

**Response to the Law
Commission and the Scottish
Law Commission Consultation
on Consumer Redress for
Misleading and Aggressive
Practices**

July 2011

OFT1355

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1 INTRODUCTION

- 1.1 The Office of Fair Trading ('OFT') is the UK's competition and consumer authority. Our mission is to make markets work well for consumers. Our goal is for competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition laws but are not overburdened by regulation.
- 1.2 We adopt a market-informed approach, with a focus on outcomes that support productivity growth and consumer and business welfare. We believe this approach is in the best interests of both businesses and consumers as well as to the benefit of the UK economy.
- 1.3 The OFT is supportive of the Law Commission's proposals on introducing redress where consumers have suffered detriment as a result of unfair commercial practices. The OFT believes that effective private rights of action for consumers are important in ensuring that markets operate efficiently, since empowered consumers drive healthy competition and innovation.
- 1.4 The OFT believes that an effective redress system in relation to unfair commercial practices would cover the whole scope of the Consumer Protection from Unfair Trading Regulations 2008 ('CPRs'). Redress should be available for all the prohibited practices in the Regulations. Broadly speaking, if a consumer is subjected to an unfair commercial practice, then they should be able to seek redress from the trader. We do not think that providing a right of action only in respect of misleading actions and aggressive practices will be effective, and it may create undesirable consequences and perverse incentives for traders in the way they may adapt their trading practices.
- 1.5 We think that there should be further consideration of the desirability of collective, or representative claims in this area, as often the individual detriment is small, but the overall detriment caused by a practice may be large – it may be more efficient for enforcers, consumers, businesses and the court system to aggregate substantively identical claims under

one route, either through improved Group Litigation Orders or a separate collective claims process. We would be happy to discuss this further with the Law Commission.

- 1.6 We think that concerns about creating an overly litigious US-style approach to compensation have been exaggerated. Consumers were given the right to challenge unfair contracts since 1995 (under the Unfair Terms in Consumer Contracts Regulations) but there has been no large rise in claims management arising from this. Similarly, under the Consumer Credit Act 1974 consumers have held some rights, but claims management has only recently started to increase since 2006, when Credit legislation was updated.
- 1.7 Clearly, some safeguards may be needed, and some regulatory or co-regulatory oversight of such claims companies might be required; but the OFT considers the UK courts are well placed in deciding whether claims are legitimate or not. The OFT appreciates that there is some risk that any such system of redress may potentially be exploited by aggressive claims-management firms. However, we do not believe that this risk outweighs the need for an effective reform of the system of private rights, given the changes in Consumer Protection law over the last few years, as well as the need for consumers to seek damages and redress. Importantly, claims management companies would themselves be subject to the CPRs as well as ultimately being subject to the UK courts.
- 1.8 The OFT has previously commented on other proposals in relation to redress, and we have done some of our own research to inform our position.¹ We have historically² supported proposals for private rights of action for consumers in relation to the CPRs on implementation³ and

¹ OFT1267: *Mapping UK consumer redress: A summary guide to dispute resolution systems*

² OFT916: *Private actions in competition law: effective redress for consumers and business, which was a series of recommendations made following a consultation (OFT916)*

³ OFT950: *Implementation of the Unfair Commercial Practices Directive - consultation response*

competition law,⁴ as well as supporting EU and UK proposals on collective redress.⁵ We have also been involved in proposals to introduce administrative sanctions for breaches of (among other laws) the CPRs through the Department for Business Innovation and Skills ('BIS') proposed Civil Sanctions pilot.⁶ These proposals and papers highlight the importance of redress, restoration and compensation being made to individuals who suffer as a result of unfair or otherwise illegal business practices. Providing some form of restitution or compensation to consumers is important for several reasons, it:

- encourages compliance with the law by reducing or removing the financial incentive for traders to break the law in the first place
- reduces or removes any possible competitive advantage that a trader has temporarily gained through his use of unfair practices
- maintains consumer confidence in the market
- helps to offset or remove the negative consequences for individuals, which can be very serious.

1.9 The OFT believes that empowering consumers drives innovation and growth in competitive markets, which requires effective private redress mechanisms as well as effective public enforcement.

1.10 We believe that there should be a sufficiently wide range of routes into redress for consumers to ensure that an appropriate mechanism is

⁴ Most recently referred to in OFT1335: *Response to the BIS consultation: A Competition Regime for Growth: a consultation on options for reform*

⁵ OFT983resp: *OFT's response to the EU consultation on consumer collective redress benchmarks*; OFT1063 *OFT's response to the EU Green Paper on Consumer Collective Redress*; OFT1100 *OFT response to the EU discussion paper on consumer collective redress*

⁶ OFT1229resp: *Response to the consultation on the pilot operation of civil sanction powers for consumer law enforcers*; and OFT 1296: *Civil Sanctions Pilot*

available for all levels and types of transactions. This level of accessibility does not exist as yet in our view. For example, our research into the availability of alternative dispute resolution mechanisms ('ADR') in the UK has found that many sectors either have no, or limited ADR coverage.⁷

