



Department for Business, Innovation & Skills

This document summarises the government response to the recommendations of the Law Commission and Scottish Law Commission on misleading and aggressive commercial practices and the response to the BIS consultation on implementing the Consumer Rights Directive.

AUGUST 2013

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Misleading and Aggressive Practices – Responses to the Commissions Recommendations

Between April and July 2011, the Law Commission and Scottish Law Commission undertook a public consultation including extensive stakeholder contact and discussions.¹ The Commissions published their findings in March 2012 which included 52 recommendations for law reform in this area.²

The Case For Reform	
Recommendation	Government Response
1. There should be new legislation to simplify and clarify consumer redress for misleading practices	Agree in full: Simplification of the law relating to consumer redress for misleading practices will improve outcomes for consumers. Consumers currently have to rely on the law of misrepresentation which is overly complex and uncertain. This deters consumers from seeking redress and creates extra costs for businesses in trying to make sense of the law.
2. Consumers who suffer aggressive practices should have a right of redress under the terms of the new legislation.	Agree in full: In the course of their project, the Law Commissions were given a number of examples of aggressive practices such as elderly consumers who had suffered unscrupulous hard-selling on the doorstep. Aggressive commercial practices lead to a high level of consumer detriment and are often targeted at vulnerable consumers. New legislation is needed to address this gap in consumer protection.
3. The new legislation should apply to aggressive and misleading payment collection against private individuals.	Agree in full: Where consumers have been misled or bullied into making payments, for example in relation to wheel clamping charges, the existing law of unjust enrichment is overly complex and fails to provide a clear remedy. The new provisions should provide redress in relation to misleading and aggressive payment collection against private individuals. The new provisions will not impact on legitimate payment collection which is neither misleading nor aggressive.

¹ For a copy of the consultation paper please visit: <http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm>

² <http://lawcommission.justice.gov.uk/publications/Consumer-redress.htm>

4. There should not be a right of redress for all breaches of the CPRs.	Agree in full: Legal rights should only be extended where there is a clear need to do so. The CPRs cover a wide range of practices, with harm ranging from the very minor to the very serious. In addition, some areas of the CPRs, such as misleading omissions and the general prohibition against commercial practices which are “contrary to the requirements of professional diligence” are uncertain in scope. We think it is therefore appropriate to limit redress to certain breaches of the CPRs.
5. The Department for Business, Innovation and Skills should review whether to extend a right of redress to other breaches of the Regulations five years after the new Act is brought into force.	Agree in full: The impact of all legislation is reviewed and these issues will be included in any review of the wider consumer rights package.
Scope	
6. We recommend that: (1) the new legislation should apply to consumers in their dealings with traders; (2) the definition of consumer should be consistent with other consumer legislation; and (3) in defining consumers generally, the new legislation should specify that an individual acts as a consumer if they act for purposes which are wholly or mainly outside their business, trade or profession.	Agree in full: The Government is committed to simplifying consumer legislation and consistent definitions will be a key element of this. The proposed package of consumer law reforms includes a definition of ‘consumer’ which is in line with the Law Commissions’ recommendations. We are intending to adopt that definition for the purposes of the new provisions on private redress.
7. It is not necessary to include a specific provision to protect unemployed individuals who are mis-sold training courses.	Agree in full: The Government accepts the reasoning of the Law Commissions that specific provision to cover unemployed individuals who are mis-sold training courses is unnecessary. The general definition of consumer should be sufficient to cover such cases.
8. The new Act should not provide redress for all “transactional decisions”, such as the decision to visit a shop.	Agree in full: We agree with the Law Commissions that the new provisions should not provide redress for all “transactional decisions” under the CPRs, such as the decision to visit a shop. This might lead to unlimited claims, where the losses may often be negligible and difficult to quantify.

<p>9. The new Act should provide redress where the consumer has:</p> <p>(1) entered into a contract with the trader; or</p> <p>(2) made a payment to the trader.</p>	<p>Agree in full: We agree that traders should only be liable to provide redress where the consumer has either entered into a contract or made a payment. This mirrors the position under the existing law of misrepresentation and other areas of consumer law (e.g. faulty goods). We also agree that the new private right of redress should apply to payments made outside of a contract. The Law Commissions' Report points to many instances where consumers make payments to a trader following a misleading or aggressive practice – for example where private wheel clampers demand large payments from individuals. Entering into a contract or making a payment are the most common and significant decisions which consumers make and it is therefore right to focus on those decisions.</p>
<p>10. The new 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.</p>	<p>Agree in full: The Government agrees with the Law Commissions that the new provisions should not provide redress to consumers who have been misled or deterred as to the exercise of their legal rights. It is clear that such behaviour is serious and detrimental but we agree with the Law Commissions that where a consumer has a legal right (such as the right to return faulty goods), redress should be obtained by enforcing that right rather than via a secondary cause of action.</p>
<p>11. The consumer's rights should lie only against the other party to the contract, or against the party to whom the payment was made.</p>	<p>Agree in full: The Government accepts that redress should only be available against the other party to the contract or the person to whom the payment was made. This is consistent with other aspects of consumer law where remedies tend to be confined to the contracting parties. The Government agrees that it would be undesirable for the consumer to become embroiled in disputes as to liability where it is not clear who has carried out the misleading or aggressive practice. We agree that this offers the simplest and clearest approach. Consumers will know where to go to claim redress. Traders should be liable for misleading or aggressive practices which they themselves, have carried out, their agents have carried out or which others in the supply chain (e.g. the manufacturer) have carried out. However, we do not think traders should be liable for misleading or aggressive practices carried out by someone else in the supply chain where they could not reasonably have been aware of the practice.</p>

