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# Consultation on rationalising and modernising consumer law on the sale of goods and services and digital content

## Explanation of what the consultation seeks to achieve

The Government's overarching objective in seeking to clarify consumer law is to provide consumers and businesses with a simple framework of consumer law that they can apply by themselves without having to resort to legal professionals or an arbitration process.

The Government is therefore consulting on changes to overhaul the core consumer rights in relation to faulty goods and poor services, and update the law to clarify rights in relation to digital content. These changes will:

**Remove unnecessary inconsistencies and clarify the law on the sale and supply of goods with clear rules** where a principles based approach is causing disputes and consumer detriment.

**Introduce clearer statutory consumer rights and remedies for services** to improve consumer protection when a service fails to meet reasonable standards.

**Bring the law up to date by protecting consumers from faulty digital content** such as music or film supplied on a disk or as a download.

The Government believes these measures will stimulate growth and innovation by encouraging consumers to feel more confident when buying from businesses that are not household names or when asserting their rights against less scrupulous businesses that currently exploit consumer uncertainty.

<b>Issued</b>	13 July 2012
<b>Respond by</b>	5 October 2012
<b>Enquiries to :</b> <a href="#">Adam Gray</a>	<a href="mailto:consumerbill@bis.gsi.gov.uk">consumerbill@bis.gsi.gov.uk</a>

**This consultation is relevant to** businesses of all sizes, consumers, consumer law enforcers, consumer organisations, legal bodies and academics.

## 1. Foreword

**By Norman Lamb MP, Minister for Employment Relations,  
Consumer and Postal Affairs**



The Coalition Government believes in handing power over to people.

This means giving consumers the ability and the confidence to assert basic consumer rights when faced with shoddy goods, services or digital content.

And it means giving businesses a simple framework of consumer law that they can apply by themselves in the vast majority of cases without having to consult lawyers or refer cases to head-office for advice.

But simple and clear consumer law is not just a matter of being fair to businesses and consumers, important though that is.

Markets work best when consumers understand their options and exercise choice confidently, forcing businesses to innovate and relentlessly pursue efficiency to attract consumers with low prices and attractive products. This competition for custom based on quality and price is the principal driver of economic growth.

Complex law results in consumers not understanding their rights. What is more, it makes it difficult for businesses to be familiar with all of their obligations. Those that try to apply the law fairly incur substantial training, legal and dispute resolution costs, whilst those that try to avoid their responsibilities are less frequently challenged by consumers and may save considerable sums. Consumer choice is distorted, the best companies are not always rewarded and the impetus for innovation, efficiency and growth is reduced.

The law covering consumer rights when they buy faulty goods and services has evolved over many years. Much of it is rooted in the common law of contract, but there is also an overlay of several statutes, some of which are over 30 years old, and a further overlay of more recent changes implementing European Union obligations. Not only is the law itself now unclear and hard for consumers to apply in several areas, but also consumers are not clear what their legal entitlements are when things go wrong. This is particularly true for digital content (e.g. music, software or games) where there is a complete lack of clarity at the moment over what rights and remedies a consumer may have. Obviously the Government cannot tolerate archaic law holding back innovation in a sector as important as this. Few consumers are willing to pursue their rights when the benefits of doing so are so hard to predict without expensive legal advice.

The Government set up the Red Tape Challenge to identify areas where the law was too complex and to bring forward repeals and simplifications. The proposals outlined in this Consultation respond to that challenge.

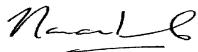
The Government is determined to clarify, update and simplify the law. We want informed and confident consumers to be able to ask businesses to honour their obligations and for the vast majority of businesses to recognise and see the value of those obligations and to settle disputes quickly without recourse to law. Consumer confidence goes up, rogue traders find it much harder to escape their duties and distort competition and honest businesses save considerable sums in reduced legal and dispute resolution costs.

But we will not simplify at any price. Any change to the law can have unforeseen consequences, and may itself damage markets or promote undesirable business behaviours.

Assessing the impact of change to fundamental consumer law is both extremely difficult and very important – there may be variations in impact by sector and by size of companies. Much depends on how consumers would react to new provisions and on how business policy currently tries to overcome complexity in the law. Some of our proposals are therefore cautious at this stage and in places we put forward a range of options.

This makes this Consultation exercise particularly important. We want to know how our proposals and ideas would affect both consumers and businesses. To make it easy for a range of people to respond, we have therefore produced a short and simple version of the Consultation, including in Welsh, alongside the full version which sets out the law in more detail. The online version is designed to allow the user to navigate to the sections which interest him/her the most.

Your replies will be immensely valuable to us when we finalise our proposals after the consultation.



Norman Lamb MP

## 2. Executive Summary

- 2.1. Consumers who understand their rights can play a strong part in driving growth because they force businesses to innovate and pursue efficiency. For this they need both competitive markets and a strong but simple framework of consumer law that can be effectively enforced. Poorly understood law leads to economically unproductive disputes between businesses and consumers and tends to favour those less scrupulous firms which exploit uncertainty.
- 2.2. There is widespread agreement that current consumer law is not fit for purpose and needs to be clarified and modernised. The language and concepts used make it very difficult for consumers to understand their rights and remedies when goods or services are sub-standard and in some areas the extent of those rights are unclear. Furthermore, it does not clearly protect consumers of digital content such as music or film supplied on a disk or as a download. For these reasons, the Government wants to achieve a greatly simplified framework of consumer law that consumers and businesses can confidently use for themselves.
- 2.3. In this consultation the Government is seeking views on a range of options to simplify and clarify the law in relation to goods, services and digital content supplied under a contract.

### Goods

- 2.4. With regard to sub-standard goods, we are proposing to:
  - (1) Replace an opaque system of 'implied terms' with a clearer set of statutory guarantees to make consumer rights easier to understand;
  - (2) Set a clear time limit on the short term right to reject, within which consumers can return sub-standard goods and get a full refund, to provide clarity for both parties;
  - (3) Where the right to reject is lost, or where the consumer does not choose to reject faulty goods, clarify the number of times that retailers can repair or replace sub-standard goods before being obliged to offer a refund;
  - (4) Limit the extent to which retailers can reduce the level of refund provided, to account for the use of the goods the consumer has had up to that point;
  - (5) Unify the currently inconsistent rights and remedies available for different contract types, such as sale, conditional sale or hire purchase.



## Services

2.5. For 'faulty' services we are proposing to:

- (1) Replace 'implied terms' with a statutory guarantee which can be easily understood so that business cannot avoid basic responsibilities to the consumer;
- (2) For the first time, set out basic statutory remedies which apply when services go wrong, and make clear what a service provider would always have to offer when the statutory guarantee had not been met.

2.6. We are also consulting on whether we should go further to introduce a "satisfactory quality" standard for some types of service (in particular, installation, repair and other services involving goods) in line with the goods regime.

## Digital Content

2.7. In respect of digital content (such as music, software and games) the proposed reforms are:

- 1) To give clarity to consumers and businesses by clarifying the rights that a consumer can expect for digital content and the remedies that are available if the digital content does not meet those expectations. This is an area that current consumer law is ill-adapted to;
- 2) To treat digital content as a separate category from goods and services in order to tailor the regime where necessary. We propose that the rights and remedies are aligned as far as possible with those available in relation to faulty goods in order to create a familiar regime for business and consumers.

2.8. We are also consulting on whether the remedies available should include a short term right to reject for digital content and whether to apply specific rights and remedies to the services surrounding access to and use of the digital content such as the downloading or streaming of the digital content. We will not, however, be changing the law of copyright or addressing internet service provision in our proposals on digital content (although the latter would be covered in the proposals on services).

## Devolution

- 2.9. Consumer protection policy is not devolved to Scotland or Wales and is transferred to Northern Ireland. The Minister for the Department of Enterprise, Trade and Investment in Northern Ireland has given consent to extend this consultation to include Northern Ireland so that responses may inform any decision the Assembly may take to amend any legislation affecting Northern Ireland in this field.
  
- 2.10. The Government's aim is to ensure consistency of consumer rights across the UK whilst respecting the devolution settlements.

## 3. Responding to the consultation

### How to respond

- 3.1. When responding, please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.
- 3.2. A copy of the Consultation Response form is available electronically at <http://www.bis.gov.uk/consultations/consultation-rationalising-modernising-consumer-law?cat=open> Responses to this consultation must be received **by 5 October 2012** and can be submitted via letter, fax or preferably by email to:

Email: [consumerbill@bis.gsi.gov.uk](mailto:consumerbill@bis.gsi.gov.uk)

Adam Gray  
Consumer & Competition Policy  
Department of Business, Innovation and Skills  
1 Victoria Street  
London SW1H 0ET  
Tel: 020 7215 1940

- 3.3. A list of those organisations and individuals consulted is in Annex D. We would welcome suggestions of others who may wish to be involved in this consultation process.

### Additional copies

- 3.4. This consultation can be found at: <http://www.bis.gov.uk/consultations> and is also available from:

BIS Publications Orderline  
ADMAIL 528  
London SW1W 8YT  
Tel: 0845-015 0010  
Fax: 0845-015 0020  
Minicom: 0845-015 0030  
[www.bis.gov.uk/publications](http://www.bis.gov.uk/publications)

- 3.5. You may make copies of this document without seeking permission.

## Confidentiality & Data Protection

- 3.6. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
- 3.7. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

## Help with queries

- 3.8. Questions about the policy issues raised in the document can be addressed to Sarah Hudson (contact details as above).
- 3.9. If you have any comments or complaints about the way this consultation has been conducted, these should be sent to:

Sameera de Silva  
BIS Consultation Coordinator  
1 Victoria Street  
London  
SW1H 0ET

Telephone: 020 7215 2888  
or email to: [sameera.de.silva@bis.gsi.gov.uk](mailto:sameera.de.silva@bis.gsi.gov.uk)

- 3.10. A copy of the Government's Code of Practice on Consultation is in Annex F.

## What happens next?

- 3.11. Following the close of the consultation period, the Government will publish all of the responses received, unless specifically notified otherwise (see data protection section above for full details).
- 3.12. The Government will, within 3 months of the close of the consultation, publish the consultation response. This response will take the form of decisions made

in light of the consultation, a summary of the views expressed and reasons given for decisions finally taken. This document will be published on the BIS website with paper copies available on request.

## 4. Introduction

- 4.1. Empowered consumers who understand their rights make better choices and get better deals – better value, better customer service and better support. That is good in itself, but more active and informed consumers also contribute to long-term growth by forcing businesses to innovate and pursue efficiency. The Government is relentlessly pursuing growth so has an ambitious agenda to improve the operation of UK competition and consumer law to deliver this outcome.
- 4.2. In April 2011 the Government launched a strategy to empower consumers by giving them access to the information and expertise necessary to exercise choice effectively.<sup>1</sup> It is designed to help consumers help themselves. The Government also announced in March 2012 plans to improve consumer information and advice, strengthening support for Citizens Advice to help the vulnerable.
- 4.3. But if consumers are to play their full part in driving growth, there are three further preconditions:
  - competitive markets without which there is no choice, and so no effective impetus for keen prices, high quality and innovation;
  - a strong but simple framework of consumer law, so consumers are confident about their rights and empowered to take action if businesses fail to deliver; and
  - effective enforcement of the law so that consumers know that rogue businesses will be effectively tackled.
- 4.4. The Government put forward draft legislation in May 2012 to tackle the first of these - strengthening UK competition law and the way it is enforced. It also issued a consultation in April 2012 on strengthening private enforcement of competition law.
- 4.5. In March 2012 the Government announced plans to tackle the third precondition - important changes to institutional arrangements for enhanced enforcement of consumer law, notably through a new National Trading

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<sup>1</sup> 'Consumer Empowerment Strategy; Better Choices: Better Deals. Consumers Powering Growth,' 13 April 2011.

Standards Board. It also issued a further consultation on consumer law enforcement powers.

- 4.6. This consultation is concerned with the second precondition above: creating a strong but simple framework of consumer law across all sectors and sales techniques. Unfortunately, UK consumer law has evolved over many years into a complex combination of laws with many overlaps and areas of uncertainty. This has been commented on in a number of expert reports and studies.
- 4.7. A study by the University of East Anglia in 2008 found that the current system of consumer law offers a high degree of protection but is confusing and complex because it has grown up piecemeal over the years. This has resulted in overlapping and sometimes complex law that is often expressed in outdated language and is unevenly enforced.

Box 1

*'In terms of the extent and content of rights, the UK appears to be on a par with the best, with the caveat that the amount of legislation conferring these rights may be higher than desirable and may potentially render the rights inaccessible to consumers.'*

*'So long as consumers' rights are not transparent, they will not be accessible by consumers. In turn, having rights that are not accessible can be tantamount to not having any rights at all. Therefore, for consumer empowerment, not only should consumers have the necessary rights, but they should also be aware of these rights and be able to access these rights when they need to.'*

**University of East Anglia, Benchmarking the UK Framework Supporting Consumer Empowerment, 2008**

- 4.8. A review of consumer law by the former Department for Business Enterprise and Regulatory Reform in 2008 revealed widespread criticism and almost all respondents agreed in principle that there would be significant advantages to simplifying the structure and language of consumer law and consolidating it so far as possible in one piece of legislation. Business organisations, consumer groups and consumer law enforcers agreed that the current lack of clarity undermines consumer confidence as people don't know their rights and increases the cost of compliance for business. It also has a distorting effect on competition because people who are uncertain about their rights are reluctant to buy from firms that are not established high street names.

Box 2

*'Complex Law means greater reliance for business on advisors who tend to take a cautious approach to business risk. It adds cost for business and enforcers and ultimately for consumers.'*

**Confederation of British Industry, Response to the Consumer Law Review 2008**

## Reducing burdens on businesses

- 4.9. The Government is determined to reduce the regulatory burden on business by tackling laws which are burdensome or unnecessarily complex. Many business organisations complain that the current complexity of the law is burdensome for business to understand and follow and leads to time consuming and costly disputes with their customers. Some have pointed out that consumers can overestimate their rights as well as underestimate them and this was confirmed by the UEA 2008 study which found evidence of UK consumers 'believing they have rights that they do not actually have.'

Box 3

*'People tend to be confident in raising problems with high street stores, but there is slightly less confidence in relation to making complaints in relation to items bought from local independent stores and in relation to other possible sources of purchase the situation is worse still. Only 51 per cent of the [lower socio-demographic group] (C2DEs), would be confident in raising an issue with an item bought online while 22 per cent would either never make an online purchase or are unsure (of their rights when doing so).'*

**Office of Fair Trading: Know Your Consumer Rights Campaign Evaluation: Report of Research Results, May 2012**

- 4.10. Poorly understood law undermines competitiveness because it is economically unproductive and tends to favour less scrupulous businesses which do not value consumer goodwill and exploit consumer uncertainty. For these reasons, consumer law was identified as an area where the law could be radically simplified in July 2011 through the Government's Retail Red Tape Challenge.<sup>2</sup> In response, the Secretary of State for Business announced a

<sup>2</sup> Details of the Red Tape Challenge are available at:  
<http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/>



proposal for a consumer law reform programme<sup>3</sup>. Its aim was to streamline, clarify and modernise rights found currently in twelve different pieces of legislation and the investigatory powers of Trading Standards officers found scattered across some 60 pieces of legislation. The proposals in this consultation concerning the law on the sale of goods, services and digital content are at the heart of this programme.

Box 4

*'A simplified framework of consumer law is needed to allow businesses and consumers to address the challenges posed by increasing competition at a global level, rapidly expanding technology and far greater choice, particularly of increasingly complex goods and services.'*

**The Confederation of British Industry in response to the Consumer Law Review 2008**

## The current law

4.11. There is no one piece of legislation that deals with consumers' rights when they buy things. The law that protects buyers when they receive "faulty" goods or services has developed piecemeal over time. Initially it was the courts that recognised that when a person buys goods they have certain clear and justified, but sometimes unspoken, expectations. The courts developed a body of case law which gave buyers rights when these expectations were not met. This case law was then made into legislation that protected buyers when buying goods. It did not, when first written, make any distinction between consumers and other types of buyers (e.g. people buying in the course of business). This legislation was then extended to cover the situations where goods were supplied other than by sale (for example when someone hires goods). Now the main pieces of legislation that set out buyers' rights when they receive sub-standard goods or services are the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982 and the Supply of Goods (Implied Terms) Act 1973. These Acts have themselves been added to over time, including by European legal requirements.

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<sup>3</sup> [www.bis.gov.uk/news/topstories/2011/Jul/retail-red-tape](http://www.bis.gov.uk/news/topstories/2011/Jul/retail-red-tape)

Box 5

**The Sale of Goods Act 1979**

The Sale of Goods Act 1979 consolidated the law relating to the sale of goods. It replaced the whole of the Sale of Goods Act 1893 as well as parts of the Misrepresentation Act 1967 and the Supply of Goods (Implied Terms) Act 1973. Since its enactment, the Sale of Goods Act has been amended by several Acts and statutory instruments, including those implementing European obligations. Our proposals are likely to involve substantial changes to the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982 as well as some amendments to the Unfair Contract Terms Act 1977.

In parallel to this consultation the Law Commissions are also looking at the Unfair Contract Terms

**How the legislation works**

- 4.12. When a person buys something from another person a contract is created between them, even when they do not set anything out in writing. The way the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 work is to imply certain terms into those contracts, and these implied terms can in some cases override other express terms where those express terms try to restrict them. The legislation also uses concepts and terminology – such as “conditions” and “warranties” – that derive from general English contract law. This means that some knowledge of contract law as well as the legislation itself is necessary to understand all your legal rights – something that most consumers will not have.

**European law**

- 4.13. The European Union has also legislated to protect consumers and so the UK legislation has been amended over the years to incorporate this European legislation. For example, the Sale of Goods Act 1979 was amended with effect from 31 March 2003 to introduce the right for consumers to ask for repair or replacement of goods, which was a requirement of the Consumer Sales Directive.<sup>4</sup> In the past, European legislation has sometimes been implemented in domestic law without resolving inconsistencies or overlaps, so that the Sale of Goods Act 1979 has been described as ‘a disjointed, often incoherent, amalgam...’<sup>5</sup> Historically the EU has been more concerned with protecting

<sup>4</sup> Directive 1999/44/EC

<sup>5</sup> L Miller, “The Common Frame of Reference and the feasibility of a common contract law in Europe”

consumers from sub-standard goods, rather than services or digital content. However, the EU has legislated to define and establish pre contractual information requirements for goods, services and digital content, most extensively in relation to distance and off-premises sales (most recently in the Consumer Rights Directive) and the current proposal for a Common European Sales Law includes some specific, sales-related rules for contracts for the cross border supply of digital content.

## **Problems with the law on goods, services and digital content**

### **Goods**

- 4.14. The legislation applying to the supply of goods (by sale or other means such as hire purchase or conditional sale) provides a high level of consumer protection but is not always easy to understand. It provides a total of seven implied terms which taken together ensure that when consumers buy goods they get what they pay for: a working product that does what they expect.
- 4.15. It is also very difficult for sellers to dodge their responsibilities as they cannot force a consumer to agree that these implied terms will not apply: any attempt to do so will be void.
- 4.16. There are also specific and practical remedies set out in legislation for consumers if the goods do not do what they should, (for example consumers can usually demand repair or replacement of the goods, or subsequently a refund or reduction in price). However, the law is difficult to understand because a consumer's rights and remedies differ according to the type of transaction (for example, rights are different when goods are bought under a conditional sale or hire purchase arrangement) and because some consumer rights leave plenty of scope for dispute, (for example, how long is the 'reasonable time' after purchase in which the consumer can obtain a refund for the goods if faulty?).<sup>6</sup>

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[2007] *Journal of Business Law* 378.

<sup>6</sup> The current law in relation to the sale or supply of goods is dealt with in more detail in Chapter Five

Box 6

*'There are effectively two legal regimes: the traditional UK remedies have been overlain by the scheme set out in the EU Consumer Sales Directive (CSD). This makes the law difficult for consumers and retailers to understand, and can generate unnecessary disputes.'*

*'These problems are compounded by the fact that the two separate regimes co-exist, using different language and concepts and imposing different burdens of proof.'*

**Consumer Remedies for Faulty Goods, a Joint Consultation Paper by the Law Commission and the Scottish Law Commission**

*'Regulation has been imposed upon regulation without any attempt to consolidate or codify the law to achieve consistency and remove duplication.'*

**The CBI in response to the Consumer Law Review 2008**

*'Following the implementation of the Consumer Sales and Guarantee Directive, the remedies available to consumers when they have been sold faulty goods are too complicated. It is unclear how best to choose between the various remedies available.'*

**The Davidson Review on the Implementation of EU Legislation 2006**

## Services

4.17. The legislation on services says surprisingly little on either rights or remedies (what a consumer's entitlement is if these rights are not met). In contrast to goods, there is only one implied term concerning the expected standard, which is that the service will be provided with "reasonable care and skill". Moreover, (and unlike with goods), a supplier of a service can specify other terms in the contract that limit the effect of this implied term, where it is reasonable to do so.<sup>7</sup> Consequently, it is usually easier for a consumer to establish whether a goods contract has been properly performed than a services one. Another difference between the protections for the consumers of goods and the consumers of services is that there are no remedies set out in statute for a consumer of services if the quality of the service is not up to scratch.<sup>8</sup> The consumer's entitlement depends on the wider law of contract.

## Digital content

<sup>7</sup> Under the Unfair Contract Terms Act 1977, certain liabilities cannot be excluded and others can only be excluded where reasonable

<sup>8</sup> The law on services is discussed in more detail in Chapter Six.

- 4.18. Most current consumer law was written about 30 years ago and the current law on sale of goods is based closely on the 1893 Sale of Goods Act. It does not cater well for the concept of digital content, that is to say content delivered as a digital file such as software, games, music files, films. The legislation does not deal specifically with digital content transactions and the courts have struggled to fit the rights found in the sale and supply of goods and services legislation to different types of digital content transactions, leaving the law uncertain and unclear. As a result it is not clear what, if any, legal rights the purchaser of a digital content product has if the product proves defective or fails to live up to expectations. It is clearly unsatisfactory that consumers in this large and growing market should be so poorly protected by the law.<sup>9</sup>

Box 7

*'It is generally reckoned that to be effective consumer law must be clear, accessible and comprehensible. The law relating to digital products currently satisfies none of these criteria'*

**Professor Robert Bradgate, in his paper for BIS, Consumer Rights in Digital Products**

*'Digital consumers will only embrace the digital economy if they can trust that their legitimate interests and rights are respected.'*

**Professor Marco Loos et al. in their paper on digital content contracts for consumers**

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<sup>9</sup> The law on digital content is discussed in more detail in Chapter Seven.

## The Government's programme of reform

4.19. The proposals that follow build on the BERR review of the consumer law regime in 2008 which 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 transactions. The Government subsequently commissioned further research which made recommendations relating to consumer law for digital content and how the law could be simplified for goods and services. The report on the Consolidation and Simplification of UK Consumer Law by Professor Howells, Professor Twigg Flesner and others<sup>10</sup> recommended that consumer contract law would be improved if many of the provisions could be brought together into a single consumer contract law that so far as possible subjected all consumer supply contracts to the same rights and remedies. The Bradgate report on digital content<sup>11</sup> concluded that it was not clear in law what, if any, legal rights the purchaser of a digital product had if the product proved defective or failed to live up to expectations and that the position should be clarified.

## Scope of the legislation

4.20. The Government's proposals relate to consumer rights in transactions where a business supplies goods, services or digital content to a consumer under a contract (rather than transactions between two businesses or two consumers). Contracts and dual purpose (part business, part consumer) contracts are explained in more detail in Annex C. The terminology of 'consumer' and 'trader' (which is used in this consultation to refer to the person or organisation supplying goods, services or digital content) is explained further below. These terms and concepts are currently not entirely consistent across the relevant legislation, so the Government is proposing to consolidate these and would welcome views on this proposal as well as the more specific proposals explored later in this document.

## Micro and Small Businesses

4.21. There are many small and micro-businesses in the retail and service sectors. These proposals cover businesses of all sizes as consumers rightly expect, and European law<sup>12</sup> requires, a strong framework of legal protection when they buy goods and services from any size of business. We are not intending to exempt micro-businesses from the effect of the changes we are proposing

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<sup>10</sup> Consolidation and Simplification of UK Consumer Law 2010

<sup>11</sup> Consumer Rights in Digital Products, a research report prepared for the UK Department for Business, Innovation and Skills by Professor Robert Bradgate 2010

<sup>12</sup> See paragraph 4.13 which explains that there are European derived rights and obligations. These make no distinction made based on size in relation to business obligations.

so that they continue to be covered by the current consumer protection framework. This is because our proposals are designed to clarify, simplify and modernise the law for the benefit of businesses as well as consumers and this objective would be greatly undermined if consumers were faced with the confusion of different rules applying depending on the size of business with which they are dealing.

- 4.22. Moreover, we consider that any variation in basic consumer law applied to different sizes of business would probably be counter-productive for micro-businesses. Consumers could choose to avoid buying from firms which they perceived as having fewer obligations to treat them fairly in the event that something goes wrong.

***Question:***

- Q1. Do you agree that all businesses should be subject to the same framework of consumer protection for the sale and supply of goods, services and digital content, or

Do you consider that micro-businesses should be exempt from any or all of the new proposals and remain subject to the current framework?

## **Cross border sales**

- 4.23. In the increasingly globalised marketplace, consumers in the UK may obtain goods, services and digital content from a trader based outside the UK, either from other EU Member States or from outside the EU. This can mean that the contract between the parties is not governed by UK law, but that laws of another country apply in the event the items are sub-standard.
- 4.24. However, even though another country's laws may apply to the transaction, if the trader pursued or directed its activities to the UK, a consumer living in the UK will still be covered by any higher protections in UK law that cannot be contracted out of.<sup>13</sup> Depending on the circumstances, pursuing or directing activities might, for example, include having a website translated into English or with a ".uk" web address (where the trader is not established in an English

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<sup>13</sup> Regulation (EC) No 593/2008 (Rome I), Article 6

speaking country) from which a consumer in the UK can purchase goods or digital content in sterling. The consumer protections set out in this consultation document (i.e. the standards which goods, digital content and services do, or would under the current proposals, have to meet) generally cannot be contracted out of (or, in respect of services, can only be contracted out of or limited where reasonable), but there is an exception for some cross-border contracts for the supply of goods. The Government proposes to amend the Unfair Contract Terms Act 1977 to ensure that consumers are protected in these circumstances, if the applicable law is less beneficial than UK law.

## The definitions of consumer and trader

### The Consumer

- 4.25. There is not currently a single, consistent definition of 'consumer' in the relevant UK legislation. There are however some similarities: the current definitions in relevant legislation do all require that, to qualify as a 'consumer', a party to a contract must not be acting in the course of his or her business. However, the definitions within current legislation differ depending on whether they derive from EU law.
- 4.26. The UK Acts of Parliament which are being considered for reform use a wider definition of 'dealing as a consumer', under which an individual or a company or other organisation can be a consumer where they are not acting in the course of their business. The definition of 'dealing as a consumer' in the UK Acts of Parliament also excludes persons holding themselves out as acting in the course of their business (even if they are not in fact acting in the course of their business) and, for a company or other organisation to be a consumer in a contract under which goods pass, the goods must be of a type which is ordinarily provided for private use or consumption. A person also cannot be 'dealing as a consumer' under the UK Acts if they are an individual purchasing second-hand goods at a public auction which individuals can attend in person, or if they are a company or organisation purchasing goods by auction or competitive tender.
- 4.27. In European directives and other provisions of consumer law which derive from EU law, a 'consumer' can only be an individual (a 'natural person' in legal terminology).



## Proposal

- 4.28. The Government is keen to improve the consistency and clarity of consumer law and therefore intends to use one definition of consumer across the consumer rights covered by the proposed Bill of Rights. The Government has limited scope to amend the definition of ‘consumer’ for those parts of consumer law which derive from EU law, as the UK’s enactment of EU directives must meet both the standards set in those directives and the principles of EU law. EU law impacts on much of the consumer law which the Government is reviewing (as explained further in the subsequent chapters of this document). For this reason, we will use the definition of ‘consumer’ as set out in EU legislation as a basis for a single definition. This would mean that the scope of coverage (ie the types of people and activities affected by the law) would be aligned for domestic and EU law.
- 4.29. If the definition from EU law were used for all of the protections covered by this consultation, companies and other organisations would no longer have access to consumer protection (as they do currently) if they enter a transaction which is not made in the course of business or is only incidental to their business and is not of a kind they make regularly. However, companies and other organisations are covered by the protections for business to business transactions within the existing UK legislation. The Government therefore does not expect that this change in terminology would cause significant detriment to businesses, particularly as the circumstances in which an organisation can be considered to act as a consumer are relatively limited. However, we would welcome views on this.
- 4.30. We propose to follow the recommendations of the Law Commissions who consulted publicly on the UK and EU definitions, in two consultations on consumer law,<sup>14</sup> that UK legislation should define a consumer by reference to acting for purposes “which are wholly or mainly outside their business, trade or profession.” The single definition of ‘consumer’ that we propose to introduce for the purposes covered by the consumer protections below would:
- a) limit the meaning of ‘consumer’ to an individual, rather than a company or other organisation;<sup>15</sup> and
  - b) refer to that individual acting for purposes which are wholly or mainly outside of his or her trade, business, craft or profession<sup>16</sup>; but

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<sup>14</sup> Consultation on Unfair Contract Terms, 2005 and Misleading and Aggressive Practices, 2011

<sup>15</sup> If a number of individuals, who each met the definition, entered into a contract together then we propose they would be covered by the definition. They would not be covered if they formed some kind of company or organisation.

<sup>16</sup> This would cover dual purpose contracts where the main purpose is consumer-related, e.g. if somebody bought a car mainly for personal use but would sometimes make business trips then they would come within this definition of ‘consumer’. See Annex C for further details.

- c) not include an individual buying goods at an auction which individuals may attend in person, for the purposes of parts of the package which address the protections currently subject to this restriction; and
- d) not include other elements from the current UK Acts of Parliament.

4.31. In the 2008 Consumer Law Review, the Government asked whether the definition of consumer should be extended to include small or micro-businesses whose bargaining power in a contract is often similar to that of the consumer. Business groups were opposed to the idea and we do not propose to take it forward.

## The Trader

4.32. There is also not currently a single, consistent definition for the party providing goods, services or digital content – nor a single term used across the relevant UK legislation to describe this person.

4.33. Firstly, this is because different types of transaction are currently covered in different laws: in the law of sales of goods, there is a concept of a ‘seller’; in the law of provision of services, a concept of a ‘supplier;’ and in the law covering goods supplied other than by sale (such as by exchange), a concept of the ‘transferor.’<sup>17</sup>

4.34. Secondly, the current UK laws have developed and been added to over time. The main UK Acts each deal with contracts made in various contexts (business to consumer, business to business and consumer to consumer), but limit some provisions within the legislation to situations where the goods or services are provided to a consumer or by a person or organisation acting ‘in the course of business’. Therefore, whereas EU directives tend to include a single description of the person providing the goods or services, UK law is more complex – it defines the seller/supplier etc, then specifies that certain provisions apply where that person acts in the course of business, and includes a further gloss that ‘business’ includes a profession and the activities of any government department, local or public authority.

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<sup>17</sup> This is also the case in EU law, as for example the directive addressing consumer sales uses defined concepts of ‘seller’ and ‘producer’ – Directive 1999/44/EC Art 3(2). However as the Consumer Rights Directive will be implemented within the Government’s package of consumer rights measures, we focus here on the definition it uses.

Box 8

*'In our view there is no case for treating small or micro-businesses as consumers in terms of legal obligations. That merely muddies the waters in terms of consumer rights and redress and distinctions between small and larger businesses.'*

**British Retail Consortium, Response to the Consumer Law review 2008**

- 4.35. The concept of acting in the course of business is common to UK and EU definitions. However, there are differences between the definition of 'trader' in the Consumer Rights Directive and the associated definitions in the UK Acts. Many of these are differences in the terminology used, and largely do not affect the scope of the definitions.

## Proposal

- 4.36. Again, in the interest of improving consistency and clarity of consumer law, the Government intends to use a single definition of 'trader' to cover businesses providing goods, services or digital content across the protections to be included in the proposed Bill of Rights. Due to the impact of EU law in this area, and particularly as the UK is required to implement the Consumer Rights Directive shortly, (and largely without any scope for diverging from its provisions), the Government proposes to adopt the definition of 'trader' from the Consumer Rights Directive.
- 4.37. The Government considers that this definition would pick up the various aspects of the existing UK definitions and would be beneficial in the interest of increasing certainty for consumers and businesses, but would welcome views on this proposal.
- 4.38. The Consumer Rights Directive definition appears suitable to be used across the proposed consumer protections for the following reasons:
- i. It includes persons acting for purposes relating to their trade, business, craft or profession in relation to contracts, so it will include activities leading up to or otherwise related to the contract. This would be consistent with current UK law, which covers persons who agree to supply goods or services as well as persons who actually supply them, and would ensure that a person would still be covered if they re-sold goods before

the ownership of the goods had properly passed to them;

- ii. The Consumer Rights Directive definition states that privately and publicly owned bodies may be covered. Whilst it does not expressly state that government departments and local and public authorities are covered, as the UK legislation does, this clarification should not be required since such bodies will be publicly owned<sup>18</sup>;
- iii. The definition includes a trader acting through another person, where the other person is acting in the name, or on behalf, of the trader. To the extent it clarifies the current protections, we think this would be beneficial to consumers, since businesses should not be able to avoid complying with consumers' rights where agents act for them, nor should it be onerous for businesses since it does not affect the standards required of them. We do not consider this a substantial change, as a business which has individuals or other businesses acting in its name or on its behalf should be responsible for contracts made by those persons.

**Question:**

Q2: Do you agree with the Government's proposal to introduce a single definition of 'consumer' and a single definition of 'trader'?

Do you have any concerns with any aspects of the proposed definitions?

The proposed definitions can be summarised as follows:

*Consumer* - this would be limited to an individual acting for purposes which are wholly or mainly outside of his or her trade, business, craft or profession; but would not include an individual buying goods at an auction which individuals may attend in person (for the purposes of protections currently subject to this restriction).

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<sup>18</sup> The Law Commissions noted in their consultation that an EU law definition similar to that under the Consumer Rights Directive could give rise to an argument that a contract between, say, a local authority and a consumer would not be covered due to the lack of express inclusion of local authorities in the definition; but considered this an 'unlikely interpretation' (Unfair Terms in Contracts A Joint Consultation Paper, p.57).

*Trader* – this would be an individual (‘natural person’) or organisation (‘legal person’) whether publicly or privately owned, who is acting – including through any other person acting in their name or on their behalf – for purposes relating to their trade, business, craft or profession in relation to contracts for goods, digital content or services.

## Delivering these changes

- 4.39. The Government has developed a set of proposals to overhaul the core consumer rights in relation to faulty goods and poor services, and update the law to clarify rights in digital content. They are the heart of a broader programme of reform of consumer law, and would form the core of a Consumer Bill of Rights. We are proposing that the Bill should also introduce wider civil court sanctions for breaches of consumer law<sup>19</sup> and measures to empower consumers to challenge anti-competitive practices,<sup>20</sup> provide a consolidated set of consumer law investigatory powers<sup>21</sup> and provide more effective powers for Local Authorities to regulate street trading.<sup>22</sup> Alongside the Bill, we are proposing to implement the European Consumer Rights Directive, clarify consumer rights for victims of misleading and aggressive practices and simplify and update the law on unfair contract terms.
- 4.40. It is the Government’s intention to introduce these proposals in a package of measures that will update consumer protection law for many years to come. All of these measures are intended to come into force at the same time and use the same language and concepts to ensure that consumer protection law is as coherent as possible.
- 4.41. The Government proposes to repeal the provisions of all the current laws referred to in this document (see annex G for details), as far as they relate to business to consumer sales, and to set out the new law in an integrated single text. Much of this “old” law will, however, remain on the statute book to the extent that it also regulates business to business sales, which will be unaffected by these proposed changes.

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<sup>19</sup> We will consult on these proposals in the autumn

<sup>20</sup> Private actions in competition law – a consultation on options for reform – closing 24 July 2012

<sup>21</sup> Consumer Law Enforcement Powers consultation closed 20 June 2012

<sup>22</sup> We will consult on these proposals in the summer

## Guiding Principles

- 4.42. This project is evidence based and the feedback we have received from stakeholders has guided our work since the start of the project. When facing choices between simplicity and certainty on the one hand and flexibility on the other, we have generally opted for simplicity and certainty. This is because we want businesses to find it easier to comply with the law and consumers to feel confident that they can enforce their rights for themselves without either side having to turn to lawyers or an arbitration process.
- 4.43. Our preference is therefore for clearly expressed rights and simple standardised remedies but in some cases we have put forward alternative options so that consultees can advise which is the fairer choice. Our intention is to consolidate and clarify consumer law in legislation which sets out in plain English the trader's responsibilities and the consumer's rights. The outcome we want is for each party to have a clear understanding of the consumer's core rights. However, the impact of the changes we are proposing depends on consumers and businesses understanding this new framework of consumer law, and also on its effective enforcement. We are therefore already engaging with business organisations, consumer groups and Trading Standards and other enforcers to ensure that they are aware of the proposed changes and are actively involved in both policy development and awareness raising. Chapters five, six and seven set out respectively our proposals for goods, services and digital content on which we welcome your views.

# 5. The Supply of Goods

## Introduction

- 5.1. The law protecting consumers who purchase sub-standard goods has developed piecemeal over many years and has been strongly influenced by UK contract law and EU law.<sup>23</sup>
- 5.2. Initially, the courts developed rules protecting buyers (who were generally merchants) when goods they purchased did not meet their reasonable expectations. In the 1890s, protections for buyers were made into legislation, which covered sales of goods which did not meet expectations. In the 1970s and 1980s, rights for consumers were extended in legislation to cover goods supplied by hire purchase, and goods supplied by other means than a standard sale for money (e.g. barter, exchange and materials supplied together with services). In 2002, certain European consumer protections were enacted in the UK, giving consumers new rights to demand repair or replacement of sub-standard goods and, if these were unsuccessful, a reduction in the price or return of the goods for a (partial) refund.
- 5.3. There are complexities arising from the development of the law. Consumers' remedies for sub-standard goods are dependent on how the goods are supplied, and particular types of supply of goods are covered by different laws<sup>24</sup>. This complexity has been an issue of interest to the Law Commission and the Scottish Law Commission (referred to collectively as the Law Commissions), which carried out a joint review in 2009 into the remedies available to consumers for faulty goods. Further research was conducted for BIS in 2010 on 'Consolidation and Simplification of UK Consumer Law'<sup>25</sup>.

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<sup>23</sup> The legal position described in this document is (save where otherwise stated) the position for England and Wales. The proposals are intended to provide equivalent rights in Scotland, but some of the terminology and principles in the current law differ between England/Wales/Northern Ireland and Scotland.

<sup>24</sup> Sale and conditional sale are covered by the Sale of Goods Act 1979; hire, barter or exchange and work & materials contracts are covered by the Supply of Goods and Services Act 1982; and hire purchase is covered by the Supply of Goods (Implied Terms) Act 1973.

<sup>25</sup> Professors Howells and Twigg-Flesner (ed.), 'Consolidation and Simplification of UK Consumer Law' (2010).

