



Consumer Rights Bill: Statement on Policy Reform and Responses to Pre-Legislative Scrutiny

Presented to Parliament
by the Secretary of State for Business, Innovation and Skills
by Command of Her Majesty

January 2014



Consumer Rights Bill: Statement on Policy Reform and Responses to Pre-Legislative Scrutiny

Presented to Parliament
by the Secretary of State for Business, Innovation and Skills
by Command of Her Majesty

January 2014

© Crown copyright 2014

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or e-mail: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

Any enquiries regarding this publication should be sent to us at Department for Business, Innovation and Skills, Consumer Rights Bill Team, 1 Victoria Street, London SW1H 0ET.

ISBN: 9780101879620

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID 2618473 01/14 36520 19585

Printed on paper containing 75% recycled fibre content minimum.

Consumer Rights Bill

January 2014

Core Consumer Rights

Right to clear and honest information before you buy.

Right to get what you pay for.

Right that goods and digital content are fit for purpose and services are provided with reasonable care and skill.

Right that faults in what you buy will be put right free of charge, or a refund or replacement provided.

Contents

Foreword

Executive Summary and Overview

What do we mean by consumer rights?

Economic rationale and economic impact

Consumer Rights Reform

How will consumers and businesses become familiar with these rights and obligations?

Devolution

Annex A - Summary of consultation processes relating to consumer rights reforms

Annex B - BIS Select Committee recommendations and Government response

Annex C - Summary of main quantified impacts of the consumer rights reforms

Annex D - Practical examples of how the reforms will make a difference

Consumer Rights Bill – Detailed Annexes on Bill Provisions

Annex E - Goods

Annex F - Digital Content

Annex G - Services

Annex H - Unfair terms

Annex I - Investigatory Powers

Annex J – Enterprise Act 2002: Enhanced Consumer Measures and Other Enforcement

Annex K – Private Actions in Competition Law

FOREWORD



Our consumer law reforms are the most fundamental reform of UK consumer rights in more than a generation. The Consumer Rights Bill sets out in one place key consumers' rights and what they are entitled to if something goes wrong. This covers goods, services and, for the first time, digital content. The reforms will also build on and enhance the success of the current consumer and competition law enforcement regimes.

Well-informed, confident consumers are vital to building a stronger economy. High levels of consumer confidence means people experiment and shop around, which encourages new businesses and drives innovation, boosting competition and creating growth.

But consumers cannot be confident when they do not understand their rights or find it hard to know what they are entitled to if something goes wrong. Businesses also find it costly to understand what they need to do to fulfil their responsibilities. That is why these important reforms make consumer rights clearer and fit for the 21st Century.

The Bill has benefited from scrutiny by the BIS Select Committee as well as from a wide range of stakeholders across the business, consumer, legal and enforcement communities. They have commented and supported the development process of these reforms. I am extremely grateful for the time, energy and engagement from all these groups which have helped us design a strong set of reforms, summarised in this document.

A handwritten signature in black ink that reads "Jenny Willott".

Jenny Willott
Parliamentary Under-Secretary of State for Employment Relations and Consumer Affairs

EXECUTIVE SUMMARY AND OVERVIEW

A draft Bill was published on 12 June 2013 following extensive consultation with consumers, businesses and enforcers, and a number of reports and consultations by the Law Commission and Scottish Law Commission. The Government then invited views on the draft Bill and, in addition, the Bill has had the advantage of pre-legislative scrutiny by the BIS Select Committee.

The Committee reported the outcome of its scrutiny on 23 December 2013 and this report, together with the evidence provided to the Committee both orally and in writing, can be viewed on Parliament's website here <http://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/inquiries/parliament-2010/gvt-draft-consumer-rights-bill/> . More information about the consultation processes relating to these reforms is set out in **Annex A**.

The Government has listened to the comments made during pre-legislative scrutiny, both directly to Government and through the BIS Select Committee, and is publishing a Bill which has benefited from that process. The Bill has now been formally introduced to Parliament.

This document explains how consumer rights are being reformed by the Consumer Rights Bill, in particular, how it will:

- Streamline key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts into one place;
- Clarify the law where it is confusing, or written in legal jargon;
- Modernise the framework for the digital age;
- Deregulate to reduce business burdens and costs; and
- Enhance measures to protect consumers, where it is appropriate to do so.

This document summarises the current problems with consumer law and explains how the Bill will address these issues.

Annex B contains a list of recommendations made by the BIS Select Committee in its report, and records a summary of the Government's response to each of those recommendations.

What do we mean by consumer law?

Consumer law affects how we buy a huge range of products and services, from mobile phones to music downloads, from kettles to kitchen extensions, from sofas to software. The law sets out what consumers should expect from what they buy, and what rights and responsibilities consumers and traders

have if things do not go to plan. It sets out the circumstances when consumers are entitled to refunds, and what might be the alternatives.

The UK's consumer law has evolved over many years, through different pieces of legislation. It has come from the UK and the EU. At present, 8 separate pieces of legislation cover key consumer rights in the UK, while around 60 pieces of legislation cover the investigatory powers of consumer law enforcers. As a result, consumers and businesses find it confusing to understand their rights and responsibilities.

This confusion over consumer law is exacerbated by unnecessary complexity and ambiguity in parts of the law. It has also failed to keep up with technological developments, particularly in the case of digital content. Which? has commented:

“Currently the consumer protection regime is unclear, overly complex and in need of updating to reflect the myriad of different purchases made by today's consumers¹.”

“.....introducing the right to move to a Tier Two remedy after one failed repair or replacement, is a good example of where clarity on the face of the Bill works really well².”

Independent research carried out for the Law Commissions³ suggests that there is currently a high degree of confusion among UK consumers about what rights they have under consumer law⁴. This confusion costs businesses and consumers time and money.

“the overall thrust for greater clarity has to be the right thing⁵.”

“..welcome the consolidation and the simplification that this brings in⁶.”

Economic rationale and Economic Impact

It is widely recognised that well-functioning competitive markets encourage growth by creating incentives for firms to become more efficient and

¹ Which? response to BIS consultation, 5 October 2012:

<http://www.staticwhich.co.uk/documents/pdf/which-response-supply-of-goods-services-and-digital-content--299754.pdf>

² Chris Warner (Lead Lawyer, Consumer Rights, Which?) oral evidence to the BIS Select Committee 8 October 2013

³ The Law Commission for England and Wales and the Scottish Law Commission

⁴ Law Commission (2009), 'Consumer Remedies for Faulty Goods'

⁵ Matthew Fell (Director for Competitive Markets, CBI) oral evidence to the BIS Select Committee 8 October 2013 on the fixed period of 30 days for a consumer to reject faulty goods

⁶ Mike Cherry (National Policy Chairman, Federation of Small Businesses), oral evidence to the BIS Select Committee 8 October 2013, on the fixed period of 30 days for a consumer to reject faulty goods

innovative to compete for customers⁷. 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 products⁸.

In April 2012, the Government announced a series of reforms to the bodies carrying out consumer functions. The new consumer landscape is designed to support growth by helping markets work better for consumers by giving greater clarity about where consumers need to turn for help and advice. The reforms will deliver a better deal overall for consumers through clearer responsibilities and better co-ordination between consumer bodies and enforcers.

The reforms to consumer law are designed to build on the foundations of the institutional changes already announced and strengthen the framework in which markets operate. The entire suite of Consumer Rights reforms are estimated to be worth over £4 billion to the UK economy over 10 years in *quantified* net benefits. These net benefits include the impact on consumers, business and the public sector from the Bill (£1.7 billion) and its associated secondary legislation (£2.73 billion).

In addition to these quantified benefits there are a range of economic benefits that have not been quantified. In particular, the market-wide changes through promoting confident consumers, set out above.

The main quantified impacts are summarised in **Annex C**. The Government has published Impact Assessments, which contain more details.

Consumer Rights Reform

The Government intends that the majority of its reforms will be delivered through primary legislation, in the Consumer Rights Bill. In parallel, secondary legislation has been developed to:

- implement the Consumer Rights Directive⁹; and
- reform the law on misleading and aggressive practices¹⁰.

The Government is ensuring that the secondary legislation is consistent with the Consumer Rights Bill, for example employing consistent definitions, and cross-referring between the legislation where appropriate.

⁷ For references to literature on the links between competition and growth, see OFT (2011), 'Competition and growth'

⁸ Mark Armstrong (2008), 'Interactions between competition and consumer policy'

⁹ <https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/implementing-the-consumer-rights-directive-2011-83-eu>

¹⁰ <https://www.gov.uk/government/publications/misleading-and-aggressive-commercial-practices-the-draft-consumer-protection-from-unfair-trading-amendment-regulations-2013>

Details of the Bill’s reforms are set out in the attached **Annexes E to K**. A summary of the measures is set out in the table below.

Type of Reform	High Level Summary of Measures
<p><i>The reforms will streamline consumer rights, remedies and enforcement powers so consumers and businesses can access what they need to know more easily and effectively</i></p>	<ul style="list-style-type: none"> • Puts in one place key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts, currently spread over 8 different pieces of legislation; • Aligns inconsistent remedies available for goods supplied under different contract types, such as: sale, work and materials, conditional sale or hire purchase; • Combines and clarifies overlaps and confusing laws on unfair terms in contracts; • Generic consumer law investigatory powers set out in one place, repealing equivalent powers in around 60 pieces of legislation.
<p><i>The reforms will clarify the law where it is confusing, or written in legal jargon</i></p>	<p>Set out clearly in plain words the quality standards that goods, services and digital content must meet, so that consumers get what they pay for:</p> <ul style="list-style-type: none"> • They must meet descriptions given before they are sold. Goods and digital content must be fit for purpose, and services must be provided with reasonable care and skill. • Set a clear time period of 30 days in which consumers can reject substandard goods and receive a full refund; • Limit the number of repairs or replacements of faulty goods before retailers must offer some money back, and clarify the extent to which traders may reduce the level of refund when the consumer chooses to end the contract to take account of the use of the goods the consumer has had up to that point. • Clarify which terms in a contract can be challenged in a court to decide whether or not they are fair.
<p><i>The reforms will modernise the legal framework to ensure that consumer law keeps pace with technological developments</i></p>	<ul style="list-style-type: none"> • Introduce a new regime relating to digital content (such as ebooks and software), and aligning this as far as appropriate with the law covering goods and services; • Make clear that a trader must take care that digital content does not harm other digital content on a consumer’s device.

<p><i>The reforms will deregulate to reduce business burdens and costs</i></p>	<ul style="list-style-type: none"> • Simplification means businesses spend less time and money on training staff in complex consumer law, and save time and money dealing with disputes. • Businesses will receive notice of <i>routine</i> inspections from relevant enforcers, including local authority Trading Standards officers, giving them time to make necessary arrangements such as relevant staff being available; • Faster and lower cost redress for businesses (and consumers) which have been disadvantaged by breaches of competition law.
<p><i>The reforms will enhance measures to protect consumers, where it is appropriate to do so</i></p>	<ul style="list-style-type: none"> • New statutory right that a service must comply with information given by the trader in certain circumstances, even if this is not recorded in the written contract; • More flexibility for Trading Standards or other public enforcement authorities to seek redress for consumers who have been victims of breaches of consumer law.

Examples of what differences these reforms make in practice are set out in **Annex D**.

How will consumers and businesses become familiar with these new rights and obligations?

This is the biggest overhaul of consumer law for a generation and consumer and business organisations have rightly emphasised that the Bill will not have an impact unless consumers and traders know about the new regime and are adept at using it. Businesses will require a period of adjustment to understand and implement the changes the Bill proposes. When the new rights are in force, consumers will need a basic awareness of their updated rights and know where to turn for advice to address a specific problem with faulty goods, services or digital content.

