

**THE SUPPLY OF DIGITAL
CONTENT:**

Impact assessment

JULY 2012

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Title: The Supply of Digital Content IA No: Lead department or agency: Department for Business, Innovation and Skills Other departments or agencies:	Impact Assessment (IA)	
	Date: 06/03/2012	
	Stage: Consultation	
	Source of intervention: Domestic	
	Type of measure: Primary legislation	
		Contact for enquiries: Sarah Hudson (x1066)
Summary: Intervention and Options		RPC Opinion: AMBER

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

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

Consumer rights in connection with digital content are highly uncertain. There is legal dispute over whether digital content is goods, services, both or neither. A recent legal research paper commissioned by BIS examining core consumer protections in the area, found that it was not clear what, if any, legal rights the purchaser of digital content has if the content proves defective or fails to live up to expectations. As a result it is unclear what rights to quality and what remedies are available to consumers for digital content making it difficult for consumers to enforce their rights. The digital content market is large and growing and there is evidence of consumer detriment caused in particular by the provision of lacking or overly complex information, problems accessing the digital content and quality issues with the digital content.

What are the policy objectives and the intended effects?

We aim to provide a simple framework that gives legal certainty for both business and consumers as to rights and remedies available in relation to digital content purchases. The framework should take into account the unique nature of digital content, existing domestic legislation and European proposals and should achieve a fair balance between rights and responsibilities for both businesses and consumers. In order to achieve these objectives, we are proposing:

- A clear definition of what we mean by digital content and hence the scope of our proposals.
- A set of quality standards guarantees that digital content should meet.
- A set of the remedies available to consumers when digital content does not meet these quality standards.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing – This will include introducing the Consumer Rights Directive, which contains elements applicable to digital content, into law.

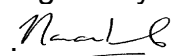
Option 1: Provide bespoke rights and remedies for digital content only - Align the rights and remedies for digital content with those proposed for goods in the wider Bill, but exclude the right to reject for digital content. Treat related services akin to other services in the wider Bill.

Option 2: Provide bespoke rights and remedies for digital content and related services – Extend the rights and remedies available to “goods” to digital content. For related services, apply the quality standards available to “services” and the remedies available to “goods”, as in the proposal for a Common European Sales Law.

Will the policy be reviewed? It will/will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

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 responsible Minister



Date: 12/07/2012

Summary: Analysis & Evidence

Policy Option 1

Description: Provide bespoke rights and remedies for digital content only - Align the rights and remedies for digital content with those proposed for goods in the wider Bill, but exclude the right to reject for digital content. Treat related services akin to other services in the wider Bill.

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 45.7	High: 81.2	Best Estimate: 66.9

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	4.6	40.7
High	Optional	7.9	57.4
Best Estimate	2.7	6.6	68.6

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

Business costs are estimated at between £4.6m and £7.9m, with a mid-range estimate of £6.6m. Assuming that retailers pass on 73% of this cost to manufacturers, between £3.3m-£5.8m (middle estimate of £4.8m) of costs would be faced by manufacturers, while £1.2m-£2.1m (£1.8m) would be faced by retailers. Additionally the costs to retailers of training staff on the proposals are estimated at £2.7m.

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

Consumers may see an increase in prices if businesses pass on the costs of consumer redress.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	10.4	86.5
High	Optional	18.0	149.8
Best Estimate	NA	14.9	124.3

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

Given the uncertainty around the level of consumer detriment in digital content, throughout this impact assessment and where possible, we have adopted conservative estimates of consumer detriment, meaning that the estimates of consumer benefits are also conservative. Annual consumer benefits arising from the expected reduction in consumer detriment are estimated in the range of £10.4m-£18m, with a mid-range estimate of £14.9m.

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

Business will benefit from lower compliance costs from reduced expenditure on legal advice and reduced time spent dealing with disputes. Minimum quality standards will also create a level playing field and some business (particularly new / small entrants) may also see increased sales due to increased consumer confidence.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

A variety of assumptions have been made in identifying the potential impact of the various options. These are explained in the relevant sections and will be tested in the consultation. One key assumption is that the cost of replacing digital content is likely to be close to zero for the rights holder, with the majority of costs occurring in the R&D stages of production.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 9.3	Benefits: 0	Net: 9.3	Yes	IN

Summary: Analysis & Evidence

Policy Option 2

Description: Provide bespoke rights and remedies for digital content and related services – Extend the rights and remedies available to “goods” to digital content. For related services, apply the quality standards available to “services” and the remedies available to “goods”, as in the proposal for a Common European Sales Law

FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 67.5	High: 98.2	Best Estimate: 118.9

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	6.6	57.8
High	Optional	11.5	81.9
Best Estimate	2.7	9.5	98.2

Description and scale of key monetised costs by ‘main affected groups’

An indicative estimate of annual cost to business arising from providing redress to consumers for faulty / non conforming digital content is between £6.6m and £11.5m, with a mid-range estimate of £9.5m. Assuming that retailers pass on circa 73 percent of this cost to manufacturers, around £4.8m-£8.4m (£7.0m) of costs would be faced by manufacturers, while £1.8m-£3.1m (£2.6m) would be faced by retailers. Additionally the costs to retailers of training staff on the proposals are estimated at £2.7m.

Other key non-monetised costs by ‘main affected groups’

Consumers may see an increase in prices if businesses pass on the costs of consumer redress.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	15.1	125.3
High	Optional	26.1	217.1
Best Estimate	NA	21.7	180.1

Description and scale of key monetised benefits by ‘main affected groups’

Given the uncertainty around the level of consumer detriment in digital content, throughout this impact assessment and where possible, we have adopted conservative estimates of consumer detriment, meaning that the estimates of consumer benefits are also conservative. We estimate potential annual consumer benefits arising from the expected reduction in consumer detriment (not including benefits achieved in option 0) are in the range of £15.1m to £26.1m, with a mid-range estimate of £21.7m.

Other key non-monetised benefits by ‘main affected groups’

The increased clarity of the law will mean businesses and consumers are clear about their responsibilities. This should mean that business see lower compliance costs from reduced expenditure on legal advice and reduced time spent dealing with disputes, particularly from consumers who are misinformed. Minimum quality standards will also create a level playing field and some business (particularly new / small entrants) may also see increased sales due to increased consumer confidence.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

A variety of assumptions have been made in identifying the potential impact of the various options. These are explained in the relevant sections and will be tested in the consultation. One key assumption is that the cost of replacing digital content is likely to be close to zero for the rights holder, with the majority of costs occurring in the R&D stages of production.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 12.2	Benefits: 0	Net: 12.2	Yes	IN

Evidence Base

Problem under consideration;

1. Consumer rights in relation to digital content are not clearly set out in the law, resulting in legal dispute, uncertainty for both businesses and consumers and significant consumer detriment. The current law covers the supply of goods and services and digital content cannot clearly be placed in either of these categories, giving rise to legal uncertainty. Whether a product is a good or a service has implications for consumer rights and remedies such as refunds and replacements for faulty or poor quality digital content. It is currently unclear what, if any of these rights and remedies apply to digital content. This lack of clarity is not in line with consumer expectation where consumers can overestimate the degree of consumer protections they are afforded by the law, particularly when purchasing downloaded digital content.¹ There is further evidence of consumer detriment caused by lacking or overly complex information being given to consumers, issues that affect access to the digital content and quality issues. Evidence also points to consumers being less active in resolving issues arising from digital content, meaning that estimates of the size of consumer detriment are likely to under-estimate the true value of consumer detriment. Consumer reluctance is likely to arise due to a number of factors, including poor understanding of rights and the typical low value of digital content acts as a barrier to consumers resolving issues.²

Rationale for intervention

2. The digital content market in the UK forms a significant part of the economy, both in output and employment terms. While the majority of digital content consumers are satisfied with their consumption experiences, there is evidence of significant consumer detriment³, for example through the sale of digital content which is of an unsatisfactory quality. The legal framework on consumer rights for digital content is very unclear, particularly as buyers' rights have been interpreted in various ways in the courts. This situation means consumers and businesses face uncertainty about their rights and responsibilities for digital content. This represents a risk for retailers as to how a court may interpret the current law, and does not help underpin innovation and promote competition in the digital content market. The following sections consider each of these aspects in turn which further highlight the case for Government intervention in the digital content sector:
 - Size of the digital content market;
 - Consumer detriment; and
 - Legal uncertainty (unclear rights and remedies).
3. The proposals we are making on digital content are part of a wider simplification of consumer law. The proposed Consumer Rights package of measures is a response to feedback from retailers, lawyers, academics and consumer groups that the current law is overly complex and difficult to interpret and that this loads unnecessary costs on businesses. It also makes it hard for consumers to assert their rights, thereby making life easier for rogue traders and undermining both fair competition and consumer confidence⁴. The Consumer Bill of Rights aims to streamline confusing and overlapping legislation and regulation and to provide much simpler and more coherent consumer rights, for example, by:
 - using common and intelligible language;
 - putting the legislation on core protections⁵ in one place;
 - using common concepts and aligning remedies where possible for each area of consumer protection e.g. goods, services and digital content; and
 - setting consumer rights into statute.

¹ For example, 53 percent of respondents to a Consumer Focus Survey on consumer experiences with digital downloads, incorrectly thought that they were entitled to a refund, having purchased faulty digital content.

² Since consumers are more likely to complain about low-value goods and services. See paragraph 4.102 here: http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf

³ Consumer detriment can be defined as the loss of consumer welfare, either at an individual or structural level. Personal consumer detriment can arise as a result of poor quality products, financial loss, lost time in dealing with resulting problems, stress and other personal impacts. Structural consumer detriment can arise from market failures such as uncompetitive prices resulting from distortions of competitive conditions or regulatory failure. See Europe Economics report on consumer problems in digital content services which is available here: http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf

⁴ Responses to the Consumer Law Review (2008), the Law Commission and Scottish Law Commission's report on Consumer Remedies in Faulty Goods (2009) and research conducted for the Department on 'Consolidation and Simplification of UK Consumer Law' (2010).

⁵ In relation to sale and supply of goods, core consumer protections are reasonable quality and fitness for purpose and in relation to services are those such as the supplier will carry out the service with reasonable care and skill

4. To achieve the aim of overall simplicity, the proposals on digital content will aim to align as far as is possible with proposals elsewhere in the Consumer Bill of Rights.

The digital content market – large and growing

5. Digital content encompasses a diverse range of products and services. At its most basic, digital content can be defined as follows:

*'... data or information products supplied in digital format as a stream of zeros and ones so as to be readable by a computer and give instructions to the computer...'*⁶

6. Digital products include computer software, videos, films, music, games, e-books, ring tones and apps and consumers can access these in a variety of ways, both through physical media and intangible ones such as downloads via the internet.⁷ The development of web services to support the delivery of digital content to its users, has gathered pace as internet adoption in the UK and globally has grown, and with improvements in internet technology such as faster internet speeds through broadband internet availability.
7. The UK has a high penetration of internet access; Ofcom's Communications Market Report 2011⁸ found that total UK broadband take up has risen from 41% in 2006 to 74% in 2011. A wide range of digital content is accessed by internet users in the UK. Around four in ten home internet connections are used for playing games (38%), downloading music or video (37%) and watching video (40%).⁹ A recent study, commissioned by the European Commission and carried out by Europe Economics indicated a similar situation can be found in the rest of the EU, with, for example, 79% of respondents having used digital music in the last 12 months¹⁰.
8. In the UK the broadening of access methods (69% access the internet at home via a laptop or PC, 31% on a mobile phone, 9% via a games console and 4% using an e-reader¹¹) and the higher proportion of younger age groups accessing digital content (92% of 16-24 year olds access music compared with 58% of 55-64 year olds¹²), also indicate a growing market for digital content.
9. In terms of consumer spending on digital content, Gartner estimate \$200 billion was spent globally on content and software in 2010¹³. This seems only set to increase in the next few years; forecasts for online gaming revenue, for example, predict growth from \$11.9 billion in 2011 to \$28.3 billion in 2015 while spending on public cloud services is expected to grow five times faster than overall IT enterprise spending (19 percent annually through 2015)¹⁴.
10. Digital Content & Subscriptions (composed of digital content downloads such as music, movies, TV shows and e-books) was the fastest-growing retail e-commerce category in 2011 in the US, with a 26-percent growth rate.¹⁵
11. Across the EU, the cultural and creative sectors¹⁶ account for 2.6% of EU GDP and employ over 3% of its workforce.¹⁷

⁶ Bradgate, R. (2010), 'Consumer Rights in Digital Products: A research report prepared for the UK Department for Business, Innovation and Skills', Department for Business, Innovation and Skills, Available for download here: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products>.

⁷ Ibid.

⁸ Ofcom Communications Market Report: UK, 4 August 2011, http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr11/UK_CMR_2011_FINAL.pdf

⁹ Ibid.

¹⁰ University of Amsterdam, Digital content contracts for consumers, Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf

¹¹ Ofcom Communications Market Report: UK, 4 August 2011, http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr11/UK_CMR_2011_FINAL.pdf

¹² Ibid.

¹³ Half of this was spent on video content that has been purchased, rented, streamed or downloaded, as well as premium channel, pay per view (PPV) and video on demand (VOD). The other half was spent on PC and gaming software, digital music and books, and purchases from mobile apps stores.

¹⁴ October 17, 2011 <http://www.gartner.com/it/page.jsp?id=1824919>

¹⁵ Digital Future in Focus – Key insights from 2011 and what they mean for the coming year, February 2012, ComScore

¹⁶ Includes (hard copy and digital) published content such as books, newspapers and magazines, musical works and sound recordings, films, video on demand and video games.

¹⁷ EC (2009), 'Creative Content in a European Digital Single Market: Challenges for the Future', available here: http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf

12. The creative industries¹⁸, which include several aspects of digital content, are a major contributor to the UK economy. Table 1 shows the economic value added of the creative industries.
13. BIS Business Population statistics suggest that digital content and the industries supporting its creation in the UK, form a significant part of the economy, both in term of employment and output, as Table 1 below shows. It is noteworthy that the figures below do not include the retail sale of digital content, which would add significantly to these. Overall, these sectors account for 3.7 percent and 5.5 percent of UK employment and turnover respectively.

Table 1: Estimates of digital content sectors¹⁹

	Enterprises	Employment (000's)	Turnover 2011 (£m)
Book, periodicals, software and other publishing	34,830	183	20,933
Television, film and sound production	50,755	130	18,117
Programming and broadcasting activities	9,570	31	8,945
Telecommunications	12,365	208	59,784
Computer programming, consultancy and related activities	152,995	526	64,006
Information service activities	8,000	59	10,108
Total	268,515	1,137	181,893

Source: Business Population Survey 2011²⁰

14. Therefore, our proposals are aimed at addressing consumer problems in a significant part of the UK economy, meaning that consumer protection legislation in the area must strike the right balance between consumer rights and supporting growing sectors.

