative tricks' to induce the consumer into making a purchase, and so even if the consumer did not then go on to make the purchase, would fall under the Regulations. It would be exceedingly odd if a particular consumer who suffers harm as a result of a trader's criminal conduct in contravention of the Regulations should subsequently discover that there would be no grounds for private compensation.

⁶ LC Paper, para 2.53

⁷ *A private right of redress for unfair commercial practices, A report for Consumer Focus*, Professor Hugh Collins, April 2009 para 4.6 (hereafter referred to as the Consumer Focus report)

⁸ ie that the representation is 'material' if it would affect judgment of a reasonable person in the position and with the known characteristics of the actual representative.

⁹ Reg 6(1)

We agree with the Law Commissions that it would be helpful to clarify that a statement may be misleading if, in its overall presentation, it would be likely to be misleading to the ‘average consumer’.

A note about the burden of proof

We note that under the Misrepresentation Act 1967 s2(1), the burden of proof lies with the defendant. In other words, the Act 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 and has been subject to academic criticism. This reversal of the burden of proof of negligence, which applies to the Misrepresentation Act s. 2 (1), may advantage the consumer in comparison to the common law¹⁰.

¹⁰ LC Paper, para 5.100

Misleading omissions

Should there be redress for misleading omissions?

Should this be restricted to implied terms under the Sale of Goods Act?

A further aspect of the law of misrepresentation is the legal doctrine concerning misleading omissions. Here, the Regulations impose a duty on traders to disclose 'material' information to consumers, but there is no liability at common law or statute for omissions unless a specific duty has been breached. Or, in other words, traders have no general duty to disclose information to the consumer¹¹.

There are, however, a number of exceptions or rules that indirectly compel traders to disclose information in certain circumstances, and often distinguished by reference to broad market sectors. The Law Commissions identify eight possible routes to redress for misleading omissions under the following headings:

- i. omissions shading into positive misrepresentations
- ii. contracts of utmost good faith
- iii. fiduciary relationships¹²
- iv. implied terms under the Sale of Goods Act 1979
- v. contracts for services
- vi. other implied terms
- vii. other statutory duties of disclosure
- viii. unfair terms

We do not intend to discuss each of these in turn since a duty to disclose information usually stems from a trader owing a duty to the consumer to take reasonable care. Instead we provide comment, in particular, on the implied terms arising under the Sale of Goods Act 1979.

Under the Sale of Goods Act 1979 s14 consumers have strong protection for material omissions concerning defects in goods. The Act states that contracts for sale of goods are subject to implied terms that the 'goods are of satisfactory quality and fit for the buyer's purpose'. However, the implied terms only concern the 'quality of the goods themselves', and there may be other information that the consumer regards as material.

Example¹³: a consumer purchases a new boiler for their central heating system. The boiler functions satisfactorily, but it uses fuel far less economically than rival brand, so it is expensive to run. The seller did not disclose information about fuel efficiency. There is probably no breach of the implied terms under the Sale of Goods Act since the boiler works satisfactorily, if a bit expensively. Under the Regulations, it is arguable that fuel efficiency is information that the consumer needs when making a transactional decision regarding the acquisition of a new boiler, and therefore it may amount to material information that ought to have been disclosed.

¹¹ LC Paper, para 6.1. Chitty – a concealment to be material, must be a concealment of something that the party was bound to tell

¹² Such as those between a solicitor and their client

¹³ Consumer Focus report, para 5.8

In simplifying the law, the Law Commissions opt for a limited and cautious reform owing to business reports that some elements of the Regulations are too uncertain, ‘particularly, prohibitions on misleading omissions and the general prohibition against commercial practices which are contrary to the requirements of professional due diligence.’

Trading Standards Officers report that, in practice, there is little evidence that the Regulations have created any real difficulties for traders. We question whether there is a confusion or tension here between the Law Commissions’ stated approach to fill in the gaps between the Regulations and the law of misrepresentation, to the limited and cautious reform set out here. This is especially so when considering that the Regulations and law of misrepresentation already cover similar ground – owing to the existing exceptions or rules that indirectly compel traders to disclose information – while there is also a need to close the gaps in the law that would continue to exist if we were to rely solely on the provisions of the Sale of Goods Act for implied terms.