- 1.11 Although proposals are being considered at EU level in relation to both ADR and collective redress, the potential scope, timescales and impact of these is unknown. We therefore consider that an opportunity to expand private redress provisions to include all unfair practices should not be missed and would strongly contribute to providing a more comprehensive system of accessible redress within the UK.
- 1.12 Concerns over the unforeseen impact of the CPRs (and their European origin, the Unfair Commercial Practices Directive) were expressed ahead of implementation, mainly because of the principles-based nature of the Regulations (and Directive) which offered flexibility and a general materiality test in lieu of the certainty found in detailed (and inherently inflexible) rules. Since implementation, fears about the potential negative impact of the misleading omissions and professional diligence concepts, both substantively new to UK law, have not been realised.
- 1.13 Understandably, many have expressed similar concerns about the potential impact of private rights of action for the CPRs. The OFT believes that the UK court system will quickly filter out any unsuitable claims which materialise (if any). We believe that it is important for us to accept that this principles-based approach has been implemented (importantly, traders are already criminally liable for unfair commercial practices, and thus could be subject to claims under the Proceeds of Crime Act 2002 and/or compensation orders) so that to balk at providing civil liability and thus denying consumers the ability to make claims when traders have, for example, omitted to provide material information, seems logically indefensible.

⁷ OFT1267 *Mapping UK consumer redress – A summary guide to dispute resolution systems*, Page 3

1.14 Therefore the OFT proposes that the Law Commission widens its proposals to include all breaches of the CPRs. We think it is especially important that private rights of action are provided where a misleading omission is made by a trader, and that provision for vulnerable consumers is explicitly included in any new proposals or Draft Act. More detail can be found in the specific answers to the consultation questions.

1.15 In relation to misleading omissions in particular, several points are worth making:

- information required under other Community rules, for example notice of cancellation rights,⁸ is considered to be 'material information' for the purposes of the CPRs. This crucial rule on cancellation may not be effectively covered by the existing proposals to exempt misleading omissions from the scope of any new private rights. This could potentially leave a serious gap in empowerment and protection for consumers
- where a car's odometer is tampered with, this is likely to be a misleading action, but selling a car after such tampering is likely to be a misleading omission (unless the trader is clear about the condition of the car and the steps he has taken to identify the mileage) because the retailer has failed to give accurate information about mileage or usage. This area needs to be covered by the protections, partly because of the impact of 'clocking' on the overall value of the vehicle.

1.16 Misleading actions and omissions are often linked. In the recent *OFT vs. Purely Creative Limited* case, the judge argued that it was impossible to separate misleading actions and omissions:

⁸ *Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008*

- '...I consider that the combined effect of all relevant misleading acts and omissions must first be ascertained... Otherwise a communication which contained misleading acts and omissions, none of which would individually satisfy the causation test, may escape from classification as an infringement, even though (as may have been intended by the trader) their combined effect would satisfy the causation test.'⁹

⁹ (2011) EWHC 106 (Ch) *OFT vs. Purely Creative Limited*, paragraph 72

2 THE NEED FOR REFORM

Q1. Do consultees agree that there is a need for statutory reform to:

(1) Simplify and clarify private redress for misleading practices?

2.1 Yes. We believe there is a need to provide redress for misleading practices, both actions and omissions, as provided for in the Regulations and the underlying Unfair Commercial Practices Directive.

(2) Extend private redress for aggressive practices? (page 150)

2.2 Yes. We support the proposal to provide redress where an aggressive practice is carried out.

2.3 Consumers have a bewildering array of issues to consider when exercising their rights of redress. We therefore welcome the initiative to simplify the framework and extend its scope to include redress for aggressive practices.

2.4 The OFT proposes that the Law Commission extends the right of private redress to **all** breaches of the CPRs. This includes the requirements of professional diligence, misleading actions, misleading omissions, aggressive practices and the 31 banned practices in Schedule 1.

Q2. Do consultees agree that there should not be a private right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008? (page 15)

2.5 The OFT disagrees with the proposal.

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

breaches of the CPRs which posits an aggressive practice or misleading action as being of greater importance (hence the reason that there is a right of individual redress) than a misleading omission, the banned practices in the annex and a breach of the requirements of professional diligence.

- 2.7 From a consumer's perspective it is not the way in which a consumer may have been treated unfairly that is important but the fact that he/she has suffered unfair treatment. We are also concerned that a limitation to only a few specific areas of the CPRs may limit consumers' ability to seek redress following enforcement action, and may also create perverse incentives for traders.
- 2.8 The more fully aligned the new private rights of action are with the CPRs, the better proofed against future European legal changes any proposed set of private rights of action are likely to be. The risk of missing this opportunity is, potentially more complexity and uncertainty about how these rights may work in practice.