Box 9

**Key definitions:*****'Goods'***UK definition:

For the purposes of the consumer protections described in this chapter, 'goods' covers a wide range of things. 'Goods' are defined in the current law to include all 'personal chattels' (this essentially means tangible moveable objects), other than money or personal rights over property which the owner cannot physically hold but can only claim by action (for example debts, a cash balance at a bank or money due on a bond). Land is not included in 'goods', but crops and anything attached to or forming part of land are goods if cut from the land. (This definition is in the Sale of Goods Act 1979, and is also used to define goods in other related laws.)

European definition:

EU directives define 'goods' in different terms from the Sale of Goods Act. In the Consumer Rights Directive, 'goods' means any tangible movable items, except for items sold 'by way of execution or otherwise by authority of law' (i.e. items sold by an official under a legal authority to satisfy a debt), and includes water, gas and electricity if they are put up for sale in a limited volume or set quantity.

The European definition above is expressed in clearer language than the UK definition, but both are wide and cover most tangible movable items. However, there are some differences: (i) The UK definition expressly excludes money, so that banknotes and coins which are exchanged as legal tender are not sold or supplied as goods. Nonetheless, 'money' can have different meanings and there have been cases in which coins have been considered goods and in which they have not. (ii) The definition under the Consumer Rights Directive includes electricity, when put up for sale in a limited volume or set quantity, but other directives (for example Directive 1999/44/EC - the Consumer Sales Directives - which sets the 'European remedies' for consumers referred to later in this chapter) exclude electricity. A contract to supply energy has however been held to be subject to similar implied terms to goods, and for VAT purposes supply of power is a supply of goods.

The Government's proposal in relation to these definitions is set out in paragraphs 5.57-60 below.

- 5.4. The rest of this introduction outlines the complexity of the current law in some detail.



5.5. Not every supply of goods is covered by consumer protection laws. The following are covered (these are all types of supply under a contract):

- **Sale** - goods exchanged for money (most standard retail transactions are sales)
- **Conditional Sale** – sale where the consumer pays in instalments and only obtains ownership of the goods when he makes the final payment, although he may use the goods in the meantime
- **Barter or Exchange** - goods exchanged for something other than money
- **Work & Materials** – goods supplied as an incidental part of a contract for work or services
- **Hire Purchase** - a hire contract with an option to buy the goods at the end of the hiring period
- **Hire** - a hire contract with no intention that the consumer will obtain ownership of the goods

Box 10

**Relevant legislation**

The transaction types outlined here are governed by different pieces of primary legislation, as follows:

Sale: Sale of Goods Act 1979

Conditional Sale: Sale of Goods Act 1979

Barter or Exchange: Supply of Goods and Services Act 1982

Work & Materials: Supply of Goods and Services Act 1982

Hire Purchase: Supply of Goods (Implied Terms) Act 1973

Hire: Supply of Goods and Services Act 1982

5.6. ‘Supply’ of goods is used in this consultation to mean any of these types of transaction.

5.7. Most items are ‘goods’ so are covered by the consumer protections described below, but the definition for these purposes (under the Sale of Goods Act 1979) is not expressed clearly and there are different definitions under EU directives<sup>26</sup>. It is not desirable for the

Box 11

***What is a contract and when will one arise?***

A contract is an agreement which can be enforced legally – that is, one party could take the other party to court if they do not do what was agreed. It is not necessary to agree anything in writing, or to sign anything, in order for a contract to exist. A contract will arise when the trader agrees to supply goods to the consumer in return for something of value (this may be a payment by the consumer, or something else – for example a consumer may give something they own, such as their current car, in exchange for new goods).

<sup>26</sup> See Key Definitions box for further detail.

same word to be defined slightly differently for related protections.<sup>27</sup>

- 5.8. Currently, the legislation relating to supply of goods covers any contracts under which the various types of supply of goods listed above are made. Some of the current protections only apply where the person obtaining goods is a consumer or the person providing them is a trader<sup>28</sup>, but some apply regardless of the status of the parties to the contract. The Government is proposing to reform the law relating to supplies by a trader to a consumer. Protections for contracts between two consumers or two businesses will continue to be dealt with under the current law<sup>29</sup>. Please see the Introduction chapter for further details of the scope of the proposed reform.

## Consumers' rights - the standards consumers should receive

- 5.9. By law, goods supplied to consumers must meet seven standards. These are:
- 1) The trader must have the right to sell the goods. This means that the trader must either own the goods or have the owner's permission to sell them, and that other people must not hold any copyright (or similar rights) which would prevent the sale or make it illegal;
  - 2) No other person must have any rights over the goods (for example, a right to use the goods);
  - 3) The buyer must be able to use the goods without being disturbed by anyone who has rights over them (for example, someone else with a right to use the goods);
  - 4) If a description of the goods is given as part of the sale, they must match that description (this does not cover everything said about the goods in advance of the sale, but goods are often described e.g. by labels and information in shops);
  - 5) The quality of the goods must be satisfactory<sup>30</sup>. What is 'satisfactory' depends on the particular goods and circumstances, but it includes the goods being fit for their common uses. For example, a pencil must be able to be used for writing;

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<sup>27</sup> See paragraphs 5.57-60 for the Government's proposal to clarify this terminology.

<sup>28</sup> The terms 'trader' and 'consumer' are explained in the Introduction chapter.

<sup>29</sup> As explained in the Introduction chapter, under the Government's proposals a company or other organisation would no longer be able to access consumer protections.

<sup>30</sup> This standard currently applies where the trader is acting in the course of business.

- 6) If the buyer tells the trader that they will use the goods for a particular purpose, the goods must be reasonably fit for that purpose<sup>31,32</sup>. For example, a watch might not always have to be waterproof, but if the buyer asks the trader to recommend a watch for use whilst scuba-diving then it would need to be waterproof; and
- 7) Where a buyer is only shown a sample of the goods, the rest of the goods must be consistent with that sample.

Box 12

**Key definitions: *Express terms and implied terms***

Some of the concepts relevant to consumers' rights come from contract law. Contracts can include 'express terms' which the buyer and trader have explicitly agreed (for example, the price) and 'implied terms'. Implied terms are not explicitly agreed between the buyer and trader, but form part of the contract because of statute or case law rules.

- 5.10. If any of these standards are not met, the consumer can raise this with the person who supplied the goods – for transactions relating to goods, this will usually be the retailer (but in this consultation, we refer to this person as the 'trader', for consistency across the various areas).<sup>33</sup> This is a 'strict liability' system, as the trader is liable if a standard is breached, whether or not the trader has caused the fault or been careless.
- 5.11. Standards 4 – 7 are particularly relevant to the proposed reforms because these can give rise to a complex range of remedies for the consumer (described further below). The application of standards 1-3 is more limited and thus the Government's proposals in respect of these standards are less extensive.
- 5.12. Leading commentators consider that a standard can also be implied under contract law that where a consumer buys goods after examining a supposedly identical model – for example in a shop where the trader has items on display, but provides the consumer with a packaged version of the item from the store room – the goods must be identical to the display model (unless any differences are brought to the consumer's attention). As part of the consolidation of the current law, the Government proposes to include this standard expressly within the new law.

<sup>31</sup> This protection does not apply if the buyer did not rely on the trader's skill and judgement to determine that goods were fit for the special purpose, or if it was unreasonable for the buyer to do so.

<sup>32</sup> This standard currently applies where the trader is acting in the course of business.

<sup>33</sup> If the manufacturer offers a free guarantee, then the consumer can approach the manufacturer if the guarantee is breached. This protection is separate from the consumers' main statutory rights in relation to the goods and is not being considered for reform, so is not covered further in this consultation

5.13. The seven standards listed above form part of the contract between the trader and the consumer for the supply of the goods (there will be a contract in place when goods are supplied, even if the parties do not sign a written agreement). This is because these standards work as 'implied terms'<sup>34</sup> inserted into the contract. In order to understand how the protections work, some basic features of contract law need to be understood.

Box 13

**Key definitions: Exclusion clause**

This is a clause in a contract which seeks to limit one party's liability or responsibility for certain circumstances or to say that they have no liability or responsibility for certain circumstances. For example, if a buyer and trader agreed that the buyer would not be able to return goods or obtain any money back from the trader if the goods broke down, this would be an exclusion clause within the contract of sale. The law does not allow traders to rely on exclusion clauses in contracts with consumers relating to goods, if they seek to exclude liability for breach of the seven implied terms.

5.14. There are different categories of contractual terms, known as 'conditions' and 'warranties'. These categories determine what the consumer can do - referred to in this consultation document as the 'remedies' the consumer has - if the standards set out above are not met.

5.15. Most of the protections regarding sale or supply of goods are classified as 'conditions'<sup>35</sup>. If these standards are not met, the consumer can return the goods and get the money back from the trader (legally, this is a form of terminating the contract), and can claim compensation as well or instead.

5.16. The protections against other people having rights over the goods<sup>36</sup> are classified as 'warranties'. If these standards are not met, the consumer cannot terminate the contract but may claim compensation from the trader.

Box 14

**Key definitions: Conditions and warranties**

These are also phrases from contract law. A 'condition' is a term of a contract which is so important that, if the trader breaches it, the consumer can terminate the contract if he/she wishes (i.e. return the goods and obtain a refund), and can claim compensation as well or instead. A 'warranty' is a term which is less important so, if it is breached, the consumer cannot terminate the contract but may claim compensation from the trader.

(Note – The terminology of conditions and warranties does not apply to Scotland)

<sup>34</sup> See the Key Definitions box 12

<sup>35</sup> Protections 1 and 4-7 in the list above are conditions.

<sup>36</sup> Protections 2 and 3 in the list above are warranties.

- 5.17. The seven protections cannot be excluded from a contract with a consumer. This means that even if the consumer agrees that the trader will not be responsible if goods are faulty (by having an 'exclusion clause' in their contract), the consumer can still seek a remedy from the trader.<sup>37</sup>
- 5.18. If goods do not meet the standards listed above, consumers can seek a remedy within six years from the delivery of the goods (five years in Scotland).<sup>38</sup> After this time, the trader cannot be required to provide a remedy.<sup>39</sup> Although consumers have a six (or five) year window in which they may seek a remedy, the defect (or other shortfall from a standard listed above) must be present when the consumer obtains the goods<sup>40</sup>. For example, no remedy is available if goods break down after sale due to something the consumer has done to them rather than because of a latent fault in them.
- 5.19. The protections described in this chapter apply where the contract between the parties is governed by UK law. If goods are obtained from a trader who is based outside of the UK, the laws of different countries may apply. However, if the trader directed its activities to the UK, the consumer will still be covered by any higher protections in UK law that cannot be contracted out of. Pursuing or directing activities might, for example, include having a website in English from which a consumer in the UK can purchase goods in sterling (if a different language and currency are generally used in the country where the trader is based). The standards which goods have to meet generally cannot be contracted out of, but there is an exception for some cross-border contracts for the supply of goods. The Government proposes to amend the Unfair Contract Terms Act 1977 to ensure that consumers are protected in these circumstances, if the applicable law is less beneficial than UK law.
- 5.20. As explained above (in the Introduction) the Government's package of consumer protection measures will include implementation of the Consumer Rights Directive. The Consumer Rights Directive requires traders to give certain information to a consumer before the contract is made. This includes the "main characteristics" of the goods, to the extent appropriate to the medium of sale and to the nature of the goods. (In the case of simple goods, their main characteristics may be relatively obvious without much need to

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<sup>37</sup> Legislation in relation to unfair contract terms prevents the protections from being excluded. This legislation is being considered by the Law Commissions and will be covered by a separate report. Although the protections cannot be excluded by agreement, the standard which the goods must meet will depend on factors such as what the consumer is told about them and how much he pays.

<sup>38</sup> This is because the statutory protections work as implied terms in contracts for supply of goods, so consumers' remedies are subject to time limits for contractual claims.

<sup>39</sup> The time limit works differently if there has been fraud or the issue with the goods has been concealed so that the consumer could not find out about it immediately; such situations will be rare.

<sup>40</sup> The consumer normally has to show this, but for the purpose of the 'European remedies', this is presumed to be the case if the fault arises within 6 months. See further below.

communicate further information, particularly if they are sold face to face on the trader's premises, whereas more information may well be needed for more complex goods.) It also includes other pieces of information such as the price (or how the price will be calculated) and the trader's name and address. The requirement to provide information is separate from the seven standards to be met (as above), but if pre-contract information provided regarding the "main characteristics" of the goods is incorrect, the Government expects that this could well breach the standard that goods sold by description must match their description (standard 4 above).

- 5.21. The Consumer Rights Directive also requires that, unless the parties agree otherwise, the trader must deliver the goods to the consumer without undue delay, and in any event within 30 days from the time the contract is concluded. This will provide more specific protection for consumers than the current UK law, which generally requires delivery within a reasonable time<sup>41</sup>, unless otherwise agreed. UK law also requires that delivery is made at a reasonable hour and this position will not be changed by the Consumer Rights Directive.

## Consumer remedies for sub-standard goods – what can consumers do if the standards are not met?

- 5.22. The remedies available if goods do not meet the standards listed in paragraph 5.9 depend on how the goods are supplied. Some remedies were established by UK case law, and others were added to the UK legislation to meet EU law requirements. The interaction of these different remedies can be unclear.

- 5.23. The various remedies are set out in the flowchart on the next page<sup>42</sup>.

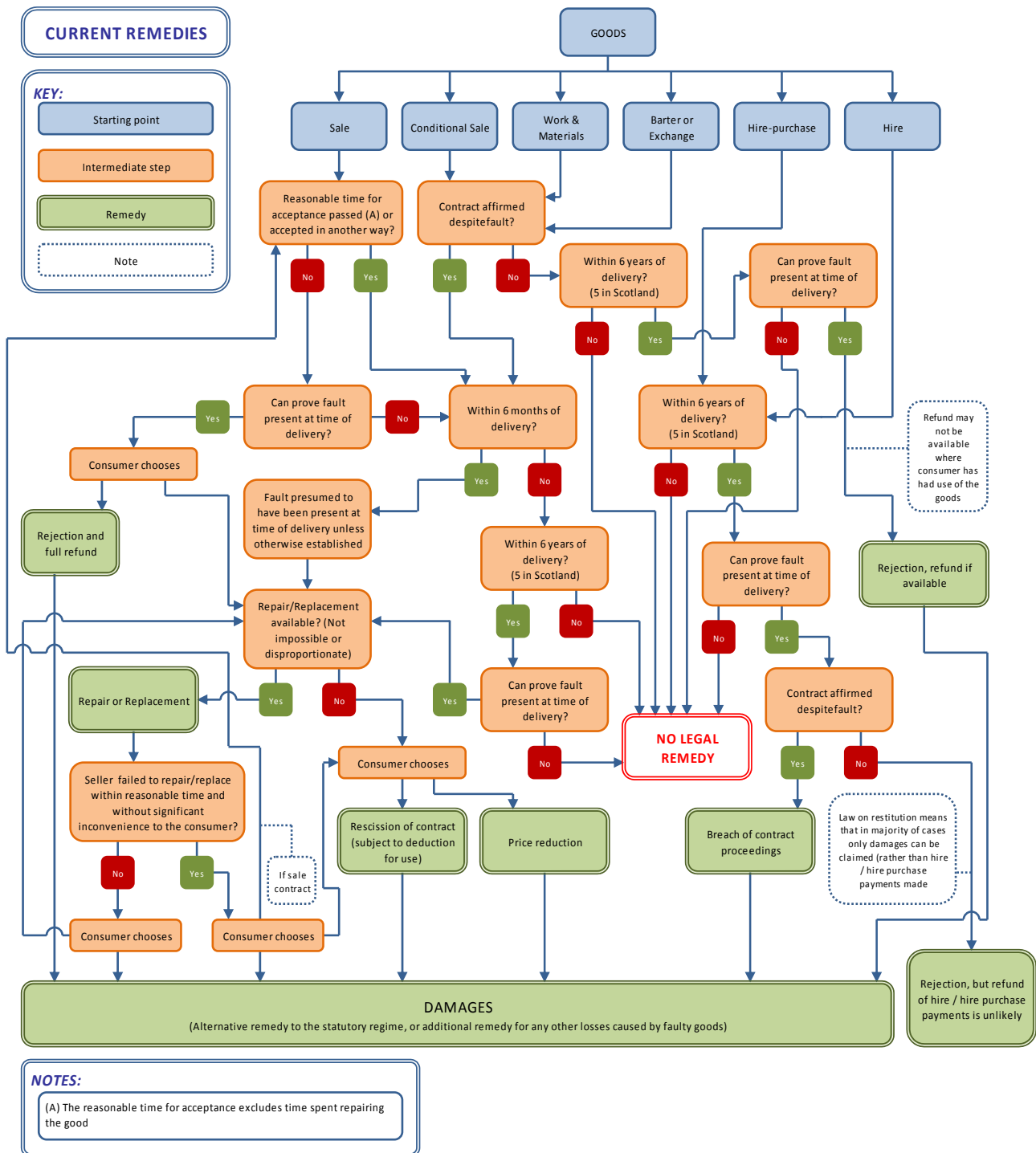
Box 15

### What do we mean by remedies?

The consumer's 'remedies' are the courses of action which are open to the consumer if the standards listed above in paragraph 5.9 are not met. Some remedies are actions which the consumer can take – such as suing the trader for compensation (damages); others are actions that the consumer can require the trader to take – such as repairing or replacing the goods.

<sup>41</sup> SOGA, s.29(3). However, for distance sales, the Consumer Protection (Distance Selling) Regulations 2000 (as amended) require performance of the contract within 30 days.

<sup>42</sup> Note that this flowchart does not cover remedies for breach of the implied condition that the trader has the right to sell, or of the implied warranties (protections 2 and 3 in the list above).



5.24. If goods have a fault<sup>43</sup>, the consumer can also only obtain a remedy if it is reasonable to expect that the fault should not have arisen. That is, goods will only be considered not to be of satisfactory quality if they do not meet the standard which a reasonable person would see as satisfactory in the circumstances. For example, if the goods were so cheap that no reasonable person would expect them still to be working (or in the same condition) after 4

<sup>43</sup> I.e. they are not of satisfactory quality, as required by standard 5 above

years, then a consumer could not obtain a remedy at that time, even if the defect or issue in quality was present when they were purchased.

### **'Traditional' UK remedies – rejection and/or compensation**

5.25. A consumer can only obtain the 'traditional' remedies if he can show that the goods were sub-standard at the time they were supplied.

#### Right to reject

5.26. If the goods do not satisfy any of the protections in standards 4 to 7 above, a consumer can 'reject' them – by this we mean returning the goods to the trader and requiring his money back. If the consumer discovers the fault before paying for the goods, he can simply refuse to pay - but in most cases issues with goods are discovered after payment.

5.27. It is important to note that this right to reject relates to situations where goods are sub-standard. It is a separate right from consumers' right to cancel a contract made away from the trader's premises or by distance selling (e.g. over the internet or by telephone).<sup>44</sup>

5.28. A consumer's right to reject goods depends on how they were supplied.

#### *Sales*

5.29. In the case of sales, the consumer can only reject the goods within a 'reasonable time' after purchase. However, the right to reject is lost if the consumer indicates to the trader that he/she accepts the goods or does anything which shows that the consumer treated the goods as his/her own (this could include the consumer altering the goods or trying to repair the goods). Doing either of these things or keeping the goods beyond a 'reasonable time' is known as 'accepting' the goods. The consumer must have a 'reasonable opportunity' to examine the goods before the right to reject is lost.

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<sup>44</sup> These cancellation rights, which are required by the Consumer Rights Directive, will be further explained in the Government's consultation on the implementation of that Directive.



5.30. What is a 'reasonable time' will depend on the circumstances and the complexity of the goods (a computer, for example, will require longer to evaluate than a kitchen knife). In general, consumers have only a short time to reject goods<sup>45</sup>. This criterion of "reasonable time" can therefore give rise to uncertainty.

### *Other transactions*

5.31. Consumers have a longer period to reject goods supplied in other ways. A consumer then only loses the right to reject if he/she knows of the fault<sup>46</sup> and behaves in a way that shows the consumer has chosen not to reject (this is known as 'affirming' the contract). For example, if a consumer buys electrical equipment under a conditional sale agreement and the goods have a fault that only materialises after several months of use, the goods can still be rejected.

5.32. It is more difficult for a consumer to obtain a refund under a hire / hire purchase contract than for other types of supply. This is because the purpose of the hire / hire purchase is to allow the consumer to use the goods. Even if the goods are sub-standard, the consumer has had use of them, so the law does not require his payments to be refunded<sup>47</sup>.

5.33. If the consumer has had substantial use of goods provided under a conditional sale agreement before rejecting them, he may have difficulty in obtaining a refund of the payments he has made for the same reason.

5.34. It should be noted that the right to reject described in this chapter relates to situations where goods are sub-standard. It is a separate right from consumers' general termination rights for hire, hire purchase and conditional sale contracts under the Consumer Credit Act 1974.

### *Breach of protection 1, that the trader has the right to sell*

5.35. If the trader does not have the right to sell the goods, the consumer's right to reject in this situation is treated differently. The consumer may reject the goods, even if the issue becomes apparent after a 'reasonable time' for acceptance has passed. Consumers may in principle recover the full amount

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<sup>45</sup> The courts have however allowed for longer periods in some cases more recently.

<sup>46</sup> Or the breach, if one of the standards other than satisfactory quality is not met.

<sup>47</sup> There have however been cases in which courts have awarded damages (compensation) equivalent to the money paid under hire purchase contracts, with limited or no deduction for use.

paid for the goods, even if they have used the goods for a long period or the value has decreased. The reasoning is that the consumer has paid to obtain ownership of the goods and has not got what he/she paid for, because the trader could not properly pass on the ownership. The Government does not propose to reform this aspect of the right to reject.

## Damages

- 5.36. Consumers can claim money from the trader to compensate them for having obtained sub-standard goods (known as 'damages').
- 5.37. Consumers may generally seek this compensation as well as, or instead of, rejecting the goods (for breaches of standards 1 and 4 to 7 above, as these are conditions)<sup>48</sup>. However, if a consumer has 'accepted' the goods or 'affirmed' the contract (as above), they cannot reject the goods but can only claim compensation (or pursue the EU remedies set out below).
- 5.38. The amount of compensation is not set out in legislation, but would be decided by a court based on past cases. It will generally reflect the cost of repair or replacement of the goods. Consumers may also be able to claim compensation for harm caused by sub-standard goods, for example if the sub-standard goods harm the consumer's other property. Compensation for distress, inconvenience or disappointment is more difficult to obtain.

## **'EU remedies'**

- 5.39. Where consumer rights derive from EU law, they must meet EU requirements. Some EU-based consumer rights have therefore been added to the previous UK framework without the opportunity being seized to align them fully with existing rights.
- 5.40. In 2002, additional remedies derived from EU law were included in the legislation for sub-standard goods. These enable consumers to require repair, replacement, price reduction or termination of the contract. Before this addition to the legislation, consumers could request a replacement or repair but had no right to insist on one. However, there is some cross-over between these EU-derived remedies and the 'traditional' UK remedies, which adds to the complexity of this area of law. The UK and EU-derived remedies are not

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<sup>48</sup> As explained above, if a warranty is breached (e.g. standard 2 or 3), no right to reject arises but damages would be the only remedy. See 5.16 above.

mutually exclusive. If a consumer opts for an EU remedy such as a repair, the consumer is not precluded from then deciding to use the UK right to reject the goods.<sup>49</sup>

- 5.41. The EU-derived remedies apply where the goods supplied are not of satisfactory quality, or do not match their description or sample, or are not fit for a particular known purpose (protections 4 to 7 above).<sup>50</sup> These remedies also apply if an express term in the contract between the parties is breached.
- 5.42. These remedies are available in relation to sales, conditional sales, barter or exchange contracts and work and materials contracts. They do not apply to hire or hire purchase contracts.
- 5.43. For these remedies, a consumer does not have to prove that goods were sub-standard at the time they were supplied, if a breach of a relevant term (standards 4-7 or an express term of the contract) arises within six months of delivery.<sup>51</sup>

#### First tier remedies – repair or replacement

- 5.44. Initially, a consumer can choose between repair and replacement. Replacement can include uninstalling faulty goods and re-installing the replacement goods, or the trader bearing the cost of doing so, where goods have been installed in a way consistent with their nature and purpose (for example, installation of a dishwasher into a kitchen or fixing of bathroom tiles to the wall).<sup>52</sup>
- 5.45. However, a consumer cannot insist on one of these options if it is impossible or disproportionate. For example, a consumer cannot insist on a repair if the

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<sup>49</sup> Under the SOGA, the consumer has to allow a reasonable time for the repair/replacement before switching to the right to reject (s.48D). The fact that a consumer requests a repair does not mean they are taken to have accepted the goods (s.35(6) SOGA).

<sup>50</sup> These remedies do not apply to a breach of the implied term that the trader has the right to sell, or to a breach of the warranties that no other people have rights over the goods (protections 1 to 3 above).

<sup>51</sup> However, this will not apply if the trader produces evidence that the goods were not sub-standard at the time of delivery, or if the presumption is inconsistent with the type of goods or the type of fault / other issue.

<sup>52</sup> See also Chapter 6 below (Services). This has been established in European case law (Joined cases C-65/09 *Weber v Wittmer* and C-87/09 *Putz v Medianess Electronics* (16 June 2011))

goods cannot be fixed or if it would be cheaper to replace them (as is commonly the case with cheaper products).

- 5.46. The Government intends to clarify in the proposed Bill of Rights that a consumer's right to insist on one of the first tier remedies (either repair or replacement) depends on whether that remedy is impossible or disproportionate compared only to the other first tier remedy, to reflect recent European case law.

#### Second tier remedies – refund (with deduction) or a price reduction

- 5.47. The consumer can require a second tier remedy if the first tier remedies (repair or replacement) are impossible or disproportionate, or if a first tier remedy is requested but the trader fails to provide it within a 'reasonable time' or without 'significant inconvenience' to the consumer.
- 5.48. The second tier remedies are that a consumer may choose either to keep the goods but receive a reduction of an 'appropriate amount' from the purchase price; or to terminate the contract<sup>53</sup>, returning the goods and receiving a refund. If the consumer opts to return the goods and obtain a refund, the refund need not be the full purchase price paid, as a deduction can be made to take account of the use the consumer has had of the goods. The amount of the deduction, or the means of calculating it, are not fixed by law.
- 5.49. This second-tier remedy of termination is similar to the right to reject, as in both cases the goods are returned for a refund. However, the short time period for rejection does not apply to the EU-derived right to terminate, as this is only available if first tier remedies fail or are unavailable. The deduction for use which is applied under the EU-derived termination remedy does not apply to the "traditional" English rejection remedy.
- 5.50. The concepts of 'reasonable time' and 'significant inconvenience' are further examples of where the consumer protection currently in place can give rise to uncertainty as to what the consumer can receive and what businesses must do.

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<sup>53</sup> Referred to in the legislation as 'rescission'

## Summary of remedies available to consumers

5.51. The various remedies available under the current laws, depending on the type of supply of goods, can be summarised as follows:

Table 1 – Remedies available by contract type

Contract Type	Remedies Available (where goods are not of satisfactory quality, or do not correspond with description or sample, or are not fit for a known purpose )		
	Right to Reject	Damages	1 <sup>st</sup> & 2 <sup>nd</sup> tier (EU-derived remedies)
Sale	Short-term	Yes	Yes
Conditional Sale	Long-term	Yes	Yes
Barter or Exchange	Long-term	Yes	Yes
Work & Materials	Long-term	Yes	Yes
Hire Purchase	Long-term	Yes	No
Hire	Long-term	Yes	No

## The problem

5.52. As discussed in the introductory chapter of this consultation, current law is remarkably complex. At present it is difficult for many businesses and consumers to be clear about their rights and obligations, leading to disputes that are costly for business and consumers, and preventing consumers from effectively pursuing their rights. Given the complexity of the law described above, this is not surprising. Qualitative research commissioned by the Law Commissions found that people's expectations are 'governed largely by shops' policies rather than by the law'<sup>54</sup>, and small business representatives, like the Association of Convenience Stores, have indicated that the law is unclear for many businesses.<sup>55</sup>

5.53. The Davidson Review (2005), responses to the Consumer Law Review (2008), the Law Commission and Scottish Law Commission's report on Consumer Remedies for Faulty Goods (2009) and research conducted for the Department on 'Consolidation and Simplification of UK Consumer Law' (2010) all

<sup>54</sup> FDS, 'Qualitative Research into Consumers' Perceptions of Consumer Remedies for Faulty Goods', in The Law Commissions, 'Consumer Remedies for Faulty Goods, A Joint Consultation Paper', Appendix A, p.138

<sup>55</sup> This was raised in informal consultations, & in their response to the Government's Consumer Law Review – 'Responses to the Consumer Law Review A-B' (2008), p.10 - 'It is highly possible that knowledge of consumer law is limited in the convenience sector'  
<http://www.bis.gov.uk/files/file51997.pdf>

suggested there would be strong benefits for business, consumers and enforcers from a coherent consolidated law, clearly expressed, which as far as possible minimised the differences between different types of contract and manners of purchase. Such changes would make the law more accessible, increasing both business and consumer awareness of their rights and obligations. This would in turn reduce dispute resolution costs and strengthen consumer confidence to exercise choice, making markets work better.

- 5.54. Consumer sales in the UK were worth £5,774 million per week in the first quarter of 2011 and there is evidence that the scale of consumer detriment in the UK is large. The latest available research conducted by the OFT estimated that the total consumer detriment related to problems with goods and services, amounted to around £6.6bn in 2008. Of this, around £481 million specifically related to problems with 'defective goods' and 'goods that were faulty, damaged or lacked durability', and the overall detriment caused by goods will be much higher given their additional involvement in other recorded sources of detriment, such as 'repair problems'. This equates to a minimum of 5.38 million problems with goods in the UK, suggesting that the scale of the problem to be addressed here is considerable.
- 5.55. The Government's Retail Red Tape Challenge concluded in July 2011 that there would be significant gains to be made by rationalising and clarifying consumer law. Reform of the law on sale of goods is a part of the response to achieve this.

## The proposals

- 5.56. The Government has identified six areas with the current law on the supply of goods where it believes that clarification and/or simplification will bring benefits for both consumers and traders.

### Clarifying the language

#### 1. Terminology

- 5.57. As explained in the Introduction chapter, there are some differences in the meanings applied to key terms across the current legislation; particularly as some legislation uses long-established UK definitions and others incorporate definitions from European law.
- 5.58. The term 'goods' has different definitions under UK and EU law (and also

various definitions within each of these forms of law). This does not assist the complexity of the current law, and more significantly it may mean that, as new EU requirements are enacted in the UK, the position may become ever more complex.

- 5.59. The UK law definition which applies to the protections discussed in this chapter, and the EU law definition under the Consumer Rights Directive which is shortly due to be implemented in the UK are both wide and cover most tangible movable items. The EU definition employs plainer language and will need to be enacted to give effect to some EU measures. For these reasons, the Government proposes using the EU definition of 'goods' instead of the current UK law definition, in order to provide a consistent and simpler standard. (Further detail is set out in the 'Key Definitions' box 9).
- 5.60. There are some differences between the definitions but the Government's provisional view is that the EU definition would be appropriate for consumer protections:
- a) The UK definition expressly excludes money, so that banknotes and coins which are exchanged as legal tender are not sold or supplied as goods. However, this aspect of the definition does not preclude doubt as to the status of money in some circumstances (as there is case law considering this);
  - b) The definition under the Consumer Rights Directive includes electricity, when put up for sale in a limited volume or set quantity, but other directives exclude electricity from the definition of 'goods'<sup>56</sup>. A contract to supply energy has however been held by UK courts to be subject to similar implied terms to goods, and for VAT purposes supply of power is a supply of goods.

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<sup>56</sup> For example, Directive 1999/44/EC – which we refer to as the Consumer Sales Directive - which sets the 'European remedies' for consumers referred to in this chapter.

**Question:**

- Q3. Do you agree that it would be beneficial for a single definition of 'goods' to be used for the protections explored in this chapter and provisions of EU law? Do you consider that the use of the following EU definition would be appropriate (please give reasons)?

*"Goods" means any tangible movable items, with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods where they are put up for sale in a limited volume or a set quantity.*

## Clarifying Rights

### 2. Implied terms to become statutory guarantees

- 5.61. The problem is that a complex legal framework for consumer law is contributing to a low awareness of consumer rights amongst business and consumers, which means that both parties waste time and money on these issues unnecessarily. The very concept of 'implied terms' is a technical legal one, which would mean little to many consumers or shop staff members. Consumer cases are very rarely taken to court, and so it is essential that consumer rights can be easily understood and applied without legal expertise if they are to be effective on the ground.
- 5.62. There is ample evidence to suggest that the complexity of the current legal framework results in a degree of confusion among businesses. An OFT report, for example, found that 'in the absence of detailed knowledge, many businesses ...said that they followed their understanding of the principles of consumer protection laws rather than 'the letter of the law.'<sup>57</sup> This has a direct impact on the cost of staff training, with the Davidson review stating that 'in the retail sector the main challenge is to train staff to know what remedies a consumer is entitled to'<sup>58</sup>. It also imposes costs in terms of time spent dealing with complaints, both legitimate ones and groundless ones that, if knowledge of the law was greater, could more easily be dismissed.
- 5.63. Similarly, there is ample evidence that many consumers have a poor knowledge of the law, either being unaware of the legal rights that they possess, or believing that their statutory rights are stronger than the reality.

<sup>57</sup> OFT, 'Consumer Law and Business Practice, Drivers of compliance and non-compliance' (2010), p.6

<sup>58</sup> Davidson Review, Implementation of EU Legislation (2006), p.40



For example, qualitative research, commissioned by the Law Commissions found that 'participants aged under 25 ... appeared likely to underestimate their consumer rights' whilst 'older people, often influenced by the policies of their preferred retailers, tended to overestimate them'.<sup>59</sup>

- 5.64. This is also borne out in the findings of the OFT's Know Your Consumer Rights campaign evaluation report which found that: "A third theme was that many consumers had an inflated view of their consumer rights. This is probably attributable to the policy of major high street retailers. Because they give refunds or exchange goods in circumstances where they are not legally obliged to do so, consumers have formed the impression that their rights to exchange and refund are greater and less limited than they are."<sup>60</sup>
- 5.65. The rationale for intervention is that implied terms appear to be contributing to the problems described above, without bringing any obvious benefit that could not be achieved through a clearer system. Indeed, an independent and in-depth academic report concluded that a move away from implied terms towards a clearer system of statutory guarantees would be 'easily achieved, highly desirable and unproblematic'.<sup>61</sup> There therefore seems to be a strong case for reforming this unnecessarily complex system.

### The Government's Proposal

- 5.66. The Government proposes a move away from the current system of implied terms to the adoption of a system of statutory guarantees which clearly state the quality standards that goods must meet and the remedies available to the consumer if these guarantees are breached.
- 5.67. This option would involve explicitly setting out in the Bill the standards legally required of any goods supplied to a consumer. It would not involve creating significantly different rights and obligations compared to the present requirements – the guarantees would still operate as contractual protections - but would just set them out in a clearer, more coherent and comprehensive way.

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<sup>59</sup> FDS, 'Qualitative Research into Consumers' Perceptions of Consumer Remedies for Faulty Goods', in The Law Commissions, 'Consumer Remedies for Faulty Goods, A Joint Consultation Paper', Appendix A, p.137

<sup>60</sup> Office of Fair Trading, 'Know Your Consumer Rights Campaign Evaluation: Report of Research Results', (May 2012)

<sup>61</sup> Professors Howells and Twigg-Flesner (ed.), 'Consolidation and Simplification of UK Consumer Law' (2010), p.35

- 5.68. The contractual language of “condition” and “warranty” which determines the contractual remedies which flow from a breach<sup>62</sup> would be replaced by clearly expressed remedies (to similar effect<sup>63</sup>) that would be available to consumers if the guarantees were breached. Reducing complexity and increasing transparency would make it easier for consumers and businesses to understand their rights and obligations.
- 5.69. Together with the other changes proposed in this document, the Government expects that the changes proposed above should make consumer rights more accessible and straightforward to understand for both business and consumer alike. This should help to speed up the time taken to resolve disputes and lead to a business saving in relation to ensuring compliance with the law. In particular, it may lead to
- more cases being handled immediately in shops, rather than being passed to head office or a customer service centre
  - a reduced need for businesses and consumers alike to take legal advice;
  - reduced number of cases being litigated;
  - reduced need for legal training for new staff.
- 5.70. The specific move away from implied terms would only be likely to bring a small proportion of each of these intended benefits, but should contribute to the impact of our overall package of reforms in these areas.
- 5.71. The Association of Convenience Stores and the Federation of Small Businesses have both expressed concerns that awareness of the current law is especially low among small businesses and we therefore believe that these changes would be especially beneficial to this group. This is reinforced by an OFT report which also found that SMEs in particular are likely to have less awareness of the detail of consumer protection laws, and how they can access relevant information to assist compliance.<sup>64</sup>
- 5.72. A more effective consumer regime in general should also help to boost consumer confidence and competition. By making consumers more aware of their rights, this reform should give them the confidence to shop at a wider range of available retailers, thereby promoting competition, helping new

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<sup>62</sup> The terminology of condition and warranty does not apply in Scotland. Our proposals are still intended to provide equivalent consumer protection in Scotland.

<sup>63</sup> The consumer’s remedies would still be for breach of contract.

<sup>64</sup> OFT, ‘Consumer Law and Business Practice, drivers of compliance and non-compliance’ (2010), p.6

market entrants, and ultimately driving economic growth. Similarly, consumers' increased confidence to insist on their rights would help to level the playing field between businesses, as unscrupulous traders would be less able to undercut competition by ignoring consumer rights.

- 5.73. If the measure is successful in contributing towards improved consumer awareness and confidence, it may indirectly lead to an increase in short-term costs for some businesses related to dealing with consumers pursuing their rights. This would arise where consumer rights are currently so opaque that they are not exercised. Greater clarity might persuade more consumers to step forward to assert their rights, although the extent of any such change cannot be predicted with certainty because many businesses offer clear consumer rights anyway, often going beyond the statutory minimum. The impact would also only be felt by those businesses denying current consumer rights and the extent of this undetected breach is not known. It is also unclear to what extent and over what timeframe simpler law will actually deliver increased consumer assertiveness.
- 5.74. In any case, there is also evidence that some consumers believe that their rights are stronger than they are in reality and may pursue claims that have no legal basis (often confusing stores' "no quibble" returns policies with their statutory rights). The British Retail Consortium report that traders often pay out on such claims, despite their lack of legal basis, because the trader is either confused over the law or wishes to avoid an argument with the customer on the shop floor. Clarifying consumer rights may reduce the number of such baseless claims, and provide confidence to business to refuse them.
- 5.75. Business groups with which the Government has engaged to date enthusiastically support this change, which may indicate that they believe this positive impact to outweigh any costs for business of greater consumer assertiveness.

**Questions:**

- Q4. Do you believe that this is a sensible change or can you foresee problems arising from a move away from the implied terms model?
- Q5. What benefits can you see from moving away from the implied terms model?

