



Department  
for Business  
Innovation & Skills

CONSUMER REDRESS FOR  
MISLEADING AND AGGRESSIVE  
COMMERCIAL PRACTICES

Impact Assessment: Final

AUGUST 2013

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<b>Title:</b> Consumer redress for misleading and aggressive commercial practices  <b>IA No:</b> BIS0393  <b>Lead department or agency:</b> Department for Business, Innovation and Skills	Impact Assessment (IA)	
	<b>Date:</b> 31 October 2012	
	<b>Stage:</b> Final	
	<b>Source of intervention:</b> Domestic	
	<b>Type of measure:</b> Secondary legislation	
	Contact for enquiries:  consumerbill@bis.gsi.gov.uk	
<b>Summary: Intervention and Options</b>	<b>RPC Opinion:</b> GREEN	

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out? Measure qualifies as One-Out?
£109.25	£24.08	-£2.80	Yes OUT

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

Between 2007 and 2009, almost two thirds of adults experienced a misleading or aggressive commercial practice. The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) changed public regulation in this area. However, the CPRs did not change private law rights. The law giving consumers redress for misleading actions is too complex, and uses concepts which are confusingly different from the CPRs. The law on aggressive practices leaves gaps in consumer protection. This makes it more difficult to combat aggressive practices which undermine the operation of the legitimate market. Government intervention would address this gap, providing consumers with clearer and simpler routes to redress for misleading and aggressive commercial practices.

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

The policy objectives are to:

- Provide consumers with more avenues for redress against non-compliant traders;
- Reduce administrative costs on businesses through clearer, simpler law; and
- Combat misleading and aggressive practices which undermine competitive markets.

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

**Option 0: Do nothing:** This would cause no disruption but equally would have no impact on meeting our objectives.

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

**Option 2 (alternative to regulation): Voluntary Codes of Practice:** encourage greater use of voluntary codes of practice. This option is not favoured as claiming membership of a voluntary code is in itself a common misleading practice.

**Option 3: Comprehensive private right of redress:** Introduce a private right of redress for all breaches of the CPRs. We do not favour this option because of its uncertainty and potential costs to businesses.

Will the policy be reviewed? It will <b>be reviewed</b> . If applicable, set review date: 12/2016					
Does implementation go beyond minimum EU requirements?				N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			Traded: 0	Non-traded: 0	

**I have read the Impact Assessment and I am satisfied that a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and b) the benefits justify the costs.**

Jo Swinson

24 July 2013

# Summary: Analysis & Evidence

# Policy Option 1

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

Price Base Year 2009	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 105.44	High: 113.06	Best Estimate: 109.25

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	2.9	1	0.1	£4.1
High	5.8		0.7	£11.7
Best Estimate	4.4		0.4	£7.9

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

**Business and civil society organisations:** familiarisation costs to business of between £2.78m and £5.56m plus an additional cost to advice agencies of between £70,000 and £140,000. A few unmeritorious claims may be brought, resulting in annual costs of between £129,000 and £645,000.

**Public sector:** familiarisation costs for enforcers may be between £140,148 and £280,296. Ongoing public sector costs are minimal, estimated at between £7,375 and £36,875 each year in court fee remissions.

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

Nil.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	£13.60	£117.20
High	0		£13.60	£117.20
Best Estimate	0		£13.60	£117.20

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

**Business and civil society organisations:** simpler complaint handling, saving businesses around £3m each year plus an additional saving of around £680,000 per year for civil society organisations. Greater sales resulting from increased consumer confidence (£5.8m each year).

**Consumers:** increased compensation (between £2m and £5m each year) – this benefit to consumers is not included as a cost to business as the misleading and aggressive practices covered by the reforms are not carried out by compliant traders.

**Public sector:** savings to public enforcers (in relation to complaint handling) are estimated at £627,550.

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

The reforms would deter misleading and aggressive practices, leading to less consumer detriment. Consumers would find it easier to resolve disputes, saving time and experiencing less stress.

## Key assumptions/sensitivities/risks

## Discount rate (%)

3.5

The reforms may lead to more court cases, though it is difficult to know how many. We have assumed between 500 and 2,500 additional court cases in England and Wales and 50 to 250 in Scotland (see paragraphs 63-73). More court cases would lead to higher costs, while less use of the new law would result in fewer benefits.

We have assumed that the lack of effective redress against aggressive practices leads to a lack of confidence. The illustrative figures suggest that this lack of confidence depresses sales by 0.25 per cent in the mobility aids market and doorstep glazing market (see paragraphs 89-93).

Direct impact on business (Equivalent Annual) (£m):			In scope of OIOO?	Measure qualifies as
Costs: 0.9	Benefits: 3.7	Net: 2.8	Yes	OUT

# Summary: Analysis & Evidence

## Policy Option 2

**Description:** Voluntary Codes of Practice

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

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	Optional
High	Optional		Optional	Optional
Best Estimate				

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

Nil – please see key assumptions/sensitivities below.

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

Nil – please see key assumptions/sensitivities below.

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

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

Nil – please see key assumptions/sensitivities below.

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

Nil – please see key assumptions/sensitivities below.

### Key assumptions/sensitivities/risks

Discount rate (%)

This Option was considered but dismissed early on as it was not deemed sufficient to meet the objectives. In particular, a relatively common misleading practice is for firms to claim to be members of trade schemes when they are not, which undermines the whole concept behind this option and would potentially increase rather than reduce confusion and inhibit access to redress. Additionally it is a voluntary option and is unlikely to adequately secure our policy objectives.

**For this reason, the Government is minded not to pursue this option and no analysis of costs and benefits was considered.**

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes	IN

# Summary: Analysis & Evidence

## Policy Option 3

**Description:** A private right of redress for all breaches of the CPRs

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

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	1			
High				
Best Estimate				

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

Nil – please see key assumptions/sensitivities below.

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

Potential to impose considerable (unpredictable) costs on business.

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

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

Nil – please see key assumptions/sensitivities below.

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

Simple remedy providing consumers with full protection against all breaches of the CPRs.  
Important deterrent effect for businesses.

### Key assumptions/sensitivities/risks

Discount rate (%)

Given the open-ended nature of the general duty, there is a strong potential to impose considerable costs on businesses, which we have been unable to quantify.

**For this reason, the Government is minded not to pursue this option and no analysis of costs and benefits was considered.**

Direct impact on business (Equivalent Annual) (£m):			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net:		
			Yes	IN

## Evidence Base (for summary sheets)

### A. Introduction

1. This impact assessment has been prepared by BIS to consider further its proposals for allowing private redress for misleading and aggressive practices. Much of the text updates the impact assessment published by the Law Commission and Scottish Law Commission (the Law Commissions) in March 2012 to accompany their final report on consumer redress for misleading and aggressive practices.<sup>1</sup> However, as this impact assessment relates to the Government position rather than that of the Law Commissions, this version should not be taken as representing the views of the Law Commissions.