3 LIABILITY - THE SCOPE OF THE NEW RIGHT TO CONSUMER REDRESS

The definition of 'consumer'

Q.3 Should the definition of consumer generally follow other consumer legislation, in applying to an individual who acts for purposes which are primarily outside their business, trade or profession? (page 175)

3.1 Yes. Given that redress should flow from breaches of the Regulations, the definition of a consumer should be consistent with the concept of a 'consumer' as referred to in the CPRs. The 'average consumer' refers to each of the three types of consumer: 'average', 'average targeted' and 'average vulnerable'. These need to be specifically included, or specifically aligned with the CPRs definition.

Q.4 Do consultees think there are cases calling for special definition of who should count as a 'consumer', such as unemployed persons who might be sold training courses on the promise of a future job (employed or self-employed)? (page 176)

3.2 Yes. Please also see our answer to Q.3 which if applied in this example would mean that persons falling in this category would constitute 'average targeted' consumer.

3.3 We believe that the issues below are covered by the CPRs. Thus consumers who are seeking to become economically active (for example by purchasing training courses in the expectation of finding employment) but have not yet done so should be covered by these provisions. This should also apply to consumers who are economically active, but are not traders, for example someone who sells items occasionally on on-line auction sites. It should also cover mixed-use contracts, where the product is to be used for both business and consumer purposes, for example a personal computer for business and personal use.

4 THE TRANSACTIONAL DECISIONS WHICH SHOULD GIVE RISE TO REDRESS

Q.5 Do consultees agree that the proposed Act should not provide redress for 'transactional decisions', such as the decision to visit a shop? (page 178)

- 4.1 The OFT disagrees with the proposal. Broadly, we believe that the consumer ought to be able to obtain redress if they have suffered loss as a result of an unfair commercial practice.
- 4.2 We think that transactional decisions covered by the Regulations should be covered by the new provisions on redress. In the event of a 'non-financial' transactional decision such as entering a shop, Tier 1 financial remedies would not generally be available, but Tier 2 damages might be possible if the consumer could show loss and causation.
- 4.3 An exception to this would be personal data – for example a consumer misled into giving personal data to a trader ought to be able to 'unwind' the data by requiring the trader to delete it, or to correct it if a mistake has been made.

Q.6 Do consultees agree that the proposed Act should provide redress where the consumer has:

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

- 4.4 Yes. The proposed Act should provide redress where:
- a consumer has entered into a contract with a trader, and
 - made payment to a trader.
- 4.5 We believe redress should also be extended to consumers who can demonstrate that they have suffered a consequential loss as a direct result of the trader's activities, for example, responding to a misleading

advertisement. This may involve entering a contract with another trader, who has not made the misleading statement.

- 4.6 Consequential loss for which redress should be available could, for example, arise out of entry into a contract with another trader, who has not made the misleading statement.

(2) made a payment to the trader? (page 178)

- 4.7 Please see our response to Q.6(1).

Q.7 Do consultees agree that the proposed Act should not provide redress for consumers against traders who mislead them as to their legal rights or make their exercise more difficult than necessary? (page 179)

- 4.8 We disagree strongly with this proposal. There is an inherent contradiction between, on the one hand, proposals to extend/provide greater legal protection to the consumer by extending the scope of consumer redress for misleading and aggressive practices and, on the other hand, denying a right of redress for consumers who have been misled or obstructed in exercising their legal rights.
- 4.9 Such a proposal not only weakens the consumer redress proposals but potentially it could also incentivise some traders into misleading and/or obstructing consumers who are contemplating exercising their legal rights.
- 4.10 An example here might be misleading a consumer about their cancellation rights, or the consumer's liabilities. These could lead to very serious detriment indeed and we think it is not appropriate for them to be outside the scope of these reforms.

Q.8 If the proposed Act is to cover traders who mislead consumers about their legal rights, how should the difficulties such as quantifying the losses be overcome? (page 179)

- 4.11 We support the proposed Act covering traders who mislead (or otherwise act unfairly towards) consumers about their legal rights. Actual harm should be the basis for any damages.
- 4.12 We appreciate there may be difficulties in quantifying losses in these situations, but we do not think these concerns outweigh the need for consumers to be able to seek redress in these situations.
- 4.13 A possible way forward here might be to draw on the law of negligence.

5 THE PERSON AGAINST WHOM THE REDRESS SHOULD BE AVAILABLE

Q.9 Do consultees agree that the consumer's rights should lie only against the other party to the contract, or against the party to whom the payment was made? (page 182)

- 5.1 No, we do not agree that the consumer's rights should lie only against the other party to the contract. We think the consumer should be able to gain redress from the person or organisation that caused detriment, loss or harm. In some cases this may not be the contractor.
- 5.2 We can see that for the sake of clarity it may be simpler to limit rights to contractual (or payment) situations. However, we believe that this needs careful thought as there will be many situations where the mischief has actually been carried out by a third party or a trader further up the supply chain (for example a car with a tampered odometer) and in those situations we would not want the consumer to be unable to seek or gain redress.
- 5.3 We suggest that there could be some useful exploration of a possible compromise whereby the consumer always has a private right against the immediate trader, but that the trader in turn has a right of action against the supplier who has in fact caused the unfair practice. The law of negligence could provide some inspiration here – the parties could be jointly and severally liable.
- 5.4 We are happy to discuss this complex topic further.

