

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

CONSUMER RIGHTS BILL

EXPLANATORY NOTES

INTRODUCTION

1. The explanatory notes relate to the Consumer Rights Bill as published in draft on the 12th of June, 2013. They have been prepared by the Department for Business Innovation and Skills. Their purpose is to assist the reader in understanding the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comments, none is given.

OVERVIEW OF THE STRUCTURE OF THE BILL

3. The Consumer Rights Bill sets out a framework that consolidates in one place key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts. In addition, the Bill introduces easier routes for consumers and small and medium sized enterprises (“SMEs”) to challenge anti-competitive behaviour through the Competition Appeal Tribunal (“CAT”). The Bill also consolidates enforcers’ powers as listed in Schedule 5 to investigate potential breaches of consumer law and clarifies that certain enforcers (such as Trading Standards Officers) can operate over local authority boundaries. It will give the civil courts and public enforcers greater flexibility to take the most appropriate action for consumers when dealing with breaches or potential breaches of consumer law.
4. The Bill is in three Parts:
 - Consumer contracts for Goods, Digital Content and Services;
 - Unfair Terms; and
 - Miscellaneous and General, including Investigatory Powers, Amendment of the Weights and Measures (Packaged Goods) Regulations 2006, Enterprise Act 2002: enhanced consumer measures and other enforcement, and Private Actions in competition law.

Background

5. There is general agreement across business and consumer groups that the existing UK consumer law is unnecessarily complex. It is fragmented and, in places, unclear, for example where the law has not kept up with technological change or lacks precision or where it is couched in legalistic language. There are also overlaps and inconsistencies between changes made by virtue of implementing European Union (“EU”) legislation alongside unamended pre-existing UK legislation.
6. The law that protects consumers when they enter into contracts has developed piecemeal over time. Initially it was the courts that recognised that a person buying goods has certain clear and justified, but sometimes unspoken, expectations. The courts developed a body of case law which gave buyers rights when these expectations were not met. This case law was then made into legislation that protected buyers when buying goods, originally in the Sale of Goods Act 1893, updated by the Sale of Goods Act 1979 (“SGA”). These rights were then extended by the introduction of the Supply of Goods and Services Act 1982 (“SGSA”) to cover the situations when goods were provided other than by sale (for example when someone hires goods). The SGSA also covers (in relation to England, Wales and Northern Ireland) certain protections for the recipients of services supplied by traders. Legislation setting out rules on unfairness in contract terms was established domestically in the Unfair Contract Terms Act 1977 (“UCTA”). These pieces of legislation currently cover more than just consumer contracts but certain of their provisions offer extra protection to consumers (as opposed to other types of buyers).
7. The EU has also legislated to protect consumers and so the UK legislation has been amended to incorporate this European legislation; sometimes this has been implemented in domestic law without resolving inconsistencies or overlaps.
8. The relevant domestic law is currently mainly contained in the following legislation:
 - Supply of Goods (Implied Terms) Act 1973
 - Sale of Goods Act 1979
 - Supply of Goods and Services Act 1982
 - Sale and Supply of Goods Act 1994
 - Sale and Supply of Goods to Consumers Regulations 2002
 - Unfair Contract Terms Act 1977
 - Unfair Terms in Consumer Contracts Regulations 1999

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

- Unfair Terms in Consumer Contracts (Amendment) Regulations 2001
- Competition Act 1998
- Enterprise Act 2002

9. The European Directives implemented in the Bill are:

- Directive 99/44/EC of the European Parliament and Council on certain aspects of the sale of consumer goods and associated guarantees;
- Directive 93/13/EEC of the Council on unfair terms in consumer contracts;
- Some provisions of Directive 2011/83/EU of the European Parliament and Council on consumer rights. See clauses 10, 11, 38, 39 and 52 in relation to the enforcement of information requirements and also see paragraph 11 below. See clause 29 in relation to default rules for the delivery of goods, and clause 30 regarding the passing of risk in goods.

10. In addition, the Bill implements some provisions (in respect of enforcement) of:

- Regulation (EC) No. 2006/2004 of the European Parliament and Council on cooperation between national authorities responsible for the enforcement of consumer protection laws;
- Regulation (EC) No.765/2008 of the European Parliament and Council on the requirements for accreditation and market surveillance relating to the marketing of products;
- Directive 2001/95/EC of the European Parliament and Council on general product safety; and
- Directive 98/27/EC of the European Parliament and Council on injunctions for the protection of consumers' interests.

Wider reforms to the consumer legislation framework

11. In addition to the Bill, the Government will implement Directive 2011/83/EU of the European Parliament and Council on consumer rights (commonly known as the Consumer Rights Directive (“CRD”)) in regulations made under the European Communities Act 1972. However, a small number of the CRD’s provisions are implemented in the Bill, as indicated above. The CRD:

- for all contracts where a trader provides goods, services or digital content to a consumer, requires that a trader must provide certain information (for example

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published on 12th of June, 2013.*

on the main characteristics of the goods, services and digital content) before the consumer is bound by the contract;

- specifies the consumer's cancellation rights (during so-called "cooling off periods") for goods, services and digital content contracts concluded at a distance or off premises; and
- introduces various measures aimed at protecting consumers from hidden charges once they have entered into a contract.

12. A consultation by the Department for Business Innovation and Skills ("BIS") in August 2012 sought views on implementing the CRD in particular highlighting those areas where the UK had some flexibility in the way the Directive might be applied¹. A Government response will be published in due course. Part of the CRD has been introduced early as the Consumer Rights (Payment Surcharges) Regulations 2012.
13. In developing proposals for the Consumer Rights Bill, the Government has taken into account the definitions and measures contained within the CRD and, as far as appropriate, has made the Bill consistent with the CRD, with the intention of achieving overall a simple, coherent framework of consumer legislation.
14. The Government is also considering the advice of the Law Commission and Scottish Law Commissions (the "Law Commissions") received in March 2012 that the law surrounding consumer rights to redress following misleading or aggressive behaviour from traders is fragmented, complex and unclear². The Law Commissions have recommended limited reform, targeting the most serious causes of consumer detriment. The Government intends to implement the Law Commissions' proposed reforms through amendment of the Consumer Protection from Unfair Trading Regulations 2008 ("CPRs") and, as such, this reform does not need to be introduced within the Consumer Rights Bill. The recommended reform would give consumers the right to unwind the transaction (get a refund) or receive a discount on the price if they were bullied or misled into agreeing a contract. The Government will issue its response to the Law Commissions' report in due course.

¹ A consultation on implementing the Consumer Rights Directive, BIS, August 2012

² The Law Commission No.332/The Scottish Law Commission No.226, March 2012

Advice and consultations

15. The University of East Anglia concluded in 2008 that the UK consumer protection regime had two key weaknesses – uneven enforcement and excessively complex law³. A call for evidence in the Consumer Law Review in 2008 revealed strong support across the board for consolidating consumer legislation, making it clearer and more accessible⁴. Respondents highlighted a number of benefits that a rewrite would bring – removing discrepancies and inconsistencies, greater use of plain English, greater awareness of rights, remedies and obligations, greater flexibility, future proofing and aiding business growth.
16. A number of consultations and academic research papers over several years have examined proposals that form part of this Bill. A single Government response to BIS consultations between March and November 2012 and a report by the Law Commissions of March 2013 (detailed below) is published alongside a draft Bill and these explanatory notes.

Part 1

17. The Davidson report in 2006, which examined the transposition of European Directives into domestic law, concluded that UK law on the sale of goods was unnecessarily complex⁵. The Law Commissions consulted on potential changes to the law on remedies for faulty goods and made recommendations in 2009⁶. Professors G. Howells and C. Twigg-Flesner examined the law on goods and services in 2010 and made recommendations to BIS on how the law could be clarified and simplified⁷. Also in 2010, Professor Bradgate reported to BIS on the uncertainty in current law around consumer rights to quality for digital content products⁸. Following these various reports, BIS consulted from July to October 2012 on proposals to clarify consumer rights in goods, services and digital content⁹.

³ Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries, a study for BERR by UEA, 2008

⁴ Consumer Law Review: Summary of Responses, BIS, 2009

⁵ Davidson Report, HM Treasury, 2006

⁶ The Law Commission No.317/The Scottish Law Commission No.216, 2009

⁷ Consolidation and simplification of UK consumer law, BIS, 2010

⁸ Consumer rights in digital products, BIS, 2010

⁹ Enhancing consumer confidence by clarifying consumer law, BIS, 2012

Part 2

18. Legislation on Unfair Contract Terms is contained in the Unfair Contract Terms Act 1977 (“UCTA”), which applies to contracts between businesses and between consumers but contains some particular rules about business to consumer contracts. It makes some terms in contracts automatically non-binding and subjects others to a test of reasonableness. The Unfair Terms in Consumer Contract Regulations 1999 (“UTCCRs”) enable consumers to challenge most non-negotiated terms of a contract on the grounds that they are unfair. There are certain terms that cannot be assessed for fairness: terms that relate to the definition of the main subject matter of the contract and those that relate to the adequacy of the price or remuneration as against the goods or services provided in exchange. These are known as “exempt terms”. In August 2002 the Law Commissions issued a consultation proposing a unified law on unfair contracts terms and, in February 2005, they issued a report setting out detailed recommendations, which was published alongside a draft Bill¹⁰. These recommendations were not taken forward at the time. However, in May 2012 the Parliamentary Under-Secretary of State for Employment Relations, Consumer and Postal Affairs, Norman Lamb MP, asked the Law Commissions to look again at unifying a regime on unfair terms in consumer contracts, focusing on the exempt terms. From July to October 2012 the Law Commissions sought views on a discussion paper on revised proposals for the exempt terms and made recommendations to BIS in March 2013¹¹ concerning terms in consumer contracts.

Part 3

19. There are a number of pieces of legislation that set out rights and duties on traders. To ensure effective enforcement of these rights and duties, enforcers such as local weights and measures authorities (known as “trading standards”) and other regulators (such as what is now the OFT, but is to become the Competition and Markets Authority (“CMA”)) have powers to investigate compliance. These investigatory powers are usually set out in the individual pieces of legislation creating the rights or duties and whilst largely similar, have some differences between them. In March 2012, BIS published a consultation on consolidating enforcement officers’ investigatory powers into a single set. It also consulted on removing the barriers to trading standards officers operating efficiently¹². Additionally, views were also sought on reducing burdens on business by introducing certain safeguards on the use of these powers, such as requiring officers to give reasonable notice of routine visits, unless there are good reasons for them to be unannounced.

¹⁰ The Law Commission No.292/The Scottish Law Commission No.199, 2005

¹¹ Unfair terms in consumer contracts – advice to BIS, The Law Commission & The Scottish Law Commission, 2013

¹² Enhancing consumer confidence through effective enforcement, BIS, March 2012

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

20. In November 2012, BIS published a consultation paper on extending the range of remedies available to courts when public enforcers apply to them for enforcement orders under Part 8 of the Enterprise Act 2002 (2002 c.40) (“EA”)¹³.
21. Research by the OFT shows that businesses view the present approach to private actions by consumers and businesses as one of the least effective aspects of the UK competition regime. BIS consulted on measures to make it easier and simpler for businesses and consumers to challenge anti-competitive behaviour in April 2012 and Government published its response in January 2013¹⁴.

Structure of the Bill

22. The Bill consists of three parts and four Schedules. The general arrangement of the Bill is as follows:

Part	Summary
Part 1	<ul style="list-style-type: none">• Sets out the standards that goods must meet.• Consolidates and aligns the inconsistent remedies available to consumers for goods supplied under different contract types, such as sale, work and materials, conditional sale or hire purchase.• Sets a time period of 30 days in which consumers can reject substandard goods and receive a full refund.• Limits the number of repairs or replacements of substandard goods before traders must offer some money back.• Sets limits on the extent to which traders may reduce the level of refund (where goods are not rejected initially) to take account of the use of the goods the consumer has had up to that point.• Introduces a new category of digital content.

¹³ Civil enforcement remedies – consultation on extending the range of remedies available to public enforcers of consumer law, BIS, November 2012

¹⁴ Private actions in competition law: a consultation on options for reform, BIS, April 2012 and a government response, BIS, January 2013

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published on 12th of June, 2013.*

	<ul style="list-style-type: none">• Introduces tailored quality rights for digital content.• Introduces tailored remedies if the digital content rights are not met.• Introduces a new statutory right that if a trader provides information in relation to a service, and the consumer takes this information into account, the service must comply with that information.• Introduces new statutory remedies when things go wrong with a service.• Makes it clear that consumers can always request these rights and remedies when a trader provides a service to them
Part 2 including Schedules 2, 3 and 4	<ul style="list-style-type: none">• Consolidates the legislation governing unfair contract terms in relation to consumer contracts, which currently is found in two separate pieces of legislation, into one place, removes anomalies and overlapping provisions in relation to consumer contracts.• Makes clearer the circumstances when the price or subject matter of the contract cannot be considered for fairness and in particular makes clear that to avoid being considered for fairness those terms must be transparent and prominent.• Clarifies the role of and extends the indicative list of terms which may be regarded as unfair (the so-called 'grey list').
Part 3 including Schedules 5, 6 and 7	<ul style="list-style-type: none">• Consolidates and simplifies the investigatory powers of consumer law enforcers in relation to the listed legislation and set them out in one place.• Clarifies the law so that Trading Standards are able to work across local authority boundaries as simply and efficiently as possible.

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

- Introduces new powers for enforcers to seek, through applying to the civil courts:
 - Redress for consumers who have been disadvantaged by breaches of consumer law;
 - Remedies from traders who have breached consumer law to improve their compliance and reduce the likelihood of future breaches, and/or
 - Remedies to give consumers more information so they can exercise greater choice and help improve the functioning of the market for consumers and other businesses.
- Establishes the CAT as a major venue for competition actions in the UK.
- Introduces a limited opt-out collective actions regime, with safeguards, for competition law.
- Promotes ADR for competition cases.

Impact on existing legislation

23. The Bill brings together the key consumer rights from all the enactments listed in paragraph 8 above. It will harmonise existing provisions to give a single approach where appropriate.
24. The provisions in the existing legislation which cover trader to consumer contracts only will be repealed. The provisions which relate to other types of contract (for example contracts between businesses) will remain in the existing legislation.

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

Supply of Goods (Implied Terms) Act 1973	This will be replaced by provisions in the Consumer Rights Bill.
Sale of Goods Act 1979	For business to consumer contracts this will mainly be replaced by the Consumer Rights Bill but some provisions of SGA will still apply, for example, rules which are applicable to all contracts of sale of goods (as defined by that Act – essentially these are sales of goods for money), regarding matters such as when property in goods passes. The SGA will still apply to business to business contracts.
Supply of Goods and Services Act 1982	For business to consumer contracts, this Act's provisions will be replaced by the Consumer Rights Bill. The SGSA will be amended so that it covers business to business contracts only.
Sale and Supply of Goods Act 1994	This will be replaced by provisions in the Consumer Rights Bill.
Sale and Supply of Goods to Consumers Regulations 2002	This will be replaced by provisions in the Consumer Rights Bill.
Unfair Contract Terms Act 1977	In respect of business to consumer contracts the Act's provisions will be replaced by the Consumer Rights Bill. The UCTA will be amended so that it covers business-to-business and consumer-consumer contracts only.
Unfair Terms in Consumer Contracts Regulations 1999	These will be replaced by the Consumer Rights Bill.

Territorial extent and application

25. The Bill extends to England and Wales, Scotland and Northern Ireland as described below.
26. Parts 1 to 3 largely extend to the whole of the UK. Some of Part 3 does not apply to Scotland or Northern Ireland because of the differences in the law. For example, the provision relating to the Competition Appeal Tribunal issuing injunctions in private actions does not extend to Scotland, and some of the legislation which Part 3 proposes to amend does not extend to Scotland or Northern Ireland, e.g. the Sunday Trading Act 1994.
27. The position under the three devolution settlements is as follows:
 - The regulation of the sale and supply of goods and services to consumers is reserved to Westminster under section C7(a) of Schedule 5 to the Scotland Act 1998. Regulation of anti-competitive practices and agreements is reserved under section C3 of Schedule 5.
 - The regulation of sale and supply of goods and services to consumers and the regulation of anti-competitive practices are not devolved under the Government of Wales Act 2006.
 - Consumer protection is transferred under the Northern Ireland Act 1998, as it does not fall under the list of excepted and reserved matters in Schedules 2 and 3 to that Act. The regulation of anti-competitive practices and agreements is a reserved matter under paragraph 26 of Schedule 3 to that Act.
28. The Government's intention is to ensure consistency of consumer rights and the effectiveness and efficiency of their enforcement across the UK whilst respecting the devolution settlements. We are in regular discussion with the devolved administrations on the detail of the Bill's provisions and before the Bill is introduced we will ensure that if legislative consent motions are required they will be sought.

Which country's law governs the contract?

29. European Regulation EC 593/2008 on the law applicable to contractual obligations sets out the rules as to which country's law applies to consumer contracts. It is known as the "Rome I Regulation". It confirms that it is open to a consumer and a trader to choose the law of any country to govern their contract. Where they do not choose, if a trader pursues its activities in or directs its activities to the UK, (whether the trader is in the UK or not) and the contract covers those activities, the Rome I Regulation provides that a contract with a consumer habitually living in the UK will be governed by UK law. Even if the consumer and trader do choose another country's law to

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published on 12th of June, 2013.*

govern their contract, the Rome I Regulation provides that where the trader pursues or directs its activities to the UK and the consumer is habitually resident in the UK, any UK protections that parties cannot contract out of under UK law (such as the key protections covered by this Bill) will still apply. Depending on the circumstances, pursuing or directing activities might, for example, include having a website translated into English or with a '.uk' web address from which consumers in the UK can purchase goods, services or digital content in sterling.

Transposition of EU Directives

30. The Bill does not itself implement EU Directives for the first time with the exception of certain parts of Articles 5, 6 18, 20 and 23 of the CRD which are implemented in Part 1 as detailed above in Paragraph 9. Other than this, the Bill replaces earlier legislation which has implemented EU Directives, most of which is set out in paragraph 9 above.

Commencement

31. The Bill will be brought into force on a day or days appointed by a commencement order made by the Secretary of State.

COMMENTARY ON CLAUSES

PART 1: CONSUMER CONTRACTS FOR GOODS, DIGITAL CONTENT AND SERVICES

Clause 1: Principles of this Part

32. The main purpose behind clause 1 is to make clear the scope of Part 1 of the Bill. Part 1 is concerned with contracts between a trader and a consumer where a trader supplies or agrees to supply goods, services or digital content (or any combination of these) to a consumer. It does not matter whether the contract is written or oral (or both) or implied by the conduct of the trader and consumer. This means that, for the Part to have effect, there must be a *contract* and the contract must be for a *trader* to supply (or agree to supply) goods, services or digital content to a *consumer*.
33. At its most basic level, for a contract to be formed under the law of England and Wales and Northern Ireland there needs to be an offer and acceptance (i.e. one party must express a willingness to contract on certain terms and the other party must agree to those terms); and there must be 'consideration,' which is to say that both sides must offer something to the other (e.g. money in return for goods). In Scots law there is no requirement for consideration but the parties' agreement must show an intention to be legally bound. As well as using words, a contract could be implied by conduct of the parties, for example, by jumping into a black cab and stating your destination, this conduct would be taken as an agreement that the taxi driver will take you to your

destination and that you will pay a price for it.