<p>12. The new Act should not give consumers a right of action against the directors and officers of a limited liability company or against the partners in a limited liability partnership.</p>	<p>Agree in full: The Government recognises that there is a problem around rogue traders who carry out misleading and aggressive practices and then evade liability by hiding behind phoenix companies. However, we do not intend to make provision to allow consumers to bring direct claims against directors and officers. We agree that to provide for such a claim would represent a major departure from existing company and insolvency law in giving consumers additional protection over other unsecured creditors. We also agree that it would be practically difficult for consumers to prove that there is some element of fault on the part of director or officer. We think that this type of issue is best dealt with by public enforcement.</p>
<p>13. The new Act should exclude land transactions (other than residential lettings) and financial services (other than credit and debt collection).</p>	<p>Agree in full: The Government agrees that there are already sufficient routes to secure redress against a range of unfair commercial practices in relation to land transactions and financial services. These include formal redress schemes such as the Financial Ombudsman Service. The Government is committed to increasing the use of alternative dispute resolution and we think these schemes offer consumers with sufficient means of redress in these areas. The remedies proposed by the Law Commissions are intended as a simple solution to everyday problems and will not be suitable for complex transactions such as those involving pensions, investments, insurance or banking which might involve considerable amounts of money.</p>
<p>Liability</p>	
<p>14. Traders should not be liable for omissions as a specific category, but should be liable where the overall presentation of a product or service would be likely to mislead the average consumer.</p>	<p>Agree in full: The Government agrees with the Law Commission that it would be too uncertain to introduce a private right of redress specifically for all material omissions; the scope of which would be difficult to define and would mark a departure from the current approach in UK private law. The Government will restrict liability to provide private redress for ‘misleading omissions’ to instances where there is an ‘implied representation’. The Government believes that this may be achieved by relying on the definition of misleading action contained in regulation 5 of the CPRs. We intend to rely on regulation 5 in its entirety rather than adopt the simplified test recommended by the Law Commissions. This is to promote greater consistency between existing provisions on public enforcement and the new provisions on private redress.</p>

<p>15. Five years after the introduction of the new Act, the Department for Business, Innovation and Skills should review the test, “the overall presentation of a product or service was likely to mislead the average consumer”.</p>	<p>Agree in full: The Government reviews the impact of all new legislation and will include the provisions on misleading practices in any such review.</p>
<p>16. The new Act should follow the substance of the definition of misleading practice in Regulation 5(2) of the CPRs. That is, a commercial practice is misleading if it contains false information, or if it is likely to deceive the average consumer in its overall presentation.</p>	<p>Agree in full: As per recommendation 14 above, the Government believes that aligning private law with public law will enable simplification of concepts for both businesses and consumers and will adopt Regulation 5 of the CPRs including paragraph (2).</p>
<p>17. The new Act should not reproduce Regulation 5(3) to (6) of the CPRs.</p>	<p>Reject: Regulation 5(3) to (6) of the CPRs list the matters in relation to which an action may be misleading. As is stated in relation to recommendation 15, the Government is minded to rely on the full definition of “misleading action” set out in regulation 5. This is to promote consistency between private redress and public enforcement. Regulations 5(3) to (6) are very comprehensive and the Government does not therefore believe that adopting regulation 5 in full will result in a narrower test compared to that which is proposed by the Law Commission. We think that it will be easier for consumers and businesses if there is a common definition of misleading practice which applies to both private law and public enforcement.</p>
<p>18. The new Act should not include examples of practices that are misleading (unless the contrary is shown).</p>	<p>Agree in full: We are not minded to include examples of misleading practices within the new provisions. As indicated to the Commissions, businesses are familiar with the existing definition of a misleading practice in the CPRs and examples are already included within BIS/OFT guidance.</p>

<p>19. The new Act should:</p> <p>(1) provide redress for aggressive practices.</p> <p>(2) include our proposed definitions of coercion, abuse of position and harassment.</p> <p>(3) include our proposed list of examples of aggressive practices.</p>	<p>Agree in part: Aggressive practices are particularly harmful to consumers, especially vulnerable consumers, for example aggressive doorstep selling practices. The Government agrees that a right to redress ought to be available in respect of such practices but does not agree with recommendation 19(2) that the proposed definitions of coercion and harassment should be included in the new legislation. To promote consistency between public enforcement and private law we are instead minded to follow the existing definitions under the CPRs . We do however agree that “undue influence” should instead be called “abuse of position” so as to avoid confusion with the existing domestic doctrine of undue influence. In relation to Recommendation 19(3), the Government is of the view that indicative lists in respect of aggressive practices are unnecessary given that we are minded to adopt the existing CPRs definition of aggressive practice.</p>
<p>20. A trader should only be liable for a misleading or aggressive practice if it would be likely to cause the average consumer to make a decision that they would not have made otherwise to enter into a contract or make a payment to the trader or its agent.</p>	<p>Agree in full: The Government recognises the concerns highlighted in response to the Law Commissions’ consultation and agrees that the “average consumer” test is an appropriate means of providing the necessary element of objectivity in determining whether traders are liable under the new provisions. Adopting this test also has the advantage of promoting consistency between provisions on public enforcement and private redress.</p>
<p>21. The definition of “average consumer” should include provision for vulnerable consumers, mirroring the CPRs.</p>	<p>Agree in full: This again mirrors the CPRs which will mean greater consistency between public enforcement and private redress. The Government agrees that it is important to recognise that certain classes of vulnerable consumer may be more at risk of misleading and aggressive practices, especially if that vulnerability is being targeted. We think it is therefore important to modify the average consumer test in relation to vulnerable consumers who might otherwise struggle to meet this benchmark. While we note concerns that this might lead to a disproportionately high number of consumers claiming to be vulnerable, we agree with the Law Commissions that the courts should be able to prevent any misuse of the concept of the vulnerable consumer.</p>