Q.10 Should there be a secondary right to redress against entities higher up in the supply chain such as producers, if they are proven to be at fault? (page 182)

- 5.5 Please see our answer to Q.9. We think redress should be available from the trader (or traders) responsible for the unfair practice. One solution

here might be joint and severable liability, for example as per the unfair relationships provisions in the revised Consumer Credit Act 2006.

- 5.6 Secondary rights of redress could potentially cause delays and encourage overlapping claims. Another view which we see as potentially viable is that where such a situation arises, the onus rests with the retailing trader to seek redress with entities further up the supply chain.
- 5.7 A good example of why this might be necessary is where packaging made by the manufacturer is misleading, but the consumer buys from a retailer who has not produced the packaging and is merely selling the packaged product.

Q.11 Should consumers be given a limited right to proceed against company directors or other office-holders, where the trading company or limited liability partnership is in liquidation, administration or receivership? (page 183)

- 5.8 Yes, we believe consumers should have limited rights to proceed against company office-holders. We think this shouldn't be restricted to official office-holders, but should be extended to controlling minds of the company as well, who may not necessarily be formally associated with the company. One possible threshold could be a failure to comply with directors' (or other) duties and/or disinterest or negligence in the carrying out of duties.

Q.12 If consumers had a limited right to proceed against company office-holders, what factors should apply to allow consumers to claim against a director or officer? In particular:

(1) Should the director or officer-holder actually be at fault or should they be liable as an officer of the company?

- 5.9 We believe that there should be actual fault (though this could be negligence or disinterest, or possibly linked to the creation of incentives

for staff which led to unfair practice(s) occurring) or some sort of personal gain derived from the practice(s).

(2) Should consumers be able to recover only where the misrepresentation of the director or officer-holder was fraudulent, or is negligence sufficient?

- 5.10 We do not believe that directors and equivalent officers (including controlling minds of a business) should be able to escape liability for the actions of their companies when they had no knowledge of the offence in circumstances where that lack of knowledge or the commission of the offence arises from their own negligence.
- 5.11 The OFT is of the view that negligence should be sufficient for consumers to claim against company office-holders. Fraud requires a higher burden of proof, which can be very difficult to prove in corporations.

(3) Should directors and office-holders be liable for aggressive practices and if so what degree of fault is required? (page 183)

- 5.12 Yes, directors and office-holders should be liable for aggressive practices. The OFT is of the view that a minimum degree of fault is a sufficient trigger. Negligence may be a suitable trigger.

6 THE PRODUCTS THAT SHOULD BE COVERED

Q.13 Do consultees agree that the proposed new Act should exclude:

(1) Land sales; and

- 6.1 We agree with the proposal. We think that there are good arguments for exempting land sales. We think there needs to be clarity that this does not include lettings, where consumers may need CPRs protections.
- 6.2 However, if changes in the landscape mean that the existing estate agency redress schemes are not maintained in future, we would argue that CPRs breaches in respect of land sales should be covered by the proposed changes, to ensure that consumers have a route to obtain redress.

(2) Financial services? (page 186)

- 6.3 The OFT agrees that financial services should be excluded from these provisions. We appreciate that the focus of the consultation may be on 'frequent' transactions, not complex one-off bargains, in respect of which a system whereby consumers can seek redress, subject to certain conditions, is already provided for by the Financial Ombudsman Service ('FOS').

Q.14 Do consultees agree that the proposed new Act should include misleading or aggressive demands for payment? (page 187)

- 6.4 Yes. The OFT believes that there needs to be a private right of redress for all breaches of the CPRs. We think this should include any unfair demands for payment, including those covered by Schedule 1, practice 26, which relates to unwanted and persistent remote contact, as well as misleading and aggressive practices.

Q.15 Do consultees agree that demands for damages against alleged wrongdoers should be covered by the proposed new Act? (page 187)

6.5 Yes. The OFT believes that there needs to be a private right of redress for all breaches of the CPRs. We believe that this type of unsuitable demand is covered by the CPRs. The judgment in *OFT vs. Ashbourne Management Services* also supports this view:

- 'A trader may reasonably be expected not to include unfair terms in standard form agreements which he recommends; not to present standard terms in such agreements which are likely to deceive the consumer in relation to the rights of the gym club or his rights as consumer or the risks he may face; not to omit material information or provide information which is unclear; and not to demand payments which the consumer is not bound to pay.'¹⁰

Q.16 In particular, should demands for payment following parking offences, alleged copyright infringements, wheel-clamping and 'civil recovery' also be covered? (page 188)

6.6 Yes. The OFT believes that there needs to be a private right of redress for all breaches of the CPRs. These are all potentially commercial practices by a trader.

6.7 We would also welcome further discussions around collective claims in this area.

¹⁰ (2011) EWHC (Ch) 1237 *The Office of Fair Trading v Ashbourne Management Services Ltd & Ors*, paragraph 227.