34. *Subsections (3) to (5)* sets out the position with regard to “mixed contracts”. There are many examples of mixed contracts, for example contracts involving the supply of both goods and services (e.g. a kitchen installation or a car service where spare parts are fitted) or digital content and a service (e.g. the service of supplying and installing anti-virus software). In such contracts, under the Bill, the service element attracts service rights, the goods elements attracts goods rights and so on. Subsection (3) therefore makes clear that, for such mixed contracts, it will be relevant to look at the rights and remedies for each element of the mixed contract. Chapter 2 is the chapter dealing with goods and also makes clear that special rules apply where goods are supplied and installed by a trader and that similarly special rules apply where goods and digital content are supplied together in one product (e.g. where digital content is supplied on a disk (clause 15)). In the main, it is Chapter 3 that applies to digital content (but as mentioned above clause 15, which is in Chapter 2 sets out particular rules about digital content and goods supplied together in one product. Chapter 4 applies to services. *Subsection (6)* makes clear that consumer contracts are subject to additional rules. These include Part 2 on unfair contract terms and also certain rules in the SGA which are applicable to all contracts of sale for goods as defined by that Act (essentially sales of goods for money), including rules relevant to the passing of property. Subsection (6)(c) refers to the common law (case law or precedent) as developed by judges through decisions of courts and similar tribunals.

Clause 2: Key definitions

35. One of the policy objectives is to align, as far as possible, the definitions of certain key terms across the Bill and other consumer law, such as the regulations currently being drafted to implement the CRD, to facilitate easier interpretation and clearer application of the law. These terms are “consumer,” “trader,” “goods” and “digital content”. Since the CRD is a maximum harmonisation Directive, there is little scope for the UK to alter those definitions when implementing the CRD. Therefore, to ensure as much consistency as possible, the definitions of these key terms in the Bill are based largely on the definitions within the CRD. This clause sets out these key definitions in a clause separate from the general interpretation clause (which sets out all other definitions of terms used in the Bill that need definition) because they are vitally important to understanding the scope of the Bill. ‘Service’ is also a key concept but is not defined by the Bill; it was not defined in the SGSA nor is it defined in the CRD.
36. *Subsection (2)* makes clear that a trader is a person acting for purposes relating to that person’s trade, business, craft or profession. It makes clear that a trader acting through an agent, for example by subcontracting part of a building contract, is liable for proper execution of the contract. The term agent covers anyone acting in the name of, or on behalf of, a sole trader or trader company so would also include an employee. A “person” is not just a natural person but can also include companies, charities and arms of government (and the reference to a “person” can also include more than one person). So where these types of body are acting for purposes relating to their trade,

business, craft or profession, they are caught by the definition of trader. The general interpretation clause (clause 60) makes clear that a ‘business’ includes the activities of government departments and local and public authorities, which means that these bodies may therefore come within the definition of a trader. Not-for-profit organisations, such as charities, mutuals and cooperatives, may also come within the definition of a trader where they are acting for purposes relating to their trade, business, craft or profession. For example, if a charity shop sells t-shirts or mugs, they would be acting within the meaning of trader.

37. Another key definition is the definition of “consumer”. Firstly, a consumer must be an “individual” (that is, a natural person) – the protection does not apply to small businesses or legally incorporated organisations (e.g. companies formed by groups of residents). If a group of consumers contracts for goods, services or digital content, they are not left without protection. For example if one consumer makes all the arrangements for a group to go to the theatre or to go on holiday, depending on the circumstances, each member of the group may be able to enforce their rights or the person who made the arrangements would have to enforce the rights on behalf of the group. The other main restriction on who is a consumer is that a consumer must be acting wholly or mainly outside their trade, business, craft or profession. This means, for example, that a person who works from home one day a week who buys a kettle and uses it on the days when working from home would still be a consumer. Conversely a sole trader that operates from a private dwelling who buys a printer of which 95% of the use is for the purposes of the business, is not likely to be held to be a consumer (and therefore the rights in this Part will not protect that sole trader but they would have to look to other legislation. For example, if the sole trader were buying goods, they would have to look to the SGA for protections about the quality of the goods).
38. *Subsection (6)* excludes (for some purposes) from the definition of consumers those acquiring second-hand goods at an auction which they have the opportunity to attend in person. This derives from Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Article 1 (3)), and the previous definition of “dealing as a consumer” under the UCTA. This exclusion applies to the Goods provisions in Chapter 2 only, other than those derived from the CRD (as the scope of the CRD is not subject to this exclusion) – its application is set out in *subsection (5)*.
39. *Subsection (7)* sets out another key definition: the meaning of “goods”. This derives from Article 2(3) of the CRD. Essentially “goods” means anything physical which you can move (“any tangible moveable item”). Therefore, the Bill does not apply to purchases of immovable property such as land or a house. However, this subsection makes clear the meaning of goods can also include certain utilities (water, gas and electricity) where they are put up for sale in a limited volume or set quantity. Examples of these are a gas cylinder, a bottle of water or a battery. Clause 3 contains further provision on the scope of the contracts for goods covered by the Bill.
40. The definition of digital content in *subsection (8)* is the same as the definition in the

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published on 12th of June, 2013.*

CRD (data produced and supplied in digital form). Digital content may be provided on a tangible medium (in which case special rules apply) for example a DVD or software, on a computer or not, for example an e-book or music download.

CHAPTER 2 GOODS

Summary and Background

41. This Chapter concerns contracts where a trader supplies goods to a consumer. It sets out:
- The rights a consumer has when a trader supplies goods under contract (the notes on clause 1 explain how a contract may be formed). These are in effect contractual rights and if they are breached it is therefore a breach of contract;
 - the statutory remedies to which the consumer is entitled if these rights are breached: namely a right to reject the goods within an initial period, a right to repair or replacement and a subsequent right to a reduction in the price (keeping the goods) or to reject the goods for a refund (subject to deduction for use in some cases);
 - that the statutory remedies do not prevent the consumer claiming other remedies from the trader where they are available according to general contract law (e.g. damages); and
 - that the trader cannot limit or exclude liability for breaches of the above rights, in most cases.
42. Currently, provisions relating to contracts for the supply of goods are contained within several different pieces of law. The SGA, the SGSA and the SGITA each contain provisions which apply, depending on the type of contract. Much of the current legislation applies to recipients of goods (whether or not they are consumers), but some protections apply only to consumers.

Contract Type	Description	Current applicable legislation
Sale	Supply of goods in exchange for money.	SGA

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

Conditional sale	Sale where the consumer pays in instalments and only obtains ownership of the goods when the final payment is made (or other conditions are satisfied), although the consumer may use the goods in the meantime.	SGA
Hire purchase	A contract of hire with an option or condition to buy at the end of the hiring period	SGITA
Barter or exchange	Where goods are exchanged for a consideration other than money	SGSA
Work and materials	Where the contract includes both the provision of a service and the supply of associated goods	SGSA
Hire of goods	A contract of hire where there is no intention that ownership of the goods will be transferred	SGSA

43. The current legislation provides that goods must meet certain standards – such as being of satisfactory quality, fit for purpose, corresponding to descriptions or samples by which they are supplied, and being free from third parties’ rights - and provides that the trader must have the right to sell (or hire) the goods. These matters are treated as “implied terms” of a contract. Implied terms are terms that are not expressly set out in a contract (which are “express terms”) but still form part of the contract.
44. The current legislation categorises these implied terms as “conditions” of the contract or “warranties” (save in relation to Scotland, as this terminology does not apply in Scots law, but the legislation provides an equivalent effect). Most of the statutory implied terms are categorised as conditions, breach of which enables the consumer to choose either to treat the contract as terminated or to continue with the contract (i.e. keep the goods) but claim damages. The implied terms regarding goods being free from third parties’ rights are classified as “warranties”, where a breach is relatively

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published on 12th of June, 2013.*

less serious but could give rise to a claim for damages. The current legislation also sets out statutory remedies for consumers, where the implied terms regarding quality, fitness for purpose and corresponding to descriptions or samples are breached in contracts other than for hire or hire purchase. The statutory remedies are repair or replacement of goods, followed in some circumstances by termination of contract or receiving an appropriate reduction from the price.

45. In 2008 the Law Commission and Scottish Law Commission consulted on “Consumer Remedies for Faulty Goods”, and published a report in 2009. Some of the provisions in this Chapter build on the Law Commissions’ recommendations.
46. In 2010 the Department for Business, Innovation and Skills (“BIS”) commissioned a report, entitled “Consolidation and Simplification of UK Consumer Law”¹⁵ to examine how existing consumer law might be consolidated and simplified to make it more accessible to consumers, business and their advisers. That report recommended that consumer contract law would be improved if many of the provisions could be brought together into a single consumer contract law that so far as possible subjected all consumer supply contracts to the same rights and remedies. The report recommended that the remedies for goods would be made clearer and more accessible by incorporating them into a single piece of legislation and aligning the remedies as much as possible.
47. Following these reports, BIS consulted in July 2012 on proposals for reform of the law regarding contractual supplies to consumers of goods, as well as of services and digital content. This consultation included proposals building on the 2009 and 2010 reports.

What goods contracts are covered?

Clauses 3-7: Consumer contracts about goods

48. Clause 3 sets out what contracts are covered by this Chapter. The provisions contained in this Chapter apply in most cases where a trader supplies (or agrees to supply) goods to a consumer under a contract – such a contract is referred to in the Bill as a “contract for the supply of goods”. (The terms “trader”, “consumer” and “goods” are addressed in clause 2).
49. *Subsection (2)* provides that the Chapter does not apply to certain contracts. Such contracts therefore do not count as “contracts for the supply of goods”.

¹⁵ The report was authored by Professor Geraint Howells and Professor Christian Twigg-Flesner available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31838/10-1255-consolidation-simplification-uk-consumer-law.pdf

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published on 12th of June, 2013.*

50. Subsection (2)(a) of clause 3 excludes from scope contracts where the goods in question are coins or notes to be used for currency, though coins and notes supplied for another purpose (for example bought by a collector) are covered.
51. Subsection (2)(b) of clause 3 excludes items sold by execution or authority of law. This reflects the CRD and the CSD and excludes from the definition of goods items sold in situations such as a sale by an official under a legal authority to satisfy a debt (e.g. an official authorised to sell off property of a bankrupt).
52. Subsection (2)(d) of clause 3 serves to prevent a contract from counting as a contract for the supply of goods and thus the protections under the Bill from applying if the agreement is not supported by consideration other than being executed as a deed (as under the law of England and Wales and of Northern Ireland, a contract lacking consideration will only be enforceable if it is made as a deed, a written document whose signature involves certain limited formalities). The meaning of “consideration” is set out in paragraph 33. This subsection does not apply to Scotland. Subsection (2)(e) applies in relation to Scotland, as Scottish law does not require consideration in order to form a contract, but the provisions of this Chapter are intended to apply only where consideration is provided.
53. Under *subsection (4)*, contracts for the supply of goods also fall within the scope of this Chapter if they involve the transfer of a share in the goods, whether between current owners or if one owner transfers their share to a third party.
54. Whilst this Chapter applies to contracts for the supply of goods, there is some variation in how particular provisions apply according to the contract type (for example some of the provisions apply in a different way to hire contracts as the consumer is not paying for ownership of the goods, but for use of them). *Subsection (5)* indicates that more specific provisions for the particular contract types take precedence.
55. *Subsection (7)* provides that with regard to any of the specific types of contracts defined in the following clauses, the provisions apply whether the goods are applied alongside a service and/or digital content.
56. Clauses 4 to 7 define the types of contract for the supply of goods to which particular provisions apply, or apply differently.
 - Clause 4 defines “sales contracts”. This is consistent with the category of “sales contracts” under the CRD and certain provisions of this Chapter which derive from the CRD therefore apply to this category of contracts. For a contract for the supply of goods to be a sales contract, the goods must have a monetary price. Under clause 3(7) the category of “sales contracts” includes contracts under which services or digital content are provided as well as goods. Examples of these types of contracts include a contract for the supply and installation of kitchen units or a car service including the supply of new parts.

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

At present, contracts under which goods were supplied together with services are subject to section 1 of the SGSA.

- Clause 5 defines contracts for hire of goods, as they apply between a trader and a consumer. This is consistent with the definitions under sections 6 and 11G of the SGSA, save that it applies only to trader to consumer contracts (as does all of this Part of the Bill).
- Clause 6 defines hire-purchase agreements for goods, as they apply between a trader and a consumer. This is consistent with the definitions in section 189 of the Consumer Credit Act 1974 and section 15 of the SGITA, save that it applies only to trader to consumer contracts (as does all of this Part of the Bill).
- Clause 7 defines contracts for the supply of goods by a trader to a consumer where no monetary value is assigned to the goods. This is a narrower category than “transfer” under section 1 of the SGSA.

What statutory rights are there under a goods contracts?

57. Clauses 8 to 16 set out requirements which the goods supplied, or the trader, must meet. Under clauses 8 to 13 and 16, the contracts are to be treated as containing terms that the relevant requirements will be met - or, in the case of clause 11, certain details are to be treated as a term of the contract with which the parties must comply. That is to say that the requirements set by these provisions form part of the contract without either party needing to refer to them.
58. Clauses 8 to 10 and 12 to 14 re-transpose Article 2 of the CSD, regarding conformity of goods with the contract. The original transposition was made in the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) which amended the SGA and the SGSA.

Clause 8: Goods to be of satisfactory quality

59. This clause provides that goods supplied under a contract for the supply of goods (as defined in clause 3 above) must be of satisfactory quality. It details aspects of quality which may be considered when assessing whether the goods are satisfactory – although the clause only gives an indication of such aspects, not an exhaustive list. This clause corresponds to section 14 SGA, section 10 SGITA and sections 4, 9, 11D and 11J SGSA in so far as they relate to satisfactory quality. But as with all of this Part it only relates to trader to consumer contracts.
60. *Subsection (2)* provides that the test of whether or not the quality of the goods is satisfactory is determined by what a reasonable person would expect of the goods in question, taking into consideration all relevant circumstances including any description, the price and any public statements by the trader or producer or their representatives, such as statements made in advertisements or on the labels of goods.

For example, a lower standard might be expected of cheap or disposable goods in comparison to an equivalent item that cost more or was advertised as being particularly durable.

61. *Subsections (5) and (6)* provide that the circumstances to be considered include public statements about the goods, for example, any claims made in advertising or labelling. However, under subsection (7) such statements are not to be considered as relevant if the trader was not (and could not reasonably have been expected to be) aware of the statement or if the statement was withdrawn or corrected before the contract was made. The statement is also not to be considered if the consumer's decision could not have been influenced by it.
62. *Subsection (4)* provides that if the consumer is made aware of a particular defect before making the contract then that defect will not be grounds for finding the goods to be unsatisfactory. If the consumer examined the goods before making the contract then a defect which should have been revealed by the examination will not be grounds for finding the goods to be unsatisfactory. If the goods were supplied by sample (even if the consumer did not actually examine the sample) then a defect which should have been revealed by a reasonable examination of the sample will not be grounds for finding the goods to be unsatisfactory.

Clause 9: Goods to be fit for particular purpose

63. This clause provides that if a consumer acquires goods for a specific purpose, and has made this purpose known to the trader beforehand, the goods must be fit for that purpose unless the consumer does not rely - or it would be unreasonable for the consumer to rely - on the skill or judgement of the trader. This clause corresponds to section 14(3) SGA, section 10(3) SGITA and sections 4(4)-(6), 9(4)-(6), 11D(5)-(7) and 11J(5)-(7) SGSA, but as with all of this Part it only relates to trader to consumer contracts.
64. *Subsection (2)* makes similar provision for transactions in which the consumer makes the purpose known to a credit broker but actually contracts with another party. For example, a consumer buying goods in a store on a payment plan may make a contract with a finance company (which would be the trader) which is introduced by the store (as credit-broker), with the store selling the goods to the finance company in order for it to sell them to the consumer. In this situation, if the consumer makes the specific purpose known to the salesperson in the store (the credit-broker) that is sufficient and the goods must be fit for that purpose -there is no need for the consumer to also have made it known to the credit provider. "Credit-broker" is defined in clause 60.

Clause 10: Goods to be as described

65. This clause provides that where goods are supplied by description, the goods must be as described. Goods can be supplied by description even if they are available for the consumer to see and select, for example on the shelves of a shop. This clause corresponds to section 13 SGA, section 9 SGITA and sections 3, 8, 11C and 11I

SGSA. But as with all of this Part it only relates to trader to consumer contracts.

66. This clause also, through *subsections (4) and (5)*, provides that certain information required by Articles 5.1(a) and 6.1(a) of the CRD forms part of the contract. Articles 5 and 6 of the CRD require traders to provide certain information to consumers before consumers are bound by a contract. The Regulations to implement the CRD will make the provision of information a duty on traders in the UK. The information required by Articles 5.1(a) and 6.1(a) of the CRD relates to the main characteristics of the goods. If the information regarding the main characteristics (as required by the CRD) is not complied with, the consumer can pursue the protections for breach of clause 10, as set out in clause 18.
67. Subsection (5) makes clear that the inclusion of this information in the contract does not stop the trader and consumer from later agreeing a change to the contract if, for example, circumstances change. A trader will not however be able to change the effect of this information without the agreement of the consumer. Nor can the parties agree a change which would deprive the consumer of his or her rights under this Chapter (see clause 32).

Clause 11: Other pre-contract information included in contract

68. This clause establishes that any other information provided under the requirements of Articles 5.1(other than paragraph (a)) and 6.1 (other than paragraph (a)) of the CRD, but which does not relate to main characteristics of the goods so does not fall under clause 10, also forms part of the contract between the trader and the consumer..
69. *Subsection (3)* makes clear that the inclusion of this information in the contract does not stop the trader and consumer from later agreeing a change to the contract if, for example, circumstances change. A trader will not however be able to change the effect of this information without the agreement of the consumer. Nor can the parties agree a change which would deprive the consumer of his or her rights under this Chapter (see clause 32).

Clause 12: Goods to match a sample

70. Under this clause, if a consumer enters into a contract for goods on the basis of a sample, the final goods delivered must match the sample in terms of quality and appearance. This differs from the following clause (Goods to match a model seen or examined) in that a sample is usually only a representative part of the whole goods in question. An example is a consumer buying curtains after having looked at a swatch of the material. This clause corresponds to section 15 SGA, section 11 SGITA and sections 5, 10, 11E and 11K SGSA. But as with all of this Part it only relates to trader to consumer contracts.

Clause 13: Goods to match a model seen or examined

71. This clause establishes that if the trader displays or provides a model of the goods in question, then the goods received should match that model, except that any differences brought to the consumer's attention before the contract is made would not

breach this protection.

72. An example is a consumer viewing a television on the shop floor but receiving a boxed television from the stockroom. Under this clause the delivered model should match the viewed model (unless any differences are brought to the consumer's attention before it is bought).

Clause 14: Installation as part of conformity of the goods with the contract

73. This clause provides that if a contract is for installation of goods (as well as the supply of the goods) and the trader, or someone appointed by the trader, installs the goods but fails to do so with reasonable skill and care or in compliance with information which forms part of the contract for services under clause 52, then the goods are to be taken to be not in conformity with the contract.

Clause 15: Goods not conforming to contract if digital content does not conform

74. This clause establishes that if the goods include digital content and the digital content does not conform to the contract, then the goods are to be taken to be not in conformity with the contract.

75. This clause applies irrespective of the nature of the relationship between the digital content and the rest of the goods. For example, for a washing machine to function properly it would be necessary for the programme (i.e. the digital content) to be functional and this clause would apply if that were not the case. Equally, if digital content such as a computer game was provided on disk, if the game was faulty this clause would apply.

Clause 16: Trader to have right to supply the goods etc

76. This clause protects the consumer by making it a term of the contract that the trader has the right to sell or transfer the goods or to transfer possession of them, at the point when the sale, transfer or hire takes place. This clause corresponds to section 12 SGA, section 8 SGITA and sections 2, 7, 11B and 11H SGSA. But as with all of this Part it only relates to trader to consumer contracts.
77. The clause also guarantees that no other person should have rights over the goods (e.g. a right to use the goods), unless the consumer is made aware of this before making the contract and that the consumer's possession of the goods should not be disturbed by anyone with rights over the goods (except any rights of which the consumer is made aware). These protections do not apply to hire contracts.
78. In the case of hire contracts, there will be other parties with rights over the goods – for example, the goods will be owned by someone other than the consumer, as the consumer is not contracting to own the goods but only to use them. Under *subsection (3)*, the consumer's use of the goods may only be interrupted by the owner of the goods or any third party with rights over the goods if the consumer has been informed of that person's rights over the goods before making the contract.