<p>22. To obtain redress the consumer would need to show that the misleading or aggressive practice was a significant factor in their decision to enter the contract or make the payment.</p>	<p>Agree in full: We think it is appropriate that redress should only be available if the misleading or aggressive practice actually affected the consumer’s decision to enter the contract or make the payment. The Law Commissions explored two possible tests which could apply here: a “significant factor” test or a “but-for” test. The “significant factor” test would require the consumer to show that the misleading or aggressive practice was a significant factor in their decision. The “but-for” test would require the consumer to prove that they would not have entered into the contract but-for the misleading or aggressive practice. We agree with the Law Commissions’ that the “significant factor” test offers the best compromise: it ensures there is a sufficient causal link between the practice and the consumer’s decision but does not go so far as to require that it was the predominant factor in their decision. In effect, consumers will need to put forward some evidence that they were influenced by a misleading or aggressive practice before making the decision to enter a contract or make a payment. If this threshold is met, the next stage will be to show that the practice was sufficiently serious such that it would be likely to cause the average consumer to enter the contract or make the payment.</p>
<p>23. The Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (in Scotland) should be disapplied for consumers in transactions covered by the new Act.</p>	<p>Agree in full: Retention of parallel measures for business-to-consumer practices will only increase confusion and uncertainty. The Government believes the new legislation will provide appropriate consumer protection without the need to retain the existing statutory provisions. The new legislation will not however affect business-to-business and consumer-to-consumer practices. The Government intends to leave the existing statutory provisions intact insofar as they apply to those transactions.</p>

<p>24. For the purposes of section 75 of the Consumer Credit Act 1974, the definition of misrepresentation should encompass misleading commercial practices in the new Act.</p>	<p>Agree in full: Section 75 of the Consumer Credit Act 1974 provides consumers with an important means of protection where they have purchased goods with a credit card from a supplier following a misrepresentation. In those circumstances, consumers have the option of bringing a claim against the creditor or supplier. “Misrepresentations” under section 75 include misrepresentations under the Misrepresentation Act 1967 (in England and Wales) and section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (in Scotland). As stated above. We intend to repeal those provisions insofar as they apply to business-to-consumer transactions. They will be replaced with a new claim based on whether there has been a misleading practice under the new legislation. It is appropriate that section 75 should therefore be amended to provide consumers with a like claim against a creditor where there has been a misleading practice. Otherwise, consumers will be left with a gap in protection when the 1967 Act and 1985 Act are repealed. As is set out below (Recommendation 52), we do not however intend to amend section 75 to encompass aggressive practices.</p>
<p>25. The proposed new statutory framework would operate without prejudice to existing common law or contractual remedies, though consumers would not be entitled to recover twice for the same loss.</p>	<p>Agree in full: The Government agrees with the Law Commissions that any new statutory framework should operate in parallel to existing common law and contract law, but that multiple recovery for loss should not be possible.</p>
<p>Remedies</p>	
<p>26. Remedies under the proposed new Act should aim to restore consumers to the position in which they were before they entered the contract or made the payment.</p>	<p>Agree in full: The Government agrees with the Law Commissions’ recommendation. Reliance damages aim to restore the parties to the position they were in before the practice; that is to unwind the transaction. Expectation damages aim to put the parties into the position in which they would have been had the representation been true. The Government believes that consumers need clear, simple remedies. Basing remedies on ‘expectation’ will mean that it will be difficult to quantify damages based on the expectation measure because it would require consumers to value their expectations. The Government agrees with the Law Commissions that this is likely to be too complex and uncertain to be workable and that the reliance measure is the appropriate approach.</p>

<p>27. The right to unwind should last for a fixed period of 90 days.</p>	<p>Agree in full: The Government agrees with the Law Commissions' recommendation that the 'right to unwind' should last for a fixed period of 90 days. The Government notes that differs from the right to reject faulty goods, for which a limit of 30 days is being proposed. However, we agree with the Law Commissions that misleading practices can often take longer to discover and often involve vulnerable consumers who may need longer to act. The Government consulted on extending the 90 day 'right to unwind' to cover 'sale by description' under the Sale of Goods Act, 1979 (s.13). Following this consultation the Government is satisfied that, although there may be some overlap, sale by description and misleading practices are sufficiently different to merit different approaches.</p>
<p>28. There should not be a discretion to extend the fixed period.</p>	<p>Agree in full: The Government accepts the reasoning of the Law Commissions that allowing extensions to the 90 day period for 'vulnerable consumers' would undermine the clarity and simplicity of the proposed remedies. We think that the 90 day fixed period ought to give the vast majority of vulnerable consumers enough time to act. If they do not act within the 90 day period then they will still be able to claim a discount on the price paid.</p>
<p>29. Where the consumer has entered a contract, the unwinding period should start on the latest of the following alternative dates: (1) when the consumer enters the contract; (2) when the goods are delivered; or (3) when the performance of the service is started.</p>	<p>Agree in full: The Government agrees that the unwinding period should start on the latest of the listed dates (either when the consumer enters the contract, when the goods are delivered, or when the performance of the service starts).</p>
<p>30. 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.</p>	<p>Agree in full: The Government agrees that the consumer should be able to assert their right to unwind by making a complaint, indicating a desire to reject the remaining goods or services, and that there should be no further formal requirements placed on them. The Government agrees that a more formal rejection process could be too restrictive or might lead to abuse by unscrupulous traders. This is in line with the proposed process for rejection of faulty goods in the Consumer Rights Bill, under which a consumer must indicate to the trader that goods are rejected and make them available to the trader for collection (or return them if this has been agreed).</p>

<p>31. 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.</p>	<p>Agree in full: The Government agrees that the right to unwind should be available where the consumer can return some element of the goods, or reject some element of the goods or service. The Government also agrees that use of these rights should not be dependent on the consumer being able to return the trader to his pre-contractual position.</p>
<p>32. In normal circumstances, 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.</p>	<p>Agree in full: The Government agrees that if the right to unwind is exercised within 90 days, there should be no deduction for use applied to the refund. This is also consistent with the proposed remedies for faulty goods in the Consumer Rights Bill, where (i) no deduction for use is made when the "early right to reject" is exercised (within the first 30 days) and (ii) for most goods, no deduction for use can be made if a consumer seeks a refund after a repair/replacement, if the refund is sought within the first 6 months</p>
<p>33. There should be an exception in contracts for the continuous or regular supply of goods and services for more than a month. In these circumstances, the court should have a discretion to require the consumer to give an allowance for use. This should be valued on whichever basis is lower: the market price for the quality of goods or services actually provided; or the price the trader had led the consumer to believe would be paid.</p>	<p>Agree in full: Where the consumer has entered into a contract for the continuous supply of goods or services for over one month, the Government agrees that an allowance for use would be reasonable. The Government agrees that this should be calculated based on whichever is lower, the market price for the quality actually provided, or the price the trader led the consumer to believe they would pay.</p>
<p>34. Where consumers have sold goods to a trader as a result of misleading or aggressive practices: (1) If it is possible to return the goods, the goods should be returned, in exchange for the price paid. (2) If it is not possible to return the goods, the trader should provide a monetary equivalent.</p>	<p>Agree in full: Where the consumer has sold something to the trader on the basis of a misleading or aggressive practice, the Government agrees that the trader should return the goods in exchange for the price paid or, where that is not possible, should provide a monetary equivalent (i.e. give back what the goods were actually worth, less the price paid). The Government also agrees that this right should last for the full length of the limitation periods in England and Wales (6 years) and in Scotland (5 years), because the alternative remedy of a discount on the price will not apply to these transactions.</p>