Q.17 Should the Regulations be amended to state that all commercial demands for payment are included with the definition of commercial practices? (page 188)

6.8 Yes. The OFT believes that these are covered by the CPRs but specific inclusion would help avoid a lack of clarity.

7 THE DEFINITION OF MISLEADING COMMERCIAL PRACTICES

Redress for misleading omissions?

Q.18 Do consultees agree that traders:

(1) should not be liable for omissions as such?

7.1 No. We disagree strongly that actions and omissions should be treated separately. Liability should cover omissions as well as actions. The OFT strongly disagrees with the proposal to exclude omissions. Misleading actions and misleading omissions are strongly linked (see *OFT vs Purely Creative*)¹¹ and it is not logical or effective to provide rights in relation to one and not the other, which would be an artificial and confusing distinction to make. The UK courts will make decisions on what information the trader needed to disclose in the event of a dispute – this should deal with any concerns about over-zealous claims.

(2) but should be liable for implied representations, where the overall presentation means that a consumer would expect the product, contract or the trader to have certain characteristics, and the trader fails to contradict that reasonable expectation? (page 190)

7.2 No, we disagree with the proposed approach. We believe that introducing this new test, which is based on the wording in Regulation 5 (misleading actions), may confuse consumers as well as the courts as to what was meant. Please see response to Q.18(1).

¹¹ See footnote 9 above.

The definition of 'misleading'

Q.19 Regulation 5(2) of the Consumer Protection Regulations 2008 defined a misleading practice as either containing false information or likely to deceive the average consumer in its overall presentation. Do consultees agree that the new Act should follow the substance of this definition? (page 190)

7.3 Yes. We think that the proposed right of action should follow the text in the Regulations as closely as possible.

Q.20 Should the new Act reproduce the lists of matters about which misleading representations may be made in Regulation 5(4) to (6) of the Consumer Protection from Unfair Trading Regulations 2008? (page 190)

7.4 Yes, we agree with the proposal.

Banned misleading practices

Q.21 Do consultees think that it would be helpful for the legislation to include examples of practices which are misleading (unless the contrary is shown)? (page 191)

7.5 The Schedule 1 practices are breaches in their own right and should be actionable under private rights separately from the other provisions. They should not merely be included as examples of the other prohibitions.

7.6 For consistency, the legislation should include the 31 unfair practices referred to in the CPRs. However, these should not be included as examples of misleading practices but rather as the stand-alone breaches that they are.

Q.22 If so, what misleading practices should be included? (page 191)

7.7 Please see our response to Q.21.

8 THE DEFINITION OF AGGRESSIVE COMMERCIAL PRACTICES

Q.23 Do consultees think that:

(1) The proposed new Act should provide redress for aggressive practices?

8.1 Yes. Please see our response to Q.2 and elsewhere in this submission.

(2) The definitions of coercion, abuse of power and harassment collectively cover the appropriate situations?

8.2 Yes. Provided, as mentioned in the consultation document, that the definition of 'harassment' does not follow or require demonstration of a course of conduct as it does in the Protection from Harassment Act 1997.

(3) It is helpful to have a list of examples of aggressive practices? If so, are these examples appropriate? (page 194)

8.3 As with the response to Q.21, we would suggest that the proposed Act includes the annex practices referred to in the CPRs as stand-alone actionable practices, not as examples of aggressive practices.

9 THE CAUSATION TEST

The average consumer

Q.24 Do consultees agree that a trader should only be liable for a misleading or aggressive practice if it would have affected an 'average consumer'? (page 195)

- 9.1 The Schedule 1 practices do not have a materiality test. They are outright bans and consumers should be able to claim redress if they suffer loss or harm as a consequence. There is no 'average consumer' test here.
- 9.2 Otherwise, we agree, except in relation to the 31 Schedule 1 practices, provided the definition of an 'average consumer' applies to the three types of consumer – 'average', 'average targeted' and 'average vulnerable', referred to in the CPRs.
- 9.3 It is also important that any redress covers situations where the practice is 'likely to' affect the transactional decision of the relevant average consumer, as per the CPRs.
- 9.4 We also think it is important that consumers can claim for individual loss, once the threshold of a CPRs breach is shown.

Q.25 Do consultees agree that the definition of 'average consumer' should include provision for vulnerable consumers mirroring the Regulations? (page 196)

- 9.5 Yes, we think that specific provision needs to be made for vulnerable consumers. Please see answer to Q.24.
- 9.6 Because the CPRs cover a wide range of situations, it is important to consider that practices may have a different impact depending on the context. This may be particularly true where there are imbalances in expertise between the trader and the consumer. In some situations, for example where consumers are subjected to extreme time pressure or

physical discomfort, this may make it easier for the trader to influence their transactional decision(s) unfairly. This is especially important for the members of vulnerable groups or those targeted by traders with the intention of exploiting inherent, contextual or situational vulnerability.