Consumer detriment

15. In the section which follows, we discuss the existing evidence of consumer detriment arising from digital content purchases.
16. Recent research by Europe Economics for the European Commission, found evidence of considerable consumer detriment in the area of digital content. The report found that:

'The combined value of financial losses and the value of lost time resulting from problems encountered in the previous 12 months with digital content services, was estimated at approximately €64 billion for the online population in the EU27.'²¹

17. The categories included in the survey were: games, music, ringtones, email, anti-virus software, social networking, personal navigation services and e-learning. Consumers reported a range of problems, including access and quality issues and lacking, unclear or complex information, across all the categories. These are discussed in more detail below. Out of this total, problems relating to the quality of digital content products were estimated at €7.5bn, problems concerning access to digital content products at €10bn and problems concerning information (both lacking and overly complex) at €33.5bn.
18. Table 2 shows the percentage of consumers in the UK who had experienced at least one problem with digital content over the last 12 months. The data is provided for 5 different digital content categories and shows that incidences of problems were fairly stable across the categories ranging between 16% (music) and 23% (anti-virus software).

Table 2: Incidences of consumer problems with digital content purchases

¹⁸ The Department for Culture, Media and Sports defines the creative industries as advertising, architecture, art and antiques, crafts, design, designer fashion, film and video, interactive leisure software, music, the performing arts, publishing, software and computer services, television and radio. While this definition is not a good match for the scope of the proposed bill on digital content, it is a good preliminary indicator of its importance.

¹⁹ Under SIC 2007 classification, these are category J activities, namely Information and Communication related activities.

²⁰ <http://www.bis.gov.uk/analysis/statistics/business-population-estimates>

²¹ Europe Economics (2011), 'Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers – Final Report', Prepared for the European Commission, Available here: http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf.

	Music	Games	Ringtones	Anti-virus software	E-learning
1 or more problem	16%	16%	19%	23%	22%

Source: Europe Economics for EC (2011)

19. Table 3 below shows the number of complaints that Consumer Direct²² received in the UK in relation to a number of product categories that predominantly fall within the definition of digital content.

Table 3: Consumer Direct Complaints 2009-2010

Product Code	Defective goods	Misleading Practices	Substandard services	Delivery, Collection, Repair	Other	Total
Games players ²³	3024	465	540	380	566	4975
Computer software upgrades	707	1047	606	118	1107	3585
Phone downloads	23	25	44	5	64	161
Compact Discs	147	214	89	148	162	760
DVDs	562	1411	268	480	493	3214
Video games and software	926	437	346	254	380	2343
Computer games	760	342	272	244	359	1977
Total	6149	3941	2165	1629	3131	17015

Source: Consumer Direct database

20. We have estimated the annual detriment experienced by consumers in the preceding digital content sectors, in order to provide an indication of the size of the problems faced by consumers. Consumer detriment is calculated as the product of the value of complaints to Consumer Direct for a particular sector and a multiplier which accounts for the fact that not all consumers who face problems complain and that consumers complain to other organisation than Consumer Direct (included here are complaints to OFT and Trading Standards Services).²⁴ The results are shown in Table 4 below and as can be noted therein, the estimated annual consumer detriment in these sectors in the UK is £30.5 million.

²² Since 1 April 2012 Citizens Advice took over responsibility for the Consumer Direct advice line and the service has since become the Citizens Advice Consumer Service. See here: http://www.citizensadvice.org.uk/index/getadvice/consumer_service.htm.

²³ The 'Games Players' category includes elements of digital content, which are likely to be impacted by the proposals. In recording consumer complaints, there is likely to be significant overlap with the other categories, since the cause of the problem may not necessarily be the one under which the complaint is recorded. For example, issues with digital content such as games, could be captured under the aforementioned category. As can be noted on Table 4, the average complaint and detriment value of games player and games and software are broadly similar, which indicates this could be the case

²⁴ Using the OFT's methodology for estimating consumer detriment in consumer enforcement cases. See paragraphs 3.13 to 3.27 here: http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of1139.pdf

Table 4: Consumer detriment in digital content (downloaded and bought on physical media)

	Total value of complaints (£000s)	Actual Complaint numbers	Multiplier ²⁵	Estimated number of problems	Average value of complaint	Average value of detriment ²⁶	Detriment value (£m)
Games players	425	2488	48.2 ²⁷	119,898	£ 171	£56	£6.8
Computer software upgrades	600	1793		86,399	£ 335	£86	£7.6
Phone downloads	8.3	81		3,880	£ 103	£41	£0.2
Compact Discs	32.4	380		18,316	£ 85	£36	£0.7
DVDs	1,074.9	1607		77,457	£ 669	£134	£10.4
Video games and software	223.3	1172		56,466	£ 191	£60	£3.4
Computer games	78.1	989		47,646	£ 79	£35	£1.6
Total	2,442.6	8508		-	410,062	-	-

Source: Consumer Direct database and BIS calculations

21. In previous research²⁸, the OFT has used sector specific multipliers for estimating the level of consumer detriment from Consumer Direct complaint numbers. Table 6 assigns each of the consumer problem categories a sector specific multiplier, in order to test the sensitivity of the analysis with respect to the uniform multiplier (of 48.2). As can be noted therein, despite the drop in overall consumer detriment, the scale of annual consumer detriment (at £17.6m), and by construction the level of consumer benefits, are significant. It is also noteworthy that the estimates of the level of consumer detriment are likely to under-estimate the level of actual consumer detriment, since the categories below represent a subset of the size of digital content sales, which we could derive from the Consumer Direct database.
22. We proceed by employing the figure of £17.6m annual consumer detriment as the lower bound expected level of annual consumer detriment arising from consumer problems with digital content.

²⁵ The multiplier accounts for the fact that only a proportion of consumers that experience problems actually complain and that some may complain to other bodies/agencies. Therefore complaints to Consumer Direct represent only a small proportion of consumers experiencing a problem. The multiplier is the inverse of: $0.64 \times 0.12 \times 0.27$. These are since 64 percent of consumers who face a problem with a purchase takes steps to complain. Of these, 12 percent make a complaint to someone else other than the retailer. Only 27 percent of these complaints arrive to and are recorded by Consumer Direct.

²⁶ Using the following formula, which the OFT has identified as a best fit to the OFT consumer detriment research, when comparing the value of the product to estimates of consumer detriment: $\log_{10}(D) = 0.3354 + 0.6340 * \log_{10}(P)$, where (D) is the detriment value and (P) is the price of the product or service raising the problem. See OFT, 'Trading Standards impact: An evaluation of the impact of the fair trading work of local authority Trading Standards Services in the UK', June 2009, OFT1085, Annex A, available here: www.offt.gov.uk/shared_offt/about_offt/offt1085.pdf

²⁷ Using the OFT's methodology for estimating consumer detriment in consumer enforcement cases. See paragraphs 3.13 to 3.27 here: http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/offt1139.pdf.

²⁸ OFT (2009), 'Trading Standards Impact: An evaluation of the impact of the fair trading work of local authority Trading Standards Services in the UK', available here: http://www.offt.gov.uk/shared_offt/about_offt/offt1085.pdf. See Annex B.

Table 5: Consumer detriment in digital content, using sector-specific multipliers (downloaded and bought on physical media)

	Actual Complaint numbers	Sector ²⁹	Sector multiplier	Estimated number of problems	Average detriment value ³⁰	Detriment value (£m)
Games players	2,488	A	22.8	56,726	56.4	3.2
Computer software upgrades	1,793	A	22.8	40,880	86.4	3.5
Phone downloads	81	B	56.9	4,609	40.9	0.2
Compact Disks	380	F	32	12,160	36.2	0.4
DVDs	1,607	F	32	51,424	133.9	6.9
Video games and software	1,172	F	32	37,504	60.5	2.3
Computer games	989	F	32	31,648	34.6	1.1
Total	8,510	-	-	234,952	448.7	17.6

Source: Consumer Direct database and BIS calculations

23. Another indicative estimate of annual consumer detriment arises out of a recent survey by Consumer Focus on digital downloads. This reported that 16 percent of respondents who had purchased digital content in the last 12 months stated that they had had a problem with a digital download.³¹ Table 6 shows estimates of annual sales in several digital download sectors. We assume that all reported problems were due to faulty digital downloads and estimate the value of faulty downloads as 16% of annual sales.³² We then estimate the number of consumers not receiving redress for faulty downloads using another figure from the Consumer Focus survey; 9.7% of consumers do not do anything when faced with a problem with a digital download and therefore receive no form of redress. We therefore calculate consumer detriment as 9.7% of the value of the estimated faulty downloads. This is likely to be a lower bound estimate, since other response categories are also likely to have suffered loss (for example those that simply did not use the seller again, or those that did complain but were refused redress). According to these figures, annual consumer detriment in digital downloads is estimated at circa £25 million.

²⁹ Ibid.

³⁰ See footnote 26.

³¹ Not yet published.

³² Under this assumption we could over-estimate the scale of consumer problems due to faulty downloads, since problems could arise for a variety of reasons, such as poor customer support or consumer expectations about performance were not met (even though the content was not faulty per se). However, we are only considering a subset of digital content sectors (due to difficulties with obtaining comprehensive and reliable data), which is likely to more than offset the bias described above, particularly in light of the other simplifying assumptions in deriving the final detriment figure.

Table 6: Consumer detriment in digital content downloads

	Annual sales (£m)	Estimated faulty downloads (£m)³³	Estimated value of detriment (£m)³⁴
Music downloads ³⁵	281	44.9	4.4
Computer software ^{36, 37}	644	103.0	10.0
E-books ³⁸	204	32.7	3.2
Digital games ^{39,40}	341	54.5	5.3
Movie downloads ⁴¹	159	25.4	2.5
Total	1,629	260.6	25.3

24. We proceed by assuming that the proposals mainly address issues relating to digital content downloads, with annual consumer detriment in the area estimated at £25.3m. This can be thought of as a mid-estimate of annual consumer detriment in digital content. We employ the figures calculated from the Consumer Direct database as the outer bound estimates of consumer detriment arising from digital content purchases, with a lower bound estimate at £17.6m and an upper bound estimate at £30.5m.

Causes of Detriment

25. Table 7 shows the type of problems that consumers are experiencing in digital content.

Table 7: Proportion of consumers experiencing type of problem in the two most recent problems

Problem type	Proportion experiencing type of problem
Access	31%
Lack of information	24%
Unclear/complex information	18%
Quality	14%
Security	9%
Unfair terms and conditions	2%
Privacy	2%
Total	100%

Source: Europe Economics (2011)

26. The three main issues experienced by consumers purchasing digital content are due to information provision and quality of and access to digital content.

A. Information Issues

27. Information issues were a significant concern for consumers with 42% identifying a problem with either lack of or unclear/complex information. Informational aspects are undoubtedly linked to issues around

³³ Assuming 16 percent of downloads are faulty, based on the results from a Consumer Focus survey on digital downloads.

³⁴ Taking 9.7 percent of consumers who do not do anything when faced with a faulty download as representing the degree of consumer detriment. This is likely to be a lower bound estimate, since other response categories are likely to have suffered loss (for example those that simply did not use the seller again).

³⁵ Music downloads for 2009. Source: <http://www.bpi.co.uk/assets/files/Digital%20Music%20Nation%202010.pdf>

³⁶ 27% of UK computer software installed in 2009 (includes system utilities, personal productivity, imaging and graphics, and finance) was pirated, representing \$1.6bn in value. This implies that legal computer software sales were \$4.3bn or £2.8bn (using average 2010 exchange rates from oanda.com). Source:

http://www.bsa.org/country/Research%20and%20Statistics/~media/Files/Research%20Papers/IDC/2010/cp_uk_english.ashx

³⁷ Assuming that the majority of software sales are online sales and that consumption patterns in the UK are the same as in the US, digital sales of software in the UK. Research in the US suggests that 23 percent of online software sales were through digital sales. Source: https://www.npd.com/wps/portal/npd/us/news/pressreleases/pr_100527a/!ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g3b1NTS98QY0P3EHNzA0-PAE9XT0Mf9cwl_11_SjjeBc3Sw8PN28TQ4sgSwsDT1d_QxfPoAAjC0sj_YLsQEUAdcJV9w!!

³⁸ E-book download sales for 2009. Source: <http://www.ons.gov.uk/ons/rel/social-trends-rd/social-trends/social-trends-41/index.html>

³⁹ Annual sales of entertainment software, pc & console games in the UK for 2011. Source: <http://ukie.org.uk/content/strong-quarter-four-sees-2011-video-games-sales-forecasts>.

⁴⁰ The Entertainment Software Association, a US representative association for the gaming industry estimates that circa 24 percent of games sales in 2010 were downloaded. Assuming that consumption patterns in the UK are the same, this implies that games download sales in the UK are circa £340m. Source: http://www.theesa.com/facts/pdfs/ESA_EF_2011.pdf.

⁴¹ Source: <http://www.bfi.org.uk/filmtvinfo/stats/BFI-Statistical-Yearbook-2011.pdf>.

28. 'Content being of poorer quality than expected given the information provided by the supplier' represented the largest proportion of problems in the Lack of information category (19%). A further 33% of problems identified under Lack of information related to access and compatibility. Other information issues identified under unclear/complex information, related to difficulties finding and understanding the information due to the length and presentation of the information, or the language used. Consumer associations identified the lack of information on complaints and redress mechanisms as the most commonly identified problem in relation to information provision. The report highlighted that this problem was compounded by consumer confusion in relation to their rights when purchasing digital content.
29. These findings are supported by recent research by the University of Amsterdam, which finds that information asymmetries exist between retailers and consumers in the digital content market. They conclude that these 'information failures' between the parties mean that regulating consumer contracts for digital content transactions is of crucial importance.⁴² They explain that when consumers are armed with information on price and quality they are able to enter into efficient contracts. This also affects competitive conditions, with well-informed consumers being empowered to exercise their choice and rewarding the most efficient businesses. Where this does not occur, information asymmetry can result in consumer detriment, as shown in Table 3 above.
30. Consumer Focus also finds that:
- 'Our study indicates that despite the growing reliance on digital technologies and increasing sales of digital products the market has not delivered to consumers' expectations. Many of our mystery shoppers were left with insufficient information about the products they were buying, and found limited access to customer services or the right to redress. This suggests that a legislative solution is required to safeguard the interests of consumers and ensure the core consumer protection principles apply to sales of digital products.'*⁴³

B. Quality Issues

31. The report also showed that quality problems are a concern in the digital content market. Major categories of quality problems identified were poor visual or sound quality (36%) and corrupt content that could not function on the consumer's device and sometimes caused damage to the device itself (32%).
32. A recent survey by Consumer Focus reported 16 percent of respondents who had purchased digital content in the last 12 months stated that they had had a problem with a digital download.⁴⁴ A recent Which? online survey⁴⁵ showed that 43% of people that had bought a download had been disappointed.
33. Perceptions of quality and what a consumer can reasonably expect from digital content are still evolving. As stated in a paper by the University of Amsterdam:

*"no clear standard exists of what characterizes digital content, what is 'normal' in digital content, which level of functionality consumers should be entitled to expect".*⁴⁶

The paper explains that consumer information plays a significant part in shaping the reasonable expectations of consumers and as such influences the level of quality and functionality that the consumer can expect. Some businesses deliberately downplay quality in complex terms and conditions because where a consumer has been informed about a usage restriction this no longer constitutes a non-conformity. The paper argues that retailers can use information to reduce their own liability by strategically informing consumers and lowering their legitimate expectations. The paper

⁴² University of Amsterdam research commissioned by the European Commission (2011), 'Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts', , Available here: http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf

⁴³ Consumer Focus, Ups and Downloads – Consumer experiences of buying digital goods and services online <http://www.consumerfocus.org.uk/files/2010/12/Consumer-Focus-Ups-and-downloads.pdf>

⁴⁴ Not yet published.