Clause 17: No other requirement to treat term about quality or fitness as included

79. This clause corresponds to section 14(1) of the SGA, but for contracts between a trader and consumer. The clause serves to state that, unless there is an express term concerning the quality of the goods or the goods' fitness for a particular purpose the contract should not be treated as including any such terms, other than those set out in clauses 8, 9 and 12.

What remedies are there if statutory rights under a goods contract are not met?

80. Clauses 18-25 set out the remedies that apply if the consumer's statutory rights covered in clauses 8 to 16 are not met.
81. Clauses 18 and 23-24 re-transpose Article 3 of the CSD (originally transposed by the Sale and Supply of Goods to Consumers Regulations 2002 which amended the SGA and the SGSA).

Clause 18: Consumer's rights to enforce terms about goods

82. Depending on the statutory right which is breached, the consumer may have an early right to reject, a right to have the goods repaired or replaced, or (if this is not possible or fails to address the fault) a right to have the purchase price reduced (and keep the goods) or a final right to reject the goods. *Subsections (1) to (5)* outline these rights and serve to signpost the reader to the relevant clauses that detail these remedies and their application.
83. Under subsection (5), if the requirement for the trader to have the right to sell or transfer the goods or possession of them (clause 16(1)) is breached, the consumer has a right to reject, as described further in clause 19. The other rights provided by clause 16 – that no other person should have rights over the goods, unless the consumer is made aware of this before making the contract and that the consumer's possession of the goods should not be disturbed by anyone with rights over the goods – are covered by *subsection (7)*, as breach of these rights does not give rise to a right to reject or the other statutory remedies, but the consumer may seek damages.
84. *Subsection (6)* makes clear that the availability of the remedies specified in subsections (2) to (5) is subject to the particular rules for delivery of the wrong quantity and instalment deliveries in clauses 26 and 27. Therefore, if a trader delivers the wrong quantity of goods, or the parties agree that the goods will be delivered in instalments, then the remedies will be determined by clause 26 or 27, rather than clause 18.
85. Subsection (7) serves as a reminder that the statutory remedies set out in clause 18 do not mean the consumer cannot pursue other remedies. The consumer may pursue common law remedies such as claiming damages or may rely on the breach to relieve the consumer of the obligation to pay the price or some of it (essentially setting the breach off against the price) or may pursue equitable remedies. The consumer may

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not, however, recover more than once for the same loss.

86. *Subsection (8)* provides that if a fault arises in the first 6 months from delivery, then it is presumed to have been present at the time of delivery unless the trader proves otherwise or this presumption is incompatible with the nature of the goods or the particular fault. This subsection corresponds to section 48A(3) and (4) of the SGA and section 11M(3) and (4) of the SGSA.

87. In summary, the statutory remedies that potentially apply for breach of the consumer's statutory rights are as follows:

Statutory right being breached	Statutory remedies that may apply
Goods to be of satisfactory quality (clause 8)	<ul style="list-style-type: none"> • The early right to reject (clauses 19-22) • The right to repair or replacement (clause 23) • The right to a price reduction or the final right to reject (clause 24)
Goods to be fit for particular purpose (clause 9)	<ul style="list-style-type: none"> • The early right to reject (clauses 19-22) • The right to repair or replacement (clause 23) • The right to a price reduction or the final right to reject (clause 24)
Goods to be as described (clause 10), including conforming to information re material characteristics under the CRD	<ul style="list-style-type: none"> • The early right to reject (clauses 19-22) • The right to repair or replacement (clause 23) • The right to a price reduction or the final right to reject (clause 24)
Conformity with contract information provided pursuant to the CRD (clause 11)	<ul style="list-style-type: none"> • The right to a price reduction (clause 24)
Goods to match a sample (clause 12)	<ul style="list-style-type: none"> • The early right to reject (clauses 19-22) • The right to repair or replacement (clause 23) • The right to a price reduction or the final right to reject (clause 24)

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published on 12th of June, 2013.*

Goods to match a model seen or examined (clause 13)	<ul style="list-style-type: none"> • The early right to reject (clauses 19-22) • The right to repair or replacement (clause 23) • The right to a price reduction or the final right to reject (clause 24)
Installation in breach of reasonable care and skill requirement (clause 14)	<ul style="list-style-type: none"> • The right to repair or replacement (clause 23) • The right to a price reduction or the final right to reject (clause 24)
Goods not conforming to contract if digital content does not conform (clause 15)	<ul style="list-style-type: none"> • The early right to reject (clauses 19-22) • The right to repair or replacement (clause 23) • The right to a price reduction or the final right to reject (clause 24)
Trader to have right to sell or transfer the goods or to transfer possession (clause 16(1))	<ul style="list-style-type: none"> • The right to reject (clause 19)
Goods to be free from any charge or encumbrance not disclosed or known (clause 16 (2) and (5))	<ul style="list-style-type: none"> • Statutory remedies do not apply but consumers may claim damages (clause 18(7))
Consumer to enjoy quiet possession of the goods (clause 16(2), (3) and (6))	<ul style="list-style-type: none"> • Statutory remedies do not apply but consumers may claim damages (clause 18(7))

88. Under the law of England and Wales and of Northern Ireland, claims for breach of contract are subject to a limitation period of six years from the date of the breach of contract, whereas in Scottish law the limitation period is five years. Because the protections provided under this Part of the Bill operate on the basis of contract law, the consumer has 6 years (or 5 years in Scotland) within which they may pursue remedies for breach of one of the statutory rights. This does not mean that a consumer may seek a remedy under the Bill for any fault arising in goods at any time in the six (or five) years following delivery, but only if one of the statutory rights is breached. The statutory right under clause 8 (goods to be of satisfactory quality) will only be breached if goods are not of the standard which a reasonable person would consider to

be satisfactory, taking into account circumstances including the price and any description given. This test of reasonableness is provided under clause 8(2). For example, the statutory right may not be breached and so a consumer would not be able to obtain a remedy if, say, a very cheap kettle stopped working fully after four years, as a reasonable person might not expect a bottom of the range kettle to last that long.

Clause 19: Right to reject

89. This clause serves to explain the remedies referred to as a “right to reject” and how this operates.
90. The clause defines what a right to reject means in terms of what it allows the consumer to do: reject the goods, treat the contract as ended and obtain a refund, as well as providing what the consumer must do either to reject the goods (as per subsection (1)(a)) or treat the contract as at an end (as per subsection (1)(b)).
91. *Subsection (6)* clarifies that when the consumer indicates to the trader that the goods are rejected and (if applicable) the contract is at an end, as long as the meaning of the indication is clear, it does not matter what form it takes.
92. If money was not used to pay for the goods, under *subsections (8) and (9)*, the consumer is not entitled to money back but the “refund” would be a return of whatever the consumer used to pay for the goods. If this cannot be returned to the consumer due to the nature of the exchange, then, under *subsection (12)*, the consumer may not demand a refund. Examples of non-monetary transfers include:
- A toy “bought” with vouchers collected from cereal packets. In this case it would be possible to return equivalent vouchers (even though they would not necessarily be the actual vouchers that the consumer cut out) and a “refund” could therefore take that form under subsection (8).
 - A microwave given to the consumer by a trader specialising in refurbishment of white-goods, in exchange for the consumer’s old fridge-freezer. In this case, if the fridge-freezer was still available in an unchanged state, then this could be returned to the consumer as a “refund” under subsection (9), but if it was no longer available, or had been refurbished, then a refund would not be possible.
93. *Subsection (10)* provides that, in the specific case of hired goods, the consumer may not claim a refund on any money paid (or whatever was transferred in place of money) for hire that the consumer enjoyed. Any refund will only cover money paid for a period of hire that was lost due to the contract being ended. For example, if a consumer hired goods for 1 month and paid in advance, but after 3 weeks a fault manifested, the consumer would only be able to seek a refund for the 1 week when the goods could not be used. Under subsection (12)(c), if something other than money was transferred in exchange for the hire of the goods, and this cannot be divided to account for the time that the consumer did not get use of the goods, no refund may be

pursued.

94. *Subsection (11)* establishes that for contracts other than hire, and where payments for the goods are made over time (conditional sale and hire purchase contracts), any claim for a refund can only be made against money that has already been paid up to that point. For example if a £500 washing machine was found to be faulty after the consumer had paid £350, the maximum refund would be £350.

Clause 20: Losing the early right to reject

95. Clauses 20-22 address the “early right to reject”, which is a right to reject (as explained in clause 19) which is limited in duration by being lost in the circumstances set out in these clauses. This clause provides that the early right to reject is lost if either the time limit for the right passes, or if the consumer accepts the goods within the time limit. The following clauses (21 and 22) explain how each of these provisions operates.
96. Under this clause (*subsection (3)*) the trader cannot reduce the 30 day period for the right to reject, but may opt to extend it.

Clause 21: Time limit for early rejection

97. This clause establishes the default time limit of 30 days for the early right to reject. The one exception (established under *subsection (2)*) is that for perishable goods which would not be reasonably expected to last longer than 30 days, the rejection period lasts only as long as it would be reasonable to expect those goods to last.
98. The 30 day period begins the day after the latest of the following:
- The consumer obtains ownership of the goods (i.e. the consumer buys the goods) or, for hire and hire-purchase, obtains possession
 - The goods have been delivered
 - The contract has been completed. In most cases completion of the contract will occur once the goods have been paid for and delivered, but in some cases, such as where the goods must be fitted, (for example double glazed windows), the contract will be completed later when both parties have performed their obligations (such as the fitting of the goods).
99. This clause also provides that the 30 day period will be paused for the duration of any repair or replacement (the waiting period) that the consumer and trader agree. On return of the goods to the consumer, the consumer has the remainder of the period, or 7 days (whichever is longer), within which they can still exercise the early right to reject.
100. *Subsections (5) and (6)* detail when the waiting period starts and stops. The starting point is dependent on the actions that the trader requires of the consumer, as detailed

under 5(a), (b) and (c).

Clause 22: Losing the early right to reject by accepting the goods

101. This clause explains how a consumer accepts goods. Acceptance is the criterion by which the consumer can lose the early right to reject before reaching the end of the time limit for the right (which is covered by clause 21).
102. *Subsection (1)* provides that a consumer cannot be taken to have accepted the goods (losing the early right to reject) before the end of the time limit without a reasonable opportunity to examine them. This clause corresponds to section 35(2) of the SGA, but is subject to the time limit under clause 21 and as with all of this Part it only relates to trader to consumer contracts .
103. *Subsection (4)* provides a right of partial rejection, that the consumer may accept some of the goods without being deemed to have automatically accepted the remainder. *Subsection (5)* provides that, if the breach giving rise to the right to reject does not affect all of the goods then, if the consumer chooses to accept some of the goods, all of the unaffected goods must be accepted. For example, if some of the goods are faulty and others are fine then the consumer can choose to keep the ones which are of satisfactory quality, but cannot keep only some of the satisfactory ones. These subsections correspond to section 35A of the SGA, but as with all of this Part they only relate to trader to consumer contracts
104. *Subsections (6) and (7)* correspond to section 35(7) of the SGA and provide that where the goods form part of a “commercial unit” (defined in subsection (7)) the consumer may not accept some of the goods but not others. For example, if furniture was sold as a three-piece-suite, but there was a fault with one of the chairs, the consumer would not be entitled to reject only the chair.

Clause 23: Right to repair or replacement

105. This clause details a consumer’s right to insist on a repair or replacement of faulty goods, the cost of which must be borne by the trader.

Clause 24: Right to price reduction or final right to reject

106. This clause provides for the consumer’s rights to reduction of the purchase price or to reject the goods and obtain a partial refund. These are generally available if repair or replacement of the goods has not been possible or has not corrected the fault. A price reduction is also the remedy for breach of a term included in the contract as a result of clause 11. Under *subsection (2)*, if the consumer transferred something other than money for the goods, and the thing transferred cannot be divided sufficiently to give back to the consumer the appropriate amount, the consumer may not seek a reduction in the purchase price.
107. This clause largely corresponds to section 48C of the SGA and section 11P of the SGSA, but there are some changes as outlined below.

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

108. The clause provides that if repair or replacement was impossible or if the consumer's goods continue to be substandard after the consumer has either
- already undergone one attempt to repair or replace the goods by the trader; or
 - sought a repair or replacement but this was not carried out within a reasonable time or without significant inconvenience to the consumer.

Then the consumer may either

- keep the goods and insist on a reduction in the price; or
 - reject the goods and obtain a refund which may be subject to a deduction to take account of any use the consumer has had of the goods.
109. *Subsections (6) and (7)* provide that if the final right to reject is exercised within 6 months of delivery of the goods, the trader may not apply a deduction to the refund to account for the use that the consumer has had (that is to say that the consumer will receive a full refund) unless there is a proven second hand value of the goods. In order to prove a second hand value the trader is required to give the consumer independent evidence of the goods in question (or similar goods if the consumer agrees that they are equivalent) and evidence of a second hand market for the goods. If such evidence does exist, then a deduction for use may be applied within the initial 6 month period (and after that period) and the second hand value represents the minimum refund that the trader may award (taking into account the actual use that the consumer has had of the goods).

Clause 25: Powers of the court

110. This clause sets out powers that a court may use in disputes between a consumer and trader. The clause has substantively the same effect as section 48E of the SGA and section 11R of the SGSA for contracts between a trader and consumer, but reflects the limits on deduction for use under section 24(6).

Other rules about remedies under goods contracts

Clause 26: Delivery of wrong quantity

111. This clause corresponds to section 30 of the SGA, but is not limited to sales contracts and as with all of this Part it only relates to trader to consumer contracts.
112. This clause provides that the consumer may reject the goods if the wrong quantity is delivered, but if they choose to accept the goods then they must pay the contract rate for what they receive. If more is delivered than was contracted for, the consumer has the additional option to reject the excess and keep the contracted amount.

Clause 27: Instalment deliveries

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- 113. This clause corresponds to section 31 of the SGA, but is not limited to sales contracts and as with all of this Part it only relates to trader to consumer contracts.
- 114. Under this clause the consumer is not required to accept delivery in instalments unless they agree to it. If they do agree and one or more of the deliveries is defective (for example because the goods in that instalment are substandard), depending on the circumstances, the consumer may have a right to compensation or to treat the whole contract as ended. Which of these rights applies depends on the specific circumstances and must be judged on a case-by-case basis. However, *subsection (3)* provides that if a delivery of an instalment fails to comply with clause 29, then it is clause 29 that applies, and not clause 27.

Clause 28: Consignation, or payment into court, in Scotland

- 115. This clause is based on section 58 of the SGA, but is not limited to sales contracts and as with all of this Part it only relates to trader to consumer contracts.
- 116. This clause applies where a trader is pursuing payment from a consumer for goods that a consumer could otherwise have opted to reject but chose not to, including where the consumer argues, in answer to a demand for payment, that the price should be reduced due to the trader's breach. It provides that a Scottish court may require that consumer to pay the outstanding price (or part of it) to the court or a third party under court authority, or to provide other security. This serves to provide comfort for the trader, that the consumer will pay if the court finds that the consumer is obliged to pay the price.

Other rules about goods contracts

Clause 29: Time for delivery of goods

- 117. This clause implements Article 18 of the CRD and applies only to sales contracts between traders and consumers for goods. Sales contracts are defined in clause 4. If the parties have agreed that the goods are to be delivered in instalments, this clause applies to delivery of each instalment. "Delivery" is defined in clause 60.
- 118. Under this clause, unless a separate agreement is reached between the consumer and trader, the trader must deliver the goods without undue delay and within 30 days after the contract is made.
- 119. If the trader fails to deliver the goods on an agreed date or within the 30 days, under *subsection (3)*, the consumer may state a further reasonable timeframe within which the trader is required to deliver the goods.
- 120. If the trader again fails to deliver the goods in this time frame, then the consumer may treat the contract as at an end.
- 121. Where the trader refuses to deliver the goods or delivery within the initial timeframe

was essential (either because the consumer told the trader that it was essential or this was implicit from the circumstances) then the consumer may treat the contract as at an end if the trader fails to meet the initial delivery period. The consumer does not have to give the trader a second opportunity to deliver in these circumstances. Examples of goods for which delivery within the initial delivery period might be taken to be essential would include a wedding dress or birthday cake.

122. The consumer may choose to reject the goods, or some of them, rather than treating the contract as at an end. For example, the consumer may wish to reject an instalment of goods which the trader failed to deliver within the relevant timeframe(s), but may wish to keep earlier instalments or continue to receive subsequent ones.

Clause 30: Passing of risk

123. This clause provides where risk relating to the goods lies before and after transfer of physical possession of the goods to the consumer. Under the clause, the risk lies with the trader until the consumer has physical possession of the goods, at which point risk is transferred to the consumer. However, if the consumer stipulates that the trader must use a carrier of the consumer's choosing, and that carrier was not offered by the trader, the risk transfers to the consumer at the time that the goods are passed to the carrier.

Clause 31: Goods offered with a guarantee

124. This clause replaces regulation 15 of the Sale and Supply of Goods to Consumers Regulations 2002. These regulations transposed the CSD and regulation 15 implemented Article 6 of the CSD. This clause therefore serves to transpose Article 6 again. Under this clause, any guarantee provided alongside the goods is legally binding. In particular, the guarantee must

- be written in plain, intelligible language and, if the goods are offered in the UK, in English
- include the name and address of the guarantor
- state the duration and territorial scope of the guarantee
- be made available to the consumer in writing and within a reasonable time

Can a trader contract out of statutory rights and remedies under a goods contract?

Clause 32: Liability that cannot be excluded or restricted

125. This clause serves to prevent traders from contracting out of the consumer's statutory rights under clauses 8 to 14, as well as clauses 29 and 30 on time of delivery and the passing of risk and, for contracts other than hire, the requirement on right to title contained in clause 16. This clause also has the effect that any term in a contract

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

which seeks to prevent the consumer from having access to the statutory rights and remedies or to make exercising these rights less attractive to the consumer by either making it more difficult and onerous to do so, or by placing the consumer at a disadvantage after doing so, will also be void. For hire contracts, contracting out of the protection that the trader must have the right to transfer possession (under clause 16), is not prevented by this clause, but is subject to the test of fairness in clause 65.

126. This clause corresponds to sections 6 and 7 of the Unfair Contract Terms Act 1977, but as with all of this Part it only relates to trader to consumer contracts. The clause also serves to implement Article 25 of the CRD (in relation to those Articles of the CRD implemented in this Chapter) and Article 7(1) of the CSD.

Clause 33: Other interaction between contractual provisions

127. This clause corresponds to section 55 of SGA for contracts between a trader and consumer. The clause serves to apply general contractual principles to supply of goods transactions, in that, apart from the core statutory rights that are protected by clause 32, the consumer and trader are free to add or remove contractual terms as is mutually agreeable.

Clause 34: Contracts applying law of non-EEA state

128. The parties to a contract may agree that the contract is to be governed by the law of a particular country. This might be because the trader is based in a country other than the UK. The Rome I Regulation governs which laws apply to those contracts. In some circumstances, despite another law being chosen, laws of the consumer's habitual residence apply if they cannot be derogated from by agreement.
129. This clause provides that clauses 32 and 33 above will apply to protect a consumer under a sales contract (as defined in clause 4), where a contract has a close connection with the UK, even if the contract states the law of a non-EEA State applies (the EEA is the European Economic Area of the EU plus Iceland, Liechtenstein and Norway). The provision is included to comply with Article 7(2) of the CSD, which requires that the consumer should not be deprived of its protection, where a contract has a close connection with a Member State, even if the contract states the law of a non-Member State applies. It does not cover restriction of liability under clauses 29 and 30, as these derive from the CRD which does not have this requirement.

