

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

CONSUMER RIGHTS BILL

EXPLANATORY NOTES

INTRODUCTION

1. The explanatory notes relate to the Consumer Rights Bill introduced in the House of Commons on 23rd January 2014. 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 (Trading Standards) can operate across local authority boundaries. It will also 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.

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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

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- 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 11, 12, 36, 37 and 50 in relation to the enforcement of information requirements and also see paragraph 11 below. See clause 28 in relation to default rules for the delivery of goods, and clause 29 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 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 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. These regulations will come into force on 13 June 2014. However, a small number of the CRD’s provisions are implemented in the Bill, as indicated above. The CRD:

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- for all contracts where a trader supplies goods, services or digital content to a consumer, requires that a trader must provide certain information (for example 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 it might be applied¹. A Government response was published in August 2013. 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 also intends to implement the majority of the recommendations made by the Law Commission and Scottish Law Commissions (the “Law Commissions”) following their findings that the law surrounding consumer rights to redress following misleading or aggressive practices by traders is fragmented, complex and unclear². The Government intends to implement the 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 a contract or payment, or receive a discount on the price paid, if they were subjected to misleading or aggressive practices. The Government published its response to the Law Commissions report together with draft regulations in August³. The Government intends to lay the regulations before Parliament 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

³ <https://www.gov.uk/government/publications/misleading-and-aggressive-commercial-practices-the-draft-consumer-protection-from-unfair-trading-amendment-regulations-2013>

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 law⁴. 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 accessible⁵. 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 complex⁶. The Law Commissions consulted on potential changes to the law on remedies for faulty goods and made recommendations in 2009⁷. 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 simplified⁸. Also in 2010, Professor Bradgate reported to BIS on the uncertainty in current law around consumer rights to quality for digital content products⁹. Following these various reports, BIS consulted from July to October 2012 on proposals to clarify consumer rights in goods, services and digital content¹⁰.

⁴ Benchmarking the performance of the UK framework supporting consumer empowerment through comparison against relevant international comparator countries, a study for BERR by UEA, 2008

⁵ Consumer Law Review: Summary of Responses, BIS, 2009

⁶ Davidson Report, HM Treasury, 2006

⁷ The Law Commission No.317/The Scottish Law Commission No.216, 2009

⁸ Consolidation and simplification of UK consumer law, BIS, 2010

⁹ Consumer rights in digital products, BIS, 2010

¹⁰ 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 currently 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 supplied 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 Bill¹¹. 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 2013¹² 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 and modernising enforcement officers’ investigatory powers into a generic set. It also consulted on removing the barriers to trading standards operating efficiently¹³. 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.

¹¹ The Law Commission No.292/The Scottish Law Commission No.199, 2005

¹² Unfair terms in consumer contracts – advice to BIS, The Law Commission & The Scottish Law Commission, 2013

¹³ Enhancing consumer confidence through effective enforcement, BIS, March 2012

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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”)¹⁴.
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 2013¹⁵.

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 currently 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.

¹⁴ Civil enforcement remedies – consultation on extending the range of remedies available to public enforcers of consumer law, BIS, November 2012

¹⁵ 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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	<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 supplies 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 as a generic set¹⁶.• Clarifies the law so that trading standards are able to work across local authority boundaries as simply and efficiently as possible.

¹⁶ Some specific powers contained in weights and measures and product safety legislation will be retained alongside the new generic set

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- Introduces new powers for public 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.
- Includes a power for the Secretary of State to extend the use of the enhanced consumer measures to private designated enforcers providing certain conditions are met and subject to safeguards on their use.
- 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.

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Supply of Goods (Implied Terms) Act 1973	For business to consumer contracts the provisions of the Supply of Goods (Implied Terms) Act 1973 (“SGITA”) will mainly be replaced by the Consumer Rights Bill. It will be amended so that it covers business to business contracts and consumer to consumer contracts only.
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 and to consumer to consumer 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 and consumer to consumer contracts only.
Sale and Supply of Goods Act 1994	This Act amended the SGA and the SGSA and as such 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 to 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. The Bill extends to England, Wales, Scotland and Northern Ireland. The Government will not normally legislate on devolved matters without the consent of the devolved administrations. BIS has agreed with the devolved administrations of Scotland and Wales that no Legislative Consent Motions ("LCM") are required. Some of the provisions in the Bill deal with devolved matters in Northern Ireland and the consent of the Northern Ireland Assembly through an LCM have been sought. If there are amendments to the Bill which deal with devolved matters, the agreement of the Northern Ireland Assembly will be sought for them.

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

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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 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.

30. Some of the provisions regarding goods and unfair terms will also apply in other circumstances, due to protections in the Directives from which these derive. See the notes on clauses 32 and 74 below.

Transposition of EU Directives

31. 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

32. 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: Where Part 1 applies

33. 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 under which a trader agrees to supply goods, digital content or services (or any combination of these) to a consumer. It does not matter whether the contract is written or oral or implied by the conduct of the trader and consumer, or a combination of these. This means that, for the Part to have effect, there must be a *contract* and the contract must be for a *trader* to supply goods, digital content or services to a *consumer*.
34. At its most basic level, for a contract to be formed under the law of England and

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Wales or 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.

35. Subsections (4) to (6) set 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 car service where 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 of the contract attracts service rights and remedies, the goods elements attract goods rights and remedies and the digital content elements attract the digital content rights and remedies. 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. In most cases it will be relevant to look at the appropriate chapter of the Bill (Chapter 2 for goods, 3 for digital content and 4 for services). Subsection (6) sets out that for particular mixed contracts (goods and installation services and goods and digital content) it may also be relevant to look at clauses 15 and 16.
36. Subsection (7) makes clear that consumer contracts are subject to provisions in Part 2 on unfair terms. In addition to the provisions of the Bill, some provisions of SGA will continue to apply to trader-to-consumer contracts if they are contracts of sale as defined by SGA (essentially sales of goods for money). The provisions of SGA which continue to cover such contracts are:
- Sections 1-10 (certain provisions regarding formation of the contract)
 - Section 11 with the exception of subsection (4) (when condition to be treated as a warranty)
 - Sections 16-19, 20A and 20B (certain provisions regarding transfer of property)
 - Sections 21-28 (provisions regarding transfer of title, duties of seller and buyer and payment and delivery being concurrent conditions)
 - Section 29 with the exception of subsection (3) (rules about delivery)
 - Section 34 (buyer’s right of examining goods) – the consumer’s remedies, if the goods are found to breach the statutory requirements under the Bill, are

still as set out in the Bill

- Section 37 (buyer's liability for not taking delivery of goods)
- Part V (rights of unpaid seller against the goods)
- Sections 49-50 (seller's remedies)
- Section 57 (auction sales)
- Sections 60-62 (rights enforceable by action ; interpretation and savings)

Clause 2: Key definitions

37. 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 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 which implement the CRD, to facilitate easier interpretation and clearer application of the law. These terms are “trader,” “consumer,” “goods” and “digital content”. 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 (clause 59, which sets definitions of the other terms used in Part 1 of 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.
38. Subsection (2) makes clear that a trader is a person acting for purposes relating to their trade, business, craft or profession. It makes clear that a trader acting through another person acting in the trader’s name or on the trader’s behalf, for example a trader which subcontracts part of a building contract or a company for which the employees make contracts with customers, is liable for proper execution of the contract. 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. Subsection (7) 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, for example, if a charity shop sells t-shirts or mugs, they would be acting within the meaning of trader.
39. 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).

40. Subsection (5) 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 the CSD (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 (6) and in the relevant clauses.
41. Subsection (8) 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.
42. The definition of digital content in subsection (9) is the same as the definition in the CRD (data produced and supplied in digital form). Digital content may be supplied 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. The creation of a category of digital content in this Bill does not affect the treatment of digital content in any other legislation.

CHAPTER 2 GOODS

Summary and Background

43. 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

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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.

44. Currently, provisions relating to contracts to supply 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
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

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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

45. 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.
46. 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 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.
47. 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.

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

48. In 2010 the Department for Business, Innovation and Skills (“BIS”) commissioned a report, entitled “Consolidation and Simplification of UK Consumer Law”¹⁷ 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.
49. 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.
50. A draft Bill was published in June 2013¹⁸ and scrutinised by the House of Commons Business Innovation and Skills Committee.

What goods contracts are covered?

Clauses 3-8: Consumer contracts about goods

51. Clause 3 sets out what contracts are covered by Chapter 2. The provisions contained in this Chapter apply in most cases where a trader agrees to supply goods to a consumer under a contract – such a contract is referred to in the Bill as a “contract to supply goods”. Chapter 2 applies whether the goods are supplied immediately or the parties agree that the trader will supply them at a future time. (The terms “trader”, “consumer” and “goods” are addressed in clause 2).
52. Subsection (3) provides that the Chapter does not apply to certain contracts. Such contracts therefore do not count as “contracts to supply goods”.
53. Subsection (3)(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 (e.g. bought by a collector) are covered.
54. Subsection (3)(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

¹⁷ 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

¹⁸ Draft Consumer Rights Bill (URN: BIS/13/925)

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).

55. Subsection (3)(d) of clause 3 serves to prevent a contract from counting as a contract to supply 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 34. This subsection does not apply to Scotland. Subsection (3)(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.
56. Under subsection (5), contracts to supply 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.
57. 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 (6) indicates that more specific provisions for the particular contract types take precedence.
58. Subsection (7) provides that with regard to any of the specific types of contracts defined in the following clauses, the provisions apply whether goods are supplied alone or alongside a service and/or digital content.
59. Clause 4 defines “ownership of goods” as referred to in Chapter 2 as being the general property in goods, which is the right over goods which an absolute owner has. It can be contrasted with more limited “special property” in a thing, which means that the person with special property can only put the item to a particular use rather than having absolute rights of ownership. The general rule is that ownership of the goods transfers to the consumer when the parties intend it to do so. The intention to transfer the ownership of the goods from the trader to the consumer will be dependent on the terms of the contract, what has been decided between the trader and the consumer and the circumstances of the case. The definition of “ownership of goods” is consistent with the meaning of “property” in goods under the SGA.
60. Section 18 of the SGA sets out the rules (for contracts of sale, to which the SGA applies) for ascertaining intention, unless a different intention appears from the contract or circumstances. The clause points to this and other specific provisions in the SGA (sections 16 to 19, 20A and 20B) about the passing of property, which will apply for determining when ownership of goods is transferred under a contract of sale

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of goods (that is, a contract to which SGA applies).

61. Clauses 5 to 8 define the types of contract to supply goods to which particular provisions apply, or apply differently.

- Clause 5 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 to supply goods to be a sales contract, the goods must have a monetary price. The strict legal position may be that a contract where the trader agrees to accept something other than cash, i.e. loyalty points, could be a sales contract but in fact under the Bill it does not matter if these types of contract are sales contracts or contracts described under clause 8 (contracts for the transfer of goods), since both attract the same rights and remedies. Under clause 3(7) the category of “sales contracts” includes contracts under which services or digital content are provided as well as the contract being for transfer of goods.
- Clause 5 (2) clarifies that a contract where the trader agrees to manufacture or produce the goods is a sales contract. For example, where a tailor produces a made-to-measure suit for a consumer, the contract between tailor and consumer would still be a sales contract for the finished suit.
- Clause 5 (3) clarifies that the category of sales contract includes conditional sales contracts where goods are paid for in instalments and the trader retains ownership of the goods until the conditions in the contract have been met, whether the consumer has possession of the goods in the meantime or not.
- Clause 6 defines contracts for hire of goods, as they apply between a trader and a consumer. The meaning of this provision 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), but the opportunity is being taken to simplify the wording. A contract for the hire of goods is covered by the Bill irrespective of the consideration given by the consumer i.e. whether the consumer pays cash or exchanges goods in return (provided that the contract falls within clause 3).
- Clause 7 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 8 defines contracts for transfer of goods by a trader to a consumer which are not sales contracts or hire-purchase agreements. A contract would be a contract for transfer rather than a sales contract if either (i) there is no monetary value assigned, or (ii) the contract is a mixed contract whether for a monetary price or not and whilst goods are supplied the transfer of goods is not

sufficiently central to the contract to be a sales contract. If no monetary value is assigned to the goods, this does not preclude money from forming part of the consideration of the contract. For example, if the trader offers goods A in exchange for goods B and a cash fee, no value has been assigned to either goods A or B so the contract would fall under clause 8, despite some money changing hands. The statutory rights under chapter 2 (see clauses 9-18) are the same for sales contracts and contracts for transfer.

What statutory rights are there under a goods contracts?

62. Clauses 9 to 17 set out requirements which the goods supplied, or the trader, must meet. Under clauses 9 to 14 and 17, the contracts are to be treated as containing terms that the relevant requirements will be met - or, in the case of clause 12, certain details are to be treated as a term of the contract. That is to say that the requirements set by these provisions form part of the contract without either party needing to refer to them.
63. Clauses 9 to 11 and 13 to 15 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. (A transposition note setting out how the Government will transpose the main elements of this Directive in the Bill is annexed to these explanatory notes – please see Annex B).

Clause 9: Goods to be of satisfactory quality

64. This clause provides that goods supplied under a contract to supply 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.
65. 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.
66. 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.

67. 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 10: Goods to be fit for particular purpose

68. 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.

69. 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 59.

Clause 11: Goods to be as described

70. 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.