We understand that Article II.-3:102 of the draft common frame of reference, for example, proposes to impose a duty on 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’¹⁴ when deciding whether to enter the contract.

We think it would be simpler and clearer to adopt the approach taken in the Regulations and impose a duty on traders to disclose all material information to the consumer. This would provide a robust legal framework for consumers and flexibility so that what is considered ‘material’ can evolve as consumer disputes are handled over time.

Misleading omissions: financial services and sales or leases of property

Do you agree that the new Act should exclude (i) financial services and (ii) land sales?

Since the Regulations create potential liability for material omissions, if redress were also available for a material omission, this would perhaps most significantly impact financial services and sales of land and leases of property (assuming that the seller is a professional). The financial services sector is highly regulated and already subject to its own legal requirements in this area, so we would agree that they should be excluded from the new Act; although it will still be important to ensure that there is consistency in the levels of protection consumers receive.

As we have seen in other areas, however, the common law does not require the disclosure of ‘material’ information to the buyer in land sales. Instead the buyer asks relevant questions about material information concerning the land to the seller and the seller’s only obligation is to answer the questions posed to them. If the responses from the seller are false, the buyer may have a claim for pre-contractual misrepresentation or negligent misstatement but clearly the more unusual the risk, the less likely it will be that the buyer will ask all the right questions.

Similarly, while there have been new requirements for sellers to produce a Home Information Pack (HIPs) going some way to disclose material information for buyers these have not affected the position in common law.

¹⁴ LC Paper, para11.48

An extension of private law claims to material omissions concerning land would provide welcome additional protection for consumers. We also believe it would help to reduce the costs associated with property transactions since increased disclosures would engender a greater feeling of confidence in property markets, especially when we consider the government's intention to repeal the Property Misdescriptions Act 1991. The ability to disclose information as well as to research information is also being made far easier with the introduction of new web based technologies and it would seem short sighted to develop legal frameworks that fail to acknowledge the positive contribution these make towards markets becoming more efficient.

Example¹⁵: in connection with the sale of a new house in a development by a commercial developer, the developer correctly answers all the buyer's questions, but fails to disclose that there has been subsidence underneath the property caused by disused coal mines. In a claim against the developer, the buyer argues that the developer knew or ought to have known of the risk of subsidence, and that this information should have been disclosed to the purchaser. In the absence of a false statement or express promise, there is no liability under the common law. Under the Regulations, however, this could be an omission of material information, which subject to the due diligence defence (see below), would constitute an offence.

We agree that financial services should be excluded from the new Act. However, the extension of private law claims to material omissions including for sales or leases of property would provide welcome additional protection for consumers.

¹⁵ Consumer Focus report, para 5.11

Aggressive practices

Should private rights of redress be provided for aggressive practices?

What should be the definition of an aggressive practice?

Should the needs of vulnerable consumers be given special consideration?

As is the case for the law of Misrepresentation, there is a degree of overlap between the Regulations and the common law doctrines that are available to consumers who fall prey to aggressive practices. But, furthermore, the scope of the aggressive trading practices as defined by the Regulations is also far broader since they are also aimed at aggressive practices¹⁶ that are likely to significantly impair the average consumer's freedom of choice causing them to take a transactional decision they would not otherwise have taken, and include behaviour such as threatening language, pressure sales tactics and unwanted solicitations.

The Law Commissions discuss four legal doctrines pertinent to aggressive practices: duress, undue influence, unconscionable bargains and intimidation, with each doctrine emphasising a different aspect of aggressive practice.

