



**Law
Commission**
Reforming the law

A private right of redress for unfair commercial practices?

**Preliminary advice to the Department for Business, Enterprise and
Regulatory Reform on the issues raised**

November 2008

THE LAW COMMISSION

Preliminary advice to the Department for Business, Enterprise and Regulatory Reform:

A private right of redress for unfair commercial practices?

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PART 1

INTRODUCTION

THE REGULATIONS

- 1.1 On 26 May 2008, the Unfair Commercial Practices Directive¹ (UCPD) was implemented into UK law by the Consumer Protection from Unfair Trading Regulations (the CPRs).² These regulations radically overhauled consumer protection legislation. They repealed provisions in 22 pieces of legislation and replaced them with a broad “standards” approach. Businesses that trade with consumers are bound not to use “unfair commercial practices”. In particular, the regulations prohibit misleading actions, misleading omissions and aggressive commercial practices which cause an average consumer to take a “transactional decision” that would not otherwise have been taken.
- 1.2 The regulations place a duty of enforcement on the Office of Fair Trading and Trading Standards Departments, who have the power to bring both criminal proceedings and civil enforcement actions under Part 8 of the Enterprise Act 2002. Part 8 allows enforcers to apply to the court for an enforcement order. Breach of an enforcement order may be contempt of court, leading to an unlimited fine or up to two years imprisonment.³

A PRIVATE RIGHT OF REDRESS?

- 1.3 The regulations do not confer on consumers a private right to redress where they have suffered from an unfair commercial practice. Consumer groups have suggested that such a right could simplify the law by replacing detailed provisions with broad principles and fill the gaps left by current provisions. It would also discourage traders from unfair practices.⁴
- 1.4 The Government thinks there could be merit in the suggestion, but has urged caution on the basis that “adopting a private right of action for the whole of the Directive might have unintended and adverse consequences”.⁵ Creating a private right of redress also leads to difficult questions about what happens to existing law. Repealing current law may reduce protection, while leaving provisions in place may produce even greater complexity.

¹ Directive 2005/29/EC.

² 2008 SI 2008 No 1277.

³ For a summary of the Regulations, see the joint BERR/OFT Guidance at www.oft.gov.uk/shared_of/business_leaflets/cpregs/oft1008.pdf.

⁴ A new right was supported by Citizens Advice, Which? and the National Consumer Council in their responses to the Government’s consultation on the new regulations.

⁵ Response to the Consultation Paper on Implementing the Unfair Commercial Practices Directive (December 2006) <http://www.berr.gov.uk/files/file35750.pdf> at p 7.

OUR TERMS OF REFERENCE

- 1.5 In our Tenth Programme of Law Reform, the Law Commission undertook to start a project on this issue. We explained that resources did not allow us to start work until April 2010. We said we would publish a scoping study in late 2010, which would consider the advantages and disadvantages of a private right of redress in the light of experience in Ireland and Australia.
- 1.6 Consumer groups, however, suggested that a debate on this subject should start as early as possible. The Department for Business, Enterprise and Regulatory Reform (BERR) therefore asked us to provide a preliminary indication of the issues at stake by November 2008 without making any recommendations, so that the Department could conduct its own consultation on the subject.
- 1.7 In July 2008 the Law Commission received a reference from BERR in the following terms:
 - (1) to advise the Department on the potential advantages and disadvantages of giving consumers a private law right of action where they have suffered loss as a result of an unfair commercial practice;
 - (2) to advise the Department on the issues that would arise if consumers were given such a private law right, including the extent to which this would replicate or extend existing law and how damages may be quantified;
 - (3) to advise the Department on alternative approaches on how the law could be made easier for businesses and consumers to understand and use if consumers are not given a private right for breaches of the Consumer Protection from Trading Regulations 2008.

THIS PAPER

- 1.8 The aim of this preliminary paper is to help BERR start the consultation process on whether a new private right of redress should be introduced. The paper does not contain proposals for reform. It is merely intended to stimulate thought on the issues that would have to be considered before a private law right could be formulated.
- 1.9 At this stage we have not consulted on the issues concerned, though we have been assisted by the responses submitted to BERR by consumer groups, in support of a new right. We are also extremely grateful for the comments we received on an earlier draft from Dr Christian Twigg-Flesner and Professor Hugh Beale.

- 1.10 The creation of a new private right of redress for unfair commercial practices raises difficult issues. Paradigmatic examples of unfair conduct immediately spring to mind, like the lying shopkeeper or the aggressive door-to-door salesperson. However, a new right could apply to many different disputes. On the one hand it could be used to seek redress for relatively minor problems, such as where a parent is annoyed by advertising designed to encourage children to pester them for fizzy drinks. On the other hand, creative lawyers may explore its potential to provide remedies in high-value disputes, where the law currently fails to provide a remedy. Possible high-value disputes where the remedy could be developed include omissions relating to land sales; damages for harassing debt collectors; and the liability of credit rating agencies for misleading statements about the solvency of savings institutions.

Contents

- 1.11 This paper is divided into four Parts and one Appendix. Following this introduction:
- (1) Part 2 discusses each of the main practices that are considered unfair. We ask whether the law currently provides consumers with redress for such practices. We then highlight issues raised by a new right in this area.
 - (2) Part 3 lists the issues that would need to be considered before introducing a new private right.
 - (3) Part 4 contains our conclusions and considers other options. We then list questions for future consultation.
- 1.12 There are 31 individual practices in the CPRs that are deemed to be unfair. In Appendix A we look at 15 of these.
- 1.13 This paper is only concerned with the law in England and Wales. The effects on Scots law would need to be considered separately. It is worth noting that the law of misrepresentation, in particular, is different in Scotland, so the issues may differ.

IRELAND

- 1.14 The UCPD has also been implemented in Ireland. The Irish Consumer Protection Act 2007 came into force on 1 May 2007, and includes provisions for both public enforcement and a private right to damages, including exemplary damages. The private remedy is available in respect of all consumer contracts, including those involving land.
- 1.15 There is no indication in the Act as to how the damages will be calculated, nor is any defence listed. Due diligence is a defence to criminal prosecutions but not, it seems, to private actions.⁶

⁶ Irish Consumer Protection Act, s 78.

- 1.16 The introduction of a general right to damages in Ireland is interesting, because much of the underlying Irish law is similar to English law. This means that the potential benefits and disadvantages of a private right can be judged against practical experience.

PART 2

PRACTICES PROHIBITED BY THE CONSUMER PROTECTION REGULATIONS

OVERVIEW

- 2.1 The Consumer Protection Regulations (CPRs) lay out four ways in which commercial practices can be unfair. A trader's conduct may be unfair because it is:
- (1) misleading, through conduct or omissions;
 - (2) aggressive;
 - (3) one of 31 specified practices; or
 - (4) contrary to the requirements of professional diligence.
- 2.2 Except for the 31 specified practices, not all such conduct is automatically unfair. With misleading and aggressive actions there is a second requirement, namely that the conduct causes or is likely to cause the average consumer "to take a transactional decision that he would not have taken otherwise".¹
- 2.3 Similarly, with practices that are contrary to the requirements of professional diligence, the regulations are only breached where the practice "materially distorts or is likely to materially distort the economic behaviour of the average consumer".² Such distortion is defined as the impairment of a consumer's ability to make an informed decision "thereby causing the consumer to take a transactional decision that he would not have taken otherwise". This seems to be a similar test to the one for misleading and aggressive conduct.
- 2.4 When considering the breadth of the regulations it is important to note that they cover nearly all interactions between consumers and traders. They apply to contracts for "any goods or service", including "immovable property, rights and obligations".³ This means that contracts for the sale of houses are included, for example, as well as financial services and insurance.

The nature of a "transactional decision"

- 2.5 The definition of a "transactional decision" is quite broad. The regulations define it as

¹ For example: CPRs, Reg 5(2).

² CPRs, Reg 3(3).

³ CPRs, Reg 2, definition of "product".

any decision taken by a consumer, whether it is to act or to refrain from acting, concerning—

- (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or
- (b) whether, how and on what terms to exercise a contractual right in relation to a product.⁴

2.6 This means that a practice falls within the scope of the regulations if it would cause an average consumer to buy a product, to pay a different price, to pay a debt that they owe, to cancel a contract or to take legal action. A consumer who refrained from doing any of these things would also be taking a transactional decision.

2.7 The effect of this wide definition is that failing to take court action may be a transactional decision, but only if the right that has not been exercised is contractual in nature. Take this example:

A consumer goes on a roller-coaster ride, and is injured through the trader's negligence. The trader is liable to the consumer in both tort and contract (for breach of the implied term to exercise reasonable skill). When the consumer complains, the trader refers them to a sign stating "we cannot accept any responsibility for any injury caused by this ride". The consumer thinks they have no right of action. Four years later the consumer is advised by their solicitor that the notice was ineffective under the Unfair Contract Terms Act 1977. However, the personal injury claim is by then outside the limitation period.

2.8 The fairground owner has breached the CPRs by relying on an unfair term. This would be a misleading statement or omission, because the consumer would be left without the information needed to make an informed transactional decision. However, failing to sue in tort does not appear to be a transactional decision within the meaning of the regulations. Subsection (b) refers only to *contractual rights* in relation to the product. On the other hand, if the consumer can establish that the injury was in breach of a contractual term, then the decision not to sue meets the definition. This means that a private right of redress would give the consumer a right to claim damages for missing the limitation period in these circumstances.

The nature of the "average consumer"

2.9 In order to see whether a commercial practice is unfair it is normally necessary to consider its effect on "the average consumer". This consumer is "reasonably well informed, reasonably observant and circumspect".⁵

⁴ CPRs, Reg 2, definition of "transactional decision".

⁵ CPRs, Reg 2(2). This concept was developed by the European Court of Justice, which also accepts that regional, linguistic and cultural factors can be relevant.

- 2.10 In two situations, however, a different test applies. First, where a practice is directed at a particular group of consumers, the regulations focus on an average member of that group.⁶ Secondly, practices that are only likely to affect the decisions of a particularly vulnerable group of consumers will be judged against an average member of the vulnerable group. The vulnerability of the group must be caused by mental or physical infirmity, age or credulity.⁷
- 2.11 It seems that the test relating to vulnerability will apply where a scam is directed at the general public, but only particularly credulous consumers would fall for it. A good example would be an email lottery scam.⁸
- 2.12 Below we consider each of the prohibitions contained in the regulations, and ask whether the remedies that are available under the current law are sufficient to protect consumers.