71. This clause also, through subsections (4) and (5), provides that certain information required by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("the 2013 Regulations"), which implement the CRD, forms part of the contract. These regulations require traders to provide certain information to consumers before consumers are bound by a contract. The information required by paragraph (a) of Schedule 1 or 2 of these regulations relates to the main

characteristics of the goods. The clause establishes that any information that is provided by the trader and that is about the main characteristics – so is of a category mentioned in paragraph (a) of Schedule 1 or 2 of the 2013 Regulations - forms part of the contract. If the information regarding the main characteristics is not complied with, the consumer can pursue the protections for breach of clause 11, as set out in clause 19.

72. Subsection (5) makes clear that any change made to this information before entering into the contract or at a later date, will not be effective on the contract unless agreed by both the trader and the consumer. Nor can the parties agree a change which would deprive the consumer of his or her rights under this Chapter (see clause 31).
73. Subsection (6) makes clear that the provisions of subsections (4) and (5) apply to a contract for sale of second hand goods which are sold at a public auction, if individuals can attend the auction sale in person. Most of the provisions of Chapter 2 do not apply in these circumstances, as explained further in relation to clause 2(5).

Clause 12: Other pre-contract information included in contract

74. This clause establishes that any other information provided by the trader which is of a category mentioned in Schedule 1 or 2 of the 2013 Regulations, but which does not relate to main characteristics of the goods so does not fall under clause 11, also forms part of the contract between the trader and the consumer. If this information is not accurate then the consumer may recover some money – see clause 19(5) - but the other remedies (right to reject, repair, replacement etc) are not available.
75. Subsection (3) makes clear that the trader will not however be able to change this information without the consumer's agreement, so there would be a breach of contract if the information provided was not correct when the contract was made. Nor can the parties agree a change which would deprive the consumer of his or her rights under this Chapter (see clause 31).
76. Subsection (4) makes clear that the provisions of this clause apply to a contract for sale of second hand goods which are sold at a public auction, if individuals can attend the auction sale in person. Most of the provisions of Chapter 2 do not apply in these circumstances, as explained further in relation to clause 2(5).

Clause 13: Goods to match a sample

77. 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 replaces section 15 SGA, section 11 SGITA and sections 5, 10, 11E and 11K SGSA for trader to consumer contracts.
78. Where goods are held out as a sample then clause 13 will be breached if the full goods

supplied do not match that sample or they have a defect which the consumer would not have discovered by a reasonable examination of the sample goods. It may also be that the full goods supplied are not of satisfactory quality (under clause 9), even if the consumer could have discovered that fault on a reasonable examination – in this case, the consumer could seek remedies for breach of the term which clause 9 requires to be treated as included in the contract.

Clause 14: Goods to match a model seen or examined

79. 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.
80. 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 15: Installation as part of conformity of the goods with the contract

81. Clause 15 makes clear that special rules apply where goods are both supplied and installed by a trader (or the installation is done under that same trader’s responsibility). In that case, if the installation service is done incorrectly then the goods remedies apply, with the exception of the short-term right to reject.

Clause 16: Goods not conforming to contract if digital content does not conform

82. Clause 16 makes clear that special rules also apply where goods and digital content are supplied together in one product (e.g. where digital content is supplied on a disk). In that case, clause 16 makes clear that if the digital content rights are not met then this will mean the goods are substandard and the consumer has the right to the full suite of goods remedies (including the short-term right to reject).

Clause 17: Trader to have right to supply the goods etc

83. 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 transfer of ownership or possession takes place. In some transactions, the sale, transfer or hire will be immediate so the trader will need to have this right at the time the contract is made. In other cases, the parties may agree that the goods will be sold, transferred or hired at a later stage – the trader must have this right at that later time. 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. The general rule is that ownership transfers when the parties intend it to transfer. For contracts of sale (that is, contracts to which SGA applies), rules on establishing the parties’ intention as to the time ownership transfers - unless a different intention arises from the contract or the circumstances - are found in SGA, in particular section 18 (note, however, that legislation refers to “property” as opposed to “ownership” though the meaning is the same). See the notes on clause 4 for further

information.

84. 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.
85. 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 by 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.
86. This clause does not affect the protection for private purchasers of motor vehicles under section 27 Hire-Purchase Act 1964. Under that provision, where a private purchaser buys a motor vehicle from someone who has it subject to a hire-purchase agreement or conditional sale agreement and does not yet properly own the vehicle (because it is still under the hire-purchase or conditional sale agreement), then, if the private purchaser is a purchaser in good faith and without notice of the hire-purchase agreement or conditional sale agreement, the transaction is treated as if the person selling the vehicle did properly own it.

Clause 18: No other requirement to treat term about quality or fitness as included

87. 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 9, 10, 13 and (where it applies) 16.

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

88. Clauses 19 to 24 set out the remedies that apply if the consumer's statutory rights covered in clauses 9 to 17 are not met.
89. Clauses 19 and 23 to 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). (A transposition note setting out how the Government will transpose the main elements of this Directive in the Bill is annexed to these explanatory notes – please see Annex B).

Clause 19: Consumer's rights to enforce terms about goods

90. Depending on the statutory right which is breached, the consumer may have a short-term right to reject, a right to have the goods repaired or replaced and/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, or a right to recover certain costs. Subsections (1), (3) to (6) outline these rights and also serve to signpost the reader to the relevant clauses that detail these remedies and their application.

91. Subsection (2) makes clear that if a statutory right is breached due to the goods not conforming to the relevant term (e.g. to be of satisfactory quality), if the non-conformity is due to the materials supplied by the consumer, then this does not count as a failure to conform to the contract.
92. Subsection (5) makes clear that if the trader is in breach of any pre-contract information required to be treated as part of the contract by clause 12, the consumer has the right to recover any costs which they incurred as a result of the breach. The consumer can recover the amount of these costs up to the full price of the goods (so they could receive a full refund), or the full amount they already paid (if they had only paid in part for the goods). This applies equally where there is other consideration given instead of a price – the cap on the recoverable costs would be the value of that consideration.
93. Under subsection (6), if the requirement for the trader to have the right to sell or transfer the goods or possession of them (clause 17(1)) is breached, the consumer has a right to reject the goods, as described further in clause 20. The right to reject in this instance is not a short-term right to reject nor a final right to reject, therefore clause 22 and clause 24 respectively do not apply. The other rights provided by clause 17 – 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 (9) and (10), 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.
94. Subsection (7) makes clear that the availability of remedies specified in subsections (3) to (6) is subject to the particular rules for delivery of the wrong quantity and instalment deliveries in clauses 25 and 26. If a trader delivers the wrong quantity of goods then the remedies will be determined by clause 25. If the parties agree that the goods will be delivered in instalments, any entitlement to exercise the short-term right to reject or the right to reject under clause 19(6) will be determined in accordance with clause 26.
95. Subsection (8) states that the remedies for a breach of a term in the contract about the time or period for the delivery of goods are set out in clause 28.
96. Subsections (9) and (10) serve as a reminder that the statutory remedies set out in clause 19 do not mean the consumer cannot pursue other remedies, as an alternative or addition to the statutory remedies but the consumer may not recover more than once for the same loss. For example, in some cases the consumer may exercise the short-term right to reject and receive a refund, and also claim damages for additional loss

caused by the non-conformity of the goods. In other cases, a consumer may prefer to claim damages instead of pursuing one of the statutory remedies.

97. Subsection (11) outlines the other common law remedies that the consumer can seek, such as claiming damages or relying 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. For a breach of an express term (that is a term which the parties expressly agree to) the consumer may be able to treat the contract as at an end, depending on the status of that term.
98. Subsection (12) provides that the consumer is only entitled to treat the contract as at an end for breach of one of the statutory rights in clauses 9-11, 13-16 or 17(1) by exercising a right to reject under Chapter 2. This overrides any common law right to terminate the contract for breach of the terms which these clauses require to be treated as included in the contract.
99. Subsection (13) clarifies that references in Chapter 2 to treating a contract as “at an end” have the same meaning as treating a contract as “repudiated”. This means that, where a consumer treats a goods contract as at an end under the Bill, then the consumer may also be able to recover damages for non-performance of the whole contract by the trader.
100. Subsections (14) and (15) provide 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. These subsections correspond to section 48A(3) and (4) of the SGA and section 11M(3) and (4) of the SGSA.
101. For goods, clauses 19 and 20 provide that in certain situations the consumer has the right to terminate the contract and receive a refund. Where the contract is a mixed contract with a goods element, this means that the consumer has the right to terminate the whole contract (both the goods and non-goods elements) and receive a refund of the price of the contract (or for money already paid towards the full price of the contract). If the consumer wishes to continue part of the contract, it is open to the parties to agree to do so.
102. For example, a consumer contracts with a trader to source for them and then install a kitchen. When the trader has finished the work, the granite worktops (the goods) are badly scratched and not fit for purpose. The consumer has the right to ask for their money back, that is any money paid for both the installation service and the kitchen units. In this case, they probably would exercise that right as the installation service has no value on its own.
103. As a further example, a consumer purchases a mobile phone handset (goods) with a network service contract. The phone keeps crashing so they return it to the trader. The consumer has the right to ask for a refund for both the phone and service, however in

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

practice they may want to continue with the service to use with another phone, and the consumer and trader could agree to that.

104. 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 9)	<ul style="list-style-type: none"> • The short-term right to reject (clauses 20-22) • 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 10)	<ul style="list-style-type: none"> • The short-term right to reject (clauses 20-22) • 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 11), including conforming to information re material characteristics under the CRD	<ul style="list-style-type: none"> • The short-term right to reject (clauses 20-22) • 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 2013 Regulations (clause 12)	<ul style="list-style-type: none"> • The right to recover costs incurred, up to the contract price (clause 19(5))
Goods to match a sample (clause 13)	<ul style="list-style-type: none"> • The short-term right to reject (clauses 20-22) • 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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Goods to match a model seen or examined (clause 14)	<ul style="list-style-type: none"> • The short-term right to reject (clauses 20-22) • The right to repair or replacement (clause 23) • The right to a price reduction or the final right to reject (clause 24)
Incorrect installation of goods (by trader or under trader's responsibility) (clause 15)	<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 16)	<ul style="list-style-type: none"> • The short-term right to reject (clauses 20-22) • 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 17(1))	<ul style="list-style-type: none"> • The right to reject (clause 20)
Goods to be free from any charge or encumbrance not disclosed or known (clause 17 (2) and (5))	<ul style="list-style-type: none"> • Statutory remedies do not apply but consumers may claim damages (clause 19(9) and (10))
Consumer to enjoy quiet possession of the goods (clause 17(2), (3), (6) and (7))	<ul style="list-style-type: none"> • Statutory remedies do not apply but consumers may claim damages (clause 19(9) and (10))

105. As set out above, the terms that are to be treated as included in the contract in clauses 9-17 are contractual terms and if they are not met it means there is a breach of contract. The common law (that is, law that is set out in cases decided by judges) already provides certain remedies for breach of contract. This clause provides that the consumer may – instead of (or, in some cases, in addition to) pursuing the statutory remedies set out in clause 19 and subsequent clauses – seek common law remedies of damages, specific performance or in Scotland specific implement.

106. "Damages" refers to the common law remedy of financial compensation paid by one party to the other. For example, where a trader is in breach of a term that this Part

requires to be treated as included in a contract, the court may order the trader to pay damages to the consumer. Generally, an award of damages for breach of contract is intended to compensate the injured party for loss suffered. In some, less frequent, cases the court may award damages which go beyond simply compensating the consumer for loss suffered – e.g. a court can sometimes award nominal damages, where there is a breach of contract but no loss, or aggravated damages to compensate for mental distress. For a breach of a term that this Part requires to be treated as included in the contract, the general rule is that damages are intended to put the consumer in the same position as if there had not been a breach. The level of damages awarded will depend on the specific circumstances and the term which the trader has breached. Typically, damages would cover the estimated loss directly resulting from the breach, in the ordinary course of events: if the consumer keeps the goods, this would generally be the difference between the value of the goods, service or digital content received by the consumer and the value had there not been a breach. There are legal tests to be satisfied for a consumer to recover damages: a person cannot recover damages for loss which was not caused by the breach (of the term required by the Bill) or which was not sufficiently foreseeable; nor can the consumer recover for loss which they could reasonably have acted to limit or mitigate.

107. “Specific performance” is a direction a court can make, to compel a party to perform their obligations under a contract. It is an equitable remedy, meaning it is not available to consumers as a right, but at the court’s discretion. It will not be ordered if damages (see above) are adequate to compensate the consumer – generally, damages will be adequate unless the subject matter of the contract is unique as the consumer can use damages to buy a replacement. “Specific implement” is similar to “specific performance” for Scotland, and there are likewise specific circumstances where that may be used. In referring to specific performance or specific implement, this clause does not seek to codify the law as to when specific performance or specific implement might be available, but the references serve as a reminder that it may be an alternative remedy to the statutory remedies. Clause 58 gives more detail on the powers of the court in proceedings where a remedy is sought.
108. 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 9 (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 9(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 20: Right to reject

109. This clause serves to explain the remedies of short-term right to reject, final right to reject and the right to reject under clause 19(6), and how these operate.
110. The clause establishes that when the consumer has one of these rights to reject and chooses to exercise it, this means rejecting the goods and terminating the contract. The clause also provides what the consumer must do to exercise the right.
111. Subsection (5) sets out what the consumer must do to exercise one of these rights: they must indicate to the trader that they are rejecting the goods and treating the contract as at an end.
112. Subsection (6) clarifies that, as long as the meaning of the indication is clear, it does not matter what form it takes.
113. Subsection (7) provides that when the right to reject is exercised by the consumer, the trader has a duty to refund the consumer and from this time the consumer must make the goods available for collection by the trader, or if agreed, return the rejected goods to the trader.
114. If money was not used to pay for the goods, under subsections (10) and (11), the consumer is not entitled to money back but the “refund” would be a return of whatever the consumer gave in exchange for the goods (see examples below). If this cannot be returned to the consumer due to the nature of the exchange, then, under subsection (14) and (15), the consumer may not demand a refund but may pursue a damages claim. The consumer still has a “right to reject” (that is, to reject the goods and treat the contract as at an end) in this situation, but the means of obtaining money back is different. Examples of situations where these subsections may apply 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 (10).
 - A microwave supplied 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 (11), but if it was no longer available, or had been refurbished, then a refund would not be possible.
115. Where money formed part of what the consumer used to pay for the goods but the rest was “paid for” with something else (something non-monetary), the consumer is still entitled to a refund for the money that they paid and return of the other property

transferred if possible. The consumer may pursue a damages claim for any loss for which they cannot claim a “refund” (of money or property) under clause 20.

