



Unit E

Consumer rights associated with unfair trade practices

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Introduction

In addition to the basic rights in the CRA (concerned with quality, description etc.) and those in the CCRs (PCI and cancellation), consumers have some further rights which arise in connection with certain unfair practices which Ts engage in. These can be found in the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and are subject to certain criteria being satisfied. An outline of the CPRs was provided in unit A, from an enforcement angle, as these are the main piece of legislation used by LA TSS to regulate T activity. The Regulations apply to unfair 'commercial practices' (UCPs). This covers those acting in the course of a business dealing with Cs, or whose practices affect Cs. There are 5 categories of UCP but only 2 of them give rise to civil redress provisions for C. The 5 categories are:

- ✓ 31 banned practices
- ✓ misleading actions
- ✓ misleading omissions
- ✓ aggressive practices
- ✓ general unfair activities

The stages of the consumer's journey addressed in this unit are as indicated below:



The areas for discussion in relation to these rights will be considered in the following sections:

- E1: Criteria for the rights to arise
- E2: Remedies for consumer contracts
- E3: Remedies in other circumstances

E1 Criteria for the rights to arise

E1.1 Definitions [r27A]

The right to civil redress under the CPRs, arises where Ts engage in 2 of the 5 listed UCPs, if certain criteria are satisfied, and they are referred to as prohibited practices. For the remedies to be available, they must have played a significant role in C's decision to enter into a contract with that T or make a payment to them.

When a T sells a product to C, there are two main remedies. C can either unwind the sale or have a discount, in addition they may be able to claim damages as well. Some of these remedies also apply when C sells goods to T, e.g. cash for gold, or when C makes a payment to T.

These may be an alternative to traditional remedy routes, for example, a sale by description under the CRA or a false representation under the Misrepresentation Act (unit J), or in addition to such routes, e.g. when T has engaged in an aggressive practice.

So for the rights to arise, it is necessary to show the following:

- ✓ the existence of a consumer contract or other relevant transaction
- ✓ the supply of a relevant product
- ✓ a prohibited practice by T
- ✓ that the prohibited practice played a significant role in C's decision to enter into the contract or make the payment

The following definitions are important for the application of the civil remedies

E1.2 Prohibited practices [r27B]

The two UCPs, known as prohibited practices, which give rise to the redress provisions are misleading actions or aggressive practices (MAPs) and the main elements of the definitions are the same as they are for enforcement purposes:

E1.2.1 Misleading actions [r5]

A misleading action is where T's activity or practice falls into one of the following 4 categories and causes or is likely to cause an average C to take a transactional decision (TD) he/she would not otherwise have taken:

- ✓ false information is given
- ✓ overall presentation is misleading in respect of any of the items listed in the Regulations (appendix E1)
- ✓ any marketing of the product creates confusion with a competitor's products, trademarks, trade names or other distinguishing marks of a competitor
- ✓ T fails to stick to firm commitments made in a code of conduct, which he/she has undertaken to comply with

The list in appendix E1, includes, for example, issues relating to:

- the way that the goods are advertised
- the sales process used
- the use of price comparisons (*Motor Depot Ltd v Kingston Upon Hull City Council*)
- the extent of T's commitments
- the main characteristics of the goods or service, etc.
- the need for a service, part, replacement or repair (*Crimea Price v Cheshire East Borough Council*)

E1.2.2 Aggressive practices [r7]

An aggressive practice relates to the way the T behaves and whether that affects the C's freedom of choice or conduct through the use of harassment, coercion or undue influence, e.g. exploiting a position of power that T may have over C.

The CPRs list a variety of factors that should be considered here, such as:

- ✓ the timing, location, nature and persistence of the activity
- ✓ the use of threatening or abusive language or behaviour
- ✓ any exploitation of C's misfortune or circumstances
- ✓ threats to take action that would be illegal

What may be considered aggressive towards one C may not be in relation to another.