The effect on the individual consumer

Q.26 Do consultees agree that traders should only be liable if the misleading or aggressive practice:

(1) would be likely to cause the average consumer to make a decision that they would not have made otherwise to enter a contract or make a payment? and

9.7 No. The OFT disagrees with the proposal because of its inclusion of the words 'to enter a contract or make a payment' as this would limit redress to consumers who have made a decision to enter a contract or make a payment. For example, consumers who have given personal data to a trader as a result of misleading actions should be able to have the data removed.

9.8 We think the transactional decision test in the CPRs (without any modification) would be the most appropriate test to use here. One possible model could be that a CPRs breach with consequence for the individual should be the threshold for liability.

(2) was a significant factor in this consumer's decision to enter the contract or make the payment? (page 197)

9.9 The extent of redress that is appropriate depends on the severity of the wrong.

9.10 We think the introduction of a new 'significant factor' test is unnecessary given the existence of the transactional decision test. Adding an additional hurdle is likely to be confusing and difficult to use in practice. We think that provided the consumer has been affected by the unfair practice, there are sufficient grounds for redress.

10 THE IMPACT ON EXISTING LAW

Q.27 Should the Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 continue to apply to consumers in transactions covered by the new Act? (page 200)

10.1 Yes, at least in the interim until the impact of the proposed new Act can be assessed.

11 REMEDIES – THE UNDERLYING POLICY CHOICES

Unwind the transaction or enforce it like a contract?

Q.28 Do consultees agree that remedies under the proposed new Act should aim to restore consumers to the position they were in before the misleading or aggressive action took place? (page 203)

- 11.1 Yes, but care needs to be taken to also ensure that where the unwinding of the contract leads to additional expenses for the consumer – as it sometimes may - there is scope for Tier 2 remedies to apply.
- 11.2 These proposals should cover a range of different actions – for example ensuring cancellation rights are offered if they have not been; repayment of sums paid; return of part-exchange goods to the consumer; deletion of personal data etc.

Q.29 Are there any examples where an expectation measure of loss would be more appropriate? (page 203)

- 11.3 Yes. This is an area that the OFT would like to consider further with interested parties. This may be relevant for complex, highly subjective services such as holidays, where loss may not be wholly or mostly financial.

12 TIER 1 REMEDIES - THE 'RIGHT TO UNWIND'

How long should the right to unwind last?

Q.30 Do consultees agree that the right to unwind should last for a fixed period? (page 209)

12.1 Yes. This would remove uncertainties over what is considered a 'reasonable' period. However, there may be options for a criterion based approach to determine the length of the period, depending on factors such as vulnerability, type(s) of goods or service, or value. Often, the problems with a transaction may not emerge until later (for example aggressive collection of payments after the contract is agreed) so the right to unwind could be linked to the practices rather than simply to the contract.

12.2 This is an area that requires further consideration.

Q.31 Do consultees think that the unwinding period should last for three months (90 days)? If not, what other period would be preferable? (page 209)

12.3 Ninety days seems reasonable but see our response to Q.30.

Q.32 Should there be a discretion to extend the fixed period in some circumstances, such as those involving vulnerable consumers? (page 209)

12.4 Yes. Vulnerability is an issue that the OFT is acutely sensitive to and one that we would be keen to discuss with interested parties when the flexibility of this option is being considered. The OFT is mindful that this is a complex area where there needs to be a balance between an extended discretionary period and the remedies available. Please also refer to our answer to Q.30.

When should the unwinding period start and how can the consumer exercise their right to unwind?

Q.33 Do consultees agree that the period for the right to unwind should start from the later of the following dates: when the contract is formed; the goods are delivered; the service is started? (page 210)

12.5 Yes we agree. Further consideration is required for 'linked' goods and service contracts where the two elements are inter-dependent, for example mobile phones and service contracts where the device may be delivered first and service starts some time later. Where there are linked contracts, the consumer must have the right to unwind the linked element of the contract too or, alternatively, the right to unwind the totality of the contract should start from the latter of the elements making up the contract.

12.6 The period should start from when the problem that the consumer wishes to unwind or address takes place. It may be useful to give the court some discretion to be flexible on this issue.

Q.34 Do consultees agree that consumers should be able to assert their right to unwind the contract by making a complaint, indicating a desire to reject the remaining goods or services? (page 210)

12.7 We agree with the proposal but caution that - contrary to what is stated in the consultation document - consumers may need to demonstrate that they have asserted their right to unwind the contract. This would remove uncertainty over whether consumers have or have not exercised their rights.

12.8 This is an area that requires further thinking and discussion.

Restoring benefits to the trader

Q.35 Do consultees agree that the right to unwind should be available where the consumer can return some element of the goods, or rejects some element of the goods or service? (page 211)

12.9 Yes.

Should consumers give an allowance for their use of the product?

Q.36 Do consultees agree that a consumer who exercises the right to unwind a contract within three months should not be required to make an allowance for their use of the product? (page 212)

12.10 Broadly we agree that there should not be an allowance for use. If it was felt necessary to have one, we believe the burden of proof should lie with the trader to show that the consumer had deliberately abused or misused the contract or product.