The 2012 Business Perceptions Survey¹¹ found that only 54% of businesses felt informed about consumer law which is less than their knowledge of employment law or food safety legislation. The Bill will *consolidate* and clarify uncertainties in the current law but many retailers and service providers are very small businesses and will need help to navigate the new legislation and understand how it applies to them.

Consumers are even less confident that they understand their rights. In a survey by uSwitch published in August 2013¹² almost half of those surveyed said they had a weak grasp of their rights and a third of them were relying on trial and error when they had a consumer problem.

The Government's simplification of the consumer law advice landscape gave the Citizens Advice Service responsibility for consumer information, advice,

¹¹ Report: Business Perceptions Survey 2012, prepared for NAO / LBRO / BRE by IFF Research, page 7.

¹² uSwitch report August 2013.

and education. Trading Standards Services have taken responsibility for most business-facing education activities, with exceptions to allow the Competition and Markets Authority to provide sector specific guidance or information relating to unfair contract terms. The Government has an important role to play in working with these partner organisations to ensure that consumers and businesses know where to turn for the most appropriate help and advice and can easily find the answer to their questions.

A communications and education strategy is vital for the success of this Bill so we have drawn together a wide spectrum of consumer, business and enforcer groups to work with us on a coordinated approach which will consider content, channels and timing. As the Citizens Advice representative on the implementation group has said:

“It’s essential consumers are aware of their rights and how the Consumer Rights Bill will affect them. As the voice of consumers, Citizens Advice will be working with BIS and others to make sure consumers are fully prepared for the changes and empowered to exercise their rights.”

Trading Standards representation in the group has said:

“TSI are working closely with BIS to provide an accessible platform which businesses can use to access clear information on the new consumer rights and are confident that the plans we have in place will assist businesses to implement their upcoming responsibilities and help consumers understand their new rights”

The group, which will meet regularly as the Bill proceeds through Parliament, has already provided advice on how much time businesses and consumer organisations need to prepare for the change and have proposed a number of innovative approaches on both content and channels. BIS will work with the group to develop core guidance about the legislation so that it is available soon after royal assent.

Devolution

Regulation of the sale and supply of goods and services 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 in principle for the inclusion of Northern Ireland in these measures subject to the appropriate Legislative Consent Motion from the Northern Ireland Assembly.

Although competition law is not a devolved matter, the changes to the private actions regime are drafted to take into account the different legal procedures across the United Kingdom.

The Government’s aim is to ensure consistency of consumer rights across the UK whilst respecting the devolution settlements.

ANNEX A – SUMMARY OF CONSULTATION PROCESSES RELATING TO CONSUMER RIGHTS REFORMS

The Government has consulted extensively on reforming consumer law. The Department for Business, Innovation and Skills (BIS) has worked with the Law Commissions, sought advice from other experts, and commissioned research on international comparisons as well as the day to day experiences of UK businesses and consumers. Most recently, the BIS Select Committee has scrutinised the Bill, held a call for evidence and heard oral evidence on which it reported in December 2013.

The Davidson Review (2006), which examined how EU Directives have been implemented in the UK, highlighted consumer law as an area where the implementation had caused additional complexity, by overlaying EU law on top of the existing domestic regime. As a result, the review concluded that the law on consumer remedies was too complex, causing unnecessary burdens on business.

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 years¹³.

Following a 2009 Supreme Court judgement on bank charges, which highlighted difficulties in the law, the Government asked the Law Commissions to bring forward proposals to reform the law on unfair terms in consumer contracts¹⁴.

A legal research paper commissioned by BIS examined core consumer protections relating to digital content. It 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 expectations¹⁵. 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.

In 2012, BIS commissioned a report by IFF Research Ltd. IFF surveyed 1000 business-to-consumer firms, and completed follow-up interviews with 60 firms, in order to provide quantitative evidence on business practices in relation to consumer rights¹⁶.

An international literature study by GHK on behalf of BIS in 2012 found widespread agreement from around the world that enhanced consumer legal

¹³ Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries, a study for BERR by UEA, 2008

¹⁴ http://lawcommission.justice.gov.uk/areas/unfair_terms_in_contracts.htm

¹⁵ 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>

¹⁶ IFF report available here: <https://www.gov.uk/government/publications/draft-consumer-rights-bill>

protection leads to positive economic outcomes, such as increased consumer confidence. GHK found evidence that this results in wider economic growth. For example, in Australia the Productivity Commission estimated that simplifying national consumer law could increase productivity by 0.13 per cent, worth \$6 billion (equivalent to £7.7 billion in productivity gains for the UK economy) over 40 years¹⁷.

In 2012, the Government issued a number of consultations proposing measures to reform UK consumer law¹⁸. A summary of contributions to these consultations can be found at:

<https://www.gov.uk/government/publications/draft-consumer-rights-bill>.

More recently, the Government sought views over the summer 2013 on the draft Bill. The Government has carefully considered all of the comments made and is grateful to all those who have taken the time to contribute to shaping the reform of consumer law.

¹⁷ GHK report available here: <https://www.gov.uk/government/publications/draft-consumer-rights-bill>

¹⁸ <https://www.gov.uk/government/consultations/consultation-on-enhancing-consumer-confidence-by-clarifying-consumer-law>.
<https://www.gov.uk/government/publications/enhancing-consumer-confidence-through-effective-enforcement-supplementary-legislative-document-for-the-consultation-on-consolidating-and-modernising-consumer-law-enforcement-powers>.

ANNEX B - BIS SELECT COMMITTEE RECOMMENDATIONS AND GOVERNMENT RESPONSE

BIS Select Committee Report paragraph number	BIS Select Committee Recommendation	Government's response
32	<p>Given that the ADR Directive covers any contractual dispute between a trader and a consumer within the EU, we expect the Government to explain the extent to which the key requirements of the ADR Directive could have been included in the draft Bill, and why that approach was not taken.</p>	<p>The ADR Directive was finalised in July 2013 and should come into force in Member States by July 2015. Since the Directive was agreed we have been discussing its requirements and implications with stakeholders, as well as discussing how to interpret some of its provisions with the European Commission and other Member States. The next step is to consult formally on our plans for implementing the Directive. We plan to publish a consultation document in the first quarter of 2014.</p> <p>The appropriate legislative route for implementing the Directive cannot be determined without first undertaking a detailed consultation exercise, assessing stakeholder views and deciding how best to implement the Directive. Depending on the approach we take, we may not need primary legislation to implement the Directive.</p> <p>The Government has brought forward wide ranging and fundamental reform of the competition and consumer institutional landscape, framework of consumer legislation and other reforms to build confident consumers. While they all inter-relate and form part of a stronger, overarching framework not all of the reforms, including legislative reforms, have been nor should be</p>

		taken forward in the same Bill at the same time. However, by consulting thoroughly we are ensuring that our proposals to implement the ADR Directive will complement the provisions of the Consumer Rights Bill.
42	We recommend that the Government considers the case for small businesses to be treated as consumers	The Government has considered the case for small businesses to be treated as consumers, consulting on this question in 2008 and 2012. As the committee acknowledges, all business groups that responded to the Government's 2008 Consumer Law Review preferred to retain the clarity of the current distinction between business and consumer and this position was supported by the majority of responses to the 2012 consultation. However, the Government will examine the findings of the research undertaken on behalf of the FSB when it is published and respond to any recommendations.
43	We recommend that the Government provides a substantive response to the research commissioned by the Federation of Small Businesses on small business as Consumers.	
54	The Government reconsider an exception to the time limit for the early right to reject where it is reasonably foreseeable that the consumer would need a longer period to inspect the goods and try them out in practice.	The Government agrees that it should provide guidance which will include examples of where a trader might wish to allow the consumer to exercise the short-term right to reject after the 30-day period. Clause 22 (1) allows for the trader and consumer to agree to exercise the short-term right to reject later than the 30 day limit, should the trader wish to offer a more flexible arrangement for the benefit of the consumer. Many retailers already choose to offer refunds for extended periods, for example by offering gift receipts for Christmas presents purchased well in advance. As the Select Committee identified, the specified time limit is a minimum which does not prevent competitive positioning by retailers to offer more flexible arrangements.

		<p>The Government has also reconsidered the inclusion of an exception in the bill itself. While there was some support for this proposal, there were also strong concerns. For example, the British Retail Consortium in its evidence to the Select Committee on 8 October 2013 made the following point:</p> <p><i>“We welcome the drive of the legislation to provide clarity for retailers. It is really important that, as retailers, our staff understand what customers’ rights are. To see the 30 days set quite in stone is helpful to us, because if you start to introduce exemptions from that and a reasonableness test there is a question around how much is included in that and what circumstances would arise.”</i></p> <p>The Government believes that requiring businesses in the legislation to provide longer exceptions to the limit for the short-term right to reject would undermine the benefits of certainty provided by the 30 day time limit. The Bill would need to specify which events were exceptions such as religious festivals, other personal celebrations or goods bought out of season and by how much the time limit should be extended or varied by the circumstances. The more discretion provided the less certainty for businesses and consumers trying to interpret the legislation. The more certainty, the more new time limits and detail would need to be contained in the legislation which would increase its complexity and the knowledge that consumers and businesses would be expected to apply in a particular situation.</p>
--	--	---

		<p>It is also worth noting that the bill offers further remedies once the time limit for the short-term right to reject has passed. The option of repair or replacement and afterwards, the final right to reject or a reduction in price are available.</p>
78	<p>Clause 24(5) (which relates to the “deduction for use” that may be made if the consumer exercises the final right to reject) should be removed, in line with the recommendation of the Law Commission.</p>	<p>The Government has considered carefully the arguments for and against the removal of the deduction for use provision and remains persuaded that the retention of this provision is required to balance appropriately the interests of businesses and consumers.</p> <p>It is important to consider the Bill from the current starting point, where current legislation allows for a deduction for use at any time after the expiry of the short time right to reject. Although a deduction for use is not always applied, it is a valuable mechanism to balance business and consumer interests, particularly, where the consumer has had a significant amount of use of the goods over a longer period of time, and this use has had a notable impact on the value of the goods – the depreciation cost that, in the absence of a deduction for use, would otherwise be fully borne by the trader in these cases. Some business groups have stated that the removal of this right could have a severe impact on their businesses.</p> <p>In response to BIS’ consultation in 2012, the Retail Motor Industry Federation (RMI) said: <i>“It must be stated, not only in terms of the retail motor industry but for traders as a whole, especially those providing high-value products, [the option] to remove the right of</i></p>

		<p><i>deduction for use would be wholly detrimental to the process of business and would place a heavy burden and unreasonable cost upon traders. The rapid depreciation in value incurred by vehicles is felt across many high-value products, such as electronic goods and brand associated products and this must be acknowledged when assessing which proposal to adopt.”</i></p> <p>Similarly, the Co-operative Food said: <i>“We believe that retailers should be able to reduce any reimbursement to take account the use a customer has already got out of the product. If a television failed after five and a half years the consumer would still have enjoyed five and a half years’ use of a television – this use would have come at no cost if the full purchase price was refunded.”</i></p> <p>The Government believes that this provision is vital given the other changes that are being made to the remedies for goods which will collectively make it easier for consumers to reach the final right to reject goods. In most cases, a deduction for use will not be available in the first six months (whereas currently deduction for use can be made at any time), and where a deduction may be made, it must be based on an assessment of the use that the consumer has had of the goods.</p>
79	Should the Government retain “deduction for use”, we recommend that the proportion of any deduction should be based on the lifespan of the good, not on the retail or second hand market value, since the consumer	The Government has considered how a deduction for use should be calculated. It was not the intention that a deduction should be based on the retail or second-hand value of the goods in question (the second hand value, where applicable, was only to serve as the minimum refund). But we

