



Department
for Business
Innovation & Skills

**CONSUMER RIGHTS BILL: SUPPLY
OF DIGITAL CONTENT**

IMPACT ASSESSMENT: FINAL

JUNE 2013

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Title: Consumer Bill of Rights: The Supply of Digital Content IA No: BIS0399 Lead department or agency: Department for Business, Innovation and Skills Other departments or agencies:	Impact Assessment (IA)			
	Date: 26/02/2011			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
Contact for enquiries: consumerbill@bis.gsi.gov.uk				

Summary: Intervention and Options	RPC Opinion: GREEN
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
£219.60m	-£3.58m	£0.42m	Yes	IN

What is the problem under consideration? Why is government intervention necessary?
Consumer rights in connection with digital content are currently highly uncertain. There are legal disputes over whether digital content is goods, services, both or neither. Legal research commissioned by BIS, found that it was not clear what, if any, legal rights the purchaser of digital content has if the content proves defective or fails to live up to expectations. As a result it is unclear what rights to quality and what remedies are available to consumers for digital content making it difficult for consumers to enforce their rights. The digital content market is large and growing and there is evidence of consumer detriment caused in particular by lacking or overly complex information and by problems accessing the digital content.

What are the policy objectives and the intended effects?
A simple framework that gives legal certainty for both business and consumers as to rights and remedies for digital content purchases, which takes into account the unique nature of digital content, existing domestic legislation and European proposals and which achieves a fair balance between rights and responsibilities for both businesses and consumers. In order to achieve these objectives we are proposing:

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

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
We consulted on 3 options:
0: Do nothing, however the Consumer Rights Directive will be implemented in parallel with these proposals, which contains separate elements applicable to digital content.
1: Provide bespoke rights and remedies for digital content, treating related services akin to other services in the wider bill. Exclude the right to reject for digital content.
2: As 1 but treat related services the same as digital content, and include the right to reject.
Following the consultation we propose a blend of options 1 and 2 – provide bespoke rights and remedies for digital content and related services but exclude the right to reject for intangible digital content. This provides the best balance between a strong regime which is clear to consumers, but without stifling innovation.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 01/2019					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro Yes	< 20 Yes	Small Yes	Medium Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister: _____ **Jo Swinson** _____ Date: _____ **4 June 2013** _____

Summary: Analysis & Evidence

Policy Option 1

Description:

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 135.82	High: 303.38	Best Estimate: 219.60

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	1.9	2.5	23.4
High	4.6	5.7	53.4
Best Estimate	3.2	4.1	38.4

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

Business: Transition costs: Familiarisation costs £1.48m; Initial increase in legal costs £1.76m.

Ongoing costs: Cost of amending deduction for use £0.17m; Increase in the number of complaints to business at £0.74m; Increased number of consumers receiving redress £3.17m.

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

Consumers: There is a non-monetised cost for consumers from the potential for delayed redress for intangible digital content, where consumers may have to wait for a repair or a replacement (which fail) before they are able to claim some money back.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0.0	22.0	189.2
High	0.0	38.1	326.8
Best Estimate	0.0	30.0	258.0

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

Business: Ongoing: Simpler complaint handling £1.30m; Reduced legal advice costs £0.76m; Reduced number of court cases £0.68m; Reduced training costs £0.64m; Net saving of setting right-to-reject period to 30 days of £0.67m. Consumers: Ongoing: Reduced risk of consumer detriment increasing from £6.75m in the 1st year to £7.39m in the 10th year, and reduced transaction costs increasing from £18.10m in the 1st year to £19.79m in the tenth year.

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

Minimum quality standards will create a level playing field and some businesses (particularly new/small entrants) may also see increased sales due to increased consumer confidence.

Key assumptions/sensitivities/risks

Discount rate (%)

We identified two key risks associated with providing new, bespoke quality rights and remedies for digital content. Firstly, the risk that the framework places too much burden on business, or conversely undermines consumer protection. Secondly there is a risk that a more certain legal framework removes flexibility which is relevant to particular sectors supplying digital content. In developing these proposals we have sought to mitigate these risks by consulting widely with business and consumer groups.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 4.5	Benefits: 4.0	Net: -0.42	Yes	IN

Evidence Base (for summary sheets)

Problem under consideration

1. This Impact Assessment relates to proposals to reform consumer law on the supply of digital content. The proposals form part of a wider programme of work to reform consumer law (the 'Consumer Law Reform Programme'). This section outlines the overall motivation for simplification and clarification of consumer law, before explaining the specific proposals covered by this IA.

Background to the proposed reforms to consumer law

2. Consumer law is unnecessarily complex. A bench-marking 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, because it has grown piecemeal over the years¹. Consumer law is fragmented and in places unclear, for example where the law has not kept up with technological change or lacks precision. There are also overlaps and inconsistencies between EU and pre-existing UK legislation and the law is couched in legalistic language.
3. It is widely understood that 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.
4. For traders, poorly understood law wastes business time and creates costs arising from unnecessary and prolonged disputes with consumers, additional staff training and the need to seek legal advice. Unscrupulous traders can exploit the law's complexity and undermine competition from legitimate businesses. Consumers who lack confidence in their rights are less likely to try new market entrants and innovative products, which in turn weakens competitive pressure on incumbent firms.
5. The proposals within this impact assessment form part of a proposed wider reform of Consumer Law intended to come into effect alongside or shortly after the introduction of the Consumer Rights Directive in order to simplify the legislative framework across the piece. The reform will require primary legislation (the proposed Consumer Bill of Rights), amendment of the Consumer Protection from Unfair Trading Regulations and introduction of the new Consumer Rights Directive into regulations. The package of reform intends to:
 - **Consolidate** the law to reduce fragmentation;
 - **Clarify** the law to reduce the scope for costly disputes;
 - **Update** the framework to ensure that consumer rights keep pace with technological advances;
 - **Deregulate** to introduce key business-friendly provisions; and
 - **Enhance** consumer rights where it is appropriate to do so
6. These proposals intend to update and clarify the law. It may also enhance consumer protections.

¹ Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries, a study for BERR by UEA, 2008

Digital Content

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

*'... data or information products supplied in digital format as a stream of zeros and ones so as to be readable by a computer and give instructions to the computer...'*²

8. Digital content products include computer software, films, music, games, e-books, ring tones and apps and consumers can access these in a variety of ways, both through physical (e.g. on a disk) and intangible media (e.g. downloads via the internet.)³

9. The Digital Content market in the UK is established, large and growing. For example, in the UK more than £1 billion was spent on downloaded films, music and games in 2012. A description of the size of the Digital Content market can be found at Annex A.

10. Research has shown that there is significant legal uncertainty around consumer rights in digital content transactions. A recent legal research paper commissioned by BIS examined core consumer protections⁴ and found that it was not clear what, if any, legal rights the purchaser of a digital product has if that product proves defective or fails to live up to the consumer's expectations⁵. The paper concluded that UK law is not rational, effective, accessible or comprehensive in respect of consumer rights in digital products, and that it should be clarified. This was supported by respondents to the consultation (79 out of 81 respondents to the short form consultation agreed with the question "Do you agree we should make clear what legal rights the consumer has in digital content transactions?", and 37 out of 40 respondents to the full consultation who expressed a preference, agreed with the question "Do you agree that we should clarify consumer law for digital content transactions?").

11. Two different issues arise from this legal uncertainty:

- Consumers are less active in attempting to resolve problems they experience with digital content⁶, meaning that the size of consumer detriment in this area is likely to be greater than estimates suggest. Consumer reluctance is likely to arise due to a number of factors, including poor understanding of rights and the typical low value of digital content⁷.
- In contrast, some consumers may think that they are entitled to a remedy which the business does not think it is obliged to provide under the current law. In such situations there is a risk that both the business and consumer will spend time and money on unnecessary dispute. There is also a reputational risk to business if it declines to provide the remedy the consumer wants⁸. In addition, when consumers do experience problems and are unable to claim the remedy they expect, consumer confidence is undermined.

² 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>.

³ Ibid.

⁴ In relation to sale and supply of goods, core consumer protections are reasonable quality and fitness for purpose and in relation to services are those such as the supplier will carry out the service with reasonable care and skill

⁵ 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>.