'Duress primarily deals with forcing another to do something by using threats. Undue influence focuses on the relationship between parties [a stronger party] 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 (but equity will not set aside a transaction just because it is harsh)¹⁷ The tort of intimidation emphasises the intent to cause damage to another. None of these rights 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'.¹⁸

The Law Commissions' analysis here reveals gaps in the private law that are of particular relevance to vulnerable consumers such as the old, frail and infirm. The Regulations provide remedies for sales techniques that, although would be considered by most as unfair and aggressive, do not constitute physical or threats of violence or are persistent in their occurrence. Under the law of duress a further crucial issue will be whether the aggressive conduct was a compelling inducement to enter the contract or whether the consumer had another course of action open to them and acted promptly to avoid the contract once the threat had been removed. For vulnerable consumers, there may be practical difficulties, whether physical or mental, in attempting to avoid the contract, or they may simply be unaware of the precise nature of the contract they have entered into until much later on down the line.

Two examples cited by the Law Commissions illustrate well that while practices may constitute duress, it is not entirely clear they would be covered by the current law.

¹⁶ Reg 7

¹⁷ LC Paper, para 7.55

¹⁸ LC Paper, para 7.7

Example¹⁹: Builders offered to resurface an elderly consumer's driveway. The consumer said 'no thanks' but the builders started to work regardless. They caused so much damage that the consumer had to agree to then 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 the cash point to obtain payment.

Example²⁰: 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.

Consumer Focus Wales and Consumer Focus Investigations are currently investigating unfair and aggressive practices in the Park Home industry targeting a vulnerable group of consumers, the majority of whom are elderly. Examples of these practices include:

- sale blocking – where the site owner insists that the sale of a park home is subject to their veto, or must be done through them with high levels of commission, or where the sale is made to the owner at a much lower price than its true worth
- charging very high fees to disconnect electricity and gas supply when someone leaves
- constantly raising pitch fees
- refusing to allow repairs

Objections to these practices are met by threats and abusive behaviour.

We fully agree that the new Act should provide redress for aggressive practices and that the current definition should be expanded beyond physical or persistent threats or violence and so that the specific needs of vulnerable consumers can also be taken into consideration.

Debt collection

Do you agree that the new Act should include misleading or aggressive demands for payment?

We fully agree with the Law Commissions that particular problems of aggressive practices occur in respect of debt collection. In seeking remedy for these, the Law Commissions' point to the common law of unjust enrichment (where consumers pay money which is not owed) as well as to the statutory protections provided under the Protection from Harassment Act 1997 and the unfair relationships test found in the Consumer Credit Act 1974. Again, when seeking remedy, consumers are faced with a number of pathways to redress with each establishing a different legal doctrine, but equally where it appears as if there is starting to be an increasing convergence of authority or opinion. A recent judgement, for example, concludes:

'the calls were a form of torture oppressively frequent in amount and often without attribution to an identifiable number.

¹⁹ LC Paper, para 7.18

²⁰ LC Paper, para 7.2

'... 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.'²¹

which is wholly reflective of the approach taken by the Regulations.

We fully agree with the Law Commissions that aggressive debt collection practices fall within the scope of the Regulations since 'whether, how or on what terms to make payment in whole or in part'²² relates to the consumer making a transactional decision. It is this proximity to the 'transactional decision', coupled with the unequivocal provisions in the Black List which clearly point to many common practices that are employed by debt collection agencies as being banned. In particular, traders 'misleading consumers about their rights or the risks they may face'²³ should they not make a payment, and 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'²⁴

Citizen's Advice has recently published guidelines for debt collection agencies owing to growing concerns about the current economic downturn which has left many people feeling vulnerable and scared, with rising levels of debtor anxiety when repaying debts. Giving individual consumers private rights of redress would also help to keep in check potentially harmful activities in the future at a time when consumers feel vulnerable.

Aggressive demands for payment (debt collection) clearly fall within the scope of the Regulations and should thus be included in the new Act.

Unfair payment collection

Should demands for unfair payment collection also be included?

Should the Regulations be amended to state all demands for payment are included within the definition of commercial practices?