⁴⁵ <http://conversation.which.co.uk/technology/download-refund-disappointing-faulty-app-store-itunes-android-market/>

⁴⁶ University of Amsterdam research commissioned by the European Commission (2011), 'Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts', , Available here: http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf

concludes that, “consumer information can result in a creeping degradation of traditional user freedoms” where retailers gradually reduce the standard of what a consumer can reasonably expect. They conclude that this provides a justification for mandatory substantive rules.

34. Providing clear quality standards for digital content within the Consumer Bill of Rights would help standardise and protect consumers’ reasonable expectations, clarifying what quality standards consumers can expect digital content to meet.

C. Access Issues

35. Issues with access to digital content were raised by a third of those who were surveyed as part of the Europe Economics report and who had experienced a problem with digital content over the last 12 months. A large majority of these (two thirds) identified unexpected service interruptions at the suppliers end as the cause. Feedback from industry, commissioned as part of the same report, explained that such short-term access restrictions typically relate to internet connection problems and thus require action by internet service providers rather than the suppliers of the digital content.
36. Longer term access restrictions can be caused by issues with interoperability and technical protection measures where consumers are only able to use digital content on certain devices. Consumer organisations were also interviewed as part of the report by Europe Economics and they highlighted that cross-border restrictions on product use could also result in problems for consumers.

Legal uncertainty

37. Research has shown that there are significant legal uncertainties around consumer rights in digital content transactions. A recent legal research paper commissioned by BIS examining core consumer protections⁴⁷ found that it was not clear in law what, if any, legal rights the purchaser of a digital product has if the product proves defective or fails to live up to expectations.⁴⁸
38. This analysis considered the position of tangible digital products (such as software on a CD ROM), downloaded digital files (such as music, ebooks, software and ring tones), bespoke produced software, and a digital product held on a third party server and accessed by the consumer (cloud computing). Professor Bradgate’s view was that UK law is not rational, effective, accessible or comprehensive in respect of consumer rights in digital products and that the law should be clarified. Furthermore, the report concluded that the law currently draws fine distinctions between similar transactions and therefore the legal position in relation to digital content is confusing and unclear.⁴⁹
39. There is also relatively little case law interpreting how the statutory framework applies to digital products. The limited case law that exists in the UK, refers to business to business disputes involving the sale or supply of digital content and supports the above point that digital products do not clearly fit into existing legislation. Bradgate (2010) found the case law which does exist has given inconsistent interpretations of the current legislation. Judges tend to apply implied terms as to fitness for purpose to the contracts but use different methods for doing so. In the leading English case on whether software can be “goods” a judge found that a computer program could not be a “good” and therefore if the software is defective the statutory protection for buyers of goods does not apply; however, he continued that a disk on which a computer program is supplied could be a good and if the disk is sold and the program on it defective then the protection for goods would apply. In this case, the disk was not sold – an employee of the software company came and installed the software, taking the disk with him when he finished - and so the statutory protections did not apply⁵⁰. This caused dispute within industry as to what the judgement actually meant, with some arguing that this meant the disk is a good but that the software on disk is a service⁵¹. In another case⁵², a Scottish

⁴⁷ In relation to sale and supply of goods, core consumer protections are reasonable quality and fitness for purpose and in relation to services are those such as the supplier will carry out the service with reasonable care and skill

⁴⁸ Bradgate, R. (2010), ‘Consumer rights in digital products: A research report prepared for the UK Department for Business, Innovation and Skills’, Institute for Commercial Law Studies, Sheffield and BIS, available here: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products>.

⁴⁹ Ibid.

⁵⁰ *International Computers Ltd v St Albans District Council* [1996] 4 All ER 481

⁵¹ Joint ICT Industry Declaration on the Consumer Rights Directive <http://www.europeandigitalmedia.org/uploads/Press/documents/Joint-ICT%20industry%20statement%20on%20proposed%20Consumer%20Rights%20Directive.pdf>

⁵² *Beta Computers (Europe) Ltd v Adobe Systems Ltd* [1996] SLT 604

court considered sale of software on a disk to be a sui generis⁵³ contract (some characteristics of a sale of goods/services, some of a licence). As a result it is unclear what rights and remedies are available to consumers for digital content, particularly content supplied wholly in intangible form such as when downloaded⁵⁴, streamed⁵⁵ or in the cloud⁵⁶.

40. The source of the problem in assigning consistent consumer rights to digital content lies in the fact that the consumer rights framework applies a distinction between goods and services, whereas the classification of digital content as goods or services remains uncertain, and there is no one consistent approach to the treatment of digital content, either in domestic or European legislation⁵⁷. This uncertainty is important as different legal consequences are attached to a consumer contract depending on whether the transaction relates to a good or a service (see Box 1). This can also result in an inequitable situation where two consumers buying the same digital content, for example a computer program, one buying it on disk and the other downloading it from the internet, have different rights and remedies if the program proves faulty.

Box 1: Existing consumer protection law in the UK; Goods and Services

In the UK different legal consequences are attached to a consumer contract depending on whether the transaction relates to a good or a service. As explained by Professor Bradgate:

“A consumer who purchases goods enjoys significant rights under UK law which requires that the seller has the right to sell the goods, that the goods correspond with their description, and where the seller sells the goods in the course of the business, that the goods are of satisfactory quality and reasonably fit for the buyer's purpose. If these requirements are not satisfied the seller is in breach of contract, and the consumer may choose from a range of remedies, including the right to reject the goods, terminate the contract and demand the return of any money paid, the right to request their repair or replacement by the seller, or have the price reduced. In addition, the consumer is entitled to claim damages for any loss he suffers as a result of the seller's breach of contract.”

While the supplier of goods is strictly liable for the goods supplied, liability for the supplier of services is based on a negligence standard. As provided in the Supply of Goods and Services Act 1982, there is an implied term that the supplier of services must perform the work/service with reasonable skill and care⁴⁴. The supplier of services is only liable if a breach of the duty of reasonable skill and care is proved. It is therefore down to the consumer to prove that the supplier was negligent.

As noted above there is an automatic right to reject faulty goods and terminate the contract. This is not the case for services where, if the reasonable care term is breached, the remedies available to the consumer are not set out in statute but depend on the seriousness of the breach and its consequences.

Finally, while for goods an exclusion / limitation of liability for breach of the statutory implied terms is never valid against a consumer, for services an exclusion or limitation of liability for loss (other than personal injury caused by negligence) in the course of the supply of services, will be valid, in so far as it satisfies a test of reasonableness.

41. As explained by Bradgate (2010):

⁵³ A legal classification that exists independently of other categorizations because of its singularity or due to the specific creation of an entitlement or obligation

⁵⁴ To copy or transfer (data or a program) into the memory of one computer system from a larger one (The Collins English Dictionary - Complete & Unabridged 10th Edition 2009)

⁵⁵ Compressed audio and video files are sent as a data stream over the internet. The stream sends ahead a few seconds of data which is downloaded on the subscriber's computer. It is usually written to temporary storage and disappears after viewing.

⁵⁶ The NIST Definition of Cloud Computing: Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This cloud model is composed of five essential characteristics, three service models, and four deployment models. Full definition available at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>

⁵⁷ Ibid. 18

'There is therefore concern that purchasers of digital products may not enjoy an adequate level of protection from the law and that this in turn may damage their confidence in entering into transactions.'

42. Bradgate (2010) also explains that to be effective consumer law must be clear, accessible and comprehensible but that the law relating to digital products currently satisfies none of these criteria.⁵⁸

43. The European Consumer Centres' Network state, in their report on the European online marketplace, that one of the "major deficits" of the present legal situation is the fact that digital content is excluded from the application of consumer sales law⁵⁹. They also say;

*'As this intangible economy is today in an experimental phase, there is a considerable amount of uncertainty and a lack of sufficient legal regulation in the field... The high level of legal uncertainty presents a problem not only to consumers, but seemingly to businesses too. It would, therefore, be in the interest of all stakeholders to introduce up-to-date and apt regulations that provide consumers with the necessary protection on the one hand, but do not impose obstacles to business innovation on the other. In order for e-commerce to flourish, consumers should be made more interested in, and confident of, the digital market.'*⁶⁰

44. There have been numerous other calls for a more clearly defined consumer rights framework for digital content.

*'The concerns of the digital consumer and the present uncertain legal situation has led to various calls for more clearly defined digital consumer rights. Consumer organizations, academics, and digital rights groups have presented proposals and guidelines for consumer rights' catalogues.'*⁶¹

45. We believe that the uncertainty in the law exposes consumers of digital content to a lack of access to redress when something has genuinely gone wrong⁶². Furthermore, the current legal framework does not clarify business responsibilities when dealing with consumer issues arising in digital content. This can result in costly and time consuming disputes and exposes digital content retailers to risk about how the law may be interpreted if a case were to reach court.

46. A legal analysis of different European Member States has confirmed that this lack of clarity is widespread in the EU, including in the UK.

47. The lack of clarity around which remedies are available to digital content consumers is likely to dissuade some consumers from even attempting to claim redress. A recent Which? online survey⁶³ showed that 62% of people had not taken any action when they had been disappointed by a download they had bought. It therefore seems likely that, in addition to the detriment described above, there is some hidden consumer detriment for digital content transactions, where consumers experience a problem but do not complain or seek redress.

48. A recent survey by Consumer Focus⁶⁴ found that 9.7% of consumers did not take any action when they experienced a problem with digital content, 9.7% stopped using that seller while 4.5% stopped using digital content altogether (see Chart 1). The main reasons that consumers did not take action were uncertainty about how to obtain redress (60%) and the low value of the download (40%).

⁵⁸ Bradgate (2010).

⁵⁹ The European Consumer Centres' Network, The European Online Marketplace: Consumer Complaints 2008-2009, August 2010, p. 21. (Hereafter 'ECC-Net 2010').

⁶⁰ The European Online Marketplace: Consumer Complaints 2008 - 2009

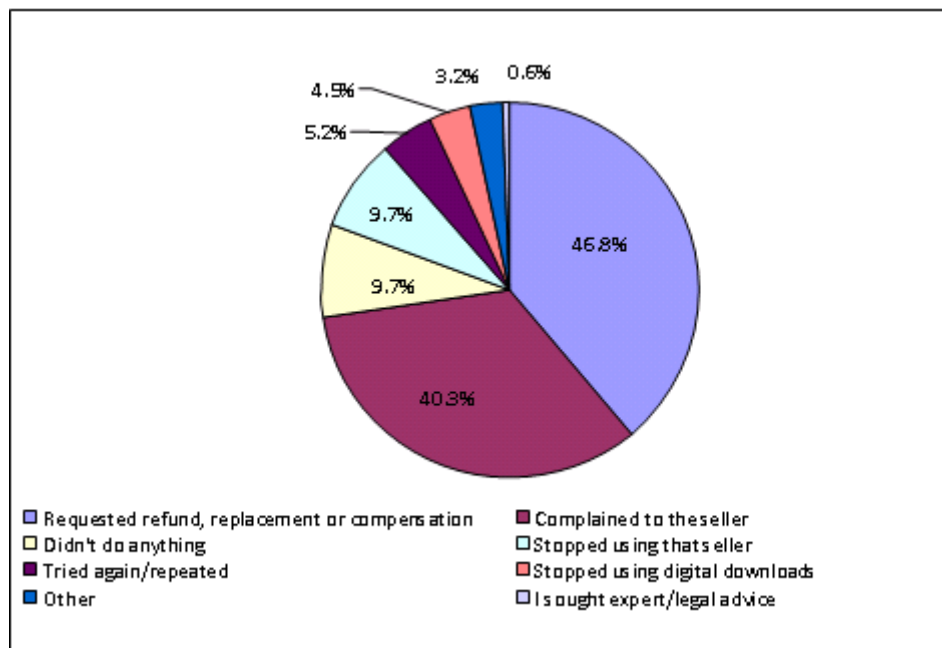
⁶¹ Natali Helberger (2008), 'Making space for the iconsumer in consumer law', Lists the following examples BEUC—European Consumers' Organisation: Declaration of Consumers' Digital Rights. Available at: <http://www.beuc.eu/Content/Default.asp?PageID=825>; Digital Copyright Canada: Petition for Users' Rights. Online available at: http://www.digital-copyright.ca/petition/petition_en.pdf; DigitalConsumer.org: The Consumer Technology Bill of Rights. Online available at: <http://www.digitalconsumer.org/>; Electronic Frontier Foundation: The Customer Is Always Wrong: A User's Guide to DRM in Online Music. Online available at: <http://www.eff.org/pages/customer-always-wrong-users-guide-drm-online-music>; Public Knowledge: What every citizen should know about DRM. Online available at: http://www.publicknowledge.org/pdf/citizens_guide_to_drm.pdf.

⁶² For example a recent Which? online survey found that 62% of consumer who had experienced a problem with digital content did not claim redress while a further 19% were refused redress.

⁶³ <http://conversation.which.co.uk/technology/download-refund-disappointing-faulty-app-store-itunes-android-market/>

⁶⁴ Not yet published

Chart 1: Consumer behaviour when they experience a problem with digital content



Source: Consumer Focus survey, not yet published

49. A study by the Office of Fair Trading on consumer detriment also found that consumers are less likely to seek redress for low value transactions:

*'The proportion of cases where respondents took action increases with the price of the good or service.'*⁶⁵

This is significant for the digital content market where there is a high volume of low value transactions, with music tracks and apps often selling for a pound or less.

50. The terms and conditions of many digital content retailers may also put consumers off from seeking remedies for faulty digital content. A recent Which? investigation looked at the refund policies and terms of sale for popular download retailers including iTunes and Amazon, they summarised 7 out of 9 policies they looked at, as saying 'downloads are not refundable'. Interestingly however, in reality they were able to get some kind of reimbursement in almost 80% of cases. Which? concluded that retailers were using their own discretion to judge whether to refund a download purchase.⁶⁶ A qualitative assessment by Consumer Focus also indicated that most terms and conditions, excluded liability for damage to software and left remedies for defective or undelivered products to the discretion of the retailer.

51. While a significant proportion of consumers choose not to follow up problems or to claim redress others overestimate the remedies that will be available to them if something goes wrong. A recent survey by Consumer Focus found that consumers are likely to assume they have legal rights to remedies, when in reality it is unclear whether they do or not. As Table 8 below shows, a significant proportion of consumers believe that they have rights to remedies, even though these rights are not currently defined in law.

