The CMA's response to the European Commission's questionnaire on contract rules for online purchases of digital content and tangible goods

Part 1 - Digital Content

Content

1. Digital content products markets are growing rapidly. For instance, the app sector in the EU has grown significantly in less than five years, and is expected to contribute EUR 63 billion to the EU economy by 2018. Consumer spending in the video game sector is estimated at 16 billion EUR in 2013. In the music industry, digital revenues now represent 31% of total revenue in the EU. This economic potential should be further unleashed by increasing consumer trust and legal certainty for businesses.

2. However, when problems with digital content products arise (for example, the digital content products cannot be downloaded, are incompatible with other hardware/software, do not work properly, or even cause damage to the computer), specific remedies are lacking at the EU level (namely a right of the user against the trader when the digital content is defective). In addition, the user cannot influence the content of the contracts on the basis of which digital content products, which are 'off-the-shelf' products, are offered because these are 'take it or leave it' contracts. For instance, contracts may limit the user's right in case the digital content products do not work properly. They may also exclude the user's right to receive compensation if the digital content products caused damage (for example by damaging the computer), or limit compensation solely to so-called 'service credits' (extra credits for future service).

3. In addition, contracts for the supply of digital content products may be characterised differently in the Member States for example as service, lease or sales contracts. Such different treatment may result in different sets of remedies, some of them in the form of mandatory rules, others not. This may cause legal uncertainty for businesses about their obligations – and for users about their rights - when selling digital content products both domestically and cross-border.

4. A number of Member States have enacted or started work to adopt specific legislation on digital content products (namely the UK, the Netherlands and Ireland). This could further increase the differences between national rules that businesses would have to consider when providing digital content products throughout the EU.

Legal background at EU level

5. Certain aspects of contract law for online supply of digital content products are already covered by EU law. For example, the Consumer Rights Directive provides uniform rules on the information that should be provided to consumers before they enter into a contract and on the right to withdraw from the contract if they have second thoughts; the Unfair Contract Terms Directive provides rules against unfair standard contract terms in consumer contracts. However, there are no EU rules on other aspects of contracts for digital content products (such as what remedies are available if the digital content product is defective).

Section 1 – Problems

Q1. In general, do you agree with the analysis of the situation made in the 'Context? Please explain.

6. We consider that with the digital economy developing quickly, it is important that an adequate level of protection for consumers is provided across the EU in relation to the purchase of digital content, without reducing any existing high levels of consumer protection in some Member States. The CMA agrees with the analysis that certain aspects of contract law for online supply of digital content are already covered by, for example, the Consumer Rights Directive and Unfair Terms Directive at European level. We also agree that there are no EU rules on remedies if the digital content is defective.

7. Greater consistency between the national rules that businesses need to consider when providing digital content products throughout the EU may aid some businesses in cross-border trade. But it is important to consider that many businesses provide tangible goods and services as well as or in combination with digital content. Some businesses also provide digital content by both online and other sales channels and it will be necessary to ensure consistency across these. For businesses, it will be important to achieve a clear position both on how contracts to provide a mixture of goods, digital content and services are to be treated and to provide clarity on the borderline between digital content and services. If the measures are to succeed in their objectives any separate remedies for digital content will need to be simple to

understand and use for consumers and effective for the types of products available now and in future.

8. Any proposals in this area need to consider how the use of digital content may change in future. For example, increasingly digital content may be integrated into tangible goods or it may be sold as part of a package which delivers a particular service for the consumer (for example as part of a package of financial management tools for consumers provided by a bank). Algorithms may in future allow digital content to perform functions currently carried out by human advisors who provide services to consumers. Careful consideration should be given to any measures which seek to deal with digital content in isolation and whether these will be effective in the medium or longer term.

Q2. Do you think that users should be more protected when buying digital content products? Please explain why by giving concrete examples.

9. Our answer to this and other questions, relates to consumer contracts as it is a matter for the UK Department for Business, Innovation and Skills to address such questions for business users, as appropriate. In the CMA's view consumers should have clear rights and effective remedies when they contract for the supply of digital content. Our view is that digital content should be treated in the same way regardless of the mechanism by which it is delivered and therefore the rights and remedies should be modelled on those available for tangible goods.

10. Consumers should not be penalised because of the format in which the digital content is supplied, for example if the rights in relation to a downloaded gaming app were different from the rights applied to the same game played online. This could result in a distortion of the market, if for example, downloads convey fewer rights. The issue is to ensure the future proofing of digital content rights and remedies which is more likely to happen if the format is not relevant.

11. We welcomed the introduction of a separate category of rights for digital content based on the goods regime within the UK's Consumer Rights Act 2015[1] and believe this will provide greater clarity and confidence for both consumers and businesses. An issue for consideration when creating a category of rights for digital content in this way is whether the available remedies for all types of faulty digital content can be the same as those for goods. The Act introduces the same remedies for faulty digital content, except in relation to the short term right to reject, where there is a difference between

[1] See the Consumer Rights Act 2015.

tangible goods (CDs/DVDs) and intangible (downloads), with the right applying to the former but not the latter. In our view, in general, if digital content is faulty or not what was promised, the consumer is likely to expect a refund in the same way they would if it is a tangible good. We are aware of the perceived risk that creating such a right could allow fraudulent claims for refunds, but suggested in our responses to the UK consultations on the UK Consumer Rights Bill that industry solutions could be sought with further research into technical or business solutions to allow consumers to reject faulty digital content and receive a full refund.

Q3. Do you perceive difficulties/costs due to the absence of EU contract law rules on the quality of digital content products? Please explain.

12. If there are to be such EU rules, the CMA would favour basing them on the standards for goods in the UK, with some modifications to take into account the nature of digital content. In the UK, this will largely be brought about by the Consumer Rights Act 2015 (see answers to questions 9, 11 and 12 below for more detail). The CMA would not wish to see the protections for UK consumers regarding the quality of digital content reduced simply to provide harmonisation. We do not think such an approach would achieve the objective of promoting consumer confidence. Assuming the current quality standards for goods remain in place, it could distort the market, discouraging consumers from opting for digital content products where other products with higher quality standards could be substituted.

Q4. Do you think that upcoming diverging specific national legislations on digital content products may affect business activities? Please explain.

13. For some businesses engaging in cross border sales of digital content (or with potential to make such sales), diverging national legislation could affect their willingness to sell cross border if they are unsure about the requirements. However given that the scope for selling intangible digital content cross border is potentially higher than that of selling tangible goods because there are no delivery costs, significant incentives for businesses are likely to still remain.

Section 2 – Need for an initiative on contract rules for digital content products at EU level

Q5. The European Commission has explained in the Digital Single Market Strategy[2] that it sees a need to act at EU level. Do you agree? Please explain.

14. We can see the potential value of some further harmonisation of consumer rights in relation to online purchases of digital content, in order to provide greater clarity where this may currently be lacking, and to ensure appropriate protection of consumers' interests. However care needs to be taken in framing such rights to avoid creating market distortions between different product formats (eg streamed online and delivered on a CD) and different purchasing channels (eg online and in store).

Q6. The European Commission has announced in the Digital Single Market Strategy that it will make a proposal covering harmonised EU rules for online purchases of digital content. Other approaches include, for example, the development of a voluntary model contract that consumers and businesses could use for their cross-border e-commerce transactions or minimum harmonisation. What is your view on the approach suggested in the Digital Single Market Strategy?

15. Maximum harmonisation has the advantage of, at least in theory, providing greater uniformity across participating Member States. A risk is that such proposals might need to be narrow in scope or include many exceptions to allow for different market and social conditions prevailing in different Member States. Careful consideration should be given as to whether more advantage could be gained by minimum harmonisation proposals, which might require fewer exemptions but which may achieve a high level of harmonisation in practice.

16. In our view, a voluntary model contract for e-commerce transactions (even if limited only to digital content) would be difficult to develop in a way which would ensure fairness. Under unfair contract terms legislation, fairness is to be assessed having regard to all the circumstances at the time the contract is entered into, so what is fair necessarily varies depending on factors including the nature of the product, any imbalance of information and expertise between the parties and many other factors. This makes it hard to see how a single model contract could work, unless extensively adapted by many of its users to fit the circumstances of the transaction, which would defeat its purpose of providing simplicity and is likely to lead to greater uncertainty when used.

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[2] A Digital Single Market Strategy for Europe COM(2015)192 final.

17. Further, even if the model contract is voluntary in theory, it is not optional for the consumer if the trader uses it and the consumer needs to buy from them eg the largest internet companies. These are take it or leave it contracts for the consumer. They are only voluntary for the trader.