As with debt collection aggressive practices are prevalent when collecting payment from individuals. It might even be said that as these have reached, or are about to reach, such 'endemic' proportions, reliance on public enforcement authorities alone, will be insufficient as a deterrent to these 'traders', while consumers lack the legal tools by which to assert themselves. The examples, which are often cited, include:

- Chasing money for unpaid bills when no money is owed
- Parking, clamping and towing disputes where aggressive behaviour is employed as a means to confiscate cars or demand payment for release of a car
- Unfounded demands for payment for alleged copyright infringement
- 'Civil recovery' or unreasonable demands for compensation for shoplifting

These aggressive practices are clearly the types of behaviour which were in contemplation when the Regulations were designed. But, since they might not happen to a 'consumer' (depending on the definition of a 'consumer') it is questionable whether a civil remedy, if it were available, could be pursued under the Regulations.

²¹ LC Paper, para 7.75 - 7.76

²² Reg 2

²³ LC Paper para 3.2, Reg 5 (4) (k)

²⁴ LC Paper para 3.2, Black List, Practice 26

To recap, the Regulations specify that a consumer is:

‘Any individual who in relation to a commercial practice is acting for purposes which are outside his business’ whereas,

A commercial practice is:

‘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 relations to the product.’²⁵

It is clear upon the reading of Reg 2, that to be a ‘consumer’ you do not necessarily need to buy or sell anything. It is enough that you are induced into potentially making payment for something that *relates to a commercial transaction*. This is the key element: a commercial practice must be ‘directly related to the supply of goods and services’ and Article 2(c) of the Regulations goes on to say that goods and services may include ‘rights and obligations’. Demands for payment in the circumstances described above then could conceivably fall under the Regulations.²⁶

As the Law Commissions go on to conclude, ‘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 misleading and aggressive practices’.²⁷

Demands for unfair payment collection should be included in the new Act to reflect the Regulations and prohibit aggressive practices that directly relate to the supply of goods and services.

²⁵ Reg 2(1)

²⁶ LC Paper, para 3.55

²⁷ LC Paper, para 3.46

‘General duty’ and the black list

The ‘general duty’

Should there be a private right of redress under the ‘general duty’

As the general duty set out in the Regulations is intended to show, unfair trading practices can take many different forms, which are usually intrinsic to a particular set of circumstances.

Given the way in which the Regulations are constructed, consumers and prosecuting authorities also have some flexibility to raise grievances against unfair trading practices where these fall short of the requirement of professional diligence. Professional diligence is defined as the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers and commensurate with either honest market practice in the trader’s field of activity, or the general principle of good faith in the trader’s field of activity. Under the Regulations, this offence can only be committed by a trader who knowingly or recklessly engages in this unfair conduct²⁸ and it seems unlikely a general duty could be relied upon without reference to one or more of the other commercial practices provided by the Regulations.

Having said this, we think the right substantive approach would be for the ‘general’ duty to also attract private rights of redress. This is because the test is whether the trader’s conduct deliberately fell below honest, professional standards in a manner that is likely to distort a consumer’s transactional decision, and so it is deliberately intended as a mechanism with which to encourage trader’s to raise their game; not simply operate within the strict confines of the law. We therefore consider it highly desirable to include the general duty as a fail-safe in the private right of redress. It would also future proof the law and ensure that it could handle new, unforeseen types of scam.

The general duty should also attract private rights of redress

The black list

Should there be [automatic] private rights of redress for all breaches of the Regulations?

Schedule 1 of the Regulations contains descriptions of 31 commercial practices that are to be considered unfair in all the circumstances. This means that enforcement authorities do not need to show that an average consumer is likely to have been induced into making a transactional decision they would not otherwise have made. In effect, these practices are entirely banned across the whole of the EU.

Most of the 31 listed practices would fall under one of the general offences of misleading actions, misleading omissions and aggressive practices and so, presumably, there should be little or no controversy in providing an automatic right to redress for these practices.

Where practices arguably fall outside the general offences, however, it may be considered controversial for these to attract an automatic right of redress since there is no existing private right of redress under common law or statute.