⁶ <http://conversation.which.co.uk/technology/download-refund-disappointing-faulty-app-store-itunes-android-market/>

⁷ Consumer Focus survey, not yet published, see Annex A, para 30

⁸ Consumer Focus 2012, see Annex A, table 10

This could disadvantage new entrants to the market in particular as consumers are driven towards established brands.

12. Providing clarity to business and consumers as to what remedies should be provided for faulty digital content within the Consumer Bill of Rights should minimise disputes caused by the existing gap between consumers' expectations and what the law requires (see paras 45-50).

Evidence of Consumer detriment

13. Reports show that a significant number of consumers experience problems with their digital content purchases⁹. Table 1 shows the percentage of consumers in the UK who had experienced at least one problem with digital content during 2012. 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 1: 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)

Causes of Detriment

14. Table 2 shows the type of problems that consumers experience with digital content.

Table 2: Proportion of consumers experiencing type of problem in the two most recent problems

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

Source: Europe Economics (2011)

15. The three main problems experienced by consumers purchasing digital content concern poor information provision (both lack of information and unclear/complex information), access and quality.

A. Information Issues

16. Poor (lacking or overly complex) information provision often causes consumers to experience problems with the performance of the digital content they purchase. For example, of the 18% of consumers who experienced problems in the "Lack of information" category, one third of them reported situations where they were not made aware of the minimum technical requirements for operating the digital content, or where this information was incomplete or lacking. Much of this

⁹ 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.

detriment will be addressed by changes implementing the **Consumer Rights Directive** (see Annex B).

17. Another large proportion of problems in the 'Lack of information' category were due to 'content being of poorer quality than expected given the information provided by the supplier', which represented a fifth of the problems in that category. This issue will be addressed by changes proposed in the new **Consumer Bill of Rights** (see paras 45-50).

B. Access Issues

18. Two thirds of those who had problems accessing digital content they had purchased identified unexpected service interruptions at the suppliers end as the cause of these. Feedback from industry, commissioned as part of the same report¹⁰, 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.

19. Longer term access restrictions can be caused by issues with interoperability and technical protection measures, which mean that consumers are only able to use digital content on certain devices. Consumer organisations highlighted that cross-border restrictions on product use could also result in problems for consumers. Some of these interoperability and compatibility issues will be addressed by changes coming into force under the implementation of the **Consumer Rights Directive** (see Annex B).

C. Quality Issues

20. The report also showed that many consumers experience problems with the quality of digital content they purchase. A large number of quality problems were with visual or sound quality (36%), with another major problem in this area being corrupt content that could not function on the consumer's device and sometimes caused damage to the device itself (32% of all quality problems).

21. A number of consumers experience problems with the quality of downloaded digital content. A recent survey by Consumer Focus reported that 16% of respondents who had purchased digital content in the last 12 months stated that they had had a problem with a digital download.¹¹ A recent Which? online survey¹² showed that 43% of people that had bought a download had been disappointed.

22. Providing clear quality standards and remedies for digital content within the Consumer Bill of Rights will help standardise and protect consumers' reasonable expectations, and will provide clarity for both businesses and consumers (see paras 45-50).

¹⁰ 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_-_2001-06-15.pdf.

¹¹ Not yet published.

¹² <http://conversation.which.co.uk/technology/download-refund-disappointing-faulty-app-store-itunes-android-market/>

Economic Rationale for Intervention

23. The key motivation for simplifying and reforming consumer law is to make markets work more effectively and to drive economic growth.
24. Well-functioning competitive markets encourage growth by creating incentives for firms to become more efficient and innovative¹³. Markets can only be fully competitive if consumers are active and confident, meaning that they are willing to challenge firms to provide a better deal, switch between suppliers, and take up new products¹⁴. Consumer law reform can play a central role in empowering consumers and hence supporting more effective competition.
25. First, by simplifying and clarifying consumer law, the reforms aim to raise consumers' awareness and understanding of their existing rights. The proposed consumer law reforms will reduce and streamline the number of pieces of consumer legislation. They will also provide clarity where the law is currently not specific – for example, specifying the number of days within which consumers have a right to reject faulty digital content on a disk (or other goods), rather than the current provision that consumers lose the right to return faulty goods after a 'reasonable time.'
26. Greater awareness of consumer rights should make markets work more effectively because consumers will have greater confidence to switch to alternative suppliers or take up new products. Where consumers are unclear what will happen if things go wrong with a new product or service, they will take account of this risk either by engaging in costly search to find out more about the product, or by requiring a 'risk premium' on the new product. Clarifying consumer rights can thus reduce transaction costs of switching suppliers or taking up a new product. It can also help to overcome behavioural inertia, where customers prefer to stick with what they know rather than the slightly less certain (but potentially better) alternative.
27. This is particularly important in allowing new entrants to compete and win customers from established firms. For example, in online markets the strength of established brands comes in part from a perceived lack of consumer confidence in the protections afforded by consumer law for consumers purchasing from smaller suppliers.
28. Second, and related to these simplification benefits, consumer law reform can also ensure that substantive consumer protections are focused on addressing key market failures – particularly information asymmetries between consumers and firms.
29. There is strong academic support for the position that some minimum degree of consumer protection is required in order for markets to function effectively¹⁵. For example, in the absence of consumer law, consumers would typically not know how a firm would respond if something went wrong with a product or service. Having to find out this information in each case, and potentially negotiate an insurance agreement with each firm, would be extremely costly. Having a minimum level of consumer protection in place is an efficient way of reducing search and transaction costs.
30. The overall impact on growth of consumer law simplification could be significant. For example, in Australia, the Productivity Commission estimated that simplifying national

¹³ For references to literature on the links between competition and growth, see OFT 'Competition and growth' 2011

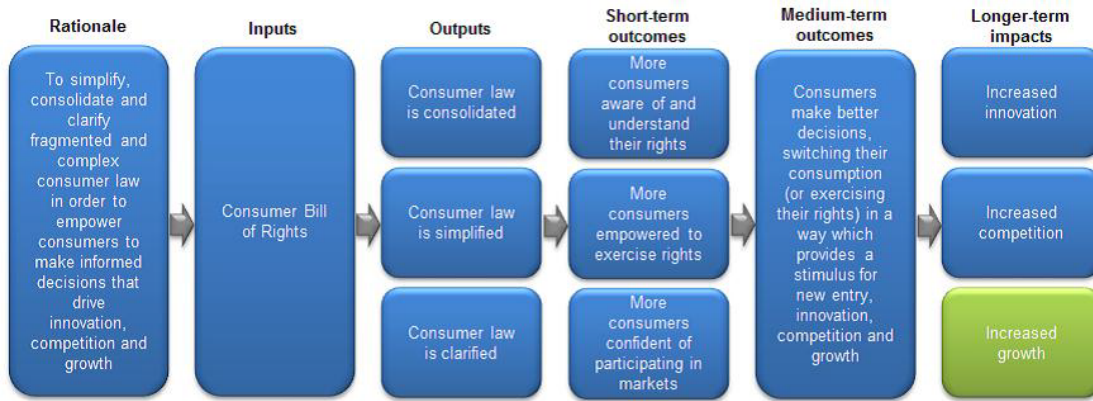
¹⁴ Mark Armstrong 'Interactions between competition and consumer policy' 2008

¹⁵ *ibid*

consumer law could increase productivity by 0.13 per cent, and in turn lead to higher GDP¹⁶. In the longer term, these productivity gains were estimated at A\$6 billion over forty years.

31. Figure 1 summarises the way simplified consumer rights can have an impact on economic growth.

Figure 1: Logic model linking simplified consumer rights and economic growth¹⁷



¹⁶ ICF GHK 'Consumer Rights and Economic Growth' (to be published 2013).

¹⁷ Model taken from ICF GHK 'Consumer Rights and Economic Growth' (to be published 2013) pg18

Policy objectives

32. This impact assessment is concerned with proposals addressing consumer rights when contracting for the supply of digital content. These proposals sit within a wider package of reforms to consumer law, as mentioned in paragraph 5.