2. The Government proposes to introduce the majority of the Law Commissions' recommendations for reforms to the law of 1) misleading commercial practices and 2) aggressive commercial practices. 2.

The proposal would introduce a private right of redress to consumers who have entered into a contract or made a payment to a trader as a result of a misleading or aggressive practice. The key benefit of the proposal would be to provide increased compensation to affected consumers, who currently have limited means to obtaining redress. Simpler and clearer law would also bring further benefits in the form of easier complaint handling, deterrence of wrongful business behaviour, and increased consumer confidence.

3. The proposals set out in this impact assessment form part of a proposed wider reform of consumer law, intended to simplify and clarify consumer law to reduce business compliance costs and empower consumers. The proposals will be implemented via secondary legislation under section 2(2) of the European Communities Act 1972.

### B. The Issue

4. Misleading and aggressive commercial practices are common and lead to a high level of consumer detriment. They are a particular problem for vulnerable consumers. Misleading practices include false claims about traders, products or prices (including offers). In the course of their project, the Law Commissions were given many examples of aggressive practices such as elderly consumers who had suffered unscrupulous hard-selling on the doorstep, where, for example, salesmen pretended to be from social services or refused to leave when asked. Alternatively, some traders put 'bouncers' on the doors of sales presentations to give the impression that consumers cannot leave the premises.

5. Consumers often do not get redress for loss they have suffered. Private law does not provide clear and effective redress for consumers who have been the victims of misleading or aggressive practices. It is often complex and in a number of places inadequate. This contrasts with the publicly enforced law in this area, the Consumer Protection from Unfair Trading Regulations (CPRs).

6. The CPRs came into effect in 2008, and aim to prevent traders from distorting the market through misleading actions, misleading omissions, aggressive practices and some other unfair behaviour. They also list 31 'banned practices', which are considered unfair in all circumstances.

7. The CPRs are enforced by the Office of Fair Trading (OFT) and Local Authority Trading Standards Services (LATSS), which have the power to bring both criminal proceedings and civil enforcement actions.<sup>2</sup> They do not give consumers a private right of redress where they have suffered from an unfair commercial practice. Instead, consumers seeking compensation have to rely on existing private law doctrines, such as the law of misrepresentation, duress and harassment.

8. Most misleading practices are covered by the private law of misrepresentation. However, this is a technical area of law, which uses concepts that are confusingly different from the CPRs. In most cases of consumer misrepresentation, the consumer is induced to enter into contracts by misleading statements and seeks a remedy against the retailer or service provider. The remedies available under current law are uncertain. The most useful remedy is the right to unwind the contract. Unfortunately, however, it is unclear how quickly the right must be exercised, or how far the consumer must be able to return goods or services. Where the right to unwind has been lost, it is unclear what other remedy the

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<sup>1</sup> The Law Commission and the Scottish Law Commission, *Consumer redress for misleading and aggressive practices* (March 2012) <http://lawcommission.justice.gov.uk/publications/Consumer-redress.htm>

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



consumer might be entitled to. This makes the whole process uncertain for consumers and adds an unnecessary burden on traders, which need to understand two systems of law: one applying to public regulation and one to private.

9. The CPRs also prohibit aggressive practices. These include for example doorstep salespersons who ignore requests to leave, or traders who put intimidating 'bouncers' on the doors of sales presentations, to give the impression that consumers cannot leave the premises. Private law does not provide clear redress in these circumstances. For example, the law on duress (in England and Wales) or 'force and fear' (in Scotland) developed in response to threats of violence to the person or goods, do not necessarily provide remedies to those who suffer the effect of other more subtle forms of pressure. This allows aggressive practices to continue, in a way which undermines the correct operation of the market in some areas, particularly in sales to vulnerable consumers.

10. Options for consumers to obtain redress through Alternative Dispute Resolution (ADR) schemes also exist but these do not provide a 'right' which is the focus of considerations under this proposal. This leads to a gap where consumers often do not get redress for loss they have suffered.

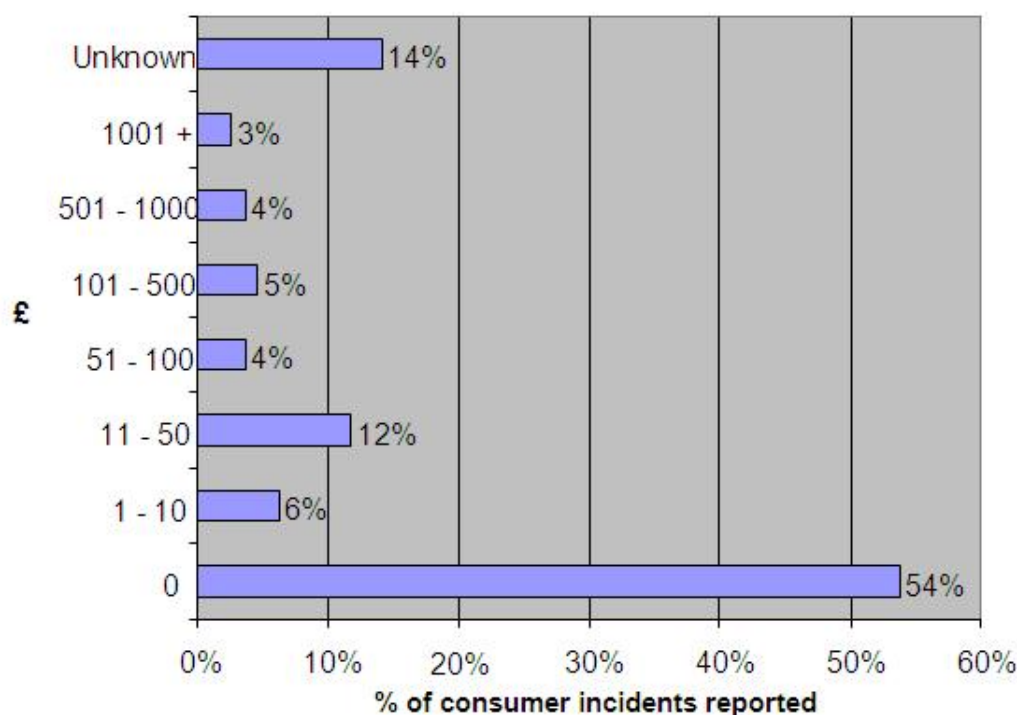
## Scale of the problem

11. In 2009 Consumer Focus commissioned research into consumers' experience of unfair commercial practices generally.<sup>3</sup> Consumer Focus helpfully provided the Law Commissions with the original tables used in the study, which they used to estimate the scale of the problem.

12. The study found that almost two-thirds (61 per cent) of the population had been the target of an unfair commercial practice from 2007 to 2009.

