The CMA's response to the UK Government's call for views on the draft directives on the online sales of digital content and tangible goods

Introduction

1. This response has been prepared by the UK's Competition and Markets Authority (CMA) - the UK's lead competition and consumer authority. The CMA's aim is to make markets work well for consumers, businesses and the economy. It works to promote competition for the benefit of consumers, both within and outside the UK. The CMA strives for competitive, efficient and innovative markets where consumers are empowered and confident about making choices, and where businesses comply with competition and consumer laws without being overburdened by regulation.

2. The CMA welcomes this opportunity to respond to the UK Government's call for views on the draft directives on the online sale of digital content and tangible goods.

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (COM(2015)634)

Scope – 'free' digital content

3. As a matter of principle, where consumers exchange personal or other data (or anything else of value) for digital content, we consider they should obtain similar protections to those available when purchasing digital content with money since there is simply a different form of payment (data instead of money). How this works in practice will need careful consideration.

4. We agree that the market implications need to be considered carefully to ensure that the proposals do not impede growth in this rapidly developing area. In our view, however, this means ensuring that there is the correct balance of rights as between businesses and consumers. We accept that business models may 'monetise' data on the basis of low margins, but in our view that is not a justification for not granting rights to consumers but, rather, for ensuring that the remedy for non-conformance is fair and proportionate.

5. The CMA reported on the commercial use of consumer data in July 2015. It found that the exchange of data for services produced many benefits for businesses, consumers and the economy. It also identified concerns with lack of trust and set out the CMA view that consumers and businesses should share the benefits derived from data exchange (see paragraph 5.67 of the report).

6. We consider that, where consumers are trading data for digital content they should obtain appropriate rights. If consumers are not granted rights when exchanging data for services, there is little incentive for businesses to improve their services or for suppliers to compete on the basis of the quality of services in exchange for data. We note that under the proposals the digital content must primarily conform to what was promised in the contract and in the absence of this to various criteria which include taking into account whether the digital content was supplied for a price or for data. It is unclear how this will work in practice. In the UK, under the Consumer Rights Act 2015 (CRA), consumers may reasonably expect higher priced goods to be of a higher quality – a principle which may equally translate to the purchase of digital content (the CRA explanatory notes give the example of a low priced and higher priced app). When the form of payment is data rather than money, the 'value' of the data may be difficult to assess given that the value of data is a fluid value depending on various factors (the same data may be more valuable, for example, to one trader than to another and may depend on other data available to the trader). So how is the value of data assessed? A practical example may be the case of an app which is 'purchased' for, say, £1, £5 or through data exchange: if the contract is silent, how does one assess against what standard the digital content should be assessed?

7. Separately we agree that it is desirable to clarify the meaning of 'actively provides'. We would be wary of an overly mechanistic approach to what constitutes 'active' in this context: consumers must do more than simply, say, 'click' a button. They should be informed of the consequences of their actions.

Scope – digital services

8. We agree that it is important that consumers and businesses understand clearly the scope of the Directive. Broadly, we welcome in principle the extension of these protections insofar as consumers understand the rights that attach to their use of particular types of service (for example, cloud storage). However, the practical implications, both in terms of workability and market impact require careful consideration. In the case of social media, for example, it is unclear how far what the consumer is paying for (if the consumer pays at all) is digital content which should be assessed under a

standard akin to that for goods, and/or services to which a different standard of skill and care should be applied.

9. We broadly agree that, in relation to tangible goods which contain digital content which is embedded and subordinate to the main functionality of the goods, the appropriate consumer remedy for defects is that which applies to goods which is well understood by consumers and traders alike.

Data protection

10. We agree that the proposals should complement the GDPR and should not go beyond the provisions of the GDPR insofar as the data in question falls within the scope of the GDPR. It seems likely that, in practice, a very large proportion of data exchanges will fall within the GDPR protections. However, insofar as they do not (for example where the counter-performance involves data which is not personal data), we agree it would be necessary to ensure clarity and consistency as between the two regimes.

Installation of digital content

11. We agree that a failure by the supplier to install the content successfully should be treated as non-conformity.

Modification of digital content

12. We agree with the thrust of these proposals but make the general points that the right of traders to update content should not be used as a mechanism to dilute consumer control over their online environment. As such:

    (a) While we agree with the requirement that in order to update the contract should stipulate that modification is permitted, we also point out that such a term must be fair (business to consumer contracts are assessable for fairness under the Unfair Terms Directive). This point could be given greater prominence.