18. Given the complexity of such contracts, even if it is voluntary the consumer cannot predict the consequences of their choice (for example, how it will affect how any dispute will be resolved). This is particularly a problem if the consumer could receive an arbitrarily different remedy because they selected a voluntary scheme, or this was selected by the trader.

Should there be digital-specific standard terms and conditions which should always be regarded as unfair? And if so, which ones?

19. We are not convinced that this is necessary, as such. We agree, however, that there may be particular types of problematic terms and conditions which feature in End User Licence Agreements (EULAs) that merit close attention given the prevalence with which licences are used in the provision of digital content. Terms that are likely to be particularly prevalent in contracts for online purchase of digital content include choice of law clauses applying a non EU law, jurisdiction clauses conferring jurisdiction on a non EU state and exclusion of liability for conformity to the contract ('as is' clauses). However, it may be that these terms are different manifestations of familiar unfair term principles and, in our view, it is important to focus on the underlying principles (perhaps illustrated by particular terms) rather than the terms themselves. Future-proofing also needs to be borne in mind.

Section 3 – Scope of initiative

Q7. Do you think that the initiative should cover ***business-to-consumers*** *transactions only or also* ***business-to-business*** *transactions? Please explain.*

20. Please see our answer to question 35.

21. We think careful consideration should be given to defining 'consumer' widely enough to include all those who need increased protection in order for the proposals to meet their objectives. The CMA does not favour a narrow definition of 'consumer'. In the UK the definition has historically been wider than it was at a European level. The Consumer Rights Act 2015 includes in the definition of consumer people who supply an item otherwise than in the course of a business and people who contract wholly or mainly for non-business purposes. In this respect we favour the wider definition of consumer

adopted in the Consumer Rights Directive[3] and used as the basis of the definition in the UK Consumer Rights Act.

22. In the UK, it may increasingly be the case that digital content (as well as IT equipment and telecoms services) are purchased for mixed personal and business use, with consumers' homes also being their business location. In recent years there has been a significant increase in the numbers of people self-employed in the UK.[4] In 2014, 4.6 million people were self-employed in their main job, with an additional 356,000 employees who had a second job in which they were self-employed. The latest UK Office of National Statistics (ONS) report also show record numbers of people working from home in the UK (at 4.2 million in the first quarter of 2014).[5] While the circumstances of self-employed people and homeworkers vary, often they will not be in a stronger position when purchasing digital content than consumers are when purchasing it for personal use.

Q8. What specific aspects in business-to-business transactions, if any, should be tackled? Please explain.

23. Please see our answer to question 7.

Q9. Digital content products may cover inter alia the products listed below. Which of these digital content products/services should be covered by the initiative (tick as many as apply)?

☑ **games, including online games** *Yes*

☑ **media (music, film, sports, e-books) for download** *Yes*

☑ **media (music, film, sports) accessible through streaming** *Yes*

☑ **social media** *Yes in relation to the supply of digital content*

☑ **storage services** *Yes in relation to the supply of digital content*

☒ **on-line communication services (for example, Skype**)

☒ **any other cloud services**

☑ **applications and any other software that the user can store in its own device** *Yes*

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[3] Recital 17 of Directive 2011/83/EU on Consumer Rights.
[4] See the report by the UK Office for National Statistics, 'Self-employed workers in the UK – 2014'
[5] See the ONS report 'Characteristics of Home-workers, 2014'.

☑ **any software that the user can access online** *Yes*

☑ **any other service that is provided solely online and result in content that the user can store in its own device (such as translation service, counselling**) *Yes in relation to the supply of the digital content but bot the quality of the service itself*

☐ **any other service that is provided solely online**

Please explain your choice(s).

24. The initiative should apply consistent protections to consumers' enjoyment of digital content as far as possible regardless of the means of delivery. However, it is also important to ensure that responsibilities are properly allocated so that, for example, if digital content does not perform satisfactorily, the consumer is able to readily assert his rights against an appropriate person (see the comments below about the 'ecosystem' under which digital content may be delivered to consumers).

25. Increasingly goods are supplied with 'built in' processing capability which goes beyond the traditional function. This is likely to increase in future with the Internet of Things and Machine to Machine interactions. We consider that, in relation to tangible goods which contain digital content, the appropriate consumer remedy for defects is that which applies to goods which is well understood by consumers and traders alike (see below).

26. However, digital content may be delivered in many different ways via an ecosystem which consists of physical goods and other digital content, some of which may be owned (or licensed) by the consumer and some of which may not. For example, in simplistic terms:

- a consumer may buy a tablet which contains a gaming app which processes data on the 'client' device
- a consumer may already own a tablet but download the app (from the same or another retailer) which processes data on the 'client' device
- a consumer may own a tablet and play the game in the cloud where the processing of data mainly takes place on a remote server but with the outcome of that processing streamed to the client device.

27. In each case, it is important for a number of reasons that the same protections apply to content which is functionally equivalent. First, this avoids confusion and provides clarity for both consumers and traders. Secondly, it applies consistent protections for digital content which is functionally similar. Thirdly, it

ensures a level playing field as between suppliers of the different forms of digital content. It is important to focus on consumer expectorations: they will not necessarily perceive the differences in delivery model when the end result is, to a greater/lesser extent, expected to be exactly the same. If remedies match the consumer expectation, consumer complaints will likely be fewer and this will be good for business and consumers alike.

28. It is also important that the legislation does not differentiate between different forms of supply of digital content in order to be future-proof. Failure to do so would mean that such legislation may soon become irrelevant and obsolete.

29. We have, however, noted above in our answer to Q1 that a distinction may need to be drawn between the supply of digital content itself and what may be more properly characterised as the supply of a service as is the case under the CRA in the UK. However, where any such dividing line should be drawn will require careful consideration given, for example, where a trader supplies both digital content and a service, it will often be difficult for the consumer to know whether any fault lies with the service or the digital content.

30. Area which may need to be considered more carefully include products such as online banking, e-tickets and some cloud services (eg 'calendar' apps). These products combine a supply of digital content with associated services. In the case of, for example, online banking, the supply of an online banking statement is a supply of digital content and should be correctly and accurately rendered, although, of course, the banking service itself is not. The differentiation is important and should be articulated clearly.

Q10. Digital content products can be supplied against different types of counter-performance. Which of the following counter-performances should be covered by the initiative (tick as many as apply)?

☑ **Money**

☑ **Personal or other data actively provided by the user (for example, by registration)**

☑ **Data collected by the trader (for example, the IP address or statistical information)**

☒ **Activity required by the user in order to access the digital content (for example, by watching an advertisement video, or visiting another homepage)**

Please explain your choice(s)

31. In our view, as a matter of principle, where consumers exchange personal or other data (or anything else of value) for digital content, such products should fall within scope since there is simply a different form of payment (data instead of money). The market implications may need to be considered carefully, however, to balance the benefits and risks to consumers and businesses. The CMA has recently considered the commercial use of consumer data, including the potential benefits to consumers and businesses.[6]

Section 4 – Content of an initiative

Q11. Among the areas of contract law below, which ones do you think are problematic and should be covered by an initiative (tick as many as apply)?

☑ **Quality of the digital content products**

☑ **Remedies and damages for defective digital content products.** *Although please see below re damages – we question the need for harmonising damages regimes.*

☑ **How to exercise these remedies, like who has to prove that the product was, or was not, defective (the burden of proof) or time limits for exercising these remedies**

☑ **Terminating long term contracts**

☑ **The way the trader can modify contracts**

☐ **Other (please specify)**

Please explain your choice(s)

32. To some extent, all of the areas are relevant to each other and the efficacy of the regime for consumer contracts as a whole. Accordingly, it seems artificial to draw a dividing line between these elements and only cover some of them in the proposals for consumer contracts. That said, we think there is a strong case for not harmonising the regimes for 'damages' given this is a complex area and the rules are founded in generally applicable laws of contract.

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[6] CMA (June 2015), Commercial use of consumer data: Report on the CMA's call for information (CMA38).

33. We believe that, as referred to above (see Q2), the rights should be in line with those of goods, with some modifications to take into account the nature of digital content. In particular, appearance and finish may not always be relevant. We would also expect a quality standard to include functionality and interoperability in line with the pre-contract information supplied under the Consumer Rights Directive.

34. Consumers should be confident that the digital content that they have purchased (or exchanged for data) will continue to operate as intended even if there are updates to the digital content itself, or updates to the operating system on which the digital content has to operate (which may be maintained by a third party). If this is not the case, the consumer should be entitled to redress.

Quality of digital products

Q12. Should the quality of digital content products be ensured by:

☒ **Subjective criteria (criteria only set by the contract)**

☑ **Objective criteria (criteria set by law)**

☒ **A mixture of both**

Please explain your choice(s).