13. Most unfair commercial practices were minor. As Chart 1 shows, in over half of all cases the consumer suffered no loss. Issues included persistent sales calls and fake wins which tended to be irritants rather than a source of loss. However, some misleading and aggressive practices can cause considerable loss. In 7 per cent of cases, the consumer claimed to have suffered more than £500 worth of loss, and in 3 per cent of cases the consumer claimed to have suffered more than £1,000 worth of loss. Consumer Focus calculated that the total detriment suffered by consumers as a result of misleading and aggressive practices was around £3.3 billion.

**Chart 1: Cost to consumer of unfair commercial practice**



14. The practices most likely to lead to serious loss are shown in Table 1. Discussions the Law Commissions held with consumer groups suggested consumers were particularly worried when they had

<sup>3</sup> Consumer Focus, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices* (August 2008) [www.consumerfocus.org.uk/files/2010/12/Waiting-to-be-heard.pdf](http://www.consumerfocus.org.uk/files/2010/12/Waiting-to-be-heard.pdf)

bought expensive home improvements through traders who claimed to be members of trade bodies (and to offer guarantees or dispute resolution services) only to find that the trader had lied to them. High-pressure door to door selling may also lead to high losses.

**Table 1: Breakdown of cases where consumer claimed losses of more than £500**

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

15. Consumer Focus found that 57 per cent of people subject to an unfair commercial practice took no action. This is not surprising given that many people suffered no loss. However, 43 per cent did make a complaint: with 34 per cent complaining to the trader, and 9 per cent approaching someone else.

16. Of those who approached a trader, just under half (48 per cent) felt that the issue had been satisfactorily resolved. Of those who remained dissatisfied, most did nothing except pass on negative comments about the trader to others. However, just over a third of people who remained dissatisfied (36 per cent) contacted someone else at this stage.

17. The final outcome is shown in Table 2. Overall, more than half of respondents (58 per cent) reported that they had resolved the matter satisfactorily, though for some this had involved several actions.

**Table 2: Summary of satisfactory resolution of the unfair commercial practice**

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

18. These figures suggest that complaints about misleading and aggressive practices are common. Although most are resolved satisfactorily, this may involve several stages, and around four in ten complaints are unresolved.

19. The results from Consumer Focus are in line with the OFT's 2008 study into consumer detriment based on a survey of over 10,000 people.<sup>4</sup> In all, this calculated that consumers suffered £6.6 billion of consumer detriment, with 17 per cent of financial losses resulting from 'misleading claims and incorrect information'. This suggests just over £1 billion of consumer detriment from misleading practices. Claims involving more than £1,000 of loss were particularly difficult to resolve, with consumers reporting spending a median of 26 hours putting things right and experiencing high levels of stress, anger and frustration.

<sup>4</sup> Office of Fair Trading, *Consumer detriment: Assessing the frequency and impact of consumer problems with goods and services* (April 2008) [www.offt.gov.uk/shared\\_offt/reports/consumer\\_protection/oft992.pdf](http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft992.pdf)

## The problem of aggressive practices

20. There have been many complaints about aggressive practices, where the private law fails to provide adequate redress. High-pressure techniques such as doorstep salesmen who refuse to leave are an increasing problem for elderly consumers. With an ageing population this problem is likely to grow. Government statistics suggest that in England and Scotland there are currently 630,000 people aged 85 or over who live alone.<sup>5</sup> This is set to rise to 1.4 million by 2033.

### *Mobility aids*

21. In September 2011, the OFT completed a market study of mobility aids, which documented the aggressive practices that may be used to sell mobility aids to elderly consumers.<sup>6</sup> The OFT estimated that the mobility aids market was worth between £430 million and £510 million. It includes mobility scooters, wheelchairs, adjustable beds, recliner chairs, stair lifts and bath hoists. The study found that more than 4,000 complaints about mobility aid sales were made to Consumer Direct in each of the three preceding years. Purchasers are often vulnerable by reason of physical and cognitive difficulties or lack of access to the internet.

22. Traders visiting a consumer's home may make misleading claims over the nature of the sales visit, giving the impression that they are working on behalf of the social services or the health service or have a link to a charity. The study also includes examples of aggressive practices, such as sales pitches lasting several hours, with traders refusing to terminate the visit when asked to do so.

23. The OFT found that consumers who reported high-pressure selling paid between £500 and £1,000 more on average for a mobility aid, an overpayment of around 50 to 100 per cent. They may be left with an unsuitable or unusable product, and often suffer emotional distress. The OFT commented that the impact on health and well being can be significant.

### *Will-writing*

24. In July 2011 a report by the Legal Services Consumer Panel showed that aggressive practices may also be a problem in the will-writing market.<sup>7</sup> Again, the problem is most acute for older people in door-to-door sales. The report gives examples where high-pressure techniques led to high prices. For example, a couple who were originally told that wills would cost £35 each were pressured to pay £3,000 when visited at home.

25. Under Regulation 7 of the CPRs, one factor indicating that a practice is aggressive is where the trader exploits a specific misfortune. The study found that some will-writers played on the prospect that the consumer would be forced to sell their home to pay for long-term care. The report comments that “the emotive nature of the topic, when coupled with the pressure of the salesperson” makes it difficult for the consumer to say no.

## The volume of disputes

26. We have used the Consumer Focus survey to estimate the total number of disputes over misleading and aggressive practices each year. The survey found that the total sample<sup>8</sup> claimed to have experienced a total of 1,760 separate instances of unfair commercial practice in the two years – of which 603 were taken up with traders. This suggests that each year, for every 100 adults in the population, there were 16 complaints to traders over alleged unfair practices. This would lead to a total of **7.7 million complaints** to traders each year.<sup>9</sup>

27. Furthermore, the survey found many instances where people contacted a third party – either initially, or after failing to resolve the matter with the trader. There were 272 cases in the study where the consumer claimed to have contacted another organisation (equivalent to 7 contacts for every 100 adults in the population each year). This suggests around **3.4 million complaints** to other organisations each

<sup>5</sup> These figures combine data from the Office of National Statistics with the household figures produced by the Department for Communities and Local Government and the General Register Office for Scotland. Unfortunately, the figures for Northern Ireland and Wales do not include a breakdown by age group, so are not included

<sup>6</sup> Office of Fair Trading, *Mobility aids: An OFT market study* (2011) [www.oft.gov.uk/shared\\_oft/market-studies/oft1374](http://www.oft.gov.uk/shared_oft/market-studies/oft1374)

<sup>7</sup> Legal Services Consumer Panel, *Regulating will-writing* (July 2011) [www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/ConsumerPanel\\_WillwritingReport\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf)

<sup>8</sup> In England, Wales and Scotland

<sup>9</sup> Based on a total population in England, Wales and Scotland of 48.147 million adults

year. The most common choices were LATSS (30 per cent), advice agencies (including Citizens Advice or Consumer Direct – 18 per cent) or the OFT (18 per cent), though some people approached trade bodies (12 per cent), dispute resolution schemes (12 per cent) or other organisations (10 per cent).