## Clarifying Remedies

### 3. The short term right to reject sub-standard goods purchased under a contract for sale

- 5.76. As outlined above, under the current law if a fault manifests shortly after buying goods, the consumer may be able to reject the goods and obtain a full refund. By law, the period within which this option is available in relation to goods which were purchased is a “reasonable” time, the duration of which will depend on the circumstances, although it should include a reasonable period for the inspection of the goods. The criterion of ‘reasonableness’ as part of the right to reject provides a balance between the interests of the trader and the consumer in this area.
- 5.77. Consumers have an alternative to the right to reject, as they are entitled to have the item repaired or replaced. Repair or replacement will usually be preferable for the trader, especially repair of expensive items. But the right to reject seems to be treasured by consumers for those cases where they lose confidence in the product or the trader.
- 5.78. The Law Commissions’ 2009 consultation paper on ‘Consumer Remedies for Faulty Goods’ concluded that ‘it is not possible to say with a sufficient degree of certainty how long the reasonable period for examination is because it depends upon the facts of the case. In a standard case, a consumer may have sought a number of repairs, and these may have been unsuccessful. The interplay between the repairs and the period for rejection is difficult, and it means that a buyer attempting to exercise the right to reject will face difficult judgments.’<sup>65</sup>
- 5.79. Consumer Direct (a government-funded telephone and online service offering information and advice on consumer issues) has reported that consumers often face difficulties when seeking to reject faulty goods beyond a two week period due to ambiguity as to what constitutes a reasonable period, though legally the period for rejection is probably longer. Consumer advisers are often concerned about advising consumers that they can reject goods more than two weeks after purchase.<sup>66</sup> If consumer advisers were able to tell people that there was a standard period, say 30 days, it would reduce the need to rely on case law which is fact specific, and it should give hesitant consumers greater confidence.

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<sup>65</sup> Law Commissions, ‘Consumer Remedies for Faulty Goods, A Joint Consultation Paper’ (2008), p.42

<sup>66</sup> Law Commissions, ‘Consumer Remedies for Faulty Goods’ (2009), p.32

- 5.80. The general lack of awareness of the parameters of the right to reject among consumers is further evidenced by the following examples:
- FDS research for the Law Commissions found that *'Currently, virtually no-one is aware customers have a right to refund only a 'reasonable' time after purchase. Some guess around 30 days but others think the 'right to reject' could last a whole year.'*<sup>67</sup>
  - A TNS consumer law survey found that 75% of consumers believed there would be a time limit on returning faulty goods; 10% did not believe there would be a time limit; 10% believe it would depend on the trader and 4% did not know.<sup>68</sup>
  - The Law Commissions said that *'consumers may accept what retailers tell them their policy is, even if it is less generous than the law: 16% of consumers did not know they were entitled to a legal remedy if goods were faulty.'*<sup>69</sup>
- 5.81. On the other side, business organisations including the British Retail Consortium also report confusion for business on what constitutes a "reasonable" time for examination and acceptance of the goods. They claim that this results in many traders erring on the side of caution and allowing a much longer period than would be necessary, up to 2 or 3 months in some cases, thereby increasing any potential costs caused by the depreciation in value of the goods. There is a feeling among retailers (relayed to BIS by retail trade bodies) that the courts tend to be pro-consumer and favour a longer period when judging what is "reasonable". Whether or not this is the case, many traders offer significantly longer periods, taking a reasoned view as to what a court may rule.
- 5.82. Taking this evidence together, it seems that the unpredictability and principles-basis of the law cause some operators and advisers on both sides to err on the side of caution resulting in extra costs for them. In this situation those traders and consumers taking an aggressive line may gain a comparative advantage over those that do not.
- 5.83. The evidence above supports the view that the period during which consumers can reject goods and obtain a full refund, currently defined as a 'reasonable' period for the inspection of the goods, is causing uncertainty about how consumer law operates in practice. This lack of definition is a source of confusion for consumers and traders, leading to costly risk

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<sup>67</sup> FDS, 'Appendix A: Qualitative Research into Consumers' Perceptions of Consumer Remedies for Faulty Goods', in The Law Commissions, *Consumer Remedies for Faulty Goods, A Joint Consultation Paper*, (2008), p.148

<sup>68</sup> TNS, 'Consumer Law Omnibus Survey' (June, 2008), Table 70, p.269

<sup>69</sup> Law Commissions, 'Consumer Remedies for Faulty Goods, A Joint Consultation Paper' (2008), p.53

avoidance in some cases and unnecessary disputes and costly litigation in others.

- 5.84. This view has been supported by the Davidson Review (2005), and the Law Commissions, following their consultation exercise, in 2009. The Davidson Review found that the law on consumer remedies was too complex, causing unnecessary burdens on business and respondents to the Law Commissions' consultation specifically reported that the main problem with the right to reject was uncertainty over how long it lasts and, in fact, *'most consultees felt strongly that the right to reject ... would benefit from clarification as to how long it lasts.'*<sup>70</sup>

### The Government's proposal

- 5.85. The Government proposes to establish a normal period for the right to reject sub-standard goods which are purchased, as 30 days, with two exceptions:
- a) where the goods are perishable and would not be expected to last 30 days
  - b) where both parties might reasonably understand that there might be a delay before use of the goods, so that 30 days would not be sufficient for the consumer to inspect and try out the goods.
- 5.86. The Government also proposes that the 30 day period should be suspended for the duration of any repair work or the delivery of a replacement<sup>71</sup>.
- 5.87. This is the preferred option recommended by the Law Commission and the Scottish Law Commission in their 2009 report on consumer remedies for faulty goods. This proposal would retain the right to reject following a sale of goods as a short-term remedy, but legislation would clarify how long it should last.
- 5.88. In addition to the Law Commissions' recommendations the Government is also proposing that consumers should have a minimum of 7 days to inspect the goods after a repair has been carried out (or the remainder of the suspended 30 day period, whichever is longer). The Government is proposing this addition because it is keen that consumers should feel that repair is a

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<sup>70</sup> Law Commissions, 'Consumer Remedies for Faulty Goods: A Summary of Responses to Consultation' (May, 2009), p.14

<sup>71</sup> See 5.98-130 below for further detail of repair/replacement

valid option even within the first 30 days, rather than simply choosing rejection which would have a detrimental effect on traders (being more costly due to the full refund payable and the costs of disposing of the goods) and on the environment. We believe that if a fault develops towards the end of the 30 day period, consumers should still have an opportunity to inspect the repair work that has been carried out and retain the option to reject if the item remains sub-standard. Without this addition, if a fault appeared on day 29 and was repaired, the consumer would only have a single day to inspect the goods before their option to reject expired. This may encourage rejection, rather than repair, which may result in significant extra costs for business.

5.89. The Government has considered other options for the length of the normal period for consumers to reject goods, such as a 60- or 90-day period. However, a period of 30 days only is being proposed at this point because the Law Commissions have already consulted extensively on this time period, and have produced, in the view of the Government, convincing evidence that 30 days would be most effective in bringing about the intended benefits of enhanced consumer confidence compared to any other time limit which we could implement. But clearly the Government is open to arguments in favour of other periods if backed by evidence, in the context of this consultation. In particular, some businesses may feel that a 28 day period would be easier to implement.

5.90. The Law Commissions' rationale for recommending a 30 day period (as opposed to any other length of time) was as follows:

- a) Firstly, the Law Commissions provisionally concluded that 'in most cases 30 days would give the consumer a reasonable opportunity to inspect the goods and to test them for a short period in actual use'<sup>72</sup> whilst at the same time providing a level of clarity and certainty which would benefit businesses and consumers alike.

These assumptions were strongly supported by consultation responses, with the majority of respondents agreeing in principle with the Law Commissions' proposal for a 30-day normal period<sup>73</sup>. Two quotations are included below to illustrate some of the responses to the Law Commissions' consultation. These assumptions have since been reinforced further by BIS's own discussions to date with stakeholders, though some would prefer 28 days as the limit, instead of 30 days.

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<sup>72</sup> Law Commissions, 'Consumer Remedies for Faulty Goods' (Nov, 2009), p.31

<sup>73</sup> Law Commissions, 'Consumer Remedies for Faulty Goods' (Nov, 2009), p.32

Box 16

*'[the 30 days normal period] appears to reflect the desires and expectations of both consumers and suppliers. As such, whilst there are no doubt arguments to be made for other periods 30 days appears a sensible compromise. We would wish to reiterate that in our view the principal advantage of any stipulated period is that it brings certainty. We regard that factor as a highly persuasive argument for having a stipulated period.*

*In our view the period is long enough to be likely to satisfy consumer expectation in this area. Equally it is sufficiently short to avoid major inconvenience and consequent unfairness to suppliers. A stated period enshrined in statute would also provide the benefit of certainty, a period known to both consumers and suppliers.'*

**The Judges of the Court of Session in response to the Law Commissions' consultation on Consumer Remedies for Faulty Goods 2008**

Box 17

*'We agree that the idea of a finite time in which the right to reject is available would be a sensible reform, provided that the period is long enough. Although we appreciate that [any] specification is likely to reduce the period of time in which the right may currently be exercised in some circumstances, the advantages of simplicity outweigh the potential disadvantages in our opinion. Further we believe that many possible disadvantages could be avoided by a good consumer/trader awareness programme. If both consumers and traders knew there was a specific period in which this right could be exercised we think it may give consumers added confidence in their dealings with traders and vice versa.*

*Many traders and consumers already appear to believe that consumers have 30 days in which to return goods (probably as a result of voluntary systems offered by some traders) so we think that this period is probably appropriate and gives the consumer sufficient time to test the goods and enables the trader to have some certainty'.*

**The Office of Fair Trading in response to the Law Commissions' consultation on Consumer Remedies for Faulty Goods 2008**

Some respondents to the Law Commissions' consultation did disagree with the proposal for 30 days. In particular, some respondents such as Consumer Focus argued that a longer period would be needed to test complex goods. However, given the weight of opinion in favour of this time period the Law Commissions still concluded that 30 days was the best option, pointing out that it would just 'encourage consumers to test goods promptly after purchase'.

b) Secondly, the Law Commissions also thought that 30 days or something



very similar to 30 days would match consumer expectations. FDS research carried out for the Law Commissions found that around two thirds of people already thought that the right to a refund lasted 30 days<sup>74</sup> and when consumers were asked how long they thought it should last, the most common answer was that it should last for around a month.<sup>75</sup> Consumers very rarely take cases to court or use expert legal advice, and therefore it was considered essential that the law could be easily understood and applied in order to be effective on the ground.

- 5.91. Although, in some cases, 30 days may be a shorter period than consumers may have at present, the other proposals outlined below - specifically the proposed limitation of the number of repairs or replacements a consumer must accept (outlined in section 4) - would mean that exiting the contract would remain a viable outcome, even outside this proposed 30 day period.
- 5.92. The Law Commissions also recommended that where it is reasonably foreseeable by, or reasonably within the contemplation of, both parties that a longer period will be needed to inspect the goods and to try them out in practice, then a consumer should have a right to argue for a period longer than 30 days. Examples of this are items bought for a nursery prior to the birth of a baby, or items of ski equipment bought in an end of season sale.
- 5.93. The Law Commissions' recommendation envisaged extensions being allowed on an objective basis, i.e. where it is clear from the circumstances and nature of the sale that the consumer would not be able to test the goods in use during the following 30 days. This would mean that the consumer (or trader) would not need to produce evidence that an explicit discussion took place and an agreement was reached. The Government would welcome views on whether it would be beneficial or burdensome to make any explicit statutory provision about how this exemption should be evidenced, or whether an objective basis for the exemption would be preferable.

#### Right to Reject goods which do not meet their description

- 5.94. The Government is also considering whether another exception to the 30 day period is necessary, in cases where goods do not match their description. Where this is the case, this is a breach of consumer rights under sale of goods law as set out paragraph 5.9. The Law Commissions have recently consulted,

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<sup>74</sup> FDS, 'Appendix A: Qualitative Research into Consumers' Perceptions of Consumer Remedies for Faulty Goods', in The Law Commissions, *Consumer Remedies for Faulty Goods, A Joint Consultation Paper*, (2008), p.137

<sup>75</sup> Law Commissions, 'Consumer Remedies for Faulty Goods' (Nov, 2009), p.31

and published their report, on redress for consumers who are victims of misleading and aggressive business practices by traders<sup>76</sup>. Their recommendations include a 90 day period within which the consumer may unwind the contract if it is found that the trader used misleading or aggressive practices in order to secure the sale. The Law Commissions recommended a 90 day period on the basis that these practices are often designed, or targeted, in such a way as to delay their discovery. Therefore 30 days was not thought to be long enough to enable victims of such tactics to become aware of the practice in order to seek redress.

- 5.95. The laws in relation to (i) sale of goods by (mis)description and (ii) misleading or aggressive business practices are intended to address different problems for consumers and different types of behaviour by traders. For this reason, greater consumer protection is considered appropriate for victims of misleading or aggressive practices, (which are, after all, criminal offences), than for breaches of the statutory standards that form part of the contract of supply. However, there is potential for overlap between the concept of misleading practices and that of sale by description. If, as part of the sale, the consumer is given a description of the goods which is incorrect – for example, the consumer purchases a television which is labelled as ‘HD ready’ when it does not in fact have this feature – the standard that goods must meet their description would be breached. The same situation might also be a misleading practice as the description would have been false or misleading – under the Law Commissions’ recommendations, it would be a misleading practice if (i) objectively, it was likely to cause an ‘average consumer’ to purchase the goods if they would not have done so otherwise and (ii) it was a significant factor for the particular consumer who bought the television.
- 5.96. If the remedies are different under the two legal regimes which can both apply in a case like this, there is a risk that this may lead to a degree of confusion over which rule would apply in some cases. Whilst, as explained above, a period of around 30 days for the right to reject goods is provisionally (subject to other evidence from this consultation) considered appropriate for breach of the statutory standards for goods, the Government wishes to avoid uncertainty for consumers and businesses and it would be clearer for consumers and for businesses if both areas of law were aligned.
- 5.97. The Government is therefore keen to hear views on whether these two sets of remedies should be aligned and if so, whether they should be aligned with the relevant period lasting 30 days or 90 days. Any evidence of the likely impact of these choices would be especially welcome.

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<sup>76</sup> Law Commission & Scottish Law Commission, ‘Consumer Redress for Misleading and Aggressive Practices’ (March, 2012)

**Questions:**

- Q6. Is 30 days a reasonable period to set for the short term right to reject sub-standard goods?
- Q7. Do you agree that an exemption is required for goods where there may be a delay before use, or does this represent an unwarranted complication?
- Q8. What evidence should a consumer have to produce to benefit from this exemption and do you think this can and should be provided for in statute?
- Q9. If an exemption is provided, do you agree that in order to make use of the provision, the likely delay must be raised by the consumer at the time of sale and the exemption be agreed by both parties at that time?
- Q10. Do you agree that the consumer should be allowed 7 days to examine the goods after any repair has been carried out, before losing the right to reject?
- Q11. Do you consider that there is a need for the remedies for sale by description and for misleading practices to be aligned? If yes, do you think that they should both have a period of 30 days or 90 days?

**4. Repair or replacement – how many are required**

- 5.98. Under current law, if goods are found to have an inherent fault, consumers are entitled to repair or replacement of the goods (known as 'first tier' remedies). If a repair or replacement is impossible or disproportionate or, having been requested, a repair or replacement is not provided 'within a reasonable time' or 'without causing significant inconvenience' to the consumer then the consumer can either keep the goods but ask for a reduction in the original price of the goods, or can exit the contract, returning the goods and obtaining a refund, subject to a deduction for use (known as 'second tier' remedies). 'Reasonable time' and 'significant inconvenience' are to be determined by reference to the nature of the goods and the purpose for which they were acquired.

- 5.99. Consumer groups and businesses alike recognise that defining the terms 'significant inconvenience' and 'reasonable time' is subjective and can therefore lead to a great deal of uncertainty about how consumer law applies in specific cases. This can result in unnecessarily lengthy and costly disputes for consumers and business alike, and may cause inconsistency in how different consumers are treated in practice, including a risk that some consumers may find themselves trapped in a repair/replacement cycle without being able to access the second tier remedies.
- 5.100. All respondents, including all business respondents, that expressed a view in the 2009 Law Commissions' consultation, agreed that the law required clarification in this area.<sup>77</sup> On this basis, there seems to be a wide consensus among stakeholders that a change is necessary.
- 5.101. The Government believes that clarifying the repair or replacement process that consumers should have to accept would make the law easier for consumers and traders to understand, and would align their expectations, leading to fewer disputes. Every option would, however, inevitably lead to some "rough justice" on both sides as it is impossible to devise criteria which would apply optimally to all types of products in all types of situation.

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<sup>77</sup> Law Commissions, 'Consumer Remedies for Faulty Goods' (2009), p.61. The Law Commissions' consultation was however focused on proposals to be enacted in a new EU directive, whereas the Government's proposed reforms are at UK level not EU level.

Box 18

**Case Study**

In response to the Law Commissions' consultation in 2009, Which? illustrated the problem with an example:

*A car was purchased for more than £30,000. The car developed an electrical fault which meant that control of certain functions of the car was lost. For example, the windows would open without warning, which made it difficult to leave the car parked.*

*Sometimes the effects were more serious. Once the electrical fault caused the engine to start and the car lurched forward whilst parked. Another time the car accelerated to 60 mph without warning. The consumer had to drive the car into a lay-by and apply the brakes while the wheels continued to spin at 60 mph.*

*As a result of a total loss of confidence in the car, the consumer was unable to drive it and was forced to cancel a holiday. The dealer refused the consumer's attempt to reject the car, on the ground that the consumer was out of time for the short-term right to reject. Instead, the dealer attempted to repair the car. After each repair, initially the problems appeared to have been corrected, but would then return soon after.*

*The consumer became locked into a cycle of failed repairs. Each time remedial work was carried out it was done quickly and efficiently and within a reasonable time, and so in practice each repair in isolation could not be said to have caused significant inconvenience; as such it is questionable that the right to rescind was triggered under the CSD [Consumer Sales Directive]. Ultimately, the consumer purchased another car while the faulty car remained in his garage for approximately two years.*

**The Law Commissions, 'Consumer Remedies for Faulty Goods' (2009), p.60**

5.102. In addition, the stipulations of 'reasonable time' and 'significant inconvenience' are part of EU law, as they come from the Consumer Sales Directive<sup>78</sup>. This is a minimum harmonisation directive, meaning that the Government can implement it in a way that maintains or imposes greater consumer protection, but the Government may not provide lower levels of consumer protection than are mandated through these terms. Consumers must always be able to proceed to second tier remedies on the ground of 'significant inconvenience' or 'reasonable time' alone.

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<sup>78</sup> Directive 1999/44/EC

- 5.103. The Law Commissions also recommended in 2009 that consumers should be able to move directly to a second tier remedy if :
- The item is essential, unless the retailer acts to reduce the inconvenience of the repair/replacement; or
  - The retailer has behaved so unreasonably as to undermine the trust between the parties.
- 5.104. The Government does not intend to implement these recommendations at this time as it believes that in both cases the key criterion would be difficult to prove and could be a source of further dispute between the parties, undermining the benefits of establishing a simple, clear route for consumers to access second tier remedies.
- 5.105. The Government is considering a number of options to address the uncertainties and would welcome views on these options.

#### The Government's Proposal, Option 1

- 5.106. Under this option, it would be established that consumers would automatically have a right to pursue second-tier remedies after two repairs or a single replacement. Consumers would also keep their current right to move to second-tier remedies immediately if a repair or replacement attempt causes 'significant inconvenience' or takes more than a 'reasonable time', as this is required by European law, but in cases where these thresholds were unclear the new rule would offer some certainty.<sup>79</sup>
- 5.107. The rationale for proposing to limit the number of mandatory replacements to one before proceeding to second tier remedies (price reduction or termination of contract) comes from the results of research that fed into the Law Commissions' 2008 consultation paper. This paper stated that '*FDS research and feedback from consumer groups universally indicated that most consumers will only accept one attempt at replacement*' and this is '*the usual practice amongst other member states*'<sup>80</sup>.

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<sup>79</sup> Directive 1999/44/EC Article 3

<sup>80</sup> Law Commissions, 'Consumer Remedies for Faulty Goods, A Joint Consultation Paper' (2008), p.103

- 5.108. Before their consultation the Law Commissions also said that ‘the European Consumer Centres’ (ECC) responses to our questionnaire and our discussions with stakeholders *‘found that two attempts [at repair] ... seems to be a reasonable approach in most situations’*<sup>81</sup>. However, one third of respondents to their consultation agreed, whilst another third said it should have gone further, namely, to allow a consumer to proceed to a second tier remedy after one attempted repair (or one replacement).<sup>82</sup>
- 5.109. The Law Commissions therefore chose to change their final recommendation (for a change which was expected to be made in a new directive) to one mandatory repair or replacement (the second option presented below), on the basis that equalising the numbers of repairs or replacements would provide maximum simplicity and clarity.
- 5.110. However, after reviewing the Law Commissions’ consultation responses and engaging with stakeholders we still believe that this option of two mandatory repairs or one mandatory replacement deserves serious consideration. We are not convinced that the relatively minor benefit, in terms of simplicity, of aligning the number of repairs and replacements outweighs the potential burden placed on businesses by a limit of one mandatory repair, particularly for businesses dealing with complex, high-value goods. Having spoken with car retailers, for example, we are concerned that obliging them to offer refunds or price reductions after fixing one minor fault may be disproportionate and unduly burdensome.
- 5.111. It also seems likely that if consumer cases were taken to court, in many cases, the court would rule that one repair had not caused ‘significant inconvenience’ or taken more than a ‘reasonable time’. Therefore, limiting the number of mandatory repairs to one could well go beyond the immediate policy objective of simply providing clarity and simplicity, and actually impose an entirely new burden on business in many cases.

### The Government's Proposal, Option 2

- 5.112. As per the Law Commissions' recommendation in 2009, this option would establish that consumers automatically have a right to pursue the second-tier remedies for sub-standard goods after a single failed repair or replacement. The repair or replacement would be deemed to have “failed” wherever it caused “significant inconvenience” or in particular was not provided within a

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<sup>81</sup> Law Commissions, ‘Consumer Remedies for Faulty Goods, A Joint Consultation Paper’ (2008), p.103

<sup>82</sup> Law Commissions, ‘Consumer Remedies for Faulty Goods’ (2009), p.61

“reasonable time”, and the consumer would not have to wait for the repair or replacement to be completed before requiring a second tier remedy if either threshold was met. But it would also be deemed to have failed if the goods broke down again during their expected lifetime.

5.113. Even though consultation respondents were evenly split between the options of limiting mandatory repairs to one or two the Law Commissions were persuaded to change their recommendation to one repair or replacement in their final report on the grounds that *'many [respondents] argued that it would be clearer and more consistent to equalise the number of attempts at repair or replacement'*<sup>83</sup> However, as explained above, we believe that this limit could place an undue burden on business, particularly in sectors dealing with complex, high-value goods.

### The Government's Proposal, Option 3

5.114. Under this proposal, it would be established that consumers automatically have a right to pursue the second-tier remedies for sub-standard goods after two repairs or a single replacement, except where each repair is minor in relation to the value of the product, in which case three or even four repairs could be allowed before pursuing second-tier remedies. A repair could be minor, for example, if it cost less than 5% of the original product value. Again, this would be subject to the second tier remedies having become available already if there had been a failure to repair or replace without 'significant inconvenience' or within a 'reasonable time'.

5.115. Each individual repair would have to be less than 5% of the original value. So even if the first repair was very cheap, if the second was more expensive, the business could not then insist on a third repair.

5.116. The value of the repair would have to include all associated costs, including the labour and parts, clearly itemised on request by the consumer. For this reason it is envisaged that this exception would only apply to relatively high-value goods, because labour costs alone mean that any repairs on cheap goods are likely to break the 5% threshold.

5.117. This option would appear to benefit traders in high-value goods such as a car retailer if, for example, soon after purchase a fault developed with the windscreen wipers and then with the built in satellite navigation system or the

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<sup>83</sup> Law Commissions, 'Consumer Remedies for Faulty Goods' (2009), p.61



radio and then with the automatic door lock or the display panel. Each individual fault might be minor and might be easily repairable. It might seem disproportionate to allow the entire car to be rejected on just the third fault.

- 5.118. On the other hand, by allowing for more repair attempts, the limit is less likely to come into effect before the consumer might have been able to prove in court that they had experienced 'significant inconvenience'. Therefore, if the limit is too high, many of the benefits of this policy proposal will be lost, because consumers and businesses would be faced with the same disputes, or consumers would simply not try to access second tier remedies, even when they are probably entitled to them.
- 5.119. The Government also believes that the cost for traders of offering refunds after 2 repairs should be manageable because our reform in this area must be seen alongside our proposed policy options regarding deduction for use (presented in section 5 below). These reforms mean that if a car were to be rejected after the third fault arose, the trader would be able to reduce the refund to take some account of the use the consumer has had of the goods. Depending on the policy option pursued, this deduction could even be linked to the product value, in which case the losses would be minimal for car retailers, because it is likely that there would be accurate data about the second-hand values of high-value goods like cars, and therefore traders should be able reduce refunds accordingly. As a result, providing earlier refunds may not represent a disproportionate burden, but therefore this option might only introduce unnecessary complexity.

#### The Government's Proposal, Option 4

- 5.120. Unlike Options 1 to 3, under this proposal, the number of repairs or replacements is not strictly limited but it would be established that consumers automatically have a right to second-tier remedies if repairs or replacements have not been completed satisfactorily within a cumulative total of days (perhaps 28 or 30 or 14 days). Though, once again, consumers would also keep their current right to move to second-tier remedies immediately if a repair or replacement attempt caused 'significant inconvenience' or took more than a 'reasonable time'.
- 5.121. The prescribed time period (30, 28 or 14 days) would be measured from, and would include, the day on which the consumer returned the goods, which would include the day on which the consumer posted the goods back, not just the day on which the trader actually received the goods. Equally however, the days would stop being counted on the day that the trader made the repaired or replaced goods available for the consumer to collect, and not the day they

actually chose to collect it.

- 5.122. Traders would also have to provide receipts for repairs or replacements which listed the time taken, but it would then be the duty of the consumer to keep a record of this receipt, so that the cumulative total of days could be tracked over time.
- 5.123. The Government considers that this option would be useful in terms of providing simplicity and clarity, because it would address both the terms 'significant inconvenience' and 'reasonable time' at once, (though, of course, a single repair may still fall foul of the significant inconvenience or reasonable time criteria sooner depending on the particular circumstances).
- 5.124. It would also allow for more flexibility, as businesses could offer a few longer repairs or lots of minor ones, depending on the product type and problem in question, rather than attempting to force a 'one-size-fits-all' rule onto a whole range of different goods and faults.
- 5.125. However, there may be concerns that 30 or 28 days, in particular, is a very long time for a consumer to be without goods that he/she has paid for and that for many high value goods "significant inconvenience" is likely to be reached much sooner ( for example, a modern household may struggle to manage without a boiler for 3 days in mid-winter, let alone 30 days) and a multiplicity of small repairs on most items, even if performed swiftly, would still probably constitute "significant inconvenience", given the need to call out a technician and be at home when he calls or call into a shop each time to return the goods. As such this limit might have little effect except in the most egregious cases, where the consumer would probably take action under the current law anyway.
- 5.126. An alternative might be to fix the threshold at 14 days, or perhaps even less, but to take account of the lower level of inconvenience which would arise if the trader supplies a temporary replacement of equal or higher quality without delay (in which case the cumulative limit could probably be extended to 28 days or 30 days quite safely).
- 5.127. The Government would welcome evidence from interested parties on whether the assumptions explained under the four options are correct and what the impact of the various options would be.

## Dangerous Goods

- 5.128. The Law Commissions recommended that where a product has proved to be dangerous the consumer should have a right to move directly to a second tier remedy. The consumer would have lost confidence in the product and would not be interested in having it repaired or replaced.
- 5.129. The Government believes that this may be a useful added protection for consumers, but that the criteria by which an item would be deemed to be dangerous would have to be clear and objective. Defining "dangerous goods" as any that breach the General Product Safety Regulations 2005 might provide that clarity, but would still require proof of such a breach, which may be difficult without resorting to court action (effectively negating the benefits of a simpler route to second tier remedies).
- 5.130. However, in cases where a successful public enforcement action has already taken place (thereby proving that the goods are dangerous), such a scheme would be of significant benefit to consumers.

### ***Questions:***

- Q12. Which of the proposed models do you believe would be the best approach?
- Q13. In Option 4, do you agree that a cumulative total of 14 days for repairs or replacements is a reasonable limit? If not, how many days do you believe would be preferable?
- Q14. Do you agree that, if a temporary replacement of equal or higher quality is provided for the duration of any repair/replacement process, the limit under Option 4 should be set higher, for example at 28 days or 30 days, or waived altogether?
- Q15. Do you believe that where a product can be proved to be dangerous, the consumer should have a right to move directly to a second tier remedy?
- Q16. Do you agree that defining "dangerous" as a breach of the General Product Safety Regulations 2005 would provide adequate clarity and protection to consumers?

## 5. 'Second tier' refund - Deduction for use

5.131. Under the current law a consumer may seek to exit a contract if the first tier remedies for sale of sub-standard goods (repair or replacement of the item) are impossible or disproportionate, or if a first tier remedy has been requested but was not performed in a reasonable time or without significant inconvenience to the consumer. In those cases the consumer may return the goods and claim a refund. The trader may reduce the amount reimbursed, to take account of the use that the consumer had of the goods prior to the fault occurring. However, there is no guidance on how the reduction may be calculated and so there is a risk of inconsistency, the potential for costly disputes and the possibility of disproportionate deductions being made, causing undue consumer detriment.

5.132. In their 2009 report<sup>84</sup>, the Law Commissions highlighted some key problems with deduction for use:

- 'In meetings, some stakeholders told [them] that the deduction for use is seldom used, and uncertain';
- It adds complications to the law. The Council of Her Majesty's Circuit Judges in their response to the consultation stated that 'the calculation of the appropriate reduction is fraught with difficulties';
- It causes disputes as consumers may feel aggrieved and retaliate with damages claims.

5.133. However, the British Retail Consortium has informed us that, rather than being rarely used, the right to deduct for use is used by many traders as a matter of course and that to remove the right would be severely detrimental. They have suggested in informal consultations that one corporate technique used for calculating the deduction is to remove a portion of the original price in a set proportion to the length of time the consumer has had the goods, so that the deduction made increases at a steady rate over the course of 6 years, which is the length of time during which a consumer could make a claim for breach of contract (except in Scotland where it is five years). Another method traders have informed us is in use is to apply no deduction for the first year and then spread the deduction over the remaining 5 years in which a claim can be made (or 4 years in Scotland).

5.134. The current framework places the decision on whether to make a deduction, and the scale of that deduction, entirely in the hands of the trader. While the Government believes that in the majority of cases the trader acts fairly in assessing these, there is the potential for abuse of the provision, to the obvious detriment of the consumer.

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<sup>84</sup> Law Commissions, 'Consumer Remedies for Faulty Goods' (2009)

5.135. The Law Commissions, following a public consultation, concluded in 2009 that the current situation lacks clarity and is a source of costly disputes and recommended a change in the law<sup>85</sup>. The Government, having reflected on the arguments put forward by the Law Commissions and the responses to the Law Commissions' consultation, and having discussed the matter with a range of stakeholders, believes a clarification of the law would potentially benefit both consumers and traders.

### The Government's Proposal, Option1

5.136. Under this proposal, the right of the trader to make a deduction for use would be removed. This means that for the whole of the limitation period within which consumers can pursue claims for breach of a contract (6 years in England and Wales, 5 in Scotland), if the conditions for a second tier remedy of termination are met then the business would have to provide a full refund to the consumer, even if the consumer has had a substantial period of trouble-free use of the goods (i.e. for up to 6 years of ownership, or 5 in Scotland).

5.137. This is the recommendation made by the Law Commission and the Scottish Law Commission in their 2009 report, 'Consumer Remedies for Faulty Goods', following a public consultation. In coming to this conclusion, the Law Commissions took account of the likelihood that consumers would have suffered considerable delay and inconvenience in order to get to the second tier remedy of termination. This option brings the greatest benefits to consumers in the short term but also carries the highest direct costs for business. Business would only be able to offset this cost by reselling the goods at a reduced price (in line with the natural devaluation of the goods and/or any residual fault(s)) and if that was not possible, would also have to bear the cost of disposing of the goods. In the long term this may cause consumer detriment by leading traders to increase up-front prices.

5.138. Furthermore, this is likely to be disproportionately more problematic in some sectors than in others. For example, in the automotive sector the initial value of vehicles is comparatively high (compared to many other goods), but there is a particularly rapid depreciation in value, and vehicles are expected to last several years. So if, for example, a fault appears in a vehicle after 4 years (and it can be proven that the fault was present when the vehicle was bought), the second tier remedy of termination in that case would mean the consumer obtained the full original value of the vehicle and the cost to business would be significant.

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<sup>85</sup> The change proposed by the Law Commissions was to abolish deduction for use in the event of a second tier termination.

## The Government's Proposal, Option2

- 5.139. Under this proposal a statutory scheme would be established for the calculation of the minimum refund a consumer should receive. No deduction for use would be applied for the first six months, followed by regularly increasing limits of maximum deductions, up to a potential deduction of 100 per cent at the end of 6 years. No deduction for use would be applicable to products priced at under, say, £150.
- 5.140. The Government would endeavour to make the calculation of the minimum refund as simple as possible to administer and would therefore propose including a table such as the one below in a schedule to the Bill.

Table 2 – Proposed minimum refunds (Option 2)

Months Owned	Minimum Refund (% of amount paid)	Months Owned	Minimum Refund (% of amount paid)
0 - 6	100	36 - 42	50
6 - 12	90	42 - 48	42
12 - 18	82	48 - 54	34
18 - 24	74	54 - 60	26
24 - 30	66	60 - 66	18
30 - 36	58	66 - 72	10

- 5.141. This option represents a compromise. The Government believes it would increase consumer confidence by clearly setting out the minimum refund which can be expected at any given time after the point of sale, providing it can be proved that the goods were sub-standard at the time the consumer obtained them, rather than the fault being caused by something happening since that time. It should also represent a slight increase in consumer protection overall, because it will only impact on businesses that are currently offering smaller refunds than this scheme specifies, whilst businesses currently offering more generous refunds will be unaffected. Traders could always provide a greater refund than the minimum level.
- 5.142. This option will impose much smaller costs on business compared to option one, and indeed for many, perhaps most, businesses it should impose no costs at all given that the model is based on models described to us as being commonly employed by retail businesses during informal consultations with the British Retail Consortium.

- 5.143. The Government also believes that in the majority of cases this will offer a similar level of consumer protection as abolishing the deduction for use, because the BRC estimate that around 80-90% of returned faulty goods are returned within the first year, and OFT research into consumer detriment in 2008 found that in most individual cases that cause consumer detriment the goods are low in value, which suggests that the majority of cases would fall below the proposed £150 threshold anyway. But in relation to high value items this option would impose a much smaller cost on the trader than abolishing the deduction for use.
- 5.144. The 2008 OFT Consumer Detriment Survey found that "While the distribution of problems is heavily skewed towards lower values, the total amount of detriment is heavily skewed towards higher value problems. This is an important finding. In terms of activity directed at reducing detriment, there appears to be greater potential for reductions in detriment to be achieved by addressing these higher value problems than in the elimination of small value problems." On the basis of this, the Government believes that applying an exemption for items priced less than £150 means that the policy proposal is targeted to provide the greatest benefits in terms of the number of cases addressed, but for higher value items the balance of rights and obligations is more appropriate.

### The Government's Proposal, Option 3

- 5.145. As under the second option, this third option would establish a statutory scheme for the calculation of a minimum refund but would allow no deduction for use in the first three months, followed by an increase in the maximum possible deduction, at 2, 4 and 6 years after the point of purchase. Again, an exemption would apply for goods priced below a certain threshold – under this option we propose no deduction for use would apply to products priced at under £100.
- 5.146. This scheme would essentially equate to a system of 5 bands of maximum possible deductions, starting at a 0% deduction for the first 3 months, increasing to a maximum deduction of 25% between 3 months and 2 years, then 50% from 2 to 4 years, 75% from 4 to 6 years, and then a 100% deduction would be possible (i.e. no refund would have to be paid) after 6 years. Again, traders could always provide a greater refund than the minimum level. In terms of minimum refunds, the system would then look like this:

Table 3 – Proposed minimum refunds (Option 3)

Months Owned	Minimum Refund (% of amount paid)
0 - 3	100
3 - 24	75
24 - 48	50
48 - 72	25
73 -	0

5.147. Although the first 3 months looks like an anomaly in this system, breaking up the otherwise uniform two-year bands, we feel that an initial period of at least 3 months where no deduction is allowed represents an important compromise between preventing what could be seen as undue consumer detriment, whilst still allowing for some deductions in the first year, which traders have told us is seen as an important safeguard for businesses which deal with goods that devalue rapidly after sale.

The Government's Proposal, Option 4

5.148. The fourth option we are proposing would be to apply the scheme outlined in either Option 2 or 3, above, but also allow for exceptions to the specified maximum potential deduction where there is robust, objective, third-party sourced reference pricing available for the second hand value of the product concerned.

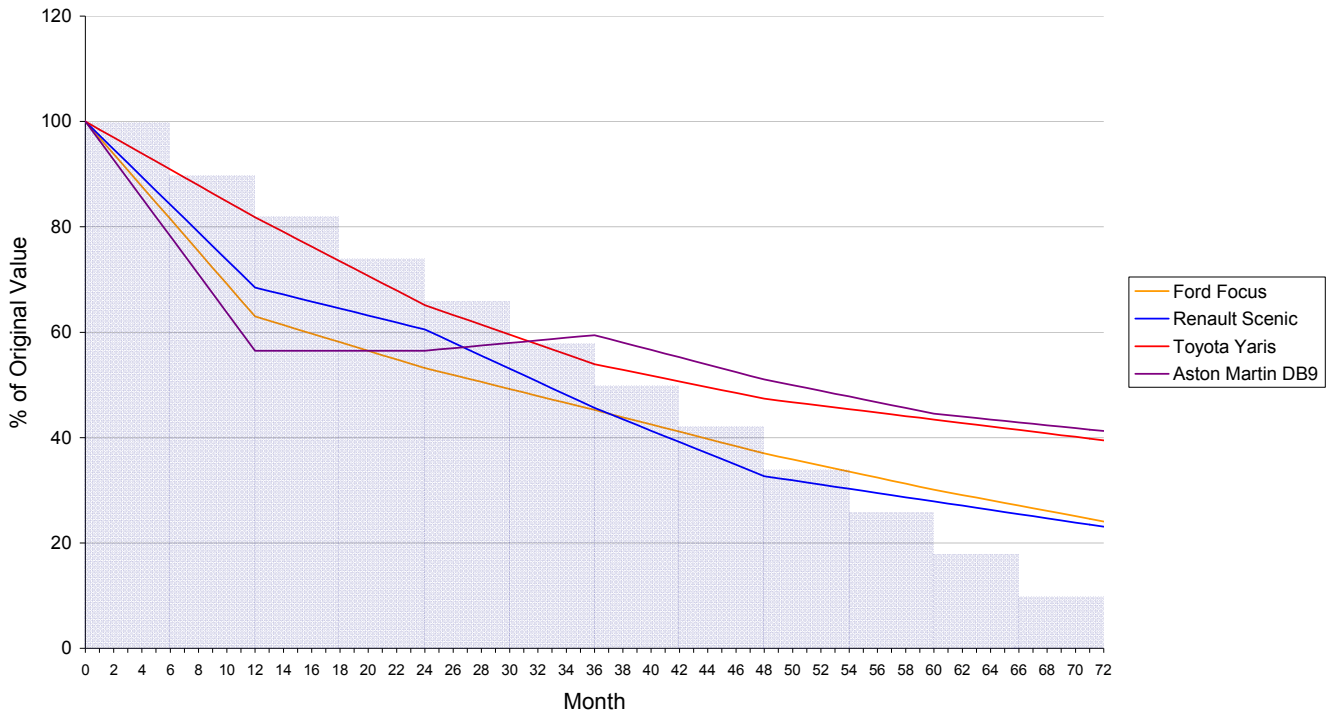
5.149. This option would allow more flexibility in determining refunds in cases where applying a prescribed minimum refund obviously imposes an unfair cost on the business, or potentially the consumer. There would be costs and benefits for both consumers and businesses under this option, but it would be impossible to calculate who would benefit most given that this would be determined on a case by case basis.

