

Title: Consumer redress for misleading and aggressive commercial practices Lead department or agency: Law Commission	Impact Assessment (IA)
	IA No: LAWCOM00XX
	Date: January 2012
	Stage: Final Report
	Source of intervention: Domestic
	Type of measure: Primary legislation
Contact for enquiries: Tammy Goriely 020 3334 0281	

Summary: Intervention and Options

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

Almost two thirds of adults claim to have experienced a misleading or aggressive trade practice in the last two years. The Consumer Protection from Unfair Trading Regulations 2008 changed public regulation in this area. However, the Regulations did not change private law rights. The law giving consumers redress for misleading actions is too complex, and uses concepts which are confusingly different from the Regulations. The law on aggressive practices leaves gaps in consumer protection. This makes it more difficult to combat aggressive practices which undermine the operation of the legitimate market.

What are the policy objectives and the intended effects?

To provide simpler, clearer routes of redress for consumers who have suffered misleading and aggressive trade practices.

- Simpler law will reduce costs to businesses and remove inconsistencies between criminal and civil law.
- Clearer law will complement the public regulation of commercial practices, deterring wrongful behaviour. It will help to support a competitive consumer market place, underpinned by confident consumers.

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

Option 0: Do nothing

Option 1: Comprehensive private right of redress: Introduce a private right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008. We do not favour this option because of its uncertainty and potential costs to businesses.

Option 2: Limited private right of redress: Introduce a limited right providing redress to consumers who have entered into a contract or made a payment to a trader as a result of misleading or aggressive practices. This is the preferred option as it will target rogue traders without encouraging unmeritorious claims for minor problems.

When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved?

The Law Commission does not implement legislation.

Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?

Review is a matter for the implementing Department.

SELECT SIGNATORY Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the Chairman, Law Commission: Date:.....

Summary: Analysis and Evidence

Policy Option 1

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

Price Base Year 2010/11	PV Base Year 2011	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 82.1	High: 114.6	Best Estimate: 104.6

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	£3.75	£0.17	£5.18
High	£7.50	£0.34	£10.36
Best Estimate	£5.50	£0.26	£7.64

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

Business will bear one-off familiarisation costs of around £3.25m to £6.5m. A few unmeritorious claims may be brought, leading to annual costs of up to £330,000.

For the *public sector*, familiarisation costs for trading standards services and advice agencies may be between £0.5 and £1m. Ongoing public sector costs are minimal, at up to £14,750.

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

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	£10.50	£87.32
High	0	£15.03	£124.00
Best Estimate	0	£13.50	£112.27

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

Businesses would benefit from simpler complaint handling (around £3.5m per year) and greater sales resulting from increased consumer confidence (£5m).

Consumers would receive more compensation (between £2m to £5m).

Savings to consumer advisers are estimated at £1.53m

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

The reforms would deter misleading and aggressive practices, leading to less consumer detriment.

Consumers would find it easier to resolve disputes, saving time and experiencing less stress.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

The reforms may lead to more court cases, though it is difficult to know how many. We have assumed 500 to 1,000 additional court cases in England and Wales and 50 to 100 in Scotland. More court cases would lead to higher costs, while less use of the new law would result in fewer benefits.

We have assumed that the lack of effective redress against aggressive practices leads to a lack of confidence. The illustrative figures suggest that this lack of confidence depresses sales by 0.25% in the mobility aids market and doorstep glazing market.

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

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?		Great Britain			
From what date will the policy be implemented?		To be decided			
Which organisation(s) will enforce the policy?		Consumers and the courts			
What is the annual change in enforcement cost (£m)?		No direct effect			
Does enforcement comply with Hampton principles?		Yes			
Does implementation go beyond minimum EU requirements?		Yes			
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)		Traded: no effect		Non-traded: no effect	
Does the proposal have an impact on competition?		Yes			
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?		Costs:		Benefits:	
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	Micro	< 20	Small	Medium	Large
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
Statutory equality duties Statutory Equality Duties Impact Test guidance	Yes	21
Economic impacts Competition Competition Assessment Impact Test guidance Small firms Small Firms Impact Test guidance	Yes	21
Environmental impacts Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance Wider environmental issues Wider Environmental Issues Impact Test guidance	No	
Social impacts Health and well-being Health and Well-being Impact Test guidance Human rights Human Rights Impact Test guidance Justice system Justice Impact Test guidance Rural proofing Rural Proofing Impact Test guidance	No	
Sustainable development Sustainable Development Impact Test guidance	No	

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

No.	Legislation or publication
1	Consumer Protection from Unfair Trading Regulations 2008 (SI 1277/2008).
2	Consumer Focus, <i>Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices</i> (August 2008).
3	Office of Fair Trading, <i>Mobility aids: An OFT market study</i> (2011) OFT1374.
4	Office of Fair Trading, <i>Annual Report 2010-2011</i> (2011).
5	Office of Fair Trading, <i>Consumer detriment: Assessing the frequency and impact of consumer problems with goods and services</i> (April 2008) OFT992.
6	Department for Business, Enterprise and Regulatory Reform, <i>Impact Assessment: The Consumer Protection from Unfair Trading Regulations</i> (March 2008).
7	Ministry of Justice, <i>Judicial and Court Statistics 2010</i> (2011).
8	Legal Services Consumer Panel, <i>Regulating will-writing</i> (July 2011).
9	IFF Research (prepared for Consumer Focus), <i>Consumer Experience of the Small Claims Court</i> (October 2010).
10	Scottish Government Statistician Group, <i>Civil Judicial Statistics 2010-11</i> (October 2011).
11	Scottish Office Central Research Unit, <i>Small Claims in the Sheriff Court in Scotland</i> (1991).
12	Scottish Government, <i>Criminal Proceedings in Scotland</i> (Statistical Bulletin) 2009 - 2010 (January 2011) and 2010-2011 (December 2011).