CHAPTER 3 DIGITAL CONTENT

Summary and Background

130. Chapter 3 concerns contracts where a trader provides digital content (data produced and supplied in digital form, e.g. software, music, computer games, 'apps') to a consumer. For contracts involving digital content that has been paid for, it sets out:
- The rights consumers have when they pay a trader to provide digital content to them under contract; these are in effect contractual rights and if they are

breached it is a breach of contract;

- when the rights apply;
- what the consumer is entitled to request (and the trader must offer) if these rights are breached: where the trader has no right to supply the digital content the consumer has a right of immediate refund; where other statutory rights about the digital content are breached, that the trader repairs or replaces the digital content or failing that, offers a reduction in the price of the digital content; we refer to these as “statutory remedies”;
- that the statutory remedies do not prevent the consumer claiming other actions from the trader where they are available according to general contract law (e.g. a claim for damages, termination of the contract); and
- that the trader cannot “contract out” of these provisions

131. For digital content provided under contract (whether free or paid for), this Chapter sets out:

- that the consumer can claim limited damages if digital content has damaged other digital content, or the consumer’s device, if they can prove that the trader failed to exercise reasonable care and skill in supplying the digital content.

132. A legal research paper commissioned by BIS examined core consumer protections relating to digital content and found that it was not clear what, if any, legal rights the consumer has if digital content proves defective or fails to live up to the consumer’s expectations. This is because it is not clear whether digital content would be described as goods, services, or something else. The paper concluded that the law in respect of consumer rights in digital content should be clarified¹⁶ and that

“In short, digital products should be treated exactly as physical goods, so far as that is possible”.

133. Regulations to implement the Consumer Rights Directive (“CRD”) will introduce a definition of digital content which is used in this Bill. The Regulations will also set out when the consumer has a right to withdraw from digital content contracts that are concluded at a distance (e.g. over the internet), or off premises. They will also introduce requirements for digital content traders to provide pre-contractual information on the functionality and interoperability of digital content as well as

¹⁶ Bradgate, R. (2010) ‘Consumer rights in digital products: A research report prepared for the UK Department for Business, Innovation and Skills’, Institute for Commercial Law Studies, Sheffield and BIS, available here: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products>.

information on the main characteristics of the digital content. The Regulations will set out the obligation to provide the information but, once it is provided, the Bill makes clear that the information will form part of the contract. Where the information is concerned with the digital content itself it will be treated the same as any other description of the digital content

134. The Government consulted formally on proposals to clarify consumer rights in relation to digital content from July to October 2012 and, since 2010, has also informally consulted a number of consumer and business stakeholders on various aspects of the proposals.
135. The Government published a response to its consultation¹⁷. Most responses to the consultation supported the creation of a new category of digital content in consumer law with a bespoke set of rights and remedies appropriate for the unique nature of digital content.

What digital content contracts are covered?

Clause 35: Contracts covered by this chapter

136. This clause clarifies which contracts to provide digital content are covered by this Chapter. It clarifies that this Chapter will apply to contracts between a trader and a consumer where a trader provides or agrees to provide digital content that has been:
 - Paid for with money, or associated with any paid for goods, digital content or services (e.g. free software given away with a paid-for magazine), and/or
 - Paid for with a facility, such as a token, virtual currency, or gift voucher, that was originally purchased with money (e.g. a magic sword bought within a computer game that was paid for within the game using “jewels” but those jewels were originally purchased with money).
137. Clause 48 (compensation for damage to other digital content) applies to all digital content provided under contract, including where no money is paid.
138. The Government retains a reserve power to extend the coverage of the digital content provisions to digital content contractually provided in exchange for something else of value other than money (e.g. in exchange for personal data) in the future, should the Secretary of State be satisfied that there is significant consumer detriment resulting from these sorts of contracts.

What statutory rights are there under a digital content contract?

¹⁷ Consumer Rights Bill Government Response (URN: BIS/13/916)

Clause 36: Digital content to be of satisfactory quality

139. In line with the findings of the Bradgate Report, the rights follow a similar approach as that taken for goods (clause 8).
140. This clause clarifies that digital content sold to consumers must be of satisfactory quality according to the expectations of a reasonable person. There are several different factors that will affect what the quality expectations of a reasonable person. These are any description of the digital content, the price paid and any other relevant circumstances (which includes any public statement about the characteristics of the digital content made by the trader or the manufacturer).
141. This means that, as with goods, this quality standard is flexible to allow for the many different types of digital content. For example, the reasonable expectations of quality for a 69p app would not be as high as for one worth £5.99. The clause also sets out other matters that can be taken into account when assessing the quality of the digital content, such as its state and condition, fitness for purpose and durability. This is not, however a comprehensive list. Other relevant circumstances may include the type of digital content (e.g. a reasonable person may expect bugs in a complex new game on release, but not a more simple piece of software) or the way in which it is accessed (e.g. on a disk or downloaded from the Internet).
142. As with goods, quality does not refer to subjective judgements as to the artistic value of the content itself (e.g. whether or not a book was interesting or well written).
143. Digital content will not be considered as substandard if the consumer was made aware of the aspect of the digital content that makes it unsatisfactory before the contract was concluded – either because it was specifically drawn to their attention or would have been apparent from inspection of the digital content or a trial version. These provisions and those relating to public statements about specific characteristics of the digital content are the same as those for goods (clause 8).

Clause 37: Digital content to be fit for a particular purpose

144. If the consumer specifies that the digital content will be used for a particular purpose, the digital content must be fit for that particular purpose. This clause corresponds to clause 9 in relation to goods. For example, if a consumer tells a trader he wants a piece of educational software so that his/her pre-school child can use it then, if it is only suitable for an older child, it would not be fit for that particular purpose (i.e. use by a pre-school child).
145. *Subsection 2* covers digital content supplied that is sold to a trader by a credit broker but the consumer does all the negotiations with the credit broker. For example, a consumer may talk to a salesperson about which is the appropriate software to edit a film they are making on their personal computer, and that salesperson may actually be a credit broker who sells it to the store with which the consumer contracts to buy the software, which they then pay for in instalments. This clause makes sure that the digital content can be held to be fit for the purpose the consumer told the salesperson,

even though they do not contract with the salesperson directly.

Clause 38: Digital content to be as described

146. There is a similar right for goods (clause 10). This clause clarifies that the digital content must match any description of it given by the trader to the consumer, and must also match any trial version. This is an important right in the digital content context where people may try a demonstration of the digital content before buying the full version. However, even if it matches a trial version but does not meet the description (where they differ), then the digital content will be in breach of this clause.
147. Articles 5 and 6 of the CRD require traders to provide certain information to consumers before consumers are bound by a contract. The Regulations to implement the CRD will make the provision of information a duty on traders in the UK. This type of information that is required can be split into two categories: information about the digital content (the main characteristics, interoperability and functionality) and other information (e.g. the trader's name and address). In order to implement the obligation to enforce these information requirements the Bill makes clear that pre-contractual information will form part of the contract. This clause makes clear that the former type of information (about the main characteristics of the digital content or the functionality or interoperability) also forms part of the description and therefore part of the contract.

Clause 39: Other pre-contract information included in the contract

148. This clause establishes that the other type of information described above (e.g. information on the trader's name and address) also forms part of the contract between the trader and the consumer. Like the provisions covered in paragraph 66 above, this implements the obligation to enforce relevant parts of Articles 5 and 6 of the CRD.

Clause 40: No other implied term about quality or fitness for a particular purpose

149. The clause makes clear that, unless there is an express term concerning the quality of the digital content or their fitness for a particular purpose the contract should not be treated as included any such terms, other than those set out in clause 36 and 37.

Clause 41: Time when, and period for which, digital content is provided

150. Digital content can be provided on a tangible medium (e.g. on a disk or preloaded on a device) or in other ways, such as through streaming or downloading. When it is not provided on a tangible medium, it will usually travel through one or more intermediaries before it reaches the consumer's device. Some of these intermediaries, for example an Internet Service Provider ("ISP"), will be within the contractual control of the consumer. This means that the consumer can choose who provides this service, and will have a contractual agreement with them. Other intermediaries, however, will be in the contractual control of the trader, or under arrangements initiated by the trader. For example, a provider of streamed movies (the trader) may contract with a content delivery network who will deliver the data from the trader's

server to the ISPs.

151. The intention of this clause is that the digital content should meet the quality standards, be fit for purpose and match the description at the time it either reaches the consumer's device or reaches a trader with which the consumer contracts for the delivery of their digital content (e.g. their ISP), whichever is sooner. Where digital content fails to meet the quality standards because of a problem with the consumer's device or with the service provided by a trader with whom the consumer has chosen to contract, the trader providing this digital content would not be liable for the problems with the quality standards. If the problem is with the consumer's network access provider (e.g. ISP, mobile network provider, cable provider), then this service provider may be liable under the services provision of the Bill (e.g. if the consumer can demonstrate they did not provide the service with reasonable care and skill – in relation to Services (see Chapter 4)). However, where the digital content fails to meet the quality standards because of a problem with either the trader or an intermediary who is in the contractual control of the trader (either directly or indirectly), the trader will be liable.
152. *Subsection 2* provides that the trader is liable for quality issues arising from the delivery of digital content up until the point at which it reaches the consumer's device (for example, directly to a consumer's satellite dish) or a trader within the contractual control of the consumer (such as an ISP), whichever is sooner. For example, if a consumer buys a music file and it fails to download correctly, the trader would be required to provide an appropriate remedy to the consumer if the fault occurred within the contractual control of the trader (either directly or indirectly).
153. *Subsection 3* applies to digital content that is of an interactive nature (that is, its use requires repeated access to the internet with some or all of the digital content being transferred between the internet and the consumer's device). Examples of this type of digital content would be massively multiplayer online games ("MMOs") and software accessed on the Cloud. *Subsection (3)(a)* provides that for such interactive digital content, the consumer should be able to access their digital content in this manner for a reasonable period of time. For example, if a consumer has purchased an MMO game they can expect to be able to play it online for a reasonable period of time. *Subsection (3)(b)* also provides that when digital content is of an interactive nature, the quality rights set out in clauses 36 to 38 (satisfactory quality, fitness for purpose and meeting the description), should apply to the digital content for that period of time. For example, as well as being able to access the MMO game, the game should meet the quality standards for a reasonable period of time. So such types of interactive digital content may be in breach of the rights in this Chapter if the services that support their access are not working properly, as well as if the original digital content itself is substandard.

Clause 42: Rights to modify digital content

154. This clause reflects a unique issue for digital content in that manufacturers and traders are able to change or update digital content after the initial provision of the digital

content. This may be set out in the terms and conditions of the licence. In the majority of cases, this is to the benefit of consumers and often includes important updates to the digital content. Requiring consent for every update would create problems for business, both due to the logistics of contacting every consumer and getting their consent and the problems that would arise when some consumers do not accept updates, thus resulting in many different versions of software in circulation and unnecessary disputes with consumers when digital content stops working due to lack of updates.

155. This clause therefore does not prevent a trader or a third party (such as the digital content manufacturer) updating digital content (without needing to request the consumer's permission), as long as the contract stated that such updates would be provided. However, following any updates, the digital content must still meet the quality rights, (i.e. it must still be of satisfactory quality, be fit for purpose and match the description given).
156. It is for a consumer to prove that the digital content is faulty. Where a consumer has not identified a fault, but a general update is sent to the consumer, this does not mean that the quality rights have been breached.

Clause 43: Trader's right to provide digital content

157. This clause clarifies that a trader must have the right to supply the digital content to the consumer. Often where a consumer buys digital content from a trader there will be other traders who have rights over the digital content, particularly intellectual property rights.
158. This clause is slightly different to the equivalent clause for goods (clause 16) to reflect that (unless the contract states otherwise) the trader does not pass on (or sell) all property rights of the digital content (e.g. the ownership of any intellectual property rights to the digital content) to the consumer. More usually, the trader passes on a limited right to use the digital content in certain defined circumstances. The ownership of any rights to the digital content usually stays with the rights holder (usually the originator of the digital content).
159. If the trader does not have the right to provide the digital content at all, the consumer will be entitled to a refund (clause 47).

What remedies are there if statutory rights under a digital content contract are not met?

Clause 44, 45 and 46: Consumer's rights to enforce terms about digital content

160. As set out above, Chapter 3 largely only covers contracts where the consumer has paid some money towards the provision of digital content.
161. This, and following provisions, set out the remedies available to consumers: what

consumers are entitled to if the statutory rights are not met.

162. If the digital content is not of satisfactory quality, fit for purpose, or does not match the description, the digital content will not conform to the contract. If the digital content does conform to with the contract, the consumer is entitled to require that the trader repairs or replaces the digital content. They can also be entitled to a reduction in price. These two types of remedy are similar to some of those available to consumers of goods, with the notable difference that there is no right to reject digital content as there is when goods do not conform to with the contract (except where the digital content is included in goods – see clause 15). The way the remedies fit together is also similar to the goods provisions- if the consumer asks for the digital content to be repaired or replaced, a trader must do so within a reasonable time and without causing significant inconvenience to a consumer. Here, there is a difference compared to the corresponding clauses in relation to goods: for goods there are stricter limits on the numbers of repairs or replacements a trader can provide for goods (*subsection 3* of clause 24). This is because it is the nature of some forms of digital content (such as games) that they may contain a few “bugs” on release. Some consumers will request repairs in relation to the bugs whereas, for the majority of consumers, the same bugs will be fixed by updates which they agreed to in the contract but did not specifically request. Restricting the number of repairs could create an incentive for some consumers to report minor problems with the digital content in order to accumulate a target number of ‘repairs’ and thus proceed to a price reduction. A strict limit on the number of repairs allowable could therefore have the effect of restricting the availability of this type of product or raising its cost to consumers.
163. A repair is not the same as an update to which clause 42 applies. A repair would be a specific repair of the digital content in response to a consumer who has shown that the digital content is substandard in that it fails to meet the quality standards set in out in clauses 36, 37 and 38) (satisfactory quality, fit for purpose and meets the description).
164. A consumer cannot require the trader to repair or replace the digital content if it is impossible or if repair is disproportionate to replacement or vice versa. If repair or replacement is not provided within a reasonable time or without causing significant inconvenience to the consumer or is impossible, a consumer is entitled to a reduction in price. The reduction will be of an appropriate amount depending on the circumstances of each individual case.
165. For example, a downloaded music file is very low cost to the trader and can be delivered very quickly, and a replacement file would similarly be very quick and easy to provide. In this example, therefore, a reasonable time would be very short and any measure of inconvenience would similarly be very low. However, for an expensive, complicated piece of software which may require a patch to bring it in line with the contract (i.e. it may need to be repaired rather than replaced) the process might be expected to take longer. But, if the digital content was obtained with a specific purpose in mind, for example, when a consumer has paid an extra amount to have early access to an online multi-user game but the server crashed and so the consumer

was not able to access the game early, a repair or replacement may not be possible so the consumer would be entitled to a price reduction of an appropriate amount.

166. What is an appropriate amount will depend on the circumstances. For example, for digital content, such as a film that is fundamentally substandard and fails to play at all, this may be for the full amount. In contrast, for a game which the consumer has played for five months and which is exhibiting a minor bug at a later stage in the game play (e.g. a character “floats” instead of “runs”), the consumer has already had some enjoyment from playing the game and the bug does not prevent the game from being played, the appropriate amount might be quite a small proportion of the amount paid
167. If the information provided pursuant to clause 39 is not complied with, the consumer has the right to a reduction in price of an appropriate amount.
168. In relation to clause 47, if the trader’s right to provide is breached, the consumer has a right to a full refund. There is no corresponding duty for the consumer to return or delete the digital content. If a consumer does not delete the digital content, this may be an interference with intellectual property rights of the trader that owns them. The reasons there are no provisions on return or deletion are as follows. Firstly, the concept of return does not easily sit with digital content (data produced and supplied in digital form) and therefore to provide for a return of the digital content would not be practical¹⁸. In relation to intellectual property rights, there are other rules that protect these property rights and the Bill’s provisions in no way undermine those rules. Indeed, if anything, the provisions taken as a whole would support the intellectual property rights of others, since they will help to ensure that traders do not supply digital content where they do not have the right to do so.
169. *Subsection 2* of clause 47 provides that, where the digital content that the trader did not have the right to provide was only part of the contract (e.g. a single film provided as part of a subscription package), the refund would not be of the full amount paid, but an appropriate amount paid relating only to the portion of digital content affected.
170. As well as these remedies, this clause also explains that the consumer retains his/her redress under common law and other legislation, for example, his/her right to end the contract or to claim damages.
171. Clause 44 does not include, unlike goods, a “right to reject” (that is to say, a right to terminate the contract and obtain a refund) substandard digital content. The reason for this is the same as set out above in paragraph 162: digital content cannot be returned in any meaningful sense.

¹⁸ Where digital content is provided on a disk or other tangible media, different rules apply

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

172. For digital content sold on a tangible medium (e.g. on a disk or as part of a digital camera), *subsection 2* provides that, where the digital content is substandard, it will render the goods faulty and so the goods remedies apply. This means that the consumer does have the right to reject substandard digital content sold on a tangible medium.
173. *Subsection 6* of clause 44 provides that the same six month reverse burden of proof applies to digital content as it does to goods. This means that, if the digital content is found to be in breach of the standards set out in this Bill within six months of the day that the digital content was first provided to the consumer, the assumption will be that the fault was present on the day of delivery, unless it can be established that the digital content was not substandard on that day, or unless the six month reverse burden of proof is not compatible with the nature of the digital content (e.g. live, paid-for, broadcast content) or with how it fails to comply with the requirement.

Compensation for damage to device or to other digital content

Clause 48: Compensation for damage to device or to other digital content

174. Currently, if a consumer downloads some software that contains a virus, he/she could make a negligence claim against the trader; that is that the trader breached a duty of care and skill which caused the consumer loss. This may not be obvious to consumers, however, and this type of negligence claim does not have statutory underpinning. The intention behind this clause is therefore to engage the principles behind a negligence claim but limit the type of loss that can be claimed to replacing the digital content.
175. In summary, the remedies that apply for breach of the consumer's statutory rights are as follows:

Consumers' statutory right being breached	Remedies that may apply
Digital content to be of satisfactory quality (clause 36)	<ul style="list-style-type: none"> • The right to repair or replacement (clause 45) • If repair or replacement are not possible or do not resolve the fault, the right to a price reduction or the final right to reject (clause 46)

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Digital content to be fit for particular purpose (clause 37)	<ul style="list-style-type: none"> • The right to repair or replacement (clause 45) • If repair or replacement are not possible or do not resolve the fault, the right to a price reduction or the final right to reject (clause 46)
Digital content to be as described (clause 38)	<ul style="list-style-type: none"> • The right to repair or replacement (clause 45) • If repair or replacement are not possible or do not resolve the fault, the right to a price reduction or the final right to reject (clause 46)
Other pre-contractual information (clause 39)	<ul style="list-style-type: none"> • The right to a price reduction (clause 46)
Trader's right to provide digital content (clause 43)	<ul style="list-style-type: none"> • The right to a refund (clause 47)
Compensation for damage to other digital content (clause 48)	<ul style="list-style-type: none"> • The right to damages to the value of the digital content and/or device harmed (clause 48)

Can a trader contract out of statutory rights and remedies under a digital content contract?

Clause 49: Liability that cannot be excluded or restricted

176. This clause prevents a trader “contracting out” of the provisions in clauses 36, 37, 38 , 43 and 48.

CHAPTER 4 SERVICES

Summary and Background

177. Chapter 4 concerns contracts where a trader provides a service to a consumer. It sets out:

- the rights a consumer has when a trader provides a service to them under contract; these are, in effect, contractual rights and if they are breached it is therefore a breach of contract;
- what the consumer is entitled to request (and the trader must offer) if these rights are breached: that the trader re-performs the service or, failing

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

that, offers a reduction in the price of the service (we refer to these as “statutory remedies”);

- that the statutory remedies do not prevent the consumer claiming other actions from the trader where they are available according to general contract law (e.g. a claim for damages, termination of the contract); and
- that the trader cannot, in effect, limit its liability for less than the contract price.