5.150. This model would clearly be more advantageous to the car industry, where there is abundant data regarding second-hand prices, and also rapid depreciation of value of new cars in the first year after purchase. The graph below plots four car prices over time, compared with the proposed Option 2 and Option 3 straight line models for calculating refunds. It demonstrates that until at least 36 months after the sale, and potentially until around 54 months,



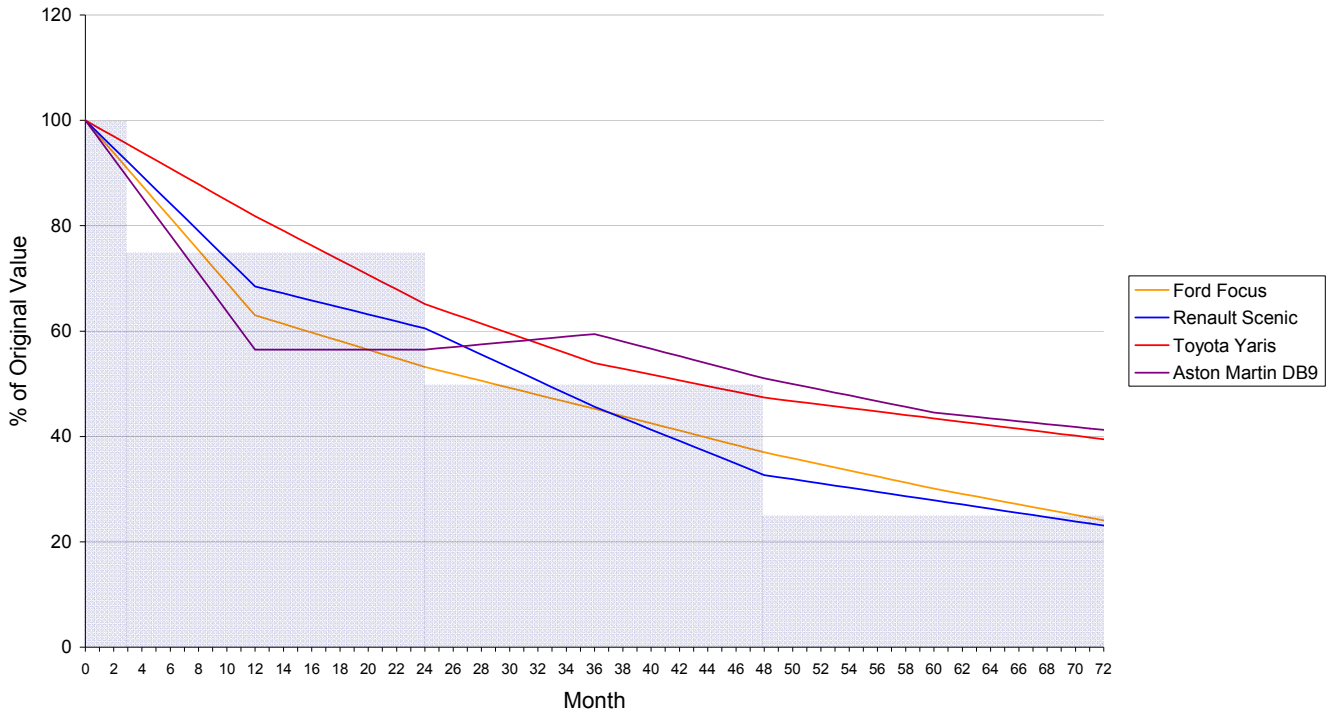
traders would stand to make a substantial loss under Option 2 if required to offer a refund in line with a straight line deduction for use calculation because the value of the car would be significantly below the value of the refund given.

Chart of proposed refund values (6 yr base) against estimated vehicle values



## 5.151. For Option 3 the profile of gains and losses is more varied:

Chart of proposed refund values (6 yr base) against estimated vehicle values



5.152. Precisely because of the lack of this kind of data for other goods, it is envisaged that this exemption would not be used very extensively outside of the automotive industry. The risk in allowing for this exemption is that it may lead to lengthy and costly disputes over the value of a wide range of products as both businesses and consumers try to limit their costs and third parties seek commercial gain by attempting to gather and present reference prices for second-hand goods in other sectors with disputes arising about whether the data is reliable enough. The lack of clear data in many sectors would make it likely that these disputes could be extensive, and judging what evidence of value was acceptable would be difficult without some kind of impartial third party involvement, which could be expensive.

5.153. The Government is keen to hear opinions on how the reliability of evidence might be established, with a view to reducing the costly disputes over whether a given piece of evidence is sufficient to count in this instance. One possibility might be the appointment of an impartial adjudicator to judge on the issue in the event of dispute. For example, a business sector wishing to rely on such evidence might have to persuade a consumer organisation or the Trading Standards Institute, for example, that the reference prices were impartial, comprehensive and reliable.

- 5.154. This option would reduce the clarity and certainty of Option 2 or Option 3, because unlike under either of those options, consumers would not be able to see clearly the minimum refund they were guaranteed to get. Therefore the original problem of potential for disproportionate deductions for use could still persist, because it would take some personal research to prove what was disproportionate in order to prevent such deductions.
- 5.155. On the other hand, Option 2 in particular might result in significant losses for businesses such as car retailers and this would ultimately be passed on to consumers in the form of higher prices. At least for the car industry, therefore, we anticipate that Option 4 may be more attractive.

**Questions:**

- Q17. Which of the proposed models (or which mix of the models) do you believe would be the best approach?
- Q18. Do you agree with the establishment of a cost threshold, below which no deduction for use is applicable? If yes, at what level do you feel the threshold should be set: £150, £100 or other?
- Q19. Do you agree that it makes sense to allow exceptions to the stated minimum refund where robust, impartial third-party evidence exists for the current value of the goods in question?
- Q20. Do you agree that, if such exceptions are allowed, the appointment of an adjudicator would be necessary to rule on the reliability of evidence? If yes, do you have suggestions for what sort of organisation might be best placed to act in this capacity?

## 6. Consistency of remedies across different transaction types

5.156. As explained in the introduction to this chapter, goods can be supplied under a number of different contract types, governed by different pieces of legislation and with different remedies applying for breach of the required standards. The list of transaction types is as follows:

- **Sale** - goods exchanged for money in the familiar way
- **Conditional Sale** - sale where the consumer pays in instalments and only obtains ownership of the goods when he makes the final payment, although he may use the goods in the meantime
- **Barter or Exchange** - goods exchanged for something other than money
- **Work & Materials** - goods supplied as an incidental part of a contract for work or services
- **Hire Purchase** - a hire contract with an option to buy at the end of the hiring period
- **Hire** - a hire contract with no intention that the consumer will obtain ownership of the goods

5.157. Consumer detriment can arise under any of these contracts if the goods supplied are sub-standard. For example, Consumer Direct received 6,736 complaints, relating to defective goods with a market value of about £73 million, which had been supplied under hire purchase contracts in 2011.<sup>86</sup> Based on OFT methodology we estimate that this equates to around 325,000 problems in the UK as a whole.<sup>87</sup>

5.158. It is therefore important that the remedies are clear, regardless of how goods are obtained.

5.159. For straight-forward sales the right to reject sub-standard goods expires after a 'reasonable time' (though, as explained above we are proposing to normalise this at 30 days). This is a **short-term right**.

5.160. For goods acquired under any other contract type, the 'right to reject' can only expire after a fault is discovered, if the consumer fails to act or indicates that he has elected not to reject. This is a **long-term right**.

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<sup>86</sup> Consumer Direct Database, 'Data Cube Dec 2010 to Dec 2011' – achieved by comparing Hire Purchase against (01A) Defective Goods

<sup>87</sup> OFT, 'Evaluation of a sample of Consumer Enforcement Cases' (2009), p.35 – explains how the OFT 'Consumer Detriment' report, 2008, can be used to estimate the proportion of complaints that reach consumer direct, in order to scale up the initial figure.

5.161. The other key difference is that hire and hire purchase contracts are not covered by the European-wide scheme of 'first tier' and 'second tier' remedies. These European remedies were overlaid onto the domestic 'right to reject' remedy, creating the confusing situation represented below:

Table 4 – Remedies available by contract type

Contract Type	Remedies Available (where goods are not of satisfactory quality, or do not correspond with description or sample, or are not fit for a known purpose)		
	Right to Reject	Damages	1 <sup>st</sup> & 2 <sup>nd</sup> tier (EU-derived remedies)
Sale	Short-term	Yes	Yes
Conditional Sale	Long-term	Yes	Yes
Barter or Exchange	Long-term	Yes	Yes
Work & Materials	Long-term	Yes	Yes
Hire Purchase	Long-term	Yes	No
Hire	Long-term	Yes	No

5.162. Low consumer awareness about consumer rights is well documented, with FDS research for example, finding that 'consumers had a partial and flawed understanding of their rights'<sup>88</sup>. There would also be a benefit for businesses in simplifying the law in this area, through reduced compliance and staff training costs, as the BRC pointed out in their response to the Law Commissions' consultation.<sup>89</sup>

5.163. Although the numerous remedial schemes being dealt with here are just one cause of this complexity, the Government understands that they do make it unnecessarily difficult for consumers to identify their rights, and can make compliance costly and uncertain for businesses, particularly because it is not always clear which transaction type has been entered into.

5.164. An independent academic report led by Professors Howells and Twigg-Flesner also recommended standardising these remedial schemes<sup>90</sup>, and a Government White Paper in 2009 said that 'responses to the Consumer Law

<sup>88</sup> FDS, 'Appendix A: Qualitative Research into Consumers' Perceptions of Consumer Remedies for Faulty Goods', in The Law Commissions, *Consumer Remedies for Faulty Goods, A Joint Consultation Paper*, (2008), p.137

<sup>89</sup> BRC, Response to the Law Commissions' Consultation (2008), p.2 - they pointed out that legal simplicity would 'help to ensure retail staff, among whom there is a high turnover from year to year, are better trained'

<sup>90</sup> Professors Howells and Twigg-Flesner (ed.), 'Consolidation and Simplification of UK Consumer Law' (Nov 2010), p.85

Review suggested that there would be strong benefits for business, consumers and enforcers from a coherent consolidated law which as far as possible minimised the differences between different types of contract and different manners of purchase'.<sup>91</sup> It therefore seems necessary and beneficial to simplify the law in this area.

### The Government's Proposal

5.165. The Government proposes to apply the sale of goods remedies (as amended through the proposals elsewhere in this chapter) to all transaction types.

5.166. This would have two main consequences:

- the short-term right to reject sub-standard goods would apply to all contracts and the long term right to reject would cease to apply; and
- consumers entering hire and hire purchase contracts would become entitled to the remedies under the European-wide scheme of pursuing 'first tier' remedies of repair or replacement, before the 'second tier' remedies of termination or a reduction in price.

5.167. The Government strongly believes that the short-term right to reject defective goods in sales contracts should not be denied to consumers. It is a particularly potent remedy because it is easy to understand and assert. Consumers know that they can get their money back if the product is not as promised, provided they act quickly. This inspires confidence, which makes consumers more prepared to try unknown brands and new traders. Without such consumer confidence markets would be less dynamic, market entry would be harder and competition weaker leading to less innovation, weaker growth, and eventually higher prices for consumers.

5.168. FDS research indicates that although consumers are generally unaware of their legal rights, most are aware that they have a legal right to a refund for faulty goods, and value it highly. Follow-up quantitative research specified that 94% of consumers said the right to a refund was important to them, and 37% that the right to a refund made them more confident about buying an unfamiliar brand.<sup>92</sup> Equally, however, in the interests of business, the Government believes that this right should only be available for a limited time. Extending the time for rejection could potentially encourage abuse by some consumers who may use an item for a period of time, and then seek a full refund when they no longer need it.

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<sup>91</sup> BIS, 'A Better Deal for Consumers, Delivering Real Help Now and Change for the Future' (July 2009), p.80

<sup>92</sup> The Law Commissions, 'Consumer Remedies for Faulty Goods' (2009), p.25

- 5.169. The Government believes that the short-term right to reject was able to earn the support of the 'vast majority'<sup>93</sup> of respondents to the Law Commissions' consultation because it strikes the right balance between consumer protection and business needs. For this reason the alternative option of extending the long-term right to reject to cover all transaction types is not favoured. The third possible option of extending the hire and hire purchase remedies across the board is not deliverable because it would infringe the European law which governs sales. Therefore, achieving an acceptable consolidated remedial scheme would necessarily entail applying the general sales remedies to all contracts.
- 5.170. Respondents to the Law Commissions' consultation were evenly split when asked about applying the sales remedies to all other contracts, apart from hire. Half agreed with the OFT (including Consumer Direct) that the benefits of simplicity outweighed any loss of consumer rights, whilst others, including The Council of Her Majesty's Circuit Judges argued that the long-term right to reject should be maintained for contracts where defects may take substantial time to manifest themselves. Ultimately, the Law Commissions recommended uniform remedies for all contracts for supply of goods other than hire, partly because they were concerned that a long-term right to reject could enable more 'free hire' abuse (i.e. consumers fabricating fraudulent claims of fault and claiming refunds with the effect that they have enjoyed use of the goods with minimal or no associated cost), and partly for the sake of simplicity.
- 5.171. The academic report led by Professors Howells and Twigg-Flesner agreed that the importance of simplicity was paramount, and therefore argued that uniform remedies should be extended even further to cover hire contracts. The Government agrees that this would further the stated aim of simplicity and clarity, because it would allow consumers to pursue the same remedial scheme regardless of how they came into possession of the sub-standard goods although as set out below some differences are appropriate in relation to hire in order to have a workable system of protections.
- 5.172. The Government recognises the concern expressed by The Council of Her Majesty's Circuit Judges and others about curtailing the long-term right to reject, but considers that this potential damage would be reduced by the availability in future of the European remedies of repair and replacement (and eventually termination or reduction in price) as well as the short-term right to reject.

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<sup>93</sup> The Law Commissions, 'Consumer Remedies for Faulty Goods' (2009), p.21

5.173. The only necessary distinction would be regarding refunds in the case of hire contracts. Currently the long-term right to reject does not include an automatic right to a refund of all hire payments made up to that point. We propose that this exemption should continue to apply, because it is not intended that a consumer will obtain ownership of goods under a hire contract: the contract is solely for the use of the goods and the consumer will have use of the goods up to the point at which they reject them.

5.174. The Government proposes that the remedies for a hire contract would operate as follows:

1. The consumer would have a short term right to reject (this would last for such period as may be introduced following consideration of responses to the proposal under section 3 above).
  - a. This short term right would entitle the consumer to exit the contract without any penalty or requirement to pay for any outstanding term of the contract.
  - b. However, the consumer would not be entitled to a refund of hire charges already paid, unless they had paid for a longer period of hire than they had received before returning the goods – in this case, they would be refunded the proportion of their payment which equated to the proportion of hire time paid for but not received.
  - c. The availability of a refund would be consistent with or more beneficial than the current law, under which a consumer has a long term right to reject under a hire contract but this does not give an automatic right to a refund.
  - d. As under the current law, the consumer could if they wished claim damages for loss suffered – for example, on the basis that they had suffered detriment by paying for use of the goods but having use which fell short of that which they paid for or caused some other damage. This might be where a car hired for a holiday was roadworthy, but had a faulty air-conditioning system or CD player which caused discomfort or ruined the consumer's CDs.
2. The consumer could alternatively seek repair or replacement and, once the conditions for second tier remedies were met, they could terminate the contract or seek a price reduction (again, subject to such reforms as may be introduced following consideration of responses to sections 4 and 5 above).
  - a. Any refund under the second tier remedies would also only be available in relation to a period of hire which had been paid for but not received.
  - b. The Government anticipates that the second tier remedy of continuing the contract but obtaining a reduction in price is unlikely



to be used for hire contracts.

- c. As for other contracts, these first and second tier remedies would continue to apply after the period for the short term right to reject had passed.

**Questions:**

Q21. Do you believe that this is a sensible change or can you foresee problems arising from applying broadly the same remedial scheme to all transaction types?

Q22. What benefits can you see from aligning the rules for different transaction types in this way?

Q23. Do you agree that the approach outlined above for hire contracts is sensible?

# 6. The Supply of Services

## Introduction

- 6.1. The UK services sector currently accounts for 77% of the whole UK economy. The sector itself is varied, covers a large number of industries and professions. Services can be delivered in a number of ways with different relationships between the consumer and the service provider. Public transport, waste disposal etc. form a significant part of the total.
- 6.2. Certain sectors of services (such as passenger transport services) are highly regulated with their own bespoke regimes setting out a high level of consumer protection. It is not our intention to undermine these bespoke regimes and we do not think our proposals will do that. However, the Government is mindful of the breath of the service sector and invites readers to give us evidence of any impact that they think our proposals will have on their service areas. In these highly regulated sectors, the extent of regulation may vary greatly from service to service and may afford different levels of protection to consumers and obligations on service providers according to the specific nature of the service involved. This applies to services such as postal services, financial services, legal and medical services and the supply of utilities. The proposals outlined below will not over-ride sector or service specific regulations which are already in place either as a result of domestic policy or European measures.
- 6.3. In some cases consumers are also protected through regulation of access to the profession of delivering such services (most obviously doctors are required to undergo long training and proof of competence). In other cases, sector regulators control which products businesses sell and how they sell them or may intervene to ensure consumers are compensated when service providers break the terms of their licences (the financial services sector is a good example).
- 6.4. In the case of public services, central or local government determines how the service must be provided in order to best protect the consumer interest, using public funding as leverage over service quality and responsiveness.
- 6.5. Other service sectors, however, are not publicly funded and are not covered by specific legislation or by sector regulators, leaving consumers to be protected under general (sometimes called “horizontal”) consumer law. The horizontal law also applies to specially regulated sectors and changes to it

may have wide impact.

### **This consultation is only concerned with the horizontal law.**

- 6.6. More specifically in this consultation when we refer to “horizontal law” we are concerned with the protection offered to consumers when they **contract** with traders providing services. As explained in Chapter 5 a **contract** is an agreement where parties exchange things of value with each other. The thing that the trader will be providing is the service in question. The consumer would be paying the service provider – usually with money, but occasionally with some other form of payment.
- 6.7. Therefore, where there is no contract between a consumer and a service provider, this horizontal law will not apply. For example, there are statutory duties to provide certain health services<sup>94</sup> and there is generally no contract between a consumer and the NHS provider. These services would therefore be out of scope of current consumer protection legislation and also out of scope of our proposals. This is, however, unlikely to result in any consumer detriment, because the provision of these services is highly regulated.
- 6.8. Where a consumer makes a payment towards the costs of health services – for example where paying for some dental or ophthalmic treatment, there might be a contract between the consumer and the dental practice or opticians which would bring the service within scope of our proposals. It is also clear that some health services are provided privately, and in these cases it is very likely that there is a contract between the service provider and the consumer. As a further example, where a patient is paying for social care services from an allocated personal budget, it is likely there will be a contract between the consumer and the service provider and therefore the services they choose to buy will be within the scope of the provisions.
- 6.9. However, even if there is a contract, we think it is far more likely that where a health related service, for example, fails to meet the required standards, a consumer would pursue the specific routes available to the consumer in that sector or would look at other areas of law (for example the law of negligence). This is because it may be easier for the consumer to seek redress in this way – for example because there is a specific body or ombudsman to complain to - and also because the consumer is likely to get a more satisfactory resolution to their complaint. However, if there is a contract it could also be open to a

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<sup>94</sup> See the National Health Service Act 2006

consumer to pursue the rights they have under horizontal consumer protection legislation.

- 6.10. Another limit on scope is that the consumer protections would only apply where a service provider is acting in the course of business. “Business” includes a profession and the activities of any government department or local or public authority. Clearly a commercial organisation offering a particular service for payment will be acting in the course of business when supplying that service. But it is also likely that a charity selling a service to a consumer, which the consumer pays for, would be acting in the course of business and that therefore the statutory protections for consumers would apply to that service.

## What is a service?

- 6.11. There is no general definition of a “service” in the main consumer legislation. Services may take a variety of forms but we have found it convenient to divide services broadly into three categories:
- A “Pure” service – this is where no goods are involved and the service would not result in the creation of goods. For example, an education service, an investment advisory service, a legal service, or an entertainment service, such as a live theatre show;
  - Services relating to property – this is where the service being provided relates to the property of the consumer (i.e. to goods that he is also purchasing or has purchased in the past). For example, a car repair, a plumbing service where new pipes need to be installed in the consumer’s house, a made to measure wedding dress (the service would be the skill of the dress maker and the goods would be the dress). Installation services, cleaning, maintenance and repair services are the most obvious services related to property, but they may also include any other contract where a business is entrusted to perform services relating to the physical property of the consumer;
  - Services relating to the person – this would include medical and dentistry services, passenger transport, hairdressing and manicure services, tattoos, cosmetic services, etc.

### **Question:**

- Q24. Are these helpful distinctions? What problems, if any, do you envisage in dividing up services in this way?

- 6.12. We will come back to these distinctions when looking at the options for reform that the Government is considering. But there is also a much more fundamental distinction between goods and services which also needs to be understood.
- 6.13. The type of service a consumer is buying is not always clear from the initial description and in some cases the consumer may feel he is buying goods and not a service. For example, if a solicitor were to write your Last Will and Testament or an architect draw up plans for a house extension, this might occur to some to be a contract to produce goods. After all, at the end of the transaction you have a tangible piece of paper that is the end product of the work.
- 6.14. On a literal interpretation of the legislation, these documents could fall within the definition of goods and would therefore attract the “Goods” quality standard (i.e. be of satisfactory quality and fit for purpose). But it is not clear that a Court would find that the law relating to sale of goods would apply in such a case. One expert<sup>95</sup> has suggested that a distinction might be made between the documents as goods i.e. paper and ink and the effect that they are intended to produce. Whether the implications of any such distinction would be clear to consumers or traders is open to question.
- 6.15. It may seem rather academic whether such activities are goods or services or a combination of both, and indeed to most consumers most of the time it doesn't matter in the least. However, as will be seen below, the distinctions are important if something goes wrong, because consumer rights are very different for sales of services than for sales of goods.

## What are consumers' rights currently?

- 6.16. When buying services, consumers currently have rights under a number of cross cutting pieces of legislation. These include protection against misleading and aggressive practices and from unfair contract terms. These rights apply across a broad range of transactions with consumers. The Government is looking to clarify and simplify these rights in its wider consumer law reform programme, but they are not the subject of this consultation. What are covered in this section are the rights consumers have when they buy a service which is simply “faulty” or sub-standard.

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<sup>95</sup> See Attiyah's Sale of Goods Twelfth Edition

- 6.17. As explained previously, when a person buys something from another person a contract is created between them, even when they do not set out anything in writing. The parties to a contract may discuss at length the terms of that contract, agreeing very specific provisions. Where they have done this, these terms are known as “express terms”. Other terms may not have been specifically agreed but will form part of the contract because the law (either statute law or case law) says so.
- 6.18. The legislation that sets out the standard that a trader providing a service must meet is the Supply of Goods and Services Act 1982 (“SGSA”). The way the SGSA works is like the Sale of Goods Act 1979 (SOGA) by implying terms into the contract. There are three terms implied by the SOGA into contracts where a trader supplies a service:
- 1) ‘Implied term about care and skill’
  - 2) ‘Implied term about time for performance’
  - 3) ‘Implied term about consideration’
- 6.19. These terms set out the only standards in primary consumer legislation with which a services contract must comply. Whilst the parties to a contract are free to negotiate different terms, these terms will apply where the parties to the contract do not specifically agree different terms.

### **Implied terms about performance and consideration**

- 6.20. “Consideration” essentially means “something of value” and the implied term about consideration provides that where the cost of the service is not expressly dealt with in the contract, the service recipient will pay a reasonable charge. What is reasonable depends entirely on the circumstances.
- 6.21. The implied term about performance provides that where the contract does not specify a time for the service to be carried out, a supplier must carry out the service within a reasonable time. A reasonable time is a question of fact and will depend on the circumstances of the case.
- 6.22. Related to this implied term is the requirement in Regulation 19 of the Consumer Protection (Distance Selling) Regulations 2000<sup>96</sup>, which provides

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<sup>96</sup> SI 2000/2334

that in relation to distance selling contracts, unless parties agree otherwise (that is unless there is an express term dealing with the time within which performance will take place), the trader will perform the service within 30 days. Distance selling includes internet and telephone sales and also buying things through catalogues for example.

- 6.23. These Regulations will soon be revoked and will be replaced with legislation implementing the Consumer Rights Directive (“CRD”). The CRD provides that for all types of consumer contract within scope a trader must provide certain information before the contract is entered into (that is pre-contractual information). This includes the time by which the trader undertakes to perform the service and also the price payable (or how the price will be calculated). We are not dealing in any detail with the implementation of the Consumer Rights Directive in this consultation – that will be subject to a separate consultation. But we will be coming back to how these changes affect the implied terms about performance and consideration later in the chapter, when we discuss our new proposals<sup>97</sup>

### **Implied term about care and skill**

- 6.24. The only term that deals with the quality of the service that a trader supplies is the implied term that a trader will carry out the service with reasonable care and skill. The key point to make is that the test is fault based – that is the consumer has to prove that the trader was negligent before any claim will be successful.
- 6.25. We should clarify that in the following paragraphs we use the expression “negligence” to mean a lack of reasonable care and skill (which results in a breach of contract). Some readers may be aware that negligence is also a “tort” which is quite separate from contractual law. We are not concerned with the tort of negligence in this consultation document and references to negligence in this consultation document mean a lack of reasonable care and skill (resulting in a breach of contract).
- 6.26. In looking at whether a trader has provided a service with reasonable care and skill a court will look at the standards of the industry in question. For example if there is an industry code of practice and a trader does not meet the standards set out in the code of practice, it would be very likely that a court would hold that the trader did not carry out the service with reasonable care and skill. Determining the meaning of reasonable care and skill can therefore

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<sup>97</sup> Beginning at paragraph 6.72

sometimes be a difficult process which can at times even involve expert witnesses from the particular industry. It can therefore also be costly.

## Terms implied by common law

- 6.27. Real Estate such as houses are not “goods”, since they are immovable – you cannot pick them up and take them away, therefore the rights in relation to goods do not apply. Construction services fall under the general law on services. However, in construction cases in particular, where problems occur that are not specifically addressed by the express terms of the contract, then the courts may be willing to imply a wider range of implied terms through common law (“judge made” law – or case law) to enable the customer to achieve their objective.
- 6.28. Terms may be implied by common law in other service contracts as well, but it is in the construction sector that this is most visible.
- 6.29. If a customer makes known to the trader the particular purpose for which the building is required and the work is of a kind which the contractor holds himself out as performing and the customer is relying on the contractor’s skill and judgment, there should be an implied term that the end result, the building, will be reasonably fit for the customer’s particular purpose. Where such an implied term is found, the trader undertakes and accepts liability for achieving the specified result, so that if the result is not achieved, the trader will be in breach of contract, no matter how much care is taken.

Box 19

‘When the common law will imply terms can be very difficult to determine, as the result is dependent on cases going to court. However, the basic principles in relation to common law implied terms are that the term:

- (1) must be reasonable and equitable
- (2) must be necessary to give business efficacy to the contract, which means that no term will be implied if the contract is effective without it
- (3) must be so obvious that “it goes without saying”
- (4) must be capable of clear expression
- (5) must not contradict any express term of the contract



- 6.30. So for example if a consumer contracts with a basement conversion specialist, telling the specialist that they want their basement converted into a bedroom but at the end of the works the basement is uninhabitable because of damp, a court may well imply a term that the basement should be fit for its intended purpose and that the contractor is therefore in breach of contract.
- 6.31. However, as long as it is reasonable, an express term of a contract limiting liability in such a case could currently be valid. For example, if the trader can only insure themselves for breach of the term to take reasonable care and skill to a specified sum, a court could find that it would be reasonable for the trader to limit their liability to this amount. We look at limitations of liability in more detail below.

***Question:***

- Q25. Do you agree that these are the implied terms which may currently be introduced into consumer contracts for the supply of services?

## **The position in Scotland**

### *Implied Terms*

In a contract for the supply of a service in Scotland, the implied terms are found in the common law. There are parallels between the terms implied in contracts for services by the Supply of Goods and Services Act 1982 in England, Wales and Northern Ireland and the terms implied by the Scottish common law. In Scotland a person carrying out services impliedly undertakes to exercise the ordinary standard of care and workmanship of a practitioner of that trade. This is analogous to the test in section 13 of the Supply of Goods and Services Act 1982, which is that the supplier will carry out the service with reasonable care and skill. There are also similar implied terms in relation to the time for performance (that, where a time is not specified in the contract, performance should be within a reasonable time) and an implied term in a contract to an entitlement to remuneration.

### *Remedies for breach of contract*

As is the case in England and Wales, there are no remedies set out in statute for breach of contracts for services in Scotland.

The common law remedies in Scots law differ in some respects from those in England and Wales. In Scots law, the consumer has an option as to which remedy or remedies to pursue when faced with a breach of contract, though the remedy available can depend on the type of breach. The remedies include damages and rescinding (ending) the contract. In contrast to England and Wales, a consumer can seek specific implement of a contract which means they can insist a business performs their obligations under a contract for service. In England and Wales, this remedy is generally only available where damages are inadequate.

### *Options for Scotland*

We believe that it is in the interests of consumers and traders that changes that clarify and simplify the law on contracts for services extend across the UK. Our preference, in taking forward the proposals from this consultation, will be to achieve the same outcome across the UK; the wording of the legislation may differ with regard to Scotland from that of the rest of the UK because of the different legal systems

**Question:**

Q26. Do you think the proposals should apply in Scotland with the same effect as they would have in the rest of the UK?

## What happens if things go wrong (“remedies”)?

- 6.32. The Goods chapter above explains the options available to consumers (known as “remedies”) if a purchased good does not work in the way it should (e.g. it is not of satisfactory quality or fit for purpose). It is clear from the legislation that a breach of the implied terms is serious and gives the consumer a right to return the faulty goods and get a refund for a short while after purchase. The consumer can alternatively demand that the goods be repaired or replaced or if that is not possible to get some money back<sup>98</sup>.
- 6.33. For services the position is not so clear.
- 6.34. Firstly, if a consumer proves that the service has not been supplied with reasonable care and skill, there is no automatic right to end the contract: it will depend on how serious the breach is. Usually the courts will try to keep the contract going and say that the consumer has a right to damages (money) to make good any problems.
- 6.35. Secondly, there are no steps set out the current legislation that allow the consumer to require the service provider to make good any problem. For example there is no statutory right to ask the service provider to repair a fault or to re-do the service if the service was not carried out with reasonable care and skill.
- 6.36. Thirdly, the service provider may have sought to exclude or limit his liability in the contract – see below.

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<sup>98</sup> These remedies are discussed at length in Chapter XX

**Question:**

Q27. Do you agree that the remedies for breach of implied terms in consumer contracts are difficult for consumers to predict?

**Limitations of liability**

- 6.37. Unlike the terms implied by the SOGA into consumer contracts for the supply of goods, liability for loss<sup>99</sup> can be limited or excluded in service contracts as long as the exclusion or limitation is reasonable and expressly dealt with in the contract.
- 6.38. This means that if a contract says that a garage will not pay more than £100 of compensation for any damage caused to a consumer's car, this term of the contract could be valid<sup>100</sup>. Whether it is valid or not will depend on the circumstances. Where a trader tries to restrict their liability to a specified sum of money one of the matters a court will look into is the resources available to the trader to meet this liability and whether insurance was available.

**What is the problem?****(a) Not meeting consumer expectations**

- 6.39. When entering into to an arrangement to purchase a service, consumers will usually have a clear idea of what they expect in return for their money. However if these expectations are not met, the current law will only give room for the consumer to seek redress if the service has not been carried out with reasonable skill and care (i.e. there has been negligence on the part of the service provider) and the onus is on the consumer to prove such negligence.
- 6.40. Many disputes arise out of the differences in expectations between the service provider (have they done a good job?) and the consumer (have they got what they expected?). The current legislation applying to services focuses on whether the provider has done a good job and does not force the provider to

<sup>99</sup> Other than personal injury or death – liability for this type of loss can never be excluded

<sup>100</sup> See section 16 of SGSA and section 2 of the Unfair Contract Terms Act 1977 (UCTA); it should also be mentioned that section 3 of the UCTA provides that a trader can claim to be entitled to render a contractual performance that is substantially different from what is reasonably expected of him, as long as the contract term is reasonable. The Law Commission is currently looking at unfair contract terms (reference) and any further discussion of this is outside of the scope of this consultation exercise

take account of consumer expectations. Disputes may not be easy to resolve if the consumer is dissatisfied because his expectations have not been met, but the provider feels that he has done a reasonable job on his own terms.

## **(b) Limitation of liability**

- 6.41. Other problems arise because the law allows service providers to limit their liability to consumers, even if reasonable care and skill is not displayed, as long as this is reasonable and expressly dealt with in the contract. The difficulty is that consumers may not know whether a particular term in a contract is reasonable or not. A number of factors will be considered, making this question difficult for lawyers and the courts as well. Traders might automatically include limitations of liability which, if they were to come to court, would be found to be unreasonable and therefore not valid. Consumers of services may therefore be led to believe that they have no rights to compensation, where in fact they might have, and this may create dissatisfaction.
- 6.42. In contrast, Section 6 of the Unfair Contract Terms Act makes it clear that in consumer contracts for goods, the implied term that goods must be of satisfactory quality, cannot be excluded or restricted by another term<sup>101</sup>.

## **(c) Absence of clear remedies**

- 6.43. As explained in Chapter 5, there are a number of statutory remedies available to a consumer if a good is “faulty”, but this is not currently the case for services. This means that consumers may be further discouraged from asserting the rights that they have when they have received a “faulty” service.

## **Consumer perception of service quality**

- 6.44. The OFT's 2008 Consumer Detriment survey estimated that, during the course of 2007, the overall value of revealed consumer detriment in the UK economy was £6.6 billion. Although this included both goods and services, it found that the greatest proportion of total detriment was among the 'professional and financial services' group, while another large service sector, 'home maintenance and improvement', also accounted for five per cent of all consumer problems reported.

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<sup>101</sup> This is the current position under the Sale of Goods Act 1979

- 6.45. The survey analysed the nature of consumer complaints but it is difficult to untangle those relating to services from those relating to goods in most categories. However in categorising the nature of the complaint the survey found that 'Poor Service Quality' was a key problem experienced by consumers. The survey showed a total detriment to the UK of £783,326,160 (estimated to be equivalent to £863,463,675 in 2011 prices) in the "Poor Service Quality" category.
- 6.46. The survey estimated that it took an average of 5.18 man hours to address each complaint relating to "Poor Service Quality".
- 6.47. It has been estimated<sup>102</sup> that the total volume of consumer complaints, including those not reported to consumer and regulatory bodies, is around 120 million a year: and that the cost to the UK economy of handling those complaints, including costs to businesses and to enforcement bodies and the judicial system is as high as £24 billion p.a. across the whole range of sectors, with the average cost to business per complaint handled standing at £200.
- 6.48. These costs arise at various stages of the complaints handling process, increasing proportionately according to the complexity of the particular case, with the top 10% of cases (those going to mediation/arbitration and/or court) thought to account for nearly 80% of the costs. Even a modest reduction in complaint handling and dispute resolution costs therefore has the potential to be economically significant.
- 6.49. The Government believes that existing consumer rights in the provision of services should be clarified so that expectations are more grounded in reality and to make dispute resolution easier and cheaper. Basic consumer rights when contracting for services should be "guaranteed" and there should be a statutory right of remedy – neither of which exist at the moment. This will remove burdens on businesses and empower consumers and move consumer rights on services closer in line with those relating to purchases of goods.

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<sup>102</sup> Pindar, Eisenegger and Hart – evidence to BERR Consumer Law Review, July 2008

## How does current law contribute to consumer perceptions of low service quality?

- 6.50. The Government believes that a part of the reason for low consumer satisfaction in relation to purchases of service derives from the obscurity of the current horizontal law. For example:
- a) Consumers are currently protected on the basis of the provider carrying out the service with “reasonable skill and care” but whether reasonable skill and care has been taken may not always be clear to consumers. For example, if an electrician negligently fixes the wiring in your house, you may be unaware that the service has been performed badly. Electrical problems may arise in another part of the system that may or may not be his fault and loose wiring may take time to create problems. The consumer will not know if the tradesman’s work was at fault until another electrician is called in to look at it. Most consumers would probably not clearly understand the scope of the work the original electrician had promised to carry out, especially if he had just promised to “have a look at it” and had charged an hourly rate without specifying exactly what he had done. It would be very difficult for such a consumer to bring any sort of case against the electrician, even if he had performed a very poor service, but the consumer may think he is entitled to compensation if he brings in an electrician and then his electrics break down again.
  - b) The basis of consumer protection is completely different for consumers purchasing “goods”, but consumers may assume that they have the same rights across the board and may be more familiar with their rights when buying goods. When consumers buy goods there are clearer remedies available to them if the goods are not of a satisfactory quality or “fit for purpose”. The consumer can usually tell if goods are not of a satisfactory quality because they are not doing what they are supposed to (e.g. the car won’t start or the vacuum cleaner is not picking up the dust). But they might not be as well placed to judge whether services have been provided with reasonable care and skill, as the latter may require some technical expertise. (Box 21 below summarises the main differences between services and goods).
  - c) Disputes may arise when consumers buy goods and services together (“mixed contracts”) because the consumer may expect the end result to be simply “fit for purpose”, only to be informed that the service element of the contract does not need to be “fit for purpose”. For example, a consumer may buy a new “power shower” from a retailer and then pay a local plumber to install it. If the shower does not work, the consumer may not know where the problem lies: is the shower faulty or is the problem with the installation service? Determining liability in these cases can be a time consuming and expensive process for a consumer.

- d) The service provider can at present try to avoid any liability to pay compensation even if the service is not provided with reasonable care and skill. They can attempt to do this by including disclaimers within the contract. For example, a dry cleaner could try to exempt itself from responsibility should its service not remove a stain from a particular item of clothing or even if it damaged the item of clothing. Such exclusions of liability have to be “reasonable”, but consumers may not know that and will certainly not always know what “reasonable” might mean, so they may think they have fewer rights than they do. Unscrupulous or ignorant traders may try to persuade consumers that they have no rights, even if they would, in law, have a strong potential claim. In contrast a supplier of goods to a consumer cannot include disclaimers in its contracts in relation to their statutory rights;
- e) Under current legislation the consumer does not have a clear “statutory guarantee” that the service will meet any standards (including reasonable skill and care). The statute implies a term that a service will be carried out with reasonable care and skill but this is not always fully understood by either the consumer or the business;
- f) In the majority of cases involving the supply of a service, current legislation does not lay down what compensation the consumer should receive for a “faulty” service. Consumers therefore cannot easily predict what compensation they will receive, so are reluctant to complain or bring cases against traders, even when their claim is strong. The exception to this is where a good is supplied together with an installation service. This will be discussed below in paragraphs 6.62-65.