MISLEADING ACTIONS

Practices covered by the CPRs

- 2.13 The CPRs ban practices whereby false information or misleading presentation leads consumers to take transactional decisions they would not otherwise have taken.⁹ The regulations focus on consumers being given clear and correct information about the product, the price of the product, the trader's practices and the consumer's rights.
- 2.14 An example of a misleading statement regarding products is where a trader states that a satellite television package includes free channels, when in fact they have to be paid for. Examples of other misleading statements include claims that a product is heavily discounted when it is not, or marketing a product so as to create confusion regarding brand names.¹⁰

To whom do the CPRs apply?

- 2.15 The misleading information does not necessarily have to be given by the retailer. The regulations apply to all practices by traders which are "directly connected with the promotion, sale or supply of a product to or from consumers."¹¹ Thus the Regulations appear to cover the misleading statements by manufacturers or by the seller's agents (such as an estate agent). They would also apply, for example, to misleading information by so-called "aggregators". These are price comparison websites, which accept payment from, for example, insurers to provide the consumer with insurance quotes.

⁶ CPRs, Reg 2(4).

⁷ CPRs, Reg 2(5).

⁸ Health & Consumer Protection Directorate-General of the European Commission, *The Unfair Commercial Practices Directive* (2006) p 17.

⁹ CPRs, Reg 5(2).

¹⁰ Examples taken from BERR and OFT *Consumer Protection from Unfair Trading Regulations 2008 Guidance* (May 2008) pp 31 and 32.

¹¹ Art 2(d). This is transposed in CPRs, Reg 2(1).

- 2.16 It is difficult to know how far “a direct connection” with the promotion of a product would extend. One of the 31 specified unfair practices is the use of “advertorial”, where, for example, a newspaper or website provides editorial content promoting a product without making it clear that the trader has paid for it. We think that if a newspaper was paid, for example, to promote a certain brand of skis in its editorial content then it would fall within the definition. We are less certain whether a newspaper would have “a direct connection” to the promotion of a product if it simply accepted a paid advert.
- 2.17 This leads to the question of whether a consumer who invested in company shares on the basis of an incorrect auditor's report would be entitled to a remedy against the auditor. The current law is that auditors are not liable to the general public who might buy shares.¹² We think that an auditor would be held not to be “directly connected” with the promotion of shares, but it is the type of issue that might generate litigation.
- 2.18 A similar example would be where a credit rating agency misleadingly stated to the general public that a savings institution had an AAA credit rating, when in fact it was on the verge of insolvency. A depositor who had lost their life savings as a result of the insolvency may attempt to seek redress from the credit rating agency. Again the issue is whether the agency is “directly connected to the promotion” of the savings scheme.

Remedies available under the current law

Remedies where there is a contractual relationship

- 2.19 Under the current law, a consumer's primary remedies would be against the retailer or service provider with whom they have contracted. Several remedies are available.
- 2.20 The first issue is whether a representation made prior to a contract forms a part of the contract. In *Bentley (Dick) Productions v Harold Smith (Motors)*¹³ a motor dealer told the purchaser of a car that it had done 20,000 miles whereas it had in fact done 100,000 miles. The Court of Appeal held that the statement that the car had only travelled 20,000 miles was part of the sale contract. The purchaser was, therefore, awarded the difference in value between the car he bought and a car that had only travelled that distance.¹⁴ The courts will often find contractual liability where traders make false representations to consumers.¹⁵

¹² *Caparo Industries plc v Dickman* [1990] 2 AC 605.

¹³ [1965] 1 WLR 623.

¹⁴ In another case, the private seller of a car made similar representations, but they did not become a term of the contract: *Oscar Chess Ltd v Williams* [1957] 1 WLR 370. This seems to indicate that courts are more likely to find that business sellers have made promises that are contractually binding.

¹⁵ This is the view taken in J K Macleod, *Consumer Sales Law* (2002) para 11.02. *Chitty on Contracts* (29th ed 2004) para 12-003, however, concludes that these cases disclose no “decisive test”.

2.21 Contracts for the supply of goods and services are particularly likely to incorporate statements made about the goods themselves. Where a retailer has misleadingly described goods, the description will normally become an implied term of the contract and bind the retailer.¹⁶ The consumer will be entitled to the difference between the value of the goods bought, and the value of the goods had the misrepresentation been true.

2.22 Even if a representation is not included in a contract, a consumer will have a remedy where an actionable misrepresentation arises. A consumer would have to demonstrate that the trader's pre-contractual statement:

- (1) was an unambiguous false statement¹⁷ of existing fact;
- (2) was made to the consumer either individually or as part of a group of consumers; and
- (3) operated on the consumer's mind so that they relied upon it in entering into the contract.¹⁸

2.23 Having satisfied these conditions, the consumer's remedy then depends upon the type of misrepresentation. There are three levels of misrepresentations, depending on the guilt of the trader: fraudulent; negligent under the Misrepresentation Act 1967; and innocent.

- (1) To show fraud, the consumer must demonstrate that the trader who made the false statement knew it to be false, did not believe it to be true or was reckless as to its truth. The consumer would be entitled to damages for all losses sustained, however remote. They could rescind the contract.
- (2) Under the Misrepresentation Act 1967, section 2(1), the trader would be liable for damages on the fraud measure,¹⁹ "unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true". In addition, the consumer could rescind the contract unless a court awarded damages in lieu of rescission under section 2(2) of the Act.
- (3) Where the trader was blameless in making the misrepresentation, the consumer is only entitled to rescission. Again, this right may be denied by the court, which must then award damages in lieu of rescission under the 1967 Act.

¹⁶ Under the Sale of Goods Act 1979, ss 13 or 14 and the Sale and Supply of Goods Act 1982, ss 3 or 4.

¹⁷ Conduct can also amount to a misrepresentation.

¹⁸ There is sometimes said to be another condition, that the misrepresentation was "material", but *Chitty on Contracts* (29th ed 2004) para 6-036, concludes that the real rule is that the misrepresentee has to discharge the burden of demonstrating reliance, given that a reasonable person would not have relied upon the representation.

¹⁹ The Court of Appeal, in *Royscot Trust v Rogerson* [1991] 2 QB 297, held that the concept of remoteness was inapplicable, as this is true for fraud. That decision has, however, excited considerable criticism.

- 2.24 Where damages are available for misrepresentations, they are awarded on the basis of putting the consumer back into the position they would have been in if the misrepresentation had not been made. The consumer would normally receive in damages the difference between what they paid and what they would have paid without the misrepresentation. Where a misrepresentation led to a bad bargain, this measure is generous. The consumer would receive the difference between the price paid and the true value of the goods.
- 2.25 The “true value of the goods” is normally based on the value at the time of purchase. Sometimes the price decreases after purchase. If the decline in price is due to a factor which was misrepresented at the time of purchase, the consumer can claim for that price drop.²⁰ If the price declines for external reasons, it is possible that the drop can also be claimed. However, the law on this point is not clear, and academics disagree.²¹ There may be more of an incentive to litigate for misrepresentations in a falling housing market, as the potential damages may be greater.
- 2.26 Rescission is normally available to the victim of a misrepresentation. Where the consumer rescinds they must return the goods, and are entitled to a refund of any money paid. Rescission is normally allowed unless it is impossible to return what has been received, or if the consumer has taken too long. Where a long time has elapsed since the consumer discovered the truth, this will be taken to show that they have “affirmed the contract”.²²
- 2.27 Where the misrepresentation was innocent or negligent, the court has a discretion to refuse rescission, and give damages instead.²³ There is some uncertainty as to how damages in lieu of rescission are calculated and whether they are based on, or capped by, a contractual measure.²⁴
- 2.28 Finally, a claimant may bring an action under the common law tort of negligent misstatement. The advantage of such actions is that they can be brought against third parties, with whom the claimant has no contractual relationship. However, as we discuss below, the claimant must show some sort of “special relationship”.²⁵

²⁰ *Smith New Court Securities v Citibank* [1997] AC 254.

²¹ *MacGregor on Damages* (17th ed 2003) from para 40-008 states that where the fall in value in property is wholly external to the fraud at hand, the defendant would not be liable. *A Burrows Remedies for Torts and Breach of Contract* (3rd ed 2004) p 255 takes the view that “all direct consequential loss” is recoverable. *Chitty on Contracts* (29th ed 2004) para 6-056 takes the middle view, saying that damages can be recovered where a pre-existing fraud is discovered, and says that the rule “may” apply where value declines for other reasons.

²² For rescission, in general, see *Chitty on Contracts* (29th ed 2004) from para 6-100.

²³ Misrepresentation Act 1967, s 2(2).

²⁴ See *Chitty on Contracts* (29th ed 2004) para 6-098, for a discussion on the leading case on this point: *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016.

²⁵ See paras 2.33 onwards.

- 2.29 In summary, a consumer who enters into a contract following a misleading statement may be able to rely on one or more of the following remedies:

Cause of action	Remedy
Breach of contract	Contractual damages
Fraudulent misrepresentation	Tortious damages, with no remoteness limit, and rescission
Negligent misrepresentation under the Misrepresentation Act 1967	Tortious damages, with no remoteness limit, and rescission (unless the court gives damages in lieu of rescission)
Innocent misrepresentation	Rescission (unless the court gives damages in lieu of rescission)
Negligent misstatement	Tortious damages

- 2.30 For a more concrete idea of how these remedies operate in practice, we have applied them to an example. Given the difficulties with this area of law, however, the correct level of damages is difficult to calculate. The “possible damages” that we mention remain necessarily tentative.

A property developer is selling refurbished flats. They tell potential buyers that all the electrical wiring has been replaced. After having heard this statement a consumer pays £200,000 for the flat. In fact, some of the wiring has not been replaced. It will cost £10,000 to replace the old wiring and redecorate. Irrespective of this fact, the consumer had overpaid, and the true value of the flat was £180,000. The housing market has now crashed, and the flat is only worth £150,000.

Scenario 1: A term in the contract. If the statement was a term of the contract, the buyer is entitled to the value of the flat had the wiring been replaced, or the cost of repair, depending on what is reasonable.²⁶

Possible damages: £10,000.

Scenario 2: A fraudulent misrepresentation. If the statement was fraudulent the buyer could give the flat back to the developer, and receive a full refund.

Damages look at the difference between what the consumer paid and what they would have done but for the misrepresentation. It is normally presumed that the buyer would not have entered into transaction.²⁷ Whether the consumer could claim damages for the drop in the housing market is disputed.

Possible damages: either £20,000 or £50,000.

Scenario 3: A negligent misrepresentation under the Misrepresentation Act 1967. In this case, the buyer may seek to rescind the contract, but the court can intervene and award damages instead. They are limited by the contractual measure.

Possible damages: £10,000.

Alternatively, the consumer can rely on the fiction of fraud, and receive the same damages as for fraud.