⁶⁵ Consumer detriment: Assessing the frequency and impact of consumer problems with goods and services, April 2008, Office of Fair Trading

⁶⁶ <http://conversation.which.co.uk/technology/return-download-for-refund-app-ebook-mp3/>

Table 8: Consumer expectations of remedies for faulty digital downloads

Remedies	Number	Proportion
Replacement	529	55.0%
Refund	502	52.2%
Repair	266	27.7%
Compensation	122	12.7%
Money off	77	8.0%
Other	8	0.8%
Don't know	167	17.4%
Baseline	961	-

Response to the following question: When buying a digital download what legal rights do you think are available to you if it was faulty? Multiple choice question.

Baseline: All who have purchased anything via digital download in the last 12 months

Source: Consumer Focus (2012)

52. Where consumers expect to receive a remedy that the business does not think they are obligated to provide there is a risk to business of time and money spent on unnecessary dispute and also a reputational risk to business if they decline to provide that remedy. There is also a risk that, when consumers do experience a problem and are unable to claim the remedy they expect, consumer confidence is undermined. The resulting dent in consumer confidence could disadvantage new entrants to the market in particular as consumers are driven towards established brands.
53. Providing clarity to business and consumers as to what remedies should be provided for faulty digital content within the Consumer Bill of Rights should minimise disputes caused by the existing gap between consumers' current expectations and the law.

Policy objective

54. The proposals set out in this Impact Assessment form a part of a proposed wider reform of consumer law, intended to simplify and clarify consumer law to reduce business compliance costs and empower consumers. The proposals in this Impact Assessment would require primary legislation to be implemented, which we propose to do via a Consumer Bill of Rights.
55. The intention of the Government's proposed Consumer Bill of Rights is to set out a clear code of consumer shopping rights in one place, with workable remedies when things go wrong⁶⁷. It is an opportunity to remove complexity, fragmentation and overlap in the current consumer laws⁶⁸. There is further information about the Consumer Law Reform programme in Annex B.
56. . As part of the Consumer Bill of Rights, the Government will be consulting on proposals to clarify how the law applies in the case of digital content transactions.

The proposals have the following aims in relation to digital content purchases:

- Provide legal certainty for both businesses and consumers as to rights and remedies available in relation to digital content purchases;
- Provide a simple framework that is easy for business and consumers to understand and use by aligning where possible with existing legislation (see box 1) and with consumer expectations (see table 6);
- Support the development of the Digital Single Market by aligning where possible with emerging proposals from the European Commission, as far as this is appropriate and achievable (see box 2);
- Support a growing and significant part of the UK economy and protect intellectual property rights by taking into account the unique nature of digital content (see box 3);
- Provide a framework that is principles based⁶⁹ and can therefore adapt to future innovations;

⁶⁷ <http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=421254&NewsAreaID=2>

⁶⁸ <http://www.bis.gov.uk/news/topstories/2011/Jul/retail-red-tape>

⁶⁹ A Better Deal for Consumers - Delivering Real Help Now and Change for the Future, published in July 2009 and available here: <http://www.bis.gov.uk/files/file52072.pdf>, listed the following principles for consumer strategy: consumers are protected from unfair practices, consumers are enabled to exercise greater personal responsibility, businesses that behave fairly are not disadvantaged, new and emerging consumer markets are identified, consumers benefit from open and competitive markets, Government actions will be accountable, consistent and transparent, targeted on the areas where major breaches or areas of confusion occur.

- Achieve a fair balance between rights and responsibilities for both businesses and consumers;
- Reduce consumer detriment, through easier access to redress mechanisms.

57. In order to achieve these objectives, we are proposing:

- A clear definition of what we mean by digital content and hence the scope of our proposals.
- A set of quality standards guarantees that digital content should meet.
- A set of the remedies available to consumers when digital content does not meet these quality standards.

58. Following changes to the law it would be our intention that a communications campaign will be initiated in order to inform consumers and those who deal with consumers and also businesses of the changes to the law. The Consumer Landscape Review is being implemented and one of its objectives is to streamline the provision of advice on consumer issues through Citizens Advice. Therefore we are already talking to Citizens Advice about their role in communicating the changes that the consumer law reform programme will bring about. We will discuss awareness-raising for businesses with a range of business representative bodies.

Box 2: European legislation and proposals relating to digital content; CRD and CESL

The **Consumer Rights Directive (CRD)** is largely a maximum harmonisation directive that must be implemented into UK law and our intention is to do this at the same time as the Consumer Bill. This treats digital content supplied on disk as a good but also has provisions applying to digital content as its own category.

Article 2 (11) of the Consumer Rights Directive provides the following definition of digital content:

"digital content" means data which are produced and supplied in digital form

This definition is supplemented by the following text as in Recital 19:

Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. [...] If digital content is supplied on a tangible medium such as a CD or a DVD, it should be considered as goods... contracts for digital content which is not supplied on a tangible medium should be classified ... neither as sales contracts nor as service contracts.

The CRD introduces two new requirements for pre-contractual information that must be given for digital content and specifies how the right to withdraw applies to digital content in intangible and tangible form (see Option 0 below).

In October 2011 the European Commission published a proposal for an optional **Common European Sales Law**⁷⁰ that includes some specific, sales-related rules for contracts for the supply of digital content⁷¹. While the current proposal is an optional instrument for cross border transactions, the Commission has indicated that it could, in future, provide a basis for a more comprehensive policy and measures on consumer protection in the digital market.¹

Article 2J of the 2011 Common European Sales Law proposal defines digital content as follows:

'digital content' means data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software; it excludes:

- (i) financial services, including online banking services;*
- (ii) legal or financial advice provided in electronic form;*
- (iii) electronic healthcare services;*
- (iv) electronic communications services and networks, and associated facilities and services;*
- (v) gambling;*
- (vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users;*

Article 5 sets out which contracts it is intended that CESL is used for. Article 5b provides:

The Common European Sales Law may be used for contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price.

Included within the scope are 'contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user' as well as related services. This excludes digital content that cannot be re-used (e.g. streaming of live events).

⁷⁰ http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf

⁷¹ On the 2nd Feb 2012, the Government published a Call for Evidence on the EU proposal for a Common European Sales Law. This is a joint MoJ, BIS, NI and Sc publication and is available on the MoJ website, the consultation period will end on the 21 May 2012. <https://consult.justice.gov.uk/digital-communications/common-european-sales-law>

Box 3: The unique position of digital content

When considering the options available we recognise a number of issues that are particular to digital content and that need to be taken into account when proposing clarification to the consumer protection law.

Firstly it is crucial to the value chain of digital content creators that copyright is appropriately controlled. Specifically this means that copyright of the digital content does not usually pass to the consumer. It also means there are restrictions on how the consumer can use the digital content. 'Bugs' (imperfections) are considered standard in digital content on issue, although we think that both consumers and the Courts can distinguish between minor and major quality issues and can therefore take a reasonable view of bugs⁷².

There are also issues of trust and information for both consumers and suppliers of digital content. It is difficult for suppliers to make a judgment on whether a particular digital product will be compatible with a consumer's system due to the interplay between many different components in that system. However from the consumer's point of view they are reliant on information about the digital product before purchasing, since they will lose their right to withdraw once they have tried the digital content.

Equally the concept of returning goods does not easily transfer to digital content since copies could be retained and indeed some consumers may not know how to delete digital content from their devices.

⁷² Bradgate, R. (2010), 'Consumer Rights in Digital Products: A research report prepared for the UK Department for Business, Innovation and Skills', Department for Business, Innovation and Skills, Available for download here: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products>.

Description of options considered to clarify rights for digital content (including do nothing)

59. Keeping in mind the EU context and the unique situation that digital content presents there are three main options that we are proposing as part of the consultation process. The first is to 'do nothing', this would mean we implement what is set out in the CRD and do nothing further. In both of the remaining two options we would define digital content using the expanded CRD definition, and clarify that the goods quality standards are applicable to digital content itself (i.e. the data which are produced and supplied in digital form). Briefly these quality standards are that the digital content should meet the description given, be of adequate/reasonable quality including being fit for purpose and correspond with any sample.
60. The approach of options 1 and 2 differs in two main areas: scope and remedies. Within scope of option 2, we include related services such as maintenance and installation of digital content. We define these 'related services' as a category to which we apply the services quality standard of reasonable care and skill but the goods remedies of repair, replacement and rescission or reduction in price. This option is similar in its approach to the European Commission's proposal for a Common European Sales Law (CESL).
61. Option 1 is narrower in scope, covering just digital content itself and not any related services. Such services would therefore fall under the normal services regime. Again, we would largely apply the goods remedies to digital content, but, in contrast to option 2 this option would exclude the right to reject.
62. Each of the options refers solely to business to consumer transactions. We will be consulting on whether our proposals should apply to free digital content or to contracts where something of value other than money (such as personal data) has been given. The options are explained and discussed in more detail below.

Option 0: Do nothing – except introduce the Consumer Rights Directive into law

63. There is no true 'do nothing' option, the minimum action required is to implement the Consumer Rights Directive (CRD), which in many respects is a maximum harmonisation directive that must be implemented into UK law and which has implications for digital content transactions to UK consumers. Laws to implement the CRD have to be adopted and published by the 13th December 2013 at the latest and should apply from the 13th of June 2014. Our intention is to implement the CRD alongside the Consumer Bill of Rights. The proposals from the CRD are analysed in a separate CRD impact assessment.

CRD definition of digital content

64. The CRD includes a definition of digital content that will be the first to be incorporated into UK law. Article 2 (11) of the Consumer Rights Directive provides the following definition of digital content:

'digital content means data which are produced and supplied in digital form'.⁷³

65. This definition is supplemented by the following text in Recital 19:

'Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. [...] If digital content is supplied on a tangible medium such as a CD or a DVD, it should be considered as goods... contracts for digital content which is not supplied on a tangible medium should be classified ... neither as sales contracts nor as service contracts.'⁷⁴

CRD requirements for digital content

⁷³ Ibid

⁷⁴ Ibid

66. **Pre-contractual information** - The CRD will introduce new requirements for pre-contractual information that must be given to consumers prior to the purchase of digital content, goods or services. This will include the main characteristics of the digital content and the price as well as the name, address and contact details of the trader. In addition, for digital content, the trader must inform the consumer in advance of the relevant interoperability of the content and the functionality. Functionality refers to the ways in which digital content can be used, for instance tracking of consumer behaviour, as well as the absence or presence of any technical restrictions, for instance protection via Digital Rights Management or region coding. Relevant interoperability refers to information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version, certain hardware features.⁷⁵
67. **The right to withdraw from digital content transactions** - The CRD also sets out how the right to withdraw from a distance or off premises contract for digital content on disk or in intangible form works. In essence the rules in the CRD will mean that a consumer could have up to 14 days from transacting for digital content to withdraw from the contract. However if the consumer chooses to access the digital content or install it on their device within the 14 days, and was warned by the trader that in doing so they would waive their right to withdraw, the consumer loses this right to withdraw. In effect this means that the consumer does not have the opportunity to try digital content and then change their mind about the contract.

Quality Standards

68. The Consumer Rights Directive does not cover rights regarding non-conformity with the contract or quality issues, except to the extent that incorrect pre-contractual information may be a breach of contract (see below). Under this option the quality standards available for digital content transactions would remain unclear. Arguably introduction of the CRD may reinforce the legal position that digital content on disk is to be treated as goods but it will not help to clarify what rights there are regarding the quality of intangible digital content. This is because the CRD states that digital content supplied on a tangible medium should be considered as a good but does not set out or indicate what rights exist to quality or remedies for breach of those rights to quality.

Remedies

69. Under this option the remedies available to digital content transactions would remain unclear. The Consumer Rights Directive does not cover what remedies are available to consumers for non-conforming digital content or quality issues.

Costs and Benefits of Option 0

70. This is the baseline scenario, against which alternative options will be assessed. While the baseline scenario typically adopts the status quo, as discussed above, the CRD has important implications for consumer legislation in digital content purchases. Therefore, we proceed by considering some of these implications and their impacts on consumers and business.

Benefits

71. When implemented, the CRD information provisions will provide clearer and more comprehensive information to the consumer prior to purchasing digital content, goods and services.⁷⁶ This will enable consumers to make informed choices about the digital content, goods and services that they purchase and will reduce consumer detriment caused by lacking information. This is particularly relevant for digital content where consumers are often reliant on pre-contractual information and where currently this information is often unclear as to the characteristics the consumer can expect from digital content, what exactly they will be charged and who the consumer should contact if they have a problem. In addition, for digital content, the requirement for pre-contractual information on functionality and interoperability will address existing consumer detriment in these areas.
72. To estimate what proportion of consumer detriment might be addressed by the CRD ideally we would measure the financial value of digital content transactions that face issues due to information failures

⁷⁵ See here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>

⁷⁶ See paragraph 66

(we would include only those failures that would be addressed by the CRD information provisions). Detriment calculations would have to incorporate tangential costs such as the cost of seeking expert opinion, the value of time spent getting redress and psychological factors such as stress from the difficulties in obtaining redress.⁷⁷ However, some of these aspects would either be prohibitively costly to estimate or are difficult to quantify with any substantial degree of reliability. We plan to use consultation responses to develop robust estimates of the impact of the proposals.

73. Therefore we proceed by providing indicative estimates of the degree by which consumer detriment would be reduced in this option (and subsequently other options).
74. As shown in Table 6 a significant proportion of issues experienced by digital content consumers in the EU relate to information. Nearly a quarter (24%) of the problems raised by consumers were around a 'Lack of information' with a further 18% around 'Unclear / complex information'.
75. The problems identified around 'Unclear / complex information' are unlikely to be significantly reduced by introduction of the CRD, as it will have no effect on the information that businesses already provide, for example in the End User License Agreement.
76. Some problems relating to a 'Lack of information' do appear to be addressed by the CRD information provisions. Problems include consumers not being informed of compatibility issues, poorer quality and access given the information provided and additional / unclear charges. As shown in Annex A, a brief analysis of the problems, indicates that around 60% of the issues listed under 'Lack of information' would be partially or completely dealt with by the CRD information provisions.
77. If we assume that the proportion of consumer detriment due to information is the same in the UK as in the EU as a whole, that the CRD information provisions would be met by all businesses, and that this would solve 60% of problems relating to a lack of information and none of the problems relating to unclear/complex information, a maximum of 14.4% of consumer detriment could be solved by the CRD information provisions.⁷⁸ We have previously estimated consumer detriment at between £17.6m and £30.5m, with a mid-range estimate of circa £25.3m.⁷⁹
- 78. Assuming the CRD information provisions have the maximum impact on consumer detriment, the expected reduction in annual consumer detriment would be between £2.5m and £4.4m and the mid-range estimate standing at around £3.6m.**
79. The CRD sets out how the right to withdraw from a distance or off premises contract for digital content on disk or in intangible form works. This will clarify the situation for both business and consumers, potentially reducing any disputes. This is, however, unlikely to have a significant impact as, particularly for intangible digital content, there is rarely a delay between purchasing the content and downloading it and once downloaded the right to withdraw will lapse. Even for digital content on disk, the right to withdraw will lapse once the wrapper has been removed making the right of very limited value for digital content purchases altogether.