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y ₀	Y ₁	Y ₂	Y ₃	Y ₄	Y ₅	Y ₆	Y ₇	Y ₈	Y ₉
Transition costs	5.5	0.0	0.0	0	0	0.0	0.0	0.0	0.0	0.0
Annual recurring cost	0.0	0.26	0.26	0.26	0.26	0.26	0.26	0.26	0.26	0.26
Total annual costs	5.5	0.26	0.26	0.26	0.26	0.26	0.26	0.26	0.26	0.26
Transition benefits	0.0	0.0	0.0	0	0	0.0	0.0	0.0	0.0	0.0
Annual recurring benefits	0.0	13.5	13.5	13.5	13.5	13.5	13.5	13.5	13.5	13.5
Total annual benefits	0.0	13.5	13.5	13.5	13.5	13.5	13.5	13.5	13.5	13.5

* For non-monetised benefits please see summary pages and main evidence base section

EVIDENCE BASE

INTRODUCTION

- 1.1 This impact assessment is published alongside the Law Commission and Scottish Law Commission's final report on consumer redress for misleading and aggressive practices. The Law Commissions recommend reforms to the law of 1) misleading commercial practices and 2) aggressive commercial practices.
- 1.2 For *misleading practices*, the complexity and uncertainty of the private law of misrepresentation leads to an unnecessary administrative burden on business. At present, traders need to understand two systems of law: one applying to public regulation and one to private.
- 1.3 For *aggressive practices*, private law leaves many gaps and uncertainties. This allows aggressive practices to continue, in a way which undermines the correct operation of the market in some areas, particularly in sales to vulnerable consumers.
- 1.4 Below we start with the background and the nature of the problem. We then look at the available data on how often consumers experience misleading or aggressive practices. Subsequently, we consider the rationale for intervention, the policy objectives and the options, before outlining the costs and benefits of the preferred option.

BACKGROUND

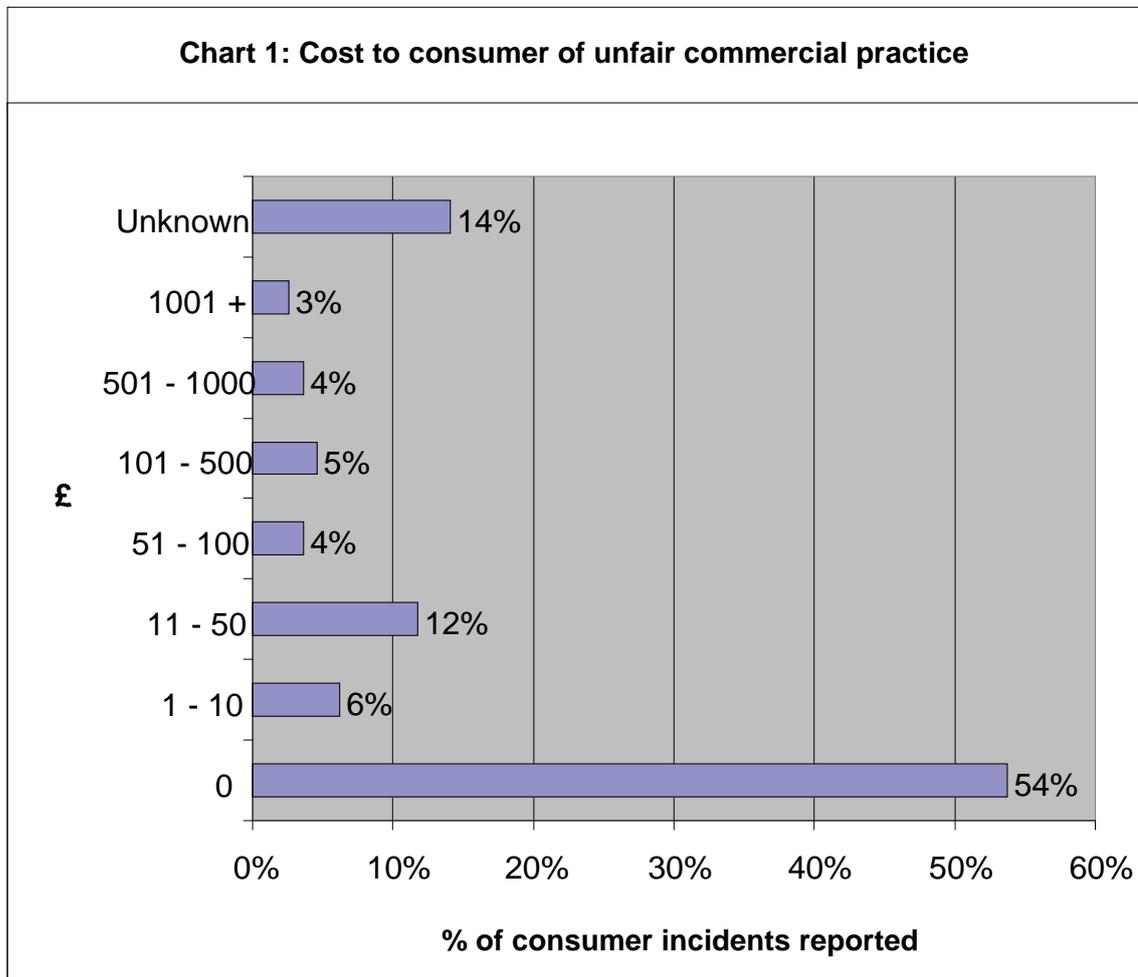
- 1.5 The Consumer Protection from Unfair Trading Regulations came into effect in 2008, and implement the Unfair Commercial Practices Directive in UK law. The Regulations replaced 22 pieces of legislation, including most of the Trade Descriptions Act 1968. They aim to prevent traders from distorting the market through misleading actions, misleading omissions, aggressive practices and some other unfair behaviours. They also list 31 "banned practices", which are considered unfair in all circumstances.
- 1.6 The Regulations are enforced by the Office of Fair Trading (OFT) and trading standards services (TSS), which have the power to bring both criminal proceedings and civil enforcement actions.¹ They do not give consumers a private right of redress where they have suffered from an unfair commercial practice. Instead, consumers seeking compensation have to rely on existing private law doctrines, such as the law of misrepresentation, duress and harassment.
- 1.7 Most misleading practices are covered by the law of misrepresentation. However, this is a technical area of law, which uses concepts that are confusingly different from the Regulations.
- 1.8 The Regulations also prohibit aggressive practices. These include doorstep salespersons who ignore requests to leave, or traders who put intimidating "bouncers" on the doors of sales presentations, to give the impression that consumers cannot leave the premises. Private law does not provide clear redress in these circumstances. For example, the law on duress (in England and Wales) or "force and fear" (in Scotland) developed in response to threats of violence to the person or goods, and do not necessarily provide remedies to those who suffer the effect of other more subtle forms of pressure.