33. The aim of the proposals relating to consumer purchases of digital content are to:

- Provide legal certainty for both businesses and consumers as to what rights and remedies are available in relation to such purchases;
- Provide a simple framework that is easy for businesses and consumers to understand and use by aligning, where possible, with existing legislation and consumer expectations;
- Align our proposals, as far as this is appropriate and achievable, with the Consumer Rights Directive and with emerging proposals from the European Commission (for a Common European Sales Law (CESL) - see Box 1 below);
- Support a growing and significant part of the UK economy and to protect intellectual property rights by taking into account the unique nature of digital content (such as the importance of copyright control, technical compatibility issues, and difficulties in returning digital content);
- Provide a framework that is principles-based¹⁸ 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.

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

- A clear definition of what we mean by digital content.
- A set of quality standards that digital content must meet.
- A set of the remedies which will be available to consumers when digital content does not meet these quality standards.

35. Updating, consolidating and enhancing the law in this area should:

- Benefit the market as a whole by increasing consumer confidence, empowering consumers and driving stronger competition between firms.
- Make it easier for consumers to secure redress when their rights are breached.
- Reduce business costs, by allowing traders to resolve disputes more quickly and easily, and reduce expense in staff training over consumer rights.

¹⁸ A Better Deal for Consumers - Delivering Real Help Now and Change for the Future, published in July 2009 and available here: <http://www.bis.gov.uk/files/file52072.pdf>, listed the following principles for consumer strategy: consumers are protected from unfair practices, consumers are enabled to exercise greater personal responsibility, businesses that behave fairly are not disadvantaged, new and emerging consumer markets are identified, consumers benefit from open and competitive markets, Government actions will be accountable, consistent and transparent, targeted on the areas where major breaches or areas of confusion occur.

36. Increasing consumer confidence will empower consumers to challenge incumbent firms, switch to competitors, and take up new products. In turn, this should force businesses to compete on price and quality, stimulating innovation and growth – along with greater investment in the long term.
37. Following changes to the law, it would be our intention that a communications campaign will be initiated in order to inform consumers, those who deal with consumers, and also businesses, of the changes to the law.

Box 1: European legislation and proposals relating to digital content; CRD and CESL

The **Consumer Rights Directive (CRD)** is largely a maximum harmonisation directive that must be implemented into UK law and our intention is to do this alongside the Consumer Bill. The CRD provides that digital content supplied on disk should be considered as goods, but provides that digital content not on a tangible medium should be treated as neither sales contracts nor services contracts. It also has provisions applying to digital content as its own category.

The CRD introduces two new requirements for pre-contractual information that must be given for digital content and specifies how the right to withdraw applies to digital content in intangible and tangible form. The CRD does NOT, however, establish quality rights for consumers when buying digital content or set out what remedies should be available to consumers if digital content is sub-standard.

In October 2011, the European Commission published a proposal for an optional **Common European Sales Law**¹⁹ that includes some specific, sales-related rules for contracts for the supply of digital content²⁰. 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.

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

¹⁹ http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf

²⁰ On the 2nd Feb 2012, the Government published a Call for Evidence on the EU proposal for a Common European Sales Law. This is a joint MoJ, BIS, NI and Sc publication and is available on the MoJ website, the consultation period will end on the 21 May 2012. <https://consult.justice.gov.uk/digital-communications/common-european-sales-law>

Description of options considered to clarify rights for digital content

38. Three main options were proposed as part of the consultation process. These are detailed below.

Option 0, do nothing

39. The first option was to do nothing beyond implementing the CRD (see Box 1 above and Annex B).

40. Implementation of the CRD may address some of the consumer detriment caused by lack of information (para 16), and access issues (para 19). See Annex B for a consideration of the effects of implementing the CRD.

Why Rejected

41. The Consumer Rights Directive does not cover rights regarding non-conformity with the contract or quality issues (paras 17 and 20-22), except to the extent that performance that is not in accordance with the pre-contractual information will be a breach of contract. If we implemented the CRD alone, the quality standards available for digital content transactions would remain unclear. Arguably introduction of the CRD may reinforce the legal position that digital content on disk is to be treated as goods but it will not help clarify what rights there are regarding the quality of intangible digital content. This is because the CRD states that digital content supplied on a tangible medium should be considered as a good but does not set out or indicate what rights exist on quality for digital content per se or remedies for breach of those rights to quality.

Option 1

42. Under this option we proposed to:

- Define digital content using the CRD definition (for consistency)
- Clarify that quality standards similar to those that apply to goods are applicable to digital content itself, with some modifications. These quality standards are that digital content must
 - Be of satisfactory quality, meaning that it meets the standard a reasonable person would consider satisfactory taking account of any description, price and all other relevant circumstances (including general fitness for purpose)
 - Be fit for particular purposes made known to the trader by the consumer
 - Correspond to any description given including trial versions
 - Differences to the goods regime include different provisions in relation to title and to the rights to modify digital content post sale (bug fixes, updates etc)
- Apply remedies similar to the current goods remedies and to those proposed for services (this will not include a right to reject intangible digital content (returning it and getting a refund)).

Option 2

43. Under this option, we proposed to:

- Introduce a definition of digital content and clarify that quality standards and remedies similar to those that apply to goods apply to such content (as in Option 1)
- Apply the short term right to reject to faulty digital content.
- Include ‘related services’ (e.g. those services which stream digital content delivered online) within the scope of the digital content proposals. Two further options were considered in relation to ‘related services’:
 - i. Apply the services quality standard of reasonable care and skill, but the goods remedies of repair, replacement, rescission of contract, and reduction in price; or
 - ii. Apply the digital content quality rights and remedies to the content after the performance of the related service.

44. Within each Option 1 and 2, we consulted on whether the proposals should apply to free digital content or to contracts where something of value other than money (such as personal data) has been provided by the consumer.

Preferred Option – introduce bespoke rights and remedies for digital content

45. Following the responses to our consultation and feedback on our proposals, the preferred option, and that proposed, mixes Options 1 and 2. In summary, we propose to provide bespoke rights and remedies for digital content after related services have been performed but exclude the short term right to reject and the longer term right to rescind for intangible digital content. We believe that this will provide enhanced clarity and consumer protection, without stifling innovation in this growing area.

46. Overall, our legal analysis, as well as that of the European Commission and other countries that have already clarified the status of digital content in their consumer law²¹, is that the expectations relating to the of quality digital content align better with the existing quality rights applicable to goods, than to those applicable to services.

47. A study by the University of Amsterdam suggested that “*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.*”²²

48. This evidence suggests that new digital content rights and remedies will be easier for consumers and businesses to use if they are similar to those applicable to goods. It is therefore proposed to align the digital content framework with the goods framework, where this is appropriate. This alignment will involve:

- Applying ‘outcomes-based’, goods style, standards to digital content. As with goods the trader will be strictly liable if the digital content does not meet these standards.
- Preventing traders limiting their liability for breach of these standards.

²¹ 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.

²² University of Amsterdam, http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf

49. We will therefore introduce a definition of digital content and related services, and a clear set of quality standards that digital content (once the related services have been performed) should meet. Where there has been a breach of the quality standards, we would largely apply the “goods” remedies, with the exception of the short term right to reject and longer term remedy of rescission. We are also clarifying that there is a right to limited damages if the trader fails to use reasonable care and skill to prevent digital content, provided under contract, from harming a consumer’s other digital content or device. This is intended as a reflection of what would happen if a negligence case was taken. See Box 2 for a summary of the digital content proposals.

Box 2: Summary of proposals for Digital Content

Rights

When buying digital content from a trader, a consumer will have the following rights:

That the trader has the right to provide the digital content;

That the digital content will:

- Be of satisfactory quality, meaning that it meets the standard a reasonable person would consider satisfactory taking account of any description, price and all other relevant circumstances (including general fitness for purpose)
- Be fit for particular purposes made known to the trader by the consumer
- Correspond to any description given including trial versions
- That the trader can only modify (update) digital content post sale if the update does not reduce standard to the digital content
-

Statutory Remedies

- If the first of these statutory rights are not met the consumer will be entitled to: a full refund
- If any other of these rights are not met the consumer will be entitled to request:
 - a repair or replacement of the digital content (we call these “first tier remedies”)
- If the digital content cannot be repaired or replaced within a reasonable time or without significant inconvenience to the consumer - the consumer will be entitled to
 - keep the digital content but receive a reduction from the price (we call this the “second tier remedy”)
- Where it is impossible to repair or replace the digital content the trader is not required to offer those remedies
- If digital content provided to a consumer under a contract damages the consumer’s other digital content or device, and the consumer can show that the trader failed to use reasonable care and skill to prevent it, the trader will be liable to pay the consumer the cost of replacing the damaged digital content or device.