Costs

80. There will be some additional costs to business in providing the stipulated pre-contractual information, this will include the costs of finding, updating and supplying the info. There might also be costs resulting from a decrease in sales where the supplied pre-contractual information dissuades the consumer from purchasing the content e.g. if they see it is not compatible with their software. This may be counter balanced by reducing existing costs of dispute resolution or reputational costs of supplying digital content that a consumer cannot use.
81. It is possible that there would be some small costs in informing the consumer about their right to withdraw and from any increase in the number of withdrawals however, as explained above we expect this will be low as there is rarely a delay between purchasing the content and downloading it. The costs are analysed more fully in the Consumer Rights Directive Impact Assessment.

⁷⁷ See for example Section 4 of OFT (2008) Consumer Detriment study.

⁷⁸ Europe Economics study shows that 24% of problems are due to a lack of information. Annex A, indicates that the CRD information provisions would solve 60% of problems identified in the lack of information category. 60% of 24% = 14.4%

⁷⁹ See paragraph 21.

82. There will also be costs to business if they fail to provide sufficient or correct pre-contractual information⁸⁰.

Further Options

83. In the following two options, we look at how to clarify the rights and remedies that are available to consumers of digital content. Providing clear quality standards and remedies for when these quality standards are not met should reduce consumer detriment relating to poor quality digital content and issues with access to digital content. The changes introduced in the CRD would still apply in both of these options.

84. In both options we will use the CRD definition of digital content. While the CRD provides that digital content on a tangible medium should be treated as a good, we will make clear that our definition of digital content includes digital content on a tangible medium.

85. Overall, our legal analysis, as well as that of the European Commission⁸⁰ and the stance taken by other countries that have clarified the status of digital content already in their consumer law⁸¹, is that the expectations of quality for digital content align better with those existing for goods rather than for those applying to services. We think it will be easier for consumers and businesses to use a clarified framework for digital content if it bears similarity to the existing framework for goods, and therefore propose to align where appropriate with that framework.

*'The provisions applicable to sales [of goods] contracts lend themselves well for application to digital content contracts, with some obvious amendments as to gratuitous digital content. In particular the provisions on conformity and the remedies for non-conformity may be applied with only minor changes.'*⁸²

86. For both Options 1 and 2, we therefore apply quality standards that are aligned with the standard tests applied to goods. The standards, as for goods would be 'outcome-based', meaning the retailer is strictly liable if the digital content does not meet those standards. As for goods, a consumer would need to provide a retailer with evidence that one or more of the statutory guarantees had been breached. The retailer would not be able to limit their liability. **In summary the quality standards for digital content in both options would be based on the implied terms in the Sale of Goods Act but with modifications as follows:**

- Guarantee as to title i.e. that the seller has the right to sell the goods
In the context of digital content, it should be clarified that the "title" that passes is the right to the exclusive use of the copy of the digital content but not (usually) the copyright ownership. This corresponds with the provision in s.12(3) of SOGA, that 'The seller should transfer only such title as he or a third party may have.'
As in s.12(2)b of SOGA, there would also be a guarantee as to quiet possession of the digital content. However in the case of digital content we propose to clarify that possession / use of the digital content would have to be in line with the licence agreement. We would also consult on the basis that quiet possession includes a guarantee that the consumer must consent to - or at least be warned of- any interference that could affect this use (e.g. software updates).
- Guarantee as to sale meeting description i.e. that the digital content should correspond with the description given.

We will be consulting on whether failing to disclose applicable technical protection measures (TPMs) to the buyer before sale would result in (or provide evidence for) the sale not meeting description.

⁸⁰ Detail on enforcement of CRD provisions, including the information provisions, can be found in the CRD Impact Assessment where in addition to existing enforcement we are proposing a specific injunctive regime, similar to that which operates under the current Distance Selling Regulations.

⁸¹ New Zealand, Australia and South Africa are the only countries to our knowledge to have legislated specifically for digital products in their consumer frameworks and in each case they have defined software as goods.

⁸² University of Amsterdam, http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf

There would also have to be a guarantee that the digital content should possess the performance capabilities indicated in the pre-contractual information. If it did not, it could not be deemed to meet description / be fit for purpose.

- Guarantee as to quality and fitness i.e. that the digital content is of satisfactory quality
The digital content would be of satisfactory quality if it met the standard that a reasonable person would regard as satisfactory. Such a judgement would take into account any description of the digital content, the price (if relevant) and all the other relevant circumstances (such as public statements on the specific characteristics of the digital content).

Judgements as to the quality of the digital content could include consideration of:

- fitness for purpose - both common use and particular purposes made known to the seller
- appearance and finish
- freedom from minor defects
- safety and
- durability

In context of digital content, bugs are considered standard in digital content on issue⁸³ and as such we propose that a reasonable person would expect a certain amount of bugs and that as such the existence of these bugs would not necessarily be a breach of the guarantee as to quality and fitness. To clarify this further we are consulting on whether to remove the 'freedom from minor defects' aspect of quality (s.14(2B)(c) of SOGA) specifically and only for digital content.

- Guarantee that the sale will correspond to any sample given i.e. that the digital content will correspond with any trial version

More specifically that the bulk of the digital content should correspond to any sample and that the digital content should be free from defect which would not be apparent from reasonable examination of the sample.

87. Options 1 and 2 also clarify the remedies available to consumers when digital content does not meet these quality standards. **In both options, where there has been a breach of the above quality standards, we would largely apply the 'goods' remedies (however for option 1 we would not provide a short term right to reject)⁸⁴. These are:**

- The consumer has a short term right to reject (with full refund) until they have accepted the digital content⁸⁵; and
 - As an alternative or after the digital content has been accepted, the retailer must offer either a repair or replacement goods; and
 - where repair or replacement:
 - (a) is impossible or
 - (b) is disproportionate either in relation to each other (i.e. repair is disproportionate in relation to replacement or vice versa), or is disproportionate in relation to a reduction in price or rescission, or
 - (c) has not taken place within a reasonable time or without significant inconvenience to the consumer.⁸⁶
- the consumer can require the seller to reduce the purchase price⁸⁷ or rescind the contract⁸⁸. Liability can extend for up to 6 years (England) or 5 years (Scotland).

⁸³ Bradgate (2010)

⁸⁴ Breach of the statutory guarantee as to title would not give rise to the remedies of repair, replacement, rescission or reduction in price

⁸⁵ Elsewhere in the Bill we are proposing that, amongst other things, acceptance will be deemed to have taken place after a lapse of 30 days.

⁸⁶ Elsewhere in the Bill we are proposing that the consumer will be entitled to a refund or partial refund after two failed repairs or 1 failed replacement

⁸⁷ Where there is a simple price reduction and not a rescission the consumer continues to use the goods but gets some money back.

⁸⁸ Where the contract is rescinded the consumer must return the goods. Any reimbursement can be reduced to take into account the use the consumer has had of the goods. Elsewhere in the Bill we are consulting on clarifying this deduction for use by setting a deduction profile. Full details on this can be found in the *Supply of Goods: Deduction from refund for use at rescission of contract impact assessment*. For digital content we intend align with the proposals that is decided on for goods.

- As an alternative to invoking these statutory remedies, the consumer always has the option of pursuing the supplier for normal common law contractual remedies for breach of contract. The remedy is usually one of damages (flexible monetary compensation for any loss suffered as a result of the breach).
- For distance and off premises contracts, even where there is no breach of quality standards, the consumer also has the right to withdraw from the contract (within 14 days, once the CRD is implemented) and receive a full refund for goods purchased at a distance, unless performance has begun with the consumer's prior consent and acknowledgement that the right of withdrawal is lost.

Costs and benefits of options 1 and 2

88. Options 1 and 2 seek to address the same problems and as such will result in many of the same impacts. The common costs and benefits to options 1 and 2 are described below.

Benefits

89. The proposals are expected to lead to the following benefits:

- Quality standards and remedies available to digital content consumers will be clarified making the law clearer and easier to understand for consumers, businesses and consumer advisers. This should result in reduced costs of enforcement and compliance due to a decrease in disputes and reduced court time/dispute resolution faced by business and consumers.
- Both options make use of familiar legal concepts thereby reducing some of the risk of legal uncertainty that new laws could create.
- As described by the Law Commission in their Impact Assessment on Consumer Remedies for Faulty Goods, a base level of remedies allows consumers to be more adventurous, by selecting unknown (and cheaper) brands. This could provide a risk/reward ratio that allows new providers to enter the market at a competitive price.
- Businesses would gain legal certainty as to their responsibilities when selling digital content to consumers. Moreover, businesses may see increased sales as consumer confidence increases. Particularly true for new / small entrants to market.⁸⁹
- In the long term, an indirect effect of consumer protection in this area, could be the development of higher quality digital content.

Costs

90. The proposals are expected to lead to the following costs:

- Clarifying consumer rights and remedies for digital content could increase the costs to some retailers of providing redress to consumers. Consumers who had previously been put off seeking redress due to the lack of clarity of the law may now be encouraged to enforce their rights and claim redress. Simultaneously, retailers who were benefiting from the current uncertainty of the law and refusing consumers redress for faulty digital content will now understand their responsibilities to the consumer and will have to provide the appropriate redress.
- It may be difficult in some cases to distinguish between faults in the digital content itself and failures in the services which surround delivery of the digital content and thus to determine where a fault lies e.g. whether there is a problem with the streaming process or with the actual digital content. In both options different quality standards are applied and in option 1 different remedies are applied depending on whether the fault is with the digital content or the related service. This could be time consuming and expensive for business and confusing for consumers who may remain unclear of their rights when they experience a problem. Consumers may also struggle to prove that a retailer has not delivered related services with reasonable care and skill.

⁸⁹ EC CESL impact assessment <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:1165:FIN:EN:PDF>

- In both options consumers might face an increase in prices as businesses could try to compensate for the higher cost of remedies.
- There will also be some training costs for incumbent business to familiarise staff with new digital content rights and remedies.

Differences between options 1 and 2

91. Option 1 and 2, differ in two mains area: scope and remedies. These differences are highlighted in Table 9 and the options are described in more detail below.

Table 9 – Summary of the main differences between the options		
	Scope	Remedies
Option 0	CRD provides a definition of digital content and some requirements for pre-contractual information	No rights to quality or remedies for substandard quality digital content are established
Option 1	Digital content defined as in the CRD Related services are not included within scope but fall under the normal services regime	“Goods” remedies applied to digital content (as defined in CRD) only The right to reject is not included for digital content Related services, including access to content and maintenance etc, are covered by general services remedies ⁹⁰
Option 2	Digital content defined as in the CRD “Related Services” are included within the scope of the proposals and are defined as in the CESL.	“Goods” remedies are applied to digital content and related services The right to reject is included for digital content

Option 1: Provide bespoke rights and remedies for digital content only

92. This option recommends a bespoke framework that applies specifically to digital content. In order to provide as simple a regime as possible for businesses and consumers to understand and use, rights and remedies for digital content align as far as is appropriate with existing rights and remedies for goods. As can be noted below, the scope of the proposals are narrower than those proposed under option 2 as related services are not included as a separate category but are dealt with using the services framework.

Scope

93. Digital content is defined using the CRD definition but any related services such as any installation or maintenance would be covered under the services regime. As such, the usual services rights and remedies would be applied.

94. Figure 1 provides a diagrammatic representation of option 1.

⁹⁰ We are consulting elsewhere on introducing statutory remedies for services - that is repair, reperformance and / or reduction in price. If this goes ahead the treatment of related services in option 1 and 2 will be similar, the main difference being the availability of a right to reject.

Figure 1: Scope of option 1

Digital content Digital content quality standards Goods remedies	Service Services quality standards Services remedies
<p>For example:</p> <ul style="list-style-type: none"> • <i>Games</i> • <i>Videos</i> • <i>Text e.g. e-books</i> • <i>Computer programs</i> • <i>Apps</i> • <i>Music</i> <p>Whether supplied on a tangible or intangible medium</p>	<p>For example:</p> <ul style="list-style-type: none"> • <i>Access to software supplied in the cloud</i> • <i>Storage of consumers own digital content in the cloud</i> • <i>Delivery of digital content e.g. by download</i> • <i>Access to game online</i> • <i>Updates to digital content e.g. for antivirus or operating systems</i> • <i>Streaming of digital content</i> • <i>Upkeep to virtual worlds</i>

Remedies

95. Under this option, the remedies for breach of the guarantee in relation to digital content itself are almost identical to the remedies listed in option 2, apart from the fact that we exclude the short term right to reject.

96. As in option 2, clarifying which remedies apply to digital content will provide clarity and certainty to business and consumers. Unlike in option 2, the consumer does not have a short term right to reject. This is due to the risk that consumers make a copy of the digital content and retain it after they have claimed their money back. Without the short term right to reject the retailer will be able to offer a repair or a replacement in the first instance, although a price reduction or full refund will still be available to the consumer should this fail to fix the problem. This will mean that a consumer with a genuine problem will still be able to get appropriate redress.

Costs and Benefits of Option 1 (in addition to those listed in paras 81 and 82)

97. The following costs and benefits apply to option 1. Later in this document we provide very rough quantified estimates of these impacts, we intend to use the consultation period and consultation responses to test these with stakeholders, strengthening these calculations in time for the final stage impact assessment.

Benefits

98. The proposals under option 1 are expected to lead to the following benefits:

- Not including a right to reject digital content would reduce the risk of fraudulent behaviour by the consumer and would reduce the burden on business. The other remedies would still apply, i.e. repair/replacement and, failing this, partial or full refund would remain meaning the consumer who has a genuine problem and strong evidence is likely to pursue the remedies through the stages until they reach a full refund but this would be exceptional and replacement or repair or even price reduction would be more common.
- The European remedies of repair or replacement will be the main remedies, which would lead to a reduction of costs to retailers, in comparison with option 2, as they will save on refunds. Contrary to tangible products, replacement of digital products is cheap. Repair can also present less of a burden for business as a repair will often be transferable to all consumers.

Costs

99. The proposals under option 1 are expected to lead to the following costs:

- The consumer is not able to inspect the digital content prior to purchase and is therefore particularly reliant on the description of the digital content provided pre-contractually. To clarify in law that there is no right to reject might open the market place to rogues and undermine consumer confidence to try out new market entrants, thus having an anti-competitive effect.
- The absence of the legal right to reject for digital content will mean that, compared with option 2, an increased number of consumers will have to rely on European remedies of repair and replacement. They would only be entitled to a refund if repair or replacement proved impossible or disproportionate, or took too long or caused significant inconvenience⁹¹. This may result in disputes, both in and out of court, for example over what amounts to “significant inconvenience”. This would increase costs to businesses and consumers. There is also a risk of delayed redress when the only valid outcome for the consumer is a refund.⁹²
- No right to reject leaves a possibility of a lack of consumer confidence in buying from smaller retailers and non-branded goods (as consumer is not convinced they will be able to claim their money back), which could adversely affect competition⁹³. This could result in a decline in range / choice of products.