	<p>would not have intended to sell the good at this stage.</p>	<p>acknowledge that this could be confusing and agree that reference to the second hand value should be removed.</p> <p>The Government does not believe however, that the deduction should be based only on the expected lifespan of the goods.</p> <p>As mentioned above, any deduction applied should be based on the use that the consumer has had of the goods and this will be stated in guidance. The value of this use should be assessed on a case-by-case basis (as at present), which would include considering the goods' expected use and lifespan, and we believe that in the majority of cases the parties involved will reach agreement on a sensible value. Where this is not the case, it will ultimately be for the courts to decide on the deduction that may be applied.</p> <p>The Government has considered the question of how the exception to the 6 month period without a deduction for use is defined. We are persuaded by the feedback received from the Committee and from stakeholders that an exception based simply on the existence of a second-hand value for, and an active second hand market in, the goods is too wide. The new provisions establish that the exception applies only if there is an active second-hand <u>business to consumer</u> market in goods of <u>the same make and model</u> as the goods in question.</p> <p>The Government believes that the requirement for the market to be between business and consumers will significantly tighten the exception by removing from scope</p>
--	--	---

		<p>those goods that are commonly traded only between consumers (for example, on online auction sites), a concern raised by the Committee. The requirement for the evidence of an active market to be for the same make and model of the goods additionally tightens this requirement. These changes will help target any deductions particularly in markets for high-value, complex goods, where deductions for use are most justified to balance business and consumer interests.</p> <p>The Government will clarify in associated guidance that an active market is to be assessed on a case-by-case basis, taking into consideration the frequency of second-hand sales, in the context of the market as a whole.</p>
87	<p>We support the proposals to apply satisfactory quality rights to digital content. However, the evidence we received indicates that the Government has failed to communicate clearly its intention to create a bespoke set of rights and remedies for digital content. As a result, the industry remains confused about the intended flexibility of the proposed digital content regime. The Government will need to address this as a priority if it is to convince the industry of the merits of its proposals.</p>	<p>The Government accepts this recommendation and will continue to work with the industry to address uncertainties about how the regime will operate including the use of clearer explanation in the Explanatory Notes. The Government will also develop guidance on which it will work with industry to help ensure traders understand the new digital rights and their responsibilities under them.</p>
95	<p>We recommend that the Government expressly state in the Explanatory Notes to clause 36 ('digital content to be of satisfactory quality') that</p>	<p>The Government accepts this recommendation and the Explanatory Notes have been amended.</p>

	the application of the quality aspect “freedom from minor defects” to digital content will depend on reasonable expectations of quality.	
100	We recommend that the Government thoroughly examines market practice in this area to assess the impact of clause 38 (‘digital content to be as described’) on consumers and businesses.	The Government accepts this recommendation and will meet industry representatives to explore the concerns which have been raised with the committee. The Explanatory Notes have also been revised to make it clear that digital content does not need to be exactly the same in every aspect as a trial version and could, for example, go beyond the description, as long as it also continues to match the description. This is particularly relevant for updates that may enhance features or add new features.
109	We recommend that the Government should include in clause 41 clear definitions of the services which will be subject to an outcomes-based liability standard. Furthermore, it should be explicit in how these will be applied to “related” and enabling” services, and to other services that surround interactive digital content.	The Government accepts the need to amend Clause 41 and the accompanying Explanatory Note to create greater certainty about its application and they have been redrafted. This includes amending the clause to refer to situations where the contract is for a specified period of time and clarifying in the Explanatory Notes that any express terms relating to a specific period of time for the use of the digital content would apply.
113	We recommend that the Government clarifies the liability standard that is intended to apply to “related services” under the draft Bill.	New drafting in the clause entitled “Contracts covered by this chapter” makes it clear that Internet Service Providers are not trading in digital content merely because they provide the service of delivering digital content to a consumer.
116	We recommend that a full cost benefit analysis should be undertaken of the proposal to apply an outcomes-based liability standard to the services surrounding digital content described in clause 41.	These changes should help address the point raised by the Committee as to which products would come within the scope of the Chapter. The Government considers it would not be beneficial to provide greater specificity in the
119	We recommend that the	

	<p>Government clarifies how clause 41(3) (a) ('time when, and period for which, digital content is provided') is intended to operate.</p>	<p>legislation on different types of service as this might not adequately anticipate future developments in the market. However, this is an aspect of digital content which we expect to cover in guidance for business and consumers.</p> <p>The Government does not believe that there should be a further cost benefit analysis as the digital content proposals, including the concept that the trader should be liable for a problem with a service provided by another trader where that service was under the trader's control, have already been subject to a cost benefit analysis in the final impact assessment published with the draft Bill.</p>
129	<p>To remedy the existing inconsistency in the draft Bill, there should be a short-term right to reject and a final right to reject in relation to intangible digital content. We recommend that the draft Bill states that there is an obligation on the consumer to delete the relevant intangible digital content. This would achieve consistency in the Bill, which would be valuable for both consumers and businesses.</p>	<p>The Government has considered this proposal but maintains its view that it is not generally possible for the consumer to 'return' intangible digital content to the trader. There is also a potential for the consumer to retain (and use) a copy of the content, which may in many circumstances be useable by the consumer but with some faults.</p> <p>The committee has recommended that business could be protected from loss by imposing a requirement on the consumer to delete faulty intangible content from their devices. However, the Government agrees with comments from a range of stakeholders during pre-legislative scrutiny that such a requirement would be both impractical and burdensome for consumers because it is very difficult to delete content from a device altogether.</p> <p>However, the Government agrees that it should be made clearer on</p>

		the face of the Bill that where the consumer is entitled to request a reduction in price this could in appropriate cases be the full amount of the price paid.
130	We do not consider that the case has been made to justify the Government's proposal to introduce varying remedies for tangible and intangible digital content, and to have inconsistent remedies for intangible content dependent on which statutory right has been breached. If the Government is to proceed with this approach it must set out in detail the evidence base for its proposals alongside legal advice on the risk to intellectual property rights.	The Government accepts this recommendation to set out the basis for its proposals in more detail and this will include setting out industry concerns about the risk to intellectual property rights, and will provide a note with further information for Committee stage of the Bill. As set out above, we are also making it clearer that where the consumer is entitled to request a reduction in price (that is where it is impossible to repair or replace the digital content or where repair or replacement cannot be done within a reasonable time or without significant inconvenience) in appropriate cases the reduction in price can be of the full amount paid.
136	The Government must clarify whether or not a claim can include any device damaged by such content. This is not clear in the Explanatory Notes relating to clause 48 of the draft Bill.	The Government accepts this recommendation and the Explanatory Note makes clear that the damages claim can extend to damage to the device as well as damage to other digital content.
141	We recommend that the Government clarify the proposals in relation to digital content to ensure that the familiarisation costs and legal costs incurred by businesses in respect to the draft Bill are in line with the Government's estimates.	The Government accepts this recommendation which it will address through drafting changes reflected in the Bill and Explanatory Notes as introduced, and the work it intends to carry out with industry in developing guidance to help ensure traders understand the new digital rights and their responsibilities under them.
165	The draft Bill should apply an additional outcomes-based liability standard to services that required	The Government has looked in detail at whether to add a new quality standard for services ¹⁹ . As well as its own consultation, the

¹⁹ <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/3112>

	<p>service provision to achieve the stated result, or one which would reasonably be expected, as well as to any product resulting from the service. This would simplify and align UK consumer law, and increase certainty and confidence among consumers and businesses.</p>	<p>Committee's report, a detailed roundtable and the commissioning of further evidence, the Government is not persuaded of the benefits of an outcomes-based service standard for consumers and is concerned by the potential costs for businesses.</p> <p>One of the challenges for proper assessment has been to obtain strong evidence of both the costs and benefits. Through the processes outlined above, the Government has worked hard to improve the evidence base but, despite that, does not believe that arguments about the potential benefits of a move to an outcome-based standard for services have been sufficiently substantiated.</p> <p>The Committee assesses that the benefits to consumers are significant because:</p> <ul style="list-style-type: none"> ○ The current 'reasonable care and skill' standard will fall short of consumer expectations while the problems with an outcome-based standard (for example bureaucratic disclaimers from traders) can be overcome using the 'reasonable' person test; ○ Closer alignment with the goods regime will help increase consumer and business confidence. <p>The Government is not convinced that the challenges of an outcome-based approach can be overcome by resorting to a 'reasonable person test'. Because of the subjective element of many services it may not be clear what a reasonable person might expect in different circumstances. With goods it is usually obvious whether</p>
--	--	--

		<p>the item is 'fit for purpose' or of 'satisfactory quality'. For many services that can be less clear cut, as to what might be expected and is likely to vary from consumer to consumer (eg. the outcome of a beauty treatment, a French lesson, a hair cut).</p> <p>We acknowledge that courts could, and have in some circumstances, been willing to imply outcomes-based terms into service contracts. However, the Government does not believe that that will prevent businesses from reacting with lengthier contracts or with more disclaimers to help anticipate situations where they may not be able to deliver what a reasonable person might expect. Rather than helping consumers and businesses reach an understanding of what is expected, this could also lead to bureaucratic lists of disclaimers. Over time, case law and experience could help build up an understanding in different service sectors which will reduce uncertainty over time. But the Government is of the view that case law can be difficult to access and apply for businesses and consumers and this would add to costs initially and uncertainty, the opposite of the Government's and the Select Committee's shared goals for the reforms, without the promise of significant consumer benefits later.</p> <p>The Government examined carefully the evidence and examples submitted by those that thought an outcome-based quality standard would benefit consumers, but concluded that such a standard would not in fact increase protection further than the current standard of 'reasonable care and</p>
--	--	---

		<p>skill’.</p> <p>There were also those in the consultation responses who disagreed that alignment with the goods regime would boost confidence and clarity. For example:</p> <p>The Association of British Insurers commented that a quality standard would “<i>reduce clarity and risk further inconsistency of application</i>”.</p> <p>Mobile Broadband Group said they “<i>support the Government’s proposal not to align the law on services with the law on sale of goods, as there are material differences between the two that could make the costs of compliance and the risks of unintended consequences outweigh any consumer benefit.</i>”</p> <p>While we agree that alignment and simplification are important, the Government also recognises that differences in regimes are still sometimes necessary to ensure there are not unintended consequences. For example, applying a time limit to the short term right to reject goods could not be applied with the same meaning to services. It is therefore not a sufficient argument in itself.</p>
171	Where there is to be a price reduction (clause 58), this should be calculated based on the value received by the consumer under the contract, not linked to the costs incurred by the trader. This means that any price reduction should not be linked solely to the	The Government agrees that this would be a helpful clarification which will provide more information to businesses and consumers on how the remedies should be applied in practice. The Government will therefore set out in the Explanatory Notes to the Bill how the price reduction remedy should be calculated and that usually a “price reduction” remedy

	<p>element of the contract that has not been performed with reasonable skill and care, as that will not provide appropriate redress to the consumer.</p>	<p>for goods, digital content and services will be calculated as the difference between the price paid and its value, as provided to the consumer.</p> <p>The Government has decided not to require in the Bill that this is the position in all cases. While it is likely to be appropriate we envisage there could be limited situations where it may not be.</p> <p>For example, taking the position of a sole trader, electrician who might complete work on a house but on the final day cannot connect the circuit to the mains. He cannot come back at a convenient time, so the consumer is entitled to a price reduction. They have no electricity, so if the price reduction were based solely on the benefit as provided to the consumer, they might receive a full refund. However the electrician has done most of the work, and so the real outcome to the consumer (in the end) will be much higher than zero as a simple connection is all that is necessary to complete the work. It may therefore be appropriate for the electrician to recoup some of his costs to reflect that the majority of the work has been done.</p>
172	<p>The Bill should clarify that in appropriate circumstances a price reduction could be as much as a full refund, in particular where the consumer has obtained no benefit or no substantial or meaningful benefit under a contract for services.</p>	<p>The Government agrees that in certain circumstances the consumer should have the right to request a full refund. The Bill has been amended to make this clear.</p>
185	<p>The price exemption should be narrowed to</p>	<p>This area of consumer law has led to particular confusion and different</p>