178. Chapter 4 applies to all service sectors except where they are expressly excluded from one or all of its provisions. The provisions in this Chapter do not cover contracts of employment or apprenticeships and, where there is legislation that gives more detailed provision about rights or duties of particular services, that legislation will take precedence over the provisions in this Chapter. This Chapter also partially implements Articles 5 and 6 of the CRD; however certain sectors such as financial and gambling services are exempt from those provisions.
179. Currently the SGSA provides some protection for recipients of services (whether they are consumers or not) in England, Wales and Northern Ireland (its provisions on services do not extend to Scotland). It sets out that a business supplier of a service must provide that service with ‘reasonable care and skill’ and, if the time and charge have not been agreed, the service must be provided within a ‘reasonable time’ and at a ‘reasonable charge’. The way it does this is by saying that these matters are “implied terms” of a contract. Implied terms are terms that are not expressly set out in a contract (those expressly set out in a contract are called “express terms”). The effect of this is that, even if these matters are not expressly set out in the contract, these implied terms will still form part of the contract and a business supplier of a service must comply with them, unless they are excluded.
180. At the moment, there are no statutory remedies for breach of the SGSA in respect of its provisions relating to services.
181. Clause 63 and Schedule 1 contain detailed explanation about how this new legislation impacts on existing legislation. The SGSA will continue to apply to contracts between businesses.
182. Chapter 4 does not cover all legal rights and obligations surrounding the provision of services, for example there is a large amount of sector specific legislation that will affect contracts between traders and consumers.
183. In addition, the CRD provides that, for all types of consumer contract within scope, including most service contracts, a trader must provide certain information to the consumer before the contract is entered into.

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

184. In 2010, BIS commissioned a report, entitled ‘Consolidation and Simplification of UK Consumer Law¹⁹’, to examine how existing consumer law might be consolidated and simplified to make it more accessible to consumers, business and their advisers. That report recommended that consumer contract law would be improved if many of the provisions could be brought together into a single consumer contract law that, which so far as appropriate, subjected all consumer supply contracts to the same rights and remedies. The report recommended that this be done using simpler language, such as avoiding specialist legal language including references to ‘implied terms’. The report suggested that remedies for services should be made clearer and more accessible by incorporating them into the legislation.
185. Following the 2010 report, BIS carried out a consultation, from 13 July to 5 October 2012, into proposals for reform of the law regarding contractual supplies to consumers of services, as well as of goods and digital content. This consultation covered most of the recommendations of the 2010 Report, including how to present ‘implied terms’ in easier and more accessible language, whether to introduce statutory remedies and whether to introduce a new ‘satisfactory quality’ standard for all or certain types of services
186. Following the consultation, BIS published a government response. Most responses to the consultation supported simplification and removal of difficult to understand phrases, and the introduction of statutory remedies for when things go wrong in the provision of services.

What services contracts are covered?

Clause 50: Contracts covered by this Chapter

187. This Clause sets out which contracts are covered by Chapter 4. It follows the structure of the corresponding provision of the SGSA but makes clear that Chapter 4 is only concerned with contracts where a trader provides a service to a consumer (and not where a trader provides a service to another trader or where a consumer provides a service to a consumer or a trader). It also sets out that contracts of employment are not covered by this Chapter.
188. In contrast to the relevant Part of the SGSA, Chapter 4, like the rest of the Bill, applies to the whole of the UK, including Scotland.
189. In-keeping with the SGSA, Chapter 4 covers contracts in which the trader does not undertake to provide the service personally, but rather uses an agent to perform the

¹⁹ The report was authored by Professor Geraint Howells and Professor Christian Twigg-Flesner available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31838/10-1255-consolidation-simplification-uk-consumer-law.pdf

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service. For example, a house-building firm may engage a specialist glazing firm to perform part of the work, and the house-builder would still be bound by the provisions in this Chapter.

190. This clause includes a power exercisable by statutory instrument to dis-apply the provisions to a particular service or particular services. There is a similar power in the SGSA, which has been used to dis-apply the provisions of SGSA to the services provided by an advocate in a court or tribunal, by a company director, by a building society and the management of a provident society and finally to services rendered by an arbitrator. It is likely that the power in the Bill will be used to exclude the same sorts of services. Contracts of employment are also excluded from the scope of SGSA. Employees are protected by employment specific legislation, such as the Employment Rights Act 1996.

What statutory rights are there under a services contract?

Clause 51: Service to be performed with reasonable care and skill

191. This Clause corresponds to section 13 of the SGSA but, as with all the provisions in the Bill, it only relates to contracts between traders and consumers. It removes the legalistic reference to an 'implied term' that is in the SGSA and simply says that every consumer contract includes a term that the service must be performed with reasonable care and skill. The effect of the two pieces of legislation, however, is the same.
192. 'Reasonable care and skill' focuses on the way a service has been carried out, rather than the end result of the service. This means that, if a trader has not provided a service with reasonable care and skill, they will be in breach of this right, whatever the end result.
193. This provision does not include a definition of 'reasonable care and skill'. This is to allow the standard to be flexible between sectors and industries. It is also to reflect that current case law provides guidance on this meaning and, further, that future case law might elaborate on that guidance. It is generally accepted that relevant to whether a person has met the standard of reasonable care and skill are industry standards or codes of practice. The price paid for the service can also be a factor in determining the level of care and skill that needs to be exercised in order to be reasonable. For example, a consumer might expect a lower standard of care and skill from a quick and cheap repair service than from a more expensive and thorough one.
194. For example, if an individual engages a high-cost, specialized gardener to landscape his/her garden, that gardening service must be provided with reasonable care and skill. If the gardener does not cut and treat the grass to the industry standard, it is likely that a court would find that the gardener did not exercise reasonable care and skill and the consumer would have the right to remedies (explained below).

Clause 52: Information about the trader or service to be binding

195. This is a new provision in that there is no corresponding provision in the SGSA. It is incorporated here for two reasons:
- Firstly, there may be consumer detriment where a trader may say something to a consumer, which the consumer then relies on, but which the trader later does not comply with. Whilst it may be the case that the proper legal construction is that these statements are validly incorporated into the contract as express terms, a trader may try to argue that they are not contractually bound by the statement; and
 - Secondly, for certain contracts, the CRD mandates that certain information must be made available by a trader to a consumer before the consumer is bound by a contract. In order to implement the obligation to enforce Articles 5 and 6 of the CRD the Bill makes clear that these pieces of information will form part of the contract which cannot be altered unless the parties expressly agree otherwise. This part of the CRD aims to ensure that consumers are properly informed of key information before they are bound by a contract. Certain services are excluded from the scope of the CRD and therefore from this provision, such as financial and gambling services
196. Clause 52 may be split into two parts to deal with these two objectives above.
197. Firstly, the clause sets out that that the trader providing the service must comply with information they have provided, orally or in writing (e.g. a description it has given of the service to be provided), where the consumer has taken this information into account when making any decision about the service (including whether to enter into the contract). This information must be read in the context of everything else in the contract and other information given. This is to prevent the consumer being able to rely on some information, where the trader clearly qualified that information when giving it to the consumer. *Subsection (3)* makes this clear.
198. The information given covers both information about the service and other information the trader gives (e.g. information about the trader itself, or its trading practices, such as a commitment to paying its workers the minimum wage). Different remedies apply depending on whether the information is about the service or is other information that the trader gives (see below).
199. Secondly, the clause explains that information required to be provided under the CRD is also to be treated as included in the contract. Therefore, the trader must comply with the information it has provided or be in breach of contract.
200. For both types of information (that required under the CRD and information provided by the trader voluntarily) this clause also makes clear that the trader and consumer can later agree a change to the contract if, for example, circumstances change. A trader will not however be able to change the effect of this information without the

agreement of the consumer. Nor can the parties agree a change which would deprive the consumer of his or her rights under this Chapter (see clause 59).

201. For example, if a consumer chooses a trader to fit wooden windows on the basis that the trader said that it would install and finish the frames and, after fitting the windows, the fitter would only prime the frame and told the consumer to paint them him/herself, the trader would not have complied with the information it gave the consumer, and which the consumer had taken into account. Under the CRD, the trader must give the consumer the “main characteristics” of the service and the service must comply with those characteristics. This is in addition to the right that the service must generally comply with any information given to the consumer by the trader which the consumer takes into account when deciding to enter into the contract

Clause 53: Reasonable price to be paid for a service

202. In most cases, a contract will set out the price for the service, and indeed following the implementation of the CRD, traders who are not excluded from that scope (given in Article 3 of the CRD and Regulations to implement the CRD) will be under an obligation to provide information about the price before the consumer is bound by the contract. In other cases, the price might be agreed outside the contract. In addition, the price could be paid up-front when the contract is agreed, in which case the consumer will know the price. Outside of these three circumstances, this provision sets out that the price should be reasonable. What is ‘reasonable’ is a question of fact, which limits how much the decision can be appealed once it has been made.
203. This corresponds to section 15 of the SGSA but updates the language in line with the rest of the Bill.
204. For example, if a home owner engages a plumber to fix an urgent leak, he/she may not take the time to discuss the price before fixing the problem. The price might not be in the contract if the plumber did not know the problem before he/she arrived to fix it. If the leak was fixed in ten minutes and with only a £50 replacement part, the consumer has the right not to receive a bill for £1000, even though they did not negotiate the price in advance.

Clause 54: Service to be performed within a reasonable time

205. Like the price of the service (discussed above), the time for performance of the service is not always agreed in advance. For situations where a time for performance of the service has not been agreed, this clause gives the consumer the right to have the service provided within a reasonable time after the contract is agreed.
206. For example, an individual engages a builder to rebuild a 1 metre high, 25 metre long garden wall. At the outset, the individual agrees the price with the builder, but not a deadline for completion of the work. If, six months later, the work had not been completed, the builder would most likely not have carried out the work within a reasonable time.

207. There is a similar provision in section 14 of the SGSA.

Clause 55: Relation to other law on contract terms

208. The provision in this clause corresponds to section 16 of the SGSA. It recognises that certain types of contract to provide services are regulated by sector specific legislation (e.g. financial or transportation services). In most of those cases, this provision means that the sector specific legislation applies alongside or instead of this Chapter.

What remedies are there if statutory rights under a services contract are not met?

Clause 56: Consumers' rights to enforce terms about services; clause 57 Right to Repeat Performance; and clause 58 Right to Price Reduction

209. The provisions in these clauses set out the remedies available to consumers if the statutory rights set out in Chapter 4 are not met. The contract itself may set out other remedies, in which case those apply in addition, but only if they are not inconsistent with the remedies set out in this Chapter and only if they are deemed 'fair' (see Part 2 – Unfair Contract Terms). Likewise, this provision clarifies that there might be other remedies available, for example, seeking of damages (which may be available under common law).
210. If the service is not provided with reasonable care and skill (and so breaches the provision in clause 51) or where the service is not in line with information given about the service (and so in breach of clause 52), the service will not conform to the contract. If the service does not conform to the contract, the consumer is entitled to require that the service is properly performed, through it being done again. They can also be entitled to a reduction in price in certain circumstances. These two types of remedy are similar to those available to consumers of goods (in clause 18 onwards). The way the remedies fit together is also similar to the regime for goods as set out in Chapter 2 – if the consumer asks for the service to be re-performed, a trader must do so within a reasonable time and without causing significant inconvenience to a consumer. A consumer cannot require re-performance if it is impossible, for example, if the service was time specific. If re-performance is not provided within a reasonable time or without causing significant inconvenience to the consumer or is impossible, the consumer is entitled to a reduction in price. The reduction will be of an appropriate amount depending on the circumstances of each individual case.
211. If the information provided about the trader is not complied with (and there is a breach of clause 52), the consumer has the right to a reduction in price of an appropriate amount.
212. If the service is not provided within a reasonable time (and so breaches the provision in clause 54), the consumer has the right to a reduction in price of an appropriate amount.

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

213. As well as these remedies, this clause 56 also explains that the consumer retains his/her right to redress under common law and other legislation, for example, his/her right to end the contract or to claim damages.
214. In summary (see above and the clauses themselves for more detail), the remedies that apply for breach of the consumer's statutory rights are as follows:

Consumers' statutory right being breached	Remedies that apply
Service not performed with reasonable care and skill (clause 51)	<ul style="list-style-type: none"> • The right to ask for a repeat performance (clauses 56 and 57) • And, if that is impossible, or not done in a reasonable time without inconvenience: • The right to a reduction in price (clauses 56 and 58)
Service not performed within a reasonable time (clause 54)	<ul style="list-style-type: none"> • The right to a reduction in price (clauses 56 and 58)
Service not performed in-line with information provided concerning the service (clause 52)	<ul style="list-style-type: none"> • The right to ask for a repeat performance (clauses 56 and 57) • And, if that is impossible, or not done in a reasonable time without inconvenience: • The right to a reduction in price (clauses 56 and 58)
Service not performed in-line with information provided concerning the trader (clause 52)	<ul style="list-style-type: none"> • The right to a reduction in price (clause 56 and 58)

215. For example, a consumer has his/her house treated for subsidence, with a new kitchen floor laid and bedrooms redecorated. But, whilst the bedrooms are fine, the builder just papered over cracks, and the kitchen floor is uneven. The builder accepts that the job in the kitchen was not done with reasonable care and skill. In this case, the consumer can insist that the builder re-does the unsatisfactory work without any extra cost to the consumer. If the builder does not do that within a reasonable time, the consumer would be entitled to a price reduction of an appropriate amount. The

amount would reflect that only some of the work was not done with reasonable care and skill.

216. For example, if a decorator is engaged to paint a room in a certain high quality paint, stating in advance that he/she will do so, and the consumer took this into account when deciding whether to enter into the contract with this decorator, and the decorator uses lower quality paint, the consumer would be entitled to have the room repainted in the agreed paint and, if that was impossible or couldn't be done for another (say) ten weeks, the consumer would be entitled to a reduction in price. If the decorator claimed to have a certain qualification and the consumer only wanted to contract with someone with this qualification, which the decorator did not in fact have, the consumer would be entitled to a price reduction. If the decorator were to arrive to paint the room one year after being engaged to do so, that delay would entitle the consumer to a reduction in price.

Can a trader contract out of statutory rights and remedies under a services contract?

Clause 59: Exclusion of liability

217. This clause serves to prevent traders from "contracting out" of the consumer's statutory rights as established under clauses 51 52, 53 & 54. It also makes clear that a trader cannot limit its liability for breach of these clauses to less than the contract price.
218. For example, a decorator cannot ask a consumer to sign a contract to paint a room where the contract includes a term such as 'the decorator accepts no responsibility if the paint work is not completed with reasonable care and skill'. If this is in the contract, that term will be invalid.

CHAPTER 5 GENERAL AND SUPPLEMENTARY PROVISIONS

219. The general and supplementary provisions cover definitions other than the key definitions set out in clause 2. Subsection 7 of clause 18, subsection 5 of clause 44 and subsection 6 of clause 56 provide that enforcement of rights under this Part does not prevent a consumer seeking damages or specific performance in relation to the contract which may be available to him/her arising out of general contract law. Clause 61 provides further detail on how and in what circumstances the financial value of the loss sustained by the consumer should be calculated. Clause 62 explains when a direction for specific performance may be made and how it will work.

PART 2: UNFAIR CONTRACT TERMS

Background and overview

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

220. Part 2 of the Bill clarifies and consolidates existing consumer legislation on unfair contract terms.
221. In 2005, the Law Commissions concluded, following an earlier consultation, that the law on unfair contract terms is particularly complex²⁰. It is contained in two separate pieces of legislation– the UCTA and the UTCCRs – that have inconsistent and overlapping provisions.
222. The UCTA applies to a broad range of contracts, including those between two businesses, contracts between businesses and consumers and even, to a limited extent, to contracts between two consumers.. It applies to individually negotiated as well as non-negotiated terms. It focuses on exclusions, that is to say terms or notices which aim to exclude or restrict liability for: negligence causing death or personal injury; negligence causing other loss; and breach of contract. As a result, traders are not permitted to exclude their liability for negligence causing death or personal injury. Other exclusions are only binding if they meet the ‘reasonableness requirement’. Some types of contracts are exempted, for example those relating to insurance contracts, interests in land or, other than in Scotland, intellectual property rights.
223. The UTCCRs implement the Unfair Terms in Consumer Contracts Directive (Council Directive 93/13/EEC) (“UTCCD”), and only apply to non-negotiated (standard term) contracts between a trader and a consumer. They provide that contract terms must be “fair” and written in “plain, intelligible language”. The definition of fairness differs from the reasonableness test in the UCTA, and while overall both pieces of legislation may in some cases achieve a similar effect, they do so in different ways. In their 2005 report, the Law Commissions concluded that the two overlapping and inconsistent pieces of unfair terms legislation have led to complexity and confusion about how the law should be applied.
224. A transposition note illustrating how the UTCCD is implemented in the UK is annexed to these notes.
225. In 2012, BIS asked the Law Commissions to look again at how the legislation could be clarified in the light of some high profile legal cases. They therefore undertook a consultation in 2012²¹, to obtain up-to-date evidence and views on their proposals for reform.
226. The focus of the consultation was on two particular areas:

²⁰ Their documents can be found at http://lawcommission.justice.gov.uk/consultations/unfair_consumer_contracts.htm

²¹ *ibid*

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

- contract terms that are exempted from an assessment of fairness by the courts because they concern the essential bargain of the contract – the subject matter and the adequacy of the price (this is commonly referred to as “the exemption”); and
- an indicative and non-exhaustive schedule of types of terms that may be considered unfair (this is commonly referred to as “the grey list”).

227. Part 2 consolidates the UCTA and the UTCCRs, to remove conflicting overlapping provisions and, in particular, to clarify and amend the law on the above-mentioned exemption and the “grey list”.

What contracts and notices are covered by this Part?

Clause 64: Contracts and notices covered by this Part

228. This clause sets out the scope of Part 2 of the Bill:

- It covers contracts between a trader and a consumer. For ease of reference, trader to consumer contracts are called ‘consumer contracts’ in this Part.
- Whilst Part 2 concerns contracts, it also includes consumer notices – both contractual and non-contractual consumer notices. A consumer notice includes an announcement or other communication which it is reasonable to assume is intended to be read by a consumer. Non-contractual consumer notices (e.g., a sign in a car park) do not include an exchange of something in return for something else of value (known as “consideration”) as a contract does.
- This Part does not cover employment contracts, as they are regulated by specific employment legislation.

What are the general rules about fairness of contract terms and notices?

Clause 65: Requirement for contract terms and notices to be fair

229. The effect of this clause is that terms used in contracts and notices will only be binding upon the consumer if they are fair. It defines ‘unfair’ terms as those which put the consumer at a disadvantage, by limiting the consumer’s rights or disproportionately increasing their obligations as compared to the trader’s rights and obligations.

230. This clause also sets out factors that a court should take into account when determining whether a term is fair, notably that it should consider the specific circumstances existing when the term was agreed, other terms in the contract and the nature of the subject matter of the contract. This assessment is known as the ‘fairness test’ (see also clause 66 as regards the list of terms that may be used to assist a court

when considering the application of the fairness test).

231. For example, a contract to subscribe to a magazine could contain a term allowing the publisher to cancel the subscription at short notice. In deciding whether this is fair or not, the court could consider issues such as whether the subscriber can also cancel at short notice or obtain a refund if the publisher cancels the contract.
232. This clause brings together sections 4 and 11 of the UCTA (for England, Wales and Northern Ireland), sections 17 and 18 of the UCTA (for Scotland), and regulations 5 and 6 of the UTCCRs. This clause also implements Articles 3, 4 and 6 of the UTCCD.