116. Subsection (12) 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 so the consumer exercised their short-term right to reject, the consumer would only be able to seek a refund for the remaining 1 week when the goods would not be used. Under subsection (14)(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 has not had use of the goods, no refund may be pursued. The consumer could instead claim damages. If what the consumer transferred can be divided but not into the portion to which the consumer would be entitled under subsection (12), a refund of the division can be pursued, even if this is less than the proportional amount transferred by the consumer for the period of use of the goods. The consumer could then claim damages for the remainder.
117. Subsection (13) 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 21: Partial rejection of goods

118. This clause clarifies the consumer’s rights around partial rejection of goods. If the consumer has the right to reject the goods because some or all of them do not conform to the contract then the consumer can reject some or all of them. If the consumer rejects only some of the goods they cannot reject any of the goods which do conform to the contract. That is, the consumer can:
- reject all of the goods (conforming and non-conforming);
 - reject all of the non-conforming goods (but none of the conforming goods); or
 - reject some of the non-conforming goods (and keep some of the non-conforming goods and all of the conforming goods).
119. If the consumer has the right to reject an instalment of goods because some or all of them do not conform to the contract, then the consumer can reject some or all of the goods in the instalment. If the consumer rejects some of the goods they cannot reject any of the goods in the instalment which do conform to the contract.
120. In this clause, conforming to the contract means conforming to any of the requirements of the contract. This includes conforming to all of the terms which the

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Bill requires to be treated as included in a contract to supply goods, including under clause 17. In this way, conforming to the contract has a wider meaning than in clauses 19 and 22-24, which do not cover conformity to the terms required by clause 17

121. The provision is in effect consistent with section 35A of SGA, although section 35A provides that acceptance of some goods does not prevent rejection of others, whereas that concept of acceptance does not apply under the Bill. This clause therefore provides clarity the consumer nonetheless has equivalent rights to reject in part.
122. Subsections (3) and (4) correspond to section 35(7) of the SGA and provide that where the goods form part of a “commercial unit” (defined in subsection (5)) the consumer may not reject some of the goods in that unit but keep 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 22: Time limit for short-term right to reject

123. This clause establishes the default time limit of 30 days for the short-term right to reject. The one exception (established under subsection (4)) is that for perishable goods which would not be reasonably expected to last longer than 30 days, the period for exercising the short-term right to reject lasts only as long as it would be reasonable to expect those goods to last.
124. 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, hire-purchase or conditional sales, obtains possession
 - The goods have been delivered
 - The trader has notified the consumer that any actions required before the goods may be used (including installation, if needed) have been completed by the trader.
125. This clause also provides that the 30 day period will not run during any repair or replacement (the waiting period). On return of the goods to the consumer, the consumer has the remainder of the 30-day period, or 7 days (whichever is longer), within which they can still exercise the short-term right to reject if the goods still breach the standards set by the Bill.
126. Subsection (8) details when the waiting period starts and ends. The period starts on the day the consumer requests the repair or replacement and ends on the day that the consumer receives the repaired or replacement goods.

Clause 23: Right to repair or replacement

127. 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. This includes the trader bearing any costs involved in the removal of an installed item and reinstallation of a replacement. A replacement would usually need to be identical, that is of the same make and model and if the goods were bought new then the replacement would need to be new.
128. Once the consumer has opted for a repair or replacement of the goods, he or she may not exercise an alternative remedy without first allowing the trader a reasonable time to complete that chosen remedy. However, if waiting a reasonable time would cause the consumer significant inconvenience then the consumer can pursue an alternative remedy without doing so.

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

129. 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 12. Under subsection (4), if the consumer transferred something other than money for the goods, and the thing transferred cannot be returned in the same state or divided sufficiently to give back to the consumer the appropriate amount the consumer may not seek a reduction in the purchase price.
130. This clause largely corresponds to section 48C of the SGA and section 11P of the SGSA, but there are some changes as outlined below.
131. 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.
132. For the purposes of determining when one repair has been carried out, subsection (7) provides that, where the repair is carried out on the consumer's premises, the repair is not complete until the trader indicates to the consumer that the repairs are finished. This means that a single repair may be carried out over more than one visit, without

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triggering the right to a price reduction or the final right to reject until the trader notifies the consumer that it is complete.

133. Where the consumer requests that a number of faults be repaired, and these repairs are provided together, this counts as a single repair.
134. If the consumer opts to keep the goods and require a reduction in price the question of what is an appropriate amount will depend on the circumstances and the remaining functionality of the goods. The reduction in price should reflect the difference in value between what the consumer paid for and the value of what they actually receive, and could be as much as a full refund or the full amount already paid.
135. Subsections (9) to (12) 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 the make and model of the goods is stated when they are supplied and there is independent third-party evidence of an active business-to-consumer second-hand market in “corresponding goods” - i.e. goods of the same make and model, and matching any other characteristics or designation that a reasonable person would count as relevant when buying the goods (for example, when buying a computer, as well as the make and model, factors such as the amount of installed memory and the size of the hard-drive would usually also be relevant). When assessing if there is an active market, the frequency of sales should be considered within the context of the market as a whole: evidence of occasional sales would not be sufficient. If such evidence does exist, then a deduction for use may be applied within the initial 6 month period (and after that period). This does not mean that the deduction is linked to the second hand value of the goods in any way – the deduction is only to take account of the use the consumer has had.

Other rules about remedies under goods contracts

Clause 25: Delivery of wrong quantity

136. 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.
137. 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.
138. This clause only entitles the consumer to reject goods: rules of contract law will determine whether or not the contract can be treated as at an end. This reflects the existing position under the SGA.

Clause 26: Instalment deliveries

139. This clause corresponds substantively to section 31 of the SGA, but is not limited to

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sales contracts and as with all of this Part it only relates to trader to consumer contracts.

140. 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 damages or to reject the goods in the relevant instalment(s), 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 (5)* provides that if a delivery of an instalment fails to comply with clause 28, then it is clause 28 that applies, and not clause 26.

Clause 27: Consignation, or payment into court, in Scotland

141. 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.
142. 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 28: Delivery of goods

143. This clause implements Article 18 of the CRD and will replace regulation 42 of the 2013 Regulations. It applies only to sales contracts between traders and consumers for goods. Sales contracts are defined in clause 5. 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 59. In addition to clause 28, the rules about delivery in section 29 of SGA apply to sales contracts, with the exception of section 29(3) SGA.
144. Under this clause, unless a separate agreement is reached between the consumer and trader, the trader must deliver the goods to the consumer and must do so without undue delay and within 30 days after the contract is made.
145. Where the goods are to be delivered immediately at the time the contract is made, this counts as an agreement between the parties as to the time for delivery. Therefore, if goods are not delivered immediately, the consumer is able to terminate the contract if immediate delivery was essential; otherwise, the trader may deliver again within a period specified by the consumer. It is expected that in most cases where a consumer

purchases goods expecting to receive them immediately, that immediate delivery will be essential in the circumstances.

146. 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 further 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.
147. In cases other than those above then, if the trader fails to deliver the goods on an agreed date or within the 30 days, under subsection (7), the consumer may state a further reasonable timeframe within which the trader is required to deliver the goods.
148. If the trader again fails to deliver the goods in this time frame, then the consumer may treat the contract as at an end.
149. The consumer may choose to reject some of the goods rather than treating the contract as at an end, or, where the goods have not been delivered, the consumer may cancel their order for some or all of those goods. For example, if goods are delivered after the periods required by this clause, the consumer may wish to reject some of the goods but keep others, as some may no longer be of use to the consumer. If some goods are delivered on time but others are outstanding, the consumer may wish to cancel the order for some or all of the outstanding goods.
150. *Subsection (14)* makes clear that the provisions of this clause apply to a contract for sale of second hand goods which are sold at a public auction, if individuals can attend the auction sale in person. Most of the provisions of Chapter 2 do not apply in these circumstances, as explained further in relation to clause 2(5).

Clause 29: Passing of risk

151. 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 as an option, the risk transfers to the consumer at the time that the goods are passed to the carrier.
152. *Subsection (6)* makes clear that the provisions of this clause apply to a contract for sale of second hand goods which are sold at a public auction, if individuals can attend the auction sale in person. Most of the provisions of Chapter 2 do not apply in these circumstances, as explained further in relation to clause 2(5).

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Clause 30: Goods offered with a guarantee

153. 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 that the consumer has statutory rights (under this Bill) regarding the goods which are not affected by the guarantee
 - 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 31: Liability that cannot be excluded or restricted

154. This clause serves to prevent traders from contracting out of the consumer's statutory rights under clauses 9 to 15, as well as clauses 28 and 29 on time of delivery and the passing of risk and, for contracts other than hire, the requirement on right to title contained in clause 17. This clause also has the effect that any term in a contract 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 17), is not prevented by this clause, but is subject to the test of fairness in clause 64.
155. 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.
156. This clause also provides that an agreement to submit disputes to arbitration is not covered by this bar on excluding or restricting liability. It should be noted however that paragraph 20 of Schedule 2 makes clear that a term requiring the consumer to take disputes exclusively to arbitration may be regarded as unfair. Furthermore, the Arbitration Act 1996 provides that a term which constitutes an arbitration agreement is automatically unfair (under Part 2 of the Bill, once it comes into force), if the claim

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is for less than an amount specified in an Order made under section 91 of the Arbitration Act. This amount is currently set at £5000 in the Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 1999/2167). It is possible that this amount may change from time to time.

Clause 32: Contracts applying law of non-EEA state

157. 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. See paragraph 29 for further details.
158. This clause provides that most of Chapter 2 will apply to protect a consumer under a sales contract (as defined in clause 5), 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 clauses 28 and 29, nor restriction of liability under clauses 28 and 29, as these derive from the CRD which does not have this requirement.

CHAPTER 3 DIGITAL CONTENT

Summary and Background

159. Chapter 3 concerns contracts where a trader agrees to supply digital content to a consumer. "Digital content" is a key definition in Part 1 and as such is defined in clause 2 (Key definitions). It is defined as data which are produced and supplied in digital form and includes software, music, computer games and applications or "apps". In the case of digital content which is supplied under contract from a trader to a consumer, and largely or wholly stored and processed remotely, such as software supplied via cloud computing, some digital content will always be transmitted to the consumer's device so that they can interact with the digital content product that they have contracted for. This digital content falls within the scope of the definition of digital content as set out in clause 2 and as long as it is provided pursuant to the types of contract set out in clause 33 or 46, Chapter 3 applies. The definition of digital content would also cover the digital content supplied to a consumer as the result of a service which produced bespoke digital content, such as a website design service. The Chapter does not apply where a trader supplies a service merely to enable consumers to access digital content, such as Internet or mobile service provision.
160. For contracts involving digital content that has been paid for, Chapter 3 sets out:

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- The rights consumers have when they pay a trader to supply 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 refund; where other statutory rights about the digital content are breached, the consumer has a right that the trader repairs or replaces the digital content and a subsequent right to a reduction in the price of the digital content; these are the “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); and
- that the trader cannot “contract out” of these provisions.

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

- that if digital content has damaged the consumer’s other digital content, or the consumer’s device, and the consumer can prove that the damage was caused because of the trader’s lack of reasonable care and skill, then the trader has either to repair the damage or give the consumer some financial compensation for the damage.

162. 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 clarified¹⁹ and that “in short, digital products should be treated exactly as physical goods, so far as that is possible”.

163. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (“the 2013 Regulations”), which implement the CRD, introduce a

¹⁹ 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>.

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definition of digital content which is used in this Bill. The 2013 Regulations 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 also introduce requirements for digital content traders to provide pre-contractual information on the functionality and interoperability of digital content as well as information on the main characteristics of the digital content. The 2013 Regulations 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.

164. 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.
165. The Government published a response to its consultation²⁰ in June 2013. 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.
166. A draft Bill was published in June 2013²¹ and scrutinised by the House of Commons Business Innovation and Skills Committee.

What digital content contracts are covered?

Clause 33: Contracts covered by this chapter

167. This clause sets out which contracts to supply 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 agrees to supply digital content that has been:
 - Paid for with money,
 - Associated with any paid for goods, digital content or services (e.g. free software given away with a paid-for magazine), and not generally available to consumers for free (that is, the consumer must pay something in order to get the digital content), and/or

²⁰ Consumer Rights Bill Government Response (URN: BIS/13/916)

²¹ Draft Consumer Rights Bill (URN: BIS/13/925)

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- 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).