Possible damages: £20,000 or £50,000.

Scenario 4: An innocent misrepresentation. No right to damages, unless the consumer attempts to rescind and is awarded damages instead.

Possible damages: £10,000.

Scenario 5: A negligent misstatement. The relationship between buyer and seller appears close enough to justify tort action. Damages would be based on the tortious measure, based on what the consumer would have done if no statement had existed. Unforeseeable losses could not be claimed.

Possible damages (if the consumer would not have bought the flat): £20,000

²⁶ See *MacGregor on Damages* (17th ed 2003) para 26-011.

²⁷ *Chitty on Contracts* (29th ed 2004) para 6-049.

Remedies against third parties

- 2.31 Under current law, statements made by manufacturers or their agents to the general public can affect the liability of the retailer in some situations.²⁸ However, the traditional rule is that the consumer's primary redress should be against the retailer, with whom they have a contract, rather than against a third party, such as a manufacturer.
- 2.32 There are some exceptions to this rule. If a manufacturer makes a specific promise to all consumers who buy their product, it may be possible to find a contract between the manufacturer and the consumer, based on the manufacturer's offer and the consumer's acceptance through conduct.²⁹
- 2.33 Outside of contractual relationships, there will sometimes be liability under the law of negligent misstatements. This can occur where there is a "special relationship" between two parties, and one relies on the negligent statement of the other. In these cases, damages may be available. A special relationship will be found to exist only where one party knew, or ought to have known, that the other party was likely to rely upon the statement.³⁰ Furthermore, the representator must know that the representee will rely on it in entering a particular transaction or type of transaction.³¹
- 2.34 This is a limited right. Lord Bingham, sitting in the Court of Appeal, highlighted that the statement must be specific to the claimant, to the purpose and to the transaction:

The statement... must be plaintiff-specific: that is, it must be given to the actual plaintiff or to a member of a group, identifiable at the time the statement is made, to which the actual plaintiff belongs. Secondly, the statement must be purpose-specific: the statement must be made for the very purpose for which the actual plaintiff has used it. Thirdly, and perhaps overlapping with the second condition, the statement must be transaction-specific: the statement must be made with reference to the very transaction into which the plaintiff has entered in reliance on it.³²

²⁸ Sale of Goods Act 1979, s 14(2D); Supply of Goods and Services Act 1982, s 4(2B).

²⁹ See *Carlill v Carbolic Smoke Ball Co Ltd* [1893] 1 QB 256. For a modern example, see *Bowerman v ABTA* [1996] CLC 451, where ABTA was contractually bound to reimburse a customer of a failed tour operator by virtue of a notice in the operator's outlet.

³⁰ *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465.

³¹ *Caparo Industries plc v Dickman* [1990] 2 AC 605.

³² *Reeman v Department of Transport* [1997] PNLR 618 at 639.

- 2.35 This quotation from Lord Bingham suggests that statements made to the general public would not usually be sufficient to establish the “special relationship” required. It is possible that an estate agent may be liable to a buyer for a statement made directly to a specific buyer in order to induce them to buy a particular property. An estate agent may also owe a duty of care to those who buy at auction in reliance on the estate agent’s description of the property.³³ However, under the current law it would be difficult to show that an agent owed a duty to any member of the public who, for example, read their website and then bought a house on the basis of what they read.

Issues to consider regarding a private right for misleading actions

- 2.36 The current private law on misleading statements is hardly a beacon of clarity. Where consumers have been misled, they will often be unsure of the applicable rights and duties. An unscrupulous trader could take advantage of the law’s complexity to deny the consumer their rights.
- 2.37 If a new private right of action were introduced, it might cure the complexity and give consumers an easy-to-understand right of action. This could persuade traders to live up to their obligations.
- 2.38 However, the most complex areas of the current law lie around how to calculate the proper level of damages. As we saw on page 12, where a property developer sold the consumer a bad bargain, which has since fallen in value and needs unexpected remedial work, the appropriate damages might range from £10,000 for the remedial work to £50,000 for the fall in value. Simply creating a new right will not cure these problems. The same difficulties that arise with the current remedies would have to be addressed in any new right.
- 2.39 If a new right were to be introduced, it would probably be conceived as being based on a breach of statutory duty, which would normally give rise to tortious damages. However, this raises the issue of whether more damages should be available for fraud, and whether (as now) a consumer should have the right to rescind a bad bargain. We return to the issue of remedies in Part 3.
- 2.40 One would also need to consider how far the new right would be an addition to the current law, and how far it would be a substitute for the existing law of misrepresentation. A substituted right might make the law simpler, but may under-compensate consumers in some cases, such as fraud.

³³ An example was reported on 18 September 2008: the buyer bought a flat, relying on the inaccurate information and pictures provided by the estate agent. The estate agents were convicted under the Property Misdescriptions Act 1991 and fined £7,500. They then settled with the buyer for an undisclosed amount. See www.propertyweek.com.

The 1991 Act cannot be used to found civil liability. Any civil action would need to establish a duty of care between the agent and buyers at auction. This is not entirely straightforward: the action appears to lie at the boundary of what the current law permits. Under a private right of redress, the buyer would find it much easier to argue the case for compensation in these circumstances. However, it would not necessarily be clear how far an estate agent’s liability would extend. An agent may find itself liable to someone who downloads particulars from a website and then buys the house, possibly through another agent.

- 2.41 Finally, careful thought would need to be given to how far parties should be made liable for their misstatements, even if they do not have a contractual relationship with the consumer. The test under the CPRs is whether the third party has “a direct connection” with the promotion of a product, while the test under the current law is whether there is a “special relationship” between the party making the statement and the party relying on it. The CPR liability is wider as it would appear to include statements made to the general public in, for example, an advertisement or website by manufacturers, estate agents, price comparison websites and newspapers containing “advertorial”.
- 2.42 However, the test of “a direct connection” is not always easy to apply in practice. The question raises difficult policy issues. It may also be useful, for example, to clarify that the regulations do not extend to the role of auditors in approving company accounts, or to credit rating agencies assessing the credit worthiness of financial institutions.

MISLEADING OMISSIONS

Practices covered by the CPRs

- 2.43 Under the CPRs traders are required to provide consumers with all the information that they need to make an informed transactional decision. The regulations prohibit any commercial practices that omit or hide material information. Nor are traders allowed to provide the information in an unclear or unintelligible manner.³⁴
- 2.44 This prohibition covers a wide range of information, and imposes a positive duty to draw the consumer’s attention to important matters. The example given is that a trader selling analogue televisions should tell consumers that the television will no longer work after the analogue signal is switched off.³⁵
- 2.45 The regulations do not require proof that the trader was aware of the omitted information. Civil enforcement proceedings may be brought in respect of a purely innocent omission. However, a trader who is prosecuted for omitting information may take advantage of a “due diligence” defence. This requires the trader to prove that the omission was due (for example) to a mistake; to another person’s default; or to another cause beyond its control.³⁶

Remedies available under the current law

- 2.46 The rule in English law has long been that there is no general duty to make disclosures during contractual negotiations, subject to certain exceptions.³⁷ This means that the fact that a trader omitted to inform the consumer of material facts does not usually give rise to a cause of action.

³⁴ CPRs, Reg 5.

³⁵ See BERR and OFT *Consumer Protection from Unfair Trading Regulations 2008 Guidance* (May 2008) p 34.

³⁶ CPRs, Reg 17.

³⁷ In particular, insurance law.

- 2.47 As we explore below, in some cases an omission may amount to a breach of an implied contractual term. However, the duties on traders under the regulations are much more extensive than under the current law.

Omissions regarding goods

- 2.48 Where a retailer fails to provide material information about goods, the circumstances will often amount to a breach of an implied term of the contract. Under section 14 of the Sale of Goods Act 1979, goods must be of satisfactory quality and fit for the purpose for which goods of that kind are normally supplied. Furthermore, if the buyer tells the seller that they are buying the goods for a particular purpose, the goods must be reasonably fit for that purpose. Therefore if there is any undisclosed defect that undermines the quality or fitness of the goods, the retailer is in breach of contract. In the example given above,³⁸ if a trader sells analogue televisions without telling consumers about the digital switchover, there is probably a breach of contract. A television that will soon stop working does not appear to be fit for its purpose.³⁹
- 2.49 However, not all omissions will necessarily make goods unfit for their purpose. Suppose a bookseller sells an expensive law book without telling the consumer that a new edition is about to be published. The previous edition is not necessarily unfit for its purpose: it is just that the new edition would be more suitable. In this example, the current law does not appear to provide a remedy, although the omission may be a breach of the regulations.

Omissions regarding services

- 2.50 With services, there is no general implied term requiring the service to be of satisfactory quality or fit for the consumer's purpose. Instead, the supplier must merely act with "reasonable care and skill".⁴⁰
- 2.51 However, it may be possible to imply a term based on normal commercial practice. Take the following example:

A consumer buys tickets for the theatre, and is not told that they will be unable to see the whole of the stage from their seats.

The theatre company is not in breach of a statutory implied term. The consumer may, however, be able to establish that, as a matter of normal commercial practice, there is an implied term that the stage is reasonably visible from all seats unless the consumer is told otherwise.

- 2.52 The problem is that this is a complex area of law, which might discourage consumer action.

³⁸ Para 2.44.

³⁹ Sale of Goods Act 1979, s 14.

⁴⁰ Sale and Supply of Goods Act 1982, s 13.

Omissions regarding land

- 2.53 Where the subject matter of a contract is land, the protection of implied terms does not exist. It is well established that the seller is under no duty to disclose facts, and omissions do not generate liability. It is a case of “buyer beware”.
- 2.54 Since 2007, sellers of residential property have been required to provide certain information in a Home Information Pack (HIP). However, only a few documents are compulsory, and even for compulsory documents a failure to provide a HIP does not render a seller legally liable to the buyer.⁴¹ For example, there is no requirement to provide a flood report, or any liability for failing to tell a buyer that a house floods frequently. However, this would be material information from the buyer’s point of view.

Omissions by third parties

- 2.55 At present, there is no liability for a misleading omission outside the confines of a contractual relationship. A private right of redress would substantially extend liability in this area. As discussed earlier, the regulations have the potential to extend liability to manufacturers, estate agents and price comparison websites who promote a product but omit material information. We think this would be one of the main ways in which a private right of redress would extend the remedies available to consumers.
- 2.56 This is particularly true in sales of land. It is worth noting that the regulations do not apply to private sellers. Thus where one private individual sold a house to another by omitting material information, the buyer would have no right to bring a court action against the private seller. However, the buyer may have a potential action against the estate agent. This means that a buyer who was not told about a problem with a house would have a strong incentive to seek compensation from the estate agent, even if the main fault lay with the individual. It is difficult to know how the courts would interpret this new liability, or how far it would extend.
- 2.57 The Government has recently taken steps towards ensuring greater disclosure in the housing market, by requiring home information packs. It has also legislated to require estate agents to be members of a redress scheme.⁴² A private right of redress for material omissions would extend this approach further. This would be particularly true if it applied to public statements by estate agents, outside the context of a specific transaction.