Unwinding the contract where the consumer has sold goods

Q.37 Do consultees agree that consumers who have sold goods as a result of misleading or aggressive practices should be entitled to the return of the goods within three months, in exchange for the price paid? (page 213)

12.11 Yes, where this is possible. The proposals, however, need to be considered further, particularly where a trader's 'fair price' paid for the goods is inconsistent with the products' real value. This is especially true where the trader has valued the part-exchange good at a very low or notional level, for example £10 for a car, as part of the overall deal.

Q.38 Do consultees agree that where this is not possible, the trader should provide a monetary equivalent? (page 213)

12.12 Yes. If necessary, this should be damages-based, as it may not be the value of the lost product but the lost utility from not possessing it, such as the inconvenience of not having a bed while waiting for the new one to be delivered.

The right to unwind a payment

Q.39 Where a consumer makes a payment which was not owed as a result of a misleading or aggressive practice, would it be helpful to provide a new statutory right to the return of the payment? (page 213)

12.13 Yes, particularly where a consumer is being pursued for a debt which he/she does not owe, for example the use of unfair terms to require payment of sums that are not owed, such as in the recent Ashbourne Management Services case. This needs to cover legal mistakes, where payments are demanded and/or made in error.

- '...A trader may reasonably be expected not to include unfair terms in standard form agreements which he recommends; not to present standard terms in such agreements which are likely to deceive the consumer in relation to the rights of the gym club or his rights as consumer or the risks he may face; not to omit material information or provide information which is unclear; and not to demand payments which the consumer is not bound to pay.'¹²

¹² (2011) EWHC (Ch) 1237 *The Office of Fair Trading v Ashbourne Management Services Ltd & Ors*, paragraph 227.

Q.40 Where the payment was owed, should the debt be offset against the payment, permitting the trader to retain the money paid? (page 214)

12.14 No. This may not be appropriate in some situations, particularly where the nature of the debt is disputed, or where the consumer needs the money to pay other, more immediate or pressing debts first.

13 TIER 1 REMEDIES - A DISCOUNT ON THE PRICE

Q.41 Where the right to unwind has been lost, should consumers be compensated by a discount on the price? (page 215)

13.1 Yes – this seems a sensible suggestion, particularly where the right to unwind may have been exercised if the consumer had acted within the time limits, for example where goods/services have been sold to vulnerable consumers. Also see our answer to Q.25.

Q.42 If so, should the discounts be in pre-set bands? (page 215)

13.2 This may make it easier but also may constrain judicial discretion if the bands are not appropriate. We would, therefore, suggest that the proposal provides for flexibility for the judiciary in appropriate circumstances or the bands are provided only as a guide.

Q.43 Are the proposed bands (0%, 25%, 50% and 100%) set in the right place? (page 215)

13.3 If the proposal goes ahead we would suggest an additional band at 75 per cent.

14 TIER 2 REMEDIES

Q.44 Do consultees agree that:

(1) Damages for indirect economic loss should be available, provided that the consumer proves that they would not have incurred the loss but for the misleading or aggressive practice?

- 14.1 Yes, we think that foreseeable and proximate losses ought to be recoverable. We think that 'show' would be better than 'prove', as in many cases it will be very difficult for the consumer to 'prove' a counterfactual, for example 'I would have bought Car B had I not been misled about Car A.' It is important that the consumer can demonstrate some connection to actual or likely loss, but the threshold should not be too high.

(2) Damages for distress and inconvenience should be available, provided the consumer could show that an important object of the contract was to give pleasure, relaxation or peace of mind, or that the practice caused them alarm, distress, physical inconvenience or discomfort?

- 14.2 Yes. Examples would include (but not limited to) holidays, burglar alarms, aggressive sales pitches at timeshare presentations and harassment by debt collectors.

(3) Damages for distress and inconvenience should be modest, and in defined bands?

- 14.3 The OFT agrees that the majority for claims for damages in this area and any consequential awards should be modest, and that defined bands may help provide some clarity. However, the OFT is of the view that in some circumstances high but proportionate levels of damages may be needed, in order to deal with serious instances of distress or inconvenience that may, for example, arise from aggressive practices

directed at the elderly or infirm. It may be possible and useful to create an unlimited 'band' or category for these exceptional instances.

(4) Damages for indirect economic loss and distress and inconvenience should not be available if the trader can establish a due diligence defence?

- 14.4 No, we disagree. If a breach has occurred, then there should be a right to unwind and seek damages. Due diligence defences do not prevent civil liability, only criminal. It may not be appropriate to imprison a trader if he can show due diligence, but we do not think this should stop claims for losses caused by the practice.

(5) The due diligence defence within the proposed new Act should mirror the due diligence defence in the Consumer Protection from Unfair Trading Regulations 2008? (page 219)

- 14.5 We do not agree that a defence should prevent liability (though it may affect it), and thus do not support this proposal. However, if the proposal does go forward, it would seem sensible to model it as closely as possible on the defence in the CPRs to avoid creating new concepts and risk further uncertainty.