<p>35. Where a consumer makes a payment which was not owed as a result of a misleading or aggressive practice, there should be a new statutory right to the return of the payment.</p>	<p>Agree in full: A simple statutory right for the return of the payment will provide a more accessible remedy for consumers than the current law of unjust enrichment which is complex and rarely used.</p>
<p>36. Where the payment was owed, the trader should retain the money paid.</p>	<p>Agree in full: The Government notes the arguments made by a number of respondents that allowing traders to keep payments that were owed, where someone was misled or threatened into paying them, may not properly deter the use of these techniques to collect debts.</p> <p>We do however agree with the Law Commissions that if the money were to be refunded, the consumer would still be liable to pay the debt, which does at least to some extent render the unwinding of the payment meaningless. The Government also notes that the Law Commissions' proposals would still allow consumers to pursue damages for distress and inconvenience (see Recommendation 43 below) and that public enforcement would also be available against serious and/or persistent offenders.</p> <p>We would envisage that where a consumer pays too much to a trader (i.e. makes a payment that consists in part of money owed and in part of money not owed), the trader should only be able to retain the amount representing the money owed.</p>
<p>37. The consumer should have the statutory right to a discount on the price where the right to unwind has been lost.</p>	<p>Agree in full: The Government agrees with the Law Commissions that consumers should have a statutory right to a discount on the price where the right to unwind has been lost, either because 90 days have elapsed, or because the goods or services have been fully consumed. In these circumstances, we agree that consumers should still have a standard remedy rather than having to face the complexity and evidential difficulties of bringing a claim for damages. We also agree that the use of pre-set bands may provide a helpful reference point for negotiations between the consumer and trader – see recommendation 39 below.</p> <p>The Government is also minded to go further than the Law Commissions in proposing that the right to a discount on the price should also be available before the right to unwind has been lost. If, for example, a consumer would prefer to keep the goods and claim a discount, we think they should have the option of claiming a discount straight away rather than having to wait until 90 days have passed.</p>

<p>38. The level of discount should depend on the following factors:</p> <ol style="list-style-type: none"> (1) the impact of the commercial practice on the value of the product; (2) the trader's behaviour; and (3) the amount of time that has passed between the commercial practice and the consumer's complaint. 	<p>Agree in full: In relation to faulty goods, the Government is currently proposing that the deduction for use should be calculated solely on the basis of time passed. However, the Government agrees that for misleading and aggressive practices it is also appropriate to take into account the impact of the commercial practice on the value of the product and the trader's behaviour even though they make the calculation more subjective and complex. For example, where the trader's behaviour has been particularly aggressive or upsetting we think it is appropriate that this should be taken into account in calculating the discount. The Government therefore agrees that these three factors together should be used to determine the appropriate level of discount for misleading and aggressive practices.</p>
<p>39. In cases where the right to unwind has been lost, the level of discount should be the most appropriate from the following options:</p> <ol style="list-style-type: none"> (1) 0% if negligible; (2) 25% if minor; (3) 50% if serious; (4) 75% if very serious; or (5) 100% if maximal. 	<p>Agree in full: The Government agrees with the pre-set bands proposed by the Law Commissions. Although these may not precisely reflect the loss the consumer has suffered, they offer a clear and simple means of determining what amount a consumer should be entitled to following a misleading or aggressive practice. The Government agrees that the use of bands will be particularly useful in providing a framework for negotiations between parties thereby reducing the number of claims which reach the courts.</p>
<p>40. In cases involving high-priced goods or services, where the court has clear evidence of the level of the loss, the court should have the power to award a different amount.</p>	<p>Agree in full: The Government agrees with the Law Commissions that an exception should be made in cases involving high-priced goods or services, where the right to unwind has been lost and where the court has clear evidence of the level of the loss. We think that the amount at stake and the evidence available justify taking a more precise approach. In such cases we think it is appropriate that the court should have the power to award a different amount which reflects the actual loss to the consumer. We agree, for example, that in a £10,000 purchase, where a trader can show that the loss was 10%, then the statutory discount would produce unfair outcomes as the court would only be able to award a 25% discount or nothing.</p>
<p>41. A consumer who can show that the misleading or aggressive practice has taken place should have a right to terminate future performance under contract.</p>	<p>Agree in full: The Government agrees that a consumer who can show that the misleading or aggressive practice has taken place should have a right to terminate future performance under contract. No consumer should be "locked in" to a contract which they were misled or bullied into entering. Additionally, termination of the contract will encourage switching and an opportunity for a supplier who has not broken the law to compete fairly for the consumer's business.</p>