In addition, for the practice to be considered aggressive for the Regulations, it is necessary to show that it would cause or be likely to cause an average C to take a TD he/she would not otherwise have taken, e.g. putting a lot of pressure on them to buy something or make a decision that they may not otherwise have bought or made (*OFT v Ashbourne Management Services Ltd and others, R v Rodney Stone and Geoffrey Moore*).

E1.2.3 Other categories of unfair practice

It is possible that unfair practices which would usually be considered to be misleading omissions or which appear in the list of banned practices, could also amount to misleading actions or aggressive practices. Sometimes a partial omission can have the overall effect of being a misleading action, e.g. if T tells C that a vehicle was a category D write off (insurer not prepared to repair but can be repaired and returned to the road), following an accident it was involved in, when actually it was a category A write off (should have been totally crushed, including all its spare parts) this may amount to a misleading action even though T omitted to tell C that it was a category A write off.

There is also overlap between some of the banned practices [Schedule 1] and both categories of prohibited practices, e.g.

- ✓ falsely claiming accreditation by a trader approval scheme (no. 4)
- ✓ falsely claiming that a product is able to cure illnesses (no.17)
- ✓ telling C that if he does not buy the product, T will lose his/her job (no. 30)
- ✓ creating a false impression that C has won a prize when C would incur costs to claim it (no.31) (*OFT v Purely Creative*)

An unfair commercial practice which is purely a misleading omission (*R (House of Cars Ltd) v Derby Car and Van Contracts Ltd*) will not give rise to the redress provisions.

E1.3 Commercial practice [r2(1)]

A 'commercial practice' covers any act, omission, type of conduct, representation or communication (including advertising and marketing) by T (*R v X Ltd*).

E1.4 Transactional decisions [r2910 & r27B(2)]

In addition to proving that T has engaged in a MAP, C would also have to show that as a result of such trader activity, the average C is likely to take a TD he or she would not take otherwise. The definition of a TD, is more restrictive than it is for enforcement purposes. From a remedy perspective the only concern is whether C would have made a different decision with regards to actually making the contract or the payment. The wider definition, encompassing activities which take place at other stages in the transactional process, after a sale has occurred for example, will only be relevant from an enforcement point of view (*OFT v Purely Creative*).

E1.5 Average consumer [r2(2) – (6)]

The definition of an average consumer is the same as it is for enforcement purposes (*OFT v Purely Creative Ltd*) and it encompasses three different categories, as indicated in table E1.

Table E1: Definitions of average consumer in the CPRs

Average consumer	Considered to be reasonably well-informed, reasonably observant, and circumspect, i.e. cautious
Average targeted consumer	Where the commercial practice is aimed at a particular class of people
Average vulnerable consumer	Where a specific identifiable group e.g. the elderly are concerned, and T could reasonably foresee they would be vulnerable due to the commercial practice or to the underlying product

E1.6 Product [r2(1), r27C & 27D]

The definition of a product for the redress provisions, differs from that used for enforcement purposes and table E2 shows the differences:

Table E2: Differences in the definition of product for enforcement and civil redress provisions in the CPRs