Contractual remedies

- The rights set out above will be contractual rights. The Bill will make clear that consumers will also be able start an action for damages under normal contractual principles, as an alternative to using the statutory remedies.

50. Providing clear quality standards, and remedies which will apply when the quality standards are not met, should reduce consumer detriment associated with poor quality digital content (paragraphs 17, 20-22) and some problems with accessing digital content (paragraph 18).

51. In summary the quality standards for digital content will be based on the implied terms in the Sale of Goods Act (SOGA) but with modifications as outlined in Annex C.

Monetised and non-monetised costs and benefits of the proposals

52. Reforms to consumer law on the sale of digital content are part of a suite of proposed improvements to consumer law to be introduced through the Consumer Law Reform Programme.
53. Many of these impacts are common across all the proposed changes to consumer rights law. The following analysis outlines specific impacts of reform of the law, in relation to faulty digital content.
54. In order to get a better understanding of the potential impacts of the proposed reforms, we consulted stakeholders and commissioned an independent survey of businesses ('The IFF Survey'). The survey was conducted by IFF, on behalf of the Department of Business, Innovation and Skills during the autumn of 2012²³. This project comprised two stages: the first stage gathered data on current business practices in relation to treatment of complaints and redress given to consumers of faulty goods. The second stage of the survey involved the return by a smaller sample of businesses of a cost sheet of estimates for expenditure and resources allocated to consumer rights issues²⁴.

Estimating the number of businesses within scope of the reform

55. The majority of businesses that sell digital content to consumers will be within scope of the changes. Annex A (Table 1) details the applicable digital content population using the 2011 Business Population Survey, which estimates a total population of 289,075 firms with an annual turnover of £200 billion. Our definition includes intangible digital content, such as a download, and tangible digital content providers, which includes content on a DVD or CD.
56. The ONS Business Population Statistics allowed us to split the population between micro firms, with 9 or fewer employees, and larger firms (10 or more). We found that 97% of all digital content businesses are micro firms, while the other three per cent are larger firms. This distinction was useful in applying the IFF survey cost data to our population since the cost data is split between micro, small, medium, and large firms.

²⁴ Stage 1 of the survey was conducted on 1,000 firms engaged in business-to-consumer trading. Stage 2 involved a selected sample of 60 Stage 1 participants who provided additional detail on their Stage 1 responses.

Table 3: Summary of costs and benefits of preferred option

Type of cost	Impact	High (£ million)	Low (£ million)	Best Estimate (£million)
One-off costs to business	Familiarisation and training costs	2.06	0.89	1.48
	Initial increase in legal costs	2.52	1.01	1.76
Ongoing costs to business pa	Increase in the number of complaints from consumers	1.18	0.30	0.74
	Increased number of consumers receiving redress	4.23	2.11	3.17
	Limiting deduction for use to post 6 months	0.26	0.08	0.170
Total cost (net present value)		53.4	23.4	38.4
Ongoing benefits to business p.a.	Simpler complaint handling	1.78	0.81	1.30
	Reduced legal costs because of clarification of the law	1.01	0.51	0.76
	Reduced number of cases escalating to court cases	0.90	0.45	0.68
	Reduction in staff training costs	0.99	0.30	0.64
	Benefit of shortening right to reject	0.92	0.41	0.67
Ongoing benefits to consumer	Reduced transaction and search costs ¹	24.13	12.07	18.10
	Reduced risk of consumer detriment ¹	6.89	6.62	6.75
Total benefit net present value		326.8	189.2	258.0
Equivalent annual net cost to business				0.42

1. These benefits will increase annually by 1%, in line with the forecasted increase in household expenditure.

Costs and Benefits to Business

One-Off Costs to Business:

Familiarisation costs

57. We anticipate that all digital content providers will incur familiarisation costs from the proposed reforms, but these costs will be relatively small because the changes are intended to simplify existing law, making it easier to understand and apply. Moreover, as the proposals on digital content will be introduced in parallel with the CRD and other reforms within the Consumer Bill of Rights, we believe that the cost incurred may be lower than if these changes were introduced in isolation (synergy in familiarisation and training).

58. As the proposed reforms are straightforward to explain, we do not think it will take more than 10-20 minutes for a staff member to become familiar with the changes specific to digital content. This is based on the assumption that the training for all consumer rights reform will be delivered in one session, of which 10-20 minutes would be spent on the changes to digital content. This is underpinned by the plan to include an awareness campaign as part of the reforms and the reality that most businesses are informed of changes by their trade associations and businesses groups, and likely to involve reading purpose-drafted literature. Cumulatively, over all changes to consumer rights (including Goods, Services and CRD) training is estimated to take around two hours in total.

59. As stated above, most digital content firms are micro businesses with 9 or fewer staff members. For these, evidence from the IFF survey shows that consumer complaints are typically handled by a senior staff member (often the owner or proprietor)²⁵. Therefore we have based our familiarisation cost on the wages costs for Customer Service Managers and Supervisors, at £15.55 per hour²⁶. Assuming the time taken for familiarisation is 10-20 minutes as noted above, the average cost per business would be £2.59 to £5.18. Extrapolated across the business population, the overall cost is in the range £0.75m to £1.50m. Therefore, the best estimate is £1.12m.

60. For larger firms with 10 or more employees, we have assumed that staff at management level would be familiarised with the reforms (included above at the same wage cost for customer service managers and supervisors). We estimate that in addition, there would also be familiarisation costs in training 10-20 frontline staff members for on the reforms at an hourly cost of £9.78²⁷. This will result in an overall cost for larger firms in the range £0.14m to £0.57m, with a central estimate of £0.35m.

61. In total businesses will incur familiarisation costs of £0.89m to £2.07m, with a central estimate of £1.48m.

Transitional, one-off legal advice costs

62. We anticipate that the reforms under the Consumer Rights Bill, in parallel with the CRD, may initially lead some businesses to seek additional external legal advice. This is likely to be a once-off transition cost to help business apply the reforms (in the longer term we expect firms to have less need for legal advice, as set out in the benefits section below). Based on the responses to the IFF survey, only a proportion of businesses (28%) sought external legal

²⁵ IFF Survey F2, Table 23.

²⁶ This is based on ASHE 2012 hourly wage of £13.58 for Customer Service Managers and Supervisors, with non-wage labour costs at 14.5%, giving an hourly cost of £15.55

²⁷ Based on ASHE 2012 hourly wage for frontline customer service occupations at £8.53, uprated to include 14.5% non-wage labour cost is £9.78 per hour.

advice in the last year. As the reforms do not represent significant legal change, we believe that there will only be a small increase in legal advice costs. We used the data from the IFF survey on annual legal costs to estimate the impact of an increase of 2-5%. This was done by firm size to reflect the variation in legal advice costs faced. We have estimated a cost range of £1.01m to £2.52m, with a central estimate of £1.76m.

Ongoing Costs to Business:

Increase in the number of complaints received from consumers

63. The new clarity in digital content law, and the application of an up-to-date remedy framework, may increase the number of complaints to business. However, clarification of the law should lead to a reduction in the number of groundless complaints because consumers and businesses should have a clearer understanding of their rights. On balance we expect that these two effects will lead to a small increase in the number of complaints and a resulting increase cost for business.

64. First, there will be increased costs of handling more complaints. This is calculated by assuming an increase of 10-20% in the number of complaints to business, resulting in an additional staff wage cost of 20-40 minutes per complaint. We expect that this increase in volume of complaints will be offset by reduced costs of handling each complaint, which is discussed under benefits to business. We have estimated this additional cost at £0.30m to £1.18m – with a best estimate of £0.74m.

Increase in redress costs

65. Adding clarity to consumer law will make the complaint process simpler and more accessible for consumers. This will empower a proportion of consumers to seek recourse when they purchase faulty digital content and receive a remedy. The exercise of these clearer rights and remedies by consumers we expect will incur a cost to business.