## Mixed Services

- 6.51. The supply of a “pure” service will be subject to the constraints highlighted above but the situation becomes more complicated if the supply of the service also involves goods.
- 6.52. Where a service **produces** a good, the consumer may not know whether he has a contract for supply of goods or a contract for services, so will struggle to understand his rights and remedies.
- 6.53. For example, a tailor produces a bespoke suit or wedding dress, or a key cutter produces a copy of your front door key. The finished “goods” legally would have to meet the standards that apply to goods as they would if the



consumer had bought the suit or wedding dress off the peg.

- 6.54. A trader in practice however, might try to argue that the consumer had contracted for a service and might try to include some limitations of liability in relation to the goods. Unless a consumer is assertive and fully aware of their legal rights, they could be discouraged from trying to enforce their full legal rights if the wedding dress or suit was not of a satisfactory quality or the key was not fit for purpose and did not open the front door properly.

Box 21

### **The differences between Goods and Services**

The legal position for the standard expected for services general differs significantly from the standards expected in relation to goods.

For goods the focus is on the end result. If the goods are not of satisfactory quality then the supplier of those goods is liable regardless of how much care and skill they have taken (that is known as “strict liability”).

For services the focus is on performance and whether the supplier performed the service according to expected standards – if they do then they are not liable, whatever the end result (this is sometimes known as “fault-based liability”). However, all services have an end result and so the focus on performance is not a logical necessity.

### ***Question:***

- Q28. The Government is not proposing a solution to this problem as it cannot identify a deficiency in the law or any obvious clarification that would help. Do you have any suggestions?

## **Services relating to Property**

- 6.55. An alternative situation is where a consumer contracts with a trader to carry out works to his property. For example, if you were to take your car for a service, in carrying out the service the garage might have supplied and fitted a replacement part (for example a new exhaust pipe or set of tyres). The service element (fitting the new exhaust pipe) must be done with reasonable care and skill but the goods element must be of satisfactory quality (ie meet the requirements of the implied terms under goods).

- 6.56. If the car still does not work properly at the end of the works, a consumer may not know which of the elements (the goods element or the service element) was causing the problem and might be put off from trying to seek redress because of their lack of knowledge. This problem is even more difficult where the supplier of goods and the supplier of services are different companies.
- 6.57. If the reason that the car does not work is because the goods are faulty, then one of the things a consumer can ask for the goods to be replaced. This remedy- which would be against the provider of the goods - would include the reasonable costs of removing and refitting the faulty goods<sup>103</sup>. However, this can be a difficult and time consuming process, with the consumer having to prove that the goods were faulty and the fault was not with the service provided.
- 6.58. We also think that in practice, however, if the consumer were to bring a case against the supplier of the service in such circumstances, a district judge would probably consider quality of the end result and in many cases would find that if the exhaust pipe or tyres were not working properly then the consumer should have a successful claim for damages against the service provider. This could be on the basis that even if the fault is with the goods, the garage did not demonstrate reasonable skill in not recognising the fault during the service; if the fault is not with the goods, then it must be the service itself that was not carried out properly. Alternatively a court might find that there was a common law implied term that the problem would be fixed and this part of the car would work properly after the service had been performed.
- 6.59. But there would be significant uncertainty around this result and a consumer would not know the intricacies of the law and may be put off from trying to argue their case. Alternatively there may be particular facts in the case that would work against a consumer reaching a successful resolution. Where work is performed on the consumer's property, the consumer may struggle to understand why the service provider should not obviously and clearly be held accountable to the same standard as the supplier of the goods in the first place.
- 6.60. From the consumer's perspective the test for whether the service has been performed well will be the same as for goods - whether the property works properly and does what was intended (is the window clean? does the car run? is the washing machine hooked up properly? ). But the service provider may

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<sup>103</sup> See the joined cases C-65/09 and C-87/09

be able to escape liability if the consumer fails to prove absence of reasonable care and skill.

- 6.61. The Government is considering ways to improve this situation, which are set out below.

### **The special case of installation services.....**

- 6.62. A further dimension to the existing legal framework relates to installations. Where goods are purchased with an accompanying installation service, and the installation was not carried out with reasonable care and skill, a consumer will have the right to ask for the goods to be repaired, replaced or if that is not feasible, ask for some money back, even if there is no inherent problem with the goods themselves<sup>104</sup>.
- 6.63. This provision implements the provisions of Article 2.5 of the Consumer Sales Directive (which provides that “incorrect” installation shall be deemed to give rise to the remedies of repair or replacement or, if that is not feasible, money back. In our legislation we have therefore decided that “incorrect” installation is synonymous with not carrying out a service with reasonable care and skill, but this does create the difficulty for the consumer of potentially having to prove absence of reasonable care and skill on the part of the installation service provider to obtain compensation if his goods do not work.
- 6.64. The Government recognises the confusion to both business and consumers which can result from the current law and sets out some ideas in the following sections to make the law easier to understand across the board and to bring an element of consistency in particular to services relating to the consumer’s property (including installation services), which will raise the bar higher in terms of customer service and consistency across the market. These are outlined below.
- 6.65. A key issue in assessing the effects of the current law and the likely effects of the Government’s options for reform is to understand how consumers react to the existing complexity in the law and how their behaviour might change if there were greater certainty.

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<sup>104</sup> The detail of these remedies are discussed at length in Chapter 5

## Effects on consumer behaviour...

- 6.66. Consumers can behave in different ways when faced with a service that does not meet their expectations. The OFT Consumer Detriment Survey 2008 highlighted two main factors which could influence the consumer to seek redress.
- 6.67. Consumers appear to consider the option of redress based on the cost of the service and the level of detriment they experience as a direct result. The OFT survey showed the higher the detriment the more likely a consumer would be to seek compensation. A key cut off point appears to be £5 - below this level, consumers cannot generally be bothered to even complain. But generally consumers will only take a case to court if their losses have been much higher. The Survey quotes consumers as saying they would seek redress if they had already paid or part paid for the service and the monies were considered to be of a considerable amount – ie the consumer cannot afford to let the situation go unresolved or afford to engage a different provider. Consumers were also more likely to seek redress should the level of need in the service be paramount (ie if they had suffered considerable inconvenience from a poor service, such as a boiler not being repaired properly in winter or a special set of clothes being damaged just before a wedding or anniversary celebration).
- 6.68. Consumers consider different factors as reasons for not considering redress. For some consumers the hassle factor, the expectations that discussion with the service provider would not reach a desired outcome or the cost associated in taking advice and pursuing the action through the court system will act as a deterrent from seeking redress. The survey quoted lack of consumer confidence as a reason for not pursuing a remedy and drew a link between low consumer confidence and confusion about consumer rights.

### ***Question:***

Q29. In your view, what problems are created for consumers by the current law? Can you estimate the impacts? What effects on the market do these problems cause?

## Effects on business behaviour.....

- 6.69. Businesses providing services do not on the whole do so with the aim of giving a low quality service or making the consumer unhappy with the final result. It is inevitable that at some point in the running of their business a trader will find that things have not gone according to plan and they need to take action to put things right.
- 6.70. At present many service providers will act out of a sense of good business practice to rectify any issues which may have arisen. This is likely to be on a case by case basis and vary from supplier to supplier. Although consumers might in some instances benefit from this, it can add further confusion if the practice is not replicated across the market place.
- 6.71. Businesses are often as confused by their obligations to their customers under consumer legislation as consumers are about their rights. Businesses wanting to give a quality service to their customers will often go beyond existing requirements. But by offering compensation beyond what the consumer is legally entitled to expect, the business could be putting itself at a commercial disadvantage compared with its competitors. Other service providers may not be aware of the current provisions and unwittingly may not comply with the existing regulations when addressing consumer concerns. Again this would lead to an uneven playing field in terms of competition in the market place and to customer confusion.

### **Questions:**

- Q30. How does your business respond to the complexity of consumer law? What, in particular, is the cost of compliance?
- Q31. Does your business consciously seek to go beyond consumer law in terms of what it offers consumers of services?
- Q32. Do you apply a "goods" standard of liability and "goods" remedies for some of the services you offer if they go wrong? If so, what are these services?
- (Goods standards and remedies are discussed in paragraphs 5.9 and 5.22-51)

## What do we propose to do?

### Part A – Reforms across the Board

- 6.72. The proposals below are designed to make the law simpler and clearer across the board for all services. The Government is also considering in Part B below more substantial reforms in relation to services carried out in relation to the consumer's property.
- 6.73. The Consumer Law Review 2008 concluded that simplifying and modernising consumer protection legislation could bring benefits not only to consumers but also to business and the wider economy. It made recommendations to change the legislation to allow consumers and those dealing with consumers to be clear on their rights when undertaking a transaction and on their remedies should things go wrong.
- 6.74. The Review found strong public support for simplification and clarification of the law and highlighted a number of benefits this could bring. For example, consumer empowerment through increasing awareness of rights, remedies and obligations and removing discrepancies and inconsistencies across existing legislation. The conclusion was drawn that empowering consumers and greater consistency for business would inevitably lead to a stronger market and business growth.
- 6.75. In summary the proposals below will:
- Simplify existing consumer rights in relation to poor services so they are more easily understood and applied by both consumers and businesses;
  - Move away from implied terms to give consumers a guarantee in law where a consumer contracts for services (a statutory guarantee) which can be easily understood and where the business cannot avoid basic responsibilities to the consumer;
  - Set out basic statutory remedies which consumers and business can follow should anything go wrong.
  - Bring greater consistency for the consumer and business to assess the acceptability of services that relate to goods;
- 6.76. The aim is to encourage businesses and consumers to resolve disputes amicably. If both sides are clearer about what the law provides, it should be possible to resolve most disputes up-front, without the need for lawyers to be

consulted or cases referred to head office.

- 6.77. Clearer law should also make markets work better by making consumers more confident. Confident consumers should make it difficult for some businesses to gain competitive advantage through avoiding the financial consequences of poor quality. This would force business to compete on price and high quality, thus stimulating investment, innovation and growth.

## Proposal 1 – To set out Statutory Guarantees

### Reasonable care and skill

- 6.78. The Government proposes a move away from the current system of implied terms to the adoption of a system of statutory guarantees. This option would involve explicitly setting out that, there will be a “statutory guarantee” that a service will be carried out with reasonable care and skill. This will only apply where a consumer contracts with a business to provide services, as now. It is not intended that this will change the substance of the law, rather that it will be clearer to a consumer what their rights are in relation to the quality of a service provided pursuant to a contract. It will have implications, however, notably the guarantee will mean the service provider will have to offer the statutory remedies of repair or re-performance or a reduction in price (see below). Traders will also have a clearer understanding of their liabilities.

### ***Question:***

- Q33. Do you agree that moving to a statutory guarantee will be easier for consumers and traders to understand? Do you foresee any problems with this approach?

- 6.79. The proposals represent a minimum standard which all businesses and consumers will be able to observe. There is nothing in the proposals which prevents the service provider from going beyond the requirements of the statutory guarantee should they feel it benefits their business or is more suited to the environment in which they trade.

## Performance and consideration

- 6.80. As set out above in paragraphs 6.20-23 the SGSA currently contains implied terms about performance and implied terms about consideration. This is to deal with the situation where the time for performance and the cost of the service is not expressly agreed in the contract.
- 6.81. As discussed above (in paragraph 6.23) when the Consumer Rights Directive is implemented, there will be an obligation on traders to give certain information to a consumer before a contract is made<sup>105</sup>. This includes not only the time for performance and the price (or how the price will be calculated), it also includes the “main characteristics” of the service as well as other pieces of information (such as the trader’s name and address). In relation to distance and off premises contracts<sup>106</sup> it is clear from the Directive that this information must become part of the contract<sup>107</sup>, except where the parties expressly agree otherwise.
- 6.82. We think that even though the Directive does not expressly say so, for other types of contract this information would probably also be incorporated into the contract in most cases, through the normal principles of contract law, unless the parties agreed otherwise. So for example if part of the arrangement between a trader and consumer is that the trader will come to fix the consumer’s washing machine between 9 am and 11 am and does not turn up during that time, without agreeing a different time with the consumer, they would be in breach of contract and a consumer may be entitled to damages.
- 6.83. We are considering that where information is provided pre-contractually pertaining to the service (including the price and time for performance), whether arising from the obligations in the CRD or not, we should also include a “statutory guarantee” that the service will meet the substance of the pre-contractual information. Again we do not think that this would change the

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<sup>105</sup> Indeed much of this information will already be required through the obligations in the Provision of Services Regulations

<sup>106</sup> Distance contract mean “any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded”; off premises contract means “any contract between the trader and the consumer: (a) concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader; (b) for which an offer was made by the consumer in the same circumstances referred to in point (a); (c) concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous presence of the trader and the consumer; or (d) concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer.

<sup>107</sup> See Article 6.5



substance of the law, but having a guarantee set out in legislation will make it clearer and more accessible for both consumers and traders. This would align services with the right that buyers have in relation to goods that are sold by description (in section 13 of the SOGA).

- 6.84. However, not everything that is said about goods in advance will form a part of the sale by description. Some statements will be merely representations which do not form part of the contract. Similarly in relation to this statutory guarantee for services, it would only be important statements of the characteristics of the services, including the price and time for performance, which would fall within this statutory guarantee.

***Question:***

- Q34. Do you agree that there should be a statutory guarantee that a service will meet the description given pre-contractually, including the information as to price and time for performance?

- 6.85. Alternatively, we could include express reference to the information requirements in the Consumer Rights Directive, that the service must meet the substance of the information provided pre-contractually (because of the obligation in the CRD). We think there are some difficulties with this approach because there are certain services which are excluded from the scope of the CRD and traders may provide other information in addition to that which will be required because of the CRD implementation.
- 6.86. If we do decide to have a statutory guarantee along the lines of either of the options set out above, the question arises of what remedy the consumer would have as a result. This is addressed in the section on remedies below.
- 6.87. We are also proposing a statutory guarantee that where the time for the service to be carried out is not fixed by or left to be fixed in the contract, the performance will be carried out in a particular time period. We think that rather than using "a reasonable time" we will specify, as with Regulation 19 of the current Distance Selling Regulations, that the time for performance, where not expressly agreed, will be "30 days". Although we appreciate that different services will inevitably take different amounts of time to perform, it will always be open to the parties to agree longer periods. Specifying 30 days

provides clarity and certainty for both consumers and traders in those cases where they do not agree when the service will be performed.

**Question:**

Q35. Do you agree that there should be a “default” period of 30 days in which a service must be carried out?

6.88. Similarly we will need to ensure that there is an obligation on the consumer to pay a reasonable charge where the consideration is not expressly agreed.

## Proposal 2 – Basic Statutory Remedies

6.89. There are currently no statutory remedies available to consumers if a business is negligent in the provision of a service, except in relation to some installation services, as discussed above<sup>108</sup>. Consumers must either agree a remedy with a business; or, if the business does not accept liability or the parties cannot agree on a suitable remedy, consumers have to take legal action. If they are successful, the Courts will generally make an award of damages (financial compensation) in their favour.

6.90. The awarding of damages for breach of contract is based on the general principle that as far as money can provide, the consumer should be in the same position as they would have been if the contract had been performed. This means that the consumer will be compensated for foreseeable loss they suffered as a result of the breach of contract. Compensation may be available for loss which is a normal and obvious consequence of the breach (known as direct loss), or unusual loss that the trader and consumer knew would arise if the contract was breached (this latter category is sometimes called “consequential loss”). There is also a duty on the innocent party to take reasonable steps to limit their loss as far as they can.

6.91. Damages would therefore allow the consumer to engage with a different party to finish the job off or repair any faulty work, but the amount of damages may cause dispute and be difficult to reconcile outside of the courtroom. Existing

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<sup>108</sup> This is where installation of goods forms part of contract for the transfer of goods and the goods were installed by the transferor negligently, then the goods will not conform to the contract and so the remedies in relation to goods will be available to the consumer

remedies are therefore flexible, but somewhat unpredictable and complex. They are also not specifically set out in legislation. Consumers have little understanding of what remedies they might receive and this may deter them from pressing their case or alternatively they may have unrealistic expectations as to how much money they are entitled to.

6.92. Formal legal action is not attractive to either businesses or consumers, so the Government aim is to provide a simpler and more transparent basis for dispute resolution outside the Courts. This will not suit every case, but it should allow a proportion of the cases which currently go to Court to be resolved privately, in some cases perhaps without the need for lawyers to get involved.

6.93. By setting remedies aimed at resolving issues on to the face of the legislation, consumers would have more confidence in asserting their rights should something go wrong and traders would be able to better defend themselves against consumers attempting to claim more than their entitlement. Introducing a clear set of rights and remedies will help discipline the market through the setting of a fair, equitable and competitive environment.

6.94. One of the Government's objectives throughout this consultation is to try and align as far as possible consumers' rights and remedies in relation to goods, services and digital content so the framework of consumer rights is as simple to use as possible. We have therefore looked at the existing statutory remedies for goods and tried to adapt these to see if they would work for services, offering consumers and traders clear practical steps they can take to resolve disputes quickly and as amicably as possible.

6.95. The Government proposes to introduce the following statutory remedies where any service has not been provided with "reasonable skill and care":

*Tier 1:*

- The supplier should either repair the fault (ie redo the element of the service which is inadequate) or perform the whole service again;

*Tier 2:*

- Give a reduction in the price of the service to cover the element which has

not been performed with reasonable skill and care

- 6.96. Under this proposal the consumer would have to allow the business to rectify the fault either by repair or by re-performing the appropriate part of the service (for free) before moving to the second tier, should reasonable skill and care still not be demonstrated. In line with proposed remedies for sale of “faulty” goods, consumers would have the right to pursue the Tier 2 remedy after two repairs had failed to solve the problem or after one failed re-performance, or whatever the final settlement is for moving to Tier 2 remedies (see chapter on Sale of Goods for a discussion of options).

**Questions:**

- Q36. Do you agree that the statutory remedies for “faulty” or sub-standard services should be as similar as possible to those for goods?
- Q37. Do you agree that we should specify that the reduction in price should cover the element which has not been performed with reasonable care and skill? Or should we use the same wording as used in relation to goods; i.e. “an appropriate amount”?

- 6.97. Although the tier system described above would generally need to be followed, there are circumstances where this could be deviated from in circumstances similar to those that apply to goods. For example, the consumer would be able to move to the tier two remedy directly should the repair or re-performance not be supplied in a reasonable time frame or without significant inconvenience to the consumer. Equally, it may not always be possible to repair or re-perform the service. In these cases it would be possible to move directly to the tier two remedy.
- 6.98. It is accepted also that not all services, particularly services related to particular occasions and ongoing services, can be repaired or replaced. For example, an ongoing broadband or mobile phone service which is not working for a week or a month will cause damage that could not be repaired, even when it is up and running again. In such circumstances Tier 1 remedies would be insufficient by themselves and the consumer would be entitled to move straight to Tier 2, asking for a reduction in price.

- 6.99. Where a business is required to offer a Tier 2 remedy, the reduction in price would need to reflect any use the consumer has had from the service prior to the fault being detected. In the mobile phone or broadband example above, it could only relate to the period where the service was not available, so the reduction would be one twelfth of an annual subscription if the service were down for one month. The core statutory remedies are not designed to cover damages for lost income or inconvenience or any kind of consequential loss.
- 6.100. If the consumer is required to pay for a new service provider to come in and do the job that the original supplier has failed to deliver with reasonable care and skill, the service provider could be liable to refund the full value of the original contract, as the consumer will have to incur at least the same cost again to obtain a fair outcome. The Government proposes, however, that the service provider could never be liable under this statutory remedy, for more than the value of the contract. However, as described below, the general contract law remedy of damages would remain available for consumers if they wanted to claim for loss in excess of the original value of the contract.
- 6.101. These proposed remedies would help to bring largely into line the different regimes for services and goods to address the issue of complexity and lack of consistency, but some differences would remain (see below).
- 6.102. In particular, the Government has considered whether there should be another Tier 2 remedy. This would entitle the consumer to terminate the contract (rescind) and get a refund (with deduction for use) as there is in relation to sale of goods. The argument against is that services can rarely, by their nature, be given back and therefore the contract cannot be swept away and the parties returned to where they were before, as they often can with goods. Since price reduction offers the same opportunity to compensate the consumer for their loss, taking account of the level of enjoyment they have had of the service in the meantime, there is arguably no need for a termination remedy as well.
- 6.103. However, some services are long-term, with penalty clauses for early cancellation, where consumers are locked in and denied the opportunity to switch to a rival supplier in return, often, for an up-front attractive price or "sweetener". In these cases, if the service has proved "faulty", the consumer's main objective may be to terminate the contract, rather than to seek reimbursement for services already supplied, especially if the reason that the service is "faulty" is that the pre-contractual information given about the service was misleading or inaccurate.

6.104. The Government is therefore considering allowing consumers, in the case of the tier 2 remedy of “reduction in price” to also insist on a termination of the contract from that point forward, with no penalty being applied on the consumer, even if one is written into the contract.

6.105. In the case of pre-contractual information about a service proving to be inaccurate or not being supplied in accordance with the law (under the provisions of the Consumer Rights Directive) the Government is considering stipulating that the consumer has the right to move straight to the tier 2 remedy of reduction in price combined with termination of the contract.

**Questions:**

Q38. Do you think that the Tier 2 remedy should always include a facility for the consumer to terminate the contract from that point forward?

Q39. Alternatively, do you think that the right to terminate the contract should only be available in response to a failure to meet pre-contractual information requirements, or perhaps not at all?

Q40. What would be the impact on your business of making such remedies available?

6.106. Should a consumer remain dissatisfied with the proposed remedies or wish to claim back more than 100% of the value of the contract, they would still have the option of pursuing existing contractual remedies under general contract law. This would be the only option should a consumer wish to seek redress for loss other than the cost of completing the service in accordance with the contract, such as consequential damages or personal injury as a result of a negligent service, for example.

6.107. The Government does not see the need to codify these complex existing contractual remedies in legislation, as to do so may have unintended consequences (and higher costs) for businesses. It is proposed, however, to include in the legislation a confirmation that the new statutory remedies do not exclude recourse, as now, to claims for damages for breach of contract through the courts.

**Question:**

Q41. Do you agree that it would be disproportionate and also risky in terms of potential effects to try to codify current contractual remedies for damages in legislation?

6.108. It is hoped that under the proposals simple claims will be resolved quickly and amicably by business and consumers by reference to the core statutory remedies set out above. But where claims are large and/or complex or where liability is contested, consumers and/or businesses may still wish to take their chances in Court using claims for damages under the current law.

**Proposal 3 – To restrict a traders’ ability to limit liability**

6.109. Part of the statutory guarantee that a service will be carried out with reasonable care and skill will be that a trader must always offer the statutory remedies set out above for free where the service has not been carried out with reasonable care and skill. This will mean that a trader will not be able to totally exclude liability when a service has been carried out without reasonable care and skill – they will always have to offer the statutory remedies, which will involve some cost to the trader. Our proposal is that this will include the remedy of reduction in price, that is to say that a trader will not be able to limit their liability in relation to the reduction in price.

6.110. We think that it would be rare in consumer cases that a total exclusion of liability would be found to be reasonable at the moment anyway. In the vast majority of cases this clarification is therefore unlikely to be a major change, especially for most reputable businesses. It could, however, have an important effect of bolstering consumer confidence and reducing the risk that consumers fail to assert rights, because they wrongly believe that they have waived them by signing a contract containing such terms. It will also help businesses to negotiate practical resolutions to justified complaints, maintaining good customer relations

6.111. The proposals will not remove altogether the rights of service providers to limit their liability for damages, (for example for consequential damages as a result of a negligent service), as long as the limitation is “reasonable” because

this is permitted in contract law and would be unaffected by these proposed changes to consumer law.<sup>109</sup>

**Questions:**

- Q42. Do you agree that there are few cases at present where a service provider would be able to limit its core contractual liability to a consumer in a way that a court would find reasonable?
- Q43. What impact do you think it would have on traders and insurers if liability were to be restricted as proposed above in future?

**What else could be done?**

6.112. The proposals in Part A for a statutory guarantee and statutory remedies are designed to make the law clearer, to empower consumers to assert their rights, to make markets work better and reduce dispute resolution costs for the majority of businesses should issues arise. These proposals do however only go so far in addressing some areas of complexity and misunderstanding by business and consumers.

6.113. In particular, the proposals do not address:

- The differences between rights and liabilities for the sale of goods and the sale of services and the tricky areas of interface between goods and services, especially where services are performed on the consumer's property (see details in box 22 below);
- The practical difficulties in consumers being able to judge if a service has been supplied with reasonable care and skill. The more technical the service the greater the difficulty.

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<sup>109</sup> Unfair Contract Terms Act 1977 Section 2



Box 22

**Major differences between consumer protection for the purchase of goods and services after the Government's proposed changes.**

- The liability standard for services will remain fault based – absence of “reasonable care and skill”, whereas the liability standard for goods is outcome-based or “strict” – “satisfactory quality”. The argument is that the quality of a service is much harder to judge and may be entirely subjective. The consumer pays for the expertise of the service provider, perhaps on an ongoing basis, rather than for a tangible item at a fixed point in time.
- There may not be a statutory remedy entitling the consumer to terminate (rescind) the service contract or therefore any accompanying sliding scale or formula to determine “deduction for use” (see Q36). Not all services will include a “physical entity” which can be returned to the supplier. Although it is likely an element of the service has been enjoyed by the consumer, a number of factors will have contributed to the breakdown of the contract which cannot be addressed by a single approach. The tier 2 remedy for services we are proposing is a reduction in the price, which the Government thinks should be calculated with reference to the cost to the consumer of completing the contract in line with the original contract specification. This will depend entirely on the circumstances, so no attempt (as with goods) has been made to set out a sliding scale in the law for how it should be calculated. However, this issue may be addressed in guidance in order to ease dispute resolution.
- Consumer protection for the purchase of services will not include a right to reject the service (ie terminate the contract and get a refund) in the short term. In relation to goods, this right is only available until the consumer has “accepted” the goods and there are particular rules governing the meaning of “acceptance”. With a service contract, once the service has begun, it is difficult to see how a “right to reject” would work. The nature of the relationship between the consumer and the supplier in the majority of cases is such that once liability has been accepted the supplier should be given the opportunity to repair or re-do the service. This will not affect the rights of the consumer to seek redress under contract law where either liability is not accepted or there is a breakdown of trust leading to the consumer wanting to terminate the contract.

Most regulated services already comply with the concept of a statutory guarantee as different sectoral regulators already require service providers to set out clearly in their consumer contracts what service levels consumers can expect to receive. For example in the communications industry General Condition 9 under the Communications Act effectively plays this role, as it requires all internet service providers to state clearly in their contracts what broadband speeds can be achieved and what the download limits are etc.

## PART B – A Strict Liability Standard for some Services

### Could we move to a strict liability standard for services?

6.114. It would be desirable in terms of clarity and simplicity to develop a single, clear legal regime for the supply of both goods and services.

6.115. This would mean changing the liability standard for services from one based on fault (lack of reasonable care and skill) to one of strict liability (an outcome-based or “satisfactory quality” test) or supplementing the current fault-based test with a strict liability variant. It would not be possible to align on a fault-based liability standard only for both goods and services, as this would contravene European Union Directives which make strict liability obligatory for sale of goods.

### Would an outcome based “satisfactory quality” standard be practical for services?

6.116. An outcome-based liability standard is more complex for services than for goods. With a goods purchase it should be relatively simple to make a judgement on satisfactory quality – either the goods work or they don’t. There may be occasions where a judgement has to be made on the standard of quality in relation to the price of the goods. The SOGA allows this to be taken into consideration in appropriate cases when determining if the goods are of satisfactory quality<sup>110</sup>. For example, a customer purchasing a high-end TV for around £1000 would expect a higher quality of picture than if they had purchased a basic £100 model. This would fall into the bracket of “getting what you paid for”.

6.117. In services the expectation can be more difficult to manage. The gap between the consumer expectation and what is delivered could be dependent on a number of factors, for example the nature of the service; the degree of specialist knowledge or skill that the service provider deploys; the consumer’s understanding of what the service entails and the risks that things may not always work out the way the consumer thinks they should.

6.118. For example, a lawyer could never guarantee a result in court, a doctor would point out the risks attached to an operation, dry cleaners would point out that some stains cannot be removed, financial advisors point out that markets can

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<sup>110</sup> Section 14 (2A)

go down as well as up and often electricians or car mechanics would offer to “have a look” but would not always guarantee they could fix the problem.

- 6.119. A strict liability standard for services may therefore be seen as a radical step. It would be likely to result in variable impact across different service sectors and could result in serious unintended consequences as well as significant potential benefits. For example, in supply of professional services there is likely to be a gap between the knowledge and expertise of the service provider and the understanding of the risks involved in the service by the customer. Our proposals try to address this by allowing the service provider to draw limitations to the attention of the consumer as is currently the case with goods. It may remain however difficult to assess if a service is of satisfactory quality or simply not meeting the consumer’s expectations.
- 6.120. On the other hand there are a large number of services where satisfactory quality can be judged easily and in which the benefits to the consumer will outweigh any disadvantages to the service provider. For example, it would be easy to see if a painter had left gaps or applied the paint in an uneven manner. In this case it would not be difficult to assess the service as not of satisfactory quality.
- 6.121. The Government is very conscious therefore that applying a single satisfactory quality regime may cause some service industries problems. In some cases it might hinder a provider’s ability to deliver services without either increasing prices or risking his reputation in a competitive market. Some of the potential implications are explored in box 23 below.

Box 23

**Implications of a “satisfactory quality” standard for services**

A strict liability standard for services is easier to imagine working for some services than for others.

Where a service such as repair or installation is performed on goods, the consumer expects the goods to then work. If it does not, the consumer will seek to hold the service provider accountable in the same way as the goods supplier would be held accountable and in practice any Court would be likely to apply something akin to a strict liability standard for any business seeking to avoid responsibility in this scenario.

On the other hand, strict liability for pure (especially professional) services is much more problematic. What is the consumer expectation in relation to an education service, for example? Could a student hold a service supplier responsible for failure to get an A grade in exams? A fault based system seems much fairer for most “pure” services, especially where the outcome is unpredictable. The consumer pays for the service provider’s expertise, but there is no guaranteed outcome so liability can only be based on whether the service provider has used reasonable care and skill in the circumstances. Whilst any strict liability standard would include the ability to limit consumer expectation by effective communication by the service provider, we could still foresee problems with a strict liability standard for professional services.

If Government were to insist on a strict liability standard for services, the results could be far-reaching. Services which had a high risk of not delivering optimal outcomes, despite the best efforts of the service provider, might no longer be offered at all, despite consumer demand for them and even if there is full consumer understanding of the risks. This could be a serious issue in relation to medical services, for example, and perhaps for high-risk investment services. Service providers might become risk averse, loading simple services with precautions in order to protect themselves against claims and thereby raising prices for consumers across the board. However, this problem could be mitigated by ensuring good communication between the service provider and the recipient so that the recipient is aware of the extent of “satisfactory quality”

This in turn however may lead some service providers to react also by under-promising. Great care might be taken to manage consumer expectations, perhaps including pages of standard form contracts emphasising that the service provider is not committing himself to a particular outcome. This would allow the company to more easily claim that the service has delivered an acceptable outcome, even if the consumer is dissatisfied.

- 6.122. The Government is therefore approaching the question of strict liability for service providers with great caution. It is considering moving to an outcome-based, strict liability standard for some types of services, but only in those cases where the benefits of clarity and consumer empowerment are likely to outweigh the risks of unintended or negative consequences.
- 6.123. The area where the value appears greatest is where services are related to the consumer's property. These are the cases where goods and services are likely, of their nature, to be combined and where the current divergence in liability standards between goods and services causes the most confusion and constitutes probably the greatest source of expensive disputes. These are also the cases where consumer expectations of an outcome-based test are strongest and where the outcomes are most likely to be capable of objective assessment.
- 6.124. On the other hand, an outcome-based liability standard for pure services and services related to the person seems to be much more problematic. The case for moving to a strict liability or outcome-based test for these services is much weaker and the risks of unintended consequences are much higher.

**Questions:**

- Q44. Do you think any strict liability standard for services should be imposed instead of or in addition to liability under the current fault-based regime?
- Q45. Do you agree that an outcome based liability standard is likely to be more appropriate for services relating to property than for services to the person or pure services?
- Q46. Do you think that consumers would benefit from an outcome based liability standard for services to their property or would any benefit be outweighed by higher prices because of increased costs on business?
- Q47. Do you think introducing a “satisfactory quality” standard across a limited number of service sectors would create greater confusion to the consumer and/or business?
- Q48. How would a “satisfactory quality” or “outcome-based” liability standard for some services work in practice?

## **A strict liability standard that some services should be of “satisfactory quality”**

- 6.125. Under this option consumers would have a claim against the service provider if the service was not of a satisfactory quality. A service would be of satisfactory quality if it meets the standard a reasonable person would regard as satisfactory taking into account:
- The description of the service; this could include any advice given by the service provider as to the limits of what can be achieved
  - The price and
  - All other relevant circumstances which would include in appropriate cases the following features of the outcome of the service:
    - (i) fitness for purpose (either a common purpose or a specific purpose made known to the service provider)

- (ii) freedom from minor defects
- (iii) appearance and finish
- (iv) safety, and
- (v) durability.

6.126. The proposed guarantee of satisfactory quality would not extend to any genuine risks or limitations that were drawn to the consumer's attention before the contract was made. This would therefore allow the trader to point out any real risks before the service is undertaken, ensuring that the consumer's expectations are limited to what is reasonable.

6.127. The remedies available to the consumer would be the same as in respect of the supply of other services (see above).

**Questions:**

Q49. Do you agree that the quality standard in any strict liability scenario for services should be as above – the same as for goods?

Q50. To which services might the new liability standard apply?

6.128. Essentially our proposal is where a service is provided to consumers' goods, the service provider would be liable for the end result of the service to be of a satisfactory quality. This would mean that if the service provider knows or ought to have known that there is something about the consumer's property which would mean that the service would not produce the result the consumer reasonably expects, they must tell them about it. If they do not make sure the consumer is aware of the problem they must take the responsibility of ensuring that the end result meets the standard a reasonable consumer would expect in the absence of that problem.

6.129. The meaning of "services to property" and what our proposals will signify is discussed in more detail below.

## Installation Services

6.130. There is already specific provision in relation to contracts which cover goods and their installation. As stated above:

Where goods are purchased with an accompanying installation service, and the installation was not carried out with reasonable care and skill, a consumer then will have the right to ask for the goods to be repaired, replaced or if that is not possible, ask for some money back.

6.131. The legislation is clearly seeking to address the inconsistency in the law relating to goods and services which does present practical problems when services and goods are combined or services performed on goods, as described above. But this logic would apply equally to services to repair goods or maintain or clean them.

6.132. The current UK law maintains a fault-based liability standard for the installation service, whilst offering goods remedies (for the good and the service) if the standard is not met. The legislator at that time clearly preferred to maintain the integrity of the fault-based standard for all services.

6.133. But it is unlikely that a strict liability standard for installation services would make much practical difference in law, at least where the installation service is provided through the retailer of the good. If, after an installation, the good does not work, the retailer/installer has to accept that any problem is his responsibility and it is hard to imagine any Court finding otherwise, except in extreme cases.

6.134. Where installation is carried out by a business other than the retailer of the goods, the law on liability for sale of services currently applies without any change. This gives rise to problems such as in the "power shower" example mentioned above:

*A consumer may buy a new "power shower" from a retailer and then pay a local plumber to install it. If the shower does not work, the consumer may not know where the problem lies: is the shower faulty or is the problem with the installation service? Determining liability in these cases can be a time consuming and expensive process for a consumer.*

6.135. The current situation is that if the goods are faulty, as part of the right to replacement, the consumer has the right to reimbursement from the seller of the goods for the costs of removing the defective goods and reinstalling them if they were installed in good faith in a way consistent with their nature and purpose by the consumer (although the compensation can be limited to a "proportionate amount").



- 6.136. This, however leaves it to the consumer to prove that the problem lies with the goods and not the service, which in many cases may be difficult for the consumer to prove. Furthermore, if something does not work after a service has been performed on it, the consumer's first port of call is likely to be the service provider. There is no easy answer to this sort of problem scenario, but the Government is considering whether the service provider in this sort of case should take some responsibility (alongside the liability for the goods provider) for the final product working, which would imply some overall fitness for purpose test.
- 6.137. It would not be fair to impose on the plumber the cost of repairing or replacing the faulty shower itself and there is no need, as the retailer already bears that liability. However, it would probably be fair to ask the plumber to check that the shower works before completing his installation service, and if it doesn't, to warn the consumer before the shower is plumbed in and tiled over
- 6.138. Where the retailer of the goods also does the installation, an outcome based liability standard for installation services would probably make little difference in the vast majority of cases. But where the service provider is different, this would imply a somewhat higher standard of care.
- 6.139. However, there are many cases where there is no inherent problem with the goods themselves but there are other surrounding problems which will mean that the goods will not work. For example a consumer might want a power shower fitted on the 18<sup>th</sup> floor of a tower block. The plumbing of that tower block might be such that the shower would have no power once installed. Here we think it would be reasonable for the service provider, who is likely to have a far greater knowledge of these matters to take some responsibility for the end result not meeting consumer expectation. Here we would expect a plumber to warn the consumer before fitting the shower that it will not be a true "power shower" because of the consumer's household plumbing system. If he does not, he could be made responsible for removing the shower and replacing it with a different shower that would better meet the consumer's expectation.
- 6.140. We appreciate of course that some problems may be outside of a service provider's knowledge, even very good service providers. For example, a painter and decorator may paint a kitchen with blue paint wrongly delivered by a retailer (when the consumer actually ordered yellow paint but the service provider was unaware of the choice). Here it would not be fair on the service provider to give them responsibility for painting the kitchen the wrong colour. Indeed it is unlikely that a consumer would even think of blaming the service provider in any way. This is an extreme example and there are many others

that might not be as clear as this but where it would nonetheless be unfair to impose liability on a service provider because he simply could not have known about the problem.

- 6.141. This situation is complicated because it is unlikely to advance a consumer's rights much further from the current situation if a consumer has to prove in the first instance that a service provider knew or ought reasonably to have known about a problem. This would come across the same problems as we have with the current duty to use reasonable care and skill.
- 6.142. One option to deal with this problem would be to introduce a presumption that the service provider does or should know about problems with the consumer's property which would mean that the end result would not meet the standard that a reasonable person would regard as satisfactory. It would then be for the service provider to show that he did not or could not have known about these problems.

***Questions:***

- Q51. Do you agree that in practice a strict liability standard for installation services would make no difference to installation services which are carried out by the retailers of the goods?
- Q52. Where the provider of the installation service is not the retailer of the goods, what impact do you think this possible change might have? Can you quantify any costs you think it would impose on your business and on other businesses in your sector?
- Q53. Do you think that the current rules on installation services encourage consumers to employ goods retailers to perform such services? If so, would strict liability across the board for installation services offer some benefit to independent contractors?