¹ In Scotland, criminal prosecutions are conducted by the Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate.

SCALE OF THE PROBLEM

THE CONSUMER FOCUS FINDINGS

- 1.9 In 2009 Consumer Focus commissioned research into consumers' experience of unfair commercial practices generally. Consumer Focus helpfully provided us with the original tables used in the study, which we have used to estimate the scale of the problem.
- 1.10 The study found that almost two-thirds (61%) of the population had been the target of an unfair commercial practice from 2007 to 2009.²
- 1.11 Most unfair commercial practices were minor. As chart 1 shows, in over half of all cases the consumer suffered no loss. Issues such as persistent sales calls and fake wins are one of life's irritations rather than a source of loss. However, some misleading and aggressive practices can cause considerable loss. In 7% of cases, the consumer claimed to have suffered more than £500 worth of loss, and in 3% of cases the consumer claimed to have suffered more than £1,000 worth of loss. Consumer Focus calculated that the total detriment suffered by consumers as a result of misleading and aggressive practices was around £3.3 billion.



² Consumer Focus, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices* (August 2008), p 3, available at <http://www.consumerfocus.org.uk/files/2010/12/Waiting-to-be-heard.pdf>.

- 1.12 The practices most likely to lead to serious loss are shown below. Discussions with consumer groups suggested consumers were particularly worried when they had bought expensive home improvements through traders who claimed to be members of trade bodies (and to offer guarantees or dispute resolution services) only to find that the trader had lied to them. As we have seen, high-pressure door to door selling may also lead to high losses.

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

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

Source: *Consumer Focus study on unfair commercial practices (2009), unpublished tables.*

- 1.13 Given that many people suffered no loss, it is unsurprising that 57% took no action. However, 43% did make a complaint: with 34% complaining to the trader, and 9% approaching someone else.
- 1.14 Of those who approached a trader, just under half (48%) felt that the issue had been satisfactorily resolved. Of those who remained dissatisfied, most did nothing except to give the trader a bad word-of-mouth reputation. However, just over a third of people who remained dissatisfied (36%) contacted someone else at this stage.
- 1.15 The final outcome is shown in the table below. Overall, more than half of respondents (58%) reported that they had resolved the matter satisfactorily, though for some this had involved several actions.

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

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

Source: *Research report on unfair commercial practices for Consumer Focus (2009) p 17.*

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

- 1.17 These results are in line with the OFT's 2008 study into consumer detriment based on a survey of over 10,000 people.³ This also found high levels of consumer detriment. In all, it calculated that consumers suffered £6.6 billion of consumer detriment, with 17% of financial losses resulting from "misleading claims and incorrect information".⁴ This suggests just over £1 billion of consumer detriment from misleading practices. Claims involving more than £1,000 of loss were particularly difficult to resolve, with consumers reporting spending a median of 26 hours putting things right and experiencing high levels of stress, anger and frustration.

THE PROBLEM OF AGGRESSIVE PRACTICES

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

The mobility aids market

- 1.19 In September 2011, the OFT completed a market study of mobility aids, which documented the aggressive practices that may be used to sell mobility aids to elderly consumers.⁶ The OFT estimated that the mobility aids market was worth between £430 million and £510 million. It includes mobility scooters, wheelchairs, adjustable beds, recliner chairs, stair lifts and bath hoists. More than 4,000 complaints about mobility aid sales were made to Consumer Direct in each of the last three years. Purchasers are often vulnerable by reason of physical and cognitive difficulties or lack of access to the internet.
- 1.20 Traders may make misleading claims over the nature of the sales visit, giving the impression that they are working on behalf of the social services or the health service or have a link to a charity. There are also examples of aggressive practices, such as sales pitches lasting several hours, with traders refusing to terminate the visit when asked to do so.
- 1.21 The OFT found that consumers who reported high-pressure selling paid £500 to £1,000 more on average for a mobility aid, an overpayment of around 50 to 100%. They may be left with an unsuitable or unusable product, and often suffer emotional distress. The OFT commented that the impact on health and well being can be significant.⁷

³ Office of Fair Trading, *Consumer detriment: Assessing the frequency and impact of consumer problems with goods and services* (April 2008) OFT 992, available at http://www.offt.gov.uk/shared_offt/reports/consumer_protection/oft992.pdf.

⁴ Above, p 32 and para 4.4.

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

⁶ Office of Fair Trading, *Mobility aids: An OFT market study* (2011) OFT1374, available at http://www.offt.gov.uk/shared_offt/market-studies/oft1374.

⁷ Above, p 66.

Will-writing

1.22 In July 2011 a report by the Legal Services Consumer Panel showed that aggressive practices may also be a problem in the will-writing market.⁸ Again, the problem is most acute for older people in door-to-door sales. The report gives examples where high-pressure techniques led to high prices. For example, a couple who were originally told that wills would cost £35 each were pressured to pay £3,000 when visited at home.