⁴¹ If an estate agent markets a property without or with an incomplete home information pack, they will be liable to a £200 penalty notice. It will also be treated as an “undesirable practice” under the Estate Agents Act 1979. Repeated flouting of pack duties will risk a banning order from the OFT. An individual marketing their own property may also be liable to a £200 fixed penalty.

⁴² Consumers, Estate Agents and Redress Act 2007, s 53.

Hiding material in small print

- 2.58 The CPRs say that information may be regarded as a misleading omission if it is hidden in small print. There is an overlap here with the Unfair Terms in Consumer Contract Regulations 1999. If terms are prejudicial to the consumer, and included in the small print, it is possible that a court would hold the term to be unfair. The 1999 Regulations do not, themselves, give rise to a right to damages. Instead the term is declared not to be binding on the consumer.
- 2.59 In these situations, a private right of redress would appear to give the consumer a choice. The consumer could state that the term was valid, and had been misleadingly omitted, which would give rise to a claim for damages. Alternatively, the consumer could argue that the term was unfair, and not binding (in which case it would not amount to material information). Which course was more profitable would depend on the circumstances.

Issues to consider regarding a private right for misleading omissions

- 2.60 Under the current private law, the rules on omissions are very different from those that apply to misrepresentations. One advantage of a single right across the new regulations would be to bring the two sets of rules into alignment.
- 2.61 In addition to aligning the rules, however, it would also extend them. In particular, a new right would radically alter the obligations of commercial property developers and estate agents. While there may be good arguments for such an extension, BERR would need to consult carefully on the scope and effect of such changes, and prepare an analysis of their costs and benefits.
- 2.62 Introducing a private right of redress would also extend liability to other agents and promoters, including price comparison websites. It should be considered whether the benefits of such an extension outweigh the costs.⁴³
- 2.63 One would also need to think through the potential defences. There are several possible approaches. An aggrieved consumer could be given a right of action:
- (1) only if they could show that the trader was aware of the omitted information;
 - (2) only if they could show that the trader should have been aware of the omitted information;
 - (3) not if the trader were able to establish a due diligence defence; or
 - (4) in all circumstances, irrespective of the trader's knowledge (strict liability).
- 2.64 Strict liability would appear overly harsh. It would mean that agents would be liable for failing to inform purchasers of facts of which they were not aware. On the other hand, it may be difficult for a consumer to prove actual knowledge.

⁴³ See below, paras 4.6 to 4.9.

AGGRESSIVE PRACTICES

Practices covered by the CPRs

- 2.65 Aggressive practices involve “harassment, coercion or undue influence”.⁴⁴ The regulations prohibit traders from using such conduct to impair the average consumer’s freedom of choice, where this would cause the consumer to take a different transactional decision.
- 2.66 Undue influence has a particular meaning under the regulations. It is defined as:
- Exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer’s ability to make an informed decision.⁴⁵
- 2.67 Regard must be had to a number of factors, including the timing, location, nature and persistence of the trader’s conduct. The regulations specify that a trader who is aware of a misfortune in the consumer’s life is not allowed to exploit that factor. It is also considered aggressive to impose onerous non-contractual barriers to the exercise of contractual rights, or to threaten to take action that cannot legally be taken.
- 2.68 An example of conduct covered by this prohibition is where a consumer owes money to a trader and the trader offers to reschedule the debt on condition that further products are bought.⁴⁶ A mechanic who refuses to return a car until the consumer has paid for extra, unagreed, work is also in breach.⁴⁷

Remedies available under the current law

- 2.69 In protecting people from aggressive practices, the current law relies upon the doctrines of duress and undue influence. With some of the behaviour covered by the regulations, these doctrines will bite, and allow the consumer to undo the contract. So, with the two examples cited in the paragraph above, the modern doctrines of duress of goods and economic duress would appear to give a remedy to a wronged consumer.⁴⁸
- 2.70 There are some unfair practices, however, where it appears that the consumer may be left without a remedy. Two hypothetical situations are considered below.

The bullied vulnerable consumer

- 2.71 Consider this example:

⁴⁴ CPRs, Reg 7.

⁴⁵ CPRs, Reg 7(3)(b).

⁴⁶ Example taken from Health & Consumer Protection Directorate-General of the European Commission, *The Unfair Commercial Practices Directive* (2006) p 14.

⁴⁷ From BERR and OFT *Consumer Protection from Unfair Trading Regulations 2008 Guidance* (May 2008) p 41.

⁴⁸ For details of these actions see *Chitty on Contracts* (29th ed 2004) para 7-009 onwards.

A vacuum cleaner salesperson enters the house of a vulnerable consumer and refuses to leave when asked, always insisting that there is one more remarkable feature of the vacuum cleaner that needs to be demonstrated. The consumer ends up purchasing the vacuum cleaner in order to get rid of the salesperson.

- 2.72 There are specific rules relating to contracts made during visits to consumers' homes.⁴⁹ These give a consumer the right to withdraw from any contract concluded during such a visit within seven days. The European Commission has recently proposed extending this period to 14 days.⁵⁰ The more difficult issue is whether the law provides redress even if the consumer fails to act within the seven or 14-day period allowed.
- 2.73 This conduct would probably not amount to undue influence, which is normally applied to transactions within a relationship in which one person has come to trust the other. The essential element of the doctrine has been described as taking "unfair advantage" of the other or assuming "a role of dominating influence".⁵¹ The vacuum cleaner salesperson has not so much "dominated" the consumer's mind; the practice is more aimed at wearing down the consumer's willingness to say "no".
- 2.74 We are not sure whether the consumer would be able to establish duress in this situation. Duress will not be established unless there is some kind of illegitimate pressure. The categories of illegitimate pressure currently recognised are threats to the person, goods or economic rights.⁵² In the example the pressure by the salesperson could, at most, be characterised as an implied threat not to leave until the vacuum cleaner was sold.
- 2.75 More generally, however, duress has been said to rely on consent procured through pressure that "the law does not regard as legitimate".⁵³ It may be that the mere fact that conduct is in breach of the CPRs is sufficient to convince the court that illegitimate pressure has been applied, so as to allow the consumer to undo the contract.
- 2.76 Even if the trader's conduct amounted to duress, the consumer would lose their right to complain if they took no steps to undo the transaction after escaping from the pressure.⁵⁴

A harassing debt collector

- 2.77 In this example:

⁴⁹ Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987 No 2117.

⁵⁰ European Commission's proposal for a Directive on Consumer Rights, COM (2008) 614/3.

⁵¹ *National Westminster Bank plc v Morgan* [1985] AC 686 at 707b, by Lord Scarman.

⁵² The three categories are listed in *Chitty on Contracts* (29th ed 2004) from para 7-007, though they are not said to be exhaustive.

⁵³ *Universe Tankships of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 384, by Lord Diplock.

⁵⁴ *North Ocean Shipping Co Ltd v Hyundai Construction Ltd* [1979] QB 705.

A consumer owes £5,000 to a mail order company, and is approached by a debt collector. The debt collector threatens the consumer with criminal proceedings unless they pay their bill. Not knowing the law, the consumer pays the debt and is subsequently unable to keep up with their mortgage repayments.⁵⁵

- 2.78 The concepts of duress and undue influence can do nothing to help this debtor; the payment of the debt was satisfaction of a pre-existing contractual obligation. No new contract has been formed by the payment of the debt, so there is no contract to undo.
- 2.79 Harassing conduct that takes place more than once does give rise to a civil claim.⁵⁶ However, the remedies available would be limited. Traditional measures of damage tell us that the harassed debtor has suffered no financial loss. The payment to the mail order company was satisfaction of a debt genuinely owed, and the debtor's financial position has not, therefore, changed. Damages for harassment can reflect the distress caused, but it is hard to know how much the consumer could expect to receive. On a practical level, the consumer was denied the choice between the catalogue debt and the mortgage payments. However, this is unlikely to be reflected in an award for damages.

Issues to consider regarding a private right for aggressive practices

- 2.80 There are some practices that would fall foul of the regulations which current law does not cover. In particular, traditional definitions of the doctrines of duress and undue influence may leave some gaps.
- 2.81 One possible solution would be to amend the law of duress, to include any form of illegitimate pressure.⁵⁷ This would mean that, if a consumer were to enter into a contract as a result of an aggressive practice, and took the case to court, the fact that the CPRs had been breached should be sufficient to establish the presence of illegitimate pressure. It might be possible for the courts to adopt a flexible approach to this issue without statutory intervention.
- 2.82 If a new right was seen as necessary, the main policy questions concern the remedy that should be given to a victim of such conduct.

⁵⁵ Other examples are included in BERR and OFT *Consumer Protection from Unfair Trading Regulations 2008 Guidance* (May 2008) pp 43 and 74. Such actions are said to be aggressive.

⁵⁶ Protection from Harassment Act 1997, s 3.

⁵⁷ This could have far-reaching consequences. Duress is a common law doctrine, and applies equally in commercial transactions.

- 2.83 For the first example (where a vulnerable consumer was bullied into buying a vacuum cleaner) the most obvious remedy would be to allow rescission. It seems right that the consumer should be entitled to give back the vacuum cleaner and receive a refund of the price paid. However, there is a real question about how long this right should last for. The cooling off period for doorstep selling (seven to 14 days) seems too short. On the other hand, six years seems too long. By then the vacuum cleaner may well have reached the end of its natural life. One possible solution may be to allow the consumer to receive the purchase price less an allowance for the use they have had from the vacuum cleaner.
- 2.84 In the case of the harassed debtor, the law of duress would not help, as the consumer has not entered into a contract. Here it is essentially a policy question as to what the debtor should receive. Given that the payment satisfied a real debt, the appropriate remedy will depend upon how one views the debtor's case. There are at least four options:
- (1) To do nothing, and to leave the regulation of debt collection to public enforcers.
 - (2) To award damages for provable financial losses (and, perhaps, distress) attributable to the pressure, but not to undo the payment.
 - (3) To give the money back to the consumer, and to resurrect the debt.
 - (4) To award the consumer damages on a punitive basis.

In deciding on the appropriate solution, BERR would need to consult with relevant stakeholders. There is a tension between the goal of deterring aggressive practices and the danger of encouraging inappropriate litigation.