168. Clause 46 (Remedy for damage to device or to other digital content) applies to all digital content supplied under contract, including where no money is paid.
169. The Government retains a reserve power to extend the coverage of the digital content provisions to digital content contractually supplied 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?

170. In line with the recommendations of the Bradgate Report, consumers’ statutory rights for digital content follow a similar approach to that taken for goods (Chapter 2).

Clause 34: Digital content to be of satisfactory quality

171. This clause requires 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 whether the quality expectations of a reasonable person are met. These are any description of the digital content, the price paid and its state and condition, as well as any other relevant circumstances (which includes any public statement about the characteristics of the digital content made by the trader or the manufacturer). 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.
172. The clause sets out in subsection (3) that the state and condition of the digital content is always an aspect of quality and sets out other matters that can be aspects of quality for the purposes of assessing whether the digital content is satisfactory – fitness for the purposes for which the type of digital content in question is usually supplied; freedom from minor defects, safety and durability (e.g. the lifespan of the digital content). A reasonable person’s expectations as to quality are likely to vary according to the nature of the content and some aspects of quality set out in subsection (3) may not be relevant in particular cases. So for example a reasonable person might expect a simple music file to be free from minor defects so that a track which failed to play to the end would not be of satisfactory quality. However, it is the norm to encounter some bugs in a complex game or piece of software on release so a reasonable person might not expect that type of digital content to be free from minor defects. Consequently the application of the quality aspect “freedom from minor defects” to digital content will depend on reasonable expectations as to quality.
173. 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).

174. Digital content will not be in breach of this clause 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 9).

Clause 35: Digital content to be fit for a particular purpose

175. 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 10 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). The clause states that the consumer must “make known” to the trader the particular purpose for which it is intended. This implies that the trader must be aware of the consumer’s intentions. For example, an email sent to a trader immediately before downloading an app is unlikely to fulfil the “makes known” requirement, whereas an email discussion with a trader would.
176. 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 working for a particular shop about which software would be appropriate to edit a film they are making on their personal computer. The consumer may then buy the digital content on a payment plan (paying in instalments) from a finance company introduced by the shop’s salesperson. What may actually happen here is that the store sells the digital content to the finance company who then sells it to the consumer. This clause makes sure that the digital content can be held to be fit for the purpose the consumer told the credit broker (i.e. the shop’s salesperson), even though the consumer does not contract with the shop directly.

Clause 36: Digital content to be as described

177. The right for digital content to be as described is similar to the right for goods (clause 10). Clause 36 clarifies that the digital content must match any description of it given by the trader to the consumer. This is an important right in the digital content context where people may not be able to view the digital content before buying the full version. Even when the digital content matches a trial version, if it does not meet the description (where they differ), then the digital content will be in breach of this clause.
178. The policy intention is that matching the description should mean that the digital content should at least do what it is described as doing. It is not intended that "matches the description" should mean that the digital content must be exactly the same in every aspect. This clause would not, for example prevent the digital content

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

going beyond the description, as long as it also continues to match the description. This is particularly relevant for updates that may enhance features or add new features. As long as the digital content continued to match the original product description, additional features would not necessarily breach this right.

179. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 require traders to provide certain information to consumers before consumers are bound by a contract. The 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.
180. Subsection (4) provides that changes to the description of the digital content are only effective when expressly agreed between the consumer and the trader (that is, if a trader and consumer do not expressly agree the change to the information then if the digital content provided was not in line with this information, this would be a breach of this clause. Conversely, if the trader and consumer do expressly agree a change to the description of the digital content, the consumer would not subsequently be entitled to a remedy if the digital content did not meet the original description but did meet the agreed, changed description).

Clause 37: Other pre-contract information included in the contract

181. This clause establishes that the other type of information described above (e.g. information on the trader's name and address) provided by the trader pursuant to the obligation in the 2013 Regulations also forms part of the contract between the trader and the consumer. Like the provisions covered in paragraph 74 above, this implements the obligation to enforce relevant parts of the 2013 Regulations.
182. Subsection (3) provides that changes to the description of the digital content are only effective when expressly agreed between the consumer and the trader (that is, if a trader and consumer expressly agree a change to the description of the digital content, the consumer would not subsequently be entitled to a remedy for that change).

Clause 38: No other requirement to treat term about quality or fitness as included

183. The clause makes clear that no other terms about quality or fitness can be implied into the contract. Express terms (that is those that are expressly agreed and set out in the contract) about quality and fitness that are more preferential to the consumer from those in clause 34-35 can be included. Furthermore, if another piece of legislation exists which implies terms into contracts for digital content, these too can be included in the contract (this clause does not prevent those being included).

Clause 39: Supply by transmission and facilities for continued transmission

184. This clause concerns rights that apply when in order to access digital content it is transmitted to the consumer (for example, where digital content is bought or used via the internet or through a satellite transmission) and makes clear that digital content must be of satisfactory quality, fit for a particular purpose and as described at the point when it reaches either the consumer's device or, if earlier, a trader with whom the consumer has contracted, such as an internet service provider or mobile network operator.
185. Digital content can be supplied on a tangible medium (e.g. on a disk or preloaded on a device or embedded within other goods such as a washing machine which relies on software for its programming) or in other ways, such as through streaming or downloading. When it is not supplied 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"), have been chosen by and are within the contractual control of the consumer. Other intermediaries, however, will be within the contractual control of the trader, or under arrangements initiated by the trader. For example, a supplier 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 who will then deliver the content to the consumer.
186. Subsection (2) provides that the trader (T) from whom the consumer purchased the digital content supplies the content at the point that it reaches either the consumer's device (for example, directly to a consumer's satellite dish) or an independent trader within the contractual control of the consumer (such as an ISP), whichever is sooner. T is responsible for ensuring that it meets all the relevant quality standards. A trader which is in the contractual control of the consumer and which only provides a service by which the digital content reaches the consumer is not providing digital content for the purposes of Chapter 3 (see clause 33(7)) but may be subject to the provision in Chapter 4 (Services)).
187. Where digital content fails to meet the quality standards because of a problem with the consumer's device or with the delivery service supplied by an independent trader with whom the consumer has contracted (e.g. ISP, mobile network provider, cable provider), T would not be liable for the failure to meet the quality standards as that trader (T) cannot be at fault in any way for the problem and has no way of rectifying it. If the problem is with the consumer's network access provider, then this service provider is liable under the services provision of the Bill if the service is not provided with reasonable care and skill (see Chapter 4). However, where the digital content fails to meet the quality standards because of a problem for which T or an intermediary in the contractual control of T (either directly or indirectly) is responsible, then T will be liable. This is similar to the rules on the passing of risk for goods (clause 29) which provide that the trader carries the risk for the goods purchased until they come into the physical possession of the consumer, unless the delivery is arranged by the consumer in which case the consumer takes the risk for the

delivery of the goods.

188. Subsections (3) to (7) apply to digital content where use of the content in line with the contract requires some digital content to be transferred via the internet between the consumer's device and a server (processing facility) operated by or within the contractual control of T. Examples of this type of digital content would be massively multiplayer online games ("MMOs") and software accessed on the Cloud such as a music streaming facility. Subsection (5) provides that for such types of digital content, the consumer should be able to use their digital content in the way described for a reasonable period of time. Where there is an express term in the contract relating to a specific period of time for the use of the digital content in this manner, the express term would apply (e.g. if a consumer expressly pays for 48 hours access to an online journal or for a one month trial period for an MMO game). Subsection (7) provides that breach of this provision will give the consumer access to the remedies under section 43. Subsection (6) also provides that for these types of contracts for digital content, the quality rights set out in clauses 34 to 36 (satisfactory quality, fitness for purpose and meeting the description), should apply to the digital content for that period of time.

Clause 40: Quality, fitness and description of content supplied subject to modifications

189. This clause reflects a unique issue for digital content in that manufacturers and traders are technically 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.
190. 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 supplied. 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). Subsection (2) makes clear that the time period for bringing a claim begins when the digital content was first supplied notwithstanding the fact that the modification itself must have occurred some time after the original supply. This means that any claim for breach of this provision must be brought within 6 years of the date the digital content was first supplied.
191. It is for a consumer to prove that the digital content is faulty. Where a consumer has not identified a fault (and therefore not requested a repair or replacement), but a general update is sent in any case to the consumer, this does not necessarily mean that

the quality rights were breached nor that the update constitutes a repair or replacement.

Clause 41: Trader's right to supply digital content

192. 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.
193. This clause is slightly different to the equivalent clause for goods (clause 17) to reflect the fact 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).
194. If the trader does not have the right to supply the digital content at all, the consumer will be entitled to a refund (clause 45).

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

195. As set out above, Chapter 3 largely only covers those contracts where the consumer has paid some money towards the provision of digital content.
196. This, and following provisions, set out the remedies available to consumers: what consumers are entitled to if the statutory rights are not met.

Clause 42: Consumer's rights to enforce terms about digital content

197. 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 not conform to 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 16). 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 strict limits on the numbers of repairs or replacements a trader can provide (clause 24(3)(a) sets out that after one repair or one replacement the trader must offer the consumer some money back). 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. However, it is possible that a consumer will be caused “significant inconvenience” after a single repair or replacement.

198. Clause 42 does not include 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 contrast with the goods remedies (clause 19) is because digital content cannot be returned in any meaningful sense. However for digital content sold on a tangible medium (e.g. on a disk or as part of a digital camera), clause 16 provides that, where the digital content is substandard (as judged against the digital content quality rights), it will render the goods faulty and so the goods remedies apply. Subsection (3) refers back to this clause 16 so that consumers who may go directly to the Chapter of the Bill that deals with contracts for the supply of digital content will know that they may also have rights under the Chapter that sets out their rights under contracts for the supply of goods. What clause 16 makes clear is that consumers do have the right to reject substandard digital content sold on a tangible medium. It also means that there would be strict limits on the number of repairs or replacements that the consumer is required to accept before moving to a price reduction or the final right to reject.
199. Clause 42(4) sets out the remedy that applies if the pre-contract information provided pursuant to clause 37 is not complied with. This remedy is similar to the remedy of a price reduction (see paragraph 207 below) but as explained below we expect that a price reduction will usually be calculated on the basis of the difference in value between the digital content the consumer receives and what they actually paid. Given that clause 37 concerns information that does not describe the digital content (such as the trader’s name and address), if it is breached it is unlikely to affect the value of the digital content received and therefore it would not fit with the way it is anticipated a price reduction to be calculated. This subsection therefore provides that a consumer has the right to recover any costs which they incurred as a result of the breach, which could be any amount up to the full price of the digital content (so they could receive a full refund in appropriate cases), This applies equally to a facility for which money has been paid, such as a token, virtual currency, or gift voucher, that was originally purchased with money. Where the consumer has not incurred costs but has suffered other losses as a result of this breach, it may be open to them to claim damages in breach of contract (see below), although it is unlikely that these damages would amount to a significant amount.
200. This clause (and clauses 43 and 44) does not prevent the consumer seeking other remedies available to them. As set out in paragraph 159 above, the terms that are to be

treated as included in the contract in clauses 34-37 are contractual terms and if they are not met it means there is a breach of contract. The common law (that is, law that is set out in cases decided by judges) already provides certain remedies for breach of contract. This clause provides that the consumer may – instead of (or, in some cases, in addition to) pursuing the statutory remedies set out in this clause (as explained further in subsequent clauses) seek common law remedies of damages, specific performance or in Scotland specific implement but not so as to recover twice for the same loss.

201. "Damages" refers to the common law remedy of financial compensation paid by one party to the other. For example, where a trader is in breach of a term that this Part requires to be treated as included in a contract, the court may order the trader to pay damages to the consumer. Generally, an award of damages for breach of contract is intended to compensate the injured party for loss suffered. In some, less frequent, cases the court may award damages which go beyond simply compensating the consumer for loss suffered – e.g. a court can sometimes award nominal damages, where there is a breach of contract but no loss, or aggravated damages to compensate for mental distress. For a breach of a term that this Part requires to be treated as included in the contract, the general rule is that damages are intended to put the consumer in the same position as if there had not been a breach. The level of damages awarded will depend on the specific circumstances and the term which the trader has breached. Typically, damages would cover the estimated loss directly resulting from the breach, in the ordinary course of events: if the consumer keeps the goods, this would generally be the difference between the value of the goods, service or digital content received by the consumer and the value had there not been a breach. There are legal tests to be satisfied for a consumer to recover damages: a person cannot recover damages for loss which was not caused by the breach (of the term required by the Bill) or which was not sufficiently foreseeable; nor can the consumer recover for loss which they could reasonably have acted to limit or mitigate.
202. "Specific performance" is a direction a court can make, to compel a party to perform their obligations under a contract. It is an equitable remedy, meaning it is not available to consumers as a right, but at the court's discretion. It will not be ordered if damages (see above) are adequate to compensate the consumer – generally, damages will be adequate unless the subject matter of the contract is unique as the consumer can use damages to buy a replacement. "Specific implement" is similar to "specific performance" for Scotland, and there are likewise specific circumstances where that may be used. In referring to specific performance or specific implement, this clause does not seek to codify the law as to when specific performance or specific implement might be available, but the references serve as a reminder that it may be an alternative remedy to the statutory remedies. Clause 58 gives more detail on the powers of the court in proceedings where a remedy is sought.
203. As is the normal position, the person who asserts a fault has to prove it. Therefore the burden of proof for faulty digital content, as with goods and services, is on the consumer. However, during the first 6 months following the purchase if the consumer

can prove that the digital content was faulty (it is not of satisfactory quality or does not meet the particular purpose the consumer wanted it for or it does not meet the description) it is assumed that the fault was present on the day the digital content was supplied unless this is inconsistent with the type of alleged fault or can be proven otherwise by the trader.