66. The 'additional complaints arising from simplified consumer law' provided us with an estimate of the number of new issues directed at business. We assumed that 52% of these issues were resolved by providing an explanation or advice rather than a remedy, which is derived from evidence in the IFF survey²⁸. We weighted the average annual cost of all types of digital content redress to get an estimate of the average annual cost of all remedies, which was £77²⁹. This figure was derived from the stage 2 cost data from IFF Research. The cost per remedy was multiplied with the number of problems that were not resolved by providing information. We calculated that the increased cost of redress will cost business £2.11m to £4.23m per year. Our best estimate is £3.17m.

Increased costs of limiting deduction for use to post-6 months from date of purchase

67. Under existing EU legislation which applies to sales of goods only, consumers have rights when tier 1 remedies fail; either keep the goods and get a price reduction or return the goods and get a refund. Currently businesses can deduct for use at any time. Under proposed reforms detailed in the goods impact assessment, business cannot now deduct for use within the first six months, unless the goods have a proven second hand value (and the deduction cannot then reduce the amount of a refund to below that value). This will result in some costs as a refund of a six month old fault will cost more if the retailer has to refund the full purchase price, rather than the value of the content at the time the refund is paid. This

²⁸ IFF Raw Dataset 2, Table 24/1

²⁹ We removed compensation from this average since no micro or small firms reported any compensation costs. This artificially deflated the annual compensation costs to £5 per annum, and brought down the annual average remedy cost. We felt that retaining compensation underestimated the increase cost to business from customers receiving redress. Including compensation lowers the annual remedy cost to £63.

additional cost only impacts tangible digital content, such as digital content on a compact disc (CD), since the right-to-reject is limited to digital content on a tangible medium.

68. Based on the IFF data, we estimated the frequency of cases where a deduction for use would have been applied in the past, but will no longer be available to the business³⁰.
69. In particular, we estimated the impact by using the IFF data to calculate the number of business who do not currently give full refunds³¹ within 6 months³², when tier 1 fails³³. This isolates the percentage of firms who are currently not compliant with the proposed regulations (1.317%). We analysed the data by firm size as the evidence suggests variation in costs and approach depending on the size of the business. To calculate the cost of compelling these firms to pay a refund, we estimated their current costs from additional replacements or repairs (this provides the range as not all business currently opt for the same remedy and so will face different costs in complying) and then estimated how much the provision of full refunds would cost them. We estimated this cost at £23.30 - 67.01 per firm, suggesting an overall impact across the affected population of £0.08m to £0.26m – with a central estimate of £0.17m. The ongoing cost to business, in this case, is relatively small because of the limited applicable population.

Non-monetised Costs to Business.

70. Manufacturers might face an increase in costs as traders may attempt to pass on the additional costs of redress.

Costs to Consumers

71. Consumers might face an increase in prices as businesses may raise prices in an attempt to cover additional costs of redress. Consumers may also face delayed redress where they may have to wait for a repair or replacement (which fail) before claiming some money back.

Benefits to Business:

Time savings from simpler complaint handling

72. A key objective of the Consumer Bill of Rights is to provide clarity for consumers and businesses on their rights and obligations in the event of faulty digital content and complaints. We envisage that this will result in quicker and easier handling of complaints for business, where less time and staff resource will be required to resolve issues; including moving complaints handling to more junior staff because procedures and remedies can be simplified and easily applied.
73. To estimate the impacts on business of simpler complaint handling we took the current volume of complaints and assumed that there would be a slight decrease in time costs of 5-10 minutes per complaint. We estimate that these reforms will make it easier for businesses to handle complaints and decide quickly which complaints have merit, which require a standard response/remedy and which need to be escalated for legal advice. As with the familiarisation costs, these savings are based on Customer Service Managers and Supervisors, at £15.55 per hour³⁴ (as our research shows that currently in the majority of

³⁰ Complaints about digital content are often remedied without recourse to statutory rights at all, with 32% of retailers reporting that providing explanation or advice to the consumer resolved complaints over digital content the majority of the time (IFF Raw Data Set 2 Table 24/1).

³¹ IFF Survey E20, Table 21

³² IFF Survey E6, Table 6.

³³ IFF Survey E19Ran, Table 20

³⁴ This is based on ASHE 2012 hourly wage of £13.58 for Customer Service Managers and Supervisors, with non-wage labour costs at 14.5%, giving an hourly cost of £15.55

cases, complaints are handled by senior staff members)³⁵. We estimate the savings at £0.81m to £1.78m. The best estimate is £1.30m. We believe that some businesses may wish to reduce the number or seniority of staff complaint handling but it was not possible to quantify and monetise.

Reduced ongoing legal advice costs (after transition)

74. Linked to simpler complaint handling and based on simplified regulations, we estimate that businesses will incur reduced legal costs as a result of the reforms. According to the responses to the IFF survey, approximately 28% of businesses sought external legal costs in the previous year³⁶. Based on the population of businesses that incur legal costs, we estimate a reduction of 1-2% in legal advice costs. There is no additional information on why businesses engage external legal advice. So we have assumed a conservative reduction in advice costs as the law will be simpler and clearer to interpret and apply, which is likely to reduce the need for additional legal advice. We have estimated the savings at £0.51m to £1.01m. The best estimate is £0.76m.

Reduced number of cases escalating to court

75. The clarification through the proposed reforms is also expected to reduce the number of consumer complaints which escalate to court cases. This is based on raising the understanding of both consumers and businesses on rights and obligations, and clarifying the language of the legislation.
76. The IFF survey indicated that only a small percentage of businesses (5%)³⁷ had incurred costs for court cases in the previous year and so we assume that only a small proportion of the business population will experience savings. We calculated the impacts using IFF survey evidence, splitting business into micro and other as the estimated costs varied significantly based on firm size. We have conservatively estimated a saving of 5-10% due to the clarifications. This produces a saving to business ranging from £0.45m to £0.90m and a best estimate of £0.68m. This is a conservative estimate as it is based on the cost of legal fees to the business, and not on the full cost of going to court to contest the case.

Savings from reduced training costs

77. Although we have estimated an initial increase in training costs as businesses inform their staff about the reforms, we believe that after the initial period, training costs should decrease with business experiencing savings over time. This is primarily due to clarification of the law where businesses no longer have to interpret their obligations or prepare scenario responses and can reduce training times accordingly.
78. Based on the IFF data, only a proportion of businesses currently provide ongoing consumer rights training for staff (21% for digital content firms). We have estimated a range of savings based on 3 employees with a time saving of 10 mins to 5 employees with a time saving of 20 mins. The evidence from the IFF survey suggests that many businesses do not train staff on consumer rights on a regular basis and as the new laws will be easier to understand, we believe that savings are based mostly on streamlining the training for new staff, rather than up-skilling existing staff. We have estimated this saving at £0.30m to £0.99m. The best estimate is £0.64m.

³⁵ IFF Survey F2, Table 23.

³⁶ IFF Survey, D3, Table 31.

³⁷ IFF Survey F6Ran, Table 27.

Right to reject limited to 30 days

79. As detailed in the Consumer Bill of Rights: Supply of Goods Impact Assessment there is a proposal to limit the right to reject faulty goods to 30 days. This proposal will also apply to consumer contracts for the supply of digital content on a tangible medium. This 30 day limit will have three main impacts on business:
- It will introduce costs for any firms that currently have a cut-off for refunds for faulty digital content of less than 30 days;
 - It will create direct benefits for businesses that currently offer refunds for faulty digital content beyond 30 days, and will no longer have to do so;
 - It will clarify the law, thus reducing the current lack of certainty over whether a refund should be given.
80. Stakeholder engagement with the British Retail Consortium and individual retailers suggested that most retailers currently offer short-term refunds for faulty digital content up to 28 or 30 days except in extreme cases³⁸. According to the IFF survey responses, the median length of time given for rejection of faulty digital content was 1 month³⁹, while the mean length of time was 5.51 months. This suggests that there will be minimal impact on most business of clarifying the right-to-reject period at 30 days.