Clause 66: Contract terms which may be regarded as unfair

233. This clause introduces Schedule 2, which lists examples of terms which may be regarded as unfair (this list is known as the “grey list”). Schedule 2 is an indicative and non-exhaustive list. The terms on the list are not automatically unfair, but may be used to assist a court when considering the application of the fairness test in clause 65 to a particular case. Equally, terms not found on the list in the Schedule may be found by a court to be unfair by application of the fairness test. This clause and the Schedule are based on a copy-out of Article 3(3) of, and the Annex to, the UTCCD. Part 2 of the Schedule gives exceptions to the list such that terms in Part 2 are not considered as part of the Schedule but are still assessable for fairness unless clause 76 or clause 67 applies. These exemptions account, for example, for the specific nature of financial services contracts where fluctuations in the market may influence the price.
234. For example, if a contract to subscribe to a magazine included a term which provided that the publisher, but not the subscriber, could cancel the delivery at short notice, that term may be regarded as unfair, as it is covered by paragraph 7 of the Schedule (which gives a term which authorises “the trader to dissolve the contact on a discretionary basis where the same facility is not granted to the consumer” as an example of a term which may be unfair). This does not mean that the term is automatically unfair, but the court must take this into account when assessing the term under the fairness test in clause 65.
235. This reflects the case law of the EU Court of Justice on the effect of the list of terms in the Annex to the UTCCD. In Case C-478/99 *Commission v Sweden* (2002) ECR I-4147, the Court stated:
- “It is not disputed that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair... In so far as it does not limit the discretion of the national authorities to determine the unfairness of a term, the list contained in the annex to the Directive does not seek to give consumers rights going beyond those that result from Articles 3 to 7 of the Directive... Inasmuch as the list contained in the annex to the Directive is of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures.” (paras.20-22)
236. In Case C-472/10 *Nemzeti* (judgment of 26 April 2012) the Court emphasised the

importance of the list:

“If the content of the annex does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term.” (para.26)

237. Part 1 of the Schedule 3 is as including the UTCCRs and in the UTD, however the terminology has been brought in-line with the Bill as a whole. In addition, three additional items have been added to the list (paragraphs 5, 12 and 14) as recommended by the Law Commissions in their report of March 2013²²). In paragraph 5, the phrase “decides not to conclude or perform” includes where a consumer cancels a contract.
238. This clause also implements Article 15 the Distance Marketing Directive (Directive 2002/65/EC concerning the distance marketing of consumer financial services, implemented in the UK in the Financial Services (Distance Marketing) Regulations 2004 si 2004/2095). That Directive sets common minimum standards for the information that must be given to a consumer prior to a distance contract for financial services being concluded. There are also provisions for rights of withdrawal (‘cancellation rights’) in many circumstances, and provisions to protect consumers in relation to misuse of payment cards in connection with distance contracts for financial services, unsolicited supplies of financial services and unsolicited communications about such services. Article 15 provides that any contractual term or condition that puts the burden of proof on the consumer (rather than the trader) to show non-compliance with the Directive is an unfair term.

Clause 67: Exclusion from assessment of fairness

239. This clause describes the terms in a contract that are exempt from being assessed under the fairness test (described in clause 64) and the conditions under which that exemption applies.
240. If a term is of the type included in Part 1 of Schedule 3, it can be assessed for fairness. If it is not, and in order to determine whether a term is assessable for fairness, the court will first consider whether the term is transparent and prominent. If the term is not transparent and prominent (e.g. if it is in the ‘small print’), it is assessable for fairness.
241. If the term is transparent and prominent, it is exempt from assessment for fairness if it concerns the essential bargain of the contract, which is either:
- The main subject matter of the contract (usually the goods, services or digital content being purchased); or

²² http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf

- The appropriateness (usually the level) of the price.

242. This provision replaces regulation 6(2) of the UTCCRs, and implements the exemption in Article 4(2) of the UTCCD. Regulation 6(2) was considered in *Office of Fair Trading v Abbey National plc* [2009] UKSC 6. The Supreme Court concluded that the concepts of main subject matter and price are to be narrowly construed as “*the two sides of the quid pro quo inherent in any consumer contract*”, that is, the good or service that the trader agrees to provide, and the price that the consumer agrees to pay (Lord Walker at para.39). Lord Walker explained that the fact that other types of price terms appeared on the grey list reinforced this narrow construction of the exemption:

“This House’s decision in *First National Bank* shows that not every term that is in some way linked to monetary consideration falls within Regulation 6(2)(b). Paras (d), (e), (f) and (l) of the “greylist” in Schedule 2 to the 1999 Regulations are an illustration of that.” (Lord Walker, para.43)

243. Reflecting this case law, the effect of this clause is that, if a term concerns other aspects of the price other than the amount, for example the timing of payment, the term may be assessed for fairness, but the amount of the price cannot be assessed.

244. For example, if an individual contracts with a catering company to provide a buffet lunch, and the contract includes a term that the individual will pay £100 for a 3 course meal, the court cannot look at whether it is fair to pay £100 for 3 courses. It may, however, look at other things, such as the rights of the company and the individual to cancel the lunch, and when the price is due to be paid.

***Clause 68: Bar on exclusion or restriction of negligence liability and Clause 69
Scope of Section 68***

245. This clause provides that a trader cannot, in a consumer contract or consumer notice, limit liability for death or personal injury resulting from negligence.

246. With regard to other loss or damage, the trader can only limit its liability if the clause is ‘fair’. Whether a term is fair is determined by the fairness test, set out in clause 65.

247. For example, if an individual contracts with a catering company to provide a buffet lunch, and a term in that contract states that the catering company accepts no responsibility for death by food poisoning caused by their negligence, that term is not binding. The catering company can, however, and providing the clause is fair, limit liability if it breaks kitchen equipment.

248. In some cases, under common law, if an individual is aware of a risk, but ignores it, he/she may be deemed to have taken on that risk. However, this provision explains that, in contrast, a consumer cannot be assumed to have taken on any risk by agreeing to a term which limits a trader’s liability.

249. This clause reflects section 2 (for England, Wales and Northern Ireland) and section

16 (for Scotland) of the UCTA.

Clause 70: Effect of an unfair term on the rest of a contract

250. As explained above, a court can find a particular term to be unfair, rendering it unenforceable. However, it may not be in the interests of the consumer or the business for the entire contract not to be binding any more. Therefore, in so far as is practical, the contract will continue even if one or more terms within it are deemed unfair.
251. This clause reflects regulation 6 of the UTCCRs, which implements Article 4(2) of the UTCCD.

Clause 71: Other requirements for contract terms

252. Whilst previous clauses explain that a contract term must be fair, and how that is determined, this provision states that, in addition, written terms must be transparent (as defined in clause 67 as legible and in plain and intelligible language). The trader has an obligation to ensure that such terms are transparent.
253. Some terms in a consumer contract are more onerous and unusual than other terms. Courts' consideration of such terms has led to a general common law rule that, in order for a particularly unusual or onerous term to be incorporated in a contract, the party that seeks to rely on it must take steps to bring it to the other party's attention prior to contract.
254. The leading case on this issue is *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1989)²³ where the court applied a principle from the earlier judgement of Lord Denning in *J. Spurling v Bradshaw* (1956) that some terms "would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient" to bind the other party. More recently, the case of *OFT v Foxtons* 2009²⁴ illustrated how a particularly unusual term might not be noticed and taken account of by the consumer, as it was not sufficiently brought to their attention.

²³ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433, [1988] 2

WLR 615. It was applied in Scotland in *Montgomery Litho Ltd v Maxwell* 2000 SC 56.

²⁴ [2009] EWHC 1681 (Ch), [2009] 3 EGLR 133.

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

255. The Law Commission therefore recommended (in their Report of March 2013²⁵) that “the more unusual or onerous the term, the more prominent it needs to be”. This clause implements the principle behind this recommendation.
256. These requirements, like others in this Bill, may be enforced by public bodies under the relevant provisions, including under Part 8 of the EA, if the conditions in that Act are met (for example, if the term harms the collective interest of consumers).
257. The first part of this clause reflects regulation 7(1) of the UTCCRs, which implements Article 5 of the UTCCD.

Clause 72: Contract terms that may have different meanings

258. Contract terms can be ambiguous and capable of being interpreted in different ways, especially if they are not in writing or in an accessible format. In these cases, this provision ensures that the interpretation that is most beneficial to the consumer, rather than the trader, is the interpretation that is used.
259. This clause reflects regulation 7(2) of the UTCCRs, which implements Article 5 of the UTCCD.

What public bodies can enforce the general rules?

Clause 73: Enforcement of the law on unfair contract terms

260. If traders do use unfair terms in a consumer contract, there are a number of means of enforcing this Part.
261. This clause introduces Schedule 3 which sets out how this Part can be enforced. Schedule 3 explains that the CMA and other Regulators (coordinated by the CMA) can investigate and apply for injunctions to prevent the use of certain terms.
262. There are other means of enforcement available, for example private action by the consumer through the courts or enforcement by a public body through Part 8 of the EA.
263. This clause reflects regulations 10 to 15 of the UTCCRs, which implement Article 7 of the UTCCD.

Supplementary provisions

Clause 74: Duty of court to consider fairness of term

²⁵ http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf

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264. Courts hear a wide variety of disputes between traders and consumers concerning contracts. However, courts are not always specifically asked to look at the fairness of a contract term. This provision places a duty upon the courts to look at the fairness of terms even if the parties do not specifically ask the court to do so.
265. This provision reflects the view of the EUCJ in Case C-168/05 *Mostaza Claro* (2006) ECR I-10421 that “the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair” (paragraph 38).
266. In fulfilling this duty, the courts would not have to look at the fairness of the term if they do not have adequate information to do so, as was emphasised by the Court of Justice in Case C-243/08 *Pannon* (2009) ECR I-4713 (at para.35).

Clause 75: Application of rules to secondary contracts

267. This provision clarifies that the requirement for terms to be fair, as set out above, extends to contracts agreed in addition to the original contract, whether or not they are contracts between a trader and a consumer. This provides additional protection for consumers, by ensuring that any agreements made after, before or in addition to the signing of a contract are also covered by these rules.

Clause 76: Disapplication of rules to terms required to be in contracts

268. This section ensures that the new and amended provisions on unfair contract terms do not override legal requirements in other legislation. This may be relevant, for example, where several pieces of legislation affect a trader’s business.
269. This clause reflects regulation 4(2) of the UTCCRs, which implements Article 1(2) of the UTCCD.

Clause 77: Contracts applying law of non-EEA State

270. The parties to a contract may agree that it is to be governed by the law of a particular country. This might be because the trader is based in a country other than the UK. This clause provides that the consumer may not be deprived of the protection of this Part, where a contract has a close connection with the UK, even if the contract states that the law of a non-EEA State applies (the EEA is the EU Member States plus Iceland, Liechtenstein and Norway)

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271. The Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations)²⁶, governs which law applies to a consumer contract (see paragraph 29 above).
272. This clause is based on regulation 9 of the UTCCRs, which implements Article 6(2) of the UTCCD; and sections 26 and 27 of the UCTA.
- Clause 78: Changes to other legislation***
273. This clause gives effect to Schedule 4 which lists amendments required to other legislation, including the UCTA, as a result of this Part.

PART 3 MISCELLANEOUS AND GENERAL

Clause 79: Investigatory powers

Summary and Background

274. This clause makes provision for the investigatory powers of consumer law enforcers. Consumer law, which includes enforcers' investigatory powers, has built up piecemeal in around 60 pieces of consumer legislation, resulting in the investigatory powers being unclear, inconsistent and overlapping each other. In its consultation published in March 2012 entitled 'Enhancing Consumer Confidence Through Effective Enforcement – Consultation on consolidating and modernising consumer law enforcement powers,' BIS proposed simplifying the powers by consolidating them into one generic set.

Clause 79: Investigatory Powers etc

275. This clause gives effect to Schedule 5 on Investigatory Powers.

Schedule 5: Investigatory Powers etc

276. This Schedule contains a generic set of powers, which is based on those currently contained in Part 4 of the CPRs. This is because CPRs are relatively modern; reflect current business practices; build on similar existing legislation and can be used to investigate breaches which may lead to criminal or civil proceedings.
277. As well as consolidating powers that already exist, stronger safeguards have been added to the use of some such powers in order to reduce the burdens on businesses. For example, subject to a number of exemptions, the power of entry into premises cannot be exercised unless a notice in writing has been given to the occupier at least two working days before an inspection is carried out and the power exercised.

²⁶ For contracts entered into before 17 December 2009, the Rome Convention applies (Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980).

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

278. As a consequence of consolidating these powers, some modification has been necessary to the existing powers, either to ensure compliance with EU obligations, or to align powers across consumer law in order to ensure that the powers contained in the generic set are simple and consistent. For example, the generic set includes a power to require production of information, which is based on Part 8 of the EA dealing with civil enforcement but which will now apply to both civil and criminal consumer law enforcement.
279. In some instances, a limitation has been specifically placed on the use of a particular power. For example, the power to require production of information under paragraph 16 can only be used if the enforcer has a reasonable suspicion that there is, likely to be, or has been a breach of legislation. This limitation does not apply, or apply in the same way for all types of enforcer.
280. The generic set of powers applies to all enforcers detailed in the Schedule except where access to powers is specifically limited for particular enforcers. For example, the powers of some of the domestic enforcers (when acting for certain purposes), unfair contract terms enforcers and public designated enforcers, are restricted to the power to require production of information.
281. The generic set of powers is detailed in paragraphs 14 to 33 of Part 3 of the Schedule. The table below summarises how the powers in the generic set have been modified compared to those in the CPRs and other relevant legislation. The new safeguards that have been added are highlighted in bold.
282. These provisions in the Bill give effect in part to certain EU legislation by providing domestic regulators with the necessary powers for enforcing such legislation. This includes the Regulation on Consumer Protection Cooperation²⁷, the Regulation on Accreditation and Market Surveillance²⁸ and the General Product Safety Directive²⁹.

Table 1: Summary of main modifications from existing investigative powers in the new generic set (New safeguards are highlighted in bold)

Power/Provision	Modelled on	Main modifications from existing provisions in the CPRs
Paragraph 14 – Power to make test purchases	Regulation 20 CPRs	A new express provision is added to clarify that enforcers may enter premises open to the public and inspect products. The definition of officer in paragraph 10(1) extends the power to authorised persons.

²⁷ (EC) No 2006/2004.

²⁸ (EC) No 765/2008.

²⁹ 2001/95/EC.

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published on 12th of June, 2013.*

Power/Provision	Modelled on	Main modifications from existing provisions in the CPRs
Paragraph 15 – Power to observe the carrying on of a business	Section 227B(1)(a) Enterprise Act 2002 (EA02)	Clarification that power applies to premises or parts of premises open the public only.
Paragraphs 16 to 19 – Power to require production of information (by way of a written notice only)	Section 224 to 227 EA	<p>Certain enforcers, such as the some of the domestic enforcers (when acting for certain purposes), unfair contract terms enforcers and public designated enforcers, have access to this power only within the generic set.</p> <p>Some enforcers are required to have reasonable suspicion of breach before exercising power.</p> <p>Clarifies that it includes the requirement to create documents.</p> <p>Can be used for both criminal and civil enforcement purposes.</p> <p>Provision is made regarding self-incrimination.</p>
Paragraph 20 – Power to enter premises without warrant	Regulation 21(1)(a) CPRs (Currently excludes premises used only as a dwelling)	<p>The power excludes entry to premises which are wholly or mainly private dwellings.</p> <p>Requirement to give reasonable notice, subject to certain exemptions.</p> <p>Requirement for enforcers to provide evidence of their authorisation or identity, whether or not it is requested by the occupier.</p>
Paragraph 21 – Power to inspect goods etc	Regulation 21(1)(a) CPRs	To inspect products, records and examine any procedure.
Paragraphs 22 to 23 – Power to require production of documents	Regulation 21(1)(b) CPRs	<p>Power includes requiring an explanation of documents.</p> <p>Clarification that the power can be applied to a business under investigation or another person.</p> <p>There is no requirement for the enforcer to have reasonable suspicion where there is statutory duty to hold documents, and power will be power to inspect documents.</p> <p>Clarification as to how the power to require production of documents applies to business regulated by the Estate Agents Act 1979.</p>

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Power/Provision	Modelled on	Main modifications from existing provisions in the CPRs
Paragraphs 24 to 28 – Power to seize and detain goods/documents	Combination of regulation 21(c) and (d) CPRs and regulation 37 Electro magnetic Compatibility Regulations 2006	<p>Requirement to issue a receipt of goods/documents seized.</p> <p>Requirement for enforcers to provide evidence of their authorisation or identity, whether or not it is requested by the occupier.</p> <p>The power is available where there is reasonable cause to suspect (or to ascertain) a breach of legislation; that goods liable to be forfeited or that they may be required as evidence in proceedings.</p> <p>To apply power to decommission or switch off fixed installations (as defined in the Electromagnetic Compatibility Regulations – SI 2006/3418).</p> <p>Clarification as to how the power to require production of documents applies to business regulated by the Estate Agents Act 1979.</p>
Paragraph 29 – Power to break open a container/vending machine	Regulation 21(2) CPRs	<p>Clarification that the power includes access to information held on electronic devices, such as computers including those on a network.</p> <p>Clarification on what constitutes a container.</p>
Paragraphs 30 to 31 – Power to enter premises with a warrant	Combination of Reg 22 CPRs and 227C EA	<p>Includes a condition that a Justice of the Peace must be satisfied that certain conditions have been met, such as, that it is likely that goods or documents may be concealed or interfered with.</p> <p>Requirement to issue a notice stating that the premises have been entered under warrant where premises are unoccupied or occupier is temporally absent.</p>
Paragraph 32 – Power to require assistance from persons on the premises	Provision under Weights and Measures legislation	Requirement for persons on premises to provide advice and assistance.

283. Paragraph 13 of Part 2 of the Schedule introduces a power for the Secretary of State by order to amend the list of legislation to which the generic set of powers applies. This is to ensure that the generic set of powers can be used to enforce any new duties that may in future be prescribed.
284. The order making power would also allow other legislation to be repealed as a consequence of amending this list, provided that safeguards on the use of the power that replaces those being repealed are greater than those that existed before.
285. The existing investigatory powers are being repealed in order to ensure that only the

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published on 12th of June, 2013.*

generic set of powers will apply in relation to the consumer legislation within the scope of this Schedule.

286. Additionally, the Schedule designates the acts of obstructing officers of enforcers and purporting to act as such an officer when not so authorised as offences. This is set out in paragraphs 34 and 35 of Part 4 of the Schedule respectively. These and other provisions in the generic set are detailed in the table below.

Table 2: Provisions also included in the generic set

Provision	Modelled on	Main modifications from existing provisions in CPRs
Paragraph 34 - Offence of obstructing an enforcer or an officer of an enforcer	Combination of Regulation 23 CPRs and regulation 24(2)(b) General Product Safety Regulations 2005	Includes an offence of recklessly making a statement which is false. Maximum penalties reduced to level 3.
Paragraph 35 – Offence of purporting to act as officer	Regulation 21(11) CPRs	None.
Paragraph 36 – Access to seized goods and documents	-	Enforcers must grant reasonable access so that copies of seized documents can be made, though they may recover the reasonable costs of complying with such a request.
Paragraph 37 - Notice of testing goods	Combination of Reg 24 CPRs and Consumer Protection Act 1987 (CPA) and Electromagnetic Compatibility regulations 2006	Notice must also to be given where the test leads to issuing of a suspension notice or the forfeiture of the goods.
Paragraph 38 - Appeals against detention of goods	Section 33 CPA	None.
Paragraph 39 - Compensation	Regulation 25 CPRs	None.

287. Also in this Schedule, the law in relation to the ability of Trading Standards Services is being clarified to ensure that they are able to operate across local authority boundaries efficiently and effectively. This is set out at paragraphs 41 to 43 of the Schedule.

Clause 80: Amendment of the Weights and Measures (Packaged Goods) Regulations 2006

288. This clause provides an automatic exemption from keeping records of checks for

packers of bread which is sold unwrapped or in open packs.