Estimates of the costs and benefits of option 1

100. While we have not been able to obtain reliable quantified estimates of the impacts identified above (we intend to use the consultation period and consultation responses to derive such estimates in time for the final stage impact assessment), the following estimates are helpful for illustrative and indicative purposes.

101. BIS (formerly the Department for Business, Enterprise and Regulatory Reform and the Department of Innovation, Universities and Skills) commissioned ICM to conduct a retailer survey of business practices in relation to consumer remedies for faulty goods.⁹⁴ Given that under this option we are proposing to adopt the goods framework for consumer protection in digital content, the results should provide a useful indication of the impact of these on business practices. The survey showed that 29 percent of retailers⁹⁵ offered consumers the choice as to the type of remedy that they wished to proceed with. As Chart 2 below shows, the survey also found that retailer and consumer preferences as to the redress route in relation to faulty goods are broadly similar.

Chart 2: Retailer and consumer preferences for redress routes⁹⁶

⁹¹ Elsewhere in the Bill we are considering whether to limit repair and replacement to two failed attempts

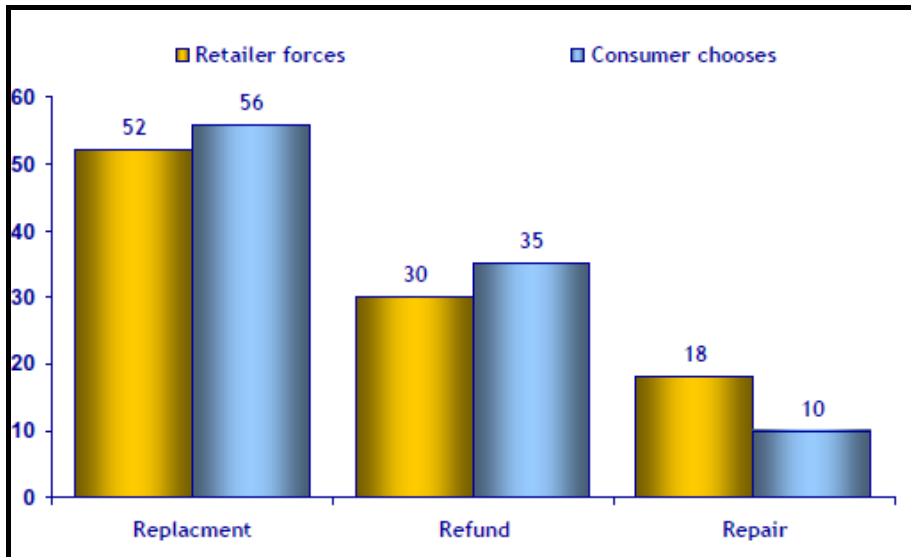
⁹² Law Commission Impact Assessment of Consumer Remedies for Faulty Goods 4 November 2009 http://lawcommission.justice.gov.uk/docs/lc317_impact.pdf

⁹³ Qualitative Research into consumer remedies for faulty goods, April 2008, Research by FDS International Ltd, commissioned by the Law Commission and published in Annex A of The Law Commission Consultation Paper No 188, http://lawcommission.justice.gov.uk/docs/cp188_Consumer_Remedies_Faulty_Goods_Consultation.pdf

⁹⁴ ICM (2009), ‘Retail Harmonisation Survey’, Commissioned by BIS (formerly BERR), Available here: <http://www.bis.gov.uk/files/file51165.pdf>.

⁹⁵ Responses weighted by turnover.

⁹⁶ Yellow bars are results from retailers who impose the remedy on the consumer, whereas the blue bars are those (of the 29% of respondents) which allow the consumer to choose the remedy. It should be noted that these figures may disguise marked differences between sectors. In the car industry, for example, retailers are unlikely to offer anything other than repair for new vehicles due to their high value.



Source: BIS/ICM (2009)

102. The survey also found that 73 percent of retailers were able to pass on the costs of returned faulty goods onto upstream suppliers or producers, with the remainder bearing some or all of the costs of returns.⁹⁷ If the same is true of digital content then the cost to business will be shared between digital content retailers and manufacturers. The cost to business of providing redress to consumers will vary depending on the remedy provided. The cost of providing a replacement for intangible digital content, for example is likely to be considerably less than the cost of repair or refund and considerably less than the cost of replacing physical goods. While the costs of making a repair such as a bug fix may be significant, it is likely that one repair can be provided to multiple consumers at little cost.

103. There are two key differences between options 1 and 2. The first relates to the available remedies, since Option 1 does not include a short term right to reject. As such, in most cases, retailers will have the opportunity to provide a repair / replacement instead of a refund. The second relates to the scope of the proposals. While Option 2 includes a related services category and applies the goods remedies to this, in Option 1, any related services such as access, updates and maintenance are not included under the digital content proposals but fall under the normal services regime. These could provide for a lower protection threshold and potentially benefit a smaller number of digital content consumers facing issues. Applying the results of the Europe Economics (2011) survey in relation to consumer issues to our estimates of consumer detriment, we obtain the following illustrative estimates of detriment by problem type (see Table 10).

Table 10: Illustrative estimate of detriment by problem type

Problem type	Proportion experiencing type of problem	Low detriment estimate (£m)	Mid detriment estimate (£m)	High detriment estimate (£m)
Access	31%	5.5	7.8	9.5
Lack of information	24%	4.2	6.1	7.3
Unclear/complex information	18%	3.2	4.6	5.5
Quality	14%	2.5	3.5	4.3
Security	9%	1.6	2.3	2.7
Unfair terms and conditions	2%	0.4	0.5	0.6
Privacy	2%	0.4	0.5	0.6
Total	100%	17.6	25.3	30.5

Source Europe Economics (2011), Consumer Direct data and BIS estimates.

⁹⁷ ICM/ BIS (2009).

104. Given that the proposals under option 1 are less likely to benefit 'service' elements of digital content, we assume for illustrative purposes that consumer detriment arising from issues to do with accessing the digital content are not going to be addressed. Therefore option 1 results in fewer consumer benefits and by implication smaller business costs.

105. Table 11 below summarises the potential costs and benefits of option 1, using the consumer detriment figures calculated in paragraphs 15-24. These figures are for illustrative and indicative purposes only, since they are based on simplifying assumptions on the way these are derived. We plan to use the consultation period to seek stakeholder opinion on these impacts, in order to derive robust estimates of these impacts.

Table 11: Estimate of costs and benefits of option 1

Annual impact	Low estimate (£m)		Mid estimate (£m)		High estimate (£m)	
Consumer benefits ⁹⁸	10.4		14.9		18.0	
Overall cost to business (refund and repair) ⁹⁹	4.6		6.6		7.9	
Cost to retailers ¹⁰⁰	1.2		1.8		2.1	
Cost to manufacturers ¹⁰¹	3.3		4.8		5.8	
Costs to business (training)	£2.7		£2.7		£2.7	
Net benefits	£3.1		£5.7		£7.4	

Source: BIS estimates and as footnoted.

106. As can be noted above consumer benefits are simply the estimates of annual consumer detriment (after detriment that should be solved by the CRD has been subtracted), with the low estimate based on the proportion of consumers who do not take remedying steps in relation to faulty digital downloads and the high estimate being those derived from the Consumer Direct database and using OFT methodology. The costs to business arising from refunds and repair are simply the consumer benefit estimate, minus the proportion of benefit that would be due to replacement; this is estimated at 56% based on the consumer preference data shown in Chart 2. This assumes that consumer preferences for remedies will be the same as for goods and that the cost of providing a replacement is close to zero, with the majority of costs occurring in the R&D stages of production.

107. Table 11 also shows the costs to business of training staff to comply with the proposals, which we assume to be a one-off transition cost.¹⁰² Ideally we would measure the cost of training to business through the product of the (financial) opportunity cost of training and the additional training arising from the proposals, across all businesses affected (that is retailers selling digital content). We have not been able to derive robust estimates of this effect and plan to use the consultation to gather stakeholder views in this area. To calculate the indicative figure shown in table 11 we assume that each employee will be trained for an additional 10 minutes on the proposed digital content consumer rights, that the employee will be paid the average hourly wage¹⁰³ for shop and retail assistants and that the number of employees working in retail is just under 3.1million¹⁰⁴. Therefore the predicted wage costs to business are circa £2.3m. In order to calculate total expected costs to business, we have also uprated this figure by an additional 16.4 percent, to account for the non-wage training

⁹⁸ We assume consumer benefits are the mirror of annual consumer detriment, minus that consumer detriment arising from issues to do with accessing the digital content (31%).

⁹⁹ We assume that 56% of consumers choose a replacement and that the cost of a replacement is close to zero. We then assume the cost to business is the mirror of consumer benefits, minus the benefit that is remedied by replacement.

¹⁰⁰ Assuming that retailers pass on 73 percent of costs of returns and refunds onto the upstream suppliers. See paragraph 98.

¹⁰¹ Assuming manufacturers absorb 73 percent of the costs of returns.

¹⁰² For simplicity we are assuming that these are the same for both option 1 and option 2. We would expect that the wider scope of proposals under option 1 is likely to result in marginally more training than under the proposals in option 2. However, given the uncertainty around these estimates, we assume that costs are the same for both options.

¹⁰³ The Annual Survey of Hours and Earnings (2011) shows this as £7.51. See here: <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-235202>.

¹⁰⁴ According to Business Population Estimates (2011), See here: <http://www.bis.gov.uk/analysis/statistics/business-population-estimates>.

costs.¹⁰⁵ Therefore total costs to business of training staff on the proposals are estimated at circa £2.7m. This is likely to be an overestimate as the number of staff working in retail of digital content as opposed to the entire retail sector will be much less than 3.1million.

108. **Therefore annual consumer benefits (not including benefits of option 0) are estimated in the range of £10.4m and £18m, with a mid-range estimate of circa £15.0m. Business costs, including the one-off cost of training staff on the new provisions, are estimated at between ££4.6m and £7.9m, with a mid-range of £6.6m.**

109. **Net benefits of the proposals under option 1, including the one-off cost of training, are estimated at between £3.1m and £7.4m, with a middle estimate of £7.4m (rising to between £8.3m and £10.1m once the one-off training cost falls away).**

110. Furthermore, the provisions in option 1 regarding the consumer remedies are less likely to result in a refund since they do not specifically provide for a short term right to reject. Therefore businesses are likely to attempt to repair or replace faulty digital content as a remedying step, prior to proceeding to providing a refund. To be able to estimate the difference this could make we would need additional data on how many issues are resolved through customer support or by repairs and replacement, and how many issues would proceed through to a refund. We would also need data on consumer preferences for redress for digital content. If consumer preferences for refunds over repair or replacement are similar in respect of digital content as they are for goods generally then we would expect 35 percent of consumers to seek a refund from retailers (see Chart 2 and paragraph 97). This could well be an over or under estimate of the likely consumer preference for refunds in digital content markets, in fact the rate might well be different for different digital content sub-sectors. We will seek evidence on this in the consultation.

Option 2: Provide bespoke rights and remedies for digital content and related services

Scope

111. In this option we take a similar approach to the European Commission's proposal for a Common European Sales Law (CESL). We introduce a "related services" category and define related services as in the CESL;

"Related service" means any service related to [goods or] digital content, such as installation, maintenance, repair or any other processing, provided by the [...] supplier of the digital content under the [...] contract for the supply of digital content or a separate related service contract which was concluded at the same time ...'

112. For these related services, as in the CESL, we would apply the services quality standard of 'reasonable care and skill', but the goods remedies, with the appropriate adaptations.

113. Figure 2 below, gives a diagrammatic depiction of this option, with examples of the types of digital content and services we are referring to in each category (digital content, related services, pure services). These are purely examples not an exhaustive list.

¹⁰⁵ Eurostat figures for the UK show that non wage labour costs are an average of 14.1 percent of total employee costs to business. Therefore a multiplier of 1.164 is applied to wage costs, to derive total costs (1/85.9). See here: http://epp.eurostat.ec.europa.eu/portal/page/portal/labour_market/labour_costs/main_tables.

Figure 2: The scope of option 2 proposals

Digital content Digital content quality standards Goods remedies	Related service Services quality standards Goods remedies	Service Services quality standards Services remedies
For example: <ul style="list-style-type: none"> • Games • Videos • Text e.g. e-books • Computer programs • Apps • Music Whether supplied on a tangible or intangible medium	For example: <ul style="list-style-type: none"> • Streaming of digital content • Delivery of digital content e.g. download • Access to software supplied in the cloud • Access to game online • Updates to DC e.g. for antivirus or operating systems 	For example: <ul style="list-style-type: none"> • Storage of consumers own DC in the cloud • Service contracts concluded with a different provider than digital content contract¹⁰⁶

Remedies

114. In option 0, it remains totally unclear which remedies are available to a consumer who purchases faulty or non-conforming digital content. In this option, we clarify that the goods remedies apply, providing certainty to business and consumers. Use of the goods remedies including the right to reject means, in the short term, a consumer who purchases non-conforming digital content can choose between a refund and a repair or replacement.

115. For the short term right to reject for digital content, in line with tangible goods, the consumer must, in addition to showing evidence of a fault, prove that the fault existed on the day the contract was concluded. For tangible goods the retailer could expect to:

- Inspect the alleged fault; and
- Retain the faulty goods. This is part of the concept of 'rejection' of goods.

116. We will consider in the consultation document whether we need to clarify how many repairs / replacements can be offered before the consumer can claim a price reduction or refund¹⁰⁷. This will be a complex issue for digital content, where patches, updates and bug fixes are such a common occurrence.

Costs and Benefits of Option 2 (in addition to those listed in paras 81 and 82)

117. The following costs and benefits apply to option 2. Later in this document we provide indicative estimates of these impacts and we intend to use the consultation period and consultation responses to test these with stakeholders, strengthening these calculations in time for the final stage impact assessment.

Benefits

118. The proposals under option 2 are expected to lead to the following benefits:

- Strong consumer protection resulting in reduced consumer detriment.
 - The inclusion of a statutory right to reject would mean that consumers can be assured of getting their money back for non-conforming digital content without having to go through repair or replacement cycles before being able to exercise the statutory right to rescind the contract.
 - Applying the goods remedies to digital content and related services means a consumer can claim redress for a defect in the content, the medium /access route or any related services. This allows easier access to redress for the consumer and thus increased consumer confidence. It also reduces the need to distinguish between the digital content and the related service, creating a simpler framework for businesses and consumers to use, meaning lower costs for training and dispute resolution.

¹⁰⁶ For example the provision of internet by an internet service provider

¹⁰⁷ For goods we are consulting on limiting the number of repairs and replacements

- Research commissioned by the Law Commission and carried out by FDS shows that strong remedies, particularly the right to reject, give consumers the confidence to purchase brands and goods which are unfamiliar to them, and from retailers whose policies they do not know.¹⁰⁸ This would encourage innovative and competitive markets.