THE 31 SPECIFIED PRACTICES

Practices covered by the CPRs

- 2.85 There are 31 "commercial practices which are in all circumstances considered unfair".⁵⁸ They are largely made up of practices that are misleading or aggressive. The importance of the list is that they are automatically unfair, and enforcers do not need to demonstrate that an average consumer has taken a different transactional decision because of them.
- 2.86 The practices listed range from displaying a trust mark without authorisation to promoting pyramid schemes. As they are so varied, we have dealt with the more difficult issues in Appendix A. However, many of the practices involve misrepresentations or pressure, and are covered by the discussion above.

⁵⁸ CPRs, Sch 1.

- 2.87 Having reviewed the practices, it appears that private rights currently exist in a majority of cases. There are some situations, however, in which there are no such rights.⁵⁹ Even where there are “gaps”, however, the provision of a new right would not always solve the problem, as damages would often be impossible to calculate.

Issues to consider regarding a private right for the specified practices

- 2.88 There is one major difference between the list of unfair practices and misleading/aggressive conduct. There is no requirement that a transactional decision be affected by the trader’s behaviour.
- 2.89 In discussing a new private right, it can be asked what the claimant should have to establish in order to show that they were influenced by the unfair practice in order to bring a claim.
- 2.90 Generally speaking, many of the 31 specified practices focus on situations in which the consumer is not forced to purchase anything, but where the situation increases the pressure upon them to buy. Such practices include “bait and switch” marketing,⁶⁰ encouraging “pester power”⁶¹ and “making persistent and unwanted solicitations by telephone, fax, or email”.⁶² These practices all involve the trader putting the consumer in a position in which the path of least resistance is to purchase something. Having driven to a shop in order to buy a cheap advertised television, which was never really available, it is simpler to buy a different model than to shop elsewhere.
- 2.91 In Part 3, we return to the question whether there might be a right to damages for persistent phone calls, or for wasted visits to shopping centres, even if the consumer refuses to buy the product in question.
- 2.92 Even if the consumer does buy the product, damages may not be an appropriate remedy. The television bought at a “weak moment” might still be a good purchase, and result in no damages.
- 2.93 Alternatively, the parallel could be drawn with the rules on doorstep selling. Consumers who buy things when caught off their guard at home are given the chance to withdraw from the contract within a set number of days.⁶³ It may be appropriate to allow consumers with a right to withdraw from the contract, but careful thought would need to be given to how long this should last. Moreover, a withdrawal period may be inappropriate for other breaches of the 31 practices.

⁵⁹ No remedy appears to be available in some situations under the following practices (numbers taken from CPRs, Sch 1): 5, 6, 11, 20, 28, 31(b).

⁶⁰ Practice 6, discussed from para A.8, below.

⁶¹ Practice 28, discussed at para A.37, below.

⁶² Practice 26.

⁶³ However, this may be longer. If the trader has failed to provide the correct information, the period can extend up to three months: see The Consumer Protection (Distance Selling) Regulations 2000 SI 2000 No 2334, Reg 11.

PRACTICES CONTRARY TO THE REQUIREMENTS OF PROFESSIONAL DILIGENCE

Practices covered by the CPRs

- 2.94 The regulations include a general prohibition on practices that contravene “the requirements of professional diligence” which distort the economic behaviour of the average consumer.⁶⁴ This prohibition was included in the UCPD to ensure that the legislation will stand the test of time, so that future practices that are also unfair will be covered.⁶⁵
- 2.95 The term “professional diligence” is briefly defined in the regulations, as the standard of skill that a consumer can reasonably expect of a trader, based on “honest market practice” or “good faith”.⁶⁶ Despite this definition, it is hard to know how this principle will operate in practice.
- 2.96 Criminal sanctions are available for other breaches of the CPRs without the prosecution needing to prove anything more, subject to the due diligence defence. With the general prohibition, however, it was decided that a mental element should be introduced. A trader is not guilty of a crime under this heading unless it can be shown that it engaged in the prohibited practice “knowingly or recklessly”.⁶⁷

Remedies available under the current law

- 2.97 Given how difficult it is to know what might contravene this provision, we have not been able to assess how far current law covers unfair commercial practices under this heading.

Issues to consider regarding a private right for conduct contrary to the standards of professional diligence

- 2.98 Given the unclear limits of the scope of this prohibition, extending a new right could have unexpected consequences.
- 2.99 For criminal cases there is, unusually, a mental element that must be proved. If a private right of action were introduced, the inclusion of a similar mental element needs to be considered.

⁶⁴ CPRs, Reg 3(3).

⁶⁵ As stated in Health & Consumer Protection Directorate-General of the European Commission, *The Unfair Commercial Practices Directive* (2006) p 14.

⁶⁶ CPRs, Reg 1.

⁶⁷ CPRs, Reg 8.

- 2.100 It can also be asked whether the ambiguity around the definitions makes it appropriate for private actions. With public enforcement, businesses can be relatively confident that enforcement authorities will only rely on this section where a real problem has emerged. Private parties, on the other hand, will not be inhibited in relying on the general clause. Before a new right could be introduced, it would be important to estimate whether the costs of vexatious, or at least overly hopeful, litigation would outweigh the benefits.

PART 3

THE INGREDIENTS OF A PRIVATE RIGHT

- 3.1 If a case can be made out for the introduction of a new right, then the ingredients of that cause of action would need to be considered.

WHO CAN CLAIM?

Just consumers?

- 3.2 We have assumed for the purposes of this paper that a new private right of redress would only provide remedies for consumers. It would not cover those who suffer damage in the course of their business.
- 3.3 Clearly, businesses may be disadvantaged by another trader's unfair commercial practice. One of the 31 specified practices is

promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.¹

- 3.4 When Trader 1 packages goods to look like those of Trader 2, then Trader 2 may suffer damage. In the course of this short paper, however, we have not considered how far the current law of passing off protects Trader 2, or whether there should be any extension in this area. This paper only considers the possibility of redress for consumers.

Only those who have made a transactional decision in relation to the product?

- 3.5 The regulations, as currently drafted, are based on the idea of public enforcement and not private litigation. So, in the CPRs, enforcers need to look at the effect of a commercial practice on the average consumer, or the average consumer within a particular group. If an average consumer would not have entered into a transactional decision on the basis of the commercial practice, it is usually not unfair.² It does not matter whether any individual consumer changed their behaviour because of the practice.
- 3.6 It can be asked how this will translate into a private law claim. Having shown that an average consumer would have entered into a transaction, would the claimant also have to demonstrate that *they* entered into a transaction on the basis of the commercial practice?
- 3.7 This is particularly relevant in the case of the 31 practices deemed to be automatically unfair. In these situations, too, should the claimant relying on a private law right have to demonstrate that they took a transactional decision as a result of the automatically unfair practice?

¹ Practice 13.

² Except for the 31 specified practices, which are automatically unfair.

- 3.8 It may be possible for a consumer to suffer loss, even if they do not buy the product with which the trader has a connection. Take this example of “bait” advertising:

An out-of-town hypermarket advertises flat screen TVs for only £100. A consumer takes time off work and drives 20 miles to visit the shop. In fact, no TVs are available at that price. The shop attempts to sell the consumer another product, but they leave without buying anything.

- 3.9 The trader has committed an unfair commercial practice. However the unfair practice has not caused the consumer “to take a transactional decision he would not have taken otherwise”. It is true that in some circumstances failing to buy a product might qualify as a transactional decision. However, in this case, the failure to buy a product was not caused by the unfair practice. The consumer would not have bought anything from the trader even if the trader had not placed the advertisement. The question is whether the consumer should be entitled to compensation for their lost wages and wasted petrol, even in the absence of a qualifying “transactional decision” within the meaning of the regulations.
- 3.10 Another example might be where the trader has pestered the consumer with a series of nuisance phone calls and visits, but the consumer had not taken a transactional decision as a result. This also raises the question of whether the consumer should be entitled to compensation for distress and inconvenience, which we discuss below.

WHO WOULD BE LIABLE?

- 3.11 The CPRs cover transactional decisions even if the transactions are not made with the party committing the unfair commercial practice.³ This means that a consumer, relying on a private right under the CPRs, could pursue a defendant with whom they have no contractual relationship.
- 3.12 This would extend the current law. As we discussed in Part 2, one example of this is where a consumer purchases goods on the basis of misleading information from a manufacturer or from a price comparison website. At the moment, statements made by manufacturers or their agents to the general public can affect the liability of the retailer in some situations.⁴ However, as we have seen, the law limits the extent to which claimants may bring actions based on agents’ or manufacturers’ statements to the general public in the absence of a contract.
- 3.13 This extension would also be relevant to estate agents, who would become liable for omitting material information. As discussed in Part 2, actions may be particularly common against estate agents because buyers who have not been told material information about their new house cannot proceed against the private seller. Thus there would be an incentive to bring an action against the estate agent, even if the private seller was also (or more) at fault.

³ We think that there may be some limits to the kind of transactions that are relevant: see above, paras 2.15 to 2.18.

⁴ Sale of Goods Act 1979, s 14(2D); Supply of Goods and Services Act 1982, s 4(2B).

- 3.14 Careful thought would need to be given as to how desirable this extension would be on policy grounds. It may also be helpful to clarify where the limits of liability would lie. In particular, it may be helpful to clarify that auditors would not be liable to share purchasers for negligent statements about company accounts. The position of credit rating agencies should also be clarified.

REMEDIES

- 3.15 Any private right must be coupled with appropriate remedies. The most typical legal response to a private wrong is to require the payment of damages. However, other responses are possible.

Damages

- 3.16 A private law right, based on breaches of the CPRs, would normally result in damages for the tort of breach of statutory duty.⁵ Tort damages aim to restore the consumer to the position they would have been in had they not made a transactional decision as a result of the unfair practice.
- 3.17 Many of the practices covered by the regulations relate to actions leading up to the formation of a contract. It is possible that consumers might ask for contract damages, to give them what had been promised. However, we think this would be a matter of contract law, rather than an appropriate remedy for a breach of the regulations.
- 3.18 To give a simple example: suppose a consumer is told, falsely, that if they ring a premium rate number they will win £1,000. The consumer rings the number. Tort damages would restore the cost of the phone call. Contract damages would provide £1,000. We think that the private right of redress should aim to restore the consumer to the position they were in before they made the phone call, leaving the issue of whether the consumer is owed £1,000 to contract law.
- 3.19 It may be that there is no financial loss, but that consumers want to claim compensation for distress and inconvenience. In tort, damages for distress may be available where the claimant has suffered physical injury, but are not generally payable where the loss is financial.⁶ In contract, damages for distress are only available where the avoidance of distress is a principal object of the contract.⁷ When creating a new right, a policy decision would need to be made about whether damages for distress and inconvenience should be available.⁸
- 3.20 The issue arises whether more generous damages should be available for fraudulent conduct than for unwitting mistakes. Damages that go further than compensation, which seek to punish the defendant, are not generally available within English law. Their introduction would be controversial, but could further the aim of deterring breaches.