35. We consider that the minimum quality standards for digital content should follow that applied to goods and should involve objective criteria (set by law) as to satisfactory quality, fitness for purpose, description, and that the seller has the rights to supply the digital content. Traders and consumers can agree higher standards or other criteria but traders should not be able to contract out of these minimum protections.

36. Consumers should also be entitled to expect that the digital content does not cause damage. This is considered further below.

37. We note that delivery of content is also increasingly likely to involve other traders with whom the consumer may have a contractual relationship (such as an ISP) and, of course, through hardware such as a router (which the consumer is likely to own) or a mobile phone (which the consumer may own or use under a different financial arrangement). The trader which supplies the digital content should only be responsible for defects that properly fall to him. This includes those suppliers the trader has contracted with to provide services. For example, if the digital content which reaches the consumers

device is unsatisfactory because of a problem with the consumer's ISP, router, or a separate app which the consumer has downloaded, the trader should not be held responsible for this. In this scenario, if the contract is frustrated, the consumer may be entitled to their money back and the trader is not liable for damages for failure to supply.[7]

Q13. When users complain about defective products, should:

☐ **Users have to provide evidence that the digital content products are defective**

☑ **Traders have to provide evidence that the digital content products are not defective if they consider the complaint to be unfounded**

Please explain your choice(s)

38. In our view, the consumer should only be required to show that a fault occurred – it should be up to the supplier to prove the problem was not their responsibility. In many cases, given how digital content is typically provided, the provider will be in a better position to identify the fault or who is responsible, than the consumer. For example, if an app 'crashed', or a mobile device unexpectedly stops working, or if a mobile phone or tablet screen cracks without warning, the consumer is likely to be far less technically proficient than the seller (who may also be the manufacturer), and will also not have access to the volume or complaint data or technical detail that the seller and/or manufacturer has.

39. Such an approach would also address the key problems for consumers of not being able to always identify where the fault lies.

40. We would have some concerns if requirements were introduced that the consumer should be required to 'co-operate' in order to receive a remedy. While, of course, consumers should seek solutions with the trader and it may be appropriate for the consumer to provide relevant information, it would not be reasonable to expect consumers, for example, to undertake technical assessments/repairs on their equipment at their own risk.

[7] See the Law Reform (Frustrated Contracts) Act 1943, s1(2).

Remedies for defective digital content products

Q14. What are the key remedies that users should benefit from in case of defective digital content products (tick as many as apply)?

☑ **Resolving the problem with the digital content product so that it meets the quality promised in the contract**

☑ **Price reduction**

☑ **Termination of the contract (including reimbursement)**

☑ **Damages**

☑ **Other (please specify)** *Please see below our explanation of the right to reject in the UK.*

Please explain your choice(s)

41. We consider that consumers' rights for remedies should primarily be aligned with those for goods, potentially including in future the right to reject defective digital content for a full refund. As is the case in relation to goods, we believe a right to reject digital content would help maintain high industry standards, both in terms of the quality of digital content, but also in terms of the remedies offered to consumers. Not only does a right to reject ensure an effective consumer remedy where a replacement/repair remedy is not appropriate, it can also help incentivise an efficient and effective approach to effecting repairs and replacements. We believe it would be valuable to have a right to reject for small value items, such as music downloads, because consumers are in practice unlikely to pursue damages and, where other remedies such as repair or replacement are of limited value, consumers are more likely simply to accept a small loss despite the unfairness.

42. We suggest that technical or business solutions may in future be found to allow consumers to reject faulty digital content and receive a full refund.

43. There are a number of reasons for this:

- Digital content which is installed on a device, can be uninstalled (and, in practice, this is often the case). If the digital content is processed remotely by a server under the control of the trader, the trader has the ability to disable this.

- Insofar as business may be concerned that the consumer may continue to benefit from the digital content which has been rejected, we consider that

given increasing connectivity businesses are likely in future to be able to determine if this is the case and take action appropriately.

- Given the relatively small sums paid for most digital content, the incentives for consumers to continue to use rejected content are reduced and we think it more likely that consumers will want to reject digital content that is actually substandard.

Q15. Should users have the same remedies for digital content products provided for counter-performance other than money (for example, the provision of personal data)? Please explain.

44. Yes, the fact that the consumer has paid with personal data (or another form of payment) should not, in principle, reduce the entitlement to a remedy although the type and level of compensation may need careful consideration. The key issue here is that a consumer must be entitled to an appropriate remedy if he has not bought the content. This is in order to incentivise good standards in the production of the content. While this would be a refund when he has paid for the content, a refund may not always be appropriate in other circumstances. The rationale behind a refund is that it puts the parties back in the pre-contractual position and we believe the policy aim should be to achieve an outcome that is as close to this as is feasible. This may include that a consumer should have the right that his personal data is no longer used by the trader and, if the trader has sold the data to a third party, the permission for the third party to use the data would also end.

45. The potential implications of such a regime would clearly need careful consideration, but deserves attention given the inherent difficulties in calculating an appropriate monetary remedy in such circumstances.

Q16. Should users be entitled to ask for remedies for an indefinite period of time or should there be a specific time limit after they have acquired the digital content products or discovered that the digital content products were defective? Please explain.

46. In the UK the normal limitation period to bring a claim is 6 years from the date of the contract. We think the simple approach of applying normal limitation to consumers' transactions works well, and we would not favour a departure from this.

47. In particular, we think that having a separate time limit for digital content would not be helpful in the context of products including mobile phones, tablets, watches and many other devices which consist, to a large degree, of software operating within the wrapper of a physical good.

Q17. Should there be one single time limit or should there be two different time limits, one for the period during which the defect should appear and one during which users have to exercise the remedies? Please explain.

48. Please see our response to question 43 which also applies to digital content.

Q18. Which time limit(s) do you think is (are) appropriate? Please explain.

49. See our answer to question 17 above.

Q19. If there is a right to damages, under which conditions should this remedy be granted? For example, should liability be based on the trader's fault or be strict (irrespective of the existence of a fault)?

50. We interpret damages for Q19 and Q20 as referring to alternatives to or additions to the statutory remedies.

51. Under the UK's Consumer Rights Act there is a fault based test in relation to a consumer's right to compensation when digital content supplied under contract causes damage and the consumer can show that the trader failed to use reasonable care and skill to prevent the damage occurring. Traders can limit their liability provided this is fair.

52. It is important that regulations do not impede the development of new and beneficial services and that they are not unduly restrictive. However, we are also concerned that, given the ecosystem by which digital content is delivered, consumers may find it difficult to enforce rights if they have to prove there has been a lack of 'reasonable skill and care' at any particular level of the supply chain. Consumers are unlikely to be equipped with the necessary knowledge and diagnostic tools to establish where the fault may lie, or establish whether services were provided with the requisite skill and care. As such, it may be difficult for them to enforce their rights. This may result in consumer detriment and reduced compliance.

Q20. Should it be possible for damages to mainly consist of 'service credits' (extra credits for future service)? Please explain.

53. We would not wish to see this as a substitute for monetary damages if a consumer goes to Court. In particular, it would mean that the consumer would be bound to deal with a trader with which the consumer may have lost confidence.

54. If traders wish to offer service credits ex gratia and consumers choose to accept them as part of an agreed settlement we see no reason why this

should be prevented. This is achieved by the current position in which the law is silent on the issue of ‘service credits’ and as such we would not support a new provision on this.

Additional rights

Q21. Should users be able to terminate long term contracts (subscription contracts) for digital content products?

☑ **Yes**

55. Yes, terms that exclude any right to cancel should not be permitted. Length of contract and notice period should be set out in the contract, and assessable for fairness. The usual provisions on fairness of contract terms should apply.

Q22. If you reply yes to question 21, please specify under which conditions and following which modalities should users be able to terminate the contract (tick as many as may apply):

☐ **Termination should be expressed in advance**

☐ **Termination should be made by notice**

☑ **Users are provided with means to retrieve its data**

☐ **The trader may not further use the users' data**

☐ **Other (please specify)**

Please explain your choice(s)

56. In our view a consumer should be able to terminate in the event part of the digital content is faulty. For example, if a consumer has taken out a 12-month subscription to a digital magazine and the first 2 monthly magazines are substandard the consumer should be entitled to terminate the contract and get a refund of all of the 12 month subscription.

57. It should be left to individual traders to decide whether they wish to include any requirements about how consumers should terminate the contract. Any such requirements will need to be fair and should not create unnecessary barriers to termination. Any termination process should allow the consumer to terminate the contract by the same means they entered it (for example if they entered the contract by email, they should be able to cancel it that way).

58. In some cases, if the consumer is unable to retrieve their data, this would form a significant disincentive to switching. For some types of product, it will be essential that consumers can retrieve their data to avoid consumers becoming trapped with one supplier (for example, data storage products). A consumer's usage data may also help them to shop around effectively. The impact of any measures on markets and innovation will also need to be considered. Regarding retrieval of data, please also see our answers to questions 23 and 25 below.