1.23 Under Regulation 7, one factor indicating that a practice is aggressive is where the trader exploits a specific misfortune. The study found that some will-writers played on the prospect that the consumer would be forced to sell their home to pay for long-term care. The report comments that “the emotive nature of the topic, when coupled with the pressure of the salesperson” makes it difficult for the consumer to say no.⁹

THE VOLUME OF DISPUTES

1.24 We have used the Consumer Focus survey to calculate the total number of disputes over misleading and aggressive practices each year. The survey found that the total sample of 1,867 adults claimed to have experienced a total of 1,760 separate instances of unfair commercial practice in the two years – of which 598 were taken up with traders. This suggests that each year, for every 100 adults in the population, there were 16 complaints to traders over alleged unfair practices. This would lead to a total of **7.7 million complaints** to traders a year.¹⁰

1.25 Furthermore, the survey found many instances where people contacted a third party – either initially, or after failing to resolve the matter with the trader. There were 272 cases in the study where the consumer claimed to have contacted another organisation (equivalent to 7 contacts for every 100 adults in the population each year). This suggests around **3.4 million complaints** to other organisations. The most common choices were TSS, advice agencies (including Citizens Advice or Consumer Direct) or the Office of Fair Trading, though some people approached trade bodies or dispute resolution schemes.

1.26 In response to our consultation paper, trading standards services confirmed that complaints about misleading and aggressive practices were a significant issue for them. Thus Slough Trading Standards said that they received 1,400 complaints in 2010 to 2011, an increase of 15% on the previous year. Highland Council Trading Standards commented:

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

1.27 In 2010 Derbyshire County Council received 603 complaints about misleading and aggressive selling in the mobility aids sector alone.

1.28 Many complaints will be resolved quickly and easily. Many may be misguided. However, it is clear from the examples we have been given that some disputes can generate considerable bad feeling and may take several hours of a trader’s time. Given the high volume of complaints, it is particularly important that the law on private redress is clear and easy to understand.

⁸ Legal Services Consumer Panel, *Regulating will-writing*, July 2011, available at http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_WillwritingReport_Final.pdf.

⁹ Above, para 5.34.

¹⁰ Based on a total population in England, Wales and Scotland of 48.147 million adults.

RATIONALE FOR INTERVENTION

- 1.29 Misleading and aggressive practices undermine competition by reducing consumers' access to information. Misleading traders misdirect consumers through misinformation. Aggressive traders act in the same way as monopoly suppliers, restricting the consumer's ability to shop around and to choose freely from other traders. Both practices lead to market failure and justify Government intervention.
- 1.30 The existing law in this area does not work as well as it should. The complexity and uncertainty of the private law on *misleading practices* leads to an unnecessary administrative burden on business. At present, traders need to understand two systems of law: one applying to public regulation and one to private redress. The costs to businesses in complaint handling would be reduced if the private law were better aligned with the Consumer Protection from Unfair Trading Regulations, and the remedies simplified.
- 1.31 For many *aggressive practices*, the current private law does not provide a clear route to consumer redress. This makes it more difficult to combat aggressive practices, which undermine competition, distort the market and impose costs on both consumers and legitimate traders.
- 1.32 At present, the onus of combating aggressive practices falls entirely on the public sector (through TSS and the OFT and, in Scotland, the Crown Office and Procurator Fiscal Service). Public regulation is resource intensive, and resources are reducing as local authorities cut their budgets for TSS. There is a need for a wider range of sanctions in this area. This would include the greater use of compensation orders and clearer remedies for individuals bringing action on their own behalf. This requires the civil law to provide clearer, simpler remedies.

POLICY OBJECTIVES

- 1.33 The policy objectives are to:
- (1) Reduce administrative costs on businesses through clearer, simpler law;
 - (2) Combat aggressive practices which undermine competitive markets; and
 - (3) Provide consumers with more avenues for redress against rogue traders.

OPTIONS FOR REFORM

- 1.34 We have considered three options:
- (1) Do nothing.
 - (2) Introduce a private right of redress for all breaches of the Consumer Protection from Unfair Trading Regulations 2008. We do not favour this option because of its uncertainty and potential costs on businesses.
 - (3) Introduce a targeted right providing redress to consumers who have entered into a contract or made a payment to a trader as a result of a misleading and aggressive practice. This is the preferred option, as it will target rogue traders, without encouraging unmeritorious claims for minor problems.

A PRIVATE RIGHT OF REDRESS FOR ALL BREACHES OF THE 2008 REGULATIONS?

- 1.35 In 2008, the Law Commission commented that introducing a private right of redress for all breaches of the Regulations would have three advantages. It would provide a simple remedy; it would ensure full protection against all breaches; and it would have an important deterrent effect.¹¹
- 1.36 The problem, however, is that such a right would impose unpredictable costs on traders:
- 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.¹²
- 1.37 The Confederation of British Industry echoed these concerns. Businesses commented that the Regulations were uncertain, and might encourage consumers to bring small and unfounded actions. This would impose litigation costs on traders which would ultimately be passed back to consumers not involved in the litigation.
- 1.38 Businesses were particularly worried about being made liable for omissions. The Regulations impose a duty to disclose material information. "Material information" is defined as what an average consumer would require to make "an informed transactional decision".¹³ The Regulations list factors that will be relevant to helping decide about materiality where the commercial practice is an "invitation to purchase".¹⁴ Nonetheless, the criterion is still extremely vague and leads to considerable uncertainty.¹⁵ Businesses were concerned that whilst they could easily agree to provide more information, it would be more difficult to react to a multitude of varied consumer claims.
- 1.39 We are unable to cost this option adequately. Given its potential to impose considerable costs on businesses, we do not recommend this option.