a) Costs to business that currently offer less than 30 days

81. Business will incur costs from the new policy if they currently accept returns for fewer than 30 days. The IFF survey suggests that a slight majority of businesses (approximately 56%⁴⁰) currently offer a right to reject for 30 days or fewer. Based on our overall business population estimate, this would apply to 157,026 micro and 4,856 small – large firms offering digital content on a tangible medium.
82. Unfortunately, the IFF survey does not provide more granular detail of the precise period over which these businesses currently offer a right to reject (i.e. how many days fewer than 30, on average). However, based on consultation responses and discussions with businesses, we consider that:
- Most of these businesses already offer at least a 28-day right to reject period, to ensure compliance with the current law. This was confirmed by consultation responses.
 - Most rejections happen within 2 weeks, and virtually all firms offer a right to reject for this time period under the current law. In the majority of cases, a fault will become apparent within two weeks; after this point, it is less likely that a customer will exercise his or her right to reject.
83. For this reason, we consider that the move to a right to reject might lead to a 1 to 1.5% cost increase, on average, for those businesses currently offering a right to reject of up to 30 days. We consider that this increase takes account of the existing high rate of compliance and the time profile of current returns.
84. According to the IFF survey, the current average annual cost of refunds for businesses, grouped by business size, is £101.80 for micro and small businesses and £570.93 for small, medium and large⁴¹. Increasing this amount by the expected rise in costs of 1-1.5% across

³⁸ Most retailers try to keep the “extreme cases” to a minimum, but they are aware of court cases which found the right-to-reject to last longer than a month in certain circumstances, and if consumers press their cases to reject digital content after a month, many retailers say they give way unless they think the claim is fraudulent.

³⁹ IFF Raw Data Set 2 Table 6/1

⁴⁰ IFF Draft Report paragraph 10.7

⁴¹ IFF Stage 2 Cost Sheet Data, F1_Total

the population of businesses currently offering up to 30 days right-to-reject, suggests a range of costs to business of £0.19m to £0.28m, with a best estimate of £0.23m per year.

b. Benefits to business that currently offer more than 30 days

85. Alternatively, there are other businesses that will experience a saving because they currently offer a right-to-reject period of more than 30 days. The IFF survey suggests that 9% of firms currently offer a right to reject period of between 1 and 6 months, and 44% of firms currently offer a right to reject period of more than 6 months (of which 9% guarantee a full refund for faulty products for over 2 years)⁴². Based on the business population estimates⁴³, this suggests that 19,642 businesses offer 1 to 6 months, and 96,031 businesses offer more than 6 months.
86. For the firms currently offering between 1 and 6 months right-to-reject, we have conservatively estimated a cost saving in the range 2-4% as a result of the change to a 30 day rule. For firms currently offering more than 6 months right-to-reject, we estimate a cost saving in the range 5-10%, since we would expect a more substantial reduction in the number of payments to consumers. Using the figures for average annual cost of refunds as noted above, produces an overall estimate of the benefits to business in the range £0.60m to £1.20m, with a best estimate of £0.90m.
87. Netting the cost and benefits of limiting the right-to-reject period to 30 days suggests an overall net benefit of £0.41m to £0.92m, with a best estimate of £0.67m per year. This is consistent with consultation responses from business groups (e.g. the BRC) which supported fixing the right to reject at 30 days and considered that it would be very beneficial for business.

c. Reducing the uncertainty over whether a refund should be given

88. We believe that limiting the right-to-reject period to 30 days will produce a benefit to businesses and consumers alike by reducing the uncertainty over whether a refund should be given. We have not quantified or monetised this impact separately, as we consider that it is already captured under other impacts including simpler complaint handling and reduced training and legal advice costs for business and under reduced transaction costs for consumers.

Non-monetised Benefits to Business.

89. Clarifying the rights that consumers have when purchasing digital content may increase consumer confidence in dealing with smaller or lesser known traders/brands and new digital content products. This increase in consumer confidence may make it easier for new entrants in the market to compete with established brands, increasing the competitiveness in the market and underpinning growth.

⁴² IFF Survey E6, Table 6

⁴³ BIS Business Population Estimates, 2012: <https://www.gov.uk/government/publications/bis-business-population-estimates>.

Benefits to Consumers

Consumer benefits

90. We expect that overall consumers will benefit from the proposed reforms for Digital Content. While we have up-to-date information on consumer detriment, there is insufficient detail provided to assess the impact of each individual legal change against current sources of detriment. In order to quantify and monetise the consumer impacts, we have assessed two main impacts:

- Transaction and search costs
- Risk of consumer detriment

91. We think that together these two impacts offer a clear and realistic estimate of how the reforms will benefit consumers. The consumer benefit estimates in this section are based on independent research commissioned by BIS into the links between consumer law reform, consumer benefits and economic growth.⁴⁴ This research included adapting a model previously used in Australia by the Productivity Commission (APC) which sought to analyse the impact of the simplification of consumer law implemented in 2011. This approach to assess consumer impacts is common across the Consumer Bill of Rights using figures appropriate to Goods, Services and Digital Content.

Reduced transaction and search costs

92. Consumers with a greater understanding of their rights will have lower search and transaction costs. Transaction costs include those costs which consumers bear to prevent risks such as the cost to consumers of learning their consumer rights. Simplifying consumer law will enable consumers to make better decisions and reduce search time.

93. Transaction costs are difficult to measure accurately in monetary terms and in many cases the greater part of these costs do not cause consumers harm, such as a consumer's search for digital content that matches their preferences. Assuming a conservative estimate of 1 per cent⁴⁵ of household expenditure equates to transactions costs of £8.6 billion in 2011.

94. This high level estimate would include expenditure outside the scope of changes in digital content consumer law. Using the earlier methodology (see paragraph 92), it is possible to apportion a share of the transaction costs which would accrue to consumers purchasing digital content and is estimated to be £2.41 billion (28% of £8.6 billion).

95. We estimate that the simplification of consumer law and enhanced consumer remedies will not lead to a large reduction in harmful consumer transaction costs. If we assume a reduction in costs of between 0.5% and 1% the benefit to consumers of digital content will be between £12.07 and £24.13 million, with a mid point best estimate of £18.10 million. These estimates will increase with the forecasted growth in consumption spending which has been estimated using the average long run growth rate in household expenditure, at 1%.

Benefit to consumers from reduced risk of consumer detriment

96. Consumer detriment exists in the form of financial cost of problems with digital content as well as the lost personal time and emotional distress suffered by consumers. The simplification of consumer law and enhancements to consumer remedies will reduce the risk of consumers encountering detriment.

⁴⁴ Source: Dept BIS Report by ICF GHK "Consumer rights and economic growth",

⁴⁵ Source: Dept BIS Report by ICF GHK "Consumer rights and economic growth", p20 (2013);

97. The 2012 Consumer Focus Consumer Detriment survey⁴⁶ estimated that the annual financial cost to consumers resulting from problems with goods and services (including digital content) was £3.08 billion. This includes the costs incurred by consumers from trying to resolve problems themselves such as seeking legal advice, or replacing the digital content affected at the consumer's own expense. Many consumers use their personal time trying to solve consumer problems and using the 2012 Consumer Detriment survey, it is estimated that consumers spent 59 million hours dealing with problems. The median hourly wage rate in the UK in 2011 was £11.14⁴⁷ giving an estimated cost to the consumer of lost personal time of £660 million per year (£11.14 multiplied by 59 million hrs).
98. The emotional distress from consumer problems can be as significant as the monetary costs to consumers. While it is difficult to accurately value this detriment it has been estimated at 25 – 30%⁴⁸ of the value of consumer's financial detriment. The sum of lost personal time, financial detriment to consumers and emotional distress gives a total consumer detriment of £4.7bn to £4.9 billion, accounting for 0.5% of total household expenditure in 2011⁴⁹. This figure represents the objective risk faced by consumers. When they engage in transactions they face a small risk that they will suffer detriment. An aim of the improved consumer policy framework is to lower that risk⁵⁰.
99. Calculating the gain in reduced consumer risk from the simplification of consumer law and the enhancement of consumer redress is difficult and requires estimation of the future level of household expenditure. The long-run average growth of household expenditure is estimated at 1%, which has been used to forecast future household spending.
100. Finally to estimate the gain to consumers from reduced risk of consumer detriment an estimate of the impact of the reforms on the detriment is needed. The changes are not a significant enhancement of consumer rights and so they should have only a limited impact on the detriment avoided, so a conservative estimate of a reduction in detriment of 0.5%.