59. Regarding further use of the consumer's data after the contract has been terminated, in some cases it may be hard for the trader to avoid further use of the consumer's data (for example where it is aggregated with other consumers' data). If the data has already been sold or otherwise transferred to another party it may not be possible for the trader to prevent further use by others who have received the data. In our view it would be useful to consider this question within the normal data protection provisions which might apply (such as express consent being needed to the use of personal data, based on a clear explanation of how the data will be used).

Q23. In case of termination of the contract, should users be able to recover the content that they generated and that is stored with the trader in order to transfer it to another trader?

☑ **Yes**

Please explain your choice.

60. We agree. Consumers should have a genuine and reasonable opportunity to retrieve data in the case of termination. If a consumer is unable to recover content they have generated this may make it costly for them to switch to another supplier. In cases where part of the objective of the contract for the consumer was safe storage of data that is valuable to them, being unable to retrieve it may undermine the value of the contract for them.

Q24. If you reply yes to question 23, please indicate under which conditions (tick as many as may apply):

☑ **Free of charge**

☑ **In a reasonable time**

☑ **Without any significant inconvenience**

☑ **In a commonly used format**

☐ **Other (please specify)**

Please explain your choice(s).

61. Yes to conditions 1-4. The conditions above appear to be sensible ones to ensure that consumers' ability to retrieve content they have generated is genuine. We think it is essential that traders do not use the data retrieval process as a barrier to prevent consumers switching to another supplier. It may be reasonable that the consumer needs to take action to retrieve content they have generated – for example by selecting content they wish to copy into another format or download. In some cases (such as where the consumer has generated a large volume of content) retrieval may unavoidably take some time. Any conditions should not penalise the trader for this, but should prevent them setting up artificial barriers to retrieval.

Q25. Upon termination, what actions should the trader be entitled to take in order to prevent the further use of the digital content?

☐ **Disable the user account**

☐ **Employ technical protection measures in order to block the use of the digital content products**

☐ **Other (please specify)**

Please explain your choice(s).

62. If a trader supplies digital content under a contract such as an annual license to use software the trader should be able to disable the user's account and block use of downloaded content if this is terminated or not renewed. As referred to above, consumers should be able to access and convert into another format content they have provided.

63. If a consumer has terminated a subscription contract, the consumer may wish to seek out alternative suppliers. Depending on the nature of the product, the data held by the trader may be extremely valuable in order to enable the consumer to make comparisons between different suppliers (for example, in the energy sector, usage statistics; in cloud storage, storage capacity). There is an argument that the consumer should be able to access this for a sufficient time to enable them to 'shop around' and port their data to an alternative supplier. In some cases, the data may already be in a format where it is readily 'portable' but, in any case, the trader should not be able to disable the account or employ Trusted Platform Module (TPM) to prevent the consumer from doing this.

64. The question of portability, and the circumstances in which it may balance the interests of the consumer in seeking alternative suppliers on the one hand and the incentives on business to invest in new products needs careful consideration in our view.

Q26. Should the trader be able to modify digital content products features which have an impact on the quality or conditions of use of the digital content products?

☑ **Yes subjection to conditions (see below)**

Please explain your choice

65. Provided that there is a term in the contract permitting modification by the trader (or a third party such as a developer), the trader should be allowed to modify content to add new features provided it continues to meet the minimum standards at the original date of purchase for digital content including satisfactory quality, fitness for purpose and description and the pre-contract description under the Consumer Rights Directive. The trader should not be permitted to be able to contract out of the responsibility to ensure that updated digital content meets these standards.

Q27. If you reply yes to question 26, under which conditions should the trader modify digital content products features which have an impact on the quality or conditions of use of the digital content products:

☑ **The contract foresees this possibility**

☑ **The consumer is notified in advance**

☑ **The consumer is allowed by law to terminate the contract free of charge**

☐ **Other (please specify)**

Please explain your choice(s).

66. Digital content is liable to be updated, for example to meet new security threats or to add new features or to respond to changes in operating systems. Updates may benefit consumers but consumers should also be able to exercise control. As such:

- The contract should provide for this (or the consumer should expressly agree before modification). Without this, the modification would amount to a unilateral variation which should enable the consumer to terminate the contract or seek redress for breach of contract.

- The update should continue to match the original description and pre-contract information under the Consumer Rights Directive (any term which seeks to contract out of this should be blacklisted).

- The consumer should be notified in advance (except in exceptional circumstances, for example where an urgent update is needed to prevent loss or damage) as a matter of general good practice and to enable the consumer, if he/she so wishes, not to accept the update.

67. If the trader (in reliance on a contract term) modifies the content in such a way that it no longer matches the original description or meets the original quality standard, the consumer should be able to revert to the original version or cancel without penalty and seek redress.

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

Q28. Which information should the notification of modification include? Please explain.

69. The trader should explain, at the least:

- the legal basis for the modification (ie how it is permitted under the contract terms)

- a description of the proposed modification (features and compatibility)

- the reason for it (eg to meet a security threat, fix a bug, respond to a change in other software such as operating systems)

- the right of the consumer, for example to cancel the contract, or to refuse the update and continue with the original version (in which case any risks of doing so should be explained accurately).

Part 2 – Online sale of tangible goods

Context

70. In 2014, 50% of EU consumers shopped online, rising from 30% in 2007. With an average annual growth rate of 22%, online retail sales of tangible goods surpassed EUR 200 billion in 2014, reaching a share of 7% of total retail in the EU-28. The Commission's Digital Single Market Strategy has highlighted that this economic potential should be further unleashed by removing barriers.

71. If traders decide not to sell outside their domestic market, this may limit consumer choice and prevent lower prices by lack of competition. Today, traders may be deterred from doing this by differences in contract law which may create costs for traders who adapt their contracts or increase the legal risk for those who do not. For example, depending on the Member State, consumers may have two years, five years, or the entire lifespan of the purchased product to claim their rights. In business-to-business transactions, where no specific EU rules exist, negotiation on the applicable law may also create costs.

Legal background at EU level

72. As for digital content products, certain aspects of contract law have already been fully harmonised for online purchase of tangible goods by consumers. In particular, the Consumer Rights Directive has fully harmonised the information that should be provided to consumers before they enter into a contract and the right to withdraw from the contract if they have second thoughts. The Unfair Contract Terms Directive provides rules against unfair contract standard terms for consumer contracts. In addition, contrary to digital content products, remedies in case of defective tangible goods are also regulated at EU level in business-to-consumers transactions (under the Consumer Sales and Guarantees Directive). Nevertheless, this harmonisation only sets minimum standards: Member States have the possibility to go further and add requirements in favour of consumers. Many Member States have used this possibility – on different points and to a different extent.

Section 1 – Problems

Q29. In general, do you agree with the analysis of the situation made in the 'Context'? Please explain.

73. We agree that there is potential for economic benefits and benefits in terms of consumer choice by introducing measures which support the growth of online

shopping for tangible goods, including cross-border sales. We remain unconvinced that differences in contract law, and in particular additional remedies consumers may enjoy in different Member States, form a significant barrier, when compared with practical issues which may deter consumers and businesses from online cross-border transactions. Such practical issues include language differences, difficulties and costs associated with cross-border delivery of goods and concerns about the practicalities of resolving any problems or disputes which do arise.

74. Any measures which harmonise contract law and remedies for online sales of tangible goods in a way that reduces the protections for consumers in these transactions risks having the effect of deterring some consumers from engaging in them. We would be particularly concerned about changes which had the effect of creating significant differences in the rights and remedies for consumers shopping online as compared to those making purchases by phone, for example. This could have a distorting effect as well-informed consumers take advantage of the possibility of securing extra protections by completing their transactions off-line. There is also a real risk that if online rights are not as good as offline rights, consumers may shop cross-border less, choosing to complete transactions in store.

Q30. Do you think that users should have uniform rights across the EU when buying tangible goods online? Please explain why by giving concrete examples.

75. As referred to in our answer to question 2 above, our response relates to consumer users, not to business users (although see our answers to questions 7 and 35 in relation to individuals on the margins of being a business).

76. We anticipate there would be some benefits to consumers having uniform rights across the EU when buying tangible goods. However as indicated in our answer to question 29 above, we would not wish to see inconsistency between the rights available when buying online and with other distance selling mechanisms, for example, when buying by phone or by catalogue. We also do not think it is logical to have fundamentally different rights for online and in store transactions in terms of the remedies available for faulty goods. We would also wish to see any uniform rights set a high level of consumer protection, with a range of effective remedies available to consumers if things go wrong.