THE PREFERRED OPTION: A TARGETED RIGHT

- 1.40 There are six ways in which the recommended new right would be more focused than the Regulations:
- (1) It would provide redress only to those who have entered into a contract or made a payment. It would not, for example, provide redress to those induced by a misleading advertisement to visit a shop, if they failed to make a purchase.
 - (2) It would provide redress only against the other party to the contract (or the trader to whom a payment was made). It would not provide redress against third parties, such as producers.

¹¹ Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department of Business, Enterprise and Regulatory Reform on the issues raised* (November 2008) paras 4.1 to 4.5, available at [http://lawcommission.justice.gov.uk/docs/rights_of_redress_advice1\(2\).pdf](http://lawcommission.justice.gov.uk/docs/rights_of_redress_advice1(2).pdf).

¹² Above, para 4.9.

¹³ Reg 6(3).

¹⁴ Reg 6(4).

¹⁵ H Collins, "Harmonisation by example: European laws against unfair commercial practices" (2010) 73(1) *Modern Law Review* 93, pp 105 to 106.

- (3) It would not cover land transactions or financial services. These often involve large sums, and are unsuited to the standardised remedies we are proposing. Moreover, these areas are already covered by tailored alternative dispute resolution systems.
- (4) Traders would not be liable for omissions as a specific category, but would be liable where the overall presentation of a product or service would be likely to mislead the average consumer.
- (5) It would not provide automatic redress for the 31 banned practices set out in the Regulations. Redress would only be available if the practice met the other elements of the test for liability. In particular, the practice must be likely to cause the average consumer to enter into the contract or make a payment.
- (6) It would not provide redress for breach of the general prohibition against practices which are “contrary to the requirements of professional diligence”.¹⁶ We think this is too uncertain to form the basis of private law rights.

1.41 The recommended new Act would provide a right of redress for a consumer against a trader. The consumer would need to show that:

- (1) The trader carried out a misleading or aggressive practice, within the definitions in the Act;
- (2) This would be likely to cause the average consumer to enter the contract or make the payment; and
- (3) It was a significant factor in this consumer’s decision to enter the contract or make the payment.

1.42 The recommendations adopt the definitions of aggressive practice and average consumer, with only minor alterations. As with the Regulations, in some cases the test of an average consumer would be replaced with a test of the average vulnerable consumer.

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

COSTS AND BENEFITS OF THE PREFERRED OPTION

BENEFITS

1.44 We would anticipate three benefits to the proposals:

- (1) Easier complaint handling. Legitimate traders and advice agencies would find it easier to deal with complaints of misleading practices; and TSS would benefit from simpler, easier ways of valuing consumer loss.
- (2) Consumers who have been the victim of misleading and aggressive practices would receive more compensation.

¹⁶ Article 5, implemented by Reg 3(3) of the Regulations.

- (3) Combating aggressive practices more effectively would increase consumer confidence, and therefore lead to increased sales.

1.45 We consider each in turn.

Easier complaint handling

1.46 As discussed above, complaints about misleading and aggressive actions appear common. Legitimate traders incur unnecessary costs because they need to understand two separate systems of law. They need to understand the Consumer Protection from Unfair Trading Regulations 2008 to avoid committing criminal offences. They also need to understand the law of misrepresentation to deal with individual complaints. The two systems use different concepts and rules to cover the same situations. Our recommendations would build the definitions and concepts of the Regulations into private redress.

1.47 It is difficult to calculate the benefit of this simplification. However, the evidence suggests that around 7.7 million complaints about misleading or aggressive practices are made to traders each year.¹⁷ If clearer and simpler law were to save traders 5 minutes of time for each complaint, this would reduce the costs of complaint handling by 90p. This is calculated on the basis that median pay for customer services occupations is £8.17 per hour, plus one-third non-wage labour costs. It seems reasonable to assume that there would be a reduction of this kind in at least half of the complaints received, leading to savings of around **£3.5 million** a year.

1.48 The study by Consumer Focus also suggested that consumers made 3.4 million complaints to other organisations, such as TSS, Citizens Advice or Consumer Direct. Again, assuming that clearer law reduced the time taken to deal with complaints by 5 minutes in half of all cases, this would suggest savings of **£1.53 million**. We also think that TSS may find the simpler standardised remedies reduce the work involved in seeking compensation orders before the criminal courts.

More consumer compensation

1.49 As we have seen, surveys by Consumer Focus and the OFT suggest that misleading and aggressive practices lead to considerable consumer detriment. We do not suggest that law reform will eliminate the problem. However, clearer simpler rules will make it easier for consumers to obtain compensation and deter some practices. They are intended to be applied in a variety of settings, including compensation orders in criminal proceedings, civil court action and individual negotiations.

1.50 At present, the use made of compensation in criminal proceedings appears particularly low. In 2010 to 2011, TSS brought 308 prosecutions for breaches of the Consumer Protection Regulations in the UK, which led to £68,362 in compensation orders.¹⁸ We hope that the simpler standardised remedies would increase this sum, possibly by an additional £500,000.

1.51 The reforms would also provide better redress for consumers, who bring actions on their own behalf. We do not estimate more initial complaints, but those who do complain will be more likely to be successful.

¹⁷ Based on a total population in England, Wales and Scotland of 48.147 million adults.

¹⁸ Office of Fair Trading Annual Report 2010-2011, Annex G, Table G-1, available at <http://www.offt.gov.uk/about-the-offt/annual-plan-and-report/annual-report/>.