⁵ This appears to be the basis of the right to damages for breach of the UCPD in Ireland: see Consumer Protection Act (Ireland) 2007, s 74.

⁶ For a quick overview see *MacGregor on Damages* (17th ed 2003) from para 3-011.

⁷ *Farley v Skinner* [2002] 2 AC 732.

⁸ This has been done explicitly for other breaches of statutory duty. Sex Discrimination Act 1975, s 66(4) and Race Relations Act 1976, s 57(4).

Undoing the contract

- 3.21 The law occasionally allows for remedies other than damages. In the law of misrepresentation, for example, the law sometimes allows the wronged party to “rescind” the contract. Where a contract is rescinded, each party must return to the other the subject matter of the contract. In other areas of law, European legislation allows consumers to withdraw from contracts in certain situations.⁹
- 3.22 The basic idea behind these doctrines is that the consumer is entitled to undo the contract, and be put back into the position they were in before the contract was formed. With rescission, however, the consumer must also be able to put the trader back into the position that they had been in prior to the contract. Withdrawing from service contracts, therefore, may be problematic.
- 3.23 It is notable that the doctrines mentioned are all short-term rights. European law allows for withdrawal within a fixed number of days, while the common law expects claimants to act quickly.¹⁰ In the example we gave of a vulnerable consumer pressurised by a vacuum cleaner salesman, seven or 14 days to withdraw may seem too short. However, the full limitation period (currently six years) seems too long.
- 3.24 The issue is whether BERR wishes to take a policy decision about the appropriate time for withdrawing from the contract, or whether it is content to leave the issue to the discretion of the courts. The first may be inflexible; the second uncertain.
- 3.25 If withdrawal can take place after a long time, it can be asked whether the consumer should be made to account for their use of the goods. In consumer sales law, the trader can reduce the refund given to take account of such use. However, this is complicated and causes problems in practice.¹¹

Other legal responses

- 3.26 Alternatively, legislation can provide for novel responses where necessary. In Australia there has long been a private right to bring an action against a party that has breached the consumer protection provisions of the Trade Practice Act 1974.¹² A court, when faced with a breach of the consumer protection rules, has a variety of remedies available to it. It can grant injunctions, give damages for loss (normally awarded on the tortious measure) or grant any other order as it thinks fit.¹³ These other orders can include:

- (1) A declaration that a contract is void in whole or in part;

⁹ For distance selling and doorstep selling.

¹⁰ In misrepresentation, the consumer may be said to have “affirmed” the contract if they do not rescind quickly. In duress the consumer must act quickly once the pressure on them has been removed.

¹¹ The Law Commission are currently working on a consumer remedies project, which addresses this issue: see http://www.lawcom.gov.uk/consumer_remedies.htm.

¹² For an overview of the law in this area see K C T Aldridge, *Sales and Consumer Law* (4th ed 1995) p 35.

¹³ Trade Practice Act (Australia) 1974, ss 80, 82, 87.

- (2) A declaration varying the terms of the contract;
 - (3) Directions that money be refunded or returned;
 - (4) Directions that goods be replaced or repaired.
- 3.27 Again the question arises as to how far BERR is content to leave the courts with the flexibility to develop appropriate remedies, and how far it would wish to provide consumers and traders with greater certainty.

DEFENCES

- 3.28 Under the CPRs as they stand, a trader in breach can face enforcement actions in the civil or criminal courts.¹⁴
- 3.29 In criminal proceedings, the trader is not guilty of an offence if they can show that they exercised all due diligence to avoid committing an offence.¹⁵ In addition, if the trader is prosecuted for breaching the requirements of professional diligence, the prosecuting authorities must show that the practices were engaged in knowingly or recklessly.¹⁶
- 3.30 In civil actions against traders, there are no defences. There is nothing in the regulations to stop enforcers seeking enforcement orders¹⁷ even if the trader had acted with due diligence.¹⁸ In the context of a private right of redress, this may seem harsh on traders.
- 3.31 Before any private right of action is introduced, therefore, the question of appropriate defences would need to be addressed. It can be asked whether the defences available in criminal actions should be available to a trader who is facing a private action.

¹⁴ Though it will not necessarily do so. Guidance from the Office of Fair Trading indicates that enforcers should adopt the "most appropriate means" to promote compliance with the regulations. This will often entail education, guidance or undertakings from traders. See BERR and OFT *Consumer Protection from Unfair Trading Regulations 2008 Guidance* (May 2008) from p 51.

¹⁵ See CPRs, Reg 17 for the full ingredients of the defence.

¹⁶ CPRs, Reg 8(1).

¹⁷ Enterprise Act 2002, s 217.

¹⁸ Though it is unlikely that enforcers would seek an injunction against such a trader.

LIMITATION PERIOD

- 3.32 We assume that the limitation period would be that applying generally to tort and contract claims. This is currently six years, though the Law Commission has made recommendations to reform limitation periods.¹⁹ Under our recommendations, actions should be brought within three years of the time that the consumer knew (or ought to have known) that they have a cause of action, though no claims would be allowed more than ten years after the conduct in question.
- 3.33 Under normal tort principles, time would run from the date of the damage.²⁰ We are not sure that the same should apply here. Many of the problems dealt with by the regulations involve actions leading up to a contract. This suggests that time should run from the date of any contract entered into with the trader as a result of the unfair act or omission. If there is no contract, then time could run from the date of the trader's act or omission.

EFFECT ON EXISTING RIGHTS

- 3.34 Finally, BERR would need to consider how far it is appropriate to remove existing rights (such as those under the Misrepresentation Act 1967). Simply adding to the existing law may increase complexity. However, removing rights would lead to a separation between consumer and business law, and may reduce the protection available to consumers in some circumstances.

¹⁹ Limitation Act 1980. This would change if the Law Commissions proposals in the Limitation of Actions (2001) Law Com No 270 were implemented.

²⁰ For a discussion of this issue, see Limitation of Actions (2001) Law Com No 270, paras 2.4 to 2.8.

PART 4

CONCLUSIONS

BENEFITS OF A PRIVATE RIGHT

- 4.1 A new right could bring some benefits for consumers.

Clarity

- 4.2 The principal benefit would be to clarify the law. If a consumer is treated unfairly under the current law, there is a myriad of possible legal principles that could apply. Each one has its own intricacies that may be too difficult for a consumer to understand. Even if a consumer knew all the relevant law, it would be difficult to make the point to the trader. With a single right to redress, however, the consumer could point to the regulations and reduce the room for argument.
- 4.3 However, clarity is not always possible to achieve. As we discuss below,¹ a very general right may produce its own uncertainties. And if the right is simply added to the existing law, it will add another layer of complexity.

Removal of gaps in the law

- 4.4 Alongside this simplicity, the consumer would not need to worry about any gaps in the law. In some situations it may be that there is no redress for the trader's breach. In this case, there is an intuitive attraction to the idea that the trader should be made to make good the consumer's loss.

Deterrence

- 4.5 Allowing consumers to bring actions for unfair practices could have an important deterrent effect. The enforcement mechanisms in the CPRs require public bodies to act to stop unfair practices. If consumers had a private right of action, they could support the public enforcement with private litigation, giving traders a further incentive to stop acting unfairly.

POSSIBLE PROBLEMS WITH A NEW PRIVATE RIGHT

Costs

- 4.6 Clearly, imposing greater liabilities on traders will carry costs. In some cases these costs may be predictable. In other cases they will be unpredictable.
- 4.7 In this paper we have highlighted the way in which a private right of redress might impose greater liabilities on commercial property sellers for omissions in respect of sales of land. It would also impose a potential additional liability on estate agents for statements made to the general public. We think that if BERR wishes to proceed with the idea of introducing a private right of redress it should consult carefully with property developers and estate agents on this issue. It should also commission a study of the economic effects on the housing market of imposing greater liability on commercial sellers and estate agents in this way.

¹ See paras 4.10 to 4.13.

- 4.8 We think that if BERR wishes to proceed with a private right of redress, it should also consider the effect of imposing greater liability on third parties for statements made to the general public about financial services. In Part 2, we raised the issue of the liability of auditors for statements made about the reliability of company accounts, and the liability of credit rating agencies for the creditworthiness of savings schemes. If it is decided that extensions of liability in this area would be undesirable, statements of this type should be specifically excluded from the private right of redress.
- 4.9 However, it is important to stress that these are only particular examples of the way in which a private right of redress might extend existing legal liabilities. The Directive and subsequent regulations were deliberately drafted in an open-ended way, so as to cover potential and unknown practices that might arise in the future. It is therefore impossible to provide an account of how they might be used, or the costs they would impose on traders. Introducing a private right of redress would involve a leap of faith, which could never be fully costed.

The effect of judicial discretion

- 4.10 Given the many types of breach, we do not think that it would be possible to prescribe remedies that would always be appropriate. The courts would need to be given a measure of discretion, for example, about whether to allow rescission of a contract, and if so for how long.
- 4.11 The problem with judicial discretion, however, is that it introduces uncertainty into the process. Consumer disputes are mainly for low values and rarely go to court. Therefore it would take a long time for the courts to develop a consistent approach. The main problem with the current consumer law is confusion about remedies: there is, for example, confusion about the remedies for misrepresentation² and for faulty goods.³ The danger is that consumers would be just as confused about what they were entitled to under the new scheme as they are under the existing law.
- 4.12 There are also difficult matters of policy, for example about the appropriate remedy for aggressive debt collection. The problem with leaving policy decisions to judges in this way is that a decision which appears fair in the particular circumstances of an individual case may have undesirable ramifications for the wider industry.
- 4.13 BERR will need to consider how far the legislation should attempt to give guidance to the courts about the appropriate remedy in particular cases. For example, what sort of remedies should be available for aggressive debt collection, and how long should a bullied vulnerable consumer have to withdraw from a contract? The challenge would be to draft legislation in a way that gives appropriate guidance without becoming inflexible and unwieldy.

² See above, paras 2.19 to 2.30.

³ For a discussion of the problems, see Law Commission and Scottish Law Commission, *Consumer Remedies for Faulty Goods* (2008) (Joint Consultation Paper, Law Com No 188; Scot Law Com 139) at http://www.lawcom.gov.uk/consumer_remedies.htm.