Clause 43: Right to repair or replacement

204. A repair is not necessarily the same as an update to which clause 40 applies. A repair means bringing the digital content into conformity with the contract – that is there must first be a breach of contract (the consumer must prove that the digital content does not meet the quality standards set in out in clauses 34, 35 or 36) (satisfactory quality, fitness for purpose and meets the description) and then the repair must make the digital content meet those standards. A repair (in response to a request from a consumer) may, in practice, be in the form of an update. Repairing digital content means bringing it back into conformity with the contract. If an update resolves a fault in this way, then it can be a repair (i.e. a repair does not have to be a bespoke solution). A repair or replacement has to be provided within a reasonable time or without significant inconvenience to the consumer.
205. 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.
206. 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.

Clause 44: Right to price reduction

207. Clause 44 sets out the circumstances in which the consumer is entitled to a price reduction and establishes that the price reduction could be as much as a full refund or the full amount they already paid (if they had only paid in part for the digital content). 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 a 100% refund because the consumer will have obtained no benefit or no substantial or meaningful benefit from the film. 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. If a single film failed to stream satisfactorily, as part of a monthly subscription, the appropriate amount may reflect the portion of the monthly subscription that could be ascribed to that film. For free digital content given away with, for example, a paid-for magazine, any price reduction would reflect the portion of the price paid that could be ascribed to the digital content instead of the magazine. We expect the reduction in price here to reflect the difference in value between what the consumer paid for the content and what they actually receive.

Clause 45: Right to a refund

208. In relation to this clause, if the trader’s right to supply the digital content (clause 41) is breached, the consumer has a right to a full refund. Clause 45 does not apply in any other cases (such as a breach of the quality rights). There is no corresponding duty for the consumer to return or delete the digital content for the following reasons. 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 practical; and many consumers would find it difficult to properly delete the digital content²². 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 act as a disincentive to traders to supply digital content where they do not have the right to do so.
209. Subsection (2) of clause 45 provides that, where the digital content that the trader did not have the right to supply was only part of the contract (e.g. a single film supplied 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.

Compensation for damage to device or to other digital content

Clause 46: Remedy for damage to device or to other digital content

210. Currently, if a consumer downloads some software that contains a virus, he/she could make a negligence claim against the trader if the virus caused loss or damage to the consumer’s device or other digital content; claiming 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. This clause applies to all digital

²² Where digital content is provided on a disk or other tangible media, different rules apply

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content contractually supplied, whether paid for with money, or free (as long as it is provided pursuant to a contract).

211. If the consumer can demonstrate that the digital content caused damage to the consumer's device or other digital content and the damage was caused because trader failed to use reasonable care and skill to prevent it, then the consumer is entitled to a remedy. The trader can either offer either to repair the damage (as long as that can be done within a reasonable time and without significantly inconveniencing the consumer), or to financially compensate the consumer for the damage.
212. What constitutes "reasonable care and skill", will be judged against the standards of the profession. For example, it would not generally be reasonable to expect a trader to check every single possible configuration on a consumer's device before providing digital content. However, if the trader has not done something that other traders would do and this has caused damage, it is unlikely to meet the standard of reasonable care and skill.
213. A negligence case could still be taken instead of the consumer claiming under this clause.
214. In summary, the remedies that apply for breach of the consumer's statutory rights are as follows:

Consumer's statutory rights being breached	Remedies that may apply
Digital content to be of satisfactory quality (clause 34)	<ul style="list-style-type: none"> • The right to repair or replacement (clause 43) • If repair or replacement are not possible or do not resolve the fault within a reasonable time or without causing significant inconvenience to the consumer the right to a price reduction (clause 44)
Digital content to be fit for particular purpose (clause 35)	<ul style="list-style-type: none"> • The right to repair or replacement (clause 43) • If repair or replacement are not possible or do not resolve the fault within a reasonable time or without causing significant inconvenience to the consumer, the right to a price reduction (clause 44)

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Digital content to be as described (clause 36)	<ul style="list-style-type: none"> • The right to repair or replacement (clause 43) • If repair or replacement are not possible or do not resolve the fault within a reasonable time or without causing significant inconvenience to the consumer, the right to a price reduction (clause 44)
Other pre-contractual information (clause 37)	<ul style="list-style-type: none"> • The right to recover costs incurred as a result of the breach (clause 44)
Trader’s right to supply digital content (clause 41)	<ul style="list-style-type: none"> • The right to a refund (clause 45)
Remedy for damage to device or other digital content (clause 46)	<ul style="list-style-type: none"> • The right that the damage should be repaired • If rectifying the damage is not possible, financial compensation to reflect the loss suffered (clause 46)

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

Clause 47: Liability that cannot be excluded or restricted

215. This clause prevents a trader “contracting out” of the provisions in clauses 34, 35, 36, 41 and 46.
216. This clause also provides that an agreement to submit disputes to arbitration is not covered by this bar on excluding or restricting liability. It should be noted however that paragraph 20 of Schedule 2 makes clear that a term requiring the consumer to take disputes exclusively to arbitration may be regarded as unfair. Furthermore, the Arbitration Act 1996 provides that a term which constitutes an arbitration agreement is automatically unfair under Part 2 of the Bill (once in force) if the claim is for less than an amount specified in an Order made under section 91 of the Arbitration Act. This amount is currently set at £5000 in the Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 1999/2167). It is possible that this amount may change from time to time.

CHAPTER 4 SERVICES

Summary and Background

217. Chapter 4 concerns contracts where a trader supplies 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 subsequently offers a reduction in the price of the service, or that the consumer is entitled to recover their costs as a result of the breach (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.

218. 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.
219. 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.
220. At the moment, there are no statutory remedies for breach of the SGSA in respect of its provisions relating solely to services.
221. Clause 60 and Schedule 1 make provision for how this new legislation impacts on existing legislation. The SGSA will continue to apply to contracts between businesses.
222. 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

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affect contracts between traders and consumers.

223. In addition the 2013 Regulations provide that, for all types of consumer contracts within scope, including most service contracts, a trader must provide certain information to the consumer before the contract is entered into.
224. In 2010, BIS commissioned a report, entitled ‘Consolidation and Simplification of UK Consumer Law’²³ 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 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.
225. 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.
226. 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. A draft Bill was published in June 2013²⁴ and scrutinised by the House of Commons Business Innovation and Skills Committee.

What services contracts are covered?

Clause 48: Contracts covered by this Chapter

227. 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

²³ 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

²⁴ Draft Consumer Rights Bill (URN: BIS/13/925)

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

service to a consumer or a trader). It also sets out that contracts of employment are not covered by this Chapter.

228. 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.
229. In keeping with the SGSA, Chapter 4 covers contracts in which the trader does not undertake to provide the service personally, but rather uses a subcontractor (or agent) to perform the service. For example, a house-building firm may engage a specialist glazing firm to perform part of the work that they have contracted with the consumer to perform, and the house-builder would still be bound by the provisions in this Chapter for the performance of the service by the glazing firm.
230. 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 section 13 (implied term to take reasonable care and skill) of SGSA to the services provided by an advocate in a court or tribunal, by a company director, by a director of a building society and the management of a provident society to that building or provident society and finally to services rendered by an arbitrator in their capacity as such. 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.
231. This Chapter applies whether the service is supplied immediately or the parties agree that the trader will supply it at a future time.

What statutory rights are there under a services contract?

Clause 49: Service to be performed with reasonable care and skill

232. 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, specifically here, where a trader supplies a service to a consumer. It removes the legalistic reference to an ‘implied term’ that is in the SGSA and simply says that every contract where a trader supplies a service to a consumer includes a term that the service must be performed with reasonable care and skill. The standard that the trader must meet in clause 49 and in section 13 of the SGSA, however is the same and if the trader does not meet “reasonable care and skill”, both pieces of legislation mean that the trader will be in breach of contract.
233. “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.
234. 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.

235. 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 50: Information about the trader or service to be binding

236. 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 2013 Regulations mandate that certain information must be made available by a trader to a consumer before the consumer is bound by a contract. To enable enforcement of those Regulations, 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 2013 Regulations 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 2013 Regulations and therefore from this provision, such as financial and gambling services.

237. Clause 50 may be split into two parts to deal with these two objectives above.

238. 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 (2) makes this clear.

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239. 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).
240. Secondly, the clause explains that information required to be provided under the 2013 Regulations 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.
241. For both types of information (that required under 2013 Regulations 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 57).
242. For example, a consumer invites a trader to their home where they agree a contract for the fitting of windows. The consumer chooses that 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 2013 Regulations, 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 51: Reasonable price to be paid for a service

243. In most cases, a contract will set out the price for the service, and indeed following the 2013 Regulations, traders who are not excluded will be under an obligation to provide information about the price before the consumer is bound by 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. If for any reason the price is not known from the outset, this provision sets out that the consumer must pay a reasonable price. What is ‘reasonable’ is a question of fact, which limits how much the decision can be appealed once it has been made.
244. This corresponds to section 15 of the SGSA but updates the language in line with the rest of Part 1.
245. 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, £1000 is

unlikely to be a reasonable price to pay.

Clause 52: Service to be performed within a reasonable time

246. 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.
247. 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.
248. There is a similar provision in section 14 of the SGSA.

Clause 53: Relation to other law on contract terms

249. 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.
250. The first subsection preserves any existing enactments or rules of law which impose stricter duties than those imposed by clauses 49 and 50. “Rules of law” means a rule of the common law.
251. The second subsection means that where Parliament has turned its mind to a particular type of service, and has decided that that service should be subject to particular rules, those rules take precedence over those in the Bill. “Enactment” is defined in clause 59 to cover primary legislation and also “subordinate legislation”, which is defined in the Interpretation Act as “orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under an Act”.

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

Clause 54: Consumers’ rights to enforce terms about services; clause 55: Right to repeat performance; and clause 56: Right to price reduction

252. The provisions in these clauses set out the remedies available to consumers if the statutory rights set out in Chapter 4 are not met. This provision also clarifies that there might be other remedies available, for example, seeking of damages (which may be available under common law).
253. If the service is not provided with reasonable care and skill (and so breaches the provision in clause 49) or where the service is not performed in line with information given about the service (and so in breach of clause 50), 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 request a reduction in price in certain circumstances. These two types of remedy are similar to those available to consumers of goods (in clause 19 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.

254. If the information provided about the trader is not complied with (and there is a breach of clause 50), the consumer has the right to a reduction in price.
255. If the service is not provided within a reasonable time (and so breaches the provision in clause 52), the consumer has the right to a reduction in price of an appropriate amount.
256. A “reduction in price of an appropriate amount” will normally mean that the price is reduced by the difference between what consideration was paid for the service and the value of the service as provided. In practice, this will mean that the reduction in price from the full amount takes into account the benefit which the consumer has derived from the service. Depending on the circumstances, the reduction in price could mean a full refund. This could be, for example, where the consumer has derived no benefit from the service and the consumer would have to employ another trader to repeat the service “from scratch” to complete the work.
257. In relation to services, however, there may be some cases consumer is able to ask for a reduction in price even where it may be argued that the value of the service as provided has not been reduced by the breach of the consumer’s rights. This could occur, for example, where the trader has not complied with information they gave about themselves. For example, if the trader tells the consumer that they will pay their workers the living wage and this is important to the consumer and a reason why they decided to go with this particular trader, arguably this does not affect the value of the service but the consumer would still have the right to request a reduction of an “appropriate amount” to account for the breach.
258. Where a consumer has the right to ask the trader to re-perform the service the trader must re-perform all or part of the service as needed to bring it into conformity with the contract.
259. As well as these remedies, clause 54 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, although the consumer will not be able to

recover the same loss twice.