- 1.52 In the consultation paper we tentatively estimated possible additional compensation payments of £5 million to £10 million to consumers who have suffered detriment as a result of a misleading or aggressive commercial practice. This included compensation through compensation orders, civil sanctions and around 1,100 to 5,500 additional court actions, though most compensation would be gained through individual negotiation in the shadow of the law.
- 1.53 We received little comment on this figure, though it was pointed out that the pilot on civil sanctions is not scheduled to go ahead. As we discuss below, several consultees also commented that we had over-estimated the number of additional court cases likely to be brought. It was thought important not to over-estimate the amount of additional compensation. Given the uncertainties involved, we have kept the estimate low.
- 1.54 We have therefore reduced the estimate of additional compensation to consumers to between **£2 million and £5 million**.
- 1.55 Consumers would also receive benefits in terms of fewer hours spent pursuing claims and less stress and aggravation, though we have not quantified these.

Improved consumer confidence leading to increased sales

- 1.56 The effect of horror stories about aggressive selling reduces consumer confidence, and makes consumers less prepared to buy the product. This appears to be a problem in the mobility aids market, though it applies more widely. Older consumers may be particularly worried about letting a salesperson into their house, even if they would benefit from the product on offer. Although legitimate traders have promised to abide by a code of practice which goes beyond the law and to provide compensation if the code is breached, they may still be tarred with the same brush. Indeed, a relatively common misleading practice is for firms to claim to be members of trade schemes when they are not, which undermines the whole concept of a code of practice.
- 1.57 The problem is not confined to mobility aids. The reduction in confidence produced by aggressive practices may affect all markets in which aggressive practices are known to be a problem, including all doorstep selling, time-shares and holiday clubs. These markets are substantial. In 2004, the OFT found that the market for doorstep selling for double-glazing and conservatories was worth £1.85 billion a year.
- 1.58 It is not possible to provide a precise estimate of the effect of reduced consumer confidence on lost sales. However, the consultation paper provided an order of magnitude. It argued that, given the major worries with the mobility market, aggressive practices may deter at least 1% of customers from entering the market, which would result in £5 million in lost sales in that market alone. If 0.5% of customers were deterred from buying double-glazing or conservatories on the doorstep, the lost sales would be £9.25 million, making a total across both markets of £14.25 million. On this basis we estimated that lack of consumer confidence may lead to lost sales of between £10 and £20 million year. We asked for comments.
- 1.59 On consultation, many agreed that aggressive practices undermined consumer confidence and reduced sales. The OFT commented that the effect could be substantial:

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

- 1.60 That said, these figures are uncertain, and we think it is important to keep the estimate low. On the basis that at least one in four hundred people (0.25%) who could benefit from mobility aids or from doorstep sales of double-glazing or conservatories is deterred by lack of legal protection, improved protection would boost the market by **£5 million**.

COSTS

Transitional costs

- 1.61 In 2008, when the Consumer Protection from Unfair Trading Regulations were introduced, the Department for Business, Enterprise and Regulatory Reform (BERR) estimated that businesses would incur one-off familiarisation costs in understanding the Regulations, which could amount to £12 to £27 million.¹⁹
- 1.62 This was based on 770,000 enterprises (an estimate based on the number of retail, hotel and restaurant, automotive, and personal services enterprises), of which about 99% are small businesses (the majority of which employ less than 5 people). It assumed that between one and two hours of a manager's time would be spent on this function. BERR also assumed those employing more than 50 people may take longer than two hours, and employ legal advisors for this purpose.
- 1.63 The transitional costs for this change would be less. Businesses are already familiar with the basic concepts behind the Regulations. The main changes are the remedies granted to consumers if the business infringes the Regulations. Businesses that are confident that they comply with the Regulations would not need to be concerned. Only businesses that think they may infringe the Regulations would need to become familiar with these remedies. We therefore think that it would be enough for businesses to spend 15 minutes to half an hour to read a simple guide to the changes, though some enterprises operating at the margins of legality may need to spend longer reconsidering their business model.
- 1.64 The median pay for a manager or proprietor in agriculture or services in 2010 was £12.61 per hour. Assuming one-third non-wage labour costs, the cost would be £4.20 per 15 minutes, suggesting familiarisation costs of between **£3.25 million and £6.5 million**.
- 1.65 There will also be a cost in training trading standards officers and consumer advisers. There are currently 150 trading standards services (TSS) in England, 32 in Scotland and 22 in Wales. We think that the training will be incorporated within current training programmes, though training about this issue may displace other subjects. We have estimated familiarisation costs for enforcement agencies and consumer advisers at **£0.5 to £1 million**.
- 1.66 We have also considered whether judges would need to receive training in the reforms. Most legal changes are notified to judges in a monthly e-letter circulated by the Judicial Studies Board. On further consultation and reflection, we do not think that the changes would require special training.
- 1.67 It is worth noting in passing that if these reforms were to be implemented as part of a major review of consumer law, then special training of the full range of reforms would be beneficial. These costs would need to be included in the overall Bill.

¹⁹ Department for Business, Enterprise and Regulatory Reform, *Impact Assessment: The Consumer Protection from Unfair Trading Regulations* (March 2008) p 99.

On-going costs

1.68 The main costs would fall on rogue traders, who would be forced to pay increased compensation to consumers. Better enforcement will bring some rogue traders into compliance, while others may no longer be able to continue trading. The loss to the rogues will be a gain to legitimate traders.

More court cases?

1.69 We have assumed that the number of initial complaints made to traders about misleading and aggressive practices will remain fairly static. However, if consumers fail to resolve the issue initially, more may take further action. The recommendations may therefore encourage more consumers to bring court proceedings before the civil courts. Where consumers are eligible for the remission of court fees this may result in costs to the state. It may also result in misguided complaints, which would produce costs for businesses.

1.70 In the consultation paper we attempted to estimate the number of additional court cases which may result from the reforms. This was difficult to do. The number of people who do go to court is so low that it cannot be reliably estimated from surveys of the general population.