28. In response to the Law Commissions' consultation paper, LATSS confirmed that complaints about misleading and aggressive practices were a significant issue for them. Slough TSS said that it received 1,400 complaints in 2010 to 2011, an increase of 15 per cent on the previous year. Highland Council TSS commented:

In the financial year 2010-11, Highland Council TSS received 4208 complaints of which 632 had false or misleading claims as the leading issue. Several others had misleading claims as a subsidiary issue. It is clear that misleading claims are a very common issue in the work of TSS.

29. Furthermore, in 2010 Derbyshire County Council received 603 complaints about misleading and aggressive selling in the mobility aids sector alone.

30. Although many complaints will be resolved quickly and easily, it is clear from the examples given to the Law Commission that some disputes can generate considerable bad feeling and may take several hours of a trader's time. Given the high volume of complaints, it is particularly important that the law on private redress is clear and easy to understand.

## C. Rationale for intervention

31. Misleading and aggressive practices undermine competition by reducing consumers' access to information. Misleading traders misdirect consumers through misinformation, while aggressive traders act in the same way as monopoly suppliers, restricting the consumer's ability to shop around and to choose freely from other traders. Both practices lead to market failure and justify Government intervention.

32. The existing law in this area does not work as well as it should. The Law Commissions' consultation found that complexity and uncertainty of the private law on *misleading practices* (the law of misrepresentation) leads to an unnecessary administrative burden on business as well as uncertainty for consumers. At present, traders need to understand two systems of law: one applying to public regulation and one to private redress. The costs to businesses in complaint handling would be reduced if the private law were better aligned with public regulation (CPRs), and the remedies simplified.

33. For many *aggressive practices*, the current private law (duress in England and Wales or 'force and fear' in Scotland) does not provide a clear route to consumer redress. This makes it more difficult to combat aggressive practices, which undermine competition, distort the market and impose costs on both consumers and compliant traders.

34. At present, the onus of combating aggressive practices falls entirely on the public sector (through LATSS and the OFT and, in Scotland, the Crown Office and Procurator Fiscal Service).

35. While there is value in both civil and criminal sanctions to provide compensation, there is a need for a wider range of sanctions in this area. While greater use of compensation orders should be encouraged, a number of cases are more suited to use of a private right of redress, for example, where only a few consumers are damaged by the unfair practice or where there is a complex range of individual losses ill-suited to a 'one-size-fits-all' compensation order. This requires the civil law to provide clearer, simpler remedies.

36. These proposals cover businesses of all sizes as consumers rightly expect a strong framework of legal protection when purchasing goods and services from any size of business. In fitting with the proposed wider reform of consumer law, we are not intending to exempt micro-businesses from the effect of the changes we are proposing. This is because the reform programmes as a whole is designed to clarify, simplify and modernise the law for the benefit of businesses as well as consumers and this objective would be greatly undermined if consumers were faced with the confusion of different rules applying depending on the size of business with which they are dealing.

37. Moreover, we consider that any variation in consumer law applied to different sizes of business would probably be counter-productive for micro-businesses. Consumers could choose to avoid buying from firms which they perceived as having fewer obligations to treat them fairly.

## D. Objectives

38. The policy objectives are to:

- Provide consumers with more avenues for redress against non-compliant traders;
- Reduce administrative costs on businesses through clearer, simpler law; and
- Combat aggressive practices which undermine competitive markets.

## E. Options identified

39. The options are:

**Option 0:** Do nothing

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

**Option 2:** Encourage greater use of voluntary codes of practice. This option is not favoured as claiming membership of a voluntary code is in itself a common misleading practice.

**Option 3:** Introduce a private right of redress for all breaches of the CPRs. We do not favour this option because of its uncertainty and potential costs on businesses.

## F. Options analysis

### Option 0: Do nothing

40. Option 0 maintains the current status quo – the ‘do nothing’ option. This would cause no disruption and would not cause any change to the way that the current system works. Enforcers would continue to take action to address breaches of the CPRs, including misleading and aggressive practices, and consumers would continue to rely on the uncertainty and complexity of existing law to obtain redress associated with such practices.

### Establishing the baseline

#### *Consumer detriment*

41. As highlighted above, it has been estimated that misleading and aggressive practices result in consumer detriment to the value of £3.3 billion each year.

#### *Compensation*

42. Consumer redress for misleading and aggressive practices is currently available via compensation orders in criminal proceedings, civil court action and individual negotiations.

43. The use made of compensation in criminal proceedings appears to be particularly low. Table 3 indicates the number of prosecutions brought by LATSS for breaches of the CPRs over the past three years, as well as the associated amount paid in compensation.<sup>10</sup>

**Table 3: LATSS prosecutions under the CPRs and associated compensation paid**

	Number of prosecutions	Amount paid in compensation (£)
2011/12	342	67,142
2010/11	308	68,361
2009/10	173	25,940

44. In their consultation the Law Commissions noted that trading standards officers may regard compensation claims as a burden because identifying the extent of harm caused to consumers can

<sup>10</sup> Office of Fair Trading Annual Reports [www.offt.gov.uk/OFTwork/publications/publication-categories/corporate/annual-report/](http://www.offt.gov.uk/OFTwork/publications/publication-categories/corporate/annual-report/)

require additional investigation from simply establishing a breach of the law. Additionally, the courts often interpret their powers restrictively in this regard – if a compensation claim is challenged, the courts must hear evidence to establish the extent of the loss, meaning that a victim of crime will often only get the minimum amount they can prove they are entitled to in the civil law because the criminal courts are not well equipped to assess the entitlement.<sup>11</sup>

45. Civil court action and individual action have proved difficult to quantify. A lot has been written on the difficulties consumers face in obtaining redress and the Law Commissions have noted that consumers rarely go to court to address misleading practices with case law dominated by business disputes. However, there appears to be a lack of quantification of case numbers.

46. The Law Commissions did, in their consultation, consider Judicial Statistics, finding that in 2009, 1.46 million money claims were issued in the county court. The majority of these were paid, settled or abandoned at an early stage – just 315,934 were defended. These statistics do not indicate how many of these claims were brought by consumers against businesses. John Baldwin published a major study of small claims, in 1997, which showed that 16 per cent of all defended money claims were brought by consumers against business.<sup>12</sup> This would suggest that in 2009, there were approximately 50,000 defended consumer cases.

47. This figure should be treated with caution for a number of reasons. First, Baldwin's study was completed 15 years ago. Second, court figures can vary considerably on a year-to-year basis depending on a number of external factors such as the economy and debt levels. And thirdly, cases brought by individuals against businesses are not necessarily 'consumer' cases as such. This last point was illustrated by research undertaken for Consumer Focus in 2010 which highlighted that at least a quarter of small claims cases brought by individuals against businesses were (for example) claims for unpaid wages or disputes with landlords. The remaining three quarters of cases may involve misleading or aggressive practices but may just be normal contract disputes.<sup>13</sup> Applying this to the 50,000 defended consumer cases in 2009 indicates that up to 37,500 may involve a misleading or aggressive practice.