Formula:

Gain from reduced risk of consumer detriment = % reduction in consumer detriment from reforms (0.005) * % objective risk to consumers before reforms (0.01) * Forecast household consumption

101. The best estimate for the ongoing net benefit to consumers in the digital content market is estimated at £6.75 million (with a range £6.62-£6.89m) initially and increasing at a rate of 1%, which is in line with household spending.

Other Benefits to Consumers

102. Applying appropriate remedies to digital content and related services will mean consumers will be able to claim redress where there is a defect in either the content, the medium /access route through which the content is provided or any related services which affect the functioning of the digital content. This allows easier access to redress for consumers and will thus increase consumer confidence.

⁴⁶ Available at <http://www.consumerfocus.org.uk/publications/consumer-detriment-2012>

⁴⁷ 2011 Annual Survey of Hours and Earnings, all employees, table 1.4a

⁴⁸ Source: Source: Dept BIS Report by ICF GHK "Consumer rights and economic growth", (2013)

⁴⁹ ⁴⁹ Consumer Trends, Household final consumption expenditure, Total Expenditure, table 0GSKS. Total household expenditure estimated at £860,679m in 2011.

⁵⁰ Breakdown in business population is Goods 356,128, Service 386,000 and Digital Content 289,075.

103. The inclusion of a statutory right-to-reject for digital content on a tangible medium will mean that consumers will be able to get their money back where digital content on a tangible medium does not conform with the statutory standards without having to go through repair or replacement cycles.
104. In the long-term, an indirect effect of introducing clear consumer protection in this area could be the development of higher quality digital content.

One-in, One-out

105. This measure is in scope of OIOO as it has direct impacts on business. The Government expects the proposed changes to result in an 'IN' of £0.42m. This has been calculated on the basis of best estimate calculations on impacts which are direct and in scope for businesses as follows:

Costs:

- Familiarisation costs for business of £1.48m;
- Transitional, one-off legal advice costs of £1.76m;
- Increase in the number of complaints received from consumers of £0.74m per year;
- Increased costs of limiting deduction for use to post-6 months from date of purchase of £0.17m.
- Increased numbers of consumers receiving redress of £3.17m.

Benefits:

- Time savings from simpler complaint handling of £1.30m per year;
- Savings from reduced number of cases escalating to a court case of £0.68m per year;
- Savings in ongoing legal advice costs (after transition) of £0.76m per year;
- Savings from reduced training costs of £0.64m per year;
- Savings from change to right-to-reject period for digital content on a tangible medium provided by businesses currently offering above 30 days of £0.67m per year.

106. Over the life of this measure there are direct annual costs of £4.5 million and direct annual benefits of £4.0 million accruing to business, netting to an IN of £0.42 million (Equivalent Annual Net Cost to Business).

Risks and assumptions

107. The key risk associated with these proposals relates to where the balance is set between providing clear and robust remedies for consumers, while minimising any additional burden on business.
108. If the proposals fail to meet the overall policy aims of greater simplicity and clarity, there is a risk that the impact will be a burden on business with little tangible benefit in terms of consumer protection. If, on the other hand, the balance is pitched too far in favour of consumers, there is a risk that this will lead to a direct cost to business from dealing with additional claims that would otherwise not have been made by consumers. In either of these scenarios, it seems likely that any additional costs would be passed on to consumers through increased prices.
109. The lack of a right to reject for digital content that is not provided on a tangible medium may mean consumers will have less confidence in their right to claim money back when buying non-branded digital content, or from smaller retailers. This could adversely affect competition and could also result in a decline in the range/choice of digital content products available on the market, impacting negatively on consumers.
110. In developing these proposals we have sought to mitigate these risks by consulting widely with businesses and consumer groups to identify the correct balance point.

Impact on small and micro business

111. Small and micro businesses are an important part of the digital content retail sector. In 2011, businesses with fewer than 50 employees accounted for 99% of enterprises and 42% of employment⁵¹ in the six digital content sectors listed in Annex A, Table 5.
112. Small and micro businesses are especially likely to suffer under the current law.
- The ambiguities in the current law are particularly difficult for small firms to cope with. Studies show, for example, that they are often over-represented as defendants in small claims proceedings, and that they find the litigation process particularly stressful⁵².
 - Low consumer confidence also affects small firms more than their larger competitors. Without the right to reject, consumers tend to buy from large firms with well-known reputations; clarification of the law should therefore be particularly beneficial to small firms.
113. On the other hand, small and micro businesses might also be disproportionately adversely affected by an extension of consumer rights. This is because they are likely to find it more difficult to pass the costs of remedying faulty digital content on to suppliers and manufacturers/developers.
114. We have considered exempting small and micro businesses from the proposed legislation, but believe this would disadvantage such businesses. The current complexities would continue to cause confusion among the retailers themselves, and consumers would be likely to gravitate even further towards larger retailers to whom the new clearer framework would apply.
115. There was no support during the consultation for small or micro businesses to be exempt from the proposals. In particular, it was noted that any exemption:
- Would be counter-productive and detrimental to small and micro businesses, as consumers would be discouraged from buying from them. Consumers would be encouraged to stick to large businesses and would be less likely to try out new suppliers, hindering innovation and growth and creating obstacles to market entry.
 - Would not encourage business growth and would cause problems to businesses looking to expand beyond the small business threshold.
 - Would allow rogues traders to continue to operate, benefiting from the opacity of the current law and might encourage unscrupulous traders to manipulate the way they trade in order to fall into the exemption.
 - Would cause confusion among business, consumers and enforcers, undermining the aim of achieving a clear and consistent consumer protection regime.

Summary and description of implementation plan

116. Table 4 below, summarises the impacts that each option will have on stakeholders and the wider economy.

⁵¹ BIS & ONS, 'Business Population Estimates for the UK and Regions 2011' (Oct, 2011) <http://www.bis.gov.uk/analysis/statistics/business-population-estimates> See detailed data table (DataSIC072011), UK divisions sheet

⁵² J Baldwin, *Small Claims in the County Courts in England and Wales* (1997) pp 26 and 100

Table 4 – Impacts by Stakeholder

	Quality Standards	Remedies	Comments
Consumers	++	++	High level of consumer protection as quality standards and remedies will be aligned as far as appropriate with those applicable to goods. It will also be made clear that the right to reject applies to digital content on a tangible medium. Appropriate remedies will also apply to digital content related services, meaning the consumer will have identical remedies regardless of whether there is an issue with the digital content or the related service. Consumers may see an increase in prices as businesses react to the increased costs of consumer redress.
Retailers	+ -	+ -	Clarifying that the right to reject applies to digital content on a tangible medium is likely to increase the burden on businesses as they may have to provide more refunds. Retailers may also have to provide redress to consumers who have issues with access to their digital content or with other related services such as updates and maintenance services. However, clarifying the law should reduce disputes as to what rights consumers have in relation to digital content, and should help create a level playing field between retailers in the digital content sector. Some business (particularly new / small entrants) may also see increased sales due to increased consumer confidence.
Manufacturers	+ -	+ -	Manufacturers of non conforming digital content will face increased costs as retailers will pass on the increased cost of remedies. However, clarifying the minimum quality standards that apply to digital content will help create a level playing field between digital content manufacturers.
Competition	+ -	+ -	Increased consumer confidence should increase competition as consumers will be more likely than currently to buy from unfamiliar digital content retailers. However high consumer protection could potentially reduce the availability of low price and low quality products, thus reducing consumer choice.

Key

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

Annex A – The size of the Digital Content Market

Consumer consumption of digital content

117. The UK has a high penetration of internet access; Ofcom's Communications Market Report International 2012 found that total UK broadband take up was 77% in 2012 (up from 74% in 2011). Around four in ten home internet connections are used for playing games (38%), downloading music or video (37%) and watching video (40%).⁵³ In the UK, more than £1 billion was spent on downloaded films, music and games in 2012 (an increase of 11.4% from 2011), although sales of CDs, DVD, Blu-ray and video games still account for just over 75% of the market⁵⁴.