²⁸ Reg 8

We understand that the Law Commissions consider the black list holds merit only in so far as they are useful examples of the sorts of unfair practice for which consumers may claim redress.

We wholly disagree with this view. It simply seems counterintuitive that while a trader's conduct can be subject to criminal or injunctive action under the Regulations, it would attract no corresponding rights for consumers to private compensation. Consumer's in other EU jurisdictions, such as in Ireland, already have this.

All 31 banned practices in the black list should attract automatic rights of redress for consumers.

Remedies

The overriding aim of the Law Commissions' proposals is to simplify the current complexity of common law and statute for misleading and aggressive practices so that consumers will have better access to redress. It is worth restating that we are fully supportive of these aims and we commend the Law Commissions' analysis of this important area of the law. Facilitating greater awareness and understanding of the law will help people to feel more confident and empowered in their dealings as consumers. More importantly, it is worth restating that by also giving consumers private rights of redress across the piece, consumers will have new tools to better look after themselves and help cleanse markets of bad practice.

The Law Commissions propose that where there is detriment, the consumer would have a remedy at 'Tier 1' of:

A right to unwind for up to three months and thereafter a discount on the price of:

0% if negligible

25% if minor

50% if serious

100% if very serious

As well as a remedy at 'Tier 2' for (i) economic loss and (ii) distress as a result of the trader's conduct, with these 'Tier 2' remedies only being used in the most serious cases 'where the misleading or aggressive practice caused actual loss beyond the value of the refund or standard discount and the trader had no due diligence defence'.²⁹

The Law Commissions have sought to provide simplicity and clarity, with the concept of unwinding and compensation as 'discounts' being reflective of the approach taken in the Sale of Goods Act. However, we question whether it is really appropriate for legal remedies and bands of compensation to be so precisely set out in statute in this way especially when the scope of the Regulations extends beyond contractual or 'special relationships'. However, we recognise there may be some merit in drafting 'guidance' at a later date.

While, we can see good argument for both consumers and traders to be guided as to desired outcomes when negotiating satisfactory resolution 'on the front line', we are concerned that the current lack of clarity about the scope of the new Act as well as the intelligence and expertise in dealing with the many different types of dispute which might arise, suggests a need for these to be considered as they arise. This is especially when we consider that 'the case law [has been] dominated by disputes between businesses [so] that consumer disputes are governed by laws shaped without reference to consumer interests or problems'.³⁰

We query the three month limit for unwinding as there are likely to be cases where the misleading practice only becomes apparent after three months. Vulnerable consumers in particular may have difficulty in raising claims within three months.

²⁹ LC Paper, para 14.56

³⁰ LC Paper, para 10.5

This means that the 100 per cent discount (full refund) is particularly important, but presumably where a remedy may only be available if (a) there was a contract or 'special relationship' and (b) the misleading or aggressive practice was 'very serious'. It is our view that a six month limit on unwinding should be considered and/or the availability of the 100 per cent discount assured wherever appropriate.

Similarly, if there was no contract or 'special relationship', would the consumer be able to claim any remedy at all given that the Tier 2 remedies are only triggered "where the misleading or aggressive practice caused actual loss beyond the value of the refund or standard discount and the trader had no due diligence defence"?³¹

We also query why a 75 per cent discount rate has not been included in the bands of compensation and feel that this omission should be rectified.

We agree that private rights of redress should include the remedy of rescission/unwinding. Claims for compensatory damages and consequential losses should also be available, and independent of one another, at both Tier 1 and Tier 2. However, further work is needed on the details of the Law Commissions proposals.

³¹ As above

Section 75 of the Consumer Credit Act 1974

Where section 75 applies should connected lenders be liable for the supplier's misleading or aggressive acts?

Should liability be capped at the amount of the loan, plus interest?