The current law

- 4.14 Another factor affecting the apparent simplicity of a new right would be the current law. A new right could be created without changing the current rights of action. This would add a new layer of rights and remedies, and could be said to make the law more difficult. In Part 2, for example, we mentioned five possible causes of action where there is a misrepresentation. By creating a new right, consumers could rely on a sixth.
- 4.15 Alternatively, the new right could replace existing types of actions. The CPRs themselves removed a swathe of pre-existing, complicated, law in favour of a “principles” approach. It might be thought that the same approach would be appropriate here. It would, for example, be possible to repeal the current law of misrepresentation – and, perhaps, duress – in so far as it is applied to consumers.
- 4.16 Repealing existing law, however, may have its problems. It would mean that the law was radically different between consumer contracts and commercial contracts. It may also leave the consumer in a worse position in some situations. For example, if one abolished the different types of actionable misrepresentation (including fraud at common law and those arising under the Misrepresentation Act 1967) consumers may receive a lower measure of damages than they currently would where the trader has been fraudulent.

Other possible consequences

- 4.17 The regulations, as they stand, represent public regulation of commercial practices. They allow the Office of Fair Trading and other enforcers to ensure that the worst practices are eradicated. It seems likely, however, that they will also play a “softer” role in allowing enforcement agencies to negotiate with industry. For example, an industry might be persuaded to end a particular practice through negotiation. A private right could undermine such efforts, if agreements carried with them the threat of litigation. Rules that are useful for public enforcement may not always be suitable to form a private right.
- 4.18 It is difficult to know what kind of litigation a new private right of action would generate. It may possibly generate a large number of small claims, where consumers feel aggrieved by the actions of particular traders and wish to test the new right. This would have costs for the court system.

OTHER OPTIONS FOR REFORM

- 4.19 It is possible that the law could be improved without introducing a new right of action under the CPRs. If changes were made within existing structures, it seems less likely that unforeseen consequences would cause significant problems.

Reform of the current rights of action

- 4.20 Many of the complications discussed above can be blamed on the law of misrepresentation. This is a field that is ripe for reform. The Law Commission has, in the past, considered undertaking such a project, but it was felt that other issues were more urgent.⁴ The introduction of the CPRs, however, could provide the impetus needed to look again at this area of law. In particular, the lack of any remedy for non-disclosure is an issue that should be considered.
- 4.21 Alongside this, the law of duress could be looked at, in order to clarify whether aggressive practices under the regulations should be automatically classed as a form of illegitimate pressure. This would effectively provide a right of action for those breaches of the CPRs.

A more limited right

- 4.22 An alternative way of “filling the gaps” in the regulations would be to introduce a new private right of action, but to limit that right to the areas where a right is most needed. If it was felt that the law is seriously defective in the area of misleading omissions, for example, a specific right could be created for breaches of that prohibition. It may also be possible to allow rescission for duress when a consumer has entered into a contract as a result of illegitimate pressure.
- 4.23 Though this would prevent the new right from distorting the law or leading to unforeseen consequences, it would undo many of the benefits derived from the provision of a single, easy-to-understand right. If an overarching right is not seen as desirable, the adaptation of other forms of action might make the law more coherent.

Greater use of compensation orders

- 4.24 The CPRs make it a criminal offence to engage in commercial practices that are contrary to nearly all of the regulations. All unfair practices discussed above, therefore, could lead to a prosecution. One way of filling any gaps in the law would be to allow the courts to consider the effects of an unfair commercial practice on individual consumers.⁵
- 4.25 Particularly in cases of aggressive conduct there will often be a limited number of identifiable victims. Those consumers who have suffered from the practice could be awarded compensation to protect their positions without the need to introduce new private rights. This might require an extension of the kinds of harm for which the orders can be made, given that they cannot currently compensate for distress.⁶

⁴ The Law Commission Ninth Programme of Law Reform Law Com No 293 (2005), pp 35 to 37.

⁵ This is specifically provided for in Ireland (as well as a general private right to redress): The Consumer Protection Act (Ireland) 2007, s 81.

⁶ Powers of Criminal Courts (Sentencing) Act 2000, s 130, gives the power to award compensation orders only where there is “personal injury, loss or damage”.

- 4.26 At the moment, compensation cannot be ordered in cases that are dealt with through enforcement orders under Part 8 of the Enterprise Act 2002. Another option would be to allow the courts to give compensation alongside enforcement orders, where there are clearly identified victims.

OVERALL CONCLUSION

- 4.27 The idea of a new private right of redress has its attractions. If a simple right could be drafted, it would make it easy for consumers to complain to traders who have acted unfairly.
- 4.28 On the other hand, the insertion of a few lines into the CPRs could create more problems than it would solve. The average consumer, with a small claim against a trader, could point at the right and might get the redress they seek. However, the right could equally be relied upon by well-informed, and legally advised, consumers who wish to litigate over high-value items, such as houses and investments. An attempt to solve one problem could create others.
- 4.29 Having created a new right, the current law would have to be considered. In some areas it could provide greater protection than the new rights. The present law could be maintained, but this would undermine the simplicity of the new regime. Alternatively, the old rights could be abolished, but this might have the effect of reducing consumer protection.
- 4.30 In order to stimulate the debate on a new private right we list some questions that we think should be answered before a new private right is created.

QUESTIONS

- 4.31 Many questions would have to be answered before one could confidently introduce a new right. Here are a few of the more pertinent ones:
- 1. A new right would be difficult to cost. How far do the benefits of having a simple, easy-to-understand, right of action outweigh the dangers of unexpected costs to business?**
 - 2. The creation of a new right could extend liability into new areas. The Government should consider how far this extension is desirable. In policy terms, should the new liabilities be created for:**
 - (a) traders involved in sales of land?**
 - (b) traders involved in financial services?**
 - 3. If a new right is seen as desirable, how should it be implemented? In particular:**

- (a) Should the claimant need to show that they made a transactional decision in respect of the product with which the trader was connected?
 - (b) How should the remedy be framed? Should judges be given discretion to decide between a range of remedies, or should the legislation attempt to give guidance on the appropriate remedy in specific instances?
 - (c) If the legislation should give guidance, what is the appropriate remedy for aggressive debt collection? How long should vulnerable consumers have to withdraw from contracts concluded through aggressive techniques?
 - (d) Should damages be available for distress and inconvenience?
 - (e) Would the remedy depend upon the mental state of the trader, as it does in the law of misrepresentation?
 - (f) Should there be a collective right of action?
4. Having created a new right of action should the current law of misrepresentation and duress be abolished for consumers?

APPENDIX A

PRACTICES THAT ARE AUTOMATICALLY DEEMED TO BE UNFAIR

INTRODUCTION

- A.1 This appendix focuses on some of the practices found in Schedule 1 of the CPRs. We have not looked in detail at those practices which fall squarely within the law on misrepresentation¹ or the issues regarding duress discussed above.²

PRACTICES 1 – 4: TRADE BODIES AND CODES OF CONDUCT

- A.2 The first four practices relate to traders who mislead consumers about their affiliations or endorsements. They include traders who display trust marks for which they have no authorisation. These are really just the same as misleading statements, and consumers can accordingly rely on the law of misrepresentation.
- A.3 Further, where the trader's claims refer to ability, and give out the impression that they are more qualified than they actually are, the consumer will normally have a claim for breach of contract. Indicating membership of an organisation for particularly skilled glaziers, for example, will create an implied term that the glazier will perform the job with that level of skill.³
- A.4 Where work is substandard, therefore, the representation may provide a contractual remedy. If the work is not substandard, there is no remedy in contract. There may be a remedy under the law of misrepresentation, but it would be difficult to calculate the loss.

Issues to consider

- A.5 Were a private right of redress to be introduced, it is unclear whether it would benefit consumers who engage with traders who misrepresent their qualifications or affiliations. Where work is substandard, the consumer already has a right to go to court. Where the work is satisfactory, any consumer complaining under a new private right of redress would find it hard to prove that they had suffered any loss, just as they would under the law of misrepresentation.

¹ Of the practices specified in CPRs, Sch 1, we consider the following to fall under normal misrepresentation principles and/or breach of contract claims: 1, 2, 3, 4, 7, 8, 10, 12, 13, 15, 16, 17, 18, 19, 21, 22, 23, 29, 31(a). We discuss Practices 1 to 4 below, but have not looked specifically at the others.

² Of the practices specified in CPRs, Sch 1, we consider that the following do not bring up new issues not already discussed above regarding aggressive practices: 25, 26.

³ Though the Supply of Goods and Services Act 1982, s 13 refers to "reasonable care and skill", other sources of law can lead to an increased standard (s 16(3)). *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 shows that where a person "holds himself out" as having a particular level of skill, the law will apply that level (at 892, by Lord Diplock). Though that was a tort case, the same logic applies to services contracts: see Implied Terms in Contracts for the Supply of Services (1986) Law Com No 156, para 2.21.

- A.6 One possible ground for complaint might exist where the consumer employs a builder because the builder claims, falsely, to belong to an organisation with free mediation services in the event of disputes. When the dispute arises, and the mediation services are not available, the consumer would feel aggrieved. However, a new right to redress would be of little assistance to the consumer. It would not provide the mediation sought. At most it would only help the consumer who went to court, and lost, who had to pay court fees or legal costs. Even then, it is hard to see how it would work: would the consumer who loses their first action go to court again? Would the courts only award nominal damages?
- A.7 Most traders who claim such affiliations provide services, and the provision of a right to withdraw from the contract would be difficult in practice.

PRACTICES 5 AND 6: “BAIT” AND “BAIT AND SWITCH” TACTICS

- A.8 In the list of specified practices, there are two that focus on traders’ tactics to entice shoppers through unfair advertising. The first involves advertising products at a particularly low price even though the trader has so few of those products that consumers have little realistic chance of being able to make the purchase. This is referred to as “bait advertising”. The other occurs where traders advertise one product that they then refuse to show to the customer, or where they show a defective example of the product. This is known as “bait and switch”, where the trader tries to sell a more profitable product.
- A.9 If a consumer was tempted to go to a shop on the basis of such advertising, and was then persuaded to buy a more expensive item, it is hard to see that they would have any remedy under the law at the moment. Though the trader did mislead the consumer, the most that this caused the consumer to do was to visit the shop. In the absence of any other factor, the decision to purchase the expensive item looks unimpeachable.

Issues to consider

- A.10 Though these advertising tactics should clearly be prohibited, it may be asked whether a private right of redress is appropriate in these circumstances.
- A.11 The remedy for such a private right would be difficult. If a court could only award damages, we would have to know on what basis these would be calculated. If the consumer was entitled to rescind the contract, limitation periods would be important. The consumer might not discover that the shop was in the practice of using underhand advertising until enforcement proceedings occurred. If this was after a number of years of happy use of a television it can be doubted whether a right to withdrawal is fair.