	<p>exclude only the main price that a reasonable consumer would take into account during the purchasing process. This would not automatically render any other clauses unfair, but would make them potentially assessable for fairness which would allow genuine consumer detriment to be tackled.</p>	<p>and sometimes contradictory findings in court rulings when applied in practice. One of the Government's key objectives in this reform has been to improve clarity while maintaining or enhancing consumer protection in this area. The Government believes this recommendation would reduce clarity while not providing enhanced protection for consumers.</p> <p>The reference to 'main price' derives from EU law. The Supreme Court²⁰ looked at this issue in detail on a particularly high profile case and on the specific question of whether it was appropriate to make a distinction to divide the "price" into "main price" and "ancillary price". The court ruled that there was no justification to do so. Further, the Court found that it was unhelpful to distinguish between main price and ancillary price. Firstly, because the EU legislation "contains no indication that only an "essential" price or remuneration is relevant"²¹ and secondly in practice there will rarely be a simple dividing line between what is main or 'core' and what is ancillary in the contract.</p> <p>The Government has therefore sought to improve clarity not by trying to define 'main' or core – which is likely to vary in practice between contracts – but by developing the concept of transparency and prominence ie the ultimate impact it will have on the consumer's awareness. The Government believes that re-opening the debate on what constitutes 'main' price will create</p>
--	--	--

²⁰ The Office of Fair Trading v Abbey National plc & Others
http://www.supremecourt.gov.uk/docs/uksc_2009_0070_judgmentV3.pdf

²¹ ibid

		<p>more uncertainty in an area where the Supreme Court has already ruled such an approach is not appropriate.</p> <p>The Law Commissions also looked at this issue in 2013 and recommended we follow the Supreme Court’s view on this point. They thought that this would adequately protect consumers and traders <i>“As discussed earlier, our proposals do not distinguish between main price and ancillary price...the Supreme Court rejected this approach, on the ground that it was often impossible to make such a distinction. Price is therefore intended to be a broad concept which includes ancillary and contingent charges.”</i></p> <p><i>“We think that the test of prominence and transparency, when coupled with the extensions to the Grey List, will enable the courts to assess the fairness of terms which are not subject to market pressure.”</i></p> <p>Under the Bill, if price terms are not transparent and prominent, they can be assessed for fairness. This applies equally to ancillary prices if “hidden” in the small print or set out in overly-technical language.</p>
186	<p>Clause 67(4) should be amended to provide for that term to be “prominent”, it should be “brought to the consumer’s attention in such a way that an average consumer would be aware of the term and would appreciate its significance”.</p>	<p>The Government believes that the addition in the Bill of a requirement for terms to be “prominent” as well as “transparent” to qualify as exempt is already a significant enhancement for consumers from the current position. Through that new requirement, consumers will for the first time have significant protection from unfair terms in the “small-print” or unclear language. However, the Government believes that the proposed addition where the consumer must ‘appreciate [the</p>

		<p>term's] significance' will reduce clarity, increase uncertainty and may not improve consumer protection.</p> <p>It is not clear, for example, what a consumer has to do to "appreciate" a term. It would be a difficult concept to define. It would also be unclear how a business could assess whether a term has been "appreciated". We know from anecdotal evidence that consumers very often tick a box to say they "have read and understood the terms and conditions" without in fact reading them and giving them much consideration.</p> <p>While enhancing consumer protection, the Government also believes an important goal is that businesses are clearer than under current legislation how they can comply with the unfair terms requirements. The Government believes that the uncertainty of what 'appreciate its significance' means will be detrimental for both consumers and businesses.</p> <p>However, the Government does believe that it can do more to ensure that there is clarity for traders on how the law will apply and what they need to do to comply with it. The Government will produce guidance on the "prominence" requirement, as requested by stakeholders. Stakeholders favoured guidance rather than amendments to the Bill because it will be easier to update and tailor for specific industries, maximising its utility to business.</p> <p>This approach also reflects that of the Law Commissions, who said in 2013 "<i>The legislation needs to use</i></p>
--	--	--

		<p><i>a general test that can be applied across all sectors. We understand businesses’ desire for more detail, but think that this is best addressed through guidance”.</i></p>
194	<p>The following term is added to the Grey List a “term which has the object or effect of permitting a trader to increase the price of, or alter unilaterally any characteristics of, goods, digital content or services during any minimum contract period or before the end of a contract of a specified duration without a valid reason or where the consumer is not free to dissolve the contract without being disadvantaged. “ (Bank of Ireland)</p>	<p>The current law contains a schedule of examples of terms (the ‘Grey List’) which cover situations where consumers may not at the outset pay sufficient attention to or understand the implications of the terms.</p> <p>The Government agrees that the Grey List is an essential part of the Unfair Terms legal framework. The Government proposes to maintain the Grey List in UK law, make three important additions and make clear, for the first time, that Grey List terms are assessable for fairness.</p> <p>The Government agrees that consumers should be protected from terms which allow traders to make unilateral changes to a contact. The Grey List already covers terms which allow the trader to unilaterally alter the characteristics of goods, services or digital content without a valid reason. However, the Government disagrees that a further term should be added concerning a change by the trader where “the consumer is not free to dissolve the contract without being disadvantaged”. The Government believes this would be overly burdensome on business and ultimately impact on costs for consumers.</p> <p>A trader would generally not know without significant costs whether a consumer would be disadvantaged by moving to one of their competitors. They would need</p>

		commercially sensitive information from their competitor to analyse this or predict how the market will evolve in the future as well as personal data about each potential consumer. Ultimately this could reduce one of the key benefits of competition - traders would be less inclined to offer good deals if the trader might be ultimately disadvantaged in the event that they had to change terms and the consumer wanted to exit the deal. Consumers may then get fewer special offers or good deals as a result.
195	Paragraph 25 of Schedule 2 should be amended so that it only exempts price variations to the extent those changes are caused by changes to a financial market rate or index that the trader does not control.	The Government agrees that this part of Schedule 2 should be clearer: as in the EU Directive on which that Schedule is based, only prices (such as foreign currency exchange rates) which are out of the trader's control should benefit from exemption from the Grey List. In the original EU Directive the text is clear that this paragraph covers only financial rates and indexes that the trader does not control. We will therefore revert to that drafting in the Bill.
200 and 201	<p>We conclude that there is a risk that clause 71 ('other requirements for contract terms') might operate in practice to modify the fairness test. As drafted, clause 71 confuses rather than clarifies the concept of "prominence".</p> <p>Clause 71 ('other requirements for contract terms') should therefore be struck out.</p>	<p>The Government has listened carefully to stakeholders' responses to the requirement (in clause 71(2) and (3) of the Draft Bill published in June 2013) that especially onerous and unusual terms should be particularly drawn to the consumer's attention. We share their concern that this may not in fact benefit consumers and risks undermining the fairness test.</p> <p>The new requirement for terms to be "prominent" to avoid assessment for fairness will ensure important terms will be made prominent by the trader, if they are to be exempt from being able to be</p>

		<p>assessed for fairness. The Government therefore agrees with the Committee and has deleted the provisions of previous clause 71(2) and (3).</p> <p>However, the Government believes it important to maintain previous clause 71(1) which is a general requirement for terms to be “transparent”. Only price and subject matter terms are covered by the fairness test exemption. Other terms, and Grey List terms are not. Significant action has been taken by the OFT (and others) under the “plain, intelligible” requirement (for example, in <i>Foxtons</i>²²) to the benefit of consumers. A general “transparency” requirement is also necessary to properly implement the EU Directive on Unfair Terms in Consumer Contracts.</p>
204	We recommend that the affirmative procedure should apply to the order making power in clause 66(3).	The Grey List is an important part of the regime to protect consumers from unfair terms. The Government is therefore content that any changes using the order making power should be subject to the affirmative procedure.
216	We recommend that the relevant exemption to the requirement to give written notice before exercising a power of entry without warrant should be amended to “the officer reasonably considers that to give notice in accordance with this paragraph would defeat the purpose of the entry”.	<p>The Government accepts the Committee’s recommendation in relation to this exemption and has amended the drafting of the Bill accordingly.</p> <p>The requirement for enforcers to give advance notice of routine inspections already exists under Part 8 of the Enterprise Act 2002 and Trading Standards indicated in their response to the consultation that they currently give notice to</p>

²² Office of Fair Trading v Foxtons Limited [2009] EWHC 1681 (Ch)
<http://www.bailii.org/ew/cases/EWHC/Ch/2009/1681.html>

		<p>businesses in 12-19% of their inspections.²³ Government does not intend to weaken the powers of enforcers, such as Trading Standards, to tackle rogue trading. That is why the requirement to give notice only applies to routine inspections. The Bill will still allow unannounced inspections to be made (i.e. without giving notice) where one of the exemptions applies.</p> <p>The majority of respondents to the Department's consultation considered that the powers and safeguards strike the right balance between protecting civil liberties, reducing burdens on businesses whilst still enabling effective enforcement. The British Retail Consortium (BRC)²⁴ did not consider that this compromises consumer protection, <i>'because if there is evidence of a serious or immediate breach, then the regulators can intervene [and] they do not have to make an appointment'</i>. The BRC therefore argued that <i>'the safeguards [...] are absolutely perfect'</i> as they provide sufficient flexibility for businesses and enforcers. This sentiment was echoed by the Federation of Small Businesses.</p> <p>As noted by the Committee, the exemption 'where giving notice would defeat the purpose of the visit,' contains the qualifying wording 'in particular because the officer has reasonable cause to suspect that evidence may be lost or destroyed if notice is given.' The Government disagrees that</p>
--	--	---

²³ Department for Business, Innovation and Skills, *Generic set of consumer law powers: Final Impact Assessment*, January 2014, page 12

²⁴ Business, Innovation and Skills Committee - Sixth Report, Draft Consumer Rights Bill, Oral evidence, 8 October 2013, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/697/131008.htm>

		<p>these qualifying words create a 'double test' but that they simply provide useful clarification of the application of the exemption, for example, in circumstances where counterfeit goods are suspected and which are likely to be concealed if advance notice is given. Nevertheless, as these additional words are for clarification, the Government is content to remove these words from the Bill and instead put the clarification in the explanatory notes accompanying the Bill.</p>
218	<p>Given the difference in views between the OFT and the Government, we look to the Government to clarify the legal position. In particular, the Government must demonstrate that the proposed provision against self-incrimination in relation to civil proceedings is lawful. Given the potential burdens on enforcers as described by the OFT, the Government must provide further detail on the provision against self-incrimination in consumer law.</p>	<p>The Government's intention is that the privilege against self-incrimination only applies if a person might incriminate themselves in criminal proceedings.</p> <p>However, the Government accepts that the draft Bill could have been read as applying to both criminal and civil cases. This meant there could have been a risk that a trader would be unlikely to disclose any information on the grounds that it might incriminate them.</p> <p>Therefore, the Government is content to revise the drafting so that it is clearer that the provision against self-incrimination does not apply in relation to civil proceedings.</p>
222	<p>We recommend that the offence of obstruction of an officer in the generic set of powers proposed under the draft Bill is maintained at its current level.</p>	<p>The Government considers that the maximum penalty for this offence should be aligned to level 3.</p> <p>Currently the maximum penalty for obstruction of consumer law enforcers, such as Trading Standards, varies across consumer law from level 3 to level 5 on the standard scale with no clear rationale for this variation.</p> <p>Evidence from Trading Standards</p>