Q31. Do online traders adapt their contract to the law of each Member State in which they want to sell? If yes, do they face difficulties/costs to do so? Please explain.

77. We are aware that UK SMEs develop their terms and conditions in a variety of ways. Some draft contracts themselves or employ legal advisers to do this, while others adapt contracts from a variety of sources to meet their needs (including, for example, copying the model contracts provided by their trade association, or copying and adapting contracts of similar businesses, or their suppliers, or contracts they find online). We are not aware of the extent that online traders adapt their contracts to take into account the law of other Member States.

Q32. Do you think that any such difficulties and costs dissuade traders from engaging at all or to a greater extent in cross-border e-commerce? Please explain.

78. We do not have evidence that the difficulties and costs of adapting contracts to the law of each Member State in which they want to sell dissuades traders from cross-border e-commerce. UK experience indicates that it is possible to create simple, user friendly guides for traders to buying and selling[8]. If such a resource was available for each Member State, it may be easier for traders to work out how to sell in that state.

79. There are a range of practical costs and difficulties traders may face when considering embarking on or expanding their business in cross-border sales of tangible goods (for example different tax rules, language barriers, delivery costs, regulatory requirements).These are likely to be more significant considerations for traders when deciding to sell cross border.

Section 2 - Need for an initiative on contract rules for online sales of tangible goods at EU level

Q33. The European Commission has explained in the Digital Single Market Strategy that it sees a need to act at EU level. Do you agree? Please explain.

80. We are less convinced there is a need for the EU to act in the area of online tangible goods than for digital content given that existing legislation already exists across the EU. As with digital content, introducing separate proposals may result in different remedies between online and on-premises contracts, as national legislation will apply for the latter. These differences may be exacerbated by the existing rights for goods that consumers have enjoyed within their own national legislation for online tangible goods. The likelihood of

[8] See, for example, CTSI's Guidance for business on trading standards law.

consumers purchasing tangible goods on premises rather than online in order to be confident of getting the remedy they want, is also likely to be higher with tangible goods. The impact on such alternative purchasing mechanisms, on consumer protection and on costs for businesses during transition to the new law needs further consideration.

Q34. The European Commission announced in the Digital Single Market Strategy that it will make a proposal allowing traders to rely on their national laws based on a focused set of key mandatory EU contractual rights for domestic and cross-border online sales of tangible goods which would be harmonised in the EU. Other approaches include, for example, the development of a voluntary stakeholders' model contract that consumers and businesses could use for their cross-border e-commerce transactions. What is your view on the approach suggested in the Digital Single Market Strategy?

81. We consider it is important that both traders and consumers should be confident about their rights and obligations when transacting online, whether domestically or cross-border within the EU. We are strongly committed to ensuring coherence, certainty and clarity in rights, with consumer protection levels at a sufficiently high level, such that consumers have real confidence and security when making purchasing decisions and asserting their rights if something goes wrong and traders are clear as to their position.

82. As referred to above, there is a real risk that consumers will choose to shop less online and cross-border, not only if the rights available are not as good as those for off-line transactions, but also if these rights are unfamiliar.

83. If the national law of the traders' Member State is applied to a cross-border contract, extra costs and difficulties may arise for consumers if there is a dispute. In the UK the courts in England and Wales, for example, if applying foreign law, require that law to be proven as a fact, usually by witness evidence from a lawyer qualified in the relevant jurisdiction. This may give rise to problems for consumers to deal with, such as conflicting expert evidence. Further, this process of instructing lawyers qualified in other jurisdictions to give evidence can add significantly to the time and cost of litigation.

84. If there are proposals to change the consumer's rights to take action in their own country this could make it impractical to enforce their rights because the courts in the trader's country have jurisdiction. Consumers are unlikely to be able to bring proceedings in the courts of a different state and in another language. [9] A consumer could also face litigation in the courts of another

[9] These difficulties for consumers have been acknowledged in ECJ cases. See, for example: Case C-240/98 *Oceano Grupo Editorial SA v Rocio Murciano Quintero*.

country which they could not easily defend (for example, for non-payment if the consumer seeks to exercise their right of set-off or if goods the consumer returns are damaged). This could undermine consumers' confidence in shopping cross-border.

85. Consumers may inadvertently make a purchase from a trader based in a different state, for example if the trader uses a website with a local domain name. Thus consumers may unexpectedly end up needing to resolve disputes in the courts of another state, or in their own courts, but applying foreign law. In this way consumers may become less confident shopping online generally. Large companies often have local domain names (.co.uk etc.) for their websites in each country they trade in, but have headquarters in another country and a preference for applying the law of that country to all their consumer transactions. Such companies are not currently prevented from trading in different countries by the need to comply with local laws.

86. Please see our answer to question 6 above for comments on the approach of development of a voluntary model contract for e-commerce transactions.

Section 3 – Content of the initiative

*Q35. Do you see a need to act for **business-to-consumers** transactions only or should the EU also act for **business-to-business** transactions? Please explain.*

87. The issue of whether consumer protection should be extended to some business-to-business (B2B) dealings is currently being considered by the UK government. The Department for Business, Innovation and Skills (under the previous 2010 to 2015 government) published a Call for Evidence in March 2015 asking for views and evidence on a number of related questions in order to consider the case.[10] A government response is currently awaited. The CMA does not hold significant evidence on this issue and has not conducted research in the area.

88. However, we would underline the need to carefully assess the impact of any proposals to widen consumer protection to small businesses so as to ensure an appropriate level of regulation that promotes the good operation of markets. This would include considering the available evidence to determine the existence and extent of any problems in this area, and then measuring the costs and other impacts of increased regulation on all businesses who would be affected, and the practical workability of any proposals. We think the questions posed by the UK government in its Call for Evidence are a good

[10] BIS (March 2015), Protection of Small Businesses when purchasing goods and services.

starting point. One particular challenge would be in formulating a clear test as to which businesses should be covered by consumer protection and how businesses in general would be able to ascertain whether another business to which they supplied goods or services, fell within the definition.

89. On a related point, the CMA does include in its focus the protection of individuals around the margins of being in business. These include 'consumer landlords', individuals undergoing training in order to set up a business, and other situations outside the traditional scenario of consumers buying goods and services, for example, consumers wanting to sell goods taking up a 'buying service' offered by businesses. We think it is important that the approach to the definition of 'consumer' takes account of these marginal cases where the individuals involved are behaving like consumers and have the unequal bargaining position and knowledge of consumers in the traditional sense. We welcome the clarification of the meaning of consumer in EU consumer protection legislation which was brought about in recital 17 of Directive 2011/83/EU on Consumer Rights[11] but consider that there are still categories of contracts entered into by individuals that ought properly to be treated as consumer contracts (such as the examples given above of consumer sellers and individuals who are not currently trading).

90. Careful thought will also need to be given to the growth of the 'sharing economy' where, for example, home-owners or car-drivers may increasingly be offering an alternative service to consumers of accommodation and transport. The impact of these new business models needs to be factored into any proposals.

Q36. What specific aspects in business-to-business transactions, if any, should be tackled? Please explain.

91. Given the factors noted in our answer to question 35, the CMA's view is that the issue of extending consumer protection to B2B dealings should be approached cautiously and considered separately for the various types of protection provided in legislation. The existence of detriment and a case for extended protection should be separately assessed for the different areas of B2B and B2C. The likely impacts should also be measured, in terms of the extent to which detriment might be reduced weighed against the extent of any increased costs or other burdens on businesses.

92. The question of what aspects of B2B dealings should be covered by consumer protection regulation is also likely to depend on how narrowly or

[11] A dual purpose contract concluded partly within and partly outside an individual's trade will be considered a consumer contract unless the trade purpose is predominant.

broadly the scope of business consumers is drawn. A key concern for businesses is likely to be their potential exposure to liability for business losses which could be substantially greater than their current exposure to liability for consumer losses.

Q37. Among the areas of contract law below, which ones do you think create problems related to national divergences which should be covered by an initiative (tick as many as apply)?

☑ **Quality of the tangible goods**

☑ **Remedies and damages for defective tangible goods** - *Although please see below re damages – we question the need for harmonising damages regimes.*

☑ **How to exercise these remedies, like who has to prove that the product was, or was not, defective (burden of proof) or time limits for exercising these remedies**

☑ **Restitution of price and tangible goods in case of termination of the contract**

☐ **Unfair standard contract terms beyond the existing protection**

☐ **Other (please specify)**

Please explain your choice(s)

93. To some extent, all of the areas are relevant to each other and the efficacy of the regime for consumer contracts as a whole. Accordingly, it seems artificial to draw a dividing line between these elements and only cover some of them in the proposals for consumer contracts. That said, we think there is a strong case for not harmonising the regimes for 'damages' given this is a complex area and the rules are founded in generally applicable laws of contract. While the CMA agrees that perceived differences in regulatory rules between Member States may be a causative factor in lower consumer and business confidence in cross border purchasing / trading, we do not think it is the predominant factor. In general, we believe consumers are likely more deterred by practical considerations such as lack of familiarity with and trust in foreign traders, language barriers, delivery costs including costs of return delivery where the consumer exercises a distance sale cancellation right, security of payment methods, confidence in recovering refunds and in easily accessible dispute resolution means or judicial forum to enforce legal rights in the event of problems, etc.