Costs

119. The proposals under option 2 are expected to lead to the following costs:

- The risk of including a short term right to reject for digital content is that in some cases, digital content would be refunded where it would be more economical to the business to repair or replace it. The burden caused by the right to reject would be the difference between the price of a refund and the price of a repair or replacement. Since the cost of replacing digital content may be close to zero for the rights holder, this gap could be significant, although in some cases the retailer may have to pay the rights holder if they provide the consumer with a new copy. Such costs would mostly affect companies who sell on average more defective products than their competitors, as the costs would only occur if the company sells a defective product.¹⁰⁹
- The inclusion of a right to reject for digital content might increase the potential for fraud, increasing the risk of abuse by some consumers who claim the digital content is faulty but then retain a copy. This issue will be explored in the consultation.

Estimates of the costs and benefits of option 2

120. Table 12 below summarises the potential costs and benefits of option 2, using the consumer detriment figures calculated in paragraphs 15-24. These figures are for illustrative and indicative purposes only, since they are based on simplifying assumptions on the way these are derived. We plan to use the consultation period to seek stakeholder opinion on these impacts, in order to derive robust estimates of these impacts.

Table 12: Estimated costs and benefits of option 2¹¹⁰

Annual impact	Low estimate (£m)		Mid estimate (£m)		High estimate (£m)	
Consumer benefits	15.1		21.7		26.1	
Overall cost to business (refund and repair) ¹¹¹	6.6		9.5		11.5	
Cost to retailers ¹¹²	1.8		2.6		3.1	
Cost to manufacturers ¹¹³	4.8		7.0		8.4	
Costs to business (training)	2.7		2.7		2.7	
Net benefits	£5.8		£9.5		£11.9	

Source: BIS estimates and as footnoted; Rounding errors are present.

121. Again, consumer benefits are simply the estimates of annual consumer detriment (after detriment that should be solved by the CRD has been subtracted), with the low estimate based on the proportion of consumers who do not take remedying steps in relation to faulty digital downloads and the high estimate being those derived from the Consumer Direct database and using OFT methodology. The costs to business arising from refunds and repair are simply the consumer benefit

¹⁰⁸ FDS International Ltd, Qualitative research into consumer perceptions of consumer remedies for faulty goods, April 2008, Prepared for the Law Commission and published in Annex A of The law commission consultation paper on consumer remedies for faulty goods http://lawcommission.justice.gov.uk/docs/cp188_Consumer_Remedies_Faulty_Goods_Consultation.pdf

¹⁰⁹ EC CESL impact assessment <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:1165:FIN:EN:PDF>

¹¹⁰ Excludes consumer detriment addressed by the implementation of relevant CRD provisions, whereby consumer detriment is reduced through consumers having access to better pre-contractual information. See paragraph section on costs and benefits of the do-nothing option (0).

¹¹¹ We assume that 56% of consumers choose a replacement and that the cost of a replacement is close to zero. We then assume the cost to business is the mirror of consumer benefits, minus the benefit that is remedied by replacement.

¹¹² Assuming that retailers pass on 73 percent of costs of returns and refunds onto the upstream suppliers. See paragraph 98.

¹¹³ Assuming manufacturers absorb 73 percent of the costs of returns.

estimate, minus the proportion of benefit that would be due to replacement; this is estimated at 56% based on the consumer preference data shown in Chart 2. This assumes that consumer preferences for remedies will be the same as for goods and that the cost of providing a replacement is close to zero, with the majority of costs occurring in the R&D stages of production.

122. **Therefore, we estimate that for option 2 potential annual consumer benefits (excluding benefits achieved through option 0), are between £15.1m and £26.1m, with a mid-range estimate of £21.7m. Business costs for the first year, including the one-off training costs are estimated between £9.3m and £14.2m (falling to between £6.6m and £11.5m thereafter, with £9.5m as a middle estimate).**
123. **Net benefits to the proposals under option 2 are estimated at between £5.8m and £11.9m in the first year, and £9.5m. These rise to between £8.4m and £14.6m thereafter, with the middle estimate at £12.1m.**

Discarded policy options – defining digital content as a good or as a service

124. There has been much academic debate as to whether digital content is a good or a service, and other countries that have legislated in this area (New Zealand, Australia, South Africa) have done so by including software in their definition of 'goods'. One option we considered was whether to include digital content in a revised definition of 'goods' or exclude it from such a definition and, by default, thereby classify digital content as a 'service'. We have discounted both of those proposals for different reasons.
125. Firstly, we do not think the services rights framework would provide relevant consumer protection to consumers purchasing digital content. The rights in service contracts are that the service be provided with 'reasonable skill and care'. It is hard to see how this could apply to digital content on a disk or the equivalent product downloaded. However, as discussed earlier, we do consider that some digital content is provided on more of a service-like basis. For example, Professor Bradgate considered this subject and found that "[classification of digital content as a service] may be appropriate in the case of streamed software services...generally software should be regarded either as goods/a product or something sui generis." Similarly a report by the University of Amsterdam, finds that applying the services framework to digital content could increase the existing legal uncertainty⁸⁰.
126. Secondly, we do not see it as suitable, for the following reasons, to include digital content in the definition of 'goods'. Although we think that the rights and remedies of the goods framework are by and large appropriate for digital content there are some minor amendments that will need to be made to ensure the practical application of these rights and remedies to digital content. Such amendments include for example the need to clarify that copyright of the digital content does not pass to the consumer and that the consumer can only use digital content as set out in the license. Revising the definition of 'goods' to include digital content would not have allowed any such minor amendments to be made without complicating the law that applies to goods.

Box 4 – A potential option 3?

In both options 1 and 2 the consumer and retailer may need to distinguish between whether there is a fault with the digital content or with the related service / pure service. In option 1 different quality standards but almost identical remedies are applied to digital content and related services, while in option 2 different quality standards and different remedies are applied to digital content and services. This may result in disputes as to what element of the transaction is at fault. In both options 1 and 2 it might be hard for a consumer to prove that a related service / pure service was not delivered with reasonable care and skill. This could leave them unable to claim redress. Unscrupulous businesses may seek to trade off this difficulty, attributing faults where possible to service deficiencies which are difficult to prove.

Elsewhere in the Bill we are considering a proposal that for contracts for bundled goods and services, the service element should also be of satisfactory quality and fit for purpose. This would make it easier for the consumer to claim redress but would introduce quality standards to the service elements of the contract that are higher than for any other service contract. This may have unintended impacts, possibly restricting innovation and causing providers to stop providing bundled contracts. We are trying to gauge the potential impact through the consultation process. If this option was pursued for bundled goods and services, to continue the themes of harmonisation and simplification across the Consumer Bill of Rights, we would also consider whether this is a viable option for bundled digital content and related services. We will consult on the practicalities of this potential option for digital content transactions in the forthcoming consultation.

Rationale and evidence that justify the level of analysis used in the IA (proportionality approach)

127. This is a consultation stage IA, we are seeking feedback on some aspects of the proposals before a final decision is made. As there is a lack of legislation worldwide on consumer protection for digital content it is difficult to find evidence of how effective different approaches to legislation have been.

Risks and assumptions;

128. A variety of assumptions have been made in identifying the potential impact of the various options. These are explained in the relevant sections and will be tested in the consultation.

129. There is a risk that we get the balance of consumer protection wrong.

130. If consumer protection is too high this could result in:

- unmanageable burdens for business
- a reduction of innovation in the digital market place
- increased levels of fraudulent behaviour by consumers

131. If consumer protection is too low this could result in:

- unfair treatment of consumers purchasing digital content
- consumers being unable to claim redress
- a lack of ability to control rogue business who sell harmful and poor quality digital content

Impact on small business

132. Small firms are an important part of the digital content retail sector. Looking at the six digital content sectors listed in Table 1, in 2011 businesses with fewer than 50 employees accounted for 99% of enterprises and 27.5% of employment.¹¹⁴

133. Small firms are especially sensitive to some of the problems outlined above. First, they may find it difficult to cope with the present ambiguities in the law, lacking the in-house legal resources of large

¹¹⁴ BIS & ONS, 'Business Population Estimates for the UK and Regions 2011' (Oct, 2011) <http://www.bis.gov.uk/analysis/statistics/business-population-estimates> See detailed data table (DataSIC072011), UK divisions sheet

retailers. Studies show, for example, that they are often over-represented as defendants in small claims proceedings, and find the litigation process particularly stressful¹¹⁵. Secondly, small firms are most affected by low consumer confidence. Without the right to reject, consumers tend to buy from large firms with well-known reputations. Clarification of the law should therefore disproportionately benefit smaller firms. On the other hand, small firms might be disproportionately affected by an extension of consumer rights. This is because they would find it more difficult to pass the costs of faulty goods to the manufacturer.

134. We have considered whether or not small businesses should be exempt from the new legislation but believe that this would mean that, not only would the current complexities continue to cause confusion among the retailers themselves, but that consumers may gravitate towards larger retailers where their rights are clearer and better understood. This would be to the obvious detriment of small retailers.

Digital content supplied to a UK consumer from overseas

135. If a consumer in the UK buys faulty or non-conforming digital content from a retailer based outside of the UK, either from other Member States or from outside of the EU, they will still be covered by any higher protections in UK law that cannot be contracted out of, if the retailer pursued or directed his activities to the UK. Pursuing or directing activities could, for example, include having a website in English that a consumer in the UK can purchase digital content from. To make a claim against the retailer in a UK court, there are some requirements; these include that there is an address for the retailer and that there is a reasonable prospect of success. Based on the above, any change we make to UK consumer law should benefit all UK consumers, regardless of whether they are purchasing from the UK or not, although successful claims will be dependant on the ability to enforce this. The same would apply to any UK consumer law and thus to the purchase of goods and services from outside the UK.
136. Arguably, digital content is particularly easy to buy and sell across borders (subject to intellectual property restrictions). It may be the case that UK consumers of digital content could find it more difficult to gain redress from suppliers based overseas. The evidence would suggest that for low value transactions many consumers would take this risk as they would be unlikely in any case to seek redress if something went wrong; for higher value transactions it may be the case that more clarity around consumer rights, and understanding of those rights, may nudge UK consumers towards purchasing digital content from UK-based retailers since they may be more confident of being able to seek redress if necessary.

Direct costs and benefits to business calculations (following OIOO methodology)

Costs

137. Our proposals could result in direct costs to business due to:
- A. An increase in the number of consumers seeking redress or submitting a complaint.
Clarifying the quality standards that digital content must meet and that remedies are available to consumers for non-conforming digital content, could encourage consumers who previously would not have done so, to seek redress.
 - B. An increase in the cost of the remedies that businesses provide.
Increased costs could be caused by business having to provide a remedy where they currently would not or by business having to provide a different type of remedy that they currently provide. As the remedies proposed in options 1 and 2 are different, the direct cost to business is also likely to vary. The existence of a short time right to reject in option 2, could result in business being forced to refund a consumer when it would have been cheaper for them to replace or repair the digital content.
138. In order to quantify the direct cost to business resulting from each of the proposals we would need to have a thorough understanding of the current situation so that we could judge what additional burdens would be introduced. We intend to seek data on the following areas in order to more accurately monetise the relevant costs and benefits of our proposals:
- A. How many consumers request a refund (a) a refund, (b) a repair or (c) a replacement?

¹¹⁵ J Baldwin, *Small Claims in the County Courts in England and Wales* (1997) pp 26 and 100

- B. How many consumers already receive (a) a refund, (b) a repair or (c) a replacement?
- C. The cost to business of providing (a) a refund, (b) a repair or (c) a replacement?
139. While the proposals may result in an increase in the number of consumers seeking redress, this will be limited by certain factors that are not affected by our proposals.
- Research by the Office of Fair Trading shows that consumers are less likely to seek redress for low value transactions (see para 31). As many digital content transactions are low value it is likely that, even under our proposals, a large proportion of digital content consumers will not seek any form of redress.
 - A significant proportion of consumers already believe that they have rights to redress, even though these rights are not currently defined in law (see Table 6). A recent Consumer Focus Survey showed that 55% of consumers thought they were entitled to a replacement for faulty digital content while 52% thought they would be entitled to a refund.
140. When establishing the increased cost of remedies from the proposals it will be important to consider this against what business already provide. In many cases it appears that businesses are already providing remedies for digital content consumers. As explained above a recent Which? investigation looked at the refund policies and terms of sale for popular download retailers (including iTunes and Amazon). It found that while 7 out of 9 policies were clear that downloads are non-refundable, in reality they were able to get some kind of reimbursement in almost 80% of cases.¹¹⁶
141. While we have not been able to provide robust estimates of the costs to business, the cost and benefit sections on option 1 and option 2 provide indicative estimates of the costs to business arising from the proposed consumer legislation.
142. Under option 2, annual costs to business arising from providing redress to consumers for faulty / non conforming digital content is between £6.6m to £11.5. Assuming that retailers pass on circa 73 percent of this cost to manufacturers, around £4.8m – £8.4m of costs would be faced by manufacturers, while £1.8m – £3.1m would be faced by retailers. Additionally the costs to retailers of training staff on the proposals are estimated at £2.7m.
143. The proposals under option 1 would result in smaller business costs, due to the smaller scope of the proposals. Business costs are estimated at between £4.6m and £7.9m. Assuming that retailers pass on 73% of this cost to manufacturers, roughly £3.3m – £5.8m of costs would be faced by manufacturers, while £1.2m – £2.1m would be faced by retailers. Additionally the costs to retailers of training staff on the proposals are estimated at £2.7m.

Benefits

144. Our proposals could benefit business due to:
- Reduced time spent dealing with disputes
 - Reduced expenditure on legal advice.
145. In order to quantify these benefits we would need the following data;
- A. What is the current cost of dealing with complaints for digital content transactions? How much would this be reduced if consumer rights for digital content were clarified?
 - B. What is currently spent on legal advice for digital content transactions and how much would this be reduced by clearer law?
146. In addition, a clear consumer protection framework helps create a level playing field; those businesses which fail to comply with the law can be tackled through enforcement, ensuring that honest businesses are competing on a level footing against each other and not against rogues. Empowered consumers should also stimulate competition and innovation, possibly increasing sales

¹¹⁶ <http://conversation.which.co.uk/technology/return-download-for-refund-app-ebook-mp3/>

for smaller or less well known businesses since well protected, well informed consumers are likely to be more open to new market entrants and innovative products.

147. Nevertheless the Government expects these proposed changes to result in a net “IN” for OIOO purposes, which would need to be offset by net “OUTS” elsewhere in the Bill or other legislation.

Summary and description of implementation plan

Table 13 below tables summarise the impacts that each option will have on stakeholders and the wider economy.