		<p>shows that these offences are hardly ever prosecuted and in the past 3 years, the maximum fines imposed have never exceeded level 3. The maximum penalty for obstructing a police officer, immigration officer or a customs officer is currently set at level 3. There is no evidence to indicate that this level of penalty encourages obstruction of these officers. The Government does agree that there should be sufficient deterrent on traders who may be tempted to obstruct enforcers carrying out their duties. On this basis, Government considers that the maximum penalty for obstruction should be aligned across consumer law and with that for other law enforcers.</p>
246	<p>The enhanced consumer measures are extended to private enforcers, subject to appropriate safeguards, to increase the likelihood of their use, which in turn would benefit consumers and compliant businesses.</p>	<p>Given the flexibility enforcers and the courts will have to identify suitable remedies for dealing with breaches of consumer law, the Government is limiting the use of the measures to public enforcers only. However, during consultation some proposed that private enforcers should gain access to these measures. Currently only Which? is designated as a private enforcer in that they are able to bring civil actions against traders to stop practices that are detrimental to consumers.</p> <p>The Government wants to ensure that these new measures are used in all appropriate cases but has not consulted in detail or undertaken an Impact Assessment on this specific proposal to extend the measures to private enforcers. The Government is therefore including a power in the Bill that will enable the use of the measures to be extended to private enforcers if it is deemed appropriate and after experience has been gained from</p>

		public enforcers. The use of this power to extend to private enforcers contains certain safeguards. In addition, before the power is used a consultation and an assessment of the impact on business and consumers would be undertaken.
260	Proposed new section 14(1A) Enterprise Act 2002 (which would be amended by Paragraph 19(3) Schedule 7 of the draft Bill) should be amended to provide that in relation to fast track claims “the Tribunal may consist of a Chairman only”.	The Government accepts this recommendation. The Government believes that this change will improve the operation of the fast-track regime as it will provide greater flexibility for the CAT to decide whether or not it is suitable for having a Chairman sit alone.
265	The Government clarifies the limitation periods that will apply to stand-alone and follow-on claims, as well as in relation to collective proceedings. Furthermore, the Government should explain the rationale for its proposals for new Sections 47A Competition Act 1998 (allowing stand-alone claims to be brought to the Tribunal) and 47B Competition Act 1998 (allowing collective proceedings to be brought in the Tribunal) to have retrospective effect.	<p>The Government accepts that on face value sections 47A and 47B may appear retrospective. However, the changes are of a procedural nature and they do not change the underlying competition law prior to commencement. They are not creating new competition law obligations, such as new categories of competition law infringement. Nor do they change how damages are calculated in respect of infringement. They are simply extending the jurisdiction of the Competition Appeal Tribunal. Defendants will only face damages for matters which already constituted competition law infringements.</p> <p>The Government also agrees that it should clarify the limitation periods that will apply. The Government has considered and agrees with responses to its consultation that it will be necessary to harmonise the limitation periods and has therefore decided that the limitation periods for the CAT should be harmonised with those of the High Court and the Court of Session. The six year</p>

		<p>limitation period will apply to all private action cases in the CAT for England and Wales and Northern Ireland. In Scotland the limitation period will remain five years in line with the Scottish Court of Session. These limitation periods apply to both stand-alone and follow-on claims.</p>
269	<p>The CAT should publish draft revised Tribunal rules before the Bill is introduced into parliament.</p>	<p>The Government agrees that draft Tribunal rules on collective actions are an important aspect of how the revised regime will work in practice. To this end, the Government will ensure that a draft CAT rule on collective actions will be available for public scrutiny shortly after the Bill is introduced into Parliament.</p>
270	<p>The draft Bill would extend the Secretary of State's order making powers in relation to the making of Tribunal Rules. Given the importance of Tribunal Rules to the operation of the proposed collective redress, we recommend that the affirmative rather than the negative resolution procedure should apply, to ensure an appropriate level of scrutiny.</p>	<p>The Government intends to undertake a full review of the Tribunal rules. This will provide opportunity for interested parties to comment on the revised rules. Before that, Government will shortly be publishing a draft CAT rule on collective actions which itself will have been the subject of discussion with a group of expert stakeholders and which will be available for discussion in Parliament during consideration of the Bill. Overall therefore the Government believes that this will be an appropriate level of scrutiny and does not agree that it would add significantly to the scrutiny it intends to undertake by amending the order making power to the affirmative procedure. The negative resolution procedure is also consistent with the Secretary of State's existing power to make Tribunal rules and their technical nature as well as the procedure for other tribunal rules such as the Employment Tribunal rules.</p>

279	<p>Government clarifies the eligibility requirement that cases raise the same, similar or related issues of fact or law. The draft Bill should be amended to clarify that “all end consumers of a product, where the price of that product has been affected by an infringement of competition law, are affected by the infringement in the same way, such that their claims raise the same, similar or related issues of fact and law.” We consider acceptance of this recommendation to be crucial to the ensuring the effectiveness of, and preventing abuse of, the new collective actions regime.</p>	<p>Under existing proposals, the CAT would have to certify that a potential claim raises ‘same or similar facts’ and is suitable for a collective action. We understand this recommendation aims to remove any debate about whether or not a case involving consumers raises the “same or similar facts” (a key test as to whether a case is included in a collective action).</p> <p>The Government appreciates the aim of the Select Committee’s recommendation to limit the possibility that the CAT gets tied up in procedural litigation. However, we believe consideration and discretion for the CAT to take a view is necessary at the certification stage. Without this consideration, the possibility will arise that inappropriate cases for collective action could proceed with debate and dispute over the nature of the case taking place at a later, and more costly stage.</p> <p>This is important, because there may be cases where consumers are not affected in the “same” way by the same infringement of competition law. For example where they have purchased goods that have been subject to different amounts of overcharge in a cartel (which is likely to be a key issue for the main court hearing). It could be that it is better case management and more efficient to consider different classes of consumer separately and it could lead to unsuitable claims being included in a collective action.</p>
283	<p>Revised Tribunal Rules should clarify that collective proceedings cannot be brought by law</p>	<p>Government agrees with the Committee and is therefore accepting this recommendation. In the Government response on</p>

	firms, third party funders, or special purpose vehicles.	<i>Private Actions in Competition Law</i> ²⁵ this was highlighted as an important safeguard to prevent vexatious claims.
285	The draft Bill should be amended to provide that a class member may be appointed as a representative for the purposes of collecting proceedings provided that the Tribunal considers it just and reasonable for that person to act as a representative in those proceedings.	The Government agrees with the Committee that there may be instances where it would be inappropriate for a class member to be appointed as a representative and is therefore accepting this recommendation.
293	Proposed new Sections 49A and 49B Competition Act 1998 (inserted by Paragraphs 10(1) and 11(1) Schedule 7 of the draft Bill) should be amended to provide that the party who makes a settlement offer must demonstrate to the CAT that its terms are just and reasonable.	<p>The current drafting of the Bill requires the CAT to only certify a settlement when it is “just and reasonable”. This will naturally require all parties involved to submit evidence to the CAT regarding why an offer is “just and reasonable.” The Government believes there is therefore already sufficient safeguard to allay the Committee’s concern in this area: that the CAT can and must have sufficient evidence before it will feel able to agree that a settlement is just and reasonable.</p> <p>Additionally, Government believes, as supported by the CBI²⁶ and others, that businesses can be encouraged to participate more readily in Alternative Dispute Resolution. Introducing the proposed requirement could be perceived as placing greater onus on one party more than the other. It could be seen as a greater burden than it is or appear more like a trial than a settlement process and therefore not</p>

²⁵ <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

²⁶ Ev 66

		conducive to greater use of the alternative dispute resolution process.
294	Where the CAT is not satisfied that the terms of the settlement are just and reasonable, the Tribunal Rules should specify that the benefit of costs consequences does not attach to such offers.	<p>Existing CAT rules provide (at rule 43) that if a defendant makes a settlement offer which is rejected by the claimant, the claimant becomes liable to pay the defendant's costs from the date of the settlement offer if the claimant fails to secure a greater amount from the CAT (i.e. the claimant is successful, but does not secure damages which are greater than the original settlement offer). The purpose of this rule is to encourage settlement and to discourage claimants from unreasonably refusing to settle.</p> <p>However, in the situation where the CAT is considering a settlement to be just and reasonable, it is a precondition that all parties, the defendant(s) and claimant(s), have already reached agreement and are jointly approaching the CAT to rule on the terms of the settlement. We do not therefore think that cost consequences will be relevant under this collective settlement regime.</p>
298	The proposed new section 49C(3) Competition Act 1998 (inserted by Paragraph 12 Schedule 7 of the draft Bill) should clarify that in deciding whether to approve a redress scheme, the CMA may not calculate compensation offered under the scheme, but may take into account the amount or value of compensation under the scheme.	The Government agrees that the CMA should not spend its resources undertaking detailed calculations, and has also received representations from stakeholders, such as the OFT ²⁷ , that the CMA should be able to take into account the amount of compensation on offer. Therefore the Government is accepting this recommendation.
301	The CMA must monitor the	The Government agrees that it is

²⁷ Ev 77

	<p>impact on its resources of dealing with applications for approval of voluntary redress schemes. The Government must evaluate this data to establish whether resources are diverted away from the CMA's core public enforcement role. (Paragraph 301)</p>	<p>important to ensure that the new role for the CMA in approving voluntary redress schemes does not divert resources away from the CMA's core public enforcement role. We will work with CMA as part of regular monitoring to ensure that resources and priorities are matched appropriately, working to ensure that the monitoring requirement on the CMA is light-touch and flexible.</p>
310	<p>The Government, in conjunction with Citizens Advice, the Trading Standards Institute, and the Competition and Markets Authority, must set out a clear and detailed education strategy for both businesses and consumers in relation to the draft Bill and its wider reforms to consumer law in the UK.</p>	<p>The Government agrees on the need for a clear and detailed education strategy for both businesses and consumers. As set out on in Executive Summary to this document, we have already drawn together a wide spectrum of consumer, business and enforcer groups to work with us on a coordinated approach which will consider content, channels and timing. The group which will meet regularly as the Bill proceeds through Parliament, has already provided advice on how much time businesses and consumer organisations need to prepare for the change and has proposed a number of innovative approaches on both content and channels. BIS will work with the group to develop core guidance about the legislation so that it is available soon after royal assent.</p>
311	<p>We support the recommendations of Citizens Advice for the inclusion of an express requirement in clauses 10 and 38 (Goods and Digital Content to be as described) and clause 52 of the draft Bill (Information about the trader or service to be binding), for a trader to provide information about</p>	<p>The Government shares the objective of Citizens Advice which is to ensure that consumers are made aware of their new rights and have the confidence to assert them when they receive faulty goods, services or digital content.</p> <p>The implementation group described above is considering whether the provision of mandatory information at point of sale would make a valuable contribution</p>

	<p>the relevant core statutory rights at the point of sale.</p>	<p>towards this objective or whether consumers are more likely to absorb information about their rights when a problem has arisen and they need specific advice. It is clearly critical that consumers know where to turn for relevant and easily understood advice and so signposting to support services will be a really important aspect of consumer education. However, it would be unhelpful to introduce a legislative information requirement in the Bill without a consensus that this was an effective approach. The Government will continue to work with its partners to ensure the final approach will be effective.</p>
--	---	---