<p>42. Damages for consequential economic loss should be available, provided that the consumer shows that they would not have incurred the loss but for the misleading or aggressive practice.</p>	<p>Agree in full: The Government agrees that consumers should be able to claim damages for consequential economic losses. This would be dependant on the consumer showing that they would not have incurred the loss had it not been for the misleading or aggressive practice. This follows the existing law which already provides damages for consequential losses caused by misrepresentations.</p>
<p>43. 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.</p>	<p>Agree in full: The Government agrees with the Law Commissions that damages for distress and inconvenience should be available. The Law Commissions' consultation highlighted that consumers who are subjected to misleading and aggressive practices often experience alarm, distress, physical inconvenience and/or discomfort. This is particularly the case where vulnerable consumers are targeted and in the case of debt collection. It is our intention that damages should be available where a consumer can show that an important object of the contract was to give pleasure, relaxation or peace of mind, or that the practice cause them alarm, distress, physical inconvenience or discomfort. It is important that this is implemented alongside Recommendation 36 above, because it will provide the only means of redress to consumers who are misled or threatened into paying monies which they owe.</p>
<p>44. The new Act should follow the courts in stating that damages for distress and inconvenience should be "restrained and modest".</p>	<p>Agree in full: The Government accepts the Law Commissions' proposal that the new legislation should make provision to the effect that damages for distress and inconvenience should be "restrained and modest". This follows the approach which is currently taken by the courts and will deter consumers from bringing weak, speculative claims.</p>
<p>45. The due diligence defence within the proposed new Act should mirror the due diligence defence in the Regulations.</p>	<p>Agree in full: The Government accepts that the due diligence defence within the proposed new legislation should mirror the due diligence defence in the Regulations. This offers the most simple and consistent approach.</p>

Unfair Payment Collection	
46. The CPRs should be amended to state that all commercial demands for payment are included within the definition of commercial practices.	Agree in full: The Government accepts that the CPRs should be amended to state that all commercial demands for payment are within scope of the regulations. The Law Commissions received a large number of complaints regarding misleading and aggressive practices connected with demands for payment including, parking, clamping, alleged shoplifting and alleged copyright infringements. The Government agrees with the Law Commissions that while there is an arguable case that the CPRs already cover these sorts of practices, this is not without doubt and that this creates uncertainty for consumers. We therefore think it would be helpful to clarify that the CPRs do apply to such practices and to ensure that civil and criminal liability is consistent on this issue.
47. The new Act should cover misleading or aggressive demands for payment.	Agree in full: The Government agrees that new private right to redress should cover misleading or aggressive demands for payment. . Responses to the Law Commissions' consultation highlighted practices such as aggressive demands for payment combined with misleading threats of enforcement action. These demands can lead to debtors taking on additional unnecessary loans to prevent enforcement action, although the Government notes Recommendation 36 that traders should be entitled to keep monies legitimately owed.
48. The new Act should provide that in deciding whether debt collection is misleading or aggressive, the court may take into account guidance issued by the OFT or its successor on good practice in debt collection.	Agree in Full: Subject to discussions with enforcers and regulators on the content of guidance in this area.
49. Demands for damages against alleged wrongdoers should be covered by the new Act.	Agree in full: The Government agrees with the Law Commissions that demands for damages against alleged wrongdoers should be covered by the new legislation, for example in wheel clamping or parking disputes. There is a due process for dealing with suspected wrongdoers, and misleading or aggressive attempts to demand payment in such cases should not be permitted. Nevertheless, the Government also highlights Recommendation 36 of the Report, and recognises that where a payment is lawfully owed, there should be a right to retain it.

<p>50. Demands for payment following parking offences, alleged copyright infringements, wheel-clamping and civil recovery should also be covered.</p>	<p>Agree in full: The Government agrees with the reasoning of the Law Commissions that misleading and aggressive practices in the context of demands for payment of this sort ought to give rise to a private right of redress.</p>
<p>Creditor Liability</p>	
<p>51. When the CCA is replaced, the opportunity should be taken to clarify that the supplier acts as agent of the creditor even if the sale from supplier to creditor takes place through an intermediary.</p>	<p>The Government is currently reviewing the consumer credit regime, and will take this recommendation into account as part of that review rather than taking a decision immediately.</p>
<p>52. Section 75 of the Consumer Credit Act should not be amended to provide that connected lenders should be liable for the supplier's aggressive acts.</p>	<p>Agree in full: The Government agrees that Section 75 of the CCA should not be amended to provide that connected lenders should be liable for a supplier's aggressive acts. While we accept that it is necessary to amend section 75 to cover misleading practices so as to avoid a reduction in consumer protection, we do not intend to extend the scope of section 75 to aggressive practices. We agree that doing so may expose creditors to an unacceptable degree of uncertainty. Further, as the Law Commissions point out, an aggressive practice will often be accompanied by a misleading practice in which case consumers will be protected in any event. As part of any general review of the policy in the future, the Government will monitor how these remedies are used.</p>

Consumer Rights Directive

As well as ongoing consultation across business and consumer groups, two formal consultations have been undertaken. The first, in November 2008, gathered views on the European Commission’s proposal for a Consumer Rights Directive.³ This informed the UK Government’s views throughout negotiations to ensure that the Directive agreed provided a fair and effective framework for business whilst maintaining high levels of consumer protection.

In August 2012 BIS ran a further consultation seeking views on the scope of the Directive, and those provisions in the Directive where we had options with regard to implementation. Comments were also sought on whether there were aspects or drafting in the Directive where stakeholders would welcome further clarity. 66 responses were received and are summarised below.

Definitions and Interpretation				
Question	Views of business and business representatives	Views of consumers & consumer groups	Views of legal bodies	Public Bodies
Question 1. Given the copy-out principle are there areas, provisions or issues in the Directive which you believe are, or may be too uncertain or unclear and would benefit from guidance or elaboration on the face of the UK’s implementing regulation?	Respondents called for clarification on a wide range of issues, including on personalised goods, timings for refunds, timing of confirmations, and calculation of diminished value, as well as the definition of ‘basic rate’ telephone calls and the meaning of ‘day to day’ transactions.	The majority of respondents generally supported a ‘copy-out’ approach accompanied by appropriate guidance. They highlighted the need for clarification on a broad range of provisions including day-to-day transactions.	Respondents suggested that it was not clear to what extent the ‘main characteristics’ of goods should be set out.	Respondents generally agreed that ‘copy-out’ was appropriate with clear guidance.