## Repair Services

- 6.143. Repair services to goods present the same issues as installation services except that the goods are not being acquired at the same time; rather they already belong to the consumer. But repairs often involve the insertion of spare parts, which are goods, as well as the service of repair itself.
- 6.144. When repairs fail, it is usually very difficult for the consumer to judge whether the problem lies with the replacement part (if there is one) or the quality of the repair service. But it is reasonably clear that the consumer expects the goods to function as before once the repair has been carried out. The service in these cases is bound up with the functioning of the goods and consumers are used to having a remedy when goods do not work.
- 6.145. A garage that charges for a car repair which fails to solve a problem and leaves the car still off the road is therefore likely to have very disgruntled customers and a short business life. The current law in relation to these situations is not very transparent, as it will be governed by case law – which most consumers are not aware of - and whether the Courts feel they either imply terms or find that the facts are such that there is a lack of reasonable skill and care.
- 6.146. An outcome-based liability standard for repair services might align better with consumer expectations and give rise to fewer disputes. The desired and expected outcome in most cases would be easy to determine and a stricter and clearer liability standard might help raise customer service standards and marginalise rogue traders, creating consumer confidence and in the long-term favouring diversity of supply and more competitive markets.
- 6.147. In some cases the service provider may signal in advance that the repair might not succeed, because of the age and quality of the original goods. It would be vital to ensure that such legitimate adjustments of expectations would remain possible in any strict liability environment.

**Questions:**

- Q54. Do you agree that in most repair scenarios the Courts would already be likely to find a way to make the service provider responsible for guaranteeing a “satisfactory quality” outcome?
- Q55. If such a strict liability standard were to be introduced, would this involve extra costs for your business and if so, can you quantify them?
- Q56. Do you think that such a change would be likely to increase consumer confidence and assertiveness?

**Other services related to the consumer’s property**

- 6.148. These would include cleaning services, maintenance services, storage and delivery services and perhaps other services performed on or to the consumer’s physical property (but not on his person). The Government tends to support such services being treated alongside installation and repair services, but would welcome views on whether that would be appropriate or not.

**Questions:**

- Q57. Do you agree that all service to consumers’ property should be treated the same? Are there any particular problems with strict liability in respect of any of the other categories of services to property?
- Q58. What would be the impact of establishing a strict liability standard across these other services to property?

## Conclusion

- 6.149. The Government is very keen to address the inconsistencies and complexities in the current law and the confusion this brings to both business and consumers.
- 6.150. The Government believes there is a strong case for placing on the face of new legislation the rights a consumer has when purchasing a service and the remedies available if the service proves to be “faulty”. From a business perspective, clarification of the law will result in the development of consistent business practices which it is anticipated will have a positive effect on overall industry standards. This in turn will boost consumer confidence encouraging innovation and competition and a more robust service sector.
- 6.151. It may be possible to go further and align the liability standard for some services with that which applies to goods. The Government believes that this would run with consumer expectations in some service sectors and reflect widespread existing business practice. But the Government is concerned about the possible detrimental effects this could have on both consumers and business and is therefore seeking evidence on whether the benefits would outweigh the costs or vice versa.
- 6.152. In relation to pure services and services to the person, the Government is not inclined at present to change the liability standard. In the case of services to property, the Government believes that the case is stronger and the risks less serious, but this is a preliminary view pending evidence received over the course of this consultation exercise.
- 6.153. It is appreciated that many professional and other service providers of various types have developed and follow Codes of Practice or apply their own individual standards of consumer service which may offer much stronger consumer rights than those guaranteed by legislation. The proposals being presented in this paper are not intended to undermine these standards but to enhance the minimum requirements underneath them to cover businesses that do not apply them and those operating in sectors where standards may not have been developed. Provided the Codes of Practice exceed any requirements of the legislation their content and application will remain unaffected.

**Overall Questions:**

- Q59. How should business and consumers be informed of any changes at reasonable cost without adding additional burdens?
- Q60. Do you agree that a clearer law as outlined above, if communicated properly, would make a real difference to consumer understanding of their rights and thus to their assertiveness, making markets work better?
- Q61. What would be the costs to your business of managing any change in the law in this area (changing systems, one-off training costs, review of policies or codes, etc.)?
- Q62. How much does your business/sector spend on an ongoing basis training employees to handle consumer complaints relating to service provision? If the law were clarified as proposed in Part A, do you think this would permit a reduction in these costs and if so, by how much?
- Q63. How much does your business spend on settling consumer disputes and on complaint handling in relation to service provision? If the law were clarified as proposed above, do you think this would permit a reduction in these costs and if so, by how much?
- Q64. Would the introduction of a “satisfactory quality” standard as described in the proposals make you change the way you deal with your customers and any problems which may arise?

# 7. The Supply of Digital Content

## Introduction

### What is “digital content”?

- 7.1. Digital content encompasses a diverse range of products offered to consumers in many ways. 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...'*<sup>111</sup>

- 7.2. Digital content products include computer software, videos, films, music, games, e-books, ring tones and apps. Consumers can access these in a variety of ways, both through physical media, such as discs, and intangible ones such as downloads via the internet or streaming.<sup>112</sup>

### Related Services

- 7.3. Many forms of digital content cannot be accessed in isolation but require the supply of one or more services for their use. We believe these services break into two categories:

- “related services” which are integral to the proper functioning of the digital content and over which the consumer has little or no choice as to who supplies the service once they have bought the digital content. This would include the download or streaming of digital content to a consumer’s computer or the provision of access to digital content in the cloud. These “related services” are almost always offered by the supplier of the digital content itself and can be seen in many ways as intrinsic to the digital content product;

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<sup>111</sup> 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>.

<sup>112</sup> Ibid.

## AND

- “enabling services” which are essential for the delivery of digital content to the consumer, but operate independently of the supply of any individual digital content product or related service. This would include broadband and internet service provision services. The service providers are often not the same companies that supply the digital content itself.

7.4. We come back to the concepts of “related services” and “enabling services” below and in one option propose specific rights and remedies that would apply to “related services” as well as rights and remedies that would apply to the digital content itself.

## Summary

7.5. The intention of the Government’s Consumer Bill of Rights is to set out a clear code of consumer shopping rights that are fit for the modern marketplace, with practical steps that consumers can take if things go wrong.<sup>113</sup> It is an opportunity to address complexity, fragmentation and overlap in the current consumer laws and to ensure that the law is fit for purpose in the current age.<sup>114</sup>

7.6. The market for digital content products has developed rapidly over the last decade with more products and devices being made available every year. This is a trend which looks set to continue.

7.7. Two recent analyses of how existing consumer law relates to digital content have concluded that the current UK law is far from clear.<sup>115</sup> As described in the previous two chapters, different legal consequences are attached to a consumer contract depending on whether the transaction relates to goods or services. Digital content has an uncertain status as it is neither clearly goods nor clearly services. It is therefore hard to identify which set of rights and

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<sup>113</sup> <http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=421254&NewsAreaID=2>

<sup>114</sup> <http://www.bis.gov.uk/news/topstories/2011/Jul/retail-red-tape>

<sup>115</sup> 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>.

## AND

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](http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf)



remedies a consumer might have if digital content is “faulty” or “sub-standard”.

7.8. The Government believes that both consumers and, ultimately, business will benefit from legal clarity, so is proposing to establish how consumer law on sale or supply of “faulty” products will apply to digital content in future. The Government is not aiming here to create new consumer rights, but to ensure their proper application to digital content. We think the best way of achieving this is to create a bespoke regime catering specifically to the digital content market.

7.9. The proposals have the following objectives in relation to digital content:

- Provide legal certainty for both businesses and consumers as to rights available in relation to digital content;
- Provide a simple framework that is easy for business and consumers to understand and use by aligning where possible with goods and services legislation (see box 27) and with consumer expectations (see table 8);
- Align our proposals as far as this is appropriate and achievable with emerging proposals from the European Commission (see box 25);
- 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 below);
- Provide a framework that is principles based and can therefore adapt to future innovations;
- Achieve a fair balance between rights and responsibilities for both businesses and consumers;
- Reduce consumer detriment, through easier access to redress mechanisms.

7.10. 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 clarification of rights that digital content should meet and clarification as to who is responsible for ensuring these rights (we propose that this should be the trader);
- Clear steps that a consumer can take if these rights are not met.

## Scope of proposals

### What is in scope

7.11. We intend to use the definition of digital content from Article 2 (11) of the Consumer Right Directive<sup>116</sup>:

*‘digital content means data which are produced and supplied in digital form’.*

7.12. Our proposals focus on consumer rights when digital content is “faulty” or “sub-standard”. We cover solely transactions where there is a contract between a business and a consumer, where the consumer is an individual not acting in the course of his or her business.

Box 24

#### ***What is a contract and when will one arise?***

A contract is an agreement which can be enforced legally – that is, one party could take the other party to court if they do not do what was agreed. It is not necessary to agree anything in writing, or to sign anything, in order for a contract to exist. A contract will arise when the trader agrees to supply goods to the consumer in return for something of value (this may be a payment by the consumer, or something else – for example a consumer may give something they own, such as their current car, in exchange for new goods).

7.13. Digital content can often be supplied for free as part of a marketing strategy or in exchange for something of value other than money (such as personal data). Because of this and because of the fact that digital content can cause consumer detriment regardless of the type of transaction by which it has been supplied there is a question as to whether ‘free’ digital content should be included within the scope of our proposals. We will revisit this after we have set out what we consider the quality standards should be.

7.14. Our proposals do consider whether to apply specific rights and remedies to “related services” such as the download or streaming of digital content.

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<sup>116</sup> DIRECTIVE 2011/83/EU. This will need to be implemented by June 2014.

## What is outside of scope

- 7.15. Our proposals would not apply to “enabling services” such as telecommunication services, or internet service provision.
- 7.16. There are also certain digital services which do not involve the consumer acquiring digital content and as such qualify as neither digital content nor “related services”. This would include for instance, a contract with a cloud provider to store your own digital content on the cloud. Such pure service contracts will be covered by the normal services framework.
- 7.17. Our digital content proposals do not apply to the sale of tangible goods on-line or the sale of online services which are merely on-line versions of services which can be purchased in stores, such as online banking. They do not apply to computer hardware such as PC’s, phones and tablets as these are goods.
- 7.18. These proposals do not include legislation that would guide consumers towards traders of legal digital content rather than websites offering illegal (pirated) copies of digital content. However once consumer law has been revised there would be an opportunity to communicate the changes to consumers; such a communications campaign could stress that the rights would only be honoured by legal traders and could advise consumers of the existence of trustmarks for digital content such as the ‘Music Matters’ initiative.
- 7.19. Table 5 gives some examples of current means of accessing digital content and whether these examples would be covered under our proposals.

Table 5: Examples of digital content that are covered under the digital content proposals

Type of digital content <sup>117</sup>	Covered by our digital content proposals?
A consumer buys music on a disk from an online or high street trader and plays it on their CD player.	Yes, the music on the disk is the digital content. In this case it is accessed from a tangible medium (the disc).

<sup>117</sup> Where we say that the consumer buys digital content, in each case we mean that they buy the right to the exclusive use of the copy of the digital content but not the copyright ownership.

<b>Type of digital content<sup>117</sup></b>	<b>Covered by our digital content proposals?</b>
A consumer buys some software online and downloads it, along with the necessary installation software. The consumer then installs the digital content onto their hardware for use.	Yes, the software is an example of digital content that is accessed using a download, a type of related service. Our proposals apply rights and remedies to the digital content and consider applying specific rights and remedies to the related service.
A consumer buys access to an e-book in the cloud, the e-book is not downloaded to the consumer's hardware but the consumer can access the e-book from the cloud server on one or multiple devices.	Yes, again the e-book is digital content which requires a related service to access the digital content.
A consumer buys a game on a disk from a high street trader and then buys access to an online system where they can play that game against other users.	Yes, although the related service is bought from a different party, it is integral to the functioning of the game and we consider what rights and remedies should apply to both the digital content (the game) and the related service (the accessing of the game online).
A consumer streams a film to watch on their laptop. The film can only be viewed once and is not saved on the consumer's hardware.	Yes, this is another example of digital content that is accessed via a related service, in this case the streaming of the film. While the consumer does not keep a copy of the digital content once they have watched the film they would still – under our proposals - expect the film to meet digital content rights as to quality.
A consumer participates in an online virtual world for free for a time and later purchases in-world credits to buy virtual items within the virtual world (e.g. to send a fellow virtual world player a bunch of virtual flowers).	Probably. The first issue is to decide whether there is a contract between the business and consumer. We think there is, even though the virtual world is free, if the consumer has had to agree to terms of use before being allowed to enjoy the virtual world. If there is a contract our proposals would apply. The digital content supplied is the virtual world, and the access to it is a "related service". Even though the consumer does not keep a copy of the digital content on their device (e.g. their computer or smartphone) they would still, under our proposals, expect it to meet digital content rights as to quality. We consider whether all proposed remedies would be appropriate for sub-standard free digital content and propose that these are limited. When the consumer pays for in-world credits they have paid for digital content and this would be fully covered under our proposals.

Type of digital content <sup>117</sup>	Covered by our digital content proposals?
A consumer browses information on a free website e.g. BBC news	No, although there is a supply of digital content there is no business to consumer contract because the consumer does not offer anything, not even agreeing to terms of use, in return for the digital content.
A consumer uploads and stores their own digital content on the cloud and can then share this digital content with others e.g. Photobox, Facebook	No, while there is a business to consumer contract this is not for the supply of digital content but rather for the storage of the consumer's own digital content. This kind of "pure service" would be covered under the normal services framework described in Chapter 6.

7.20. While our proposals suggest quality standards that digital content should meet, these address technical issues with the digital content such as poor sound quality for a music track, graphics that don't match the demo version of a game or illegible or missing text in an e-book. The quality standards are not intended to be used for any subjective judgements of the digital content, for instance the game is not exciting enough or the e-book isn't interesting. This is equivalent to the quality standards that are applied to goods such as books or board games. What our proposals do is to ensure that when a consumer purchases digital content – or a right to use the digital content – it will, amongst other things, be of a satisfactory quality. So in the same way we wouldn't expect any sections of a paperback to be missing or double typed (and therefore illegible) neither would we expect chapters of an e-book to be missing or corrupted.

## The unique position of digital content

7.21. 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 of the consumer protection law. The sale, distribution and use of digital content transactions are impacted by a web of interrelated factors including copyright, licences and terms of use. As set out above, these are important tools in preventing illegal copying and 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. None of our proposals will change the law on copyright, which will continue to be protected in the same way.

7.22. There are also a number of digital consumer issues that relate to end user licensing agreements ("EULAs"). These licences usually include terms that

relate to copyright protection but also include other terms that set out what redress the consumer can get and through which jurisdictions. Licences are usually international documents and often do not vary country by country. It can be confusing for the consumer that there seem to be one set of rights laid out in domestic legislation and another set of rights described in the EULA. The Law Commissions are examining some of these aspects in their issues paper on unfair contract terms<sup>118</sup>. Depending on the Law Commissions' recommendations, some of these issues may be addressed in our forthcoming Consumer Bill of Rights, but they are not considered in this Consultation.

- 7.23. Tools used by digital content creators to control how digital content is used, such as technical protection measures and data rights management, can result in certain consumer issues, for instance with compatibility and functionality. We do not address these in detail in this consultation but do explain proposals from the Consumer Rights Directive that attempt to ensure that consumers are specifically informed about such protection measures before purchase.
- 7.24. There is a huge breadth of other related topics such as data privacy laws and electronic payments protection which are all connected to consumer protection when buying digital content. These matters are not, however, dealt with in this Consultation which focuses on the rights that consumers have to quality when purchasing digital content.
- 7.25. We recognise that there can be higher uncertainty as to how a new digital product will perform, in comparison to more conventional products: to demand too high a standard could therefore prevent developing digital content being properly tested on the market. As we discuss below we think that in some cases people do expect minor bugs in certain software (e.g. games) and will still consider that the software is of a satisfactory quality even with these bugs. It is important not to impede innovation by creating inappropriate liabilities in this area.
- 7.26. 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 provided about the digital product before purchasing, since they do not generally have an opportunity to try out the digital content product on their devices beforehand.

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<sup>118</sup> To be published summer 2012.

### **How is digital content treated at European Level?**

In October 2011 the European Commission published a proposal for an optional Common European Sales Law (CESL) that includes some specific, sales-related rules for contracts for the supply of digital content. 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. The CESL proposal puts digital content in its own category but essentially treats contracts for the supply of digital content the same way as contracts for the sale of goods, with some modifications. One of these modifications provides that digital content is not considered as sub-standard simply because more updated digital content has become available after the conclusion of the contract. Another modification is to provide that the only remedy available for sub-standard digital content which is not provided in exchange for money is damages. We refer to the CESL where appropriate in this chapter.

The Consumer Rights Directive (CRD) also covers digital content. This Directive has completed negotiations and must come into force in all Member States by June 2014. It provides a definition of "digital content" that we will be adopting for our proposals but also provides that digital content on a disk or other tangible medium should be treated as goods. Despite its title, the CRD has very little to say about the rights to quality for consumers, but it does set out what information traders of digital content need to give to consumers before selling the digital content.

- 7.27. 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.
- 7.28. It should also be noted that digital content and technologies are evolving rapidly, with new types of digital content and ways of accessing digital content being developed all the time. As such it is important that our proposals are future proof. To achieve this we try to use a principle based approach and refer to specific technologies only in explanatory examples.
- 7.29. We think that our proposals give proper consideration to these issues but throughout the consultation we are asking for views as to whether we have got the balance right.

## **Cross border purchases of digital content**

- 7.30. Arguably, digital content is particularly easy to buy and sell across borders (subject to intellectual property copyright provisions). We intend that our proposals as to quality will not be able to be contracted out of, ie a business will not be able to say that a consumer cannot claim the rights. Even if another country's laws apply, if the trader pursued or directed their activities to the UK a consumer living in the UK will still be covered by our proposals.
- 7.31. Pursuing or directing activities might, for example, include having a website translated into English or with a UK web address from which a consumer in the UK can purchase digital content in sterling.



### The growing digital content market

The UK has a high penetration of internet access; Ofcom's Communications Market Report 2011<sup>119</sup> 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%).<sup>120</sup> 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 months<sup>121</sup>.

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-reader<sup>122</sup>) 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 olds<sup>123</sup>), also indicate a growing market for digital content.

In terms of consumer spending on digital content, Gartner estimate \$200 billion was spent globally on content and software in 2010<sup>124</sup>. 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.

Cloud computing is expected to drive future trends in digital content usage. Spending on public cloud services is expected to grow five times faster than overall IT enterprise spending (19 percent annually through 2015)<sup>125</sup> while the personal cloud is expected to eclipse the PC as the hub of consumers' digital lives by 2014.<sup>126</sup>

<sup>119</sup> Ofcom Communications Market Report: UK, 4 August 2011, [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr11/UK\\_CMR\\_2011\\_FINAL.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr11/UK_CMR_2011_FINAL.pdf)

<sup>120</sup> Ibid.

<sup>121</sup> 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](http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf)

<sup>122</sup> Ofcom Communications Market Report: UK, 4 August 2011, [http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr11/UK\\_CMR\\_2011\\_FINAL.pdf](http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr11/UK_CMR_2011_FINAL.pdf)

<sup>123</sup> Ibid.

<sup>124</sup> 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.

<sup>125</sup> Gartner Press release, October 17, 2011 <http://www.gartner.com/it/page.jsp?id=1824919>

<sup>126</sup> Gartner Press release, May 8, 2012 <http://www.gartner.com/it/page.jsp?id=2008517>

## The Problem

7.32. 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 detriment<sup>127</sup>, 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 traders as to how a court may interpret the current law, and does not help underpin innovation and promote competition in the digital content market.

## Current legal situation

7.33. Research has shown that there are significant legal uncertainties around consumer rights in digital content transactions. A recent legal research paper commissioned by BIS from Professor Bradgate examined core consumer protections and 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 reasonable expectations as to quality.<sup>128</sup>

7.34. This analysis considered the position of digital products provided on a tangible medium (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.

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<sup>127</sup> 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](http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf)

<sup>128</sup> 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>

- 7.35. As explained previously when a person buys something from another person, whether or not anything is written down, a contract is created. The way our supply of goods and services legislation works at present is by implying terms into the contract. In relation to the sale or supply of goods, seven terms are implied into the contract for the protection of the buyer, whereas there is only one term implied into a contract for the supply of services which deals with the standard that the service must meet.
- 7.36. It seems that there is a conceptual difficulty with finding that software – essentially data which is not tangible in the sense that you can touch it – can be goods. There is also a tendency to think that if something is not goods, it must be a service – but again many digital content products do not obviously fit into this category either.
- 7.37. This uncertainty is important as different legal consequences are attached to a consumer contract depending on whether the transaction relates to goods or services (see Box 27).

Box 27

### **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 goods or services. 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 care. The supplier of services is only liable if a breach of the duty of reasonable skill and care is proven. 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.

- 7.38. 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. Professor Bradgate 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 into the contracts but use different methods for doing so (see Box 28).

### Case Law in the UK

The leading English case on whether software can be “goods” was decided in 1996, well before the current tendency to download digital content. In that case, the Court of Appeal found that a computer program could not be “goods” and therefore if the software is defective the statutory protection for buyers of goods does not apply; however, the judge continued that a disk on which a computer program is supplied could be goods and if the disk is sold or otherwise transferred to the buyer and the program on it defective then the statutory protection for goods would apply.

In this case, the disk was not sold – an employee of the software company installed the software, taking the disk with him when he finished - and so the statutory protections did not apply<sup>129</sup>. However, the Court of Appeal suggested that the purchaser of the software would have still been protected by a term implied at common law (“judge made” case law). And in any event all of this was not directly relevant to the issues in the case because the Court found that in fact the defendants were in breach of an express term of the contract – so that the plaintiffs did not have to rely on implied terms at all.

This case is relatively old (considering the advances in the ways software can now be made available, for example by cloud access) and has been criticised for essentially elevating the physical medium in which the digital content is supplied (the disc) above the digital content itself. It also results 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 entitlements if the programme proves faulty.

Another case<sup>130</sup> has proceeded on the basis that a contract for the design, creation and supply of bespoke computer software is in fact the provision of a service. In yet another case<sup>131</sup>, a Scottish court considered sale of software on a disk to be a *sui generis*<sup>132</sup> contract (some characteristics of a sale of goods/services, some of a licence).

In other cases<sup>133</sup> judges have been willing to find that hardware and software supplied together can fall within the meaning of “goods”.

<sup>129</sup> *International Computers Ltd v St Albans District Council* [1996] 4 All ER 481

<sup>130</sup> *Salvage Association v CAP* [1995] FSR 654

<sup>131</sup> *Beta Computers (Europe) Ltd v Adobe Systems Ltd* [1996] SLT 604

<sup>132</sup> A legal classification that exists independently of other categorizations because of its singularity or due to the specific creation of an entitlement or obligation

<sup>133</sup> *SAM Business Systems v Hedley* (unreported)

As a result it is unclear what rights are available to consumers for digital content and what they can do about it when things go wrong. This is particularly the case in relation to digital content products supplied wholly in intangible form such as when downloaded, streamed or made available through the cloud (see Box 29).

Box 29

### Digital Content – Means of access

Digital content can be transferred or accessed in a number of different ways. These include:

**Tangible medium** – e.g. written onto a CD or DVD which is then inserted into the consumer's device.

**Download**<sup>134</sup> – where a consumer transfers digital content from an online server to their own hardware. Downloading can often imply that the data sent or received is to be stored either permanently, or for a set amount of time. Software that is downloaded will often also need to be installed. The consumer will have to run a setup program (downloaded along with the software) that copies the necessary files to the required location and configures the necessary settings on the consumer's hardware.

**Stream**<sup>135</sup> - 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. In contrast to a download the data is used as it is received, while the transmission is still in progress and is not stored long-term.

**Cloud computing**<sup>136</sup> - There is no download of data to the consumer's hardware. The consumer can store, process or access digital content which is held on a third party server and accessed by the consumer from that server using an internet connection. The consumer will be able to access the digital content from multiple devices.

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<sup>134</sup> Downloading is defined in The Collins English Dictionary as: the process of transferring data or a program into the memory of one computer system from a larger one.

<sup>135</sup> Streaming is defined in The Collins English Dictionary as: the process of supplying data, audio, etc in real time over the internet.

<sup>136</sup> The NIST Definition of Cloud Computing is: 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>

7.39. As explained by Professor Bradgate:

*'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.'*

7.40. Professor Bradgate 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.<sup>137</sup>

7.41. 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 may be excluded from the application of consumer sales law<sup>138</sup>. 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.'*<sup>139</sup>

7.42. 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 have 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.'*<sup>140</sup>

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<sup>137</sup> 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>

<sup>138</sup> The European Consumer Centers' Network, The European Online Marketplace: Consumer Complaints 2008-2009, August 2010, p. 21. (Hereafter 'ECC-Net 2010').

<sup>139</sup> The European Online Marketplace: Consumer Complaints 2008 - 2009

<sup>140</sup> 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](http://www.digital-copyright.ca/petition/petition_en.pdf);

- 7.43. 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 wrong<sup>141</sup>. 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 traders to risk about how the law may be interpreted if a case were to reach court.
- 7.44. A legal analysis of different European Member States' law has confirmed that this lack of clarity is widespread in the EU, including in the UK<sup>142</sup>.
- 7.45. The lack of clarity around what entitlements a consumer has if things go wrong is likely to dissuade some consumers from even attempting to claim redress. A recent Which? online survey<sup>143</sup> 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 below, there is some hidden consumer detriment for digital content transactions, where consumers experience a problem but do not complain or seek redress.

### **Question:**

Q65. Do you agree that we should clarify consumer law for digital content transactions?

- 
- 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](http://www.publicknowledge.org/pdf/citizens_guide_to_drm.pdf).

<sup>141</sup> For example a recent Which? online survey found that 62% of consumers who had experienced a problem with digital content did not claim redress while a further 19% were refused redress.

<sup>142</sup> 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](http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf)

<sup>143</sup> <http://conversation.which.co.uk/technology/download-refund-disappointing-faulty-app-store-itunes-android-market/>



## Consumer detriment

7.46. 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.'*<sup>144</sup>

7.47. The 8 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.

7.48. Table 6 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 6 – Incidences of consumer problems with digital content purchases

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

Source: Europe Economics for EC (2011)

<sup>144</sup> 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](http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf).

## Causes of Detriment

7.49. Table 7 shows the types of problems that consumers are experiencing in digital content.

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

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

Source: Europe Economics (2011)

7.50. The three main issues experienced by consumers purchasing digital content and identified by Europe Economics were due to information provision and quality of and access to digital content.

## Information Issues

7.51. Information issues were identified as 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 performance, most obviously where technical compatibility is an issue, such that consumers are not made aware of the minimal technical requirements for operating the digital content, or where this information is complex or incomplete.

7.52. '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. 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.

7.53. These findings are supported by recent research by the University of Amsterdam, which finds that information asymmetries exist between traders 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<sup>145</sup>. 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 7 above.

7.54. A study by Consumer Focus that looks at consumer experiences when buying digital content online 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.'*<sup>146</sup>

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<sup>145</sup> 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](http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf)

<sup>146</sup> 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>

## Quality Issues

- 7.55. The Europe Economics report also found some consumer issues directly related to the quality of digital content. 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%).<sup>147</sup>
- 7.56. A recent survey by Consumer Focus reported 16% of respondents who had purchased digital content in the last 12 months stated that they had had a problem with a digital download.<sup>148</sup> A recent Which? online survey<sup>149</sup> showed that 43% of people that had bought a download had been disappointed.
- 7.57. 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".*<sup>150</sup>
- 7.58. 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. The paper claims that some businesses deliberately downplay quality in complex terms and conditions because where a consumer has been informed about a usage restriction they may consider that this restriction can no longer be a basis for claiming that the digital product is not "fit for purpose" or is "faulty". The paper argues that manufacturers or traders of digital content can use complex information to reduce their own potential liability by strategically informing consumers and lowering their legitimate expectations. The paper concludes that, "consumer information can result in a creeping degradation of traditional user freedoms" where businesses gradually reduce the standard of what a

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<sup>147</sup> 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](http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf).

<sup>148</sup> Not yet published.

<sup>149</sup> <http://conversation.which.co.uk/technology/download-refund-disappointing-faulty-app-store-itunes-android-market/>

<sup>150</sup> 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](http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf)

consumer can reasonably expect. They conclude that this provides a justification for mandatory substantive rules.

- 7.59. 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, and increasing consumer confidence.

### Access Issues

- 7.60. 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 supplier's 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.
- 7.61. This gives rise to the complex issue of how far business liability for "faulty" digital content should be linked to liability for faulty service provision around its "delivery" or "accessibility" or "installation". We will discuss this in more detail below.
- 7.62. Longer term access restrictions can be caused by issues with interoperability, functionality and technical protection measures (see Box 30) 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 consumers in certain countries being unable to access digital content from some providers.

### Functionality and Interoperability

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.

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.

Technical protection measures - This term often denotes a measure primarily aimed at preventing or restricting access to or copying of protected digital content. Digital Rights Management systems (which restrict access or copying that is not in compliance with the terms set out by the rights holder) and Region coding (which prevent the playing of digital content from one region/country in another) are examples of such protection measures

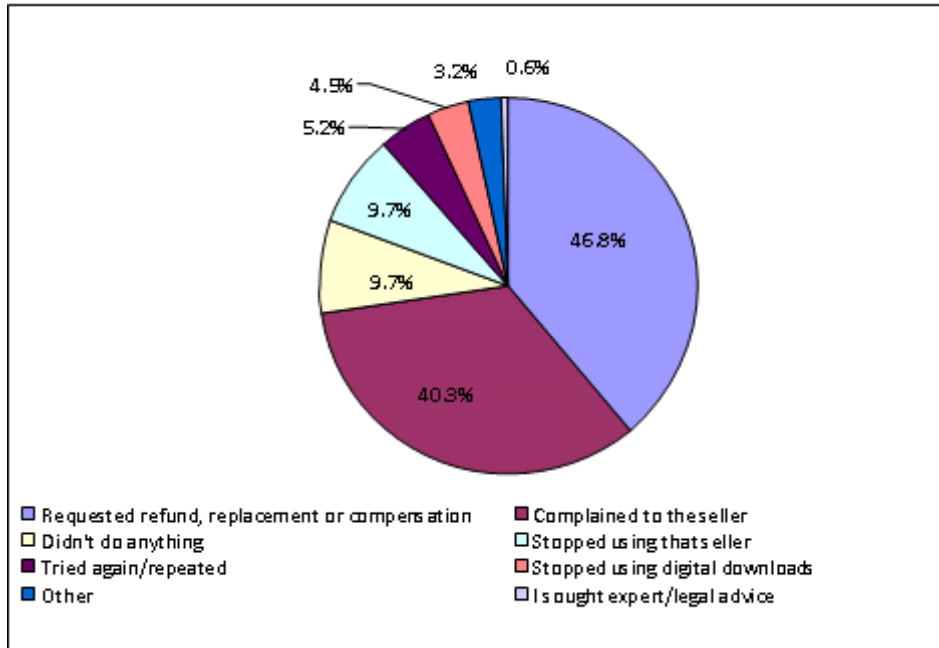
## Consumer behaviour and expectations

- 7.63. A recent survey by Consumer Focus<sup>151</sup> found that of those consumers who experienced a problem with digital content, 46.8% requested redress and 40.3% complained to the seller, whilst 9.7% did not complain but stopped using that seller and 4.5% stopped using digital content altogether, a further 9.7% did nothing (see Chart 1). The main reasons that 32% of consumers did not take action were uncertainty about how to obtain redress (60%) and the low value of the download (40%).
- 7.64. Hardly any consumers sought expert or legal advice, indicating that most consumers that complained accepted whatever redress the business was prepared to offer, without taking it any further. This may indicate that many sellers of digital content are offering fair redress despite the uncertainties of the law, or that consumers are suffering detriment when refused redress but are not prepared or confident to take it any further.

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<sup>151</sup> Not yet published

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



*Consumer Focus survey, not yet published*

7.65. 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.'*<sup>152</sup>

7.66. 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.

7.67. The terms and conditions of many digital content traders may also put consumers off from seeking redress for faulty or sub-standard digital content. A recent Which? investigation looked at the refund policies and terms of sale for popular download traders including iTunes and Amazon. They summarised 7 out of 9 policies they looked at, as saying 'downloads are not refundable'. Interestingly however, in reality mystery shoppers were able to get some kind of reimbursement in almost 80% of cases. Which? concluded

<sup>152</sup> Consumer detriment: Assessing the frequency and impact of consumer problems with goods and services, April 2008, Office of Fair Trading

that digital content traders were using their own discretion to judge whether to refund a download purchase.<sup>153</sup>

- 7.68. 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 trader<sup>154</sup>. Of course this leaves the consumer vulnerable to any seller of digital content that denies them redress, even when the product is faulty, with the further risk that such a consumer may become disenchanted with that form of digital content altogether.
- 7.69. 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<sup>155</sup> 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.

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<sup>153</sup> <http://conversation.which.co.uk/technology/return-download-for-refund-app-ebook-mp3/>

<sup>154</sup> 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>

<sup>155</sup> Not yet published.



Table 8: Consumer expectations of remedies for faulty digital downloads

<b>Remedies</b>	<b>Number</b>	<b>Proportion</b>
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%
<b>Baseline</b>	<b>961</b>	-

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)

- 7.70. Where consumers expect to receive redress that the business does not think it is obliged to provide, there is a risk to business of time and money spent on unnecessary disputes and also a reputational risk to business if they decline to provide that redress. There is also a risk that, when consumers do experience a problem and are unable to claim the redress 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.
- 7.71. Providing clarity to business and consumers as to what the consumer is entitled to if the digital content is faulty or sub-standard within the Consumer Bill of Rights should minimise disputes caused by the existing gap between consumers' current expectations and the law.

## Why act now?

7.72. The Consumer Bill of Rights aims to update and simplify UK consumer law. To carry out such an overhaul of consumer rights but to ignore the uncertainty surrounding digital content would be inconsistent. Updating the law on goods, services and digital content in a single Bill and at the same time as implementing the Consumer Rights Directive (CRD) will allow for a coherent, aligned and useable complement of consumer rights. Laws to implement the CRD have to be adopted and published by the 13<sup>th</sup> December 2013 at the latest and should apply from the 13<sup>th</sup> of June 2014. Our intention is to implement the CRD alongside the planned Consumer Bill of Rights. In addition, the UK taking a lead on consumer rights for digital content transactions will enable the UK to influence forthcoming European proposals and OECD guidance.

### **Question:**

Q66. Can you provide us with any further evidence of the impact / costs of the current unclear legal framework on business or consumers?

E.g. for business – cost of dealing with complaints or dispute resolution?

E.g. for consumers – any further evidence of consumer detriment?

## Proposals for Reform

7.73. We present three options for reform.

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

7.74. There is no true 'do nothing' option as the minimum action required is to implement the CRD. The CRD is in many respects a "maximum harmonisation" directive, which means that the UK does not have the option of making different rules to those in other Member States. As explained above, the CRD does not focus on the standard of quality that these products must meet but its provisions do cover goods, services and digital content and therefore it does have implications for digital content transactions. There will be a separate consultation dealing with the proposals for implementing the provisions of the CRD. Here we will only set out the parts of the CRD that are relevant to digital content.

## CRD definition of digital content

7.75. The CRD includes a definition of digital content. Article 2 (11) provides the following definition of digital content:

*'digital content means data which are produced and supplied in digital form'.<sup>156</sup>*

7.76. 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<sup>157</sup> nor as service contracts.'<sup>158</sup>*

## CRD requirements for digital content

7.77. **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.<sup>159</sup>

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<sup>156</sup> 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>.

<sup>157</sup> To note: sales contracts are essentially goods contracts under the CRD

<sup>158</sup> 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>.

<sup>159</sup> See here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>

7.78. *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. This right is not dependent on the digital content being sub-standard – the idea behind it is if a consumer purchases something without proper opportunity to view it, then they should have some time in which they can change their minds. 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.

### Rights as to quality

7.79. Despite its name, the Consumer Rights Directive does not set out what rights consumers have regarding the quality of digital content, goods or services, except to the extent that incorrect pre-contractual information may be a breach of contract (see below paragraph 7.105). Therefore if we were only to implement the CRD, the quality standards that digital content transactions should meet 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 goods but does not set out or indicate what rights exist to quality for intangible digital content nor what remedies the consumer is entitled to if the digital content is of a sub-standard quality.

#### **Questions:**

Q67. Do you think the Consumer Rights Directive is sufficient in itself to address the issues relating from lack of clarity of consumer rights in digital content?

Q68. Do you think that digital content supplied on a tangible medium such as a disk should be covered by the same set of digital content quality rights and remedies as intangible digital content, such as downloads?

Q69. Do you think reasonable consumer expectations as to quality would differ between digital content that is transferred to a consumer's device and digital content that is held on a 3rd party server?

## Costs and Benefits of Option 0

- 7.80. When implemented, the CRD information provisions will ensure that traders of digital content provide clearer and more comprehensive information to the consumer prior to purchase.<sup>160</sup> 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 insufficient 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.
- 7.81. The CRD information provisions will help address consumer detriment caused by consumers not being informed of compatibility issues, digital content that is poorer quality than the information suggests and additional / unclear charges for digital content.
- 7.82. There will be some costs to business in providing the stipulated pre-contractual information, this will include the costs of finding, updating and supplying the information. 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. There will also be certain costs to business if they fail to provide sufficient or correct pre-contractual information<sup>161</sup>.
- 7.83. 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. 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 as long as the trader warned the consumer that the right to withdraw would be lost. Even for digital content on disc, the right to withdraw from distance or off premises contracts will lapse once the wrapper has been removed making the right of very limited value for digital content

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<sup>160</sup> See paragraph 7.78

<sup>161</sup> As set out in the consultation on the Consumer Rights Directive (to be published summer 2012), in addition to existing enforcement we are proposing a specific injunctive regime, similar to that which operates under the current Distance Selling Regulations.

purchases altogether. It is possible that there would be some small costs to business 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.

## Options 1 and 2 – fundamental principles

- 7.84. Although the CRD addresses a proportion of existing detriment to do with information failures it does not provide the consumer with any rights to quality for digital content and therefore fails to address a significant proportion of existing detriment.
- 7.85. We think it will be easier for consumers and businesses to use a clarified framework for digital content if it bears similarity to what they are already familiar with. In designing our proposals we have therefore tried to align as far as possible with the existing consumer rights framework, in particular the framework as it applies to the sale and supply of goods. Also we have considered the framework applying to the supply of services.

### ***Question:***

Q70. Do you agree that we should align our proposals for digital content as far as possible with the existing consumer rights framework?

- 7.86. However, as discussed above we also recognise specific characteristics that are unique to digital content and require certain adaptations to be made to the existing consumer rights law. For this reason, and to ensure that if necessary the law on digital content can be updated more easily in the future, we propose a bespoke digital content category.

### ***Question:***

Q71. Do you agree that digital content should be treated as a separate and bespoke category within the Consumer Bill of Rights?

7.87. In both of the remaining two options we would define digital content using the CRD definition;

*'digital content means data which are produced and supplied in digital form'.<sup>162</sup>*

7.88. We have given considerable thought to what rights and remedies would be best applied to digital content. Overall, our legal analysis<sup>163</sup>, as well as that of the European Commission<sup>80</sup> and the stance taken by other countries that have clarified the status of digital content already in their consumer law<sup>164</sup>, is that the expectations of quality for digital content align better with those currently available for the sale of goods rather than those currently available for the supply of services.

*'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.'<sup>165</sup>*

7.89. As demonstrated in the survey by Consumer Focus discussed above, it is also clear that consumer expectations as to their rights and remedies for digital content transactions align more with those currently available for the sale of goods. Aligning the law with consumer expectation (within reason) is likely to minimise the costs for business arising out of any gap between real business liabilities and perceived consumer rights.

7.90. We therefore clarify, in both options 1 and 2 that the rights that a consumer can expect for sale or supply of digital content are by and large in line with those which currently apply to goods. Briefly these quality standards are that the digital content should meet the description given, correspond with any sample and be of satisfactory quality including being fit for purpose. We discuss these in more detail below.