Clause 81: Enterprise Act 2002: enhanced consumer measures and other enforcement

Introduction

289. The intention of this part of the Bill is to amend Part 8 of the EA to allow the courts to attach a range of enhanced consumer measures to enforcement orders and undertakings. Public enforcers will also be able to agree undertakings under Part 8 that include enhanced consumer measures.
290. The main aim of the clause is to give the civil courts and public enforcers flexibility when dealing with persons who have given undertakings or who are subject to enforcement orders. The clause will allow a range of enhanced consumer measures that are just, reasonable and proportionate to the detriment caused, to be attached to enforcement orders and undertakings.

Background

291. When there is a breach or potential breach of consumer law, the measures available to public enforcers are limited and there is a lack of flexibility in the ways that they can achieve better outcomes for consumers and compliant businesses. The main formal sanction is a criminal prosecution of the trader by an enforcer. While this can benefit consumers as it prevents the spread of instances of illegal trading, in practice there is generally no direct remedy for victims of the breach.
292. As an alternative to criminal prosecution, certain enforcers can seek civil injunctive relief under Part 8 of the EA against infringements of consumer protection legislation. The key mechanism is an enforcement order. Through an enforcement order, a civil court can order that the infringer stop engaging in the conduct in question. It can also order that the infringer publish the enforcement order and a corrective statement, aiming to eliminate the continued effect of an infringement. Alternatively, a court or an enforcer may accept an undertaking from the business that they will not engage in conduct that involves an infringement. However, civil enforcement will not generally give remedies to individual consumers or secure positive action by businesses.
293. The Government's response³⁰ to the consultation 'Extending the Range of Remedies Available to Public Enforcers of Consumer Law'³¹ sets out further information on the measures in this clause. The response also confirms the Government's intention that the new enhanced consumer measures should always be just, reasonable and

³⁰ Await link

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proportionate to the detriment caused and aimed at achieving one or more of the following:

- redress for consumers who have suffered loss from breaches of consumer law;
- improved compliance and a reduction in the likelihood of future breaches; and
- more information being provided to consumers so they can exercise greater choice and in doing so improve the functioning of the market for consumers and businesses generally.

Part 8 Enterprise Act 2002

294. Part 8 of the EA enables certain enforcers to take civil action in respect of infringements of specified domestic/Community consumer legislation which harm the collective interests of consumers.
295. The enforcement procedure is set out at sections 214 to 223 of the EA. Key to this procedure is an application for an enforcement order (under section 215), following consultation with the business and notification of the OFT³² (if the OFT is not the enforcer), which can then be issued by the court (under section 217). As an alternative to issuing an enforcement order, the court may accept undertakings (section 217(9)). Similarly, as an alternative to making an application for an enforcement order the enforcer may accept undertakings (section 219).

Public Enforcers

296. There are a number of enforcers who are able to use this enforcement procedure. Some enforcers are specialist, within a particular market, for example the CAA; whereas others, like Trading Standards Services have a broader remit. The EA (section 213) provides for the following categories of enforcer: general³³; designated³⁴; community³⁵; and CPC³⁶.

³¹ www.bis.gov.uk/Consultations/consultation-rationalising-modernising-consumer-law?cat=closedawaitingresponse Consultation on extending the range of remedies available to public enforcers of consumer law

³² Section 214 was amended by Article 9 of SI 2013/783.

³³ OFT, Trading Standards Services in Great Britain; Department of Enterprise, Trade and Investment in Northern Ireland.

³⁴ Designated, see SI 2003/1399 as amended SI 2005/917 and SI 2013/478.. CAA, Director General of Electricity Supply for Northern Ireland, Director General of Gas for Northern Ireland, Ofcom, The Water Services Regulation Authority, The Gas and Electricity Markets Authority, the Information Commissioner, ORR, the Consumers' Association and the Financial Conduct Authority.

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published on 12th of June, 2013.*

297. Under section 213(4), the Secretary of State may designate a person or body which is not a public body only if the person or body (as the case may be) satisfies such criteria as the Secretary of State specifies by Order. The new enhanced consumer measures will only be available where the enforcer is a public body.
298. The clauses amend Part 8 of the EA to enable enforcement orders or undertakings to include new enhanced consumer measures, in addition to requirements that could be made under the existing legislation (i.e. generally a requirement to stop, or to not engage in the conduct that constitutes a breach of consumer law).

Clause 81: Enterprise Act 2002: enhanced consumer measures and other enforcement

299. This clause introduces Schedule 6 and limits the use of the enhanced consumer measures to breaches or potential breaches of consumer law that occur, or are likely to occur, after the commencement of this clause.

Schedule 6: Enterprise Act 2002: enhanced consumer measures and other enforcement

300. The aim of Schedule 6 is to provide greater flexibility for public enforcers and the civil courts in relation to the contents of enforcement orders and undertakings made under Part 8 of the EA. If they are deemed suitable for a particular case, public enforcers and the civil courts will be able to attach (where they consider it just and reasonable) enhanced consumer measures to enforcement orders and undertakings. The enhanced consumer measures will need to fall into at least one of three specified categories (referred to as the redress, compliance and choice categories). Measures in the redress category will offer compensation or other redress to consumers who have suffered loss as a result of the breach of consumer law. Compliance measures are intended to increase business compliance with the law and to reduce the likelihood of further breaches. Measures in the choice category will help consumers obtain relevant market information about persons subject to enforcement orders or undertakings to enable them to make better purchasing decisions.
301. Paragraphs 2 and 3 amend sections 210 and 211 of the EA to widen the injunctive regime under Part 8. This will enable enforcers to use it for infringements of domestic

³⁵ A qualified entity for the purposes of the Injunctions Directive EC 98/27 (Injunctions for the protection of consumers' interests) which is specified in the list published in the Official Journal of the European Community, but is not a general, designated or CPC enforcer.

³⁶ OFT, CAA, Financial Conduct Authority, Secretary of State for Health, Department of Health Social Services and Public Safety in Northern Ireland, Ofcom, Department of Enterprise, Trade and Investment in Northern Ireland, every local weights and measures authority, Independent Committee for the Supervision of Standards of the Telephone Information Services, the Information Commissioner.

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published on 12th of June, 2013.*

legislation that harm the collective interests of consumers where either the supplier or the consumer is in the UK.

302. Paragraph 4 updates the list of enforcers in the EA.
303. Paragraph 5 amends section 214 (consultation), and sub paragraph (2) extends from 14 to 28 days the consultation period for a public enforcer before they can take action against a person for an enforcement order or undertaking in cases where the new subsection (4A) applies (see paragraph 304 below).
304. Sub paragraph (3) inserts a new subsection (4A) that describes when the extended 28 day period applies. It applies in those cases where the person that may be subjected to the enforcement order or undertaking is a member of, or represented by, a trade association or other business representative body that operates a consumer code of practice that has been approved by a public enforcement body.
305. In practice, the extended consultation period may be used, for example, by the person that may be subject to the enforcement order or undertaking to propose their own measures which may include addressing the detriment caused, and be based on the requirements of the relevant consumer code. Depending on the circumstances of the case, this may be an indicator that the infringement will not be repeated. At the end of the 28 day period, the public enforcer may take further action if they consider it appropriate. It can either commence court action to seek an enforcement order and/or seek to work with the person to agree undertakings which may include measures for consumers that are just and reasonable.
306. Paragraph 6 amends section 217 (enforcement orders) inserting new subsections (10A) to (10D). New subsection (10A) provides a power for the court to attach enhanced consumer measures defined in section 219A (paragraph 312 below) to an enforcement order and for the court to specify an appropriate time period for the person to comply with the enhanced consumer measures.
307. New subsection (10B) allows the court to attach enhanced consumer measures to an undertaking accepted under section (9) and for the court to specify an appropriate time period for the person to comply with the enhanced consumer measures..
308. New subsection (10C) restricts the use of enhanced consumer measures in enforcement orders and undertakings to applications by public enforcers only.
309. New subsection (10D) allows the court to include in an enforcement order or undertaking a requirement that the person subject to the enforcement order or undertaking provide information or documentation to the court to show that they have complied with the enhanced consumer measures.
310. Paragraph 7 amends section 219 (undertakings) inserting new subsections (5ZA) and (5ZB). New subsection (5ZA) enables public enforcers to include enhanced consumer

measures in undertakings and to be provided with documentation from the person subject to the undertaking to specify an appropriate time period for the person to comply with the enhanced consumer measures and to require the person subject to the undertaking to provide information or documents to them. This is in order for them to determine if the person is carrying out the enhanced consumer measures agreed in the undertaking.

311. New subsection (5ZB) restricts the use of enhanced consumer measures in undertakings to public enforcers only.
312. Paragraph 8 inserts new sections 219A (definition of enhanced consumer measures) and 219B (inclusion of enhanced consumer measures etc). Section 219A(1) lists the three categories of enhanced consumer measures – redress, compliance and choice. Subsections (2) to (5) describe those measures.
313. Details of possible measures are not included in the legislation as this may risk taking away flexibility from the courts and public enforcers to identify the most suitable measure or measures to deal with a person subject to enforcement orders or undertakings. It may also take away the flexibility for a person who is subject to enforcement orders or undertakings to put forward their own measures, which could be deemed suitable, to the court or public enforcer.
314. Subsection (2) describes the first category of measures - the redress category. Subsection (2)(a) limits compensation or redress to those consumers who have suffered loss as a result of the breach of consumer law. This is mirrored in section 219B(4)(a). Consumers retain the right to refuse offers of redress, whether in an enforcement order or undertaking, and take their own civil action against the person that has caused them detriment. Where the infringing conduct relates to a contract, subsection (2)(b) states that measures in the redress category can include giving consumers the option to terminate that contract. Subsection (2)(c) allows for measures intended to be in the collective interests of consumers in cases where consumers who have suffered detriment cannot be identified or it would require a disproportionate cost to do so. Measures in these circumstances could include, for example, making a charitable donation equivalent to the value of the detriment caused to consumers (where that charity acts in the interests of consumers). Subsection (2)(c) only applies in the circumstances outlined above. It does not apply in circumstances where consumers who have been identified as suffering detriment choose to decline the redress offered.
315. New subsections (3) and (4) describe the measures in the second and third categories – the compliance and choice categories. Measures in these categories might include the person subject to the enforcement order or undertaking:

- appointing a compliance officer;

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published on 12th of June, 2013.*

- introducing a complaints handling process;
 - improving their record keeping;
 - signing up to an established customer review / feedback site; or
 - publicising details of the breach or potential breach in the local or national press.
316. New subsection (5) excludes the existing publication requirements within Part 8 of the EA from the scope of the new enhanced consumer measures.
317. New section 219B sets out the requirements that apply to the inclusion of enhanced consumer measures within an enforcement order or undertaking. New subsection (1) confirms that only just and reasonable enhanced consumer measures can be attached to enforcement orders or undertakings under this Part. Subsections (2) and (3) set out the factors the court or enforcer must take into account. This includes a specific requirement that the measures must be proportionate, taking into account the costs of the measures (to business and consumers) and the benefit to consumers.
318. Subsections (4) to (5) make provision in relation to a loss case (which is defined in subsections (9) and (10)). These provisions restrict the imposition of enhanced consumer measures in the redress category to cases where there has been a loss suffered by consumers and require that in those cases, the court or enforcer must be satisfied that the cost to the person subject to the enforcement order or undertaking of complying with the measures is unlikely to exceed the loss suffered by consumers. However, the administrative costs (i.e. the cost of setting up and running the scheme) should not be included in this calculation.
319. Subsections (6) and (7) limit any waiver sought by the person who is subject to an enforcement order or undertaking, from consumers as part of a compensation scheme, so that the waiver is not valid to the extent that it seeks to cover conduct which is not covered by the enforcement order or undertaking. For example, the waiver will not be valid if it relates to additional goods or services that were not covered by the enforcement order or undertaking.
320. Paragraph 9 makes amendments to section 220 of the EA (further proceedings), which makes provision for further applications to the court where there has been a failure to comply with an enforcement order or undertaking made under sections 217 and 218 of the EA. Sub paragraph (2) inserts a new subsection (1A) which provides that section 220 does not apply where the only failure is a failure to comply with the information requirement in new subsection 217(10D).
321. Subsection 220(2) gives the OFT the same right to apply to the court in respect of a failure to comply with an order or undertaking as the enforcer that made the application for the order. Sub paragraph (3) amends subsection 220(2) to provide that

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any CPC enforcer (defined in section 213(5A)) has that right, not just the OFT.

322. Sub paragraph (4) contains related or consequential amendments to Part 8 of the EA.
323. Paragraph 10 updates the EA to reflect the enforcement of schedule 5 in the Consumer Rights Bill.

Clause 82: Private actions in competition law

Summary and Background

324. The intention of this clause is to make it easier for consumers and businesses to gain access to redress where there has been an infringement of antitrust provisions (“competition law”).
325. Clause 82 and Schedule 7 have three main aims:
- To widen the types of the competition cases that the Competition Appeal Tribunal hears (“CAT”) (see paragraph 327 to 340) and to make other changes to the procedure of bringing a private action before the CAT;
 - To provide for opt-out collective actions and opt-out collective settlements (see paragraphs 341 - 351);
 - To provide for voluntary redress schemes (see paragraph 352 - 355).
326. The Government’s response to the consultation “Private Actions in Competition Law”³⁷, explains the proposals for reform of claims for damages under the private actions framework in Part 3 of this Bill. There are also further proposed changes accompanying these clauses in the CAT’s rules which govern how it deals with cases.

Widen the types of cases which the CAT can hear

327. The CAT is a specialist tribunal whose function is to hear cases involving competition issues. However, at present, the CAT is restricted in which competition law cases it can consider. The CAT is able to hear follow-on cases. A follow-on action is brought after an infringement has been found by “a relevant competition authority”, which are the Competition and Markets Authority (“CMA”), European Commission and the following relevant sector regulators with competition powers:
- The Office of Gas and Electricity Markets (“Ofgem”);

³⁷ <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

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published on 12th of June, 2013.*

- The Office of Communications (“Ofcom”);
- The Water Service Regulation Authority (“Ofwat”);
- Civil Aviation Authority (“CAA”);
- Office of the Rail Regulator (“ORR”);
- Northern Ireland Authority for Utility Regulation (“NIAUR”);
- Monitor.

328. In contrast, a stand-alone claim requires the party which brings the action to prove an infringement. In *Enron v EWS (I)*,³⁸ the Court of Appeal ruled that the scope for the CAT to go beyond the findings of the initial infringement decision is extremely limited. This judgment is widely thought to be one of the contributing factors restricting the role of the CAT in competition law actions in the current regime. Businesses or consumers who wish to bring stand-alone cases must bring their case in the High Court of England and Wales, the Court of Session or the Sheriff Court in Scotland or the High Court of Northern Ireland.
329. In addition, whilst the CAT may award damages for follow-on actions, it does not have the power to grant injunctions (an order which prohibits a party from doing a particular act). This restriction prevents a party from obtaining redress from the CAT in the form of a prohibition of anti-competitive pricing. At present, a party seeking an injunction would need to apply to the High Court.
330. Paragraph 4 replaces section 47A of the Competition Act 1998 (“CA”) which currently only provides for follow-on cases to be brought before the CAT. Paragraph 4 enables the CAT to hear a stand-alone claim as well as a follow-on claim and also to have the power to grant injunctions.
331. Paragraph 31 inserts paragraph 15A of the Enterprise Act 2002 (“EA”) to allow rules to be made providing for a fast-track procedure for claims brought under s.47A of the CA. The purpose of this is to enable simpler cases brought by small and medium enterprises (“SMEs”) to be resolved more quickly and at a lower cost.
332. Paragraph 7 introduces a new section 47D of the CA, This provides that an injunction granted under s.47A and in respect of collective proceedings is enforceable as if it

³⁸ *English Welsh & Scottish Railway Limited v Enron Coal Services Limited* [2009] EWCA Civ 647, 1 July 2009.

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published on 12th of June, 2013.*

were granted by the High Court. This means that if the injunction is breached, a party may bring proceedings for breach of the injunction, such as contempt proceedings which could result in a penalty such as a fine.

333. Paragraph 24 amends Schedule 4 of the EA providing for enforcement of injunctions granted under section 47A of the CA. It does this by providing that where a party fails to comply with an injunction, the CAT may certify the matter to the High Court, i.e. sets out the facts and evidence of the matter.
334. Paragraph 34 amends Schedule 4 of EA to enable rules to be made about the grant of injunctions by the CAT.
335. Paragraph 8 introduces a new section 47E of the CA. This provides that the limitation/prescription periods (the time limit for claims to be brought) for claims before the CAT are the same as the relevant limitation/prescription period for claims before the High Court in England and Wales, the Court of Session in Scotland, the High Court in Northern Ireland. At present, the limitation period for claims before the CAT is two years, compared with six years for a claim before the High Court of England and Wales and the High Court in Northern Ireland and five years for the Court of Session in Scotland. See paragraph 349 for how the limitation/prescription periods may be suspended in the case of collective actions.
336. Paragraph 13 amends Section 58 of the CA to make clear that the CAT is bound by an OFT's finding, unless it directs otherwise. This is to ensure the CAT has sufficient flexibility when dealing with case and is in the same position as a court which hears a competition case. A court is already able to make such a direction.
337. Paragraph 9 amends section 49 of the CA to provide for a right of appeal against a decision of the CAT in proceedings brought under section 47A of the CA (stand-alone or follow-on actions) or 47B of the CA (collective proceedings). Where the appeal concerns section 47B, it may only be brought by the representative in those proceedings.
338. Paragraph 14 replaces existing section 58A of the CA. The purpose of this is to make clear when a court or the CAT is bound by a decision that there has been an infringement of competition law. This ensures the position is the same for the court and the CAT. New Section 58A ensures that once an infringement decision has become final, the court or the CAT is bound by it. New section 58A sets out when a decision becomes final, for example when the time for appealing against the decision has expired without an appeal having been brought.
339. Paragraph 32 amends paragraph 17 of the Schedule 4 of the EA, to enable rules to be made to enable the CAT to order payments to a legal party who has been acting on behalf of a business or consumer for free (i.e. on a pro bono basis).
340. Paragraph 33 inserts paragraph 20A of Schedule 4 of the EA which enables rules to be

made which enable the CAT to stay or sist proceedings under section 47A and 47B. This is because the CAT may wish to stay (or sist) proceedings, for example if the original infringement decision is subject to appeal and that appeal has not yet been decided.

Collective actions and opt-out collective settlements

341. The second aim is to introduce an opt-out collective actions regime and an opt-out collective settlement regime (both of which involve a case being brought forward on behalf of a group of claimants to obtain compensation for their losses). Cases would be able to be brought by representatives on behalf of individuals and/or businesses.
342. The CAT can already hear opt-in collective actions under the existing section 47B of the CA. An opt-in regime requires claimants to “opt-in” to the legal action to be able to obtain any damages. However, the CAT does not currently have the power to hear opt-out collective actions. An opt-out regime means claimants are automatically included into the action unless they “opt-out” in a manner as decided by the CAT on a case by case basis. The purpose of introducing opt-out collective actions is to allow consumers and businesses to easily achieve redress for losses they have suffered as a result of breaches of competition law.
343. The function of a collective settlement regime is to introduce a procedure for infringements of competition law, where those who have suffered a loss and the alleged infringer may jointly apply to the CAT to approve the settlement of a dispute on an opt-out basis. The collective settlement regime will operate on the same opt-out principles as the opt-out collective proceedings.
344. Paragraph 5 replaces section 47B of the CA so as to provide for opt-out collective proceedings, as well as continuing to provide for opt-in collective proceedings. Subsection (11) defines opt-out collective proceedings, it also provides that a person who is not domiciled in the United Kingdom must opt-in to become part of the proceedings. Subsection (10) defines opt-in collective proceedings. Subsection (4) provides that collective proceedings may only be progressed if the CAT makes a collective proceedings order. Subsection (5) provides that that CAT may only make a collective proceedings order if it considers the person who brought the proceedings meets the requirements of subsection (8) and the claims are eligible for inclusion in collective proceedings (they fall within the claims provided for in section 47A of the CA, so the proceedings may either be stand-alone or follow-on). Subsection (8) provides that a representative must either be a person who is part of the class of persons who is bringing the action (i.e. a person who claims to have suffered a loss) or a person whom the Tribunal considers is appropriate. The current section 47B of the CA only allows for named representative bodies to bring opt-in collective actions. Currently, this only includes the consumer organization Which?. The new subsection (8) will enable any appropriate consumer representative body or trade association to bring claims on behalf of consumers or businesses, as long all the claims raise the same, similar or related issues of fact or law under section 49B(6).