    (b) We may have concerns where, even though modifications do not adversely affect access or use of digital content, they 'bundle' beneficial modifications (for example to meet security threats) with other functionality which the consumer may not want (for example digital content which tracks the consumer) and therefore reduce effective choice.

13. If the trader (in reliance on a contract term) modifies the content in such a way that it no longer matches the original description or meets the original quality

standard, the consumer should be able to revert to the original version or cancel without penalty and seek redress.

14. If the trader modifies the contract to add functionality which the consumer does not want (even though it meets the original description – but adds features which other consumers may want or find useful), the consumer should be permitted to revert to the original version or cancel without penalty at their election. At the very least, a term permitting the trader to update digital content to add new features should also be assessable for fairness. The consumer should be free to reject updates that are not needed for operational reasons, but, for instance, merely advantage the trader in some way.

Standards and remedies

15. We consider that the proposals in respect on online and other distance sales of goods should be aligned with those for digital content to avoid market distortions and uncertainty.

16. The summary given in the call for views does not address potential practical difficulties we think may arise when the counter-payment has been made with data. The proposal provides that the consumer may terminate the contract insofar as the lack of conformity impairs performance and sets out further provisions. In particular, under Article 13, the supplier must take "all measures which could be expected" to refrain from the use of the data and to provide the consumer with the technical means to retrieve content and other data generated. We have concerns about how effective this may be in practice. Our understanding is that data, once collected, may be shared or sold to third parties, or used by the supplier for other purposes and that in many cases this may be instantaneous. If that is the case, if the intention is to deprive the supplier of the benefit of the counter-performance, we would question how far this provision may work in practice.

Reversal of the burden of proof

17. While we consider that the actual market impacts of the proposal need fully to be assessed, we broadly agree that the supplier is likely to have greater knowledge of the compatibility of the digital content with the online environment. We agree that the consumer should be required to cooperate (subject to reasonableness).

Termination of contract

18. In principle we can see benefits arising from consumers being able in all cases to terminate longer term contracts after a maximum of 12 months and

switch to a new provider/contract which may offer a better deal. There is a possibility that this would also impact on markets where linked products are offered as included in the contract price and suppliers may be encouraged to frontload the price of these products to the initial 12 month period in order to ensure their costs are recovered. The potential effects therefore need further consideration.

19. The length of the contract and notice period should be set out in the contract, and assessable for fairness. The usual provisions on fairness of contract terms should apply.

20. Our earlier comments regarding the practical difficulties upon termination where the relevant consideration provided by the consumer is data equally apply here.

21. We think that the scope of Art 16(4)(c) needs to be clarified together with its interaction with Article 16(4)(b). Article 16(4)(c) provides that, where applicable, the consumer must delete (or otherwise render unintelligible etc.) all forms of digital content provided under the contract. Article 16(4)(b) provides that the supplier must grant the consumer the technical means to retrieve content retained by the supplier. The precise meaning and how these provisions will operate is unclear. For example, where the consumer has taken an e-book or magazine subscription, the consumer may legitimately expect to access the content after the subscription has ended. If they do not, consumers may feel this is unfair. It may also have market implications as 'hard copy' books may offer substitutable alternatives.

Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sale of goods (COM(2015) 635 final)

Offline and online differences

22. We agree this is a concern in terms of the need for simple rights consumers can understand – there is a greater risk of confusion or lack of consumer understanding of their rights if rights differ according to the sales channel, and this undermines the objectives of the Consumer Rights Act to align and simplify rights and remedies as far as possible. There is also potential for market distortion if consumers buying offline (from shops) have better rights, eg the right to reject, longer liability periods etc. Consumers may be more inclined to buy off-line, thus reducing growth in online/distance markets.

23. We understand the argument that this period of non-alignment of rights is expected to be limited as the REFIT program is expected to evaluate the Sale of Goods and Consumer Guarantees Directive in 2016 and is expected to conclude that amendments are required mirroring the proposed new regime for online/distance goods transactions. However, we are concerned that that effectively prejudges the outcome of the REFIT review of the Sale of Goods Directive.

24. In our view, therefore, it is imperative to have regard to the longer term when considering the potential consequences of the current proposal. We think it would be a matter of great concern if European legislation could remove important UK consumer protections in contracts that are purely domestic in nature and where the impact on cross border trade is extremely limited. Indeed, we would have doubts whether a revised Sale of Goods and Consumer Guarantees Directive that fully harmonised consumer rights for on-premise contracts would satisfy the principles of proportionality and subsidiarity. Even where a directive provided for Member State discretion on this point, there is a significant risk that, in practice, that discretion would be significantly eroded in circumstances where different rights existed for distance contracts given the outlined risks flowing from disparate regimes.