260. As set out in paragraph 217 above, the terms that are to be treated as included in the contract in clauses 49-52 are contractual terms and if they are not met it means there is a breach of contract. The common law (that is, law that is set out in cases decided by judges) already provides certain remedies for breach of contract. This clause provides that the consumer may, instead of (or, in some cases, in addition to) pursuing the statutory remedies set out in this clause and subsequent clauses, seek common law remedies of damages, specific performance or in Scotland specific implement.
261. "Damages" refers to the common law remedy of financial compensation paid by one party to the other. For example, where a trader is in breach of a term that this Part requires to be treated as included in a contract, the court may order the trader to pay damages to the consumer. Generally, an award of damages for breach of contract is intended to compensate the injured party for loss suffered. In some, less frequent, cases the court may award damages which go beyond simply compensating the consumer for loss suffered – e.g. a court can sometimes award nominal damages, where there is a breach of contract but no loss, or aggravated damages to compensate for mental distress. For a breach of a term that this Part requires to be treated as included in the contract, the general rule is that damages are intended to put the consumer in the same position as if there had not been a breach. The level of damages awarded will depend on the specific circumstances and the term which the trader has breached. Typically, damages would cover the estimated loss directly resulting from the breach, in the ordinary course of events: if the consumer keeps the goods, this would generally be the difference between the value of the goods, service or digital content received by the consumer and the value had there not been a breach. There are legal tests to be satisfied for a consumer to recover damages: a person cannot recover damages for loss which was not caused by the breach (of the term required by the Bill) or which was not sufficiently foreseeable; nor can the consumer recover for loss which they could reasonably have acted to limit or mitigate.
262. "Specific performance" is a direction a court can make, to compel a party to perform their obligations under a contract. It is an equitable remedy, meaning it is not available to consumers as a right, but at the court's discretion. It will not be ordered if damages (see above) are adequate to compensate the consumer – generally, damages will be adequate unless the subject matter of the contract is unique as the consumer can use damages to buy a replacement. "Specific implement" is similar to "specific performance" for Scotland, and there are likewise specific circumstances where that may be used. In referring to specific performance or specific implement, this clause does not seek to codify the law as to when specific performance or specific implement might be available, but the references serve as a reminder that it may be an alternative remedy to the statutory remedies. Clause 58 gives more detail on the powers of the court in proceedings where a remedy is sought.
263. In summary (see above and the clauses themselves for more detail), the remedies that

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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 49)	<ul style="list-style-type: none"> • The right to ask for a repeat performance (clauses 54 and 55) • And, if that is impossible, or not done in a reasonable time or without significant inconvenience: • The right to a reduction in price (clauses 54 and 56)
Service not performed within a reasonable time (clause 52)	<ul style="list-style-type: none"> • The right to a reduction in price (clauses 54 and 56)
Service not performed in-line with information provided concerning the service (clause 50)	<ul style="list-style-type: none"> • The right to ask for a repeat performance (clauses 54 and 55) • And, if that is impossible, or not done in a reasonable time without inconvenience: • The right to a reduction in price (clauses 54 and 56)
Service not performed in-line with information provided concerning the trader (clause 50)	<ul style="list-style-type: none"> • The right to a reduction in price (clauses 54 and 56)

264. 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.

265. 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 57: Liability that cannot be excluded or restricted

266. This clause serves to prevent traders from “contracting out” of the consumer’s statutory rights as established under clauses 49, 50, 51 & 52. It also makes clear that a trader cannot limit its liability for breach of these clauses to less than the contract price.
267. Even if a term does not contravene this clause (i.e. does not limit its liability to less than the contract price) it is still subject to Part 2 (Unfair Terms).
268. 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.
269. This clause also provides that an agreement to submit disputes to arbitration is not covered by this bar on excluding or restricting liability. It should be noted however that paragraph 20 of Schedule 2 makes clear that a term requiring the consumer to take disputes exclusively to arbitration may be regarded as unfair. Furthermore, the Arbitration Act 1996 provides that a term which constitutes an arbitration agreement is automatically unfair (under Part 2 of the Bill) if the claim is for less than an amount specified in an Order made under section 91 of the Arbitration Act. This amount is currently set at £5000 in the Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 1999/2167). It is possible that this amount may change from time to time.

CHAPTER 5 GENERAL AND SUPPLEMENTARY PROVISIONS

270. Clause 58 sets out powers that a court may use to enforce the remedies of repair, replacement or repeat performance and final right to reject or price reduction (as applicable). Subsection (1) sets out the types of dispute between a consumer and trader in which the powers can be used. For goods, the clause is similar in effect to

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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(7)-(8). This clause makes similar provision for services and digital content to that for goods.

271. Paragraphs 107, 202 and 262 above provide explanation of specific performance and specific implement
272. Under subsections (3) and (4), a court may substitute a remedy under the provisions specified in subsection (8), in accordance with the hierarchy and conditions to exercising the remedies within the Bill. So, for example, in relation to a contract to supply goods, a court could only order price reduction when the consumer had requested repair, if repair and replacement were impossible (as required by clause 24(3)).
273. Clause 59 provides definitions of terms used in the bill other than the key definitions set out in clause 2 and clause 60 signposts to Schedule 1 which details consequential amendments to existing legislation resulting from the implementation of Part 1.

PART 2: UNFAIR TERMS

Background and overview

274. Part 2 of the Bill clarifies and consolidates existing consumer legislation on unfair terms.
275. In 2005, the Law Commissions concluded, following an earlier consultation, that the law on unfair contract terms is particularly complex²⁵. It is contained in two separate pieces of legislation– the UCTA and the UTCCR – that have inconsistent and overlapping provisions.
276. 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.

²⁵ Their documents can be found at http://lawcommission.justice.gov.uk/consultations/unfair_consumer_contracts.htm

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277. 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.
278. A transposition note illustrating how the UTCCD is implemented in the UK is annexed to these notes.
279. 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 2012²⁶, to obtain up-to-date evidence and views on their proposals for reform.
280. The focus of the consultation was on two particular areas:
- 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”).
281. 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 61: Contracts and notices covered by this Part

282. 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

²⁶ *ibid*

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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 62: Requirement for contract terms and notices to be fair

283. 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.
284. 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 63 as regards the list of terms that may be used to assist a court when considering the application of the fairness test).
285. 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.
286. Subsection (8) explains that terms which are void will still be void regardless of the fairness test explained in this clause. Terms which are void may still be subject to the fairness test and found to be unfair, however if they are found to be fair that does not prevent them from being void.
287. 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 63: Contract terms which may or must be regarded as unfair

288. 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 62 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 explains the scope of the list such that terms in Part 2 are not considered as part of the Schedule but are still assessable for fairness unless clause 64 or clause 73 applies. These exemptions account, for example, for the specific nature of financial services contracts where fluctuations in the market may influence the price.

289. Terms on the “grey list” are assessable for fairness even if they would otherwise qualify for an exemption under clause 64. Terms on the “grey list” are assessable even if they are “transparent” and “prominent” as defined in clause 64.

290. 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 62.

291. 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)

292. 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)

293. Part 1 of the Schedule 2 is as included in 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 2013²⁷).

²⁷ http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf

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294. Paragraph 5 adds to the grey list, terms of a contract requiring that a consumer pay a disproportionate amount if they decide not to continue the contract. In this paragraph the phrase “decides not to conclude or perform” includes where a consumer cancels a contract (and is charged a so-called “termination fee”).
295. Paragraph 12 adds to the grey list terms which allow the trader to determine the subject matter of the contract after the contract has been agreed with the consumer. In certain circumstances, defined in paragraph 23, this does not apply to contracts which last indefinitely.
296. Paragraph 14 adds to the grey list terms which allow the trader to set (for the first time) the price under a contract (or the method for calculating the price), after that contract has been agreed with the consumer. The paragraph expressly provides that, in certain circumstances, defined in paragraphs 23, 24, and 25, it does not apply to contracts which last indefinitely, contracts for the sale of securities and foreign currency (etc), and price index clauses. This is only for the avoidance of doubt, because in most of these situations the price of the contract, or the method for calculating it, will be determined before the contract is agreed, so paragraph 14 would not be relevant.
297. 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 64: Exclusion from assessment of fairness

298. This clause describes the terms in a contract that are exempt from being assessed under the fairness test (described in clause 62) and the conditions under which that exemption applies.
299. If a term is of the type included in Part 1 of Schedule 2, it can be assessed for fairness. If it is not included there, and relates either to:
- The main subject matter of the contract (usually the goods, services or digital content being purchased); or
 - The appropriateness (usually the level) of the price;

300. Then, in order to determine whether it is assessable for fairness, the court will first consider whether it 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. If the term is transparent and prominent, it is exempt from assessment for fairness

301. 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 “grey list” in Schedule 2 to the 1999 Regulations are an illustration of that.” (Lord Walker, para.43)

302. 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.

303. 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 65: Bar on exclusion or restriction of negligence liability and Clause 66: Scope of Section 65

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

305. 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 62.

306. 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.

307. This bar does not apply to a discharge or indemnity given as part of a compensation settlement. This allows parties to settle disputes which have arisen concerning the performance of an earlier contract. Clause 66 expressly provides that this bar does not apply to agreements mentioned in section 4(2)(a) of the Damages (Scotland) Act

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2011, because not all agreements to discharge liability will include compensation.

- 308. Clause 65 does not affect section 5 of the Damages (Scotland) Act 2011, which sets out special rules for settlement of mesothelioma claims in Scotland, and provides that relatives can still claim certain damages in some cases even if the original liability were discharged.
- 309. 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.
- 310. Terms which are barred under this clause are still assessable for fairness under clause 62.
- 311. This clause reflects section 2 (for England, Wales and Northern Ireland) and section 16 (for Scotland) of the UCTA.

Clause 67: Effect of an unfair term on the rest of a contract

- 312. 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.
- 313. This clause reflects regulation 6(1) of the UTCCD, which is implemented by Article 8(2) of the UTCCRs.

Clause 68: Requirement for transparency

- 314. 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 (defined as legible and in plain and intelligible language). The trader has an obligation to ensure that such terms are transparent.
- 315. This requirement, 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). It may also be enforced under Schedule 3.
- 316. This clause reflects regulation 7(1) of the UTCCRs, which implements Article 5 of the UTCCD.

Clause 69: Contract terms that may have different meanings

- 317. 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

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than the trader, is the interpretation that is used.

318. This clause reflects regulation 7(2) of the UTCCRs, which implements Article 5 of the UTCCD.

How are the general rules enforced?

Clause 70: Enforcement of the law on unfair contract terms

319. If traders do use (or recommend for use, or have recommended to them for use) unfair, void or non-transparent terms in a consumer contract, there are a number of means of enforcing this Part.
320. This clause introduces Schedule 3 which sets out how this Part can be enforced. Schedule 3 explains that the Competition and Markets Authority (“CMA”) and other Regulators (coordinated by the CMA) can investigate and apply for injunctions to prevent the use of certain terms. These are terms which the CMA or other Regulator considers might be unfair, not transparent or void (for example if they purport to exclude liability for death or personal injury through negligence). The CMA or other Regulator may take action if a term or notice falls into one or more of those three categories.
321. The schedule includes provisions for the CMA to collate and if appropriate make public information about actions taken against certain terms. It also provides that the CMA may issue guidance if it considers it appropriate to do so.
322. 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.
323. Schedule 5 also includes one additional power made available to Unfair Terms enforcers. This is the power to require the production of information (Part 3 of Schedule 5). As set out in paragraph 6 of Schedule 5, this power is only available to those enforcers listed in Schedule 3 which are also public authorities (within the meaning of the Human Rights Act 1998). So, for example, this power is not available to the Consumers’ Association (known as Which?).
324. This clause reflects regulations 10 to 15 of the UTCCRs, which implement Article 7 of the UTCCD.

Supplementary provisions

Clause 71: Duty of court to consider fairness of term

325. 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

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terms even if the parties do not specifically ask the court to do so.

326. 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).
327. 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). In addition, the courts would only have to look at the term in question, not the entire contract; this reflects the principle in Case C-137/08 *VB Penzugyi v Schneider* in 2010.

Clause 72: Application of rules to secondary contracts

328. 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 73: Disapplication of rules to mandatory terms and notices

329. 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.
330. This clause reflects regulation 4(2) of the UTCCRs, which implements Article 1(2) of the UTCCD.

Clause 74: Contracts applying law of non-EEA State

331. 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)
332. 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)²⁸, governs which law applies to a consumer contract.

²⁸ 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).

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333. 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 75: Changes to other legislation

334. 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 77: Investigatory powers etc.

335. This clause makes provision for the investigatory powers of consumer law enforcers. Consumer law, which includes enforcers' investigatory powers, has built up piecemeal, resulting in the investigatory powers, contained in around 60 pieces of consumer legislation, 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.
336. This clause gives effect to Schedule 5 on Investigatory Powers and Schedule 6 which details the consequential amendments in relation to the investigatory powers.

Schedule 5: Investigatory Powers etc.

337. This Schedule contains a generic set of powers, which is based on those currently contained in Part 4 of the Consumer Protection from Unfair Trading Regulations 2008 (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. Some specific powers contained in weights and measures and product safety legislation will be retained in that legislation alongside the generic set.
338. As well as consolidating powers that already exist, stronger safeguards have been added to the use of some powers in order to reduce the burdens on businesses. For example, subject to a number of exemptions, the power of entry into premises without a warrant 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.
339. 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 under paragraph 14 of Part 3 of the Schedule, which is based on Part 8 of the Enterprise Act 2002 (EA) dealing with civil enforcement but which will now apply to both civil and criminal consumer law

enforcement.

340. 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 can only be used if the enforcer reasonably suspects a breach of legislation. This limitation does not apply, or apply in the same way, for all types of enforcer.
341. 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 unfair contract terms enforcers and public designated enforcers, are restricted to the power to require production of information.
342. Paragraph 1 of Part 1 provides an overview of the Parts of Schedule 5.
343. Paragraphs 2 to 6 detail the types of enforcers that have access to the powers in the Schedule and define the terms used to refer to those enforcers, *e.g.* EU and domestic enforcers. Paragraph 7 details what is meant by the term ‘officer’ in relation to enforcers whilst Paragraph 8 defines other terms used in the Schedule.
344. Paragraphs 9 to 11 of Part 2 of the Schedule specify the legislation to which the generic set of powers applies.
345. Paragraph 12 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.
346. The order making power would also allow other legislation to be amended, repealed or revoked as a consequence of amending this list. The safeguards on the use of the powers of entry that replace those being repealed must be greater than those that existed before.
347. Paragraphs 13 to 17 of Part 3 of the Schedule detail the power in relation to the production of information. These paragraphs set out the purposes for which the power can be used, the procedure to be followed when using it and how the power can be enforced, as well as limitations on the use of the information obtained.
348. Paragraph 18 clarifies that Part 3 of the Schedule applies to the Crown to the same extent that the relevant powers in Part 8 of the Enterprise Act 2002 (which are being replaced by the powers in the Schedule) applied to the Crown.
349. Paragraph 19 to 20 of Part 4 of the Schedule sets out the purposes for which the further powers in the generic set detailed in this Part may be exercised by domestic and EU enforcers. These further powers are detailed in paragraphs 21 to 34. Table 1 and Table 2 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

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have been added are highlighted in bold.