345. Paragraph 6 introduces new section 47C of the CA. Subsection (1) prohibits the CAT from awarding exemplary damages in collective proceedings, i.e. damages which are designed to be punitive rather than simply compensate for the actual loss suffered. This is to avoid very large damages being awarded which do not reflect the losses suffered. Subsection (2) enables the CAT to determine the damages due in collective proceedings without being required to consider each claim which forms part of the action. This is designed to avoid the CAT having to spend time assessing many individual claims and instead enables the CAT to group the claims together for the purpose of assessing damages. Subsection (5) provides that damages not claimed in opt-out collective proceedings must be paid to a charity specified by section 194(8) of the Legal Services Act 2007. Currently, the charity is the Access to Justice Foundation as recommended by the Jackson Review of Costs³⁹, the Civil Justice Council and HM Treasury's Financial Services Rules committee as a suitable body to receive unclaimed sums. Subsection (7) provides that damages-based agreements are not allowed in opt-out collective actions. A damages-based agreement is where some of the damages are paid to the legal representatives. Paragraph 37 amends section 58AA of the Courts and Legal Services Act 1990, to make clear this restriction on damages-based agreements applies, notwithstanding the other provisions of that Act.
346. Paragraph 25 amends Schedule 4 of the EA to allow representatives in a collective action to be able to take action to enforce an order concerning damages in collective proceedings.
347. Paragraph 26 replaces paragraphs 6(a) and amends paragraph 6(b) of Schedule 4 EA to provide that where damages are awarded in a collective action to a person who is not a party to the order (i.e. they are not the representative or another person who the CAT considers are suitable to hold the damages and then distribute) or costs or expenses are awarded to a person in respect of a claim made under section 47A of the CA before it became part of the collective proceedings, it may only be enforced if permission is granted by the High Court or the Court of Session. This is to provide some judicial control over the volume of enforcement claims being made by persons who are not the representative or another person who the CAT considers is suitable to hold the damages.
348. Paragraph 27 amends paragraph 7 of Schedule 4 of the EA so that where any award of costs is made against a representative in collective proceedings, the person who is being represented (i.e. a particular business or consumer) may not be held responsible for those costs. This provision is designed to prevent legal costs being passed on from the representative to the persons who are being represented.

³⁹ *Review of Civil Litigation Costs*, <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

349. Paragraph 8 (see paragraph 335) introduces new Section 47E of the CA which makes provisions about the limitation/prescription periods for claims before the CAT. Subsection (4) provides for there to be a suspension of the limitation/prescription period where claims are made under section 47B of the CA (collective proceedings). The purpose of this is to discourage parties from also commencing separate section 47A proceedings before the CAT, so as to protect their position. This is because the collective proceedings may only progress if a collective proceedings order is made. As this may not be made for some time, a party may be tempted to bring separate proceedings section 47A proceedings before the CAT to avoid the limitation/prescription period expiring before it is known whether the collective proceedings can be continued. The suspension of the limitation/prescription period offers protection to claimants who might otherwise be time-barred in bringing a single claim if the collective proceedings fail. Subsection (5) sets out when the limitation/prescription period will resume, such as where the Tribunal declines to make a collective proceedings order. Paragraph 29 replaces paragraph 11(2)(a) of Schedule 4 EA to enable rules to be made about the operation of the limitation and prescription periods.
350. The Government is also keen to encourage parties to settle disputes. To do this it is providing for collective settlements in opt-out collective proceedings where a collective proceedings order has been made as well as in cases where a collective proceedings order has not been made. The Government is also introducing voluntary redress schemes (see paragraphs 352 - 355). Paragraph 10 provides for a new Section 49A of the CA which provides for collective settlements where a collective proceedings order has been made. Subsection (2) provides that the representative and the defendant must apply for approval of the proposed collective settlement. Subsection (4) provides that where there are multiple defendants, the defendants who want to be bound by an approved collective settlement must apply to the CAT. Subsection (5) provides that the CAT may approve the collective settlement if it is satisfied the terms are just and reasonable. Subsections (6) to (10) describes which persons are bound by the collective settlement.
351. Paragraph 11 introduces a new Section 49B of the CA which enables a collective settlement to be made where a collective proceedings order has not been made. This procedure may be relevant if parties are at an early stage of the litigation. Subsection (4) requires that the CAT may only approve the collective settlement if it makes a collective settlement order. Subsection (5) provides that this requires the CAT to consider the person who proposes to be the settlement representative is a person who the CAT could approve as being a settlement representative and that if collective proceedings were brought, the claims would be suitable for inclusion in such proceedings. Subsection (8) provides the CAT may only approve the collective settlement if it considers its terms are just and reasonable. Subsections (9) and (10) provide for who is bound by a collective settlement order. Paragraph 31 introduces paragraph 15C to Schedule 4 of the EA to provide that rules can be made about collective settlements.

Voluntary redress schemes

352. The third aim is to define a voluntary redress scheme (referred to in legislation as a “redress scheme”) so as to put it on a statutory footing. The government is keen for parties who are found liable for a breach of competition law to enter into negotiations with consumers or businesses where possible rather than the first route being a private action proceeding through the courts. The intention is to provide suitable, alternative mechanisms to allow for alternative dispute resolution. One mechanism is to allow the CMA to certify voluntary redress schemes that are entered into by businesses that have been found to have infringed competition law.
353. To support this goal, Government is introducing a new power enabling the CMA to certify redress schemes. Even without the certification, voluntary redress schemes can still be offered. However, Government wishes to place voluntary redress schemes on a firmer legal footing by allowing the CMA to accept binding, voluntary undertakings as to a compensation scheme. The intention would be that, the CMA could take into account whether a business had made an attempt to make redress when assessing the level of fine for the competition law breach. Accordingly, paragraph 12 introduces new section 49C, which provides that the CMA may decide to approve a voluntary redress scheme (which may be put forward to the CMA prior to an infringement decision or after the decision has been made). Subsection (3) prohibits the CMA from taking into the account the amount or value of compensation when deciding whether or not to approve a voluntary redress scheme. This is to avoid the CMA being required to spend a lot of time analysing the case. Subsection (5) provides that the Secretary of State may make regulations about the approval of voluntary redress schemes. These regulations may make provisions about the procedure for approval, including the information to be provided. In addition, they may set out the factors the CMA should or should not take into account.
354. Paragraph 12 also inserts new section 49D to the CA. Section 49D provides that the CMA may require a person who applies for the approval of a voluntary redress scheme to pay the CMA's reasonable costs. The CMA will incur costs in considering an application for approval. In addition, paragraph 12 also inserts new section 49E to CA which provides in subsection (1) that a party who has a voluntary redress scheme approved has a duty to comply with its terms. Subsection (3) provides that if a business or consumer suffers as a result of a breach by a business of the terms of voluntary redress scheme, they may bring legal proceedings before a court for damages or another remedy, such as an injunction. This is to ensure there are remedies available for a breach of a voluntary redress scheme.
355. Paragraph 17 amends Schedule 8 of CA to allow for a business to appeal to the CAT against any costs imposed by the CMA in respect of a voluntary redress scheme.

FINANCIAL EFFECTS / PUBLIC SECTOR MANPOWER

356. The Bill has been considered with regard to its impact on local authorities and the

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justice system. Both the Department for Communities and Local Government and the Ministry of Justice have agreed that the proposals will provide a net savings to public sector expenditure.

357. Our proposals will result in some ongoing costs for government in enforcing compliance with the law. This will be offset by the transfer of cases from the justice system to the CAT, which will produce a net savings for government.

IMPACT ASSESSMENT

358. The Impact Assessments (“IAs”) accompanying this Bill can be found in hard copy in the Printed Paper Office (House of Lords) or Vote Office (House of Commons).
359. The IAs summarise the economic effect of the package of policies contained in the Bill. It shows the overall cumulative net quantified effect (total net present value), and the proportion of which would accrue to business (business net present value). Overall they show a net benefit to business and consumers from implementing the Bill. The IAs forecast a significant decrease in consumer detriment resulting from easier access to redress and reduced transaction costs.
360. The IAs note a number of key non-monetised benefits. The assessments forecast an improvement in consumer confidence to take up new products (since they will know their rights if things go wrong), switch suppliers or make purchases through different channels such as the telephone or internet. The assessments argue that this would contribute to a competitive market, rewarding businesses that are most effective at meeting customer needs and encouraging innovation in products and services. The combination of higher levels of consumer confidence, competition and innovation would be likely to contribute to economic growth.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Compatibility

361. Section 19(1)(a) of the Human Rights Act 1998 requires the Minister in charge of the Bill to make a statement confirming compatibility with the European Convention on Human Rights (ECHR).
362. The Department’s view is that, on introduction, the relevant Minister will be in a position to make a statement in accordance with section 19 of the Human Rights Act 1998 that the provisions in the Bill are, in her view, compatible with the rights contained in the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Department considers it unlikely that the Bill’s provisions would be

challenged as incompatible with the ECHR, or that such a challenge would be successful.

363. The main ECHR issues raised by the Bill are identified below.

Consumer contracts for Goods, Services and Digital Content and Unfair Terms in Consumer Contracts

364. There are no ECHR issues raised by Parts 1 and 2 of the Bill.

Investigatory Powers

365. Schedule 6 confers a number of investigatory powers on consumer law enforcers. These include in a particular a power to request the production of specified information or documents (paragraphs 17 and 23), a power to enter premises (paragraphs 21 and 31), and a power to inspect, seize and test documents, goods or products (paragraphs 22, 25, 15 and 39 respectively). These powers engage Article 6 (right to a fair trial), Article 8 (right to respect for private life) and Article 1 of Protocol 1 (right to peaceful enjoyment of possessions) ECHR. Schedule 6 contains a number of safeguards to ensure that these powers are compatible with ECHR rights. Furthermore, the powers are exercisable only by public bodies who are required by section 6 of the Human Rights Act 1998 to act compatibly with ECHR rights.

Civil enforcement remedies

366. Schedule 7 extends the range of remedies available for the enforcement of consumer law under Part 8 of the Enterprise Act 2002. The remedies are consistent with the right to a fair trial in the determination of civil rights and obligations (Article 6(1) ECHR). Furthermore, any court exercising its discretion to grant such a remedy is required to act compatibly with Article 6(1) ECHR, by virtue of section 6 of the Human Rights Act 1998.

Private actions in competition law

367. Paragraphs 5, 6, 10, 11 and 30 of Schedule 5 introduce an “opt-out” collective actions regime for competition law private actions, so that all underlying claimants who fall within the definition of a represented class are bound by the outcome of a case unless they actively opted out of the collective action within a specified period. There are safeguards to ensure that effective and adequate notice is given to all members of the identifiable class of their right to opt-out, and that the Competition Appeal Tribunal will provide a reasonable period of time for that right to be exercised.
368. It may be argued that Article 6(1) ECHR is engaged where an individual (despite the safeguards above) is unaware of the collective action of which he or she is a part, and is bound by the outcome without having been able to participate actively in the

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proceedings, or to bring a case in his or her own name. However, the Department's view is that if there is any interference with Article 6(1) ECHR rights, it would be limited and justified. In such a scenario, it remains the case that the civil rights and obligations of the individual would be determined by an independent and impartial tribunal, as Article 6(1) requires. The limited interference with the individual's ability to participate actively in the proceedings is justified by the legitimate aim of establishing effective access to justice for consumers and businesses who would not otherwise have any, or any effective, access to justice. This is because in the absence of opt-out collective actions, it may not be economically worthwhile for potential claimants to bring a claim on the basis that the sums sought are likely to be small (e.g. the sum due for an over-priced washing machine or an excessively high coach ticket price).

COMMENCEMENT

369. The Bill will come into force on such day as the Secretary of State may appoint by order made by Statutory Instrument. Different days may be appointed for different purposes.

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ANNEX A: GLOSSARY OF ABBREVIATIONS

Small and medium sized enterprise	SME
Competition Appeal Tribunal	CAT
Alternative Dispute Resolution	ADR
European Union	EU
Sale of Goods Act 1979	SGA
Supply of Goods and Services Act 1982	SGSA
Unfair Contract Terms Act 1977	UCTA
Office of Fair Trading	OFT
Consumer Rights Directive (Directive 2011/83/EU of the European Parliament and of the Council on consumer rights)	CRD
Consumer Sales Directive (Directive 1999/44/EC of the European Parliament and Council on certain aspects of the sale of consumer goods and associated guarantees)	CSD
Department for Business, Innovation and Skills	BIS
The Unfair Terms in Consumer Contract Regulations 1999	UTCCRs
Competition and Markets Authority	CMA
Enterprise Act 2002	EA
Supply of Goods (Implied Terms) Act 1973	SGITA
Internet Service Provider	ISP
Unfair Terms in Consumer Contracts Directive (Council Directive 1993/13/EEC on unfair terms in consumer contracts)	UTCCD
European Union Court of Justice	EUCJ

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

European Economic Area	EEA
The Office of Gas and Electricity Markets	Ofgem
The Office of Communications	Ofcom
The Water Service Regulation Authority	Ofwat
Civil Aviation Authority	CAA
Office of the Rail Regulator	ORR
Northern Ireland Authority for Utility Regulation	NIAUR
Competition Act 1998	CA
Treaty on the Functioning of the European Union	TFEU
Consumer Protection from Unfair Trading Regulations 2008	CPRs
Impact Assessment	IA
European Convention on Human Rights	ECHR

ANNEX B: TRANSPOSITION NOTES

Directive of the European Parliament and of the Council 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

370. This note describes the implementation in the Consumer Rights Bill of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.⁴⁰ The Directive requires that goods sold to consumers must be in conformity with the contract and consumers have certain remedies if goods are not in conformity with the contract. The Directive also requires that guarantees provided free of charge alongside goods be legally binding.
371. The deadline for implementing the Directive passed on 1 January 2002. The legislation currently implementing the Directive can be found in the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) and in the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982 and the Supply of Goods (Implied Terms) Act 1973 which SI 2002/3045 amended. The Consumer Rights Bill repeals and replaces the provisions of those pieces of legislation which currently implement the Directive.
372. UK law has long provided that goods must meet certain requirements, which are implied into contracts for goods, and consumers have remedies if the requirements are not met. The Directive was implemented by amending and supplementing pre-existing law. The Bill goes beyond the minimum requirements of the Directive in a number of respects, as it reflects both the Directive and embedded UK law.
373. The table below describes the main substantive provisions of the Bill implementing the Directive.

Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees		
Article	Objective	Implementation
1.1	Defines scope of application.	Clause 3

⁴⁰ OJ L 171, 7/7/1999, p.12.

*These notes refer to the draft Consumer Rights Bill
published on 12th of June, 2013.*

1.2	Definitions of key terms.	Definitions for the Bill are set out in clauses 2 and 60 and include definitions which adequately implement the terms defined by the Directive. Clause 23 contains the definition of 'repair' and clause 32 contains the definition of 'producer'.
2.1-2.3	Goods to conform with the contract for sale.	Clauses 8, 9, 10, 12 and 13
2.4	Circumstances where the seller is not to be bound by public statements about the goods.	Clause 8(7)
2.5	Lack of conformity resulting from incorrect installation of the consumer goods to be deemed to be equivalent to lack of conformity of the goods.	Clause 14
3.1-3.5	<p>Seller to be liable to the consumer for any lack of conformity which exists at the time the goods were delivered, and to make specified remedies available to the consumer, as follows:</p> <p>(i) Repair or replacement, in either case free of charge, unless impossible or disproportionate;</p> <p>(ii) Appropriate reduction of the price or rescission of the contract, if the consumer is entitled to neither repair nor replacement, or the seller has not provided repair or replacement within a reasonable time or without significant inconvenience to the consumer.</p>	Clauses 18, 23, 24
3.6	Rescission unavailable if lack of conformity is minor.	Not implemented in the UK

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published on 12th of June, 2013.*

4	Right of redress for seller as against persons liable to the seller in the contractual chain.	No change to UK law is required to implement Article 4
5.1	Seller to be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods.	No change to UK law is required to implement Article 5.1. The UK relies instead on its pre-existing rules on limitation of actions.
5.2	Consumers may be required to notify the seller of a lack of conformity with 2 months of its appearance.	Not implemented in the UK
5.3	Lack of conformity appearing within first 6 months to be deemed to have been present at time of deliver unless proven otherwise.	Clause 18(7)
6	Guarantees.	Clause 31
7.1	Contractual terms which waive the rights under the Directive are not to be binding.	Clause 32
7.2	Choice of law of a non-EU State not to deprive consumer of protection.	Clause 34
8	Rights under the Directive to be exercised without prejudice to national law. Option to maintain stricter national legislation.	As explained above, the Directive has been implemented within pre-existing UK rules.

Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

374. This note describes the implementation in the Consumer Rights Bill of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.⁴¹ The Directive requires that unfair terms in contracts concluded between a trader and a consumer are not binding.

⁴¹ OJ L 95, 21/04/1993, p.29.

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published on 12th of June, 2013.*

375. The deadline for implementing the Directive passed on 31 December 1994. The legislation currently implementing the Directive can be found in the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083). The Consumer Rights Bill repeals and replaces the provisions of those Regulations.

376. The Bill goes beyond the minimum requirements of the Directive ('gold-plating') in a number of respects:

- application to all consumer contract terms, whether or not individually negotiated;
- application to trader's notices directed at consumers, whether or not incorporated in a consumer contract;
- contracts and notices excluding trader's liability in negligence for death or personal injury are not binding;
- terms on main subject matter and price are exempt from assessment of fairness only if legible and prominent;
- 'grey list' of terms that may be regarded as unfair is determinative and exhaustive for the purpose of exception for terms on main subject matter and price;
- three further terms added to 'grey list';
- more onerous or unusual terms of a contract must be more prominent, whether or not they are unfair.

377. The table below describes the main substantive provisions of the Bill implementing the Directive.

Directive 93/13/EEC on unfair terms in consumer contracts: Transposition Measures		
Article	Objective	Implementation
1.1	Defines scope of application	Clause 64
1.2	Exclusion of mandatory statutory provisions	Clause 76
2	Definitions of key terms	Clauses 64 and 2
3.1	Fairness test	Clause 65

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published on 12th of June, 2013.*

3.2	Terms not regarded as individually negotiated	No implementation required (clause 64 applies to terms whether individually negotiated or not).
3.3	Indicative and non-exhaustive 'grey list' of terms that may be unfair, as set out in Annex to Directive	Clause 66 and Schedule 3
4.1	Circumstances to consider in assessing fairness.	Clause 65
4.2	Exception from fairness assessment for terms on main subject matter and price	Clause 67
5	Terms to be in plain and intelligible language	Clauses 71 and 72
6.1	Unfair terms not to be binding	Clauses 65(1), 70 and 75
6.2	Choice of law of a non-EU State not to deprive consumer of protection	Clause 77
7	Effective enforcement	Clause 73 and Schedule 4; in addition to enforcement by public bodies under Part 8 of the Enterprise Act 2002, and private actions brought by individuals.
8	Option to retain stricter national legislation	See list of gold-plating above.
9	Commission review of Directive	No implementation required.
10	Implementation by 31 December 1994	No implementation required in Bill.
11	Directive addressed to Member States	No implementation required.