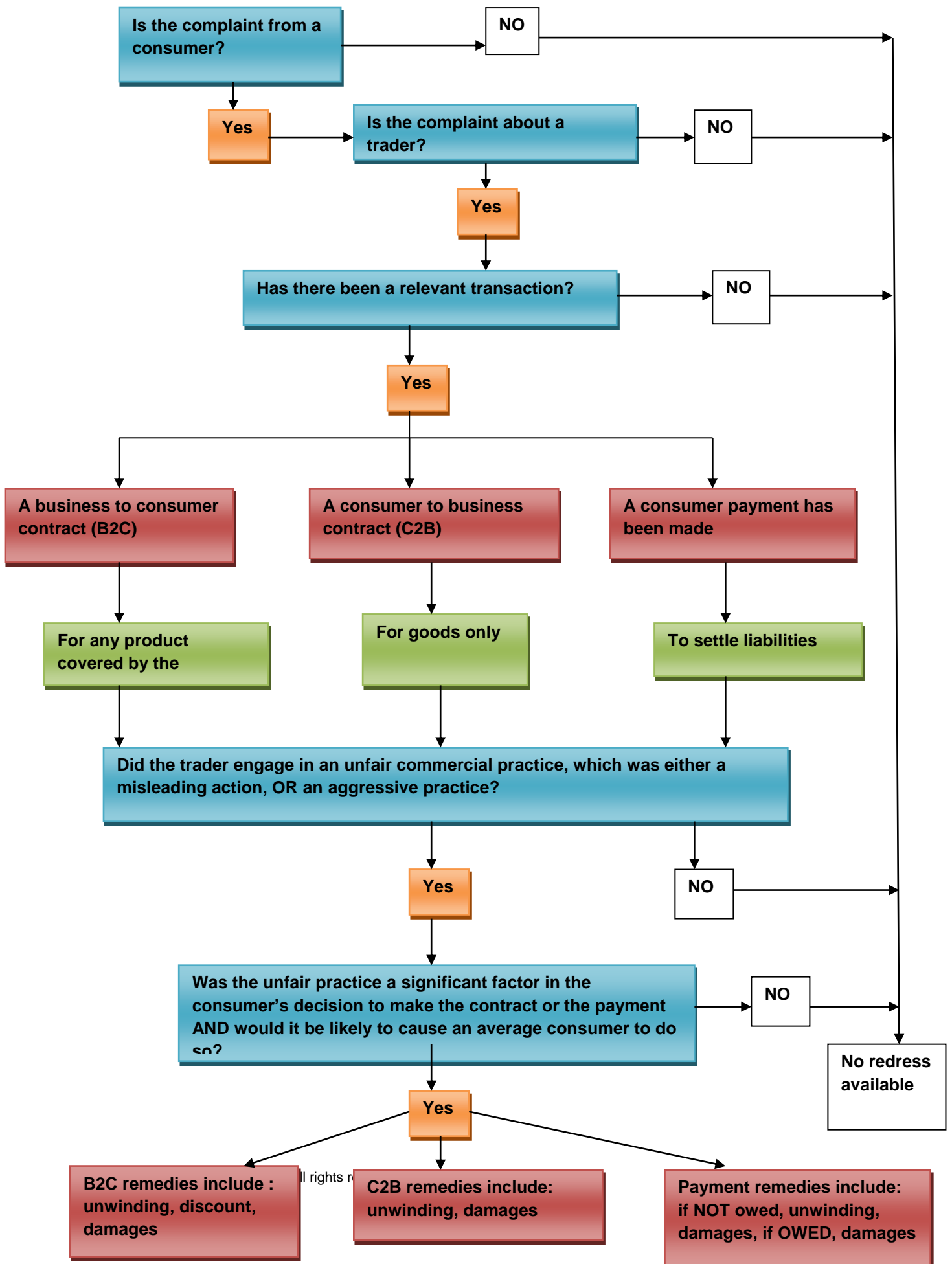
Product	Enforcement provisions	Redress provisions
Goods	✓	✓
Services	✓	Financial services are not included apart from restricted-use credit (unless it is secured by a land mortgage)
Digital content	✓	✓
Immoveable property	✓	Only relevant leases are covered, which means assured tenancies and holiday lets – social housing is not an assured tenancy
Rights and obligations	✓	✓
Full or partial settlement of a consumer's liabilities or purported liabilities in exchange for a payment	✓	✓

E1.7 Trader [r2(1)]

For enforcement purposes, a T is someone who is acting for purposes relating to their business, including when they do so through another person who acts on their behalf or in their name (*R on the application of Surrey Trading Standards v Scottish and Southern Energy PLC*). However, for civil redress purposes, a person is not treated as a T when they are acting in someone else's name or on behalf of someone else. So agents may not be Ts when it comes to considering who is liable to C and C may have to pursue the business or T using the agent, depending on the relationship between T and the agent.