#### *Complaints*

48. As noted above, it has been estimated that 7.7 million complaints are made to traders each year in relation to misleading and aggressive practices alongside 3.4 million complaints to third parties (including LATSS, advice agencies or the OFT). It is difficult to calculate the cost associated with each complaint – the Law Commissions in their consultation sought information on the costs involved in handling complaints but this information was not forthcoming. In the absence of complaint handling costs, it has been ascertained that the median pay for customer service occupations is £8.17 per hour, plus 14.5% non-wage labour costs (that is £9.35 per hour).

### **Option 1: Introduce a limited right providing redress to consumers who have entered into a contract or made a payment to a trader as a result of a misleading or aggressive practice**

49. Under this Option, there would be a new right to redress relating to misleading and aggressive practices. For the purposes of our considerations, misleading and aggressive practices are commercial practices which are misleading (whether by action or omission) or aggressive, and which cause or are likely to cause the average consumer to take a different decision.

50. This Option would be clearer and easier to understand than the current baseline position as uncertain remedies under current law would be replaced with more certain, standardised measures. Those consumers who complained within three months would have the right to unwind the contract and obtain a refund, provided they could return the goods, or reject at least some of the service. They would not need to make an allowance for the use they had from the product. If the consumer waits more than three months, or if the goods or service are fully consumed, then the consumer can claim a discount on the price.

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<sup>11</sup> Law Commissions consultation paper impact assessment  
[http://lawcommission.justice.gov.uk/docs/cp199\\_consumer\\_redress\\_impact\\_assessment.pdf](http://lawcommission.justice.gov.uk/docs/cp199_consumer_redress_impact_assessment.pdf)

<sup>12</sup> J. Baldwin (1997) Small Claims in County Courts in England and Wales: The Bargain Basement of Civil Justice

<sup>13</sup> IFF Research (October 2010) Research Report: Consumer Experience of the Small Claims Court, prepared for Consumer Focus [www.consumerfocus.org.uk/files/2010/10/Research-Report.pdf](http://www.consumerfocus.org.uk/files/2010/10/Research-Report.pdf)

51. Additionally, there are six ways in which the recommended new right would be more focused than Option 3 (new right to redress for all breaches of the CPRs) which would make it less open to abuse:

- i. It would provide redress only to those who have entered into a contract or made a payment. It would not, for example, provide redress to those induced by a misleading advertisement to visit a shop, if they failed to make a purchase.
- ii. It would provide redress only against the other party to the contract (or the trader to whom a payment was made). It would not provide redress against third parties, such as producers.
- iii. It would not cover land transactions or financial services. These often involve large sums, and are unsuited to the standardised remedies we are proposing. Moreover, these areas are already covered by tailored Alternative Dispute Resolution systems.
- iv. Traders would not be liable for omissions as a specific category, but would be liable where the overall presentation of a product or service would be likely to mislead the average consumer.
- v. It would not provide automatic redress for the 31 banned practices set out in the CPRs. Redress would only be available if the practice met the other elements of the test for liability. In particular, the practice must be likely to cause the average consumer to enter into the contract or make a payment.
- vi. It would not provide redress for breach of the general prohibition against practices which are “contrary to the requirements of professional diligence”.<sup>14</sup> We think this is too uncertain to form the basis of private law rights.

52. The proposal would target the manner in which a transaction was conducted rather than the substance of the transaction. It would provide a right of redress for a consumer against a trader where the consumer could show that:

- i. The trader carried out a misleading or aggressive practice;
- ii. This practice would be likely to cause the average consumer to enter the contract or make the payment; and
- iii. It was a significant factor in this consumer’s decision to enter the contract or make the payment.

53. The definitions of aggressive practice and average consumer used in the CPRs would apply, with only minor alterations. As with the CPRs, in some cases the test of an average consumer would be replaced with a test of the average vulnerable consumer.

## **Costs and Benefits**

### **Costs**

#### ***Transition costs***

##### *To business*

54. In 2008, when the CPRs were introduced, BIS’s predecessor, the Department for Business, Enterprise and Regulatory Reform (BERR) estimated that businesses would incur one-off familiarisation costs in understanding the CPRs, which could amount to between £12 million and £27 million.<sup>15</sup>

55. This was based on 770,000 enterprises (an estimate based on the number of retail, hotel and restaurant, automotive, and personal services enterprises), of which about 99 per cent are small businesses (the majority of which employ less than 5 people). It assumed that between one and two hours of a manager’s time would be spent on this function. BERR also assumed those employing more than 50 people may take longer than two hours, and employ legal advisors for this purpose.

56. The transitional costs for this change would be less. Businesses are already familiar with the basic concepts behind the CPRs. The main changes are the remedies granted to consumers if the business infringes the CPRs. Businesses that are confident that they comply with the CPRs would not need to be concerned. Only businesses that think they may infringe the CPRs would need to become

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<sup>14</sup> Reg 3(3)

<sup>15</sup> Department for Business, Enterprise and Regulatory Reform, *Impact Assessment: The Consumer Protection from Unfair Trading Regulations* (March 2008)

familiar with these remedies. We therefore think that it would be enough for businesses to spend 15 minutes to half an hour to read a simple guide to the changes, though some enterprises operating at the margins of legality may need to spend longer reconsidering their business model.

57. The median pay for a manager or proprietor in agriculture or services in 2010 was £12.61 per hour. Assuming 14.5% non-wage labour costs, the cost would be £3.61 per 15 minutes, suggesting familiarisation costs of between **£2.779 million and £5.56 million**. The Law Commissions invited comments on this figure during their consultation and based on responses received no adjustment to costs was required.

#### *To the public sector*

58. There will also be a cost in training trading standards officers and consumer advisers. We think that the training will be incorporated within current training programmes, though training about this issue may displace other subjects. . We have estimated familiarisation costs for enforcement agencies and consumer advisers at between £140,000 and £280,000<sup>16</sup>, split approximately 50:50 for enforcement agencies and consumers advisers (classified as civil society organisations for OIOO purposes).

59. We have also considered whether judges would need to receive training in the reforms. Most legal changes are notified to judges in a monthly e-letter circulated by the Judicial Studies Board. Following consultation and reflection, the Law Commissions were satisfied that the changes would not require special training. We are content with this approach.

#### **Ongoing costs**

##### *To business*

60. The main ongoing costs would fall on non-compliant traders, who would be subject to pay increased compensation to consumers. Better enforcement will bring some non-compliant traders into compliance, while others may no longer be able to continue trading.

61. We have not included the costs which fall on rogue traders involved in paying greater compensation payments. The aggressive practices covered by the reforms already amount to criminal offences and are not carried out by compliant traders.

##### *Court cases*

62. As we discuss more later, we have assumed that the number of initial complaints made to traders about misleading and aggressive practices will remain fairly static because the deterrent effect would be counter-balanced by more confident consumers who are likely to complain. However, the recommendations may encourage consumers to take further action where they fail to resolve the issue direct with the trader leading to more consumers bringing court proceedings before the civil courts. Where consumers are eligible for the remission of court fees this may result in costs to the state. It may also result in misguided complaints, which would produce costs for businesses.