Impact on UK consumer protections

25. We are concerned that there is a change in the conformity of goods criteria from the existing UK law set out in the Consumer Rights Act ('CRA'). It appears to us that there's a greater emphasis on what is in the contract rather than having objective quality standards. This may reduce the existing level of protection because traders may be incentivised to incorporate more limited product quality specifications in the terms and conditions that consumers may not read or be aware of before making a purchase.

26. We agree there should be a mix of both contract and objective criteria but these need to be balanced in order to provide consumers and traders with confidence in what is required. What are described or displayed to the consumer as the main features of a product, together with anything else brought to the consumer's attention or expressly agreed between the parties, should be the fundamental basis of what the consumer can expect to receive. This is consistent with the effect of the pre-contract information provisions in the Consumer Rights Directive that require sellers to inform consumers of the main characteristics of goods before conclusion of the contract, and make that information contractually binding. However, beyond these key features, there should be an objective standard of quality that goods should be assessed

against and that a consumer can reasonably expect, which should be set according to the circumstances.

27. We therefore believe that the current test of quality in the Consumer Rights Act reflects the right balance and we are concerned that the test in the draft directive moves away from this towards a test that will be in practice, more in the trader's control. As a general point, for goods, the objective quality standards (Article 5) do not include some key areas such as state, condition, appearance, finish, safety, durability and freedom from minor defects.

The short term right to reject

28. The right to reject has long been considered to be a fundamentally important right of the consumer to exit a contract where the goods are not as reasonably expected. It is especially useful in circumstances where it is clear that the fault demonstrates an inherent design flaw that cannot be repaired and will affect all replacement goods. It gives consumers more confidence to buy from new suppliers, knowing that if the goods prove to be substandard, they can recover all their money and buy substitute goods from another supplier. Consequently, we think that loss of the UK's right to reject is likely to have a dampening effect on UK consumers' confidence and willingness to buy from new and cross-border sellers.

29. We also believe that the right to reject gives traders an incentive to ensure products are of the right standard before they are sold in order to minimise returns and encourages higher standards of customer service if the consumer has the option to ask for their money back. We believe that setting a time limit of 30 days for exercising this right achieves a reasonable balance between the interests of consumer and seller, and certainty and clarity of the right to this remedy, to the benefit of both parties.

30. We note that use of the Consumer Rights Directive cancellation rights would not be an adequate alternative remedy in cases, not least because (i) for many goods, especially complex items, 14 days may not be long enough to identify the fault; and (ii) where the consumer has discovered the fault through using the goods, traders may seek to make a deduction from the refund to reflect loss of value and saleability of the goods.

Loss of one repair or replacement limit

31. Regarding the issue of when it could be determined that the seller had failed to repair or replace defective goods within a reasonable time and without significant inconvenience to the consumer:

- Under the UK law existing before the Consumer Rights Act was passed there was a great deal of concern from consumer representative bodies and others that consumers were locked into cycles of repairs or replacements with no clear line to be drawn as to when they could progress to 2nd tier remedies. This was addressed in the UK's Consumer Rights Act by an express provision that the consumer could access 2nd tier remedies if the same fault reappears or if a separate fault arises after a single failed repair or replacement. We consider that this reflects a fair balance in the majority of cases given the inconvenience caused to the consumer and the fact that the seller will have failed on two occasions to provide goods that conform to the contract. We recommend that the European legislation specifies the number of repairs or replacements that the seller should be permitted to attempt, and that this should be set as one.

- This is an important provision under the current UK law where consumers have a right to reject. It is even more important to keep this if the right to reject were removed. The regime of remedies must be assessed as a whole as well as individually, and the removal of the right to reject would be loss of a key protection making it even more important that effective access to the final right to reject is maintained.

Liability period

32. In the UK there are no explicit liability periods. Instead, there are legal limitation periods by which time a claim must be brought – in the case of claims relating to a contract that is 6 years from the date faulty goods are delivered for England/ Wales, and 5 years for Scotland. However, as there is no fixed time period that goods should last without a defect, as this will depend on the item, in practice the limitation periods act as a de facto liability period for many goods. There are certainly goods that consumers regularly buy that may be expected to be free of certain kinds of defects for up to 6 years. This includes cars, boats and caravans, and home improvements such as double glazed windows, boilers and conservatories. We believe that these time limits for bringing claims should continue as they are - we see no reason for a shorter liability period and in fact believe a shorter period is likely to cause consumer detriment.