Figure E1 shows the relevant steps to follow to determine whether C may be entitled to redress.

Figure E1: Is C entitled to redress under the CPRs?



E2 Remedies for consumer contracts (B2C)

Where T sells products to average Cs and engages in MAPs, remedies are available, providing the unfair practice is a significant factor, but not necessarily the only or even the main factor, in C's decision to enter into the contract. C could either unwind the contract or have a discount, and even claim compensation in some circumstances, all subject to being able to satisfy certain criteria. Figure E2 indicates how these three remedies work together.

E2.1 Unwinding a consumer contract [r27E]

A consumer can unwind, or undo, a B2C contract if they:

- ✓ do so within 90 days, AND
- ✓ have not fully consumed whatever they bought, AND
- ✓ they have not already asked for and had the discount option

There is no need to show any loss or that T acted dishonestly or negligently.

The period for unwinding must be within 90 days beginning with the later of whichever is the latest from the list below:

- the contract being signed
- the goods being delivered
- the performance of the service starting
- the digital content being first supplied
- the residential lease beginning

E2.1.1 The practicalities of unwinding

C must clearly indicate that they are rejecting what they have bought by saying or doing something to demonstrate this, e.g., by writing to T and saying that they want their money back because they were misled or bullied into buying the item [r27E(2)].

The contract will end, when C unwinds it and they should then receive a full refund, even though they may have used the goods or service for a while. If they have been supplied with any goods they must let T collect them [r27F].

E2.1.2 Unwinding continuous supply contracts [r27F(7)-(10)]

If the contract is for the continuous or regular supply of a product, e.g., electricity or broadband services, and C has had more than one month's use, then they will have to pay the market price for what has been used. This will be deducted from the refund.

However, if T's behaviour is particularly bad and its impact on C severe, then C will still be entitled to a full refund.

E2.2 Discounts for consumer contracts [r27I]

C will be able to have a discount instead of unwinding a B2C contract, if:

- the product cannot be rejected, for example, a service contract which has been fully performed, goods which have been completely consumed or digital content which has been fully downloaded, OR
- the 90 day period has passed, OR
- C does not want to unwind the contract, e.g., because they want to keep the goods or carry on with the service contract

There is no need to show any loss or that T acted dishonestly or negligently. If this option is chosen, or applies instead of unwinding the contract, the contract will continue but the discount can apply to what has already been paid and also any future payments.

E2.2.1 Calculating the discount for contracts of £5,000 and under [r27I(4)&(5)]

If C paid £5,000 or less, the percentage discount depends on the seriousness of T's activity. There are four categories, shown in table E3 with examples, and the following factors are relevant:

- the behaviour of T
- the impact of T's activity on C
- the amount of time since the activity took place

Table E3: Discount calculations for contracts of £5,000 and under

Category	Discount	Example
More than minor	25%	T misleads about the delivery date for a product
Significant	50%	A business misleads about the health benefits of a product
Serious	75%	A salesman visits C's home and greatly exaggerates how effective double glazing would be in reducing their energy bills and refuses to leave until they sign an order form
Very serious	100%	A salesman visits C's home and bullies them, as a vulnerable consumer, into signing a contract for work they do not want and misrepresents that it was required by local council regulations

E2.2.2 Calculating the discount for contracts over £5,000 [r27I(6)&(7)]

If C paid over £5,000 then the above discounts may not apply. If there is clear evidence that the market price was less than what they paid when the contract was made, then the discount is the difference between the two prices.

For example, if C bought a car, which they later found out had been clocked, Glasses' Guide could be used to check the market price of the car with its true mileage when it was purchased.

E2.3 Damages [r27J]

As well as unwinding the sale or having a discount, C might be able to claim damages from T too. This could be for any of the following, if they can show that they have suffered:

- ✓ financial loss, which was reasonably foreseeable
- ✓ alarm or distress
- ✓ physical discomfort or inconvenience

and that this would not have occurred without the MAP taking place.