63. In their consultation paper the Law Commissions attempted to estimate the number of additional court cases which may result from the reforms. They estimated 1,000 to 5,000 possible new actions in England and Wales, with between 150 and 750 additional hearings. Assuming that the effect of the reforms would be similar in Scotland, they thought that there may also be between 100 and 500 new cases raised in the sheriff court.

64. Several consultees thought that these estimates were too high. The British Retail Consortium did not think there would be any additional litigation:

Most complaints are already dealt with within the customer service policies of individual businesses – usually on the basis of a desire to retain the customer's loyalty. This means they are not necessarily based on the law as opposed to what seems best in the circumstances. Consequently we do not believe the change in the law will give rise to any additional complaints as consumers tend to complain not on the basis of the law but what they believe is fair.

65. On this basis the British Retail Consortium thought that “there should be no additional costs” on their members.

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<sup>16</sup> These figures are based on 204 Trading Standard authorities training 10-20 staff for 2 hours at a cost of £30 per hour, plus non-wage labour cost at 14.5%.



66. A representative of Slough Trading Standards commented that while improved law might lead to more claims, “the other side of the coin is that if the law is well defined with appropriate approved guidance that claims to the courts ought to reduce”.

67. With regards to Scotland, Cowan Ervine of Dundee University thought that any increase in Scotland would be more likely to be at the lower end of the range.

There are two reasons for this. Firstly, many scams involve fairly small sums which it would not be worth pursuing in court; and also because of the general reluctance of consumers to go even to the small claims procedure.

68. It is difficult to predict accurately the effect of social change on court cases. The number of money claims issued in the county courts in England and Wales has been falling since 2008; and there has been a 20 per cent fall since the Law Commissions consultation paper estimate.<sup>17</sup>

69. The Law Commissions accepted the arguments put to them that the original estimates are likely to be too high. Successive studies have shown that consumers are extremely reluctant to go to court.<sup>18</sup> The Consumer Focus study on unfair commercial practices, for example, shows that if consumers did not obtain redress after contacting the trader and/or another organisation, they were very unlikely to take further action. They were put off by the time, trouble and risks involved, and were extremely nervous of the legal system.

70. We think that there may be merit in the argument put by the British Retail Consortium that the reforms would have a negligible effect on the volume of court cases. It may also be that any increased incentive to litigate would be offset by increased settlement, caused by clearer law.

71. On the precautionary principle, however, we have considered that there may be some increase, though less than the number proposed in the consultation paper. We estimate an additional **500 to 2500 court cases issued in England and Wales**, leading to **75 to 375 additional court hearings**. Assuming that the effect in Scotland would be similar, this would suggest an additional **50 to 250 new actions** would be raised in the sheriff court.

#### *The effect on public funds of court cases*

72. In most cases, the costs of the court hearing would be covered by the summons and court fees paid by the consumer, and in winning cases, recouped from the trader. However, some consumers (especially those on state benefits) will qualify for fee remissions, met by court funds.

73. In 2009, PricewaterhouseCoopers LLP researched court fee remissions for the Ministry of Justice.<sup>19</sup> They found that from October 2007 to October 2008, full or partial remissions were provided in around 160,000 cases at a total cost of £23 million (or £143.75 per case). This was equivalent to 7.3 per cent of all county court family and non-family actions started in 2008. If 10 per cent of the new actions in England and Wales involve a remission of court fees, this would suggest between 50 and 250 grants of remissions, at a cost to the Ministry of Justice of between **£7,000 and £35,000**.

74. In Scotland, figures provided by the Scottish Courts Service show that in 2009-10, 11 per cent of cases involved a remission of court fees, at a cost per case of £65.80. Assuming the same proportion of cases would involve a remission of fees at the same average cost, the cost to the Scottish Court Service would be between **£375 and £1,875**.

#### *The effect on traders*

75. The main worry for traders is that a change in the law may encourage consumers to bring frivolous or ill-founded claims. The proposals are designed to limit this, by restricting the right of redress to clear cases of misleading or aggressive practices.

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<sup>17</sup> From 1.46 million in 2009 to 1.17 million in 2011, see Ministry of Justice, *Annual Judicial and court statistics* (2011) [www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011](http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011)

<sup>18</sup> See, for example, H Genn, *Paths to Justice* (1999) and P Pleasence et al, *Civil Justice in England and Wales* 2009, (2010) Legal Services Research Centre [www.justice.gov.uk/downloads/publications/lsrc/2010/2010CSJSAnnualReport.pdf](http://www.justice.gov.uk/downloads/publications/lsrc/2010/2010CSJSAnnualReport.pdf)

<sup>19</sup> PricewaterhouseCoopers LLP, *Is the 2007 court fee remission system working?* Ministry of Justice Research Series 15/09 (December 2009) <http://webarchive.nationalarchives.gov.uk/20110201125714/http://www.justice.gov.uk/publications/2007-court-fee-remission-system.htm>

76. A study of small claims, in 2010, found that 30 per cent of claimants had the case decided in their favour at the mediation stage, and a further 39 per cent won in court, leading to an overall success rate of 7 out of 10.<sup>20</sup> This suggests that of the additional 550 to 2750 new cases, between 165 and 825 may be ill-founded. The cost to the trader to defend (in management time and legal costs) these cases is estimated at between £129,000 and £645,150.<sup>21</sup> There would be no redress available to businesses in these circumstances but given that these costs will be spread over the whole retail sector, including goods and services, we do not think that it will involve a substantial burden on traders.

## Benefits

77. As well as meeting the three policy objectives, we would anticipate three key benefits to the proposals:

- i. Easier complaint handling: compliant traders and advice agencies would find it easier to deal with complaints of misleading practices; and enforcers would benefit from simpler, easier ways of valuing consumer loss.
- ii. Greater consumer redress: consumers who have been subject to misleading and aggressive practices would receive more compensation.
- iii. Increased consumer confidence: combating aggressive practices more effectively would increase consumer confidence, and therefore lead to increased sales.

### *Easier complaint handling*

78. As discussed above, complaints about misleading and aggressive actions appear common. Compliant traders incur unnecessary costs because they need to understand two separate systems of law. They need to understand the CPRs to avoid committing criminal offences. They also need to understand the law of misrepresentation to deal with individual complaints. The two systems use different concepts and rules to cover the same situations. Our recommendations would build the definitions and concepts of the CPRs into private redress.

79. It is difficult to calculate the benefit of this simplification. As noted in the baseline, around 7.7 million complaints about misleading or aggressive practices are made to traders each year, with an additional 3.4 million complaints made to third parties (including roughly 1.77 million to civil society organisations, such as consumer advice lines and trade bodies, and 1.63 million to public enforcers). We do not think the complaint level would change significantly as a result of clearer and simpler law. Although we would expect the simplification of law to have a deterrent effect resulting in fewer misleading or aggressive practices and subsequently a slight reduction in complaint numbers, we also anticipate that the simpler law would result in more confident consumers who are more likely to complain when they do experience a misleading or aggressive practice. Overall, we therefore expect these two effects to counter-balance one another.