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<sup>162</sup> 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>.

<sup>163</sup> Ibid.

<sup>164</sup> 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.

<sup>165</sup> 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](http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf)

- 7.91. We also consider the rights and remedies that should apply to the services that surround digital content. As discussed above many forms of digital content cannot be accessed in isolation but require the supply of one or more services for their use. There are parallels here with the supply of mixed goods and services which are discussed in Chapter 6 (see Box 31) and in the interests of simplicity we explore whether we can align with these proposals.

Box 31

### **Supply of mixed goods and service contracts**

Under existing law on the sale of goods, as outlined in Chapter 6 above, there is specific provision made for installation services. According to this, broadly speaking, if a business sells goods such as a washing machine, together with an installation service, and the goods, when installed, do not work, the consumer in practice has the right to the goods' remedies of repair or replacement, followed by a reduction in price or returning the goods and getting a refund, regardless of whether the problem lies with the goods themselves or with the faulty installation. The intention is to empower the consumer to get a fair outcome, in a situation where they might be unable to determine where the fault lies and would otherwise therefore be at risk of being denied effective redress.

In Chapter 6 above, we set out a discussion of whether an "outcome-based" or "strict liability" standard should be applied to some or all services to a consumer's property such as installation services or repair, maintenance, storage or cleaning services, for example. The logic in favour of such a change is that the consumer expects a clear outcome (that the goods work, are safe, clean, etc.) whenever he entrusts his property to a business for such a purpose. The service is bound up with the goods themselves and the current law, which obliges consumers to prove an absence of reasonable care and skill in performing the service, may leave the consumer disempowered as they may lack the information or expertise to prove such fault.

On the other hand, the service provider will often be a separate business from the provider of the goods, especially for services to property other than installation. One risk is that the service provider will incur a liability under an outcome-based quality standard, even if the problem lies with the goods. Another risk is that service providers would respond to any outcome-based liability standard by refusing to perform or raising the price of risky repairs or other services or by attempting to so heavily qualify consumer expectations that their liability would not arise.

- 7.92. We believe that these digital content services fall into two categories which we define as follows: "related services" such as the download or streaming of digital content and "enabling services" such as internet provision. "Enabling services" are essential for the delivery of digital content to the consumer, but operate independently of the supply of any individual digital content product or "related service". The Government does not see these as "services to property" within the meaning set out in Chapter 6, rather they are "pure"



services which stand alone and facilitate access to the internet. The service providers are often not the same companies that supply the digital content itself. “Related services” are integral to the proper functioning of the digital content. These “related services” are often offered by the supplier of the digital content itself and can be seen in many ways as intrinsic to the digital content product: often the consumer has no choice but to accept these “related services” in order to properly enjoy the digital content itself. These “related services” can be seen as services to property within the meaning of the discussion in Chapter 6.

- 7.93. The differences between Options 1 and 2 relate to the scope of what is covered by the proposals – how “related services” are treated - and the remedies available if one of the quality rights has been breached. We propose the same set of quality rights would apply to the digital content in both options and that “enabling services” are not within scope of either option. In Option 1 we apply rights and remedies solely to digital content and treat related or any other service the same as all other types of service. In Option 2, as well as rights and remedies that would apply to digital content, we propose specific rights and remedies that would apply to “related services”.

### ***Question:***

- Q72. Do you agree with the principles we have based our digital content proposals on? In particular do you agree that “related services” and “enabling services” could be distinct from digital content and from each other?

## **Option 1**

### **Summary**

- 7.94. All services (including the services surrounding digital content) will automatically be subject to the liability standards of services as described in Chapter 6. In Option 1 we do not propose making any changes to this. This will mean in each case the digital content will be judged against the digital content quality rights (statutory guarantees) proposed below, while the services surrounding, using and accessing that digital content will be judged using the services quality standard of reasonable care and skill and the proposed statutory services remedies set out in Chapter 6. Under Option 1 there is also no short term right to reject (i.e. no option to delete faulty digital content and get a refund), but the consumer could ask for a repair or a replacement of the digital content. If that cannot be done within a reasonable

period of time or without significant inconvenience to the consumer, the consumer could return the digital content and get a refund or keep the digital content but at a reduced price. Figure 1 provides a diagrammatic representation of option 1.

Figure 1 – Scope of option 1

<b>Digital content</b>	<b>All Services</b>
Digital content rights	Services rights
Statutory remedies (based on current remedies available for goods, minus the right to reject)	Services remedies
For example:	For example:
<i>Games</i>	<i>Access to software supplied in the cloud</i>
<i>Videos / films</i>	<i>Storage of consumer's own digital content in the cloud</i>
<i>Text e.g. e-books</i>	<i>Delivery of digital content e.g. by download</i>
<i>Computer programs</i>	<i>Access to game online</i>
<i>Apps</i>	<i>Updates to digital content e.g. for antivirus or operating systems</i>
<i>Music</i>	<i>Streaming of digital content</i>
Whether supplied on a tangible or intangible medium	<i>Upkeep to virtual worlds</i>

## Rights as to Quality for Digital Content

- 7.95. In line with the other proposals in this consultation, the Government proposes not to use a system of implied terms but rather the adoption of a system of statutory guarantees which clearly state the quality standards that digital content must meet and the remedies available to the consumer if these guarantees are breached. The guarantees would still operate as contractual protections but would be more accessible and clear to the consumer.
- 7.96. For the reasons discussed above we align consumer rights for digital content with those rights currently applied to goods but with some modifications to account for the unique nature of digital content. Again as with goods, the person liable would be the person who sells the copy of the digital content to

the consumer (the trader) rather than the manufacturer (where these are different businesses). The rights, as with goods, would focus on the quality of the end product, meaning the trader is strictly liable if the digital content is sub-standard. As with goods, a consumer would need to provide a trader with evidence that one or more of the statutory rights had been breached. The trader would not be able to exclude or limit their liability in relation to these statutory rights.

- 7.97. We propose the rights as to quality for digital content would be based on the rights applicable to goods as described in Chapter 5 above, but with modifications as follows:

### **Rights as to title i.e. that the seller has the right to sell the digital content**

- 7.98. As explained in Chapter 5, the Sale of Goods Act 1979 (“SOGA”) provides that the seller must have the right to sell the goods. This means that the seller must either own the goods or have the owner’s permission to sell them – and selling the goods would not be breaching rights (such as copyright) that other people might have over the goods. In the context of digital content, we will clarify that the guarantee will only apply to such title that the seller has the right to transfer. Usually this will be 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.’

#### ***Question:***

- Q73. Do you agree that the provisions as to passing of limited title work for Digital Content ?

- 7.99. 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 think a more appropriate term would be quiet or “uninterrupted” use of the digital content. We also propose to clarify that quiet use of the digital content would have to be in line with the lawful rights and restrictions given in the licence agreement.

- 7.100. Another issue we have been considering relates to the ability of traders to change or update digital content post-sale. In the majority of cases this is to the benefit of consumers and often includes important updates to the digital content. If a consumer expects to be able to carry on using the digital content, they have a responsibility to allow the business to make these necessary updates.
- 7.101. There have been situations, however, where traders or manufacturers have removed certain aspects of digital content or made updates that have negatively affected the content's functionality. In 2010, a company provided an update to one of its games consoles that removed the consumer's ability to run "other" operating systems. The aim behind this update was to prevent hacking. The update was optional but if consumers chose to opt out they were prevented from using other features of the games console including the company's network, newer games and Blu-ray movies. This update affected a number of consumers who felt that a feature which they had paid for and valued had been subsequently removed. This is a situation unique to digital content. It might be necessary to introduce a requirement that for digital content, quiet use includes a guarantee that the consumer must consent to any interference that could affect their use of the digital content.

**Question:**

- Q74. Do you think that consumers should be asked to consent to any interference that could affect their use of the digital content? What impact would such a requirement have on businesses supplying necessary updates or otherwise needing to manage the digital content post-purchase?

- 7.102. The guarantee as to title also raises another issue, specific to digital content transactions, related to copyright. There have been a number of cases where digital content has been sold to a consumer where the seller did not have the right to sell that digital content. The most well known example occurred in 2009, when an e-book trader sold copies of an e-book that they did not have the rights to sell. On discovering this, the titles were remotely deleted from consumers' e-readers and the purchase price was refunded. Notes and annotations that consumers had made were left in a separate file but were unusable without the e-book they were linked to. Two cases were filed regarding this which were settled out of court. The terms and conditions of the trader have now been updated to say that the trader will not remotely delete or modify works unless removal is required by judicial or regulatory order or for security reasons or 'the user consents to such deletion or modification' or

'requests a refund for the work'<sup>166</sup>.

7.103. Where the consumer has purchased and used digital content that the retailer did not have the right to sell, the consumer is using the digital content in breach of copyright. The consumer may be innocent or complicit in such a case, but in either scenario the consumer should be entitled to a remedy under consumer law from the retailer. The only remedy that would be available if this right was breached would be reimbursement in full for any payment they had made to the retailer, because the contract would have been invalid. Under copyright law, the consumer would then clearly have to delete or return the digital content or allow the retailer (or even perhaps the copyright holder) to do so. Nothing in this consultation is intended to change existing law on copyright.

7.104. The consumer may still, in such a scenario, be liable to the copyright holder for breach of copyright, although there is already some protection for consumers who unwittingly purchase products in breach copyright.<sup>167</sup>

**Rights as to sale meeting description i.e. that the digital content should correspond with the description given.**

7.105. Another right in relation to goods supplied is that they will meet the description given. As described above, the Consumer Rights Directive introduces a requirement that the trader must inform the consumer in advance of the relevant interoperability of the content and the functionality, including the absence or presence of any technical restrictions, for instance protection via Digital Rights Management or region coding (see Box 30). We think that for all contracts the pre-contractual information required by the CRD would be incorporated into the contract, and that therefore if the digital content did not fit with what was said in the pre-contractual information, this would be a breach of an express term of the contract. However, we also intend to make clear that if the digital content did not meet what was set out in the pre-contractual information, it would be a breach of the statutory guarantee of digital content meeting the description.

7.106. Technical protection measures (TPMs), can affect the functionality and interoperability of digital content and hence consumers' use of it. We are considering whether failure to disclose applicable TPMs to the buyer before sale would result in (or provide evidence for) the digital content not meeting its description. In any event, we would consider that failure to disclose

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<sup>166</sup> [http://assets.bizjournals.com/cms\\_media/pdf/KindleCase1.pdf?site=techflash.com](http://assets.bizjournals.com/cms_media/pdf/KindleCase1.pdf?site=techflash.com)

<sup>167</sup> s.97 of the Copyright Designs and Patents Act 1988

relevant TPMs which caused damage to a consumer may constitute a breach of the Consumer Protection from Unfair Trading Regulations 2008<sup>168</sup> and a misleading practice giving rise to specific consumer rights in private law on misrepresentation. The Government is intending to clarify those rights in its wider Consumer Bill or Rights but they are not addressed in this Consultation.

### **Rights as to quality and fitness i.e. that the digital content is of satisfactory quality**

7.107. Perhaps the most well known right that buyers have in relation to goods is that the goods must be of satisfactory quality which includes where appropriate that the goods are fit for any particular purpose. We intend to include the same right – with certain modifications, in relation to digital content.

7.108. 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 (as the price paid will affect a reasonable person's expectations as to quality) and all the other relevant circumstances (such as public statements on the specific characteristics of the digital content).

7.109. 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.

7.110. As discussed earlier, these quality standards address technical issues with the digital content such as illegible or missing text in an e-book. The quality standards are not intended to be used for any subjective judgements of the digital content for instance, the game is not exciting enough or the e-book isn't interesting.

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<sup>168</sup> SI 2008/1277

*“Bugs” and expectations as to quality*

7.111. In the context of digital content, bugs are considered standard in certain types of digital content on issue of a new version (e.g. software and games)<sup>169</sup>. As such we propose that, in some circumstances, a reasonable person would expect a certain amount of bugs and the existence of these bugs would not necessarily be a breach of the guarantee as to quality and fitness for purpose, notwithstanding the fact that “freedom from minor defects” is something that can be taken into consideration in assessing whether digital content is of satisfactory quality. An alternative option would be to remove the ‘freedom from minor defects’ aspect of quality (s.14(2B)(c) of SOGA) specifically and only for digital content. However, this is less attractive because with certain types of digital content (such as music or films) consumers would expect no bugs to be present on purchase. Another option would be to leave the ‘freedom from minor defects’ in for digital content, but to explain in accompanying guidance that dependant on the circumstances, the existence of these bugs would not necessarily be a breach of the guarantees as to quality and fitness for purpose. This issue is looked at in more detail when considering remedies (see the section on ‘repair and replacement’ remedies below).

**Question:**

Q75. Should we remove the ‘freedom from minor defects’ aspect of quality (s.14(2B)(c) of SOGA) specifically and only for digital content? Should we do so for certain types of digital content, if so which?

7.112. We have also been considering the exact meaning of the ‘safety’ aspect of quality (s.14(2B)(d) of SOGA) and whether this relates to personal safety only or also the safety of possessions. The original meaning of the term ‘safety’ was probably that the goods would not cause personal harm but a reasonable person would also expect that digital content would not cause damage to their other possessions such as computer software or hardware.

7.113. Similarly, “durability” in the digital context might be quite different from that of goods. The digital content market is fast moving with new technologies taking over from existing technologies and in some cases replacing them

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<sup>169</sup> 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>

altogether. One of the modifications proposed in the Common European Sales Law (CESL) proposal provides that digital content is not considered as sub-standard simply because more updated digital content has become available after the conclusion of the contract. Since the rights proposed here would only apply to digital content on the day of purchase we do not think it is necessary to say that updated versions of digital content do not render previous versions unfit for purpose.

**Questions:**

- Q76. Should we clarify that the 'safety' aspect of quality (s.14(2B)(d) of SOGA) means the safety of a computer or other device used to access digital content as well as personal / physical safety?
- Q77. Do you agree that we do not need an express statement on durability in respect of new versions as the European Commission have proposed for CESL?

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

- 7.114. Again, a similar right already exists in relation to the sale or supply of goods. This is clearly an important right in the digital content context where people may try a demo of the digital content before buying the full version. More specifically we would provide that the quality of the full version 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.



Box 32

**Rights as to quality for digital content**

In summary the rights we are proposing for digital content are that:

**The seller must have the right to sell the digital content and should transfer only such title as he may have.** We would clarify that the "title" that passes will be the title that the seller has the right to transfer. Usually this will be the right to the exclusive use of the copy of the digital content but not (usually) the copyright ownership. We will also clarify that there would also be a guarantee as to "quiet use" of the digital content but that use of the digital content would have to be in line with the lawful rights and restrictions in the licence agreement.

**The digital content must meet the description.** Where digital content did not meet what was set out in the pre-contractual information, it would be a breach of this guarantee. We are considering whether failure to disclose applicable Technical Protection Mechanisms to the buyer before sale would result in (or provide evidence for) the sale not meeting description.

**The digital content must be of satisfactory quality, meaning it should meet a reasonable person's expectations.** Criteria that can be used to judge satisfactory quality include fitness for purpose, appearance and finish, safety, durability and possibly freedom from minor defects, although we consider above the practicality of this final criterion for digital content.

**The digital content matches any trial version or demo**

**Question:**

Q78. Do you think that these rights to quality are broadly appropriate for digital content?

**Remedies for sub-standard digital content: what happens if things go wrong?**

7.115. In option 1 we propose the remedies available for sub-standard digital content would be:

- For faulty or sub-standard digital content, the trader must offer either a

**repair or replacement** of the digital content; or

- where repair and replacement are impossible or where repair or replacement has not taken place within a reasonable time or without significant inconvenience to the consumer<sup>170</sup> the consumer can require the seller to **reduce the purchase price (if they keep the digital content) or return the digital content and get a refund**. Liability can extend for up to 6 years (England) or 5 years (Scotland) (See chapter 5 above for a more exhaustive discussion of these remedies and our proposed clarifications to them).

### **Questions:**

Q79. Do you think these are suitable remedies for cases where sub-standard digital content has been supplied?

Q80. What impact would the clarification of these remedies have on consumers or business? Can you provide any evidence that would help us assess the likely impacts of our proposals?

e.g. What proportion of digital content transactions result in the consumer (a) requesting and (b) receiving a refund, a repair or a replacement?

e.g. What are the costs to business of providing a refund, a repair or a replacement?

7.116. **In contrast to the goods remedies, in this option, we are proposing that the consumer does not have access to a short term right to reject for digital content.** The “short term right to reject” is a right to return faulty goods and get a refund within a short period after purchase. Without the short term right to reject the consumer would only be able to ask for a repair or a replacement in the first instance, although a price reduction or 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.

7.117. As an alternative to invoking these statutory remedies, the consumer always has the option of pursuing the supplier for normal remedies for breach of contract. The remedy is usually one of damages (flexible monetary compensation for any foreseeable loss suffered as a result of the breach). If the seller has sold the digital content to the consumer where they had no right

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<sup>170</sup> Note that in line with our proposals in Chapter 5 above, the Government may stipulate a limit to the number of replacement or repairs that should always be considered as constituting “significant inconvenience to the consumer”. See Paras 7.119 - 7.127

to do so (in breach of the proposed guarantee as to title) they would only be entitled to money and not the other remedies of repair or replacement.

7.118. We should also mention the right to withdraw which is not the same as the right to reject/terminate. The right to withdraw is not a “remedy” in the usual sense, in that it doesn’t depend upon something being wrong with the digital content before a consumer can action it. For distance<sup>171</sup> and off premises<sup>172</sup> contracts the consumer also has the right to withdraw, which is a right, essentially, to change their minds, send back the goods (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. We discussed the right to withdraw under the CRD in relation to digital content above (See para 7.78).

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<sup>171</sup> In essence, a distance contract is one where the trader and consumer do not physically meet but agree the contract by using for example a telephone or the internet (See glossary for a full definition).

<sup>172</sup> In essence, an off premises contract is one where the trader and consumer do physically meet but not in the trader’s shop or other business premises(See glossary for a full definition).

## Repair or Replacement

- 7.119. In Chapter 5, which sets out our proposals in relation to the sale of goods, we have consulted on whether we should place a limit on the repair and replacement cycle after which the consumer can request a mandatory refund if they return the goods. There could either be a limit on the number of repairs or replacements that can be provided, or the length of time that the repair or replacement cycle can continue for.
- 7.120. Considering whether to apply a similar limit for digital content will be a complex issue, as patches, updates and bug fixes are such a common practice in the digital content market. To understand how such a limit could work for digital content it is important to establish what would qualify as a repair.

Box 33

### Repair of digital content

*Bug fixes:* A bug is an error, flaw, mistake, or fault in a computer program or system that produces an incorrect result, or causes it to behave in unintended ways. A change to a programme or system to permanently cure a bug is known as a bug fix.

*Updates:* Software updates are additions to software that can introduce new features or enhance the security of the software. The updates will update the consumers existing version of software, but does not upgrade it to the next version (if one exists).

*Patches:* This is a more general term that includes both updates and bug fixes, it generally refers to a piece of software designed to fix specific issues, or to update a computer program or its supporting data. Patches can fix security vulnerabilities, solve compatibility issues or introduce new features. Most major software companies will periodically release patches that correct specific problems in their software programs.

- 7.121. Firstly, to qualify for either a repair or replacement, the digital content must first be found to be “faulty” (i.e. not of satisfactory quality or not meeting the description). General updates provided by a trader or manufacturer would not be thought of as a repair in this circumstance and would not be affected by this proposal. In contrast, a bug which was significantly affecting the

consumer's use of the digital content would indicate that the digital content was not of satisfactory quality and the fixing of this bug could be counted as a repair. In this situation therefore, the number of such bug fixes a trader could provide (before the consumer could get some money back) could be limited under this option.

7.122. However, as discussed above, we think that bugs are considered to some extent standard in some forms of digital content on issue<sup>173</sup> 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 for purpose. If the bug that was fixed had not been affecting the consumer's use of the digital content, or the consumer had not identified the bug as an issue, it seems illogical to class this as a breach of the guarantee as to quality. If there is no breach then it would not give rise to the right to ask for repair or replacement etc and therefore any fixing would not be included within the limit of the number of repairs or replacements. Furthermore, we would not want to discourage the practice of providing bug fixes and would not want traders to think that because there was no statutory obligation to fix these minor bugs that they would not do it. We think that traders (or manufacturers) who currently provide bug fixes will continue to do so – to ensure that their product meets the highest standards, but would welcome views on this point.

**Question:**

Q81. Would our proposals impact on the likelihood of your business providing updates to digital content?

7.123. On the other hand, where a bug is significantly affecting the consumer's use of the digital content, for example a game, or there are a number of minor bugs which added together significantly affect the consumer's use of the digital content, the consumer could reasonably expect for these problems to be fixed within a reasonable time frame and without significant inconvenience.

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<sup>173</sup> 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>

- 7.124. The Government is therefore considering the need to distinguish between a bug which could be classed as minor, which does not significantly affect the consumer's enjoyment of the product, and one which is major and affects the substance of the product or the core expectation of the consumer. The former would not by itself cause a breach of the quality and fitness requirements, so any fixing of the problem would be voluntary, but the latter would breach the consumer's rights and fixing it would constitute a repair. Clearly this would be a difficult line to draw.
- 7.125. One solution might be to clarify what qualifies as a repair for digital content by differentiating between an automatic bug fix, supplied voluntarily by the trader or manufacturer and a fix or repair that is provided in response to a complaint or request from the consumer due to faulty or sub-standard digital content.
- 7.126. It should also be pointed out that even where a consumer has raised a complaint, they could still choose to accept repairs or replacements above any specified limit instead of terminating the contract and claiming a refund.
- 7.127. In Chapter 5, we propose various options for whether and how a trader can deduct an amount from the refund they give to a consumer when they return faulty goods following a failed cycle of repair or replacement. This deduction is to take account of the use a consumer has had of the goods before returning them (see paragraphs 5.131 – 5.156). Allowing businesses to continue to make "deductions for use" when paying refunds for goods should mean that consumers are not incentivised to cancel contracts when they believe that faults can be easily and painlessly repaired. We are therefore considering whether we should align the approach to deduction for use for digital content with the policy for goods. If deduction for use is continued it is likely there would be a minimum threshold of around £100. We think most digital content that consumers would buy would cost less than this and therefore the options for deductions for use are unlikely to apply to most digital content. This would mean for digital content that in those cases where the consumer is entitled to a refund, in line with the above policy we think they would usually get a full refund.

**Question:**

- Q82. Should we align the approach to deducting for use when calculating refunds for digital content with the policy for goods?

7.128. It may be argued that any limit on the number of repairs before consumers become entitled to reject the contract and claim a refund could potentially dissuade manufacturers from releasing games onto the market at an early stage in production and that this could have unforeseen affects on choice and innovation. But against this it might be claimed that as long as businesses explained to consumers that what they were purchasing was new and still being worked on, this would change consumer expectations and also what would be considered as satisfactory quality in the first place.

***Question:***

Q83. Would a limit on the number of repairs and/or replacements be useful for digital content consumers and practical for digital content traders?

## **Related services**

7.129. Where a consumer streams a film to their laptop and the sound quality is poor, it will be unclear to the consumer whether the digital content itself is at fault or whether there is an issue with the streaming process. Under Option 1, if the problem was with the digital content, the consumer could provide some evidence that the film was not of satisfactory quality and could demand redress. However, if the problem was due to the streaming process they would need to demonstrate that the digital content had not been delivered with reasonable care and skill.

7.130. In some cases, the division between the digital content and “related services” will be more obvious e.g. if the consumer has an e-book that is full of spelling mistakes it will be clear that the content is at fault, whereas when the digital content has not arrived it is more likely there has been a problem with the download in which case the trader could argue that they provided a download with reasonable care and skill and it would be difficult for the consumer to prove otherwise. The consumer would then need to investigate whether the problem was with their internet service provision or whether there had been an issue with the digital content provider supplying the download. Where there is an issue with the consumer’s internet service provision, the consumer would need to take this up with the internet service provider and not with the digital content trader. Where there is an issue with the digital content related service, the consumer would need to approach whoever had provided that service.

7.131. Box 34 provides an example of where a related service has prevented consumers from accessing and using their digital content.

Box 34

### Related services

A game manufacturer recently released the third instalment of their immensely popular game. In a bid to combat piracy, the game requires consumers to log on to the manufacturer's servers before they can enter the game and to remain connected to the internet throughout, even in single player mode. On the day of the launch of the game, the company's online infrastructure failed to cope with demand from consumers and the manufacturer took the decision to bring down their servers for emergency maintenance, thereby preventing consumers from playing the game. In this example there was no problem with the digital content but there was an issue with the related service. Under option 1 the consumer would have to prove that the manufacturer had not delivered this related service with reasonable care and skill.

### Question:

- Q84. What kind of proof could the consumer provide that the related service was not provided with reasonable care and skill?
- Q85. What issues do you see with how option 1, treating the services surrounding digital content as services, would work in practice?

## Option 2

### Summary

7.132. In option 2 we propose the same rights as to quality for digital content as described in option 1 (See box 32). In addition to the remedies described in option 1, **in option 2 we propose that the consumer would also have the remedy of a short term right to reject (with full refund) until they have accepted the digital content.** As with the current position in relation to goods, we propose the consumer must have a 'reasonable opportunity' to examine the digital content before they lose the right to reject. In line with the proposals in chapter 5, the Government proposes that this right would have to



be exercised within 30 days of the purchase of the item; and that the consumer must, in addition to showing evidence of a fault, prove that the fault existed on the day the contract was concluded.

- 7.133. This would mean, in the short term, a consumer who purchases sub-standard digital content could choose between a refund or a repair or replacement (in the first instance).
- 7.134. **Within the scope of option 2, we also consider what rights and remedies should apply to “related services”. We look at the arguments for applying a right to the digital content being of satisfactory quality once the related service has been performed.** We also propose that the remedies that apply to digital content/goods would also apply to the “related service” (we discuss this in the next section).
- 7.135. 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/unrelated services). These are examples, not an exhaustive list.

Figure 2 – The scope of option 2 proposals

<b>Digital content</b>	<b>Related service</b>	<b>Pure service and enabling service</b>
<p>Digital content rights (based on rights applying to goods but with adaptations)</p> <p>Statutory remedies (based on current remedies available for goods) including right to reject.</p> <p>For example:</p> <p><i>Games</i></p> <p><i>Videos</i></p> <p><i>Text e.g. e-books</i></p> <p><i>Computer programs</i></p> <p><i>Apps</i></p> <p><i>Music</i></p> <p>Whether supplied on a tangible or intangible medium</p>	<p>Digital content rights OR Services right ('reasonable care and skill')</p> <p>Statutory remedies same as for digital content (includes right to reject)</p> <p>For example:</p> <p><i>Streaming of digital content</i></p> <p><i>Delivery of digital content e.g. download</i></p> <p><i>Access to software supplied in the cloud</i></p> <p><i>Access to game online</i></p> <p><i>Updates to DC e.g. for antivirus or operating systems</i></p>	<p>Services rights</p> <p>Services remedies (currently damages; cf Chapter 6)</p> <p>For example:</p> <p><i>Storage of consumers own digital content in the cloud</i></p> <p><i>Internet service provision</i></p>

## Rights for digital content

7.136. In this option, for digital content we would propose the same rights as described in Option 1 (see box 32) but discuss two alternative proposals for the rights applying to the “related service” – see below.

## Remedies for digital content - Short Term Right to reject

7.137. In this option we propose that for faulty or sub standard digital content (content that does not conform with the rights proposed earlier in this

document), along with the remedies proposed in Option 1, the consumer would also have the remedy of a short term right to reject<sup>174</sup> (with full refund) until they have accepted the digital content. While we have included the right to reject as a remedy for faulty digital content within this option, we are still considering the practicalities of applying such a right for digital content and would welcome comments on this point.

7.138. Again, the unique nature of digital content means that this is not a straightforward decision. The concept of returning goods does not easily transfer to digital content since copies could be retained and any attempt to return the digital content to the trader could in fact result in another copy of digital content. For the purposes of digital content, this right might be better described as a right to an immediate refund for faulty digital content with an obligation to delete the digital content.

7.139. Considerations For and Against including a right to reject for digital content:

*For*

7.140. The inclusion of a statutory right to reject would mean that consumers can be assured of getting their money back for sub-standard digital content without having to go through repair or replacement cycles before being able to exercise the statutory right to return the digital content and get some money back. The absence of the right to reject for digital content will mean that, an increased number of consumers will have to rely on European derived 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 inconvenience<sup>175</sup>. 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.<sup>176</sup>

7.141. A consumer is not able to inspect digital content prior to purchase and is therefore particularly reliant on the description of the digital content provided

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<sup>174</sup> Currently, UK consumers have a "right to reject" faulty goods. This means they have a right to a refund for sub-standard goods if they act within "a reasonable time" provided they have not either indicated to the trader that they accept the goods or has taken some action which is inconsistent with the trader still owning the goods. As discussed earlier in chapter 5 of this consultation, we are considering clarifying that the right to reject for faulty goods will last for a period of 30 days.

<sup>175</sup> Elsewhere in the Bill we are considering whether to limit repair and replacement attempts a consumer must allow the trader before moving to 'second tier remedies'

<sup>176</sup> Law Commission Impact Assessment of Consumer Remedies for Faulty Goods 4 November 2009 [http://lawcommission.justice.gov.uk/docs/lc317\\_impact.pdf](http://lawcommission.justice.gov.uk/docs/lc317_impact.pdf)

pre-contractually. 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 traders whose policies they do not know.<sup>177</sup> 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 or smaller traders, thus weakening competition.

### *Against*

- 7.142. 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 use the digital content and then claim it is faulty, or who report that the digital content is faulty but retain a faulty but useable copy e.g. a game that works on most of the levels. If a right to reject is available for digital content transactions it is likely that business will develop tools to prevent a consumer continuing to use the digital content. Some such tools already exist, for instance access pins and the ability to delete digital content remotely. We are also considering whether to introduce a legal requirement that the consumer removes such digital content from their system. This could however raise problems where a consumer does not have the technical understanding to do so. It would also be a very difficult law to enforce.
- 7.143. Including a right to reject for digital content could also cause issues between the digital content trader and the digital content rights holders. The rights holder will often receive an amount for each copy of the digital content that the trader sells to a consumer. It would be difficult for the trader to prove to the rights holder that the digital content had actually been deleted and the trader may therefore struggle to recover the sums from the rights holder.
- 7.144. There is also the risk 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 under these proposals 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 trader may have to pay the rights holder if they provide the consumer with a new copy.

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<sup>177</sup> 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](http://lawcommission.justice.gov.uk/docs/cp188_Consumer_Remedies_Faulty_Goods_Consultation.pdf)

7.145. If we chose not to include a right to reject for digital content, the other remedies would still apply, i.e. repair/replacement and failing this a refund. This would mean the consumer who has a genuine problem and strong evidence is likely to pursue the remedies through the stages until they reach a refund. A consumer would also still be able to seek damages under the normal contractual principles.

### **Questions:**

- Q86. Do you think there should be the equivalent of a short term right to reject for digital content?
- Q87. To a) avoid confusion around the fact that the digital content will not actually be returned but deleted and b) more clearly differentiate between the right to reject and the right to withdraw, would the right be better expressed as a right to an immediate refund for faulty digital content with an obligation to delete the digital content?
- Q88. What impacts would a right to reject have on retailers of digital content or on rightsholders?

## **Related Services**

7.146. The quality standard for the digital content itself may be of little use to the consumer unless the related and “enabling services” are both functioning properly. But the consumer faces a clear problem if these are not, as it will often be difficult to identify whether the fault lies in the content itself, or in the “related” service or even in the “enabling” service (see above). At the moment the service providers will have no liability towards the consumer unless the consumer can show that the service provider has failed to exercise “reasonable care and skill”. This will be difficult or impossible in practice for most consumers to show and could thus undermine the quality standards for the digital content itself and the associated remedies. In practice, consumers would remain vulnerable to business claims that any problem was not their fault. Levels of disputes and consumer dissatisfaction could remain high.

7.147. Option 2, seeks to deal with a part of this issue by introducing a “related services” category in law. We propose the following definition of “related

services”:

*related services are services which are integral to the proper functioning and use of the digital content and over which the consumer has no choice over who supplies the service once they have bought the digital content.*

- 7.148. This would include the download or streaming of digital content to a consumer’s computer or the provision of access to digital content in the cloud. These “related services” are often – but not always - offered by the supplier of the digital content itself and can be seen in many ways as intrinsic to the digital content product.
- 7.149. The Government is open to considering whether such “related services” should be subject to a new, outcome-based liability standard in line with the proposals in Part B of Chapter 6 on services or whether the services quality standard of reasonable care and skill should apply (as with the provision of most services provided in the course of a business).

### **Rights as to quality for Related Services**

- 7.150. We propose two possible sets of rights that would apply to “related services”. These would apply whenever a consumer had to use specified and particular related service/s. This could be either as part of the supply of the digital contract, or under a separate related service contract with the supplier of the digital content, or as a separate contract relating to the supply of digital content but with a third party.
- 7.151. One proposal under consideration is that the related service provider should verify that the digital content they are providing a service for is of satisfactory quality and fit for purpose after the service has been performed and take responsibility for the outcome if it is not. The Government would welcome views on this point. In other words the digital content quality rights set out above could apply to the related service as well. This proposal would align with a suggestion under consideration in Chapter 6 that where there is a service to goods the service provider should take responsibility for ensuring the goods are of a satisfactory quality once the service is complete (see Box 31).

**Question:**

Q89. Do you think the provider of a related service should have responsibility for ensuring that the digital content is of a satisfactory quality once the related service has been performed? Please explain why.

7.152. An alternative option would be to provide consumers with the existing service right, i.e. that the related service should be provided with 'reasonable care and skill'.

7.153. Considerations For and Against including a strict liability standard for digital content "related services":

**For**

7.154. It may be difficult for the consumer to know what is at fault: the digital content itself or the related service. Furthermore, it may be difficult for the consumer to show that a related service provider has failed to exercise "reasonable care and skill" and this could thus undermine the quality standards for the digital content itself and the associated remedies. The consumer will just expect the digital content to be of a satisfactory quality and indeed digital content providers will also want that to be the case. Where a digital content provider knows or even requires that a particular related service must be used, it is the digital content provider who is in the best position to ensure that the related service is of a sufficient quality, so that, providing there are no issues with the "enabling services" the consumer receives digital content to the required standard.

**Question:**

Q90. Could you describe the impact that applying digital content quality standards to "related services" would have?

*Against*

- 7.155. The concept of "satisfactory quality" or "fitness for purpose" could be difficult to apply to digital content and "related services", because the "fault" may lie with the "enabling services" or even with the consumer.
- 7.156. An interruption of internet provision during delivery of digital content can cause a download to fail or be corrupted. Clearly it would not be fair to hold the supplier of the related service liable for a problem caused by a poor broadband connection. The digital content trader has no contract with the internet service provider, the latter being entirely within the choice of the consumer. The digital content trader would therefore be powerless to reclaim any costs of redress from the ISP, even if the issue with the digital content was down to a failure in internet provision. So "fitness for purpose" or "satisfactory quality" in this context cannot relate solely to the consumer's final experience. In this sense it cannot be genuinely "strict" or absolute as it is for sale of goods. But if the consumer can show that the broadband is working properly and other downloads/streams/cloud services have been unproblematic, there may be a case for holding the related service provider liable alongside the digital content supplier (if different) without the consumer having to prove absence of reasonable care and skill.
- 7.157. The Government is not proposing to make any changes to the liability standard for "enabling services", in line with the proposed treatment of pure services in Chapter 6.

**Question:**

- Q91. Do you agree that internet service provision should remain completely outside whatever new consumer protection mechanism is set up for consumers of digital content and "related services"?

**Remedies for sub-standard related services in option 2 - what happens if things go wrong?**

- 7.158. Regardless of which rights are applied to digital content "related services", we propose if these are breached, the consumer should have access to the same remedies for faulty "related services" as they enjoy for sales of faulty digital content. Namely these are: the right to reject, repair or re-performance, or failing that a reduction in price or a refund on return. This is because the



related service is intrinsic to the functioning of the digital content and a failure of the related service would most likely render the digital content unfit for purpose.

- 7.159. The Government could consider restricting the ability of the consumer to access the 'second tier' remedies of refund or price reduction, following failed repairs or replacements to the related service if this would relieve a significant burden of the costs to business. However, this would come at the risk of complicating the framework and necessitating the consumer and trader to determine which part of a contract (the digital content or related service) was at fault.

### ***Questions:***

- Q92. Do you think the concepts of repairing, replacing, reducing the price or terminating the related service will work in practice?
- Q93. What impact would these remedies have on businesses providing related services and can you substantiate your answer with any quantitative evidence on likely costs of these remedies?
- Q94. Which of these remedies do you think consumers would be most likely to find satisfactory?

## **Consumer Responsibilities**

- 7.160. As well as there being a responsibility on businesses to provide the above remedies where digital content does not meet the specified quality standards, there are also responsibilities for consumers both in their general use of digital content and when they request remedies for sub-standard digital content.
- 7.161. As discussed above, when a consumer purchases digital content they are buying the exclusive use of the copy and not (usually) the copyright ownership. There are usually a number of limits as to how the digital content can be used, including restrictions on private copying and sharing of the

digital content that the consumer must adhere to.

7.162. Under the European rules on sale of goods, there is a “reverse burden of proof” for the first six months. During this time, if the consumer can show that there is a problem with the goods, it will be assumed that the goods were faulty at time of purchase unless the seller can show otherwise<sup>178</sup>. After the first six months, it is entirely the consumer’s responsibility to prove that the goods did not comply with the quality standards laid out in the law at the time the goods were delivered. We would propose to apply the same rule for digital content, but the practicalities of proving that digital content is “faulty” may be problematic and it may be even harder to show that the fault was inherent in the product when it was bought. The “life expectancy” of digital content may be hard to assess, particularly if it is new or constantly evolving.

**Question:**

Q95. What kind of evidence could a consumer provide to show that the digital content did not comply with quality standards and that the fault was inherent? What evidence would digital content traders consider as sufficient to show that they would need to provide a remedy?

7.163. Where the consumer has proven that digital content is sub-standard, and returns / deletes the faulty digital content to claim redress, they have a responsibility to ensure that the digital content is deleted from their hardware and that no copies are made that would allow them to continue to use the digital content. If a right to reject is available for digital content transactions it is likely that business will develop tools to prevent a consumer continuing to use the digital content. Some such tools already exist, for instance access pins and the ability to delete digital content remotely. We are also considering whether to introduce a specific legal requirement that the consumer removes such digital content from their system. This would reinforce and remind the consumer of the position under copyright law that if the consumer continues to use the digital content for which they no longer have a licence, they would be in breach of copyright.

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<sup>178</sup> This does not apply to the right to reject

7.164. The consumer also has responsibilities relating to upkeep of their hardware and software. A business could reasonably expect for example, for a consumer to have up to date virus protection on their computer.

## Differences between options 1 and 2

7.165. As discussed above, Options 1 and 2, differ in two main areas: scope (how the proposals deal with services surrounding digital content) and remedies (whether they include short term right to reject digital content). These differences are summarised in Table 9.

### *Questions:*

Q96. Which option do you prefer? If you could mix and match the options, is there a preferable combination of proposals, especially those relating to the right to reject and the treatment of “related services”?