However, if T can satisfy the due diligence defence, they will not have to pay any damages. They will still have to unwind the sale or give a discount though.

E2.3.1 The due diligence defence [r27J(5)]

T will not have to pay any damages if he/she can show that they took all reasonable steps and exercised all due diligence to avoid the occurrence of the MAP, and that it occurred because of one of the five reasons listed below:

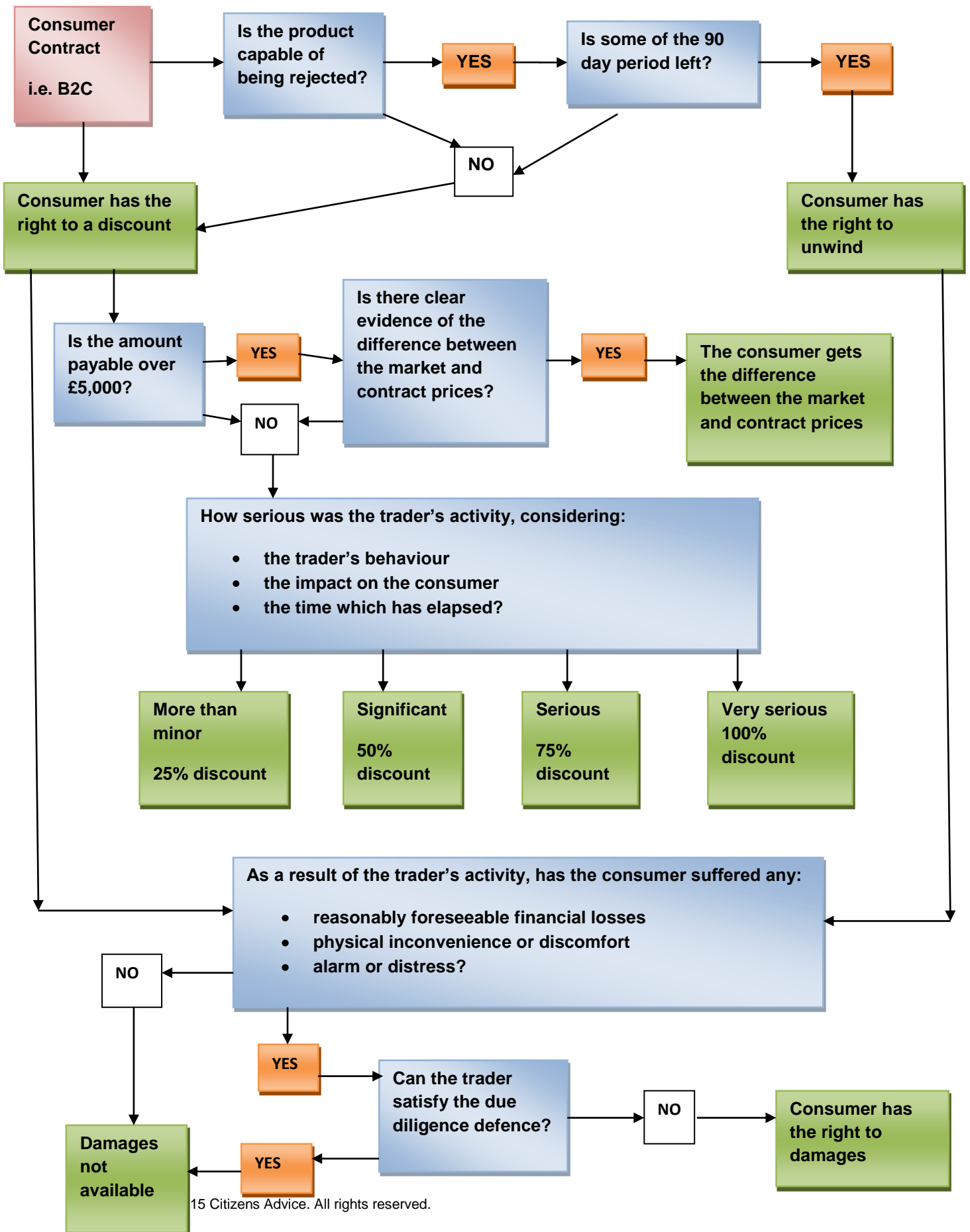
- T made a mistake
- T relied on information supplied by someone else (another person)
- it was someone else's fault
- it was an accident
- it was due to some other cause beyond T's control