350. 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 Cooperation²⁹, the Regulation on Accreditation and Market Surveillance³⁰ and the General Product Safety Directive³¹.
351. The existing investigatory powers are being repealed or revoked in order to ensure that only the generic set of powers apply in relation to the consumer legislation within the scope of this Schedule.

Table 1: Summary of main modifications from existing investigative powers in the new generic set in Part 3 of Schedule 5 (New safeguards are highlighted in bold)

Power/Provision	Modelled on	Main modifications from existing provisions
Paragraphs 13 to 17 – Power to require production of information (by way of a written notice only)	Section 224 to 227 EA	<p>Certain enforcers, such as unfair contract terms enforcers and public designated enforcers, have access to this power only.</p> <p>Some enforcers are required to reasonably suspect a breach before exercising the power.</p> <p>Clarifies that it includes a power to require the creation of documents.</p> <p>Clarifies that local weights and measures authorities have access to this power specifically for the purposes of fulfilling duties conferred by the Estate Agents Act 1979.</p> <p>Can be used for both criminal and civil enforcement purposes.</p> <p>Provision is made regarding protection from self-incrimination.</p>
Paragraph 18		Clarifies that Part 3 of the Schedule applies

²⁹ (EC) No 2006/2004.

³⁰ (EC) No 765/2008.

³¹ 2001/95/EC.

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Power/Provision	Modelled on	Main modifications from existing provisions
Application to the Crown		to the Crown when an enforcer is acting for certain purposes.

Table 2: Summary of main modifications from existing investigative powers in the new generic set in Part 4 of Schedule 5 (New safeguards are highlighted in bold)

Power/Provision	Modelled on	Main modifications from existing provisions
Paragraph 19 – Exercise of powers in this Part: Domestic enforcers	Regulation 21(1) CPRs and section 9 Estate Agents Act 1979	<p>Details the purposes and circumstances in which the powers in this Part can be exercised by domestic enforcers.</p> <p>Clarifies that for the power to require production of documents, the enforcer need not have reasonable suspicion where there is a statutory duty to hold the documents sought or when the enforcer is a market surveillance authority as defined by the Regulation on Accreditation and Market Surveillance (EC 765/2008).</p> <p>Clarifies that the powers can be used to investigate undesirable practices under Estate Agents Act 1979 as well as breaches of it.</p>
Paragraph 20 - Exercise of powers in this Part: EU Enforcers		Details the purposes and circumstances in which the powers in this Part can be exercised by EU enforcers.
Paragraph 21 – Power to purchase products	Regulation 20 CPRs	<p>A new express provision is added to clarify that enforcers may enter premises normally open to the public and inspect products.</p> <p>The definition of officer in paragraph 7(1)(d) extends this power to authorised persons (e.g. volunteers).</p> <p>Clarification that power may be exercised at all reasonable times.</p> <p>Clarification that this power can be exercised without first giving notice or obtaining a warrant.</p>

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Paragraph 22 – Power to observe the carrying on of a business	Section 227B(1)(a) Enterprise Act 2002 (EA02)	<p>A new express provision is added to clarify that enforcers may enter premises accessible to the public to observe businesses.</p> <p>Clarification that the power may be exercised at all reasonable times.</p> <p>Clarification that this power can be exercised without first giving notice or obtaining a warrant.</p>
Paragraph 23 – 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 written notice, subject to certain exemptions, such as where it would defeat the purpose of the entry, e.g. because an officer reasonably suspects that evidence may be lost or destroyed if notice is given, such as where counterfeit goods are suspected.</p> <p>Where advance notice is not given, enforcers are required to give notice to occupiers when entering the premises.</p> <p>Requirement for enforcers to provide evidence of their authorisation and identity, whether or not it is requested by the occupier.</p> <p>Clarification that proceedings are not invalid where there is a failure to provide notice or evidence of authorisation.</p>
Paragraph 24 – Application of paragraphs 25 to 31		Clarifies that the powers in paragraphs 25 – 31 are only exercisable when the enforcer has entered premises under paragraph 23(1) or under a warrant under paragraph 32 - 33.
Paragraph 25 – Power to inspect products etc.	Regulation 21(1)(a) CPRs	This includes the power to inspect products, records and to examine any procedure on the premises, as well as inspecting any apparatus or fixed installation as defined in Electromagnetic Compatibility Regulations 2006 (SI 2006/3418).

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Paragraph 26 – Power to test equipment	Weights and Measures Act 1985 and Weights and Measures (Packaged Goods) Regulations 2006	This power enables enforcers to test weighing and measuring instruments on the premises.
Paragraphs 27 – Power to require production of documents	Regulation 21(1)(b) CPRs	<p>Clarifies that this power includes requiring an explanation of documents.</p> <p>Clarification that the power does not permit an officer to require a person to create a document except where documents are held electronically.</p> <p>Clarification that the power can be applied to a business under investigation or another person.</p>
Paragraph 28 – Power to seize and detain goods	Regulation 21(c) CPRs	<p>Requirement for enforcers to provide evidence of their authorisation and identity, whether or not it is requested by the occupier, unless it is impractical to do so.</p> <p>Requirement to issue a written record of goods seized.</p> <p>The power is available where an enforcer reasonably suspects goods may disclose a breach of legislation; that goods are liable to be forfeited or that they may be required as evidence in proceedings.</p> <p>The time limit on detention for goods is three months, unless they are reasonably needed for longer, <i>e.g.</i> for use in proceedings.</p> <p>Requirement for certain enforcers to have regard to any relevant provision on property seizure in a code of practice under section 66 Police and Criminal Evidence Act 1984 or Article 65 Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)).</p>

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<p>Paragraph 29 – Power to seize and detain documents required as evidence</p>	<p>Regulation 21(d) CPRs</p>	<p>Requirement for enforcers to provide evidence of their authorisation and identity, whether or not it is requested by the occupier, unless it is impractical to do so.</p> <p>Requirement to issue a written record of documents seized.</p> <p>The power is available where an enforcer reasonably suspects they may be required as evidence in proceedings.</p> <p>The time limit on detention for documents is three months, unless they are reasonably needed for longer for use in proceedings.</p> <p>Requirement for certain enforcers to have regard to any relevant provision on property seizure in a code of practice under section 66 Police and Criminal Evidence Act 1984 or Article 65 Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)).</p>
<p>Paragraph 30 – Power to decommission or switch off fixed installations</p>	<p>Regulation 37 Electro magnetic Compatibility Regulations 2006</p>	<p>Confers a power to decommission or switch off fixed installations (as defined in the Electromagnetic Compatibility Regulations 2006).</p>
<p>Paragraph 31 – Power to break open a container/vending machine</p>	<p>Regulation 21(2) CPRs</p>	<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>

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Paragraphs 32 to 33 – Power to enter premises with a warrant	Combination of Regulation 22 CPRs and 227C EA	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, if notice of entry were given. Where premises are unoccupied or occupier is temporally absent, officers will be required to issue a notice on leaving the premises stating that the premises have been entered under warrant and to leave the premises secured as found.
Paragraph 34 – Power to require assistance from persons on the premises	Provision under Weights and Measures legislation	Requirement for persons on premises to provide assistance or information reasonably required by the officer. Clarification that the power includes requiring a person on the premises to provide information about the name and address of the packer or importer of a package which the officer finds on the premises.

355. Additionally, Part 5 of the Schedule provides supplementary provisions. Paragraphs 36 and 37 respectively designate the acts of obstructing officers of enforcers and purporting to act as such an officer when not so authorised as offences. These and other provisions in the generic set are detailed in Table 3 below.

Table 3: Supplementary provisions in Part 5 of Schedule 5 (New safeguards are highlighted in bold)

Provision	Modelled on	Main modifications from existing provisions in CPRs
Paragraph 36 - Offence of obstruction	Combination of Regulation 23 CPRs and regulation 24(2)(b) General Product Safety Regulations 2005	Clarification that this offence applies in relation to powers exercised under Part 4. Includes an offence of recklessly making a statement which is false. Maximum penalties are aligned at level 3 on the standard scale. Clarification that a person commits an offence if they give misleading information.

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Paragraph 37 - Offence of purporting to act as officer	Regulation 21(11) CPRs	Clarification that the level of the maximum penalty for this offence may be subject to amendment by section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and regulations made under that provision.
Paragraph 38 - Access to seized goods and documents	-	Enforcers must grant reasonable access to goods and documents seized, e.g. so that copies of seized documents can be made. Enforcers may recover the reasonable costs of complying with such a request.
Paragraph 39 - Notice of testing goods	Combination of Regulation 24 CPRs and Consumer Protection Act 1987 (CPA) and Electromagnetic Compatibility Regulations 2006	Clarification that there is a requirement for notice also to be given where the test leads to issuing of a suspension notice or the forfeiture of the goods.
Paragraph 40 - Appeals against detention of goods	Section 33 CPA	None.
Paragraph 41 – Compensation	Regulation 25 CPRs	None.

356. Also in Part 6 of this Schedule, the law in relation to the ability of Trading Standards Services is clarified to ensure that they are able to operate across local authority boundaries efficiently and effectively. This is set out at paragraphs 44 to 46 of the Schedule.

Clause 78: Amendment of the Weights and Measures (Packaged Goods) Regulations 2006

357. This clause provides an automatic exemption from keeping records of checks for packers of bread which is sold unwrapped or in open packs.

Clause 79: Enterprise Act 2002: enhanced consumer measures and other enforcement

Introduction

358. The intention of this part of the Bill is to amend Part 8 of the Enterprise Act (“EA”) to allow the courts to attach a range of enhanced consumer measures to enforcement

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orders and undertakings. Public enforcers will also be able to agree undertakings under Part 8 that include enhanced consumer measures.

359. 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 be attached to enforcement orders and undertakings.
360. The clause will also introduce a power for the Secretary of State to extend the use of the enhanced consumer measures to private designated enforcers.

Background

361. 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.
362. 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.
363. The Government's response³² to the consultation 'Extending the Range of Remedies Available to Public Enforcers of Consumer Law'³³ 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 proportionate 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

³² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206373/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf

³³ 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

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- 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.

364. Details of possible measures are not included in the legislation as this may risk taking away flexibility from the courts and enforcers of consumer law 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 enforcer of consumer law.

Part 8 Enterprise Act 2002

365. 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.

366. 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 OFT³⁴ (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).

Enforcers

367. 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: general³⁵; designated³⁶; community³⁷; and CPC³⁸.

³⁴ Section 214 was amended by Article 9 of SI 2013/783.

³⁵ Office of Fair Trading, Trading Standards Services in Great Britain; Department of Enterprise, Trade and Investment in Northern Ireland.

³⁶ Designated, see SI 2003/1399 as amended SI 2005/917 and SI 2013/478: the Civil Aviation Authority, the Northern Ireland Authority for Utility Regulation, Ofcom, the Water Services Regulation Authority, the Gas and Electricity Markets Authority, the Information Commissioner, the Office of Rail Regulation, the Consumers' Association and the Financial Conduct Authority.

³⁷ 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.

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368. 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. Currently only the Consumers' Association (Which?) are designated as such.
369. The new enhanced consumer measures will only be available where the enforcer is a public body. A power is included to extend the use of the measures to private designated enforcers if certain conditions are met.
370. 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).
371. Clause 79 introduces Schedule 7 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 7: Enterprise Act 2002: enhanced consumer measures and other enforcement

372. The aim of Schedule 7 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 to enable them to make better purchasing decisions.
373. 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 legislation that harm the collective interests of consumers where either the supplier or the consumer is in the UK.
374. Paragraph 4 updates the list of enforcers in the EA.

³⁸ Office of Fair Trading, Civil Aviation Authority, 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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375. Paragraph 5 amends section 214 (consultation), and sub-paragraph (2) extends from 14 to 28 days the consultation period for enforcers of consumer law before they can take action against a person for an enforcement order or undertaking in cases where the new subsection (4A) applies (see paragraph 376 below).
376. 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 or a community interest company whose role includes the approval of consumer codes.
377. 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 enforcer of consumer law may take further action if they consider it appropriate. They can either commence court action to seek an enforcement order and/or seek to work with the person to agree undertakings.
378. 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 384 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.
379. 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.
380. New subsection (10C) restricts the court from attaching enhanced consumer measures to an enforcement order or undertaking sought by a private enforcer unless the conditions in new section 219C are met.
381. 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.
382. 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 and to specify an appropriate time period for the person to comply with the enhanced consumer measures. Subsection (5ZA) also requires the person subject to the undertaking to provide information or documents to the enforcer

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to enable them to determine if the person is carrying out the enhanced consumer measures agreed in the undertaking.

383. New subsection (5ZB) restricts private enforcers from agreeing an undertaking with enhanced consumer measures unless the conditions in new section 219C are met.
384. Paragraph 8 inserts new sections 219A (definition of enhanced consumer measures) and 219B (inclusion of enhanced consumer measures etc) and 219C availability of enhanced consumer measures to private enforcers). Section 219A(1) lists the three categories of enhanced consumer measures – redress, compliance and choice. Subsections (2) to (5) describe those measures.
385. 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, the non-compliant business 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.
386. 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;
 - 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, and what they have done to put the situation right in the local or national press or on social media.
387. New subsection (5) excludes the existing publication requirements within Part 8 of the

EA from the scope of the new enhanced consumer measures.