Q.45 Do consultees think the remedies we propose as a whole offer an appropriate balance between certainty and flexibility? (page 219)

- 14.6 Assuming that the whole range of CPRs breaches are covered, then on balance we would say 'yes' but this will need to be reviewed. There is an inherent tension in principles-based legislation between certainty and flexibility – from the viewpoint of public enforcement of the CPRs we would argue that legal uncertainty, while initially quite high, decreases as more decisions are made and more precedent created. The long-term gains from flexibility outweigh the initial and inevitable uncertainty.

15 CREDITOR LIABILITY

Section 56 of the Consumer Credit Act 1974

Q.46 Do consultees agree that section 56 provides sufficient protection for consumers when goods have been supplied under hire purchase or conditional sales agreements in a misleading or aggressive way? (page 234)

15.1 Yes, in general terms we believe that it does. However, see response to Q.47.

Q.47 Is legislation needed to clarify that the supplier acts as agent for the creditor even if the sale from supplier to creditor takes place through an intermediary? (page 234)

15.2 Yes, the High Court case of *Black Horse v Langford* appears to have raised questions about the level of protection afforded to consumers under section 56 (1)(b) where a third party (and not the credit broker) sells the good or proposes to sell the goods to the creditor.

15.3 We agree with the initial judge's comments that:

- 'The purpose of the Act is to protect consumers and it would seem [to me] to make a serious inroad into that protection if the sale by the dealer of the motor car to an intermediary before its sale to the finance company renders section 56 of no assistance to the customer.'

15.4 On the basis of the above, legislative clarification may be beneficial.

Section 75 of the Consumer Credit Act 1974

Q.48 Do consultees agree that:

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

- 15.5 In principle, from a consumer's perspective, we can see advantages in lenders being held jointly liable with suppliers under section 75 for such matters as the supplier engaging in misleading or aggressive commercial practices. It may, for example, be theoretically appropriate to have a Tier 1 remedy alone, not Tier 2, as this would allow unwinding of the credit agreement but not make the creditor responsible for damages.
- 15.6 Liability under section 75 is not limited to the amount of credit – consequently, the creditor may be liable for the full damages that the consumer could claim against the supplier (including the 'non-credit' loss) subject to the individual facts and circumstances of any claim. This would allow for the consumer to adopt a 'one stop shop' approach to seeking redress, where appropriate, from the creditor.
- 15.7 However, whereas misrepresentation and breach of contract may be seen as primarily civil matters, aggressive practices are potentially 'criminal' matters under the CPRs. It is questionable as to whether it would be justified for a creditor to be held liable for the criminal acts of a supplier by virtue of what may be nothing more than indirect commercial arrangements between the creditor and the supplier. As more case law develops in relation to aggressive practices it may be sensible to review this position.

(2) The connected lender's liability for the supplier's act should be capped at the amount of the loan, plus interest? (page 236)

- 15.8 No, we have reservations about reforms which sought to limit the scope of the redress available to consumers. This would include limiting the range of the 'forms of redress'¹³ available to consumers. The type and amount of redress available to consumers, from those with liability, should be that which is appropriate and justifiable, taking account of the harm to the consumer in each individual case.

¹³ This currently includes, for example, the supply of replacement equivalent products or services as well as monetary refunds

16 IMPACT ASSESSMENT

Benefits

Q.50 How many complaints are received by trading standards services and other advice agencies? Will the proposals reduce the work involved in handling these complaints? If so, by how much? (page 239)

16.1 Consumer Direct receives around 1.5 million contacts per year on consumer issues. Not all of these are complaints. It is possible that the proposals may increase queries and complaints in the short term but may lead to a reduction in the long term as consumers become better informed and confident about exercising their new rights.

Q.52 How far do aggressive practices by rogue traders undermine consumer confidence and reduce sales? (page 240)

16.2 Substantially. A minority of traders operating at the rogue end of the trading spectrum have a disproportionate impact on consumer confidence.

16.3 The OFT¹⁴ and others¹⁵ have historically estimated consumer detriment from unfair practices to amount to billions of pounds.

¹⁴ OFT992 *Consumer Detriment*; OFT792 *The psychology of consumer detriment*

¹⁵ *Consumer Focus 2009 Waiting to be heard – Giving consumers the right of redress over unfair commercial practices*; NAO HC 1087 – *Protecting consumers – the system for enforcing consumer law*

Costs

Q.55 How many more court cases may be generated by the reforms? (page 244)

16.4 We believe the number of cases would be reduced if collective claims systems could be introduced, as well as improved access and use of Group Litigation Orders.

Other comments

16.5 We have noted the Law Commissioners observations about problems that may arise in securing redress for small claims in Scottish Courts. In follow up to the review by Lord Gill of the civil courts we understand that such issues will be considered further and we look forward to further improvement in the effectiveness of channels for Scottish consumers to secure redress.