94. We do however believe it is important to encouraging consumer confidence in online / cross border purchasing that a high standard of consumer protection is adopted. Consumers will be less confident to buy from new or unfamiliar traders and those whom they are only aware of as an online business if they do not feel assured of a high level of protection which is adequately enforced. We think consumers' key concerns are likely to be around the existence of strong remedies and the confidence that they will be honoured in practice. While the existing right to cancel distance purchases of goods within 14 days of delivery is an important plank of protection for distance sales its purpose and practical application is not to provide redress to consumers for faulty goods. In this respect, we consider the UK's short term right to reject goods that do not comply with the contract is a fundamental protection that could significantly boost consumer confidence.

Quality

Q38. Which should be the criteria for establishing the quality of the tangible goods? Should there be any additional/different criteria in addition to those already provided by Article 2[12] of the Consumer Sales and Guarantees Directive?

Please explain.

95. We think the criteria in the UK's Consumer Rights Act are comprehensive and substantially adequate in the context of the UK market. The quality rights here re-enact those that previously existed under UK law, and which reflect those in the Consumer Sales Directive, subject to one amendment. The CRA 2015 additionally provides that the requirement that goods must comply with their description also means meeting anything written or said by way of pre-contract information on the 'main characteristics of the goods' required to be given by the UK legislation implementing Directive 2011/83/EU on Consumer Rights.[13] We think this is a useful expansion of the quality right on compliance with description, given the effect of Article 6.5 of the Consumer Rights Directive that the required pre-contract information shall form an integral part of the distance contract.

96. In addition to the quality rights, UK sale of goods legislation has long provided a statutory implied term that a trader has the right to transfer ownership in goods that he sells, to a purchaser. This has most recently been re-enacted

[12] Directive 1999/44/EC of the European Parliaments and of the Council - Article 2 (Conformity with the contract)

[13] Implemented in the UK as the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

in the CRA 2015. We think that, in the UK context, this has proved a useful additional criterion to those on quality of goods.

Q39. How long should the period be during which the trader is required to prove that the tangible goods were not defective at the moment of delivery? Please explain.

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

98. While a period of six months provides a reasonable level of protection for consumers, we also see a case for a longer period given that for many household purchases, consumers could reasonably expect trouble-free use for a period more in the region of one year. We note that manufacturers and sellers of many household products routinely offer a guarantee period of 12 months and that consumers are likely to expect this period of trouble-free use as a minimum for those sorts of products. While a period of 12 months is clearly more than might reasonably be expected for many products at the lower range of quality and price, we note that this is a presumption only which can be disproved by the seller, and furthermore, as with the current provision, the presumption can be disapplied where it is incompatible with the nature of the goods or the nature of the non-conformity or defect.

Remedies[14]

Q40. Which contractual rights should the buyer have in case of a defective good (tick as many as apply)?

☑ **Repair or replacement of the good**

☑ **Price reduction**

☑ **Termination of the contract (including reimbursement)**

☑ **Damages**

[14] Certain aspects in the questions within this section are currently covered by the Consumer Sales and Guarantees Directive.

☑ **Right to withhold the payment of the price until the defect is remedied**

☑ **Other (please specify)** *See below details of the UK's right to reject*

Please explain your choice(s).

99. Part 1 of the UK Consumer Rights Act 2015 sets out remedies applying in the case of faulty goods.

Right to reject

100. UK law reflects a longstanding right of consumers to 'reject' purchased goods that do not meet the standards implied by law. This right entitles the consumer to notify the seller that s/he is rejecting the goods, following which the seller must reimburse the entire price to the consumer. The buyer is not required to return the goods to the seller (unless otherwise agreed), but must make them available for the seller to collect. This right is now contained in the Consumer Rights Act 2015 which comes into force in October 2015 and described as the 'short-term right to reject'. The period of time within which the consumer will be able to exercise the rights will generally be 30 days after the date of delivery of the goods. [15]

101. This right to reject has long been considered to be a fundamentally important right of the consumer to exit a contract where the goods are not as reasonably expected. It is especially useful in circumstances where it is clear that the fault demonstrates an inherent design flaw that cannot be repaired and will affect all replacement goods. It gives consumers more confidence to buy from new suppliers, knowing that if the goods prove to be substandard, they can recover all their money and buy substitute goods from another supplier. We also believe that the right to reject gives traders an incentive to ensure products are of the right standard before they are sold in order to minimise returns and encourages higher standards of customer service if the consumer has the option to ask for their money back. We believe that setting a time limit of 30 days for exercising this right achieves a reasonable balance between the interests of consumer and seller, and certainty and clarity of the right to this remedy, to the benefit of both parties.

[15] There is no fixed period of time under the current UK legislation but instead there is provision that the consumer will be deemed to have accepted the goods and lost his/her right to reject them if a reasonable time has passed without the consumer indicating to the seller that s/he is rejecting them.

2nd tier remedies

102. Consumers need other remedies for cases where a fault in goods only emerges some time after purchase. The UK Consumer Rights Act (Part 1) aims to combine the existing European remedies in the Sale of Goods directive with the short-term right to reject into an integrated regime of remedies. The remedies of repair and replacement will be adequate for many cases where it is too late for the consumer to exercise the short-term right to reject faulty goods, where the consumer wants to keep the original goods, or where the fault is not expected to be replicated in replacement goods and the consumer simply wants equivalent goods without the fault. We therefore think there is value in retaining these first-tier remedies, but also consider there is a need to make clearer the obligation on sellers to provide the first-tier remedy chosen by the consumer unless there is a good reason why it is impossible or disproportionate to expect them to do so. In this regard we think the law could usefully be strengthened by imposing an onus on the trader to establish that it is disproportionate or impossible for them to carry out the requested remedy.

103. In regard to the 2nd tier remedies that currently apply where the first-tier remedies are impossible or unsuccessful, these are essential back-up remedies and we support the consumer having a right to choose between keeping the goods with a price reduction, or terminating the contract and receiving a refund of the price. However, two problem areas with these remedies were raised in the course of pre-legislative consultations in the UK, and addressed by specific new provisions in Part 1 of the Consumer Rights Act.

Limitation of the number of repairs/replacements

104. First, the issue of when it could be determined that the seller had failed to repair or replace defective goods within a reasonable time and without significant inconvenience to the consumer. There was a great deal of concern from consumer representative bodies and others that consumers are locked into cycles of repairs or replacements with no clear line to be drawn as to when they can progress to 2nd tier remedies. This was addressed in the UK's Consumer Rights Act by an express provision that the consumer could access 2nd tier remedies if the same fault reappears or if a separate fault arises after a single failed repair or replacement. We consider that this reflects a fair balance in the majority of cases given the inconvenience caused to the consumer and the fact that the seller will have failed on two occasions to provide goods that conform to the contract. We recommend that the European legislation specifies the number of repairs or replacements that the seller should be permitted to attempt, and that this should be set as one.

Deduction for use

105. The second area was the provision for a deduction to be made from the purchase price to reflect the consumer's use of a product, when it had been rejected under the 2nd tier remedy of termination of contract. The OFT, and now CMA, takes a strong view that this creates scope for consumers to be significantly disadvantaged and it is arguable that no deduction is justified. In cases where a fault in goods has manifested itself fairly shortly after purchase, the consumer has had little use of the product and the use has often been adversely affected by the fault. In order to replace the product the consumer will need to pay the full price for a new product and will therefore have lost money.

106. The consumer will also have been deprived of its use during the inconvenience of any repair or replacement attempts that have taken place. Where a fault emerges after some considerable time of adequate use of the product, we see a case for a deduction to be made in principle, but in practice it is very difficult to quantify a fair and reasonable amount. In practice it leaves the question of what deduction, if any, should be made, to the discretion of the seller. These difficulties were considered within the UK during the development and passage through Parliament of the Consumer Rights Act, and the outcome reached was a provision that in general no deduction could be made if the contract is terminated within 6 months of delivery of the goods. If any harmonised regime of remedies is to be applied across the European Union, as a minimum we recommend that it should exempt any deduction for use within the first 6 months from delivery of the goods.