Section 75 is one of the key planks of consumer protection in the UK. Liability is held jointly and severally between creditors and suppliers and it is also unlimited, extending to consequential losses. Consumers may choose to claim either against the supplier or the creditor, which is highly significant for consumer protection given that many traders can be difficult to trace or suddenly become insolvent.

Consumers who enter into a credit agreement to buy goods and services specifically receive protection from misleading practices.

Section 75 (1) states:

'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'³²

Section 75, however, only specifically refers to 'misrepresentation or a breach of contract'. No reference is made to practices that may amount to duress either under common law and statute.

Section 75 then does not currently apply to duress (and presumably, by interpretation, to aggressive practices). Consumers could conceivably make a claim for an aggressive practice under section 140A on the basis that the consumer credit relationship is unfair but as this area of the law is untested, whether consumers would be able to gain a remedy is less certain.

We agree that leaving the law as it currently stands would be undesirable, not least because of the often fine lines between misleading and aggressive practices and the more general need for consistency and coherency between the two. Aggressive practices, as the Law Commissions note, are often the more reprehensible and it would run counter to the aims of strong consumer protection, if these were treated any less seriously.

Section 75 should include, as well as misrepresentation and breach of contract, both misleading and aggressive practices.

³² LC Paper, para 15.19 and 15.20(2)

Driving service quality

While the above changes to the substantive law on misrepresentation and duress will simplify an important part of the consumer law framework as well as enable consumers themselves to send the right signals to business, we consider the consumer law framework overall is currently too complex for both businesses and consumers alike, and also needs to be simplified.

We would urge Government to press ahead with its plans to provide robust consumer protection under a new Consumer Bill of Rights with simplification and codification of relevant common law plugging the gaps, removing complexities and providing a coherent set of rights to consumers with a private right of redress across the piece.

Furthermore, because the existing consumer law framework is too complex, so too are the legal procedures that have evolved to resolve consumer disputes. Most consumers find pursuing redress through formal legal procedures intimidating or unwieldy, and thus inaccessible for the majority of ordinary consumer disputes. And, because consumers experience difficulty legally enforcing their consumer rights, businesses can all too easily fob off consumers when they first look to businesses to resolve their problems.

As the Law Commissions remind us, the civil court procedure in England and Wales has ‘three tracks’ with individual claims being assigned to one of these three tracks depending on the value of the claim.

- The Small Claims track for claims not exceeding £5,000 (strict rules of evidence do not apply)
- The Fast track for claims between £5,000 and £25,000
- The Multi-track, for claims exceeding £25,000

Yet, despite the Small Claims track being specifically designed for individuals, it is predominantly used by companies chasing credit debts, while, any judgement orders that are made on behalf of consumers are often ignored making enforcement problematic.

Good businesses rely on the law to provide certainty in their dealings with consumers. As new technological applications (mobile applications, hand held devices and other web interfaces such as Smart TVs) start to generate ‘deeper conversations’ with consumers, and consumers become more vocal through feedback loops and peer reviews, there are also going to be greater demands placed on business not only to satisfy themselves they have achieved fairness or ‘legal certainty’ but also to resolve problems as early, quickly and expeditiously as possible. It is this process of very rapid communication – under the umbrella of the law – between traders and consumer, and, more crucially between consumers, which will help to cleanse markets of bad practice.

Some attempts have been made by business to set up informal redress schemes. Unfortunately, however, sector coverage and membership tends to be patchy and the quality variable. The availability and quality of ADR schemes needs to be improved.

We particularly welcome the Government’s thinking behind an e-commerce Ombudsman as consumers start to face very different and new opportunities and challenges in the global market place.

Collective redress extends access to justice for consumers, particularly, although not exclusively for those with low-value claims who are unlikely to pursue individual redress. Collective redress can make an important contribution to driving service quality and innovation. Because there will continue to be circumstances in which the trader consumer relationship entirely breaks down, so there will be a need for expeditious resolution processes with strong legal roots.



Consumer Focus response to the Law Commissions' joint consultation on consumer redress for misleading and aggressive practices (CP199 and DP149).

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Published: July 2011

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