33. We consider the introduction in the UK of a liability period of 2 years would be a significant loss of consumers' rights. The greatest impact would be on high value products that involve significant investment for consumers, including the biggest purchases consumers make as indicated in the call for views, but also more regular large purchases such as washing machines and other

household appliances. We think reasonable consumer expectations are that household appliances will last for more than two years.

34. Extending the reversed burden of proof to 2 years would not offset this reduction in consumer protection as it does not address the concern that some goods should last longer than 2 years without developing a defect. On the contrary, consumer detriment after 2 years may well increase if the rules reduce the incentives to develop longer lasting products. There is also the risk that it increases the incentives for "built in obsolescence" after 2 years.

35. Similarly, maintaining our current limitation periods would not offset the reduction in consumer rights as it again it does not address the fundamental concern that some goods should last longer than 2 years without developing a defect.

36. Stakeholders should not be concerned that the absence of a fixed liability period would mean that goods provided by traders will be held to an inappropriate standard of durability. An appropriately framed conformity / quality test will ensure that the standard of quality and durability will reflect reasonable expectations depending on the nature of the goods and all the circumstances, including potentially price. Similarly, the extended two year period for the reversal of the burden of proof can be disapplied where it is not consistent with the nature of the goods or the defect. Rejecting the proposal to adopt a two year liability period while adopting a two year reversal of burden of proof period is not the same as expecting **every** good to last for 2 years; this approach would still be subject to reasonable expectations of how long a product should last, but having a longer option covers all products and provides more confidence for consumers in higher value products.

Deduction for use

37. The OFT, and now CMA, takes a strong view that the ability for the trader to make a deduction for use in the event the consumer exercises their 2nd tier remedy to terminate the contract creates numerous practical difficulties, unnecessary disputes and significant scope for consumers to be significantly disadvantaged.

38. Consequently, it is arguable that no deduction is justified. This is particularly the case where a fault in goods has manifested itself fairly shortly after purchase, as the consumer has had little use of the product and the use has often been adversely affected by the fault. In order to replace the product the consumer will need to pay the full price for a new product and will therefore have lost money. The consumer will also have been deprived of its use during

the inconvenience of any repair or replacement attempts that have taken place.

39. Where a fault emerges after some considerable time of adequate use of the product, we see a case for a deduction to be made in principle, but in practice it is very difficult to quantify a fair and reasonable amount. In practice it leaves the question of what deduction, if any, should be made, to the discretion of the seller. These difficulties were considered within the UK during the development and passage through Parliament of the Consumer Rights Act, and the outcome reached was a provision that in general no deduction could be made if the contract is terminated within 6 months of delivery of the goods. If any harmonised regime of remedies is to be applied across the European Union, as a minimum we recommend that it should exempt any deduction for use within the first 6 months from delivery of the goods. We believe that no deduction for use should be made where the contract is ultimately terminated within 6 months from the date of delivery of the goods and consideration should be given to whether the deduction for use should be retained at all.

40. To the extent a deduction for use is introduced (and in our view this should only be after the first 6 months from purchase), then we would support the more limited approach set out in the draft proposal which we read as intended to restrict the operation of the deduction for use to exceptional cases where the product has sustained excessive wear or damage through the consumer's misuse or failure to take reasonable care of it.

Extension of protection

Reversal of the burden of proof

41. In the CMA's view, the presumption that any fault identified within a specified period from delivery of the goods was present at the date of purchase is an important protection for consumers and we strongly support its retention. We recognise the difficulty in setting the appropriate period that the presumption should apply given the range in nature, quality and price of goods that consumers buy from businesses. The period set should ideally reflect consumers' reasonable expectations of how long products should last free of defects.

42. We agree that there is a good case for extending the existing six month period given that for a great proportion of household purchases, consumers could reasonably expect trouble-free use for a period much longer than six months and, in the case of most household appliances for example, at least two years. While a period of two years is clearly more than might reasonably be

expected for many products at the lower range of quality and price, we think this is adequately addressed by the fact that the presumption can be disapplied where it is incompatible with the nature of the goods or the nature of the non-conformity or defect.

43. In principle we therefore support this proposal as we consider it would increase consumers' confidence in purchasing online/distance for products which are expected to last for longer than 6 months because they would not have the additional burden of proving that the fault existed at the time of purchase. However, as noted in the call for views, it is important to assess the regime of remedies as a whole and in our view it is important to emphasise to stakeholders that extending the reversed burden of proof to two years would go little way to offsetting the reduction in consumer protection (for the UK) which would be caused by removing the short-term right to reject and introducing a two year liability period.

15 February 2016