Right to damages

107. The Act also recognises the consumer's other remedies under general law (common law) that may apply in combination with, or instead of, the statutory remedies. Of these other potential remedies, a principal one is damages, that is monetary compensation for loss sustained by the consumer. This remedy is especially important where the consumer has suffered loss going beyond the defective goods themselves. Examples of such cases include where a defective washing machine damages the consumer's clothing, or a defective electrical item causes a fire destroying other household items. There are also occasions when the consumer will incur financial loss and inconvenience, such as where the consumer is without a faulty car while it is undergoing repairs, and incurs transport costs for necessary travel or where the consumer loses the benefit of a service contract, such as phone minutes while a faulty mobile is being replaced. As there is already a system of damages generally applicable under the common law the Act does not replace these. As

mentioned above, we think there is a strong case for not harmonising damages regimes. These may have much wider applicability than the proposals being developed.

Scope

108. We also think there is a need for clarity as to the scope of transactions to be covered by the key consumer rights for online sale of tangible goods, for example whether they cover barter / goods exchange contracts, part-exchange contracts (which are common in the UK retail car sales industry), conditional sale agreements where the consumer pays the purchase price through instalments and ownership in the goods does not pass to the consumer until all instalments have been paid and contracts for hire.

109. Additionally, consideration will need to be given as to how mixed contracts will be addressed under the proposals

Q41. Should the buyer have a free choice of remedies or should there be a hierarchy of remedies (namely the trader is first given the option to repair the good)? Please explain.

110. Please see our answer to question 40 where we explain that we think a short-term right to reject is a necessary additional remedy.

111. In the event that a fault emerges too late for the short-term right to reject to be exercised, or the consumer would prefer to keep the same or equivalent goods anyway, then it seems fair and reasonable that the consumer should have a choice of other remedies. So while we agree that the consumer should be offered a choice of repair or replacement, we cannot see the rationale for not also offering the consumer the choice of a price reduction. This might be the preferred remedy for a consumer in some cases, such as where the value of the goods is lower than it would have been if the goods had not been defective but the consumer prefers to keep them without the inconvenience of undertaking a repair or replacement. As we indicate in our response to Q40 above, we think there is also a need to strengthen the requirement on the seller to comply with the consumer's choice of remedy.

112. Please see above for our view that, in the case of the consumer choosing to terminate the contract following failed repair or replacement, the provision for a 'deduction for use' to be made should be more limited than under the existing Sale of Goods Directive. We believe that no deduction for use should be made where the contract is ultimately terminated within 6 months from the date of delivery of the goods and consideration should be given to whether the deduction for use should be retained at all.

Time limits to exercise remedies[16]

Q42. Should the buyer be entitled to ask for remedies for an indefinite period of time or should there be a specific time limit after the buyer has bought the good or discovered that the good was defective? Please explain.

113. In the UK there are legal limitation periods by which time a claim must be brought – in the case of claims relating to a contract that is 6 years from the date faulty goods are delivered for England/ Wales, and 5 years for Scotland. However there is no fixed time period that goods should last without a defect, as this will depend on the item. We believe that these time limits for bringing claims should continue as they are - we see no reason for a shorter limitation period and in fact believe a shorter period is likely to cause consumer detriment.

Q43. Should there be one single time limit or should there be two different time limits, one for the period during which the defect should appear and one during which the buyer has to exercise the remedies? Please explain.

114. Under the UK's Consumer Rights Act, the short term 'right to reject' under which the consumer will be able to claim a full refund, will be limited to 30 days from purchase. If this right is not used or no longer available and the consumer opts for repair/replacement, this is limited to a requirement to accept one attempt by the trader. If this attempt is unsuccessful the consumer is entitled to a full refund during the first 6 months[17] and a refund taking into account 'deduction for use' after that period. The burden of proof that a defect existed at the time of purchase lies with the consumer after the 6 month period. We believe this hierarchy of remedies gives both consumers and traders a fair balance of remedies based on the timescales during which the fault was noticed.

115. We would be very concerned if there were to be, in addition to a limitation period for bringing a claim, a restriction on remedies to faults appearing within a specific period of purchased goods being delivered. In practice this might be equated with a requirement that defects be notified within the same period as this would be the most obvious way consumers could convincingly demonstrate that the fault had appeared within that period. As the expected lifespan of products can vary dramatically given the range of quality and cost of goods, it would be arbitrary to set an end limit on the time that any product should reasonably be expected to remain free of defects. We would also be

[16] *Idem.*
[17] Some exceptions apply for the new car sector.

concerned about the introduction of another time limit that could be confused by traders and consumers with the (currently) 6 month period from delivery of goods during which a defect arising is presumed to have been present at the date of delivery. In summary, we can see no need for a time limit for a defect appearing, or a 'liability period', in addition to a limitation period which is a longstop date for consumers to bring a claim.

116. In addition to the difficulty in enforcing such a requirement we believe this would undermine consumer confidence, particularly in the context of cross-border transactions where hindrances to timely notification would tend to be greater. If a consumer delays notifying a trader of defects and, does so beyond six months, under existing EU legislation they will in any event then have to demonstrate that the defect existed prior to that date to benefit from the presumption that it existed at the time risk passed. We regard this as adequate protection for the trader and adequate encouragement for consumers to report faults quickly. In the UK, the proposed time limited short term right to reject (30 days) will also provide more than adequate encouragement for consumers to report faults quickly.

Q44. Which time limit(s) you think is (are) appropriate? Please explain.

117. See our response to Q42 and Q43.

118. In addition, where the consumer has a contract to receive services that is tied to hardware (such as a mobile phone), the hardware should be expected to last for the duration of the related services contract. In such cases there should be a right to conformity for the duration of that contract.

Q45. Should the time limit(s) be shorter in case of second-hand tangible goods?

119. We think the same liability period should apply for both new and second hand goods. The current provisions recognise that new goods have varying life expectancies depending on a number of factors such as the nature of the product and price, and we see no reason why this should not also apply to second hand goods in view of the fact that the goods are supplied by a trader in the course of business. In practice, the expected standard of quality and durability from second hand goods would be lower than equivalent goods that were brand new, but would still vary depending on the age of the goods, extent of use, price charged etc.

120. A shorter limit for second hand goods could increase the level of consumer detriment in areas where there are already serious problems, such as second hand cars, a category which consistently attracts a large number of complaints in the UK.

Damages[18]

Q46. If there is a right to damages, under which conditions should this remedy be granted? Should liability be based on the trader's fault or be strict (namely, irrespective of the existence of a fault)?

121. As noted above, the approach under UK consumer sales law to implementing consumer rights, seller obligations and available remedies, is to make them statutory rights that are treated as terms of the sale contract. As a result, the consumer's rights and remedies arise both under statute and under the general rules of UK contract law.

122. The right to damages to which a UK consumer would currently be entitled reflects fundamental principles of UK contract law that where one party breaches a contract, the innocent party can recover compensation to put them in the position they would have been in had the contract been properly fulfilled. In practice, in business to consumer sales, as well as seeking repair, replacement or rejection of the goods for a refund, consumers might want to claim damages for any costs or losses they have incurred as a result of the supplied goods being defective. As indicated above (Q40), examples include cases where a defective washing machine damages the consumer's clothing, or a defective electrical item causes a fire destroying other household items. (The consumer may have sustained personal injury entitling him/her to damages, although rights to compensation also exist under product liability legislation.) There are also occasions when the consumer will incur out of pocket expenses such as where the consumer is without a faulty car while it is undergoing repairs, and incurs transport costs for necessary travel. In some cases, consumers may be entitled to damages for non-financial loss such as inconvenience and loss of amenity.

123. Under UK contract law, liability of this kind is strict and applies irrespective of fault. We think this is the right position and is particularly justified in business to consumer contracts. Consumers can do little to safeguard against buying defective goods other than through buying insurance. On the other hand, business sellers can do their best to ensure they supply products which are of appropriate quality and fitness for purpose, and can take relevant insurance and/or negotiate contracts with their suppliers which pass on liability in the event of claims for faulty goods by consumers.

124. As indicated in previous answers, we think it important that these rights are maintained. We think there is a strong case for not harmonising damages

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[18] *Idem.*

regimes. These may have much wider applicability than the proposals being developed.

125. For fairness, a trader should not end up having more extensive rights when a consumer is in breach of contract than a consumer has when the trader is in breach. For example, if the consumer has to show the trader was at fault to claim damages, the trader should also have to show fault to claim damages when a consumer breaches their obligations.

Notification[19]

Q47. Should the buyer be obliged to notify the defect within a certain period of time after discovery? If so, should the period start from the moment the buyer is aware of the defect or, rather, from when he could be expected to have discovered the defect? How long should the period be? Please explain.