The value of digital content to the UK economy

118. BIS Business Population statistics suggest that digital content, and the industries supporting its creation in the UK, form a significant part of the economy, both in terms of employment and output. Two important areas of the UK economy in which digital content features prominently are the creative and retail industries. Overall, these sectors account for 3.7 percent and 5.5 percent of UK employment and turnover respectively. Table 1 shows the economic value added by the creative industries.

Table 5: Estimates of digital content sectors⁵⁵

	Enterprises	Employment (000's)	Turnover 2011 (£m)
58 Publishing activities	39,125	189	19,889
59 Motion picture, video and television programme production, sound recording and music publishing activities	45,225	115	18,286
60 Programming and broadcasting activities	9,490	33	10,441
61 Telecommunications	10,075	215	59,079
62 Computer programming, consultancy and related activities	178,230	573	67,819
63 Information service activities	6,930	62	11,382
Total	289,075	1,187	186,896

Source: Business Population Survey 2011⁵⁶

119. Given the importance of the digital content market to the UK economy, and the high level of consumer consumption of such content, legislation in this area must balance consumer protection with the need to support growing sectors.

⁵³ Ibid.

⁵⁴ Data from Entertainment Retailers Association: <http://www.eraltd.org/news/ers-news/digital-entertainment-exceeds-£1bn-in-sales-for-the-first-time.aspx>

⁵⁵ Under SIC 2007 classification, these are category J activities, namely Information and Communication related activities.

⁵⁶ <http://www.bis.gov.uk/analysis/statistics/business-population-estimates>

Annex B - Detriment that will be addressed by implementation of the Consumer Rights Directive

120. The implementation of the Consumer Rights Directive (CRD), which in many respects is a maximum harmonisation directive that must be implemented into UK law, has implications for digital content transactions to UK consumers. The CRD covers separate aspects of consumer law for digital content – specifically pre-contractual information and the right to withdraw for digital content sold at a distance. The domestic proposals cover quality rights for digital content on which the CRD does not deal with directly.

121. Laws to implement the CRD have to be adopted and published by the 13th December 2013 at the latest and should apply from the 13th of June 2014. Our intention is to implement the CRD alongside the Consumer Bill of Rights. The proposals from the CRD are analysed in a separate CRD impact assessment, but some consideration is given to them here where their implementation addresses some of the consumer detriment in the area of digital content.

CRD definition of digital content

122. Article 2 (11) of the Consumer Rights Directive defines digital content as:

'data which are produced and supplied in digital form'.⁵⁷

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

'Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. [...] If digital content is supplied on a tangible medium such as a CD or a DVD, it should be considered as goods... contracts for digital content which is not supplied on a tangible medium should be classified ... neither as sales contracts nor as service contracts.'⁵⁸

CRD requirements for digital content

124. **Pre-contractual information** - The CRD will introduce new requirements concerning information that must be given to consumers prior to the purchase of digital content, goods or services. This information will include the main characteristics and price of the digital content as well as the name, address and contact details of the trader. Most of these requirements already exist in current legislation and will be familiar to traders supplying goods and services. The CRD makes clear that digital content is also covered by such information rights and sets out two requirements, relevant to digital content, which have not been explicitly required in the past. These are that the trader must inform the consumer in advance of the relevant interoperability and functionality of the content. 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

⁵⁷ Ibid

⁵⁸ Ibid

content is compatible, for instance the operating system, the necessary version, and certain hardware features.⁵⁹

125. ***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 supplied on disk or in intangible form works.

- A consumer could have up to 14 days from transacting for digital content to withdraw from the contract.
- However, if the consumer chooses to access the digital content or to 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 where there is no fault.

⁵⁹ See here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>

Annex C – details of the digital content proposals

a) Digital content must meet any description, including that given in the pre-contractual information and the digital content must also at least meet the quality of any trial version and must be free from defect which would not be apparent from reasonable examination of the trial version.

b) The digital content must be of satisfactory quality and fit for any particular purpose

- The digital content will be of satisfactory quality if it meets the standard that a reasonable person would regard as satisfactory. In judging whether the digital content meets this standard, account will be taken of any description of the digital content, the price (if relevant) and all the other relevant circumstances (such as public statements on the specific characteristics of the digital content).
- Judgements as to the quality of the digital content could further include consideration of:
 - (a) fitness for purpose -
 - (b) appearance and finish
 - (c) freedom from minor defects
 - (d) safety and
 - (e) durability
- Bugs are considered standard in digital content on issue⁶⁰ and as such it is proposed that a reasonable person would expect a certain amount of bugs when purchasing digital content. Therefore the existence of bugs will not necessarily amount to a breach of the guarantee as to quality and fitness. However as some forms of digital content, such as music, or e-books, can be expected to be of a very high quality, we will retain the 'freedom from minor defects' aspect of quality for digital content and clarify in guidance that bugs may be acceptable in some forms of content.

(c) The digital content will be fit for any particular purpose required by the consumer and made known to the trader

d) The seller has the right to provide the digital content. The bill will provide that every contract to provide digital content will be treated as providing that the trader has the right to provide that content to the consumer.

d) The trader's right to modify the digital content. This will make clear that a trader in accordance with the contract can modify the digital content but the digital content must still meet the quality rights after the modification

126. These quality standards will apply to digital content after the performance of any related service. A related service is a service which is essential for the delivery of the digital content. The related service provider will have a contractual relationship with the trader and not (usually) with the consumer, who will have no choice over who provides that service. So in practice, the trader will be liable for problems with the related service, which will be judged against a strict liability outcomes based standard rather than the quality standard of "reasonable care and skill" which normally applies to services.

The proposed remedies available to consumers when digital content does not meet these quality standards

⁶⁰ 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>.

The trader must offer either a repair, or replacement of the digital content. These remedies are referred to as first tier remedies.

- Where:
 - (a) it is impossible to repair or replace the digital content; or
 - (b) repair or replacement are disproportionate either in relation to each other (i.e. repair is disproportionate in relation to replacement or vice versa), or in relation to a reduction in price, or
 - (c) the repair or replacement has not taken place within a reasonable time or without significant inconvenience to the consumer.⁶¹

- the consumer can require the seller to reduce the purchase price (which could be a 100% reduction where appropriate)⁶². This is referred to as a second tier remedy.

The proposed remedies for faulty digital content differ from those for goods in the following ways:

- There is no short term right to reject faulty digital content which is not provided on a tangible medium (see para 129, below)

- There is no restriction in the number of repairs or replacements offered by the trader (for goods this is 1 repair or 1 replacement)

- There is no rescission of contract for faulty digital content not provided on a tangible medium as a second tier remedy following failed repairs or replacement,

127. As an alternative to invoking these statutory remedies, the consumer always has the option of pursuing the supplier for normal common law contractual remedies for breach of contract. The remedy is usually one of damages (flexible monetary compensation for any loss suffered as a result of the breach).

128. For distance and off premises contracts, even where there is no breach of quality standards, the consumer also has the right to withdraw from the contract (within 14 days, once the CRD is implemented) and receive a full refund for goods purchased at a distance, unless performance has begun with the consumer's prior consent and acknowledgement that the right of withdrawal is lost.

129. Unlike the remedies for goods, we do not propose to introduce a short term right-to-reject for faulty digital content when it is sold in intangible form (e.g. downloaded or streamed). Nor do we propose a second tier remedy of rescission of contract. This is primarily because digital content is very easily copied and can be very difficult to delete from a device altogether. In addition digital content not provided on a tangible medium cannot be meaningfully "returned" to the trader. Digital content provided on a tangible medium (e.g. sold on a disc) will still attract the short term right to reject as the disc itself is goods. This means the short term right-to-reject will continue to apply to many purchases of digital content, as 24.5% of films, music and games were sold in intangible form in 2012, and 75.5% on tangible media.

130. Where the trader does not have the right to sell the digital content the consumer will be entitled to an immediate refund.

⁶¹ Elsewhere in the Bill we are proposing that the consumer will be entitled to a refund or partial refund after two failed repairs or 1 failed replacement

⁶² Where there is a simple price reduction and not a rescission the consumer continues to use the goods but gets some money back.

131. Where digital content provided to a consumer under a contract damages the consumer's other digital content or device, and the consumer can show that the trader failed to use reasonable care and skill to prevent it, the trader will be liable to pay the consumer the cost of replacing the damaged digital content or device.

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