1.71 Therefore, rather than use survey evidence of the number of potential complaints, we looked at court data from 2009 to see how many consumer claims are brought to the county court (in England and Wales) or the sheriff court (in Scotland). We suggested that new rights may add a proportion to these figures. On this basis we estimated 1,000 to 5,000 possible new actions in England and Wales, with between 150 and 750 additional hearings. Assuming that the effect of the reforms would be similar in Scotland, we thought that there may also be between 100 and 500 new actions cases raised in the sheriff court.

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

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

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

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

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

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

- 1.76 The Council of Circuit Judges was also critical of the figures, describing them as “a stab in the dark”.
- 1.77 It is impossible to predict the effect of social change on court cases. We note that the number of money claims issued in the county courts in England and Wales has been falling since 2008; and that there has been a 16% fall since our consultation paper estimate.²⁰
- 1.78 We accept the arguments put to us that the original estimates are likely to be too high. Successive studies have shown that consumers are extremely reluctant to go to court.²¹ The Consumer Focus study on unfair commercial practices, for example, shows that if consumers did not obtain redress after contacting the trader and/or another organisation, they were very unlikely to take further action. They were put off by the time, trouble and risks involved, and were extremely nervous of the legal system.
- 1.79 We think that there may be merit in the argument put by the British Retail Consortium that the reforms would have a negligible effect on the volume of court cases. It may also be that any increased incentive to litigate would be offset by increased settlement, caused by clearer law.
- 1.80 On the precautionary principle, however, we have considered that there may be some increase, though less than the number proposed in the consultation paper. We estimate an additional **500 to 1000 court cases issued in England and Wales**, leading to **75 to 150 additional court hearings**.
- 1.81 Assuming that the effect in Scotland would be similar, this would suggest an additional **50 to 100 new actions** would be raised in the sheriff court.

The effect on public funds

- 1.82 In most cases, the costs of the court hearing would be covered by the summons and court fees paid by the consumer (and in winning cases) recouped from the trader. However, some consumers (especially those on state benefits) will qualify for fee remissions, met by court funds.
- 1.83 In 2009, PricewaterhouseCoopers LLP researched court fee remissions for the Ministry of Justice.²² They found that from October 2007 to October 2008, full or partial remissions were provided in around 160,000 cases at a total cost of £23 million (or £143.75 per case). This was equivalent to 7.3% of all county court family and non-family actions started in 2008. If 10% of the new actions in England and Wales involve a remission of court fees, this would suggest between 50 and 100 grants of remissions, at a cost to the Ministry of Justice of between **£7,000 and £14,000**.
- 1.84 In Scotland, figures provided by the Scottish Courts Service show that in 2009-10, 11% of cases involved a remission of court fees, at a cost per case of £65.80. Assuming the same proportion of cases would involve a remission of fees at the same average cost, the cost to the Scottish Court Service would be between **£375 and £750**.

²⁰ From 1.46 million in 2009 to 1.23 million in 2010, see Ministry of Justice, *Annual Judicial and court statistics* (2010), Chapter 1, Table 1.1, available at <http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual>.

²¹ See, for example, H Genn, *Paths to Justice* (1999) and P Pleasence and others, *Civil Justice in England and Wales 2009*, (2010) Legal Services Research Centre, available at <http://www.justice.gov.uk/downloads/publications/lsrc/2010/2010CSJSAnnualReport.pdf>.

²² PricewaterhouseCoopers LLP, *Is the 2007 court fee remission system working?* Ministry of Justice Research Series 15/09 (December 2009), available at <http://webarchive.nationalarchives.gov.uk/20110201125714/http://www.justice.gov.uk/publications/2007-court-fee-remission-system.htm>.

The effect on traders

- 1.85 The main worry for traders is that a change in the law may encourage consumers to bring frivolous or ill-founded claims. The proposals are designed to limit this, by restricting the right of redress to clear cases of misleading or aggressive practices. A study of small claims found that 30% of claimants had the case decided in their favour at the mediation stage, and a further 39% won in court, leading to an overall success rate of 7 out of 10.²³
- 1.86 This suggests that of the additional 550 to 1,100 new cases, between 165 and 330 and may be ill-founded. If each case were to cost the trader £1,000 to defend (in management time and legal costs), this would lead to costs on businesses of **£165,000 to £330,000**.

Summary of costs and benefits*Costs and benefits to businesses*

- 1.87 The main costs on businesses will be the one-off familiarisation costs of finding out about the new law. We tentatively estimate transitional costs at between **£3.25 million and £6.5 million**. If the law generates additional court cases, there may also be some on-going costs where the trader eventually wins the case in the small claims court. We have suggested costs of up to **£330,000 a year**. Given that these costs will be spread over the whole retail sector, including goods and services, we do not think that it will involve a substantial burden on traders.
- 1.88 The costs will be offset by the benefits to businesses of simpler law and the increased sales generated by more confident consumers. We have estimated the savings to businesses as a result of simpler complaint handling at **£3.5 million a year**.
- 1.89 The greater private redress for aggressive practices would help to combat rogue traders, leading to increased consumer confidence and therefore increased sales. A conservative estimate suggests that deterring aggressive practices would increase the market by **£5 million**.
- 1.90 We have not included the costs which fall on rogue traders involved in paying greater compensation payments. The aggressive practices covered by the reforms already amount to criminal offences and are not carried out by legitimate traders.

Other costs and benefits

- 1.91 The proposals would bring benefits to consumers, who would receive greater levels of compensation for the detriment suffered from aggressive practices. We tentatively suggest that the reforms may increase compensation payments by between **£2 and £5 million**. There is also likely to be a deterrent effect, with fewer misleading or aggressive practices taking place. Furthermore, consumers would find it less time-consuming and stressful to pursue claims.
- 1.92 Consumer advice agencies would need to incur initial costs of familiarisation and training. We have not been able to cost these, but we do not think that they would be large as TSS and consumer advice agencies are already familiar with the 2008 Regulations. We tentatively estimate **£0.5 to £1 million**. This would be off-set by savings of **£1.53 million a year** in easier complaint handling.