ANNEX C: SUMMARY OF MAIN QUANTIFIED IMPACTS OF THE CONSUMER RIGHTS REFORMS

Main quantified benefits for business

- Simpler complaint handling because the law is easier to understand for business and consumers amounting to £9.3 million per year
- Less need for ongoing legal advice because laws are easier to interpret and apply, resulting in benefits of £3.9 million per year
- Savings from fewer court cases because the law is easier to understand and complaints are resolved more easily equating to £3.5 million per year
- Reduced training costs because the law is easier for staff to understand and is no longer based on the firm's interpretation estimated at £2.8 million per year
- Savings to business from preventing anti-competitive practices valued at £12.2 million per year
- Savings from changes to Trading Standards inspections of £4.1million per year
- Savings for exporters from harmonisation of the consumer regime across the EU from the Consumer Rights Directive of £358 million per year (this is not part of the Bill but integral to the wider suite of consumer legislation reform)

Main quantified costs for business

- Initial costs of complying with new consumer rights (including the Consumer Rights Directive) £63.8 million per year
- Costs of initial familiarisation (including initial training costs) to ensure that firms are aware of the changes and understand their obligations to customers £32.1 million (once-off)
- An initial increase in legal costs to help firms apply the reforms £16 million (once-off)
- Cost of updating terms and conditions to reflect the changes £8.9 million initially (once-off)
- Increase in the annual cost of redress of £8.9 million per year

Main quantified benefits for consumers

- Reduced costs of searching for goods/services, to prevent the risk of purchasing a faulty good/service £64.6 million per year
- Benefits from greater deterrence to anti-competitive practices of £39.4 million per year
- Reduced costs from problems with faulty goods including financial, lost personal time £29.9 million per year
- Increased redress valued at £11 million per year
- Savings in the Consumer Rights Directive from the provision of basic rate customer phone lines and extending the period for cancelling contracts valued at £6.1 million per year

Main quantified benefits to public sector

- Savings from fewer court cases £1.2 million per year
- Simpler complaint handling because the law is easier to understand and apply, valued at £0.6 million per year

Main quantified costs to public sector

- Increase in costs of enforcing compliance with law £0.5 million per year
- Lost revenue from fewer court cases and fee remissions £0.2 million per year.

The Government is committed to reducing the cost and volume of regulation in the economy, and new regulations must be justified on a 'One In, One Out' basis. Any new legislation that imposes a direct net cost on business or civil society is considered to be an "IN", and must be balanced by the removal of existing regulations with an equivalent value (an "OUT").

The measures in the Consumer Rights Bill suite of reforms have been assessed and validated on this basis, and are considered as an "OUT" of £2.4 million per year.

Summary of Impact Assessments

Summary of Impact Assessments			Consumer Rights Bill	
Measures by Area of Bill	Total Net Present Value (over 10 years) (£million)	Direct Net Annual Impact on Businesses - under 'One In One Out Methodology' (£million)		
Goods	238.3	'IN'	2.8	
Services	290.9	'IN'	0.8	
Digital Content	219.6	'IN'	0.4	
Private Actions	828.0	N/A		
Unfair Contract Terms	13.2	'IN'	0.2	
Enhanced Consumer Measures	81.0	N/A		
Consumer Law Enforcement Powers	48.0	'OUT'	5.3	
Improving Trading Standards Service cross-border cooperation & authorisation	0.6	N/A		
Associated Measures In Secondary Legislation				
Misleading & Aggressive Practices	109.3	OUT	2.8	
Consumer Rights Directive	2,622.2	'IN'	1.3	
Payment Surcharges (part of the CRD, but already implemented)	- 0.3	'IN'	0.2	
Totals				
Total for Consumer Rights Bill	1,719.6	'NET OUT'	1.1	
Total for All Legislative Reform	4,450.8	'NET OUT'	2.4	
*IN = net cost to business				
**OUT = net benefit to business				

ANNEX D: PRACTICAL EXAMPLES OF HOW THE REFORMS WILL MAKE A DIFFERENCE

Area of Reform

Example of Practical Change

Goods

A faulty toaster

- *You buy a £20 toaster but after three and a half weeks you find that it no longer works.*
- *Currently, under the law, it is not clear whether you have a right to return the goods and get a refund because it is not clear if three and a half weeks is a “reasonable time”.*
- *Under the proposed reform you will have a clear right to a full refund as less than 30 days have passed.*

Digital Content

A CD that jumps

- *You buy a CD but when played it jumps erratically between tracks or gets stuck. You try to return it but the retailer says that they don’t offer refunds on CDs. What are your rights?*
- *Under current legislation your rights are unclear, but the new law will make it clear that for faulty digital content bought on a tangible medium such as a CD, you are entitled to a refund within 30 days of purchase.*

Services

A wedding photographer arrives late

- *You contract with a photographer for your wedding, to take photos starting with the ceremony at 1pm on a given Saturday. You pay £2000 for the service. There is a clause in the contract stating that the maximum discount for any problem caused by the photographer is £1000.*
- *The photographer arrives late, at 4pm, missing the ceremony. The photographer has breached the information in their contract by not arriving at 1pm.*
- *The term limiting the price reduction is invalid. The photography service cannot be repeated, as the wedding has happened. You are entitled to a reduction in price (possibly up to 100%) due to non-compliance with the information provided*

Unfair Terms

A Mobile phone deal

- *A consumer signs up to a mobile phone contract for £20 a month. After the consumer agrees to the deal they discover their neighbour has got the same package for £15.*
- *The consumer challenges the firm, arguing that their deal is unfair.*
- *The firm made sure that the monthly price and the texts and minutes available were clearly explained, in plain English, when they agreed the contract and were prominent and transparent in the contract.*
- *Under these proposals, it is easier for the firm to understand what they should and should not leave to the 'small print'. In this case, the consumer would not be able to challenge the deal for fairness, as the terms were transparent and prominent.*

Enforcers' powers

Investigating a trader for unnecessary roof repairs

- *A rogue trader has misled consumers across a region into having expensive and unnecessary roofing repairs.*
- *Currently, to ensure that one lead authority can take proceedings for all breaches a lead authority needs memoranda with all their neighbouring local authorities: significant time and resource away from directly helping consumers and businesses.*
- *Under the new regime, the lead prosecuting local authority is able to deal with all the breaches without the bureaucracy.*

Enhanced Consumer Measures

A rapidly expanding furniture business

- *Due to rapid expansion a furniture retailer breaches consumer law by making false claims on speed of delivery for goods which arrive much later than arranged.*
- *Customers complain to Trading Standards as the furniture company does not even give a revised delivery date. A Trading Standards officer visits the company, sees the company is not purposely breaching consumer law and, using the new measures, works with the company to identify the best way of addressing the breaches.*
- *The company agrees to put in place: revised delivery dates and nominates an employee to ensure false promises are no longer made and complaints are dealt with promptly.*
- *The company avoids formal prosecution and quickly improves complaint handling.*

Private Actions in
Competition Law

A toy manufacturer is being investigated for suspected price fixing

- *The CMA is investigating a toy manufacturer for price fixing and determines that it is a case in which settlement may be appropriate. The toy manufacturer decides to settle the case and simultaneously offer a voluntary compensation scheme to affected consumers.*
- *Under the current regime, there would be no guarantee to consumers that the compensation scheme is fair.*
- *Under the Bill, the manufacturer would have to follow a set process, as laid out in secondary legislation, to reach a level of compensation. If the CMA decided to consider the application, it would have to certify that the scheme had followed the process, and if the scheme was offered alongside a settlement offer to the CMA (i.e. not after the CMA issues the fine), the manufacturer could qualify for a reduction in fine of up to 10%.*

CONSUMER RIGHTS BILL – DETAILED ANNEXES ON BILL PROVISIONS

ANNEX E - GOODS

Consumer law governing the sale of goods is complex, which is burdensome for business, and consumers are often poorly informed about their rights. In some cases, consumers do not pursue remedies as they are not aware that a remedy is available to them; in other instances, consumers overestimate their rights. This can lead to costly disputes between consumers and retailers, exacerbated by the fact that in some key areas, the law is unclear as well as complex. As well as this complexity harming consumers and businesses, an ineffective scheme of consumer rights also stifles competition between firms to produce the best quality products, for the best price.

The Bill will address these problems in the following five key ways:

1. By setting a clear time period of 30 days following purchase in which consumers can reject faulty goods and receive a full refund, thereby providing clarity to both the consumer and trader.

Currently, consumers can reject (and obtain a full refund for) goods which are faulty at the time of purchase until they have 'accepted' those goods. Acceptance of bought goods is determined by the consumer acting in a manner inconsistent with the seller's ownership of the goods (for example, this could be by altering the goods), or retaining the goods beyond a 'reasonable time', without telling the retailer that they reject them.

What constitutes a 'reasonable time' depends on the circumstances, making it difficult for consumers and businesses to know for how long after supply a refund must be given.

In order to make it clear when the right to reject may be exercised, the Bill sets a fixed period of 30 days for the right to reject faulty goods. The 30 days will start following purchase or delivery of the goods, or (if applicable) installation or set-up of the goods by the trader (whichever is the later). There is an exception only where goods are perishable and would not be expected to last 30 days.

Repair and replacement should be viable alternatives to rejection. Where a consumer opts for a repair or replacement within the 30-day period, the period for rejection is extended. When the repaired or replaced goods are returned to the consumer they will have the remainder of the period (a minimum of seven days) to inspect the goods to ensure they are acceptable, before this right is lost.

2. After 30 days, or where the consumer does not choose to reject faulty goods initially, the Bill clarifies that consumers need only accept a single repair or replacement attempt before being able to get some money back if the repair or replacement fails to fix the problem, or a further problem arises.

These remedies of repair or replacement are known as “Tier 1” remedies.

The trader will be able to offer a single repair or replacement. If this is not provided within a reasonable time and without significant inconvenience to the consumer, it will be clear that the consumer can either keep the goods with a reduction in the purchase price, or return the goods, receiving a refund, which may be subject to some deduction for use in some cases. This is currently the case under the existing law. However, it is not always clear when the next “tier” of remedies is available, if an initial repair or replacement is provided quickly and easily but problems with the goods persist.

If a repair or replacement is provided but does not bring the goods to the standard required (either because the initial fault is still present following the repair or replacement or a further fault appears) again, the consumer will either be able to keep the goods with an appropriate reduction in the purchase price, or return the goods, receiving a refund (which might not be a full refund). As a result, the scope for dispute will be reduced as a clear test will have been met. A repair or replacement would count once the trader returns the goods or gives the replacement to the consumer. These remedies of reduction in purchase price or terminating the contract and getting a refund are known as “Tier 2” remedies.

3. The Bill establishes that traders may not, in the first six months after purchase, reduce the level of refund provided to take account of the use of faulty goods the consumer has had up to that point. There is an exception where independent evidence exists of an active business-to-consumer second-hand market in the specific goods, in which case the refund may be reduced in the first six months to take account of use.

In order to provide greater clarity, the Bill specifies that, where a trader provides a refund under the Tier 2 remedy of terminating the contract, within the first six months they cannot normally make any deduction for the consumer’s use of the goods. Thereafter, the trader may deduct an amount to take account of the consumer’s use. Currently there is no time limit before a trader could start to make a deduction for use, when Tier 2 remedies are reached. Any time that the goods were returned to the trader for repair or replacement (or when the trader has delayed in collecting them for these purposes) will not count towards the consumer’s use. This balances the interests of consumers who may have had limited and/or problematic use of the goods with the interests of businesses not to have to refund the full price if the consumer has also benefited from many months of use before a problem arose.

Where there is independent evidence of an active business-to-consumer second-hand market in the goods, the trader will be able to reduce the refund to take account of use, even if it is still within the first six months. This active business-to-consumer market must exist in the specific goods that the consumer purchased - that is, the same make and model. The most obvious example where this will operate is in the motor industry, where there is clearly

an active market between traders and consumers in second-hand vehicles. The exception is not, however, limited to this industry.

4. The Bill consolidates and aligns the currently inconsistent remedies available for goods supplied under different contract types, such as sale, work and materials, conditional sale or hire purchase.