³ Consultation on EU proposals for a Consumer Rights Directive- Nov 2008

<p>Question 2. Are the definitions [in Article 2 of CRD] clear? Are there areas of potential ambiguity which might benefit from clarification in any guidance to accompany the forthcoming implementing legislation?</p>	<p>Some respondents wanted to see clarification on the meaning of 'business premises'. Others sought clarification on the terms 'durable medium' and 'ancillary contract'.</p> <p>Respondents also asked for clarification on the scope of the terms 'consumer' and 'trader', and a more precise meaning of 'goods made to consumer's specification'.</p>	<p>In general, respondents felt the definitions were clear although some asked for clarity on the terms 'business premises' and 'goods made to the consumer's specification'.</p> <p>There were also questions on digital content and the role of cloud storage as a durable medium.</p>	<p>Respondents were concerned that the definition of 'trader' might mean employees becoming liable for their employer's breach of the directive or company directors instead of the company itself.</p>	<p>Respondents made a range of comments, most often asking for clarification on the scope of 'off-premises contracts' and 'goods made to the consumer's specifications',</p>
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Scope of application of CRD

Healthcare goods and services, including those provided by healthcare professionals, and to social services

Question	Views of business and business representatives	Views of consumers & consumer groups	Views of legal bodies	Public Bodies
<p>Question 3. Do you agree with our preferred option that information and cancellation rights should continue to apply to all healthcare goods and services, including those provided by healthcare professionals,</p>	<p>The majority of respondents agreed that healthcare and social services should be included. Some expressed safety concerns with regard to healthcare goods returned after</p>	<p>All respondents agreed with the inclusion of healthcare and social services. Some highlighted an increasing trend of individuals privately acquiring healthcare products and services and made the</p>	<p>Respondents agreed that current protections afforded by the Distance selling and Off-premises regulations should be maintained.</p>	<p>Respondents agreed with the inclusion of healthcare and social services. One respondent highlighted the number of complaints as a result of pressure selling of disability aids to</p>

<p>and to social services, purchased by a consumer by means of an <u>off-premises contract</u>?</p> <p>Question 4. [...] or] by means of a <u>distance contract</u> (e.g. by phone or internet)?</p> <p>Question 5. Can you offer supporting evidence [...] to help inform our assessment of these issues and of your answers to Q3 and Q4?</p>	<p>cancellation.</p> <p>A small number of healthcare services respondents thought that their sectors were already sufficiently regulated and were concerned at potential duplication in regulation.</p>	<p>point that these consumers were often vulnerable.</p>		<p>vulnerable consumers.</p>
<p><i>Financial Services and Gambling</i></p>				
<p>Question</p>	<p>Views of business and business representatives</p>	<p>Views of consumers & consumer groups</p>	<p>Views of legal bodies</p>	<p>Public Bodies</p>
<p>Question 6. It is our view that areas such as financial services and gambling are better covered through existing, sector specific legislation and that we should not pursue the option of extending the CRD information and</p>	<p>The majority of respondents agreed with the exclusions, although one thought that gambling should be included in the CRD to avoid legal confusion.</p>	<p>All respondents agreed with the proposal.</p>	<p>Respondents agreed with the exclusions, noting the extensive information requirements imposed on the financial industries from the Consumer Credit Act and Consumer Credit Directive.</p>	<p>There were mixed views from respondents. Some agreed with the proposals while others were concerned that there should be as few exceptions as possible.</p>

cancellation rights to these sectors. Do you have any comments on this or others areas, including any not addressed in the proposals?				
Residential Lets				
Question	Views of business and business representatives	Views of consumers & consumer groups	Views of legal bodies	Public Bodies
Question 7. It is our view that cancellation rights in the CRD are not appropriate with regard to distance selling of residential lets. Do you have any evidence that you wish to present to support or to challenge this view?	There was a limited response. Respondents agreed with the exclusion highlighting that it could be unfair on landlords. Landlords might lose revenue if, having withdrawn a property from the market, the consumer then changes their mind. The consumer may enter into multiple contracts on the basis that they are allowed to cancel within the cooling-off period.	While some respondents agreed, one respondent strongly disagreed on the basis that they felt residential lets were not sufficiently regulated and malpractice was common in this area.	No responses were received to this question from this category of respondent.	Most respondents disagreed with the proposed exclusion on residential lets. Many argued that the distance selling provisions were particularly important where international students would enter into agreements on a let through a distance sale.

<p>Question 8. Do you agree with our preferred option that delivery and passing of risk, express consent for additional payments, and basic rate customer helpline provisions should apply to all healthcare goods and services and to social services purchased by a consumer and to package travel and timeshare contracts?</p>	<p>The majority of respondents from the travel and time-share industries disagreed with the proposal. They argued that there was EU agreement to exclude these sectors because of existing or anticipated EU legislation. Some also argued that delivery provisions were unnecessary.</p> <p>Other respondents , however, supported the application of ‘basic rate’ and ‘express consent’ provisions more widely, arguing that there was no reason why such legislation should not apply to all traders irrespective of sector.</p>	<p>All respondents agreed with the proposal.</p>	<p>Respondents suggested that while some provisions should be applied to the sectors described (‘basic rate’ and ‘additional payment’ requirements), delivery provisions were less relevant and would make less sense in the context of these industries.</p>	<p>Respondents thought that consumers should be afforded the same protection in these industries as would apply to those within the mandatory scope of the Directive.</p>
<p>Question 9. Do you have evidence or data you can give us in support of your answer to question 8?</p>	<p>No responses were received to this question from this category of respondent.</p>	<p>No responses were received to this question from this category of respondent.</p>	<p>No responses were received to this question from this category of respondent.</p>	<p>One respondent provided evidence on ‘pre-ticked’ boxes (i.e. failing to get express consent from the consumer) and its use in the airline industry.</p>