Table 9 – Summary of the main differences between options 0, 1 and 2

	Scope	Remedies
Option 0	CRD provides a definition of digital content and some requirements for pre-contractual information	No rights to quality (except where digital content does not meet the standards described in the pre-contractual information) or remedies for sub-standard 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	Repair and replacement, return with refund or reduction in price (or compensation) are available where digital content (only) is sub-standard  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 <sup>179</sup>
Option 2	Digital content defined as in the CRD  “Related services” are included within the scope of the proposals	Repair and replacement, return with refund or reduction in price (or compensation) are available where digital content and “related services” are sub-standard  The right to reject is included for digital content

## Costs and benefits of options 1 and 2

7.166. In both options 1 and 2 rights and remedies available for digital content transactions will be clarified making the law clearer and easier to understand for consumers, businesses and consumer advisers. Consumers would be clearer about what rights they can expect when purchasing digital content and what remedies are available to them if something goes wrong. Businesses

<sup>179</sup> 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.

would gain legal certainty as to their responsibilities when selling digital content to consumers.

- 7.167. The proposals make use of familiar legal concepts thereby reducing some of the risk of legal uncertainty that new laws could create. The clarification of the law 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.
- 7.168. On the other hand, clarifying consumer rights and remedies for digital content could increase the costs to some traders 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, traders 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. In both options consumers might therefore face an increase in prices as businesses could try to compensate for the higher cost of remedies. Businesses will also face some training costs for to familiarise staff with new digital content rights and remedies.

***Question:***

Q97. Do you agree with the above analysis of the costs and benefits of our proposals? Is there anything we've missed?

## **Free Digital Content**

- 7.169. Digital content can often be supplied without payment of money. This could be in exchange for something of value other than money such as personal data or virtual currency, as part of a marketing strategy or in connection with the purchase of something else e.g. hardware or other digital content. While it is possible that introducing laws on the provisions of free digital content could restrict provision of such free digital content, there is also potential for free digital content to cause detriment to consumers. We therefore consider here the case for including free digital content within our proposals.

- 7.170. Normally, for an agreement to be legally enforceable, and therefore be a contract, each party to the agreement (the consumer and the trader) must give something of value to the other. It is usually quite easy to see what the trader is giving to the consumer - in the digital content context the trader will be giving the consumer a right to use the digital content. However, as discussed above, the consumer payment may be more subtle.
- 7.171. Following the normal rules of contract, where a consumer gives anything of value, this would create a binding contract between the consumer and the trader. Even where the digital content is apparently provided for "free" the consumer may bind herself to act in a certain way, or within certain limits, which could be enough to make the agreement between the consumer and the trader a binding contract. Therefore if we do not specify that the contracts we are concerned with are those where the consumer pays money, the statutory rights and remedies we are proposing would automatically apply to these "free" digital content contracts in the same way that they apply to all other consumer contracts.
- 7.172. Specifically excluding free digital content from our proposals, would risk driving the digital content market towards using business models that offer one product for free in connection with other products or features that are supplied for a price. If such a business model were used, consumers may find it confusing and difficult to claim redress for those aspects of the digital content that were provided for free. Whilst it might be argued that where such "bundled" products are offered, the "free" products are not genuinely free but provided as part of the global price, consumers may be put off from making a case at all. Applying the proposals to free digital content would ensure the consumer remains protected regardless of the contract type. The proposed rights would also allow for the fact that the digital content had been provided for free, as when establishing satisfactory quality, the price of the digital content is a relevant factor (that is when something is free, there should be a lower expectation of quality than when a consumer pays for something).
- 7.173. However, it may be argued that it would be unfair to a trader to impose exactly the same obligations where the consumer is not paying money for the digital content. If we do not specify that different rights or remedies are applicable to "free" digital content, it might reduce the availability of free digital content which would not be of benefit to consumers or businesses. The Government does not want to create liabilities for charities and other public-spirited citizens offering digital content genuinely for free, but where any kind of price in reality is being paid, it tends to support the normal remedies being available, regardless of the form of payment provided by the consumer. When digital content is provided genuinely without cost to the consumer, there can

be no question of a refund or reduction in price and so the only remaining statutory remedies would be repair or replacement. However, the consumer may be paying a real price indirectly, in the form of access to personal data or being bound in to use the digital content in certain ways which create profit for the supplier of the digital content, in which cases it supports the proposal that the full range of remedies should be available.

7.174. The Common European Sales Law, proposes that where sub-standard digital content is not supplied in exchange for the payment of a price, then the buyer may only claim damages (money) for loss or damage caused to the buyer's property, including hardware, software and data, and may not ask for the normal consumer remedies (such as repair or replacement). Whatever our proposals, it would not affect the consumer claiming damages for breach of contract (where there is a contract) or potentially damages for a breach of the duty to take reasonable care and skill in the tort of negligence.

**Questions:**

- Q98. Do you think that consumers should have the right to digital content meeting a certain quality even if they do not pay money for it?
- Q99. Do you think that consumers should only have remedies if digital content has been paid for with money?
- a. Or should the rights apply but we expect consumer expectations to be lower because it was free?
  - b. Or should we provide for limited remedies if the digital content was provided for free?

### Open Source Digital Content

Open source software is software where the source code (the computer instructions used by programmers to specify the actions performed by the computer) has been made available to the general public free of charge for use and modification. To qualify as open source, under the Open Source Initiative (OSI), the licence must meet the conditions of the Open Source Definition. There are 10 criteria including:

- the free redistribution of the software;
- access to the source code; and
- the permission to allow modifications to the software and derived works that may be distributed under the same licensing conditions.

Open source code is typically created as a collaborative effort in which programmers improve upon the code and share the changes within the community. The concept relies on peer review to find and eliminate bugs in the program code.

Another similar term is 'free software', this pre-dates open source software, and focuses on several kinds of freedom that are associated with the software.

Free software and Open Source software are different to 'freeware', which is software that can be acquired at no cost but for which source code may well not be available.

Whether our proposals apply to parties to open source software arrangements will again depend on whether there is a business to consumer contract and so will depend on:

- a) whether there is a contract, i.e. where the consumer has given something of value to the business in exchange for something else (and vice versa);
- b) whether the contract is between a trader<sup>180</sup> and a consumer.<sup>181</sup>

### **Question:**

Q100. Should our proposals apply to Open Source software that is offered from a business to a consumer?

<sup>180</sup> Any natural person or any legal person, who is acting for purposes relating to his trade, business, craft or profession.

<sup>181</sup> Any natural person, who is acting for purposes which are wholly or mainly outside their trade, business, craft or profession.



## End User License Agreement (EULAs)

- 7.175. There are a number of digital consumer issues that relate to end user licensing agreements (“EULAs”). These licences can go well beyond what is necessary for copyright protection and can include terms that could be considered unfair. EULAs are usually international documents and do not vary country by country. It can be confusing for the consumer that there seem to be one set of rights laid out in domestic legislation and another set of rights described in the EULA. The Law Commissions are examining some of these issues in their consultation on unfair contract terms.
- 7.176. As we discussed when considering the position of "free" digital content, it is possible that a consumer agreeing to act in a certain way - by clicking their agreement to the Terms of Use for example - might be enough to form a binding contract between the software manufacturer and the consumer. This could be in addition to the contract between the trader (if different from the manufacturer) and the consumer. This then raises the question of whether a consumer should be able to assert their rights as to the quality of the digital content against the person they bought the digital content from (the trader) or the manufacturer (if different) or both. It seems to us that this must be made clear to the consumer so that they are not in the situation where they do not know against whom they have their rights. We believe the fairest and most practical solution would be that where the consumer has actually paid for a digital content product with money, then their rights as to quality should be enforceable against this person (who may then be able to get compensation from the manufacturer). This would align the position more clearly with the situation when buying goods and would be the most obvious person that the consumer would think of making complaints to.

### ***Question:***

Q101. Do you agree that a consumer should be able to assert their rights against the trader?

## Discarded policy options – defining digital content as goods or as services

- 7.177. There has been much academic debate as to whether digital content is goods or services, 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 which might lead people to believe that by default it must be classified as a 'service'. We have discounted both of those proposals for different reasons.

- 7.178. 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 uncertainty<sup>80</sup>.
- 7.179. 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 ownership of the digital content does not pass to the consumer and that the consumer can only use digital content as set out in the licence. 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. Defining digital content as goods could also have unintended affects on other areas e.g. on World Trade Organisation trade rules / duties and VAT.
- 7.180. Another option considered was to split digital content into two distinct categories, depending on whether the digital content is downloaded / transferred onto the consumers' hardware or purely accessed by the consumer. The two categories would be:
- **Digital content that is transferred onto the consumer's hardware** (this can be either permanent or temporary and would include for example digital content that is streamed or downloaded)
    - for this category we would apply the digital content rights and remedies to the digital content and the related service. This would introduce an outcome based standard for digital content that is downloaded and streamed.

- **Digital content that is accessed purely online** (where there is no transfer of the data onto the consumers hardware, this would include software on the cloud, online games and online virtual worlds)
  - for this category we would apply services rights and services remedies to the digital content. Currently this would mean that the digital content should be provided with reasonable care and skill.

7.181. The advantage of this option is that there would be no need to make the difficult distinction between digital content and “related services”. There is however a different distinction that needs to be made, between the above two categories. These categories would be difficult to define without being technology specific, which would threaten the longevity of the proposals. Another issue with this option is that we believe the consumer should be able to expect the same rights as to quality for digital content regardless of the method of access. A consumer who buys access to a piece of software that is in the cloud would expect the digital content to be fit for purpose and of satisfactory quality etc. Methods of accessing digital content are constantly changing and cloud computing is becoming ever more popular. This option may result in the outcome based standard for digital content being all but lost, with consumers left trying to prove a lack of reasonable care and skill in order to get any form of redress.

## Annex A: Consultation questions

### ***Questions from Chapter 4: Introduction***

Q1. Do you agree that all businesses should be subject to the same framework of consumer protection for the sale and supply of goods, services and digital content, or

Do you consider that micro-businesses should be exempt from any or all of the new proposals and remain subject to the current framework? (4.21-22)

Q2. Do you agree with the Government's proposal to introduce a single definition of 'consumer' and a single definition of 'trader'? (4.25-38)

Do you have any concerns with any aspects of the proposed definitions?

The proposed definitions can be summarised as follows:

*Consumer* - this would be limited to an individual acting for purposes which are wholly or mainly outside of his or her trade, business, craft or profession; but would not include an individual buying goods at an auction which individuals may attend in person (for the purposes of protections currently subject to this restriction).

*Trader* – this would be an individual ('natural person') or organisation ('legal person') whether publicly or privately owned, who is acting – including through any other person acting in their name or on their behalf – for purposes relating to their trade, business, craft or profession in relation to contracts for goods, digital content or services.

**Questions from Chapter 5: Supply of Goods**

- Q3. Do you agree that it would be beneficial for a single definition of 'goods' to be used for the protections explored in this chapter and provisions of EU law? Do you consider that the use of the following EU definition would be appropriate (please give reasons)?

"Goods" means any tangible movable items, with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods where they are put up for sale in a limited volume or a set quantity. (5.57-60)

- Q4. Do you believe that this is a sensible change or can you foresee problems arising from a move away from the implied terms model? (5.61-75)
- Q5. What benefits can you see from moving away from the implied terms model? (5.61-75)
- Q6. Is 30 days a reasonable period to set for the short term right to reject sub-standard goods? (5.76-91)
- Q7. Do you agree that an exemption is required for goods where there may be a delay before use, or does this represent an unwarranted complication? (5.92-93)
- Q8. What evidence should a consumer have to produce to benefit from this exemption and do you think this can and should be provided for in statute? (5.92-93)
- Q9. If an exemption is provided, do you agree that in order to make use of the provision, the likely delay must be raised by the consumer at the time of sale and the exemption be agreed by both parties at that time? (5.92-93)
- Q10. Do you agree that the consumer should be allowed 7 days to examine the goods after any repair has been carried out, before losing the right to reject? (5.88)

- Q11. Do you consider that there is a need for the remedies for sale by description and for misleading practices to be aligned? If yes, do you think that they should both have a period of 30 days or 90 days? (5.94-97)
- Q12. Which of the proposed models do you believe would be the best approach? (5.98-127)
- Q13. In Option 4, do you agree that a cumulative total of 14 days for repairs or replacements is a reasonable limit? If not, how many days do you believe would be preferable? (5.120-127)
- Q14. Do you agree that, if a temporary replacement of equal or higher quality is provided for the duration of any repair/replacement process, the limit under Option 4 should be set higher, for example at 28 days or 30 days, or waived altogether? (5.126)
- Q15. Do you believe that where a product can be proved to be dangerous, the consumer should have a right to move directly to a second tier remedy? (5.128-130)
- Q16. Do you agree that defining "dangerous" as a breach of the General Product Safety Regulations 2005 would provide adequate clarity and protection to consumers? (5.129)
- Q17. Which of the proposed models (or which mix of the models) do you believe would be the best approach? (5.131-155)
- Q18. Do you agree with the establishment of a cost threshold, below which no deduction for use is applicable? If yes, at what level do you feel the threshold should be set: £150, £100 or other? (5.131-155)
- Q19. Do you agree that it makes sense to allow exceptions to the stated minimum refund where robust, impartial third-party evidence exists for the current value of the goods in question? (5.149-155)

- Q20. Do you agree that, if such exceptions are allowed, the appointment of an adjudicator would be necessary to rule on the reliability of evidence? If yes, do you have suggestions for what sort of organisation might be best placed to act in this capacity? (5.153-154)
- Q21. Do you believe that this is a sensible change or can you foresee problems arising from applying broadly the same remedial scheme to all transaction types? (5.156-174)
- Q22. What benefits can you see from aligning the rules for different transaction types in this way? (5.156-174)
- Q23. Do you agree that the approach outlined above for hire contracts is sensible? (5.173-174)

**Questions from Chapter 6: The Supply of Services**

- Q24. Are these helpful distinctions? What problems, if any, do you envisage in dividing up services in this way? (6.11)
- Q25. Do you agree that these are the implied terms which may currently be introduced into consumer contracts for the supply of services? (6.16-31)
- Q26. Do you think the proposals should apply in Scotland with the same effect as they would have in the rest of the UK? (Box 20)
- Q27. Do you agree that the remedies for breach of implied terms in consumer contracts are difficult for consumers to predict? (6.32-36)
- Q28. The Government is not proposing a solution to this problem as it cannot identify a deficiency in the law or any obvious clarification that would help. Do you have any suggestions? (6.51-54)
- Q29. In your view, what problems are created for consumers by the current law? Can you estimate the impacts? What effects on the market do these problems cause? (6.55-68)
- Q30. How does your business respond to the complexity of consumer law? What, in particular, is the cost of compliance? (6.69-71)
- Q31. Does your business consciously seek to go beyond consumer law in terms of what it offers consumers of services? (6.69-71)
- Q32. Do you apply a “goods” standard of liability and “goods” remedies for some of the services you offer if they go wrong? If so, what are these services? (6.69-71)



- Q33. Do you agree that moving to a statutory guarantee will be easier for consumers and traders to understand? Do you foresee any problems with this approach? (6.78)
- Q34. Do you agree that there should be a statutory guarantee that a service will meet the description given pre-contractually, including the information as to price and time for performance? (6.80-84)
- Q35. Do you agree that there should be a “default” period of 30 days in which a service must be carried out? (6.87)
- Q36. Do you agree that the statutory remedies for “faulty” or sub-standard services should be as similar as possible to those for goods? (6.89-96)
- Q37. Do you agree that we should specify that the reduction in price should cover the element which has not been performed with reasonable care and skill? Or should we use the same wording as used in relation to goods; i.e. “an appropriate amount”? (6.95)
- Q38. Do you think that the tier 2 remedy should always include a facility for the consumer to terminate the contract from that point forward? (6.104)
- Q39. Alternatively, do you think that the right to terminate the contract should only be available in response to a failure to meet pre-contractual information requirements, or perhaps not at all? (6.105)
- Q40. What would be the impact on your business of making such remedies available? (6.89-105)
- Q41. Do you agree that it would be disproportionate and also risky in terms of potential effects to try to codify current contractual remedies for damages in legislation? (6.106-107)

- Q42. Do you agree that there are few cases at present where a service provider would be able to limit its core contractual liability to a consumer in a way that a court would find reasonable? (6.109-111)
- Q43. What impact do you think it would have on traders and insurers if liability were to be restricted as proposed above in future? (6.109-111)
- Q44. Do you think any strict liability standard for services should be imposed instead of or in addition to liability under the current fault-based regime? (6.114-124)
- Q45. Do you agree that an outcome based liability standard is likely to be more appropriate for services relating to property than for services to the person or pure services? (6.114-124)
- Q46. Do you think that consumers would benefit from an outcome based liability standard for services to their property or would any benefit be outweighed by higher prices because of increased costs on business? (6.114-124)
- Q47. of service sectors would create greater confusion to the consumer and/or business? (6.114-124)
- Q48. What would a “fitness for purpose” or “outcome-based” liability standard for some services look like? (6.114-124)
- Q49. Do you agree that the quality standard in any strict liability scenario for services should be as above – the same as for goods? (6.125-127)
- Q50. To which services might the new liability standard apply? (6.125-127)
- Q51. Do you agree that in practice a strict liability standard for installation services would make no difference to installation services which are carried out by the retailers of the goods? (6.130-142)

- Q52. Where the provider of the installation service is not the retailer of the goods, what impact do you think this possible change might have? Can you quantify any costs you think it would impose on your business and on other businesses in your sector? (6.130-142)
- Q53. Do you think that the current rules on installation services encourage consumers to employ goods retailers to perform such services? If so, would strict liability across the board for installation services offer some benefit to independent contractors? (6.130-142)
- Q54. Do you agree that in most repair scenarios the Courts would already be likely to find a way to make the service provider responsible for guaranteeing a "satisfactory quality" outcome? (6.143-147)
- Q55. If such a strict liability standard were to be introduced, would this involve extra costs for your business and if so, can you quantify them? (6.143-147)
- Q56. Do you think that such a change would be likely to increase consumer confidence and assertiveness? (6.143-147)
- Q57. Do you agree that all services to consumers' property should be treated the same? Are there any particular problems with strict liability in respect of any of the other categories of services to property? (6.148)
- Q58. What would be the impact of establishing a strict liability standard across these other services to property? (6.148)
- Q59. How should business and consumers be informed of any changes at reasonable cost without adding additional burdens? (6.1-153)
- Q60. Do you agree that a clearer law as outlined above, if communicated properly, would make a real difference to consumer understanding of their rights and thus to their assertiveness, making markets work better? (6.1-153)

- Q61. What would be the costs to your business of managing any change in the law in this area (changing systems, one-off training costs, review of policies or codes, etc.)? (6.1-153)
- Q62. How much does your business/sector spend on an ongoing basis training employees to handle consumer complaints relating to service provision? If the law were clarified as proposed above, do you think this would permit a reduction in these costs and if so, by how much? (6.1-153)
- Q63. How much does your business spend on settling consumer disputes and on complaint handling in relation to service provision? If the law were clarified as proposed above, do you think this would permit a reduction in these costs and if so, by how much? (6.1-153)
- Q64. Would the introduction of a “fit for purpose” standard as described in the proposals make you change the way you deal with your customers and any problems which may arise? (6.1-153)

**Questions from Chapter 7: The Supply of Digital Content**

- Q65. Do you agree that we should clarify consumer law for digital content transactions? (7.1-45)
- Q66. Can you provide us with any further evidence of the impact / costs of the current unclear legal framework on business or consumers? (7.46-72)
- E.g. for business – cost of dealing with complaints or dispute resolution?
- E.g. for consumers – any further evidence of consumer detriment?
- Q67. Do you think the Consumer Rights Directive is sufficient in itself to address the issues relating from lack of clarity of consumer rights in digital content? (7.74-79)
- Q68. Do you think that digital content supplied on a tangible medium such as a disk should be covered by the same set of digital content quality rights and remedies as intangible digital content, such as downloads? (7.74-79)
- Q69. Do you think reasonable consumer expectations as to quality would differ between digital content that is transferred to a consumer's device and digital content that is held on a 3rd party server? (7.74-79)
- Q70. Do you agree that we should align our proposals for digital content as far as possible with the existing consumer rights framework? (7.84-85)
- Q71. Do you agree that digital content should be treated as a separate and bespoke category within the Consumer Bill of Rights? (7.86)
- Q72. Do you agree with the principles we have based our digital content proposals on? In particular do you agree that "related services" and "enabling services" could be distinct from digital content and from each other? (7.87-93)

- Q73. Do you agree that the provisions as to passing of limited title work for digital content? (7.98)
- Q74. Do you think that consumers should be asked to consent to any interference that could affect their use of the digital content? What impact would such a requirement have on businesses supplying necessary updates or otherwise needing to manage the digital content post-purchase? (7.99-101)
- Q75. Should we remove the 'freedom from minor defects' aspect of quality (s.14(2B)(c) of SOGA) specifically and only for digital content? Should we do so for certain types of digital content, if so which? (7.111)
- Q76. Should we clarify that the 'safety' aspect of quality (s.14(2B)(d) of SOGA) means the safety of a computer or other device used to access digital content as well as personal / physical safety? (7.112)
- Q77. Do you agree that we do not need an express statement on durability in respect of new versions as the European Commission have proposed for CESL? (7.113)
- Q78. Do you think that these rights to quality are broadly appropriate for digital content? (Box 32)
- Q79. Do you think these are suitable remedies for cases where sub-standard digital content has been supplied? (7.115)
- Q80. What impact would the clarification of these remedies have on consumers or business? Can you provide any evidence that would help us assess the likely impacts of our proposals? (7.115)
- e.g. What proportion of digital content transactions result in the consumer (a) requesting and (b) receiving a refund, a repair or a replacement?
- e.g. What are the costs to business of providing a refund, a repair or a replacement?

- Q81. Would our proposals impact on the likelihood of your business providing updates to digital content? (7.119-122)
- Q82. Should we align the approach to deducting for use when calculating refunds for digital content with the policy for goods? (7.127)
- Q83. Would a limit on the number of repairs and/or replacements be useful for digital content consumers and practical for digital content traders? (7.128)
- Q84. What kind of proof could the consumer provide that the related service was not provided with reasonable care and skill? (7.129-131)
- Q85. What issues do you see with how option 1, treating the services surrounding digital content as services, would work in practice? (7.129-131)
- Q86. Do you think there should be the equivalent of a short term right to reject for digital content? (7.137-145)
- Q87. To a) avoid confusion around the fact that the digital content will not actually be returned but deleted and b) more clearly differentiate between the right to reject and the right to withdraw, would the right be better expressed as a right to an immediate refund for faulty digital content with an obligation to delete the digital content? (7.137-145)
- Q88. What impacts would a right to reject have on retailers of digital content or on rightsholders? (7.137-145)
- Q89. Do you think the provider of a related service should have responsibility for ensuring that the digital content is of a satisfactory quality once the related service has been performed? Please explain why. (7.146-151)
- Q90. Could you describe the impact that applying digital content quality standards to "related services" would have? (7.152-154)

- Q91. Do you agree that internet service provision should remain completely outside whatever new consumer protection mechanism is set up for consumers of digital content and “related services”? (7.155-157)
- Q92. Do you think the concepts of repairing, replacing, reducing the price or terminating the related service will work in practice? (7.158-159)
- Q93. What impact would these remedies have on businesses providing related services and can you substantiate your answer with any quantitative evidence on likely costs of these remedies? (7.158-159)
- Q94. Which of these remedies do you think consumers would be most likely to find satisfactory? (7.158-159)
- Q95. What kind of evidence could a consumer provide to show that the digital content did not comply with quality standards and that the fault was inherent? What evidence would digital content traders consider as sufficient to show that they would need to provide a remedy? (7.160-162)
- Q96. Which option do you prefer? If you could mix and match the options, is there a preferable combination of proposals, especially those relating to the right to reject and the treatment of “related services”? (7.165 & Table 9)
- Q97. Do you agree with the above analysis of the costs and benefits of our proposals? Is there anything we’ve missed? (7.166-168)
- Q98. Do you think that consumers should have the right to digital content meeting a certain quality even if they do not pay money for it? (7.169-174)



- Q99 Do you think that consumers should only have remedies if digital content has been paid for with money? (7.169-174)
- a. Or should the rights apply but we expect consumer expectations to be lower because it was free?
  - b. Or should we provide for limited remedies if the digital content was provided for free?
- Q100 Should our proposals apply to Open Source software that is offered from a business to a consumer? (Box 35)
- Q101 Do you agree that a consumer should be able to assert their rights against the trader? (7.175-176)

## Annex B: Glossary of terms and abbreviations

**Barter or exchange contract:** A contract where goods are exchanged for something other than money.

**Bug:** An error, flaw, mistake, or fault in a computer program or system that produces an incorrect result, or causes it to behave in unintended ways.

**Bug fix:** A change to a programme or system to permanently cure a bug.

**Civil court sanctions:** A penalty or other punishment imposed by the courts for breaches of consumer law.

**Cloud computing:** There are many different and complex definitions of cloud computing. A consumer will generally use cloud computing to store, process or access digital content which is held on a third party server using an internet connection. Cloud computing often enables consumers to share digital content and to access and synchronise digital content from a range of devices. There is no download of data to the consumer's hardware. The NIST definition of cloud computing can be found at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>.

**Common law:** Law that is based on prior judicial decisions (also known as case law) as opposed to law that is created by Parliament

**Conditional sale contract:** A sale where the consumer pays in instalments and only obtains ownership of the goods when they make the final payment, although they may use the goods in the meantime.

**Condition:** A type of contractual term. The breach of a condition is always so serious that it gives the innocent party a right to end the contract and claim damages.

**Consideration:** Something of value. In English law, for there to be a legally binding contract each party has to exchange something of value (the “consideration”). The trader’s consideration will be the goods, services or digital content. The consumer’s consideration will usually be money, but it can be other things, such as a promise to do something or not to do something.

**Consumer:** Any individual who is acting for purposes which are wholly or mainly outside their trade, business, craft or profession. This is the meaning we propose in the consultation document, as based on EU law. UK law currently, uses a wider definition of ‘dealing as a consumer’. (See paras 4.25-27 for further explanation.)

**Consumer Rights Directive:** Directive 2011/83/EU of the European parliament and of the council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

**Consumer Sales Directive:** Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

**Damages:** Money that consumers can claim from the trader to compensate them for having obtained sub-standard goods, services or digital content. When the court orders that the trader pays money, this is known as “damages”. How much money a court will award is based on legal principles.

**Deduction for use:** The process of a business reducing the amount a consumer is refunded when they return sub-standard goods to take account of the use the consumer has had of the goods.

**Digital content:** Data which are produced and supplied in digital form.

**Digital Rights Management:** The use of systems which restrict access or copying of digital content that is not in compliance with the terms set out by the rights holder. This is a type of technical protection measure.

**Distance contract:** Any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded. This definition is taken from the definition given in the Consumer Rights Directive Article 2.7

**Download:** Where a consumer transfers digital content from an online server to their own hardware. Downloading can often imply that the data sent or received is to be stored either permanently, or for a set amount of time. Software that is downloaded will often also need to be installed.

**Enabling services:** This is a term we use to categorise types of services surrounding the use of digital content in our consultation document. It is not a term that is in general use. By enabling services we mean services that are essential for the delivery of digital content but are independent from the supply of any individual digital content product or service and over which the consumer normally has a choice of providers. For example telecommunication services, or internet service provision.

**Exclusion clause:** Part of a contract that excuses a party to the contract from responsibility in specified situations.

**Express term:** A term that the consumer and trader have explicitly agreed, as opposed to an implied term which applies because the law (either statute law or case law) says so.

**Faulty or sub-standard:** Where goods, services or digital content do not meet the quality standards that are specified in law, for example the goods are not of satisfactory quality.

**Functionality:** 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.

**Goods:** Any physical thing that you can buy and carry away with you. There are currently slightly different definitions in the different pieces of legislation – and these are set out in full in the chapter on goods. We do not consider that the differences in the definitions are substantial. (See Box 9)

**Hire contract:** A contract for temporary use of the goods with no intention that the consumer will obtain ownership of the goods.

**Hire purchase contract:** A hire contract with an option to buy the goods at the end of the hiring period.

**Horizontal law:** Law which applies across an entire sector e.g. to all contracted services.

**Implied term:** A term that is included in a contract because statute or case law demands it. The term might not be communicated by the contracting parties but will automatically apply unless the parties contract out of it (it is not always possible to contract out of implied terms however).

**Interoperability:** The standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version or certain hardware features.

**Large enterprise:** A business of more than 250 employees.

**Maximum harmonisation:** A term used in European law to mean that all Member States must adopt the same rules and may not exceed the terms of the European legislation.

**Medium-sized enterprise:** A business of 50-249 employees.

**Micro-enterprise:** A business of 0-9 employees.

**Open source software:** software where the source code (the computer instructions used by programmers to specify the actions performed by the computer) has been made available to the general public free of charge for use and modification. To qualify as open source, under the Open Source Initiative (OSI), the license must meet the conditions of the Open Source Definition.

<http://www.opensource.org/osd.html/>

**Patch:** A piece of software designed to fix specific issues, or to update a computer program or its supporting data. Patches can fix security vulnerabilities, solve compatibility issues or introduce new features. Most major software companies will periodically release patches that correct specific problems in their software programs.

**Price reduction:** A remedy available for consumers if they receive sub-standard goods, where the consumer chooses to keep the goods but receive a reduction of an 'appropriate amount' from the purchase price. We are proposing the same remedy for "faulty" digital content. We also propose to introduce the remedy of "price reduction" where services are not provided with reasonable care and skill. The intention is that amount of the reduction will cover the element of the service that was not provided with reasonable care and skill but that the amount can never exceed the amount the consumer has paid

**Off-premises contract:** Any contract between the trader and the consumer:

(a) concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;

(b) for which an offer was made by the consumer in the same circumstances as referred to in point (a);

(c) concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer; or

(d) concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer.

This definition is taken from the Consumer Rights Directive

**Rescission:** A legal term given to the process of bringing an existing contract to an end. However, there are different forms of rescission. The document tends to refer to termination of contracts instead, to avoid uncertainty. (In some cases, the contract is treated as having never existed; in other cases, the contract is terminated from that point onwards.)

**Redress:** The options available to the consumer to address an issue with goods/services/digital content which do not meet applicable standards.

**Region coding:** A type of technical protection measure that prevents the playing of digital content from one region/country in another.

**Related services:** This is a term we use to categorise types of services surrounding the use of digital content in our consultation document. It is not a term that is in general use. By related services we mean services which are integral to the proper functioning and use of the digital content and over which the consumer has little or no choice over who supplies the service once they have bought the digital content. For example the download or streaming of digital content to a consumer's computer or the provision of access to digital content in the cloud.

**Remedy:** The course of action available to the innocent party if other parties to the contract do not do what they are supposed to. For example if consumers receive faulty or sub-standard goods, services or digital content they will be entitled to a remedy. Some remedies are actions which the consumer can take – such as suing the trader for compensation (damages); others are actions that the consumer can require the trader to take – such as repairing or replacing the goods.

**Right to reject:** The consumer's right to return faulty or sub-standard goods to the trader and receive their money back.

**Right to withdraw:** For distance and off premises contracts the consumer has the right to change his/her mind for a limited period. There are different rules applying to the right to withdraw depending on whether the contract is for goods, services or

digital content.

**Sales contract:** A contract where goods are exchanged for money (most standard retail transactions are sales).

**Server:** Part of a computer network which does a particular task, for example storing or working on information, for all or part of the network.

**Service:** There is no legal definition of a service in the legislation with which this consultation is concerned. However, in the consultation we have divided services into three broad categories;

- Pure services – where no goods are involved and the service would not result in the creation of a good, like a legal service
- Services relating property – services that relate to the property of the consumer, like a car repair
- Services relating to person – services that relate to a person, like medical services.

**Small-sized enterprise:** A business of 10-49 employees.

**Statutory guarantee:** Under our proposal, consumers would be guaranteed a certain standard of goods, services or digital content. If the retailer or service provider does not provide goods, services or digital content of this standard, the consumer would be entitled to remedies.

**Statutory remedy:** A remedy that is written in statute, as opposed to a remedy that a court might order a trader to provide.

**Stream:** Compressed audio and video files 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. In contrast to a download the data is used as it is received, while the



transmission is still in progress and is not stored long-term.

**Strict liability:** Being liable without having to prove carelessness or fault.

**Supply of goods:** This term is used to refer to any provision of goods under a contract, and includes any of the following types of transaction: sale, conditional sale, barter or exchange, work & materials, hire purchase or hire.

**Supply of services contract:** Any contract under which the trader supplies or promises to supply a service to the consumer and the consumer pays or promises to pay the price of the service

**Technical Protection Measures (TPMs):** Measures primarily aimed at preventing or restricting access to or copying of protected digital content. Examples of technical protection measures include digital rights management and region coding.

**Trader:** Any individual or any organisation, irrespective of whether privately or publicly owned, who is acting for purposes relating to his trade, business, craft or profession. (See paragraphs 4.36-38 for further explanation of our proposal for a single definition of 'trader'.)

**Updates:** Software updates are additions to software that can introduce new features or enhance the security of the software. The updates will update the consumer's existing version of software, but will not upgrade it to the next version (if one exists).

**Upload:** To copy or transfer (data or a program) from one's own computer into the memory of another computer.

**Warranty:** Warranty can have different meanings (sometimes it can mean something similar to a "guarantee"); however in this consultation document we use the word as it is used in English contract law to mean a term of a contract which is less important than a condition, the breach of which would entitle the consumer to damages but not to end the contract

**Work and materials contract:** A services contract where goods are incidentally supplied.

## Abbreviations

**BERR:** Department for Business, Enterprise, and Regulatory Reform (became Department for Business Innovation and Skills in 2010)

**BIS:** Department for Business Innovation and Skills

**BRC:** British Retail Consortium

**CESL:** Common European Sales Law

**CRD:** Consumer Rights Directive

**CSD:** Consumer Sales Directive

**ECC:** European Consumer Centres

**EULAs:** End User Licensing Agreements

**FDS:** Franchise Development Services

**ISP:** Internet Service Provider

**NHS:** National Health Service

**OFT:** Office of Fair Trading

**OSI:** Open Source Initiative

**SGSA:** Supply of Goods and Services Act (1982)

**SMEs:** Small and Medium-Sized Enterprises

**SOGA:** Sale of Goods Act (1979)

**TNS:** Taylor Nelson Sofres (market research company)

**UEA:** University of East Anglia

## Annex C: Contracts and Dual Purpose Contracts

A contract is an agreement which can be enforced legally – that is, one party could take the other party to court if they do not do what was agreed. It is not necessary to agree anything in writing, or to sign anything, in order for a contract to exist. A contract will arise when the trader agrees to supply goods, services or digital content to the consumer in return for something of value (this may be a payment by the consumer, or something else – for example a consumer may give something they own, such as their current car, in exchange for new goods or may receive digital content without paying any money but by giving personal data which is of value to the trader for marketing purposes).

### Dual purpose contracts

The current definitions of ‘consumer’ require that a party to a contract must not be acting in the course of his or her business (see *Annex B: Glossary of terms and abbreviations* above). This raises questions as to whether someone is a consumer where they obtain something which they intend to use partly for work and partly for personal purposes. For example, someone may buy a car for their personal and family use, but with the intention of making some business trips in it.

The Consumer Rights Directive (2011/83/EU) provides that, in dual purpose contracts, the individual should still be considered a consumer if the trade purpose is so limited that it is not predominant. The Government therefore considers that the main purpose of the contract can be used to determine whether or not the individual is a consumer in relation to that contract.

The Law Commissions’ view is that contracts which are mainly for consumer use should be included within the scope of consumer protection, even if they include some elements of business use. The Law Commissions have recommended that this could be achieved by specifying in legislation that an individual should be considered to act as a consumer if he or she acts for purposes which are wholly or mainly outside of his or her business trade or profession.

This is a broader approach than has been shown in European case law: it has been held that an individual will only be a consumer in relation to a dual purpose contract if the element of business use is so limited as to be negligible. Under this case law, even if the private element is the predominant purpose, then the individual will not be a consumer if a court assess that the professional purpose is any more than negligible. However, the Consumer Rights Directive (2011/83/EU) expressly provides for predominance to be the relevant criterion.

## **Annex D: List of Individuals/Organisations consulted**

Amazon

Association of Convenience Stores (ACS)

Australian Government

BPI, The British Recorded Music Industry

Prof Robert Bradgate, Sheffield University

British Hospitality Association (BHA)

British Independent Retailers Association (BIRA)

British Retail Consortium (BRC) and members

BT

The Centre for Commercial Law Studies (CCLS), Queen Mary, University of London

Citizens Advice

The Confederation of British Industry (CBI)

Confederation of Passenger Transport UK (CPT)

Consumer Focus

Dr Alan Cunningham, Queen Mary, University of London

European Commission (DG Justice)

The Federation of Small Business (FSB)

The Glass and Glazing Federation (GGF)

Dr Julia Hörnle, Queen Mary, University of London

Prof Geraint Howells, Manchester University

Intellect

Intellectual Property Office (IPO)

The Law Commission

The Law Society and members

Local Government Association (LGA)

Microsoft

New Zealand Government

Northern Ireland Executive

The OECD Consumer Committee

Ofcom

The Office for Standards in Education, Children's Services and Skills (Ofsted)

The Office of Fair Trading (OFT)

The Office of the Gas and Electricity Markets (Ofgem)

PhonepayPlus

The Publishers Association (PA)

The Retail Motor Industry Federation (RMI)

The Scottish Government

The Society of Motor Manufacturers and Traders (SMMT)

Prof Christian Twigg-Flesner, Hull University

The Association for UK Interactive Entertainment (UKIE)

The Virtual Policy Network (tVPN)

Prof Ian Walden, Queen Mary, University of London

The Water Services Regulation Authority (Ofwat)

The Welsh Government

Which?

Prof Chris Willett, Essex University

## Annex E: Impact Assessments of Consultation

The Impact Assessments accompanying this consultation document can be obtained at the following URLs:

<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/s/12-955-supply-of-goods-statutory-guarantees-impact>

<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/s/12-956-supply-of-goods-short-term-reject-faulty-impact>

<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/s/12-957-supply-of-goods-repair-replace-faulty-impact>

<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/s/12-958-supply-of-goods-deduction-from-refund-impact>

<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/s/12-959-supply-of-goods-single-scheme-for-faulty-impact>

<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/s/12-960-supply-of-services-impact>

<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/s/12-961-supply-of-digital-content-impact>

## Annex F: The Consultation Code of Practice Criteria

- Formal consultation should take place at a stage when there is scope to influence policy outcome.
- Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

### Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Sameera de Silva  
BIS Consultation Coordinator  
1 Victoria Street  
London

Telephone: 020 7215 2888  
or email to: [sameera.de.silva@bis.gsi.gov.uk](mailto:sameera.de.silva@bis.gsi.gov.uk)

## **Annex G: Proposed changes to legislation within the scope of this consultation**

There are three pieces of secondary legislation which are affected by the Consumer Bill of Rights and five pieces of primary legislation.

The secondary legislation affected is the:

- Unfair Terms in Consumer Contracts Regulations 1999
- Unfair Terms in Consumer Contracts (Amendment) Regulations 2001
- Sale and Supply of Goods to Consumers Regulations 2002

The primary legislation affected is the:

- Supply of Goods (Implied Terms) Act 1973
- Unfair Contract Terms Act 1977
- Sale of Goods Act 1979
- Supply of Goods and Services Act 1982
- Sale and Supply of Goods and Services Act 1994

The elements of this primary legislation that apply to business to business transactions will not be affected by the Consumer Bill of Rights.