PRACTICE 9: “STATING THAT A PRODUCT CAN LEGALLY BE SOLD WHEN IT CANNOT”

- A.12 Any statement or other indication to the effect that something can be sold when it cannot is a prohibited practice.⁴ As the statement is untrue, it is a misrepresentation and the normal rules regarding such statements apply.
- A.13 One example of a commercial practice that would breach this provision is where a trader states that the consumer can become owner of goods, but those goods are in fact stolen.⁵ As property cannot pass, the practice is unfair. In this situation the consumer can make a claim under the sales contract, because it is always an implied term that the seller had the right to sell the goods.⁶
- A.14 Other products cannot be sold because the law prohibits it. Generally, in these cases, the claimant would be prevented from relying on their own criminal wrong to establish an action. A consumer who buys cannabis, for example, is not entitled to bring a court action on the basis of the contract, however poor the standard of the product, or however many lies they were told. This is because the law does not allow the consumer to found an action on an illegal contract.

Issues to consider

- A.15 Where a trader engages in this practice, the only thing that would stop a consumer from being able to claim would be the rules preventing a person from relying on their own illegal contract. These rules would equally apply to claims under the regulations, unless the regulations stated otherwise. As the law on illegality is based on considerations of public policy, there seems to be no reason why they should not apply.

PRACTICE 11: “ADVERTORIALS”

- A.16 The CPRs prohibit the commercial practice whereby a trader pays for editorial content in the media, and it is not made clear that the content has been paid for. It is required that such content be identified by words such as “advertorial” or “advertising feature”.⁷
- A.17 Consider this example:

Company A makes skis, and pays website B to write an apparently objective article in which A’s skis are recommended. Based on this recommendation consumer X buys skis from shop Y (who is not connected with A or B).

⁴ CPRs, Sch 1, practice 9.

⁵ BERR and OFT *Consumer Protection from Unfair Trading Regulations 2008 Guidance* (May 2008) p 22.

⁶ Sale of Goods Act 1979, s 12.

⁷ That these titles are sufficient is suggested by BERR and OFT *Consumer Protection from Unfair Trading Regulations 2008 Guidance* (May 2008) p 23.

- A.18 Under the current law it is difficult to see how consumer X could get any redress. The consumer has no contract with company A or website B, and shop Y is untainted by the unfair practice. There would be substantial problems in establishing tortious conduct by anyone.

Issues to consider

- A.19 If there were a private right in this situation it is difficult to see who the defendant should be: company A or website B, or maybe even shop Y. The most appropriate solution would seem to be that either, or both, of the companies engaging in the unfair practice would be liable.
- A.20 The next question is for what they should be liable. The appropriate remedy would be difficult to define. If the court could award damages based on the tort measure, they would probably be very small. The only loss that the consumer could identify is the extra price paid for the skis due to the recommendation, if it could be proved. An alternative might be to allow damages for unjust enrichment, based on the gains made by either, or both, of the companies. This would be a novel claim, which may be difficult to calculate.
- A.21 If a right to rescission were included, it would seem inappropriate here: the consumer made a contract with an innocent third party.

PRACTICE 14: PYRAMID SCHEMES

- A.22 Schemes whereby a consumer pays money, and expects to receive money for introducing new members, are prohibited. These will also continue to be prohibited under earlier legislation.⁸
- A.23 Consumers are already entitled to claim back any payments made to pyramid schemes.⁹

Issues to consider

- A.24 A new private right would add nothing to the rights already available to consumers.

PRACTICE 20: DESCRIBING A PRODUCT AS “FREE” BUT REQUIRING THE CONSUMER TO PAY

- A.25 If a product is described as free, the trader may require no more than the unavoidable costs of responding, collecting or delivering the product.
- A.26 If a consumer were to be attracted by an offer of a free gift, and entered into a contract on the basis of it, the consumer would be in a strong position. The statement would normally be seen as a term of the contract and the trader should not be allowed to resile from that. Take this example:

⁸ Fair Trading Act 1973, Part 11.

⁹ The Trading Schemes Regulations 1997 SI 1997 No 30, Reg 11.

Advertising in a magazine for a mail order catalogue states that consumers will receive a free gift of a pair of sunglasses if they get the catalogue. In fact, this only applies to consumers who order other products from the catalogue.¹⁰

- A.27 It appears likely that English law would treat this as a contractual offer, which the consumer accepts by requesting the catalogue.¹¹
- A.28 There may be some statements that are covered by these practices which are not currently covered by English law. If an advertisement uses the word “free” in a headline, but underneath explains that conditions are attached, then it would be purely pre-contractual, and no remedy would be available.

PRACTICE 24: CREATING THE IMPRESSION THAT THE CONSUMER CANNOT LEAVE UNTIL A CONTRACT IS FORMED

- A.29 Government guidance on the CPRs states some companies have sales presentations at hotels, where intimidating doormen are positioned next to doors, in order to give the impression that no one can leave before buying.¹² This kind of practice is now banned under the regulations.
- A.30 In some ways, this is similar to the persistent salesperson example used in Part 2.¹³ The consumer would be in a stronger position in regard to this practice, however, as threats of imprisonment, whether express or implied, are a recognised category of illegitimate pressure.¹⁴

PRACTICE 27: REQUIRING UNREASONABLE DOCUMENTATION FOR INSURANCE CLAIMS, OR IGNORING CORRESPONDENCE

- A.31 The regulations cover two unfair practices by insurance companies. First insurers may not require consumers to produce documents that could not reasonably be considered relevant. At present, this issue is dealt with under the Unfair Terms in Consumer Contract Regulations. A contractual term requiring the consumer to submit irrelevant documents would be considered unfair and therefore void.
- A.32 The second practice is where an insurer fails systematically to respond to pertinent correspondence. Currently, where an insurer refuses to respond to correspondence, the consumer would have a choice. They could either complain to the Financial Ombudsman Service or attempt to enforce their claim before the courts.

¹⁰ Adapted from the example given by the Health & Consumer Protection Directorate-General of the European Commission, *The Unfair Commercial Practices Directive* (2006) p 23.

¹¹ On the basis that it is a unilateral contract of the type considered in *Carlill v Carbolic Smoke Ball Co Ltd* [1893] 1 QB 256.

¹² BERR and OFT *Consumer Protection from Unfair Trading Regulations 2008 Guidance* (May 2008) p 25.

¹³ See above, para 2.71.

¹⁴ *Chitty on Contracts* (29th ed 2004) para 7-008.

- A.33 In this situation, the insurer's delay may lead to further loss. For example, the consumer may have had to pay for the house to be repaired, borrowing the money at high interest rates. The Financial Ombudsman Service would require the insurer to compensate the consumer for losses that were the foreseeable result of the insurer's unreasonable delay (provided that the consumer did everything they could to mitigate their loss). However, the current law does not permit consumers to seek damages for late payment from the courts.¹⁵ This has been criticised,¹⁶ and the Law Commission has undertaken to consider whether reform is needed.¹⁷

Issues to consider

- A.34 In practice, consumers faced with these practices could gain redress by complaining to the Financial Ombudsman Service.
- A.35 There are problems with how English law deals with the losses policyholders suffer as a result of unreasonable delay in the payment of claims. However, the practical consequences tend to be felt by businesses who cannot complain to the ombudsman, rather than by consumers.
- A.36 The provision is worded narrowly. It covers a persistent failure to answer correspondence, but would not (for example) apply where an insurer responded with an unreasonable refusal to pay. It is not clear that such a refusal would necessarily fall within the other provisions of the regulations, as it may not lead the average consumer to make a different transactional decision. If the courts are to have a power to award damages for late payment of claims, it would need to apply more broadly than just a persistent failure to respond to correspondence.

PRACTICE 28: EXHORTING CHILDREN TO BUY, OR EXPLOITING "PESTER POWER"

- A.37 The regulations ban advertisements that are explicitly directed at children. Any exhortation to children to buy a product themselves, or to persuade their parents to buy a product, is prohibited.
- A.38 Under the current private law there does not seem to be any redress for consumers in this situation.

¹⁵ *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd's Rep 111.

¹⁶ See, for example, J Lowry and P Rawlings, "Insurers, Claims and the Boundaries of Good Faith" (2005) 68(1) *Modern Law Review* 82; and M Clarke, "Compensation for Failure to Pay Money Due: A 'Blot on English Common Law Jurisdiction' Partly Removed" [2008] *Journal of Business Law* 291.

¹⁷ The Law Commission is due to produce an Issues Paper on the subject in 2009.

Issues to consider

- A.39 There are many laws that regulate advertisements, and bodies to which consumers can complain.¹⁸ There is a recognised need for public regulation. It is less clear that consumers need a private right of action where advertising (which is not false) leads them to purchase a product.
- A.40 Of course, if a product is faulty the consumer can get damages. But if the product is satisfactory, and the consumer got what they bargained for, the law does not provide a remedy.
- A.41 A parent who is annoyed by their child's pestering has reason to complain about the advertisement, but would find it very hard to prove any loss. A parent who succumbed to the pestering would again find it hard to quantify damages.
- A.42 A right to withdraw might be able to help such a parent. However, it would be of little assistance where the parent bought an outing or food product that has already been consumed. Moreover, if the parent bought a toy that the child liked returning the toy would not prove popular.

PRACTICE 30: TELLING THE CONSUMER THAT THE TRADER'S LIVELIHOOD IS IN JEOPARDY

- A.43 The CPRs prevent a trader from telling consumers that their job or livelihood will be in danger if the goods or services are not purchased. This is prohibited even if it is true.
- A.44 Under the current law there is no clear remedy for the consumer who buys on this basis, unless the statement was untrue. In that case it would amount to a misrepresentation. On the basis that it was true, the consumer would only succeed if the court were convinced that the statement was illegitimate pressure amounting to duress. As stated above, the mere fact that a breach of the CPRs was involved could be sufficient to establish this.¹⁹
- A.45 If there is a right to avoid the contract on the basis of duress, the consumer can return the goods for a full refund. It does not appear that any damages would be payable.

PRACTICE 31 (B): TELLING THE CONSUMER THAT THEY HAVE ALREADY WON AND THEN REQUIRING PAYMENT

- A.46 This practice is largely in line with practice 20, discussed above. The regulations prohibit practices whereby traders tell consumers that they have "already won" a prize, but to collect it they have to spend money. Providing that everything is qualified sufficiently obviously in the trader's literature, then the consumer currently has no right to redress.

¹⁸ The Advertising Standards Authority.

¹⁹ See above, para 2.75.