<p>Question 10. We are not aware of problems which would indicate the need to extend these provisions to excluded sectors beyond those set out above (healthcare, social services, package travel and timeshare). Do you have any comments on this or other areas, including any not addressed in the proposals?</p>	<p>There was a limited response. Respondents saw no need to exclude any sectors from these 'hidden cost' provisions. It was also suggested that provisions on express consent for additional payments should apply to the gambling industry.</p>	<p>Respondents did not indicate any other sectors to which the provisions should extend. However, one respondent suggested that a power should be incorporated to allow the Government to extend the provisions to more sectors if necessary.</p>	<p>No responses were received to this question from this category of respondent.</p>	<p>A number of respondents suggested extension of the 'basic rate' and 'additional payment' requirements to the passenger transport and financial service sectors.</p>
<p>On-premises information requirements</p>				
<p>Question</p>	<p>Views of business and business representatives</p>	<p>Views of consumers & consumer groups</p>	<p>Views of legal bodies</p>	<p>Public Bodies</p>
<p>Question 11. Do you agree with our preferred option that the information as set out in Article 5 is, together with other applicable requirements, sufficient to allow consumers to make an informed choice? If not, what further information do you consider necessary?</p>	<p>All respondents agreed that the information requirements as stated were sufficient. There was concern that to add to them would unduly burden SMEs.</p>	<p>The majority of respondents felt the information set out was sufficient.</p> <p>Others proposed that traders should have to disclose the consumers' key rights and/or a body with whom a consumer could pursue a complaint if the goods or service did not meet the required standard.</p>	<p>Respondents felt that additional information was unlikely to assist consumers, whom they suggested often failed to consider closely the information provided by traders.</p>	<p>All respondents agreed the information requirements as stated were sufficient.</p>

<p>Question 12. What are your views on the proposed exclusion of day-to-day transactions performed immediately, from the application of CRD information requirements?</p>	<p>All respondents supported the exclusion of day-to-day transactions, most on the basis of the costs to business. They emphasised the importance of the definition of 'day-to-day' being made clear.</p>	<p>None of the respondents objected to the exclusion of day-to-day transactions but did call for clarity over its definition.</p>	<p>All respondents agreed that there was no need to extend information requirements to day-to-day transactions.</p> <p>There was some concern that the definition given should accurately reflect other member states' interpretation of the phrase 'day-to-day'.</p>	<p>All respondents agreed that there was no need to extend information requirements to day-to-day transactions.</p> <p>Almost all of the respondents had concerns about how ambiguity in the phrase 'day-to-day' transactions might mean businesses 'stretching' its meaning wider than envisaged, to the detriment of consumers.</p>
<p>Question 13. Can you give any cost data or other evidence to support your views in your response to Q12?</p>	<p>No responses were received to this question from this category of respondent.</p>	<p>No responses were received to this question from this category of respondent.</p>	<p>No responses were received to this question from this category of respondent.</p>	<p>No responses were received to this question from this category of respondent.</p>
<p>Off-premises contracts</p>				
<p>Question</p>	<p>Views of business and business representatives</p>	<p>Views of consumers & consumer groups</p>	<p>Views of legal bodies</p>	<p>Public Bodies</p>
<p>Question 14. What do you consider to be the benefits and/or costs to either consumers or traders in restricting the application of the</p>	<p>Respondents supported a threshold on the basis that it would avoid excessive costs in providing information.</p>	<p>There was a mixed response. While most supported a threshold in principle, some had reservations.</p>	<p>Respondents broadly supported the threshold, on the basis that to apply information and cancellation requirements to low cost</p>	<p>Respondents who agreed with the concept of a threshold tended to argue that it should be lower, often at the level required by current</p>

<p>information and cancellation provisions to off-premises contracts above 50 Euros, or indeed in setting this threshold at a lower level? What would be the benefits and/or costs of removing the threshold and applying the information and cancellation provisions to all off-premises contracts, in your view?</p>		<p>Some respondents felt that while information requirements should not apply to transactions below €50, cancellation rights should. This was thought of as important where a small price meant many consumers would not otherwise take their complaint further.</p>	<p>transactions would mean increased costs for consumers.</p>	<p>regulations (£35). However, some disagreed with the threshold altogether to maintain consistency with distance selling, where no such threshold exists, and so protect vulnerable consumers.</p>
<p>Question 15. Do you see any advantage to setting the threshold at a rounded figure of £40 rather than the maximum allowed, which would be in the region of £43.</p>	<p>There was no strong preference for either approach. Some respondents preferred a £40 threshold, either because it was easiest to implement and administer or that it was more memorable. Others wanted the higher threshold as the maximum allowable.</p>	<p>Most respondents did not express views on the exact figure, but a £40 threshold received the most support.</p>	<p>Respondents supported a £40 rounded figure for ease of understanding for consumers.</p>	<p>Responses were mixed with an equal proportion arguing for a £40 and £43 thresholds.</p>

<p>Question 16. Do you agree with our preferred option that immediate home repairs should be subject to the lighter information regime? What cost savings would result from this approach? Do you see risks to business or to the consumer from this approach?</p>	<p>Most respondents broadly agreed with the lighter information regime for emergency home repairs with some commenting that it was important to avoid undue delay to emergency work.</p>	<p>Respondents were split equally between those who agreed with the lighter regime and those who had reservations. The latter highlighted that this area was subject to particular problems around price expectation and eventual price paid.</p>	<p>All respondents agreed with the lighter information regime.</p>	<p>Most respondents objected to the home repairs lighter regime on the basis that vulnerable consumers were often targeted through false 'emergency repairs'.</p> <p>There was also concern about the meaning of 'emergency repairs'.</p>
<p>Ancillary Contracts</p>				
<p>Question</p>	<p>Views of business and business representatives</p>	<p>Views of consumers & consumer groups</p>	<p>Views of legal bodies</p>	<p>Public Bodies</p>
<p>Question 17. Do you agree that the suggested principles regarding the cancellation of ancillary contracts, are clear and equitable? What additional/alternative steps or steps do you think need to be introduced to bring clarity to the process of terminating ancillary contracts?</p>	<p>In general, respondents supported the proposal although some had concerns that the main contract provider should not be required to ascertain an ancillary provider of whom they had no knowledge.</p>	<p>All respondents agreed that the principles were clear and equitable.</p>	<p>Respondents felt that the proposals on ancillary contracts were equitable but sought greater explanation in places. In particular, they thought it important to define the period in which a consumer would not have to repay interest on credit.</p>	<p>The vast majority of respondents agreed that the principles were equitable and clear. One respondent asked for an illustrative list of ancillary contracts.</p>