Table 13 – Impacts by Stakeholder			
Option 0			
	Quality Standards	Remedies	Comments
Consumers	--	--	Consumers remain unclear of their rights and available remedies and are less able to claim redress for faulty / non conforming digital content.
Retailers	+ -	+ -	Pre-contractual info requirements are the only additional burden on retailer BUT likely disputes due to lack of clarity and businesses are exposed to risk as they do not know what quality standards content must meet or what remedies they might be expected to provide until a case reaches court.
Manufacturers	-	0	No increased burdens but lack of quality standards may mean manufacturers of good quality digital content face unfair competition from manufacturers producing faulty / very poor quality content.
Competition	-	-	Lack of consumer confidence discourages consumers from shopping at lesser known retailers / buying new products.
Option 1			
	Quality Standards	Remedies	Comments
Consumers	++	+	Good level of consumer protection but not as high as option 2. Remedies exclude the right to reject and related services / access to digital content is covered by service rights and remedies. Consumers may need to distinguish between a fault with the actual digital content and the related service as different remedies will be applied.
Retailers	+	+	The lack of a right to reject means a reduced burden compared with option 2 as the retailer will often be able to provide a repair / replacement instead of a refund. This would also reduce the risk of fraudulent consumer behaviour. It is also possible that the retailer will be less accountable for access to the digital content and for related services although these will still be covered under the services framework. Similarly to option 2, the increased clarity of the law will hopefully reduce disputes and minimum quality standards will create a level playing field. Some business (particularly new / small entrants) may also see increased sales due to increased consumer confidence.
Manufacturers	+ -	+ -	Manufacturers of poor quality digital content are likely to face increased costs as retailers will pass on the cost of

			consumer remedies. Costs are unlikely to be as high as Option 2 as the manufacturer will normally have the chance to repair / replace the digital content instead of facing the cost of a refund. Again, minimum quality standards will create a level playing field.
Competition	+ -	+ -	Possibly a wider variety of products than in option 1 as retailers / manufacturers are happier to take the risks in releasing something new, knowing they will get a chance to repair / replace. Potentially, a reduction in consumer confidence when compared with option 2 would mean consumers are less willing to shop at new places / buy new brands.
Option 2			
	Quality Standards	Remedies	Comments
Consumers	+ +	+ +	High level of consumer protection as quality standards and remedies are identical to those for goods and include the right to reject. Goods remedies are also applied to digital content related services, meaning the consumer has identical remedies regardless of whether there is an issue with the digital content or the related service. Consumers may see an increase in prices as businesses try to compensate for the cost of consumer redress.
Retailers	+ -	+ -	Clarifying that the right to reject applies to digital content will be a burden on business as they are likely to have to provide more refunds. Retailers may also have to provide redress to consumers who had issues with access to their digital content or with other related services such as updates and maintenance. However the increased clarity of the law will hopefully reduce disputes and minimum quality standards will create a level playing field. Some business (particularly new / small entrants) may also see increased sales due to increased consumer confidence.
Manufacturers	+ -	+ -	Manufacturers of non conforming digital content will face increased costs as retailers will pass on the increased cost of refunds. However, minimum quality standards will create a level playing field.
Competition	+ -	+ -	Increased consumer confidence increases competition as consumers are happier to buy from unfamiliar digital content retailers. However high consumer protection could potentially reduce the availability of low price low quality products available, thus reducing consumer choice.

Key

- = very negative effect
- = negative effect
- 0 = little / no effect
- + - = both positives and negatives
- + = positive effect
- ++ = very positive effect

Once a preferred option has been identified the government's intention is to implement these proposals through the planned Consumer Bill of Rights with a tentative implementation date of 2014 (subject to the

findings of consultations and the Parliamentary timetable). A post-implementation review will be carried out within 3-5 years of Royal Assent, as per the requirements for post legislative scrutiny.

Questions for consultation

148. Table 14 below contains a number of questions for the consultation, seeking views on the likely impacts of the proposals on business and their running costs. Estimates of the impacts would be useful, but we would also welcome any other indication on how the proposals are likely to affect businesses.

Table 14: Questions

General

What is the impact of these proposals, on businesses and consumers (any estimates of impacts would be helpful)?

Should our proposals cover free digital content transactions or transactions where a price other than money has been paid?

Business costs

Please provide any estimates where possible and how these break down by reasons for returns (for example faulty or consumer changed their mind). How do they differ by proposed options?

What are the business costs of dealing with digital content that consumers have a problem with? Please provide any figures on:

What proportion of digital content transactions result in the consumers requesting (a) a refund, (b) a repair or (c) a replacement?

What proportion of consumers that request redress already receive (a) a refund, (b) a repair or (c) a replacement?

What is the cost to your business of providing (a) a refund, (b) a repair or (c) a replacement?

What is the cost to your business of dispute resolution?

What is the current cost of dealing with complaints for digital content transactions? How much would this be reduced if consumer rights for digital content were clarified?

What is currently spent on legal advice for digital content transactions and how much would this be reduced by clearer law?

What are the likely familiarisation costs to business of the proposed legislation (hours of training or percentage of turnover that this would cost)?

Quality Standards

Does the current lack of clarity in relation to consumer rights for digital content purchases, impact on businesses? Please explain and provide any indication of the size of the problems faced by business.

Do you think there should be a guarantee that all technical protection measures (TPMs) should be disclosed to the buyer before sale of digital content? What would be the cost to business of providing this?

Bugs are considered standard in digital content on issue and as such we propose that a reasonable person would expect a certain amount of bugs and that the existence of these bugs would not necessarily be a breach of the guarantee as to quality and fitness. Do you think we need to remove the 'freedom from minor defects' aspect of quality (s.14(2B)(c) of SOGA) for digital content to clarify this?

We intend to clarify that for digital content, quiet possession (as in s.12(2)b of SOGA) means that the consumer should be able to use the digital content in line with the licence agreement. Do you think we should also clarify that for digital content quiet possession includes a guarantee that the consumer must consent to - or at least be warned of- any interference that could affect this use (e.g. software updates)?

Elsewhere in the Bill we are considering the option that for bundled goods and services contracts, goods quality standards should be applied to both the good and the service. If this proposal was taken forward, are there legitimate reasons not to apply the same goods quality standards to digital content and the related services?

Remedies

Are there any additional potential issues with applying 'goods' remedies to digital content not identified above?

Should we limit the number of repairs and replacements that can be provided before the consumer can demand a full or partial refund?

Annex A – Impact of CRD information provisions on consumer detriment

Problem	Dealt with by CRD?	Which CRD information provision	Percentage who identified problem
Compatibility			
The supplier did not inform me about what the digital content would or would not be compatible with	Yes	Article 6.1(s) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;	6%
The digital content was of poor visual or sound quality because the provider did not warn me of an incompatibility with my hardware			6%
I was unable to access the content or service because I was not made aware by the supplier that it would be incompatible with my hardware.			4%
Additional charges			
The supplier did not inform me that I would be charged for unwanted services after using/purchasing the original digital content.	Yes	Article 6.1 (e) the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated	4%
The supplier did not inform me that I would be charged for the digital content - – it appeared to be free but was not.			6%
Data privacy			
The supplier did not provide me with information about how my data would be used after I purchased/used the digital content (e.g. it did not inform me whether my data would be provided to other suppliers for marketing purposes etc.)	No		3%
I was unaware that pictures and other information that I uploaded would be retained by the provider, even after I cancelled my account.			6%
I found out that some or all of the information I provided to the supplier was made available to sources other than my original supplier, which I had not expected given the information the supplier had provided me with.	No	But paragraph (19) is relevant: The notion of functionality should refer to the ways in which digital content can be used, for instance tracking of consumer behaviour	6%
The supplier did not provide me with any guidance as to how any information I provided may be used.			4%
Access			
I had more limited access to a service or content than I had expected given the information I had received from the supplier.	Maybe	This limited access could be due to Technical Protection Measures (TPMs) Article 6.1(r) requires that the trader shall provide the consumer with the following information; where applicable, the functionality, including applicable technical protection measures, of digital content;	7%
I was unable to access the service or content because of a lack of information provided by the supplier.	No		5%
I had problems accessing the digital content because the information on how to access the service provided by the			5%

supplier was very difficult to find.			
Quality and who to contact if there is an issue			
The content was of a poorer quality than I expected given the information provided to me by the supplier	Yes	Articles 6.1(a); the main characteristics of the goods or services	19%
The supplier did not inform me about who exactly was supplying the digital content and/or whom I would need to contact, and how, if I had a problem with the content	Yes	Article 6.1 (b) the identity of the trader, such as his trading name; And Article 6.1 (c) the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address	3%
Instructions			
The supplier did not provide me with sufficient information on how to use the digital content or service that I had purchased.	No		10%
Terms and Conditions			
The supplier did not inform me of the Terms and Conditions (including licensing agreements, terms of use) until after I had purchased/signed up for the digital content.	Maybe	Article 6.1 (n) the existence of relevant codes of conduct	3%
The supplier did not provide me with information about how long the contract would be legally binding.	Yes	Article 6.1(o); the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;	2%
Total			99%
Total covered by CRD			60%

Annex B: The Consumer Law Reform Programme

149. In response to the Retail Red Tape Challenge the Secretary of State for Business announced a consumer law reform programme¹¹⁷ to clarify and simplify consumer rights. The consumer law reform programme aims to streamline and modernise rights found currently in 12 pieces of legislation and the investigatory powers of Trading Standards officers found scattered in around 60 pieces of legislation.
150. Consumer protection regulations have developed piecemeal over many decades, with confusing overlay of European legislation onto domestic legislation in recent years. Businesses complain that the complexity of the law imposes costs and uncertainty on them and consumer groups complain that consumers cannot understand their rights and so cannot enforce them. Even academics and lawyers complain that the law is too complex. The consumer law reform programme will overhaul this regime setting out a simpler framework in plain English that provides certainty where there is lack of clarity, removes overlaps and unnecessary rules, and updates the law where it is required.
151. The proposals for reform of consumer law will take forward the recommendations and conclusions of numerous academic research reports and public consultations over the last few years. The Davidson report in 2006 concluded that UK law on Sale of Goods was unnecessarily complex and this was reviewed by the Law Commission who made recommendations in 2009¹¹⁸. In 2005 the Law Commission recommended simplification of Unfair Contract Terms law¹¹⁹. The University of East Anglia concluded in 2008 that the UK consumer protection regime had three key weaknesses – uneven enforcement, weak redress for consumers when things go wrong and excessively complex law¹²⁰. A review of this regime in 2008 led by the Better Regulation Executive concluded that much consumer legislation could be simplified and modernised so that consumers and those dealing with consumers are clearer about the framework surrounding their transactions¹²¹. This review revealed strong support across the board for consolidating the legislation, making it much clearer and more accessible. Two further pieces of academic research have more recently made recommendations relating to consumer law for digital content and how the law could be simplified for goods and services¹²².
152. At the heart of the package of reform BIS will be bidding for a parliamentary slot for a Consumer Bill of Rights. The core of the Bill will overhaul core consumer rights in relation to faulty goods and poor services, and update the law to clarify rights for consumers when purchasing digital content. The Bill will also provide a generic set of Trading Standards investigatory powers in one place¹²³, measures to empower consumers to challenge anti-competitive practices¹²⁴, and possibly introduce civil court sanctions for breaches of consumer law and provide more effective powers for Local Authorities to regulate street trading.
153. The Bill will be accompanied by a package of secondary legislation that is intended to come into force at the same time using similar language. This will include implementation of the Consumer Rights Directive, updating and clarifying unfair contract terms legislation, and providing a clearer route for consumers to redress after misleading or aggressive practices.
154. We believe that the proposed Consumer Law Reform programme will reduce business compliance costs, for example by business spending less time on staff training in consumer law and reduced time and legal expense spent settling disputes with consumers. Retailers tell us they spend

¹¹⁷ www.bis.gov.uk/news/topstories/2011/Jul/retail-red-tape

¹¹⁸ Davidson Report 2006 www.bis.gov.uk/files/file44583.pdf;

http://lawcommission.justice.gov.uk/docs/lc317_Consumer_Remedies_In_Faulty_Goods.pdf

¹¹⁹ http://lawcommission.justice.gov.uk/docs/lc292_Unfair_Terms_In_Contracts.pdf

¹²⁰ Benchmarking the performance of the UK framework supporting consumer empowerment.. www.bis.gov.uk/files/file50027.pdf

¹²¹ www.bis.gov.uk/files/file52071.pdf

¹²² www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products;

www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1225-consolidation-simplification-uk-consumer-law

¹²³ The RPC has recently reviewed Impact Assessments and a consultation is ongoing (May 2012).

¹²⁴ The RPC has recently reviewed an Impact Assessment and a consultation is ongoing (May 2012).

time dealing with consumers who are misinformed about their rights, often thinking that they have more rights than is the case, and that they tend to err on the side of caution when settling disputes where the law is unclear.

155. We also believe that the new framework of consumer law will empower consumers to assert their rights. Empowered consumers should stimulate competition and innovation since well protected, well informed consumers are likely to be more open to new market entrants and innovative products. The proposed reforms will therefore contribute to growth as companies seek commercial success through innovation and targeting consumer needs, rather than by misleading them and/or fobbing them off with poor quality goods and services. A clear consumer protection framework helps create a level playing field; those businesses which fail to comply with the law can be tackled through enforcement (private and public), ensuring that honest businesses are competing on a level footing against each other and not against rogues.
156. Whilst we have a fairly robust body of evidence about failings in the existing law and about consumer experiences, behaviour and understanding of consumer law, we need to gather more evidence about business behaviour in order to make a more informed assessment of the impact of the consumer law reform programme as a whole. Government believes that the case for change is very strong, but that the impact of specific change options needs more work.
157. Alongside the formal consultation process, we are therefore planning to gather additional input from different sized retailers and service providers in several sectors in order to estimate better the current baseline and from there make meaningful estimates of likely impact of our proposals. From early discussions with business groups it will probably not be possible to collect all the evidence we would like in enough granularity, for example retailers tell us that they do not always record under which law or whether as a goodwill gesture they offer consumers a refund so they would find it difficult to relate their data back to the Sale of Goods Act. However we are planning a pragmatic approach consisting of sampling, surveys and focus groups to gather, in particular, evidence of costs of implementing any change in consumer law (such as training and communication costs), current practice in resolving disputes, and estimates of the cost of legal advice.
158. We will also explore consumer understanding of the terminology used in consumer law and in the proposed new framework, so that we can adopt a plain English approach where possible.
159. The impact of the changes in the law will rely on consumers and those who deal with consumers knowing about and understanding the new framework of consumer law, and also on its effective enforcement. The Consumer Landscape Review is being implemented and one of its objectives is to streamline the provision of advice on consumer issues through Citizens Advice and the enforcement of consumer law through Trading Standards. Therefore we are already talking to Citizens Advice about their role in communicating the changes that the consumer law reform programme will bring about. We are also engaging with Trading Standards and other enforcers to ensure that they are aware of the proposed changes and actively engaging in the policy development process. We will discuss awareness raising for businesses with a range of business representative bodies.

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This publication is also available on our website at www.bis.gov.uk

Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

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