Traders may supply goods to consumers under a variety of contract types. Currently, the forms of redress available to consumers, if their goods are faulty are inconsistent, and depend on the type of contract involved.

The different contract types are 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 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.

A clearer, simpler and more accessible framework of remedies for faulty goods should lead to better consumer and retailer awareness of their rights and obligations in each situation. The Bill therefore specifies that essentially the same rights and remedies should apply to goods supplied under all contracts where a business supplies goods to a consumer. This includes the short term right to reject of 30 days, and one repair/replacement, before moving to a reduction in the purchase price or returning the goods for a refund, which may be subject to a deduction for use in some cases.

However, in hire contracts, because the consumer pays for use, and the ownership of the goods is not transferred, the consumer will not have a statutory right to claim back any payments made for any hire period that they have already had.

5. The Bill sets out more clearly the standards that the goods must meet. This includes removing references to “conditions” and “warranties” and ‘implied terms’ and replacing these with less legalistic language.

The rights that goods should be of satisfactory quality and match the description under which they are sold are currently expressed as ‘implied

terms'. That means they form part of a contract whether or not they are expressly said or written down in it. However, the current legislation expresses these rights in legalistic language that is not easily understood by consumers or businesses. The Bill expresses these rights in clearer language, which consumers and businesses should find easier to understand.

ANNEX F - DIGITAL CONTENT

There is currently significant legal uncertainty around consumer rights in digital content transactions. Two different issues arise from this legal uncertainty. Firstly, consumers are less active in attempting to resolve problems they experience with digital content, meaning that the size of consumer detriment in this area is likely to be greater than estimates suggest.

Secondly, and 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 an unnecessary dispute. There is also a reputational risk to business if it declines to provide the remedy the consumer wants. In addition, when consumers do experience problems and are unable to claim the remedy they expect, consumer confidence is undermined. This could disadvantage new entrants to the market in particular as consumers are driven towards established brands.

Research commissioned by BIS concluded that digital content should be treated in the same way as goods as far as is practicable. This also matches consumer expectations when they purchase digital content. The Bill seeks to address these issues by introducing a new category of digital content in consumer law; new statutory rights for digital content; and new statutory remedies for faulty digital content. These rights and remedies are based on those for goods but with some bespoke changes to reflect the unique nature of digital content.

1. New category of digital content

Digital content will be defined using the definition in the Consumer Rights Directive, as *'data which are produced and supplied in digital form'*.²⁸ Digital content quality rights (set out below) will be applied to the digital content after the performance of any associated services where the consumer has no choice over who provides that service.

Digital content which has not been paid for with money will be outside of the scope of the digital content quality rights, subject to 3 conditions:

- It will be in scope if it is associated with paid-for digital content, goods or services such as a “free gift” of a computer game given away with a paid-for magazine, where the consumer has a contractual right to these “free gifts”.
- Contractually provided free digital content, as well as paid-for digital content, will be subject to the right that it will not harm other digital content on the consumer’s device (or the device itself) if the trader should have taken steps to make sure the digital content did not cause such harm.
- There will be a reserve power to extend the scope of the digital content provisions should there be evidence in future of detriment, for example

²⁸ <http://register.consilium.europa.eu/pdf/en/11/pe00/pe00026.en11.pdf>

where a consumer has given over valuable personal data in exchange for digital content.

2. New quality rights for digital content

The Bill provides the following quality rights for digital content:

- **It will match the description under which it was provided.** The consumer will be able to rely on any description of digital content provided pre-contractually. This right, combined with the pre-contractual information requirements in the Consumer Rights Directive, is intended to address current consumer detriment caused by lacking, complex and misleading information.
- **It will be of satisfactory quality.** This is a flexible standard based on the expectations of a reasonable person and so (as with goods) will be able to take into account different features of different digital content products.
- **The digital content will be fit for the particular purpose(s)** that the consumer made known to the trader was the reason for buying the digital content in question.
- **It will provide specific rights relating to the right to modify digital content.** As some forms of digital content are frequently updated remotely by the manufacturers of that digital content, the provision will allow for updates within the terms of the contract, provided that the quality of the digital content is not reduced after any updates.
- **It will specify that the trader has the right to provide the digital content.** This right will not affect intellectual property rights and will not give a consumer a right to use the digital content if the trader has no right to provide it; rather it will ensure that the consumer has a right to a remedy if provided with digital content that they then have no right to use.
- It will provide that the **digital content (contractually provided for a price or otherwise) will not cause damage to other digital content including the operating system on the consumer's device where the damage would not have occurred if the trader had taken reasonable care and skill.** The intention here is to reflect the existing common law provisions of negligence, but only where there is a contract between the trader and a consumer. If this right is breached, the trader will have to repair the damage or pay some compensation.

3. Remedies where digital content does not meet the statutory rights

Where the digital content does not meet the description given, is not of satisfactory quality, is not fit for purpose, or does not meet the quality standards following an update, the consumer will be entitled to a **repair or replacement** of the digital content (this is known as a Tier 1 remedy).

If repair or replacement is impossible, or if not done 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** of an appropriate amount (known as a Tier 2 remedy).

If the trader does not have the right to provide the digital content, the consumer will have the right to an **immediate refund**. Digital content on a tangible medium, such as on a disk, is goods, and therefore the goods rules apply; that is the goods will need to be made available to the trader (e.g. through return) in order to reject the goods.

If the digital content harms the consumer's device the consumer will be entitled to **a repair** of the damaged device or other digital content or, if that is not possible, some **financial compensation**. The consumer will need to prove that the trader failed to use reasonable care and skill in preventing such harm from occurring.

Unlike faulty goods, which a consumer will be able to reject within 30 days and receive a full refund, consumers will not automatically have a right to reject faulty digital content. This is because digital content that is not provided on a tangible medium (e.g. where it is downloaded or streamed) cannot be returned in any meaningful sense. Instead consumers with faulty digital content will only be entitled to money back if the trader cannot repair or replace the faulty digital content without significant inconvenience or within a reasonable time.

However consumers will have a short term right to reject digital content sold on a tangible medium (such as on a DVD or CD) because the disk itself is goods and can be returned, and the two things form one product.

ANNEX G - SERVICES

Consumer services law is difficult to understand and, when things go wrong, there is no statutory redress regime to put things right. It is also unclear when, or to what extent, businesses can exclude or limit liability for the consumer's statutory rights. Under current law, such exclusions or limitations must be "reasonable", but in practice it is hard for consumers and businesses to know what "reasonable" means. The rules on reasonableness and limiting liability and the rules on consumer rights are currently set out in different pieces of legislation. Legislation does not set out any remedies in relation to the provision of services, and the common-law is difficult for consumers and businesses to access, let alone interpret.

When a service goes wrong, consumers might want the business to put the service right, but in England and Wales this remedy is only given at the court's discretion and there are a number of factors which mean this does not often happen in practice. In Scotland the position is different, and the courts are more willing to order a remedy to put the service right. Whilst the current legislation covers England, Wales and Northern Ireland, the provisions in the Bill on services will also extend to Scotland²⁹.

To clarify and enhance the law on services, the Bill:

1. Introduces a new statutory right that a service must comply with information given by the trader in certain circumstances, even if this is not recorded in the written contract

Where the consumer is given information by the trader, either about the service or about the trader themselves, the consumer has a right that that information is correct. However, this only applies where the consumer relied on that information when deciding to purchase the service or make any other decision under the contract, so only information which informed the consumer's decisions about entering the contract or made after that is subject to this right. Either the trader or consumer can amend any information given, with the agreement of the other party.

2. Makes the language of the existing law easier to understand

The Bill seeks to achieve this by making clear that the existing consumer protections are statutory rights: that a service must be provided with reasonable care and skill and, where the time for the service or the price has not been agreed, that the service must be performed within a reasonable time and at a reasonable price.

3. Introduces new statutory remedies when things go wrong

These will be available alongside those available in general contract law.

Where the business has failed to provide the service with reasonable care and skill, or in compliance with certain information provided, the consumer will

²⁹ However, in Scotland, contracts without consideration are specifically excluded.

have a right to request the business to put the service right (i.e. re-perform the service, or the element of it that was at fault). The business will have to do so, unless putting the service right is impossible or cannot be done within a reasonable time or without significant inconvenience to the consumer.

In other cases, there could be a reduction in the price the consumer has to pay for the service by 'an appropriate amount'. This will be available where the business has failed to provide the service with reasonable care and skill (or in-line with certain information provided) and it is impossible to put the service right or this cannot be done within a reasonable time and without significant inconvenience to the consumer. Where the service does not meet the information given about the trader or (where the time for performance of the contract is not specified) the service is not completed within a reasonable time the consumer will also be entitled to recover their costs as a result.

4. Makes clear that consumers can always request these rights and remedies where there is a contract

The Bill makes clear that the statutory rights will always apply and the consumer can always request these remedies, and any attempt by businesses to render them inapplicable will have no legal effect.

ANNEX H – UNFAIR TERMS

Current legislation on unfair terms in consumer contracts is unduly complex. The current law is contained in two very different pieces of legislation, with different scopes. There have been high profile court cases concerning whether a term or terms in consumer contracts are unfair, or can be assessed for fairness.

The courts have analysed the current framework, clarifying the law in places, but also requesting that Government and Parliament look again at how best to protect consumers from unfair contract terms. The Bill therefore contains provisions to consolidate and enhance consumer law in this area.

Some protection in law is necessary because consumers often cannot, or do not wish to, investigate the detail of every contract term before they sign-up to an agreement. Consumers are focused on the product or service they are purchasing rather than the contract. However, this needs to be balanced against businesses' need to be able to trade without the prospect of every single term being open to challenge. Contracts are a necessary part of providing certain products and services, and should enable rather than hinder consumers and businesses in that market.

To clarify and enhance the law on unfair contract terms, the Bill will:

1. Streamline the legislation governing unfair terms in relation to consumer contracts.

This is currently found in two separate pieces of legislation, but the Bill streamlines into one place, removing anomalies and overlapping provisions. This will allow businesses, consumers and those advising them to understand more easily the circumstances in which terms can be assessed for fairness. The consolidated regime will apply both to contracts and to notices and to both negotiated and non-negotiated terms.

2. Make clearer the circumstances when the price or subject matter of the contract cannot be considered for fairness and in particular make clear that, to avoid being considered for fairness, those terms must be transparent and prominent

The main change from the current position is the requirement for prominence. It aims to prevent circumstances where extra charges or requirements which relate to the overall subject or price of the contract are buried in the 'small print' and are therefore not clear to the consumer at the time they agreed to enter into the contract.

3. Clarify the role and extent of the indicative list of terms which may be regarded as unfair (the so-called 'Grey List')

This list covers situations where consumers may not at the outset pay sufficient attention to or understand the implications of the terms. It is an indicative and non-exhaustive list of terms which might be regarded as unfair, but it is unclear whether it is there to aid consideration as a list of examples or

whether those terms are presumed to be unfair so a court should automatically assess them for fairness.

The Bill makes clear that terms on the Grey List can be assessed for fairness, even if they cover the price or subject matter of the contract. In line with the proposals from the Law Commissions and responses to their consultation, the Bill will also enhance the 'Grey List' of terms. Specifically, the Grey List will additionally cover:

- Terms which permit the trader to claim disproportionately high sums in compensation or for services which have not been supplied, where the consumer has attempted to cancel the contract. These are also known as 'early termination clauses';
- Terms which give the trader discretion to decide the amount of the price after the consumer has become bound by the contract; and
- Terms which give the trader discretion to decide the subject matter of the contract after the consumer has become bound by it.