80. It can, however, be assumed that the simplification of law would save complaint handlers time when responding to complaints because they would have a clearer understanding of the law. As noted in the baseline, the Law Commissions sought information on the costs associated with complaint handling in their consultation but such information was not forthcoming.

81. If we assume a 5 minute reduction of time for each complaint, this would reduce the costs of complaint handling by 77p (using the baseline cost of £9.35 per hour for customer service occupations). Clearly, some complaints are dealt with very quickly and the time they take would not change. However, it seems reasonable to assume that there would be a reduction of this kind in at least half of the complaints received, leading to savings of around **£3 million** a year for traders and **£1.31 million** a year for third parties (split approximately £680,680 for civil society organisations and £628,320 for public enforcers). This assumption was included in the Law Commissions consultation, alongside a request for feedback on the figures, particularly the savings that might be anticipated. The figures were not challenged by respondents and no further information provided on the anticipated savings.

82. We also think that enforcers may find the simpler standardised remedies reduce the work involved in seeking compensation orders before the criminal courts.

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<sup>20</sup> IFF Research (prepared for Consumer Focus), *Consumer Experience of the Small Claims Court* (October 2010) [www.consumerfocus.org.uk/files/2010/10/Research-Report.pdf](http://www.consumerfocus.org.uk/files/2010/10/Research-Report.pdf)

<sup>21</sup> These estimates have been calculated as follows: The median hourly wage of a regional sales manager of £32.52 plus non-wage labour costs at 14.5% (total £37.24). The British Retail Consortium estimated it would take about 3 days work (£782) to investigate the complaint, gather evidence, travel to the court and waiting time.

### *Greater consumer redress*

83. As we have seen, surveys by Consumer Focus and the OFT suggest that misleading and aggressive practices lead to considerable consumer detriment. We do not suggest that law reform will eliminate the problem. However, clearer simpler rules will make it easier for consumers to obtain redress and as noted there is also likely to be a deterrent effect, with fewer misleading or aggressive practices taking place.

84. As noted above, we do not anticipate complaint levels changing significantly, because the deterrent effect would be counter-balanced by more confident consumers who are likely to complain, but those who do complain will be more likely to be successful due to the simpler remedies available.

85. In its consultation paper, the Law Commissions tentatively estimated possible additional compensation payments of between £5 million and £10 million to consumers who had suffered detriment as a result of a misleading or aggressive commercial practice<sup>22</sup>.

86. The Law Commissions asked for comments on this figure and as a result reduced the estimate of additional compensation to consumers to between **£2 million and £5 million**. This was due to the uncertainties involved as well as the estimated number of additional court cases being revised down (as highlighted in paragraph 73, as well as compensation being gained outside of the courts system. Such a revision would reduce the estimated compensation through court actions to between £289,000 and £1.44 million). Furthermore, other aspects of the proposed Consumer Bill of Rights should provide greater redress to consumers.<sup>23</sup>

87. Consumers would also receive benefits in terms of fewer hours spent pursuing claims and less stress and aggravation, though we have not quantified these.

### *Improved consumer confidence leading to increased sales*

88. The effect of horror stories about aggressive selling reduces consumer confidence, and makes consumers less prepared to buy the product. This appears to be a problem in the mobility aids market, though it applies more widely. Older consumers may be particularly worried about letting a salesperson into their house, even if they would benefit from the product on offer.

89. The reduction in confidence produced by aggressive practices may affect all markets in which aggressive practices are known to be a problem, including all doorstep selling, timeshares and holiday clubs. These markets are substantial. For example, in 2004 the OFT found that the market for doorstep selling for double-glazing and conservatories was worth £1.85 billion a year.<sup>24</sup>

90. It is not possible to provide a precise estimate of the effect of reduced consumer confidence on lost sales. The Law Commissions consultation paper provided an order of magnitude. It argued that, given the major worries with the mobility market, aggressive practices may deter at least 1 per cent of customers from entering the market, which would result in £4.7 million in lost sales in that market alone. If 0.5 per cent of customers were deterred from buying double-glazing or conservatories on the doorstep, the lost sales would be £9.25 million, making a total across both markets of £13.95 million. On this basis the Law Commissions estimated that lack of consumer confidence may lead to lost sales of between £10 and £20 million year.

91. On consultation, many agreed that aggressive practices undermined consumer confidence and reduced sales. The OFT commented that the effect could be substantial:

A minority of traders operating at the rogue end of the trading spectrum have a disproportionate impact on consumer confidence. The OFT and others have historically estimated consumer detriment from unfair practices to amount to billions of pounds.

92. That said, these figures are uncertain, and we think it is important to keep the estimate low. On the basis that at least one in four hundred people (0.25 per cent) who could benefit from mobility aids

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<sup>22</sup> This included compensation through compensation orders (estimated at £100,000), civil sanctions and around 1,100 to 5,500 additional court actions (estimated at between £578,000 and £2.89 million on the basis of 70 per cent of cases being successful at court and providing an average payment of £750), as well as most compensation gained through individual negotiation in the shadow of the law.

<sup>23</sup> Proposals relating to the introduction of remedies attached to Enforcement Orders and undertakings under Part 8 of the Enterprise Act 2002

<sup>24</sup> Office of Fair Trading, *Doorstep selling: A report on the market study* (May 2004)  
[www.offt.gov.uk/shared\\_offt/reports/consumer\\_protection/oft716.pdf](http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft716.pdf)

(total market value £470m) or from doorstep sales of double-glazing or conservatories (total market value £1.85bn) is deterred by lack of legal protection, improved protection could boost the market by **£5.8 million**.

### **Option 2: Voluntary Codes of Practice: encouraging increased use of voluntary codes of practice**

93. This option would further encourage the use of voluntary codes of practice under which businesses would promise both to not commit misleading or aggressive practices and to offer redress and/or access to an independent ADR mechanism in the event of a breach.

94. Currently, compliant traders may sign up to a code of practice which goes beyond the law and may include an agreement to provide compensation if the code is breached. However, consumers may still be unprepared to trust them on the basis of stories they have heard. For those businesses that comply with codes, they can be an effective mechanism but there remains a selection of businesses who do not comply.

95. More specifically, a relatively common misleading practice is for firms to claim to be members of trade schemes when they are not, which undermines the whole concept of a code of practice. For this reason, the Government is minded not to pursue this option and no further analysis of costs and benefits has been considered.

### **Option 3: Introduce a private right of redress for all breaches of the CPRs**

96. Option 3 would introduce a private right of redress for all breaches of the CPRs. The CPRs consist of a general prohibition of unfair commercial practices, prohibitions of misleading and aggressive practices and 31 practices prohibited in all circumstances. The general prohibition in particular is not defined and is decided on a case-by-case basis.