This defence may be particularly relevant where T has used independent agents, e.g., to do their marketing activities, and the agents have not done as T instructed. This is because as explained in E1.6 above, a T for the civil redress provisions, does not include someone who is acting on someone else's behalf or in their name. So if C complains about aggressive selling practices by a company and independent selling agents were used, it is still the company that C needs to pursue for a remedy. However, the company may be able to satisfy the defence provisions and avoid paying damages, in which case they will only be liable for the unwinding or discounting of the contract.

For enforcement purposes, the agents may be committing a criminal offence or be subject to civil enforcement under the Regulations, even though they may not be responsible for any redress to C.

Figure E2 indicates the criteria necessary for each of the three remedies potentially available following a MAP in a consumer contract situation.

Figure E2: Redress for MAPs under the CPRs – consumer contracts



E3 Remedies in other circumstances

As well as the more traditional consumer contract scenario, some of the remedies may also be available in other circumstances, for example, where C sells goods to T, or makes a payment, even though there may not be a contract in place.

E3.1 Remedies for consumer to business (C2B) contracts [r27G(1)]

If C has sold goods to a T, who acted unfairly by engaging in a MAP, he/she might be entitled to unwind the sale and claim damages as well, providing the unfair practice is a significant factor, but not necessarily the only or even the main factor, in C's decision to enter into the contract. For example, T may offer to buy a gold jewellery item or an antique from C and may mislead them about how much it is worth and only pay a reduced value amount for it.

E3.1.1 The practicalities of unwinding a C2B contract [r27G(2)-(6)]

C must clearly indicate to T that the contract is ended by saying or doing something to demonstrate this, for example, writing to T to say that they have since discovered the true value of the item and wish to have it returned to them. There is no 90 day period in this situation.

The contract ends and C should repay any money they were paid by T, who should return the goods to C, if he is able to do so and they are still in the condition they were in when they were sold to him. If T is unable to return the goods, he should pay C their equivalent market price at the time of sale.

C may also be able to make a claim for damages from T as well as unwinding the contract. This works in the same way as damages in respect of a consumer contract as above (B2C), including the application of the due diligence defence.

E3.2 Remedies for consumer payments

Where Cs hand over money to Ts or businesses, following demands that offer to settle their liabilities or purported liabilities in exchange for a payment, this is a specific type of product [r2(1A)&(1B)] and if T acts unfairly by engaging in a MAP, a remedy may be available for C.

This will cover demanding payments in various contexts, such as, wheel-clamping, alleged copyright infringement, so-called "civil recovery" claims and unsolicited products. If such demands are made aggressively or C is misled by them, damages may be claimable for distress, alarm etc., as described above [r27J].

If the money was not actually owed, C may be able to unwind the payment as well [r27H]. Such activities will also be subject to enforcement under the Regulations and should be referred to TSS. Again, as well as demonstrating that a MAP has occurred, C would also have to show that, the unfair practice was a significant factor, but not necessarily the only or even the main factor, in C's decision to make the payment.

E3.3 Unsolicited goods [r27M]

Consumers sometimes receive items they have not ordered and this is often accompanied by, or swiftly followed by, a demand for payment. This is known as inertia selling. Provided C is certain that the goods are completely unsolicited, they can keep, use or dispose of them as if they were an unconditional gift from T. There is no obligation to let T know of the unsolicited supply and not contacting T is not an agreement to pay, return or look after any unsolicited items.

Supplying goods to C, when they have not been ordered and making a demand for payment is one of the banned unfair commercial practices in the CPRs [Schedule 1, No.29].