388. 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.
389. 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 redress scheme) should not be included in this calculation.
390. 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.
391. New section 219C sets out the conditions that must be met before enhanced consumer measures can be sought in an undertaking or order sought by a private enforcer.
392. Subsection (3) sets out the first condition, which is that the enforcer must have been specified by the Secretary of State in an Order under this section.
393. Subsection (4) sets out the second condition, which is that the enhanced consumer measures must not directly benefit the enforcer or an associated undertaking. Subsection (5) sets out particular types of measure that would be considered as directly benefitting the enforcer or an associated undertaking. These include requiring a person to pay money to the private enforcer, requiring a person to participate in a scheme designed to recommend goods or services that is administered by the private enforcer or where the measure would give the private enforcer a commercial advantage over any of its competitors.
394. Subsection (6) provides that the Secretary of State can only exercise the power in subsection (3) to extend the use of the enhanced consumer measures to a private enforcer if they are satisfied that it will result in:

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- more redress being paid to consumers;
 - more information being provided to consumers to enable them to make better informed purchasing decisions; and/or
 - more compliance by business with the law.
395. Subsection (7) provides that the Secretary of State can only use the power in subsection (3) if the private enforcer is subject to the principles of good regulation in the Regulators Code and section 21 of the Legislative and Regulatory Reform Act 2006 (transparency, accountability, proportionality, consistency and targeting cases that need action).
396. Subsection (9) defines “associated undertaking”.
397. 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).
398. 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 any CPC enforcer (defined in section 213(5A)) has that right, not just the OFT.
399. Sub-paragraph (4) contains related or consequential amendments to Part 8 of the EA.
400. Paragraph 10 updates the EA to reflect the enforcement of Schedule 5 in the Consumer Rights Bill.

Clause 80: Private actions in competition law

Summary and Background

401. 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”).
402. Clause 80 and Schedule 8 have three main aims:
- To widen the types of the competition cases that the Competition Appeal Tribunal hears (“CAT”) (see paragraph 404 to 417 below) and to make other changes to the procedure of bringing a private action before the CAT;

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- To provide for opt-out collective actions and opt-out collective settlements (see paragraphs 418 – 428 below);
- To provide for voluntary redress schemes (see paragraph 429 – 432 below).

403. The Government’s response to the consultation “Private Actions in Competition Law”³⁹, 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

404. 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”);
- 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.

405. In contrast, a stand-alone claim requires the party which brings the action to prove an infringement. In *Enron v EWS (I)*,⁴⁰ 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

³⁹ <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

⁴⁰ *English Welsh & Scottish Railway Limited v Enron Coal Services Limited* [2009] EWCA Civ 647, 1 July 2009.

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.

406. 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.
407. 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.
408. 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.
409. 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 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.
410. 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.
411. Paragraph 34 amends Schedule 4 of EA to enable rules to be made about the grant of injunctions by the CAT.
412. 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 426 below for how the limitation/prescription periods may be suspended in the case of collective actions.
413. Paragraph 13 amends section 58 of the CA to make clear that the CAT is bound by an

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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.

414. 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.
415. 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.
416. Paragraph 32 amends paragraph 17 of Schedule 4 to 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).
417. Paragraph 33 inserts paragraph 20A of Schedule 4 to 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

418. 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.
419. 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.
420. 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.

421. 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 be a person whom the Tribunal considers is just and reasonable to be a representative. 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).
422. 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 Costs⁴¹, 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.

⁴¹ *Review of Civil Litigation Costs*, <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

423. 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.
424. Paragraph 26 replaces paragraph 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.
425. 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.
426. Paragraph 8 (see paragraph 412 above) 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 section 47A proceedings before the CAT to avoid the limitation/prescription period expiring before it knows 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.
427. 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 429 – 432 below). 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.

428. 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

429. 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.
430. 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) allows the CMA to take into account the amount or value of compensation when deciding whether or not to approve a voluntary redress scheme. This is to permit the CMA to reject a scheme, if the compensation on offer seems exceptionally low. 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

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may set out the factors the CMA should or should not take into account.

431. 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.
432. 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

433. The Bill has been considered with regard to its impact on local authorities and the 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.
434. The 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, and the savings from the transfer of a small number of cases from the criminal to the civil courts when the enhanced consumer measures have bedded in, which will produce a net savings for government.

SUMMARY OF THE IMPACT ASSESSMENT

435. 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).
436. 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.
437. 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

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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.

438. In line with the Public Sector Equality Duty the Bill has been considered with regard to the characteristics of race, religion and belief; disability; gender; age; gender reassignment; pregnancy and maternity; and sexual orientation. An equality impact assessment questionnaire has been completed. This specifically explored the protected characteristics identified above, in term of discrimination, harassment and victimisation. The result identified no major impact in these communities from the Bill policies.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Compatibility

439. 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).
440. The Secretary of State for Business, Innovation and Skills has made a statement in accordance with section 19 of the Human Rights Act 1998 that the provisions in the Bill are, in his view, compatible with the rights contained in the European Convention on Human Rights and Fundamental Freedoms (ECHR).
441. 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

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

Investigatory Powers

443. Schedule 5 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 14 and 27), a power to enter premises (paragraphs 23 and 32), and a power to inspect, seize and test documents, goods or products and specified equipment (paragraphs 25, 26, 28 and 29 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.

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Schedule 5 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.

Enhanced consumer measures

444. 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

445. Paragraphs 5, 6, 10, 11 and 30 of Schedule 8 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.

446. 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 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) when compared to the cost of bringing the case.

COMMENCEMENT

447. 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

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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

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

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

448. 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.⁴² 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.
449. 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.
450. 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.
451. 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	Includes scope of application.	Clause 3

⁴² OJ L 171, 7/7/1999, p.12.

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

1.2	Definitions of key terms.	Definitions for the Bill are set out in clauses 2 and 59 and include definitions which adequately implement the terms defined by the Directive. Clause 23 contains the definition of 'repair'. Clause 30 contains the definition of 'guarantee' and other terms used in that clause.
2.1-2.3	Goods to conform with the contract for sale.	Clauses 9, 10, 11, 13 and 14; clause 19(1)
2.4	Circumstances where the seller is not to be bound by public statements about the goods.	Clause 9(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 15
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 19, 23, 24

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

3.6	Rescission unavailable if lack of conformity is minor.	Not implemented in the UK
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 19(12) – (13)
6	Guarantees.	Clause 30
7.1	Contractual terms which waive the rights under the Directive are not to be binding.	Clause 31
7.2	Choice of law of a non-EU State not to deprive consumer of protection.	Clause 32
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

452. 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.⁴³ The

⁴³ OJ L 95, 21/04/1993, p.29.

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

Directive requires that unfair terms in contracts concluded between a trader and a consumer are not binding.

453. 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.

454. The Bill goes beyond the minimum requirements of the Directive 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 transparent 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’;

455. 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 61
1.2	Exclusion of mandatory statutory provisions	Clause 73
2	Definitions of key terms	Clauses 61 and 2
3.1	Fairness test	Clause 62

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

3.2	Terms not regarded as individually negotiated	No implementation required (clause 61 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 63 and Schedule 3
4.1	Circumstances to consider in assessing fairness.	Clause 62
4.2	Exception from fairness assessment for terms on main subject matter and price	Clause 64
5	Terms to be in plain and intelligible language	Clauses 68 and 69
6.1	Unfair terms not to be binding	Clauses 62(1), 67 and 72
6.2	Choice of law of a non-EU State not to deprive consumer of protection	Clause 74
7	Effective enforcement	Clause 70 and Schedule 3; Part 3 of Schedule 5 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 paragraph 454 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.

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

Directive 2011/83/EU on consumer rights

456. This note describes the implementation in the Consumer Rights Bill of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.
457. The Directive covers
- Information which traders should provide to consumers
 - Cancellation rights and responsibilities for distance and off-premises sales
 - Delivery and passing of risk provisions
 - Measures to prevent hidden costs
458. The deadline for making national legislation implementing the Directive passed on 13 December 2013, and the deadline for the legislation to enter into force is 13 June 2014. The legislation currently implementing the Directive can be found in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134). A full transposition note for the Directive was published alongside the regulations and can be found at www.gov.uk/bis. The Consumer Rights Bill repeals and replaces a small number of provisions of these Regulations, as set out below, for coherence with related measures in the Bill, in accordance with the Government's aim to ensure that regulation is simple and coherent as possible.
459. The provisions in the Bill listed below reflect those in the Directive.
460. The two areas implemented in the Bill relate to pre-contractual information and to the delivery of goods and passing of risk. Pre-contractual information, is made a term of the contract. In addition, the Bill implements rules for the timing of delivery for goods and regarding when responsibility transfers from the trader to the consumer for goods delivered. The table below describes the transposition in the Bill of the relevant provisions of the Directive.

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

Article	Objective	Implementation
PRE-CONTRACTUAL INFORMATION		
6.5	Information provided to be incorporated into contract	Clauses 11(4)-(6), 12, 36(3), 37 50(3)
DELIVERY OF GOODS AND PASSING OF RISK		
17.1	Scope of application of Articles 18 and 20, to sales contracts only.	Clauses 5, 28(1) and 29(1)
18.1	Default rule for sales contracts of delivery within 30 days	Clause 28(3)
18.2	If late delivery, consumer to nominate a further delivery period. Consumer may terminate contract if second failure.	Clause 28(5)-(8)
18.3	Trader to reimburse all payments to consumer on termination	Clause 28(9)-(10)
18.4	Consumer may have other remedies in national law	Clause 28(10)-(13)
20	For sales contracts, risk of loss or damage passes to consumer when consumer acquires possession of goods	Clause 29
GENERAL PROVISIONS		
23.1	Adequate and effective enforcement	In relation to the provisions above, clauses 11(4)-(6), 12, 19, 28, 37, 38, 42, 50 and 54 of the Consumer Rights Bill. A future Order providing that the regime under Part 8 of the Enterprise Act 2002 for public bodies and consumer bodies to enforce consumer law applies in relation to the relevant provisions of the Bill.

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

24.1	Effective, proportionate and dissuasive penalties for enforcement.	In relation to the provisions above, clauses 11(4)-(6), 12, 19, 28, 37, 38, 42, 50 and 54 of the Consumer Rights Bill. A future Order providing that the regime under Part 8 of the Enterprise Act 2002 for public bodies and consumer bodies to enforce consumer law applies in relation to the relevant provisions of the Bill
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DIRECTIVES CONFERRING EFFECTIVE ENFORCEMENT MEASURES

461. This note describes how the Consumer Rights Bill gives effect to key Directives that require effective enforcement measures to be implemented with regard to consumer law.
462. These include Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market⁴⁴; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising⁴⁵; Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety⁴⁶; Directive 2004/22/EC of the European Parliament and of the Council of 31 March 2004 on measuring instruments⁴⁷; and Council Directive 76/211/EEC of 20 January 1976 on the approximation of the laws of the Member States relating to the making-up by weight or by volume of certain prepackaged products.⁴⁸
463. The tables below describe how the provisions of the Bill implement these key Directives.

⁴⁴Amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 (Unfair Commercial Practices Directive), OJ L 149, 11.6.2005

⁴⁵ OJ L 376, 27/12/2006

⁴⁶ OJ L 11, 15/01/2002

⁴⁷ OJ L 135, 30/04/2004

⁴⁸ OJ L 46, 21/2/1976

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

Council Directive <u>76/211/EEC</u> on the approximation of the laws of the Member States relating to the making-up by weight or by volume of certain pre-packaged products		
Article	Objective	Implementation
Annex I, Paragraphs 5 - 6	Establishes the conformity assessment of measuring instruments by competent authorities to ensure the instruments are correct and traceable for the purposes of fair trading and protecting the consumer.	Parts 3 and 4 of Schedule 5 confer powers in relation to civil and criminal enforcement.

Council Directive 2001/95/EEC on general product safety		
Article	Objective	Implementation
8.1	Establishes the principal measures that competent authorities are to be able to take in respect of unsafe products, including the obtaining of information and samples.	Parts 3 and 4 of Schedule 5 confer powers in relation to civil and criminal enforcement.

Directive 2004/22/EC on measuring instruments		
Article	Objective	Implementation
18.1	Requires Member States to take all appropriate measures to ensure that measuring instruments that are subject to legal metrological control but do not comply with an applicable provision of the Directive are neither placed on the market nor put into use.	Parts 3 and 4 of Schedule 5 confer powers in relation to civil and criminal enforcement.

These notes refer to the Consumer Rights Bill, as introduced in the House of Commons on 23rd January 2014.

Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market		
Article	Objective	Implementation
11.1, paragraph 1	Requires Member States to ensure that adequate and effective means exist to combat unfair commercial practice in order to enforce the Directive.	Parts 3 and 4 of Schedule 5 confer powers in relation to civil and criminal enforcement.

Directive 2006/114/EC concerning misleading and comparative advertising		
Article	Objective	Implementation
5.1, paragraph 1	Requires Member States to ensure that adequate and effective means exist to combat misleading advertising and enforce compliance with the provisions on comparative advertising in the interests of traders and competitors.	Parts 3 and 4 of Schedule 5 confer powers in relation to civil and criminal enforcement.

CONSUMER RIGHTS BILL

EXPLANATORY NOTES

*These notes refer to the Consumer Rights Bill as introduced
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