126. Our strong view is that no notification requirement should be introduced. To do so would disadvantage consumers and limit their rights to an unjustified extent. We assume the argument in support of such a requirement would be that the seller would be better able to assess the alleged fault and the claim if it is notified promptly. However, where the consumer failed to notify a defect in time, loss of access to any remedy would be a disproportionate sanction to achieve the intended safeguard for traders. We are not aware that in the UK there has been a notable problem of consumers notifying faults very late and any consequent disadvantage to sellers.

127. Consumers are already motivated to notify faults promptly where they are reasonably aware of their rights. In the UK, consumers know they must act promptly if they want to reject goods and obtain a refund, and the forthcoming introduction of a fixed 30 day limit to reject goods will focus consumers' minds even more on the need to act quickly once they are aware of a problem. Outside this period consumers will still be motivated to act promptly in order to benefit from the 6 month period during which faults discovered will be presumed to have been present at the date of purchase and delivery.

128. The consumer will be disadvantaged anyway if they delay unduly in notifying a claim. It will be all the harder for them to establish the fault and the claim if time has gone by making it more difficult for a seller, or a court, to assess the case. As the burden of proof lies on the consumer, it is more likely they will be disadvantaged by undue delay. We think this represents a fair balance,

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[19] *Idem.*

especially as unlike with a fixed time period, there is no 'cliff edge' where if a consumer notifies a day too late, they lose their rights completely.

129. Such a requirement would not apply in the context of commercial sales law, therefore a consumer would be in a worse position than if they had been a business purchaser, which would be an incongruous result given that consumer law seeks to redress the weaker bargaining and knowledge position of the consumer as between the parties to the transaction.

130. Introduction of such a requirement would introduce more scope for disputes as to when a consumer became aware of a defect, or ought to have done so, and provide a basis for unscrupulous traders to reject claims out of hand.

131. Finally, we would make the point that in our view, consumers' normal and reasonable behaviour is not to notify a possible fault until and unless they intend to take action about it. To introduce a notification requirement would encourage consumers to notify faults as soon as a possible problem arose, without giving them time to investigate the problem, and consider if the problem genuinely does constitute a fault. Well-advised consumers may start to notify faults as a routine step to preserve their right to take future action should this prove necessary, which would be counter-productive and administratively burdensome for traders.

132. In summary, we consider that the disadvantages to consumers heavily outweigh any perceived benefits in introducing a notification requirement.

Commercial guarantees

Q48. Commercial guarantees are voluntary commitments by the trader to repair, replace or service tangible goods beyond their obligations under the law. Do you think uniform rules on the content and form of commercial guarantees are needed? Please explain.

133. We note that the Consumer Sales Directive already provides legal requirements on the form of commercial guarantees, and they are legally binding on the business providing the guarantee, such as the manufacturer or the seller. We think the existing rules are sensible and helpful and should be retained.

134. To the extent this question is asking whether there should be further requirements, we are not sure what this is aimed at, given that guarantees are voluntary. We are also unclear whether the suggestion is that businesses *must* offer a guarantee, or on the other hand, *if* businesses offer a guarantee, the guarantee must comply with certain minimum requirements. If guarantees

had to comply with uniform rules as to their content and form, they would be more like a legal guarantee and it is unclear how they would differ from legal rights and remedies.

135. A key concern the CMA has about commercial guarantees is that if they are unduly limited, they can be misunderstood by consumers as limiting their rights. As traders cannot limit consumers' statutory rights in sale and supply of goods contracts, such guarantees could not have this legal effect. We would therefore challenge guarantees appearing to reduce consumers' rights and remedies as being unfair or not in plain and intelligible language, contrary to our legislation implementing the Unfair Terms Directive, and also an unfair commercial practice under the legislation implementing the Unfair Commercial Practices Directive. The existing provisions on guarantees in the Consumer Sales Directive do include a requirement that the guarantee should state that the consumer has statutory rights that are not affected by the guarantee. There may be scope for regulation to go further in this regard and prohibit any guarantee that is explicitly more limited than legal rights in some way.

136. Currently we cannot see a case for regulation that prescribes mandatory form and content of guarantees, and this appears to us unnecessarily prescriptive. An attempt to impose a uniform approach in our view risks being unworkable and could lead to a reduction in protection for some guarantees that are currently more generous than legal rights. To assess any proposal in this area, and to consider this from a better regulation perspective, we would need to know what problems the proposals were intended to address.

Q49. Could these requirements on the content and form of commercial guarantees be modified contractually or should they be mandatory rules? Please explain.

137. As noted above, we have concerns about the proposal to impose requirements as to the form and content of commercial guarantees. There might be scope to introduce certain minimum requirements for guarantees in order to ensure that they at least reflected consumers' legal rights. However, in our view there is a potential difficulty that given the variation in price and expected lifespan of different types of goods, it would be difficult to determine standards that should apply to all of them, for example, on the duration of the guarantee.

138. Whatever requirements applying to commercial guarantees that might be considered to be necessary and justified, such as those that already apply under the Sale of Goods directive, should be mandatory. In our experience, businesses generally seek to contract out of rules and requirements where this is possible, so it would likely become normal business practice to contractually exclude the requirements applying to commercial guarantees.

There would be little point in legislating for legal requirements if they could be routinely contracted out of.

Unfair terms

Q50. Should there be a list with contract terms which are always to be regarded as unfair? If yes, which terms should always be regarded as unfair? Please explain.

139. In our view there is some merit to having a 'blacklist' of terms which are always to be regarded as unfair. However we would not support a blacklist as an alternative to a 'grey' list (of illustrative terms which may be unfair), but only as an addition. This is because while specifying terms to be treated as illegal increases the potential force of action against terms that clearly correspond to them, it is at the cost of a loss of flexibility to deal with the full range of cases. Where a specification of terms or practices by way of example is purely illustrative, gaps in its coverage and other drafting problems are of less significance. The UK's Consumer Rights Act specifically makes clear that a term can be both blacklisted and grey listed, which is necessary because of the narrow focus and reduced flexibility of blacklisting, which can be associated with the potential for evasion. Additional grey listing serves as an anti-evasion mechanism.

140. In our view the blacklisting within the CRA strikes the correct balance for the UK and care would be needed if it were to be extended. We would urge caution against the wholesale adoption of blacklists across different Member States. Broadening grey lists may generally be a preferable approach. Blacklisting will tend inevitably to focus on fairly precise forms of words, because of the strict liability involved. Such forms of words tend to be very specific to different legal systems and cultures. Grey listing can more readily focus on objects and effects, which are of more general relevance, so it lends itself better to cross-jurisdictional legislation.

141. If a blacklist is adopted, we would not support maximum harmonisation, for the reasons above. The difference in effect between blacklisting and grey listing is not great – specifically for businesses trading across borders. Whether a term is grey listed or blacklisted, businesses will incur significant risks if they use it – there is potentially a difference in the extent of the risk, but where in the circumstances a term is obviously unfair the actual extent of risk will be largely the same. Therefore we do not see why the imperative of creating a single market requires prioritisation of harmonised blacklisting.

Q51. Should there be a list of standard contract terms which are presumed to be unfair? If so which terms should be on such a list? In particular, how to treat advance payment which is very frequent in the online world? Please explain.

142. The 'indicative' list of unfair contract terms in the Unfair Terms Directive (UTD) applies to online sales of tangible goods and we think it is essential that this is retained in order to avoid unjustified and confusing inconsistency in the treatment of different sales channels. The UK Consumer Rights Act 2015 (Part 1, Schedule 2), which will come into force in October 2015, includes the terms in the UTD, and 3 additional terms. In the CMA's view there is strong evidence for the addition of these terms in the UK and we would wish to see them retained both for online and offline transactions.

143. Currently we are not aware of evidence in the UK for additional 'indicative' terms specific to online sale of tangible goods, although this is something we would expect to keep under review as this sales method becomes more prevalent. In our answer to Q6, above, we list some terms which may be particularly common in online contracts (both for digital content and tangible goods). For tangible goods there are also terms which allow the trader to treat the contract as not concluded until the goods are dispatched. The contract should be concluded once the consumer clicks pay (particularly if payment is taken then). However, as mentioned above, in our view it is important to focus on the underlying principles which make such terms unfair rather than the terms themselves.

144. Regarding terms requiring advance payment, there are already several 'indicative' terms in the UTD which may have relevance and the balance struck by such terms (for example regarding allocation of credit risk) may be assessed under the general test of fairness.

145. We suggest that further consideration be given to the practical means available to reduce the risks to consumers of advance payments in online transactions (including, for example, escrow services) and how greater use of these might be fostered for appropriate transactions. The costs and benefits of protection for consumers' advance payments need to be carefully considered in any proposals.

3 September 2015