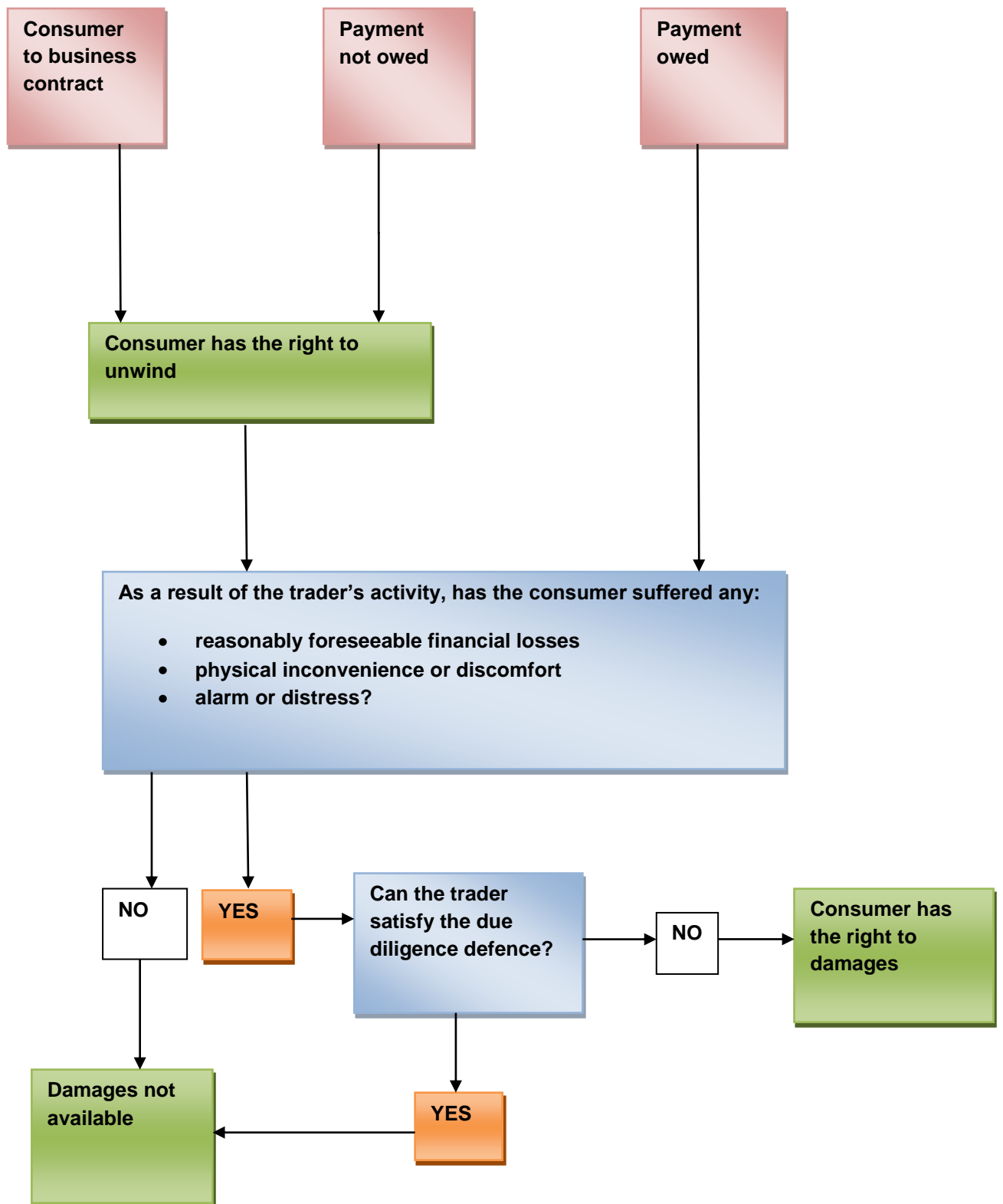
Table E4 summarises the four types of transaction discussed and shows which remedies apply for each one.