97. As noted by the Law Commission in 2008 such a right would have three main advantages:

- i. It would provide a simple remedy;
- ii. It would ensure full protection against all breaches; and
- iii. It would have an important deterrent effect.<sup>25</sup>

98. The Law Commission also noted, however, that such a right would impose unpredictable costs on traders:

The Directive [Unfair Commercial Practices Directive 2005] and subsequent regulations [CPRs] were deliberately drafted in an open-ended way, so as to cover potential and unknown practices that might arise in the future. It is therefore impossible to provide an account of how they might be used, or the costs they would impose on traders. Introducing a private right of redress would involve a leap of faith, which could never be fully costed.

99. The Confederation of British Industry echoed these concerns. Businesses commented that the CPRs were uncertain, and might encourage consumers to bring small and unfounded actions. This would impose litigation costs on traders which would ultimately be passed back to consumers not involved in the litigation.

100. Businesses were particularly worried about being made liable for omissions. The CPRs impose a duty to disclose material information. 'Material information' is defined as what an average consumer would require to make "an informed transactional decision".<sup>26</sup> The CPRs list factors that will be relevant to helping decide about materiality where the commercial practice is an 'invitation to purchase'.<sup>27</sup> Nonetheless, the criterion is still extremely vague and leads to considerable uncertainty.<sup>28</sup> Businesses

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<sup>25</sup> Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department of Business, Enterprise and Regulatory Reform on the issues raised* (November 2008) [http://lawcommission.justice.gov.uk/docs/rights\\_of\\_redress\\_advice1\(2\).pdf](http://lawcommission.justice.gov.uk/docs/rights_of_redress_advice1(2).pdf)

<sup>26</sup> Reg 6(3)

<sup>27</sup> Reg 6(4)

<sup>28</sup> H Collins, "Harmonisation by example: European laws against unfair commercial practices" (2010) 73(1) *Modern Law Review*, volume 93

were concerned that whilst they could easily agree to provide more information, it would be more difficult to react to a multitude of varied consumer claims.

101. We are unable to adequately cost this option. Given the open-ended nature of the general duty, there is a strong potential to impose considerable costs on businesses. Therefore, we do not recommend this option.

### Assumptions and sensitivities

102. It is clear that misleading and aggressive practices are a significant problem, leading to considerable consumer detriment and reducing consumer confidence. However, it is less easy to predict the effect of law reform on consumer behaviour. It is particularly difficult to determine how many consumers will use the new law to obtain compensation.

103. The impact assessment has made assumptions about the number of additional small claims brought by consumers. Consumers' recourse to the new rights may be lower than predicted, leading to less benefit to consumers, but also fewer costs to the public purse, and fewer losing claims. The use may be greater, leading to higher levels of compensation claims and some additional costs on businesses.

## G. Recommendation

104. A limited private right of redress should be introduced to provide redress to consumers who have entered into a contract or made a payment to a trader as a result of a misleading or aggressive practice.

### Illustrative estimate of key annual\* costs and benefits of preferred option

	High estimates [£]	Best estimates [£]	Low estimates [£]
<b>Costs:</b>			
<i>Transitional -</i>			
A. Familiarisation – traders	5,558,000	4,169,000	2,779,000
B. Familiarisation – consumer advisors	140,000	105,000	70,000
C. Familiarisation – enforcers	140,000	105,000	70,000
D. Total transitional (A+B+C)	5,838,000	4,379,000	2,919,000
<i>Ongoing -</i>			
E. Fee remissions	36,875	22,125	7,375
F. Firm claims defence	645,000	387,000	129,000
G. Total on-going (E+F)	682,000	409,000	136,000
<b>Total (D+G)</b>	<b>6,520,000</b>	<b>4,788,000</b>	<b>3,055,000</b>
<b>Benefits:</b>			
H. Complaint handling – traders	3,000,000	3,000,000	3,000,000
I. Complaint handling – consumer advisors	680,000	680,000	680,000
J. Complaint handling – enforcers	627,550	627,550	627,550
K. Consumer compensation	5,000,000	3,500,000	2,000,000
L. Improved consumer confidence	5,800,000	5,800,000	5,800,000
<b>Total (H+I+J+K+L)</b>	<b>15,107,550</b>	<b>13,607,550</b>	<b>12,107,550</b>

\*transitional costs only occur in the first year

## H. Implementation

105. The Government's intention is to implement these proposals via secondary legislation under section 2(2) of the European Communities Act 1972.

## I. Monitoring and evaluation

106. A post implementation review would be carried out within 3-5 years as per the requirements for post legislative scrutiny.

## J. One in, one out

107. This measure is in scope of OIOO as it has direct impacts on business and civil society organisations. The Government expects the proposed changes to result in an 'OUT' of £2.8m. This has

been calculated on the basis of best estimate calculations on impacts which are direct and in scope for businesses and civil society organisations as follows:

Costs:

- Familiarisation costs for business and civil society organisations (consumer advisors) of £4.3m (paragraphs 55-59); and
- Increase in unmeritorious claims on compliant businesses £387,000 per annum (paragraph 78).

Benefits:

- Time savings in complaint handling for business and civil society organisations of £3.68m per annum (see paragraphs 80-83).

108. Over the life of this measure there are direct annual costs of £0.9m and direct annual benefits of £3.7m falling on business and civil society organisations, netting to an OUT of £2.8m (Equivalent Annual Net Cost to Business).

## Annex 1: Post Implementation Review (PIR) Plan

<b>Basis of the review:</b> This Impact Assessment includes a commitment to review the proposed changes 3-5 years after implementation.
<b>Review objective:</b> To assess: <ul style="list-style-type: none"><li>• the level of take-up of new remedies</li><li>• whether remedies are meeting policy objectives</li><li>• whether policy objectives are in practice strengthening competitive markets.</li></ul>
<b>Review approach and rationale:</b> The review would evaluate the effectiveness of the changes within this Impact Assessment. The review will incorporate stakeholders' views that will include consumer groups, business groups, LATSS, the Consumer and Markets Authority (CMA) and the Citizens Advice services.
<b>Baseline:</b> Total detriment suffered by consumers as a result of misleading and aggressive practices has been estimated at £3.3 billion per year.
<b>Success criteria:</b> Increased compensation for consumers; greater levels of compliance with the law; reduced consumer detriment.
<b>Monitoring information arrangements:</b> Feedback from businesses, consumers groups, TSS, the CMA and Citizens Advice will be achieved through regular engagement. The transition costs will be recorded during the implementation stage and Government will monitor the ongoing costs via annual reports and management information. More general information about the conditions facing consumers can be collected through surveys and the European Commission's Consumer Market Scoreboard, which is currently published bi-annually.
<b>Reasons for not planning a review:</b> N/A

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills

1 Victoria Street

London SW1H 0ET

Tel: 020 7215 5000

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