<p>Question 18. Do you think that there are types of ancillary contract which require more detailed rules than the principles here allow?</p>	<p>No responses were received to this question from this category of respondent.</p>	<p>No responses were received to this question from this category of respondent.</p>	<p>There was a limited response. One respondent thought more detailed rules were needed to cover credit card agreements forming a package with associated goods and services.</p>	<p>Some respondents suggested that it should be made clear that credit agreements can be categorised as ‘ancillary contracts’.</p>
<p>Question 19. Where the ancillary contract is provided by a third party, what are your views over the respective responsibilities of the trader, consumer and the third party with regard to repayment of any monies once the main contract is cancelled? Should the trader, for instance, be responsible for refunds relating to the ancillary contract, or should the ancillary provider refund direct to the consumer? How best can we achieve a straightforward regime, which consumers and business will most easily understand?</p>	<p>Those who responded suggested that the ancillary contract trader should reimburse the consumer directly .</p> <p>A minority of respondents thought that it would be the trader’s responsibility to reimburse all contracts arranged through them, regardless of who made the payment.</p>	<p>Those who responded suggested that the main contract trader should be obliged to reimburse money paid under the ancillary contract. They argued this was fair given that the ancillary contract would usually have been arranged by the main trader.</p>	<p>A single respondent suggested that in principle the party who received money from the consumer should reimburse all of it to them in the event of cancellation.</p>	<p>Several different proposals were made but the consistent theme was that the main trader should be liable for reimbursement.</p>

Enforcement				
Question	Views of business and business representatives	Views of consumers & consumer groups	Views of legal bodies	Public Bodies
Question 20. Do you agree that a specific injunction and interdict regime would be an appropriate supplement to Part 8 Enterprise Act powers?	There was a mixed response. Some respondents agreed in principle. Others called for assurance that any changes would not create greater complexity in the law.	No respondents objected to this regime. Most were supportive of the power of enforcers to challenge collective harm as well as specific breaches. One was sceptical of the ability of Trading Standards alone to execute its responsibilities in this area effectively.	There were no preferences expressed by respondents.	All respondents agreed with the proposal.
Question 21. Do you see any gaps that the combination of Part 8 powers and a specific injunctions regime would not address?	Most respondents said that they saw no gaps in the regime. One suggested that a similar system of injunctions and interdicts should apply to consumers who mishandle goods before cancellation.	There was a limited response. One respondent suggested that enforcement under this regime should result in compensation to the consumer.	Respondents saw no gaps in the regime.	Respondents were unsure, remarking that they could not comment on gaps in the regime until they saw concrete proposals.
Question 22. What other measures do you believe would usefully address gaps, acting as an appropriate deterrent and sanction for breaches of the CRD?	Respondents did not suggest other measures to address gaps.	Respondents emphasised the importance of individual consumers receiving private redress.	A single respondent suggested that a criminal sanction could be considered but that this would probably be excessive.	Some respondents proposed criminal sanctions and compensation to the consumer as effective supplements to the regime.

<p>Question 23. What are your views on the proposal that failure to notify of cancellation rights for off-premises should remain a criminal offence?</p>	<p>Most respondents opposed the retention of criminal sanctions as there were already extensive existing and proposed enforcement powers in this area</p> <p>Others argued that it unnecessarily singled out off-premises traders and was disproportionate..</p>	<p>There was universal support for the retention of criminal sanctions. Respondents argued that they were a particularly effective deterrent, especially to protect vulnerable consumers.</p>	<p>There was support for the retention of criminal sanctions because of its efficacy in deterring rogue door-stop traders.</p>	<p>All respondents argued for the retention of criminal sanctions as they were seen as a key deterrent, less burdensome than EA powers in this context and were only used for serious and organised criminals.</p>
<p>Question 24. With regard to private redress, do you consider the consequences provided for in the Directive for breaches of certain provisions to be clear and appropriate? Please explain your answer.</p>	<p>All respondents thought the private redress proposals were clear and appropriate, although some sought more clarity on how consumers would take advantage of the rights. Another was concerned that it should not interfere with existing regulations on ADR.</p>	<p>Respondents were supportive of private redress proposals. Most thought consumer education was particularly important in this area, given that many of the provisions were not obvious.</p>	<p>There was support for the private rights proposals.</p>	<p>Most respondents agreed with the redress proposals.</p>

<p>Question 25. In your view, should the <u>consumer</u> have a private right of recovery, and if so, what form should that right take where a trader fails to comply with the obligation to reimburse payments following cancellation by the consumer?</p>	<p>Most respondents supported a private right of redress. They were equally divided between action based on 'statutory duty' and 'breach of contract'. Those opposing the right altogether objected that public enforcement was sufficient and thought that it could send the wrong message to consumers.</p>	<p>Respondents agreed that consumers should have a private right of recovery. There was a mixed response on how it should be implemented.</p>	<p>A single respondent suggested that private redress should come through 'breach of statutory duty', because an action based on 'breach of contract' would have to 'survive the cancellation of the contract.</p>	<p>All respondents supported the private redress, but had varied views on how it should be implemented.</p> <p>Some suggested 'breach of statutory duty' was best, particularly because it allowed for enforcer involvement.</p> <p>Others were keen on equal liability with credit providers, and thought breach of contract was the way of achieving this.</p>
<p>Question 26. With regard to private rights of the <u>trader</u>, should a failure by a consumer to return items, in breach of CRD obligations, be actionable as a breach of statutory duty or expressed in another way? What are your views regarding the imposition of penalties for such breaches? Please give your reasons.</p>	<p>Some respondents thought that consumers should be liable to the trader, commenting that the mechanism should be the same as for the consumer pursuing an action against the trader.</p>	<p>Respondents agreed that the trader should be provided with private redress where a consumer is in breach of the CRD.</p>	<p>Respondents opposed the proposal, remarking that there were sufficient means of redress for traders in general contract and tort law.</p>	<p>While most supported the proposal on the basis of equality between the two parties, others disagreed on the basis that businesses had sufficient means of pursuing a consumer who failed to meet CRD requirements under general law.</p>

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This publication available from www.gov.uk/bis

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BIS/13/1108