Figure E3 indicates the remedies which apply to all but the business to consumer situation, which was indicated figure E2.

Table E4: Summary of the remedies available under the CPRs

Type of contract or payment	Example	Right to unwind?	Right to a discount?	Right to seek damages?
Consumer contract (B2C) for a PRODUCT	C buys goods, services or digital content from T and is misled about a main characteristic	Yes	Yes	Yes
Consumer to business contract (C2B) for GOODS	C sells a gold necklace to T for cash and T undervalues its worth	Yes	No	Yes
Consumer payment which WAS NOT OWED	Following misleading threats of legal action, C makes a payment to T, which was not actually owed because the goods it related to were unsolicited	Yes	No	Yes
Consumer payment which WAS OWED	Following aggressive conduct by a debt collector, to whom their debt has been assigned, C makes a payment	No	No	Yes

Figure E3: Redress for MAPs under the CPRs in non-consumer contract situations



Summary

- The civil redress provisions in the CPRs cover traders engaging in unfair commercial practices which are **aggressive or misleading actions** (MAPs).
- If the MAP is a **significant factor** in C's decision to enter into a **contract with T or pay money** to them, and it would be **likely to cause an average consumer to do this**, then C can seek redress.
- The forms of redress available are: a **right to unwind or have a discount and also damages** for certain categories of loss or suffering but what is appropriate in each case will depend to some extent on the type of transaction.
- In **B2C contracts**, the right to **unwind** is for **90 days** and a full refund, if there has been no full consumption or performance; however, C may have to pay for what has been used if it is a continuous supply contract, depending on T's behaviour and its impact on C.
- **Alternatively**, in a B2C contract situation, C may have a percentage **discount depending on the seriousness** of the MAP, assessed by reference to T's behaviour, its impact on C and the time since it occurred if the contract price was £5,000 or below; if it was over £5,000, the discount will be the difference between the market price and the actual price, providing there is clear evidence of this.
- **Damages** for reasonably foreseeable **financial loss and/or alarm, distress, physical discomfort or inconvenience** may also be awarded in a B2C contract, unless T can satisfy the three limbed **due diligence defence**.
- **Remedies** are available for **other transactions**: so for a C2B contract for goods C may be able to unwind the contract and or claim damages; where C has made a payment that was not owed, the payment may be unwound and damages sought, and where a consumer payment is made that was owed, the remedy of damages may be available.

Appendix E1

Misleading actions under the CPRs [r5]

A trader's commercial practice can be a misleading action if it is false or its overall presentation deceives an average consumer about any of the matters listed in box 1:

Box 1 – listed matters for a misleading action [r5(4)(a)-(k)]

- 1) the existence or nature of the product
- 2) the main characteristics of the product (see box 2)
- 3) the extent of the trader's commitments
- 4) the motives for the commercial practice
- 5) the nature of the sales process
- 6) any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product
- 7) the price or the manner in which the price is calculated
- 8) the existence of a specific price advantage
- 9) the need for a service, part, replacement or repair
- 10) the nature, attributes and rights of the trader (see box 3)
- 11) the consumer's rights or the risks he may face

Box 2 – the main characteristics of a product, include its [r5(5)(a)-(r)]:

- (a) availability
- (b) benefits
- (c) risks
- (d) execution
- (e) composition
- (f) accessories
- (g) after-sale customer assistance
- (h) handling of complaints
- (i) method and date of manufacture
- (j) method and date of provision
- (k) delivery
- (l) fitness for purpose
- (m) usage
- (n) quantity
- (o) specification
- (p) geographical or commercial origin
- (q) results to be expected from use
- (r) results and material features of tests or checks carried out

Box 3 – the nature, attributes and rights, include the trader's [r5(6)(a)-(h)]:

- (i) identity
- (ii) assets
- (iii) qualifications
- (iv) status
- (v) approval
- (vi) affiliations or connections
- (vii) ownership of industrial, commercial or intellectual property rights
- (viii) awards and distinctions