²³ IFF Research (prepared for Consumer Focus), *Consumer Experience of the Small Claims Court* (October 2010), available at <http://www.consumerfocus.org.uk/files/2010/10/Research-Report.pdf>.

- 1.93 Other costs to the public purse would be minimal. If consumers bring additional cases through the small claims procedure, this may lead to between 50 and 100 grants of remissions, at a cost to the Ministry of Justice of between **£7,000 and £14,000 a year**. The equivalent cost to the Scottish Court Service would be between **£375 and £750**.

- 1.94 Table 3: Summary of the key annual* costs and benefits

CONSUMER REDRESS	High estimates [£]	Best estimates [£]	Low estimates [£]
Benefits:			
A. Complaint handling- Firms	3,500,000.00	3,500,000.00	3,500,000.00
B. Complaint handling - TSS etc	1,530,000.00	0.0	0.0
C. Consumer compensation	5,000,000.00	5,000,000.00	2,000,000.00
D. Improved confidence	5,000,000.00	5,000,000.00	5,000,000.00
Total (A+B+C+D)	15,030,000.00	13,500,000.00	10,500,000.00
Costs:			
<i>Transitional -</i>			
E. Familiarisation	6,500,000.00	5,000,000.00	3,250,000.00
F. Training	1,000,000.00	500,000.00	500,000.00
G. Total transitional (E+F)	7,500,000.00	5,500,000.00	3,750,000.00
<i>On-going -</i>			
H. Fee remissions	14,000.00	10,500.00	7,000.00
I. Firm claims defence	330,000.00	247,500.00	165,000.00
J. Total on-going (H+I)	344,000.00	258,000.00	172,000.00
Total (G+J)	7,844,000.00	5,758,000.00	3,922,000.00

- 1.95 * Transitional costs only occur in the first year

ASSUMPTIONS AND SENSITIVITIES

- 1.96 It is clear that misleading and aggressive practices are a significant problem, leading to considerable consumer detriment and reducing consumer confidence. However, it is less easy to predict the effect of law reform on consumer behaviour. It is particularly difficult to tell how many consumers will use the new law to obtain compensation.
- 1.97 The impact assessment has made assumptions about the number of additional small claims brought by consumers. Consumers' recourse to the new rights may be lower than predicted, leading to less benefit to consumers, but also fewer costs to the public purse, and fewer losing claims. The use may be greater, leading to higher levels of compensation claims and some additional costs on businesses.

SPECIFIC IMPACT TESTS

Statutory equalities

- 1.98 We do not think our proposals will have any adverse equality impact on any social group as defined by their race, religion or belief, sexual orientation, gender, age, or disability.
- 1.99 As we have noted above, our proposals may be particularly beneficial to the very elderly, many of whom will be particularly susceptible to misleading and aggressive practices. We think the same considerations apply to those with learning disabilities.

Competition

- 1.100 We anticipate that our proposals will enhance competition in the market in two ways. First, the deterrent effect of our proposals will reduce distortions in the market caused by unfair commercial practices. Secondly, consumer confidence generally will be enhanced by the knowledge that, with relative ease, consumers can avoid contracts which they have been misled or bullied into making.
- 1.101 Misleading and aggressive practices exploit information asymmetries and consumers' vulnerabilities to force them into an adverse selection of goods or services. Traders who secure custom by resorting to these practices deny consumers opportunities to which they would otherwise have access. While these practices are already prohibited by the criminal law, trading standards services recourses are limited, and not all enforcement action will result in criminal offences. The introduction of a civil right to damages will serve as a useful additional deterrent, reducing these distortions of the market.
- 1.102 In the absence of effective consumer redress, consumers will tend to favour better known brands. Large firms have greater goodwill and brand value to protect and therefore have greater incentives to resolve complaints. Where consumer confidence is low, consumers may reject products from small or unknown firms, even if those firms provide cheaper prices. As consumers gain in confidence, however, and feel their rights are better protected, they become more willing to buy from small firms. We believe, therefore, that implementing our proposals will help foster an environment favourable to entrepreneurialism and enhance competition.
- 1.103 **Small firms**
As we have described above, the principal benefit for small firms will be the enhancement of competition. However, this is not the sole benefit we foresee for small firms. The opportunity cost involved in dealing with a complaint will often be significantly higher for small firms than for large ones. While larger and more sophisticated firms will have mechanisms in place to deal with customer complaints, smaller firms may not have the staff to handle them. Small firms stand to save more than larger ones if the process of complaint handling can be expedited.
- 1.104 Compare, for example, a sole trader mechanic and a chain of car dealerships. The chain of dealerships will presumably have dedicated customer service staff. We have assumed above that the median pay for customer service occupations is £8.17 per hour. According to the Warranty Direct Labour Rates Survey 2010, the national average labour rate for a mechanic is £55.90.²⁴ On these figures, the independent sole trader mechanic loses almost seven times as much per hour as the dealerships when dealing with a complaint.

²⁴ <http://www.motor-trade-insider.com/index.php/2010/11/survey-reveals-mechanic-costs-are-coming-down-but-franchised-dealers-still-40-higher/>.

1.105 We do not anticipate that there will be any particular negative effect on small firms beyond minimal familiarisation costs.

Justice system

1.106 As discussed above, the reforms may increase the number of small claims in England and Wales by between 500 and 1,000 cases. Most cases will be paid for by the consumers themselves, but there may be between 50 and 100 grants of remissions, at a cost to the Ministry of Justice of between £7,000 to £14,000. The equivalent figures for Scotland are 50 to 100 cases, at a cost to public funds of no more than £750.

Other impacts

1.107 We do not consider that the proposals have any impact on greenhouse gas emissions; wider environmental impact; health and well-being; human rights; rural proofing or sustainable development.