ANNEX I – INVESTIGATORY POWERS

Investigatory powers vary across consumer law making them unclear for both businesses and enforcers. The investigatory powers of consumer law enforcers are currently scattered in around 60 different pieces of legislation. These powers include powers of entry and inspection and seizure of goods and documents. Slight variations in the powers across the legislation cause confusion and potential disputes with officers as it is difficult for businesses and enforcers to know what officers' powers are in every circumstance, leading to unnecessary costs to business.

The current law enabling Trading Standards to work across local authority boundaries is open to different interpretations and this is causing confusion amongst enforcers. This results in reduced effectiveness and efficiency of the enforcers to tackle rogue traders operating across local authority boundaries which are causing consumer harm, damaging consumer confidence and presenting unfair competition to reputable businesses.³⁰

To address these issues, the Bill will:

1. Consolidate and simplify the investigatory powers of consumer law enforcers

The Bill sets out a generic set of investigatory powers in one place³¹ based on the powers contained in Part 4 of the Consumer Protection from Unfair Trading Regulations 2008.

Consumer law investigatory powers include powers of entry, test purchasing and inspection of products, powers to break open containers and powers to seize goods and documents. In setting out the powers in a generic set, they have been aligned as far as possible across consumer law to simplify them and reduce the likelihood of disputes as to enforcers' powers. The equivalent powers in the existing legislation are being repealed.

At the same time to protect civil liberties, the Bill adds enhanced safeguards to the powers, such as the requirement for enforcers to give reasonable notice to businesses for routine inspections and restricting powers to enter wholly or mainly private dwellings so that a warrant is required to exercise a power of entry to these premises.³²

³⁰ Department for Business, Innovation and Skills, the Office of Fair Trading and Local Authority Trading Standards Services Protecting consumers – the system for enforcing consumer law, Report by the Comptroller and Auditor General, HC 1087 Session 2010–2012, page 8, National Audit Office, 15 June 2011, http://www.nao.org.uk/publications/1012/protecting_consumers.aspx

³¹ Some specific powers contained in weights and measures and product safety legislation will be retained alongside the new generic set

³² As outlined in the Protection of Freedoms Act 2012 requiring the review and consolidated powers of entry and to improve safeguards to their use. This implements the Government's commitment in Coalition: our programme for government, page 11, HM Government, May 2010, http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf

This is a key response to the Retail theme of the Government's Red Tape Challenge in July 2011 which aims to reduce regulation. This will reduce cost and disruption to businesses, saving an estimated £4 million per year. Details of the powers making up the generic set and the changes the Bill makes to the current powers are outlined in the Impact Assessment for the Generic Set of Powers.³³ Notice of an inspection need not be given, for example, where it would defeat the purpose of the officers' visit, such as where evidence may be destroyed or where a breach of law is suspected. This will ensure that the ability of Trading Standards to carry out spot checks, where appropriate, and to tackle rogue traders is not diminished. The nature of these powers may be reviewed subject to decisions on proposals regarding the investigation of crime on the internet.

2. Clarify the law so that Trading Standards Services are able to work across local authority boundaries

The current law enabling Trading Standards to work across local authority boundaries is open to different interpretations, causing confusion amongst enforcers. This has caused particular difficulties for the Scambuster and Illegal Money Lending teams, which work on a pan-local authority basis. We are therefore clarifying the law to make it easier for Trading Standards Services to tackle the £4.8 billion of consumer harm caused by rogue traders which operate across local authority boundaries.³⁴ It will also support the National Trading Standards Board (NTSB), which was established in April 2012, and has responsibility for prioritising Trading Standards enforcement in complex cross-local authority cases.³⁵ This will help reduce harm and improve consumers' confidence as well as protect compliant businesses from unfair competition posed by these rogue traders.

The Government is also removing specific restrictions to officers' powers under the Weights and Measures Act 1985 limiting them to the local authority area in which the inspector is appointed.³⁶ This will increase businesses' choice of local authority when requesting verification of their regulated weighing and measuring equipment.

Businesses that operate across local authority boundaries can form a Primary Authority relationship with a local authority which then takes the lead in providing advice and guidance to that business, including developing a national inspection plan. In addition, proposals in the Enterprise and Regulatory Reform Act 2013 (ERR Act) have put these inspection plans on a

³³ Enhancing consumer confidence: Generic set of consumer law powers Impact Assessment, Department of Business, Innovation and Skills, 01 May March 2013, Link: <https://www.gov.uk/government/publications/draft-consumer-rights-bill>

³⁴ Department for Business, Innovation and Skills, the Office of Fair Trading and Local Authority Trading Standards Services Protecting consumers – the system for enforcing consumer law, Report by the Comptroller and Auditor General, HC 1087SesSIon 2010–2012, page 8, National Audit Office, 15 June 2011, http://www.nao.org.uk/publications/1012/protecting_consumers.aspx

³⁵ Empowering and protecting consumers: Government response to the consultation on institutional reform, Department for Innovation and Skills, April 2012, <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf>

³⁶ Section 79(1) Weights and Measures Act 1985

statutory footing. This will ensure that these businesses are not subjected to unnecessary or duplicate checks and tests by Trading Standards.

3. Amendment of the Weights and Measures (Packaged Goods) Regulations 2006

As part of the simplification of consumer law investigatory powers, the Bill repeals the power of Trading Standards officers to issue an exemption certificate to certain bakers under weights and measures legislation. In its place, the Bill introduces an automatic exemption. This means that bakers who bake on the premises and sell loaves unpackaged will be automatically exempt from the requirement under weights and measures legislation to keep a record of their checks on loaves' average weight. This will remove unnecessary burdens on businesses and enforcers.

ANNEX J – ENTERPRISE ACT 2002 – ENHANCED CONSUMER MEASURES AND OTHER ENFORCEMENT

Public enforcers, like Trading Standards Services, currently lack flexibility in the ways that they can achieve better outcomes for consumers and compliant businesses when dealing with breaches of consumer law.

To enhance the flexibility of enforcers of consumer law, the Bill introduces new powers for enforcers to seek, through the civil courts:

- Redress for consumers who have been disadvantaged from breaches of consumer law
- Remedies from traders who have breached consumer law to improve their compliance and reduce the likelihood of future breaches
- Remedies to give consumers more information so they can exercise greater choice and help improve the functioning of the market for consumers and other businesses.

Enhancing the range of actions enforcers can take will help target their interventions more effectively which in turn will help improve their role in making markets function more effectively.

To retain flexibility the legislation will not set out a prescribed list of what an appropriate measure might be. The Government's aim is that the business would propose appropriate measures which they would agree with the relevant enforcer but where a business is unwilling to propose a scheme, the enforcer could seek a requirement through civil courts to implement measures to give consumers more information and improve the market.

For example, a business that has breached consumer law by making false claims on delivery times could suggest to the enforcer that they put in place measures to give consumers more information on revised delivery dates, appoint a compliance officer or improve their complaints handling systems and revamp their training. If the enforcer thought that this was an appropriate way of dealing with the breach then court action would not be necessary.

The Bill includes safeguards for businesses to ensure that, even where they have breached consumer law, any redress or other remedies are:

- Proportionate to the detriment or harm caused by the initial breach in consumer law
- Just and reasonable, the trader must be able to deliver the remedies.

Given the flexibility enforcers and the courts will have to identify suitable remedies for dealing with breaches of consumer law, the Government is limiting the use of the measures to public enforcers only.

However, during consultation some proposed that private enforcers should gain access to these measures. Currently only Which? is designated as a private enforcer in that they are able to bring civil actions against traders to stop practices that are detrimental to consumers. The Government wants to

ensure that these measures are used in all appropriate cases but has not consulted in detail or undertaken an Impact Assessment on this specific proposal to extend the measures to private enforcers. The Government is therefore including a power in the Bill that will enable the use of the measures to be extended to private enforcers if it is deemed appropriate and after experience has been gained from public enforcers. The use of this power to extend to private enforcers would require the Secretary of State to:

- believe that by doing so it increase business compliance with the law, gives consumers more redress and/or gives consumers more information;
- be content that the enforcer is compliant with the Legislative and Regulatory Reform Act 2006 (representing best practice for enforcers); and
- The enforcer, or any charitable parts of it, could not directly benefit from using the measures. For example, they could not seek an order for a business to pay them redress or for the business to join one of their own trusted trader schemes.

Before the power is used a consultation and an assessment of the impact on business and consumers would be undertaken.

ANNEX K - PRIVATE ACTIONS IN COMPETITION LAW

Research by the Office of Fair Trading (OFT) shows that businesses view the current approach to private actions as the least effective aspect of the UK's competition regime. Anti-competitive behaviour can harm consumers by lowering output, increasing prices, and reducing choice and innovation. At its worst, the anti-competitive behaviour can be covert and often difficult to identify. Establishing the situation that would have existed in the absence of the anti-competitive behaviour is complex, and will often require costly expert economic input. Consequently challenging anti-competitive behaviour is beyond the resources of individual consumers and many businesses, particularly SMEs. The Bill contains the following provisions to address these problems:

1. Reform the Competition Appeal Tribunal (CAT)

This includes allowing the CAT to hear stand-alone cases, as well as follow-on cases, grant injunctions, and introduce a cost-capped fast track regime aimed at SMEs.

Follow-on cases are claims for damages where an infringement of competition law has been previously found by a competition authority (notably the OFT, European Commission and some sector regulators). In such a case, the claimant must show that the infringement caused them harm.

Stand-alone cases occur where an infringement has not been found by a competition authority. The claimant must therefore first show a breach of competition law, and if this is established, may then attempt to show how it relates to their case.

The fast-track regime for SMEs will be established to issue swifter and cheaper redress with an emphasis on injunctive relief. There will be a presumption that an SME case will be suitable for fast track.

2. Promote ADR to ensure that the courts are the option of last resort

This will introduce a new opt-out collective settlement regime in the CAT and a new role for the Competition and Markets Authority (CMA) in certifying voluntary redress schemes.

Under the collective settlement regime, any representative consumer group or trade association and a business, which has broken competition law, could jointly approach the CAT to agree on a level of damages without having to take a case through the court process. Any settlement would then be binding on eligible consumers, unless they opted-out of the settlement.

Under the certifying redress scheme, the CMA could approve a consumer compensation scheme put forward by a business which had broken competition law. Consumers could then come forward and claim their compensation.

3. Introduce a limited opt-out collective actions regime, with safeguards, for competition law to sit alongside the existing opt-in regime

Under the current regime, only Which? can take forward a group, or “collective” action (a case bought forward on behalf of a group of consumers), and on an “opt-in” basis. This means that only consumers who actively join the action could benefit from any damages, and requires consumers to provide evidence of eligibility for a product that they possibly purchased several years earlier.

The provisions in the Bill will allow any representative consumer group or trade association to take forward an action, and eligible consumers or businesses would automatically be included in the proposals, i.e. they would have to “opt-out” if they didn’t want to be included in the action. In order to prevent US style class actions, there will be a range of safeguards including:

- certification by the CAT whether the case should be opt-in or opt-out;
- no treble damages.
- no contingency fees (percentage of the damages awarded as a success fee).



information & publishing solutions

Published by TSO (The Stationery Office) and available from:

Online

www.tsoshop.co.uk

Mail, Telephone, Fax & E-mail

TSO

PO Box 29, Norwich NR3 1GN

Telephone orders/General enquiries: 0870 600 5522

Order through the Parliamentary Hotline Lo-Call: 0845 7 023474

Fax orders: 0870 600 5533

Email: customer.services@tso.co.uk

Textphone: 0870 240 3701

The Houses of Parliament Shop

12 Bridge Street, Parliament Square

London SW1A 2JX

Telephone orders: 020 7219 3890/General enquiries: 020 7219 3890

Fax orders: 020 7219 3866

Email: shop@parliament.uk

Internet: <http://www.shop.parliament.uk>

TSO@Blackwell and other accredited agents

ISBN 978-0-10-187962-0



9 780101 879620