Public Bill Committee

CONSUMER RIGHTS BILL

WRITTEN EVIDENCE

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Written evidence submitted by The Law Commission (CR 01)

Introduction

1.1 The Law Commission was set up by the 1965 Law Commission Act as an independent body to review and recommend reform to the law of England and Wales. The Law Commission aims to ensure that the law is fair, modern, simple and cost-effective.

1.2 The Consumer Rights Bill 2014 implements recommendations in two reports which we published jointly with the Scottish Law Commission. The reports are:

(1) Consumer Remedies for Faulty Goods (Faulty Goods Report);[1] and

(2) Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills (Unfair Terms Report).[2]

1.3 These reports are part of a wider joint project to simplify consumer law. Our joint report on Consumer Remedies for Misleading and Aggressive Practices is being given effect by the Consumer Protection from Unfair Trading (Amendment) Draft Regulations 2013.[3]

1.4 Here we summarise the main recommendations in our faulty goods and unfair terms reports and highlight a few areas of concern regarding the Bill.

Faulty goods

The current law

1.5 The law concerning consumers' remedies for faulty goods is unnecessarily complicated and uncertain. Two separate sets of remedies apply where goods fail to conform to contract. The traditional UK "right to reject" is supplemented by the European remedies set out in the Consumer Sales Directive 1999 (CSD).

1.6 Under the right to reject, a consumer may refuse to pay for the goods or (if they have paid already) claim a full refund. However, the right is lost once the consumer is deemed to have accepted the goods, which may happen "after the lapse of a reasonable time".[4] The case law on what amounts to a reasonable time provides little guidance on how long it lasts. In one case a consumer was said to have accepted a new car in less than four weeks;[5] in another, the buyer was entitled to reject a car after seven months.[6]

1.7 Meanwhile, the CSD introduces four new remedies, organised into two tiers. Consumers must first ask for a repair or replacement. If a trader fails to provide these within a reasonable time or without significant inconvenience, the consumer may move to the second tier—which consists of rescission and a reduction in price. Rescission resembles the right to reject, with one major difference: the consumer is not entitled to a full refund. Instead the trader may make some deduction for the use the consumer has had from the product.

Our recommendations

1.8 Our recommendations were designed to simply and clarify the law. In particular, we recommended that the right to reject faulty goods should last for a "normal period" of 30 days. Based on research with consumers, we thought that consumers would be able to understand, remember and assert a clear 30 day period.

1.9 We accepted that in many cases this would be a reduction in consumer rights: courts would often consider a longer period to be a reasonable time. This reduction was balanced against two further recommendations:

(1) The 30 day period would be applied flexibly in some circumstances. A longer period would be appropriate where it was reasonably foreseeable at the time of the contract that the consumer would not be able to test the goods within 30 days (for example, where a consumer buys a Christmas present in October, or a lawnmower in November).[7]

(2) Where the period was exceeded, and a consumer was unable to obtain a repair or replacement without unreasonable delay or significant inconvenience, the consumer would be entitled to a full refund without a deduction for use.[8]

1.10 In our research, consumers had been particularly critical of the deduction for use. Consumers said that if they had been unfortunate enough to buy a faulty product, and repairs and/or replacements had been

[1] (2009) Law Com No 317/ Scot Law Com No 216. http://lawcommission.justice.gov.uk/docs/lc317_Consumer_Remedies_Faulty_Goods.pdf
[2] (2013) http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf
[3] (2012) Law Com No 332; Scot Law Com No 225. http://lawcommission.justice.gov.uk/docs/lc332_consumer_redress.pdf
[4] Sale of Goods Act 1979, s 35(4).
[5] *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220.
[6] *Bows v Richardson & Son Ltd*, 28 January 2004 (unreported).
[7] Faulty Goods Report, paras 3.83 to 3.88.
[8] Faulty Goods Report, paras 6.40 to 6.50.

unsuccessful, they would feel aggrieved if they were then charged for use of the product. Consumers felt that if the refund were reduced, they should be entitled to compensation for the inconvenience they had suffered (such as taking time off work to wait for repairs). A further problem was that there was no agreed method for valuing the use a consumer had had from a product, particularly where the product had intermittent faults for some time.

1.11 In practice, we were told that deductions for use were seldom applied—and where they were applied they led to disputes and ill-feeling. Consumers felt that where they had paid for new goods, they wanted new goods. If the first goods were faulty, they wanted to be able to start again, with enough money to buy other new goods, not second hand ones.

The Bill

1.12 Clause 22(3) of the Bill implements a 30 day right to reject. However:

(1) There is no extension for goods likely to be tested after a period of 30 days (such as the Christmas present bought in October, or a lawnmower in November); and

(2) Under clause 24(8), the final right to reject is subject to a deduction for use. Clauses 24(10) to (12) set out some limits: where the make and model of goods is not stated and there is no clear independent evidence of an active second-hand market no deduction can be made within the first six months.

1.13 BIS made clear in its evidence to the BIS Select Committee that clause 24 aims to protect the motor industry due to the rapid depreciation of cars. However, clause 24 may not achieve this. If a consumer rejects a new model of car after a few months there may not be an active second-hand market in that make and model of car, so no deduction for use will be made.

1.14 However, a make and model can be put on virtually any good, including ordinary household items such as a toaster or microwave. Furthermore, with eBay, it is possible to show a second-hand market in almost any good (even if second-hand prices are extremely low). A popular toaster would have a make and model and an active second-hand market on eBay, so a deduction for use would be made. This means that clause 24 instead of protecting the motor industry, seriously undermines consumers' rights regarding a wide variety of goods.

1.15 There is also a clash between the emphasis on an active second-hand market in clause 24(10) and the statement in clause 24(8) that a deduction for use should take into account the use the consumer has had of the goods. The second-hand price may bear little relationship to a consumer's use of the goods, as the following example shows.

> On 20 April Sandra buys a camera for £800 to take on a two week holiday in June. Between April and June, she hardly uses it. On holiday she uses a great deal, but after one week it breaks. On 20 June, Sandra takes the camera to the shop for repair. On 25 June, the camera is returned, and she uses it a couple of times—but when she goes to a friend's wedding on 20 August it breaks again. Sandra rejects the camera under clause 24.

1.16 How should Sandra's use of the camera be valued? The problem is that clause 24 will encourage disputes, as the trader and the consumer will view the issue differently:

(1) The trader will provide "clear independent evidence" under clause 24(10) to show that the second hand value of the camera is £500—and will probably start by suggesting a deduction of £300. The trader will point out that Sandra has had the use of the product for five months, during which she has probably taken several hundred photos.

(2) Sandra will point out that the second-hand value of the camera bears no relationship at all to the use she has had from it. The reason she bought the camera was to take pictures of her holiday—and this failed. She should receive the full £800. In fact, she should also be compensated for the distress in not having photos of her trip, which she had saved for six years. Also she did not have use of the camera for five months. Between 10 June and 25 June it was broken.

1.17 The Bill provides little guidance on how to resolve this issue, which is likely to become inflammatory. We fear that disputes over deductions for use may undermine the simplicity and certainty of the new rights. Cases will be more likely to proceed to court. The trader will give evidence of second-hand value, while the consumer goes through every occasion on which they used the goods, and their disappointment when the goods failed them.

1.18 We would urge Parliament to look at this again. One solution may be not to provide any deduction for the first six months. If the deduction for use is to continue, we feel that it is particularly important to provide a longer initial period to reject the goods where it was clear that the goods would not be inspected for several months (such as the lawnmower bought in November).

Unfair Terms

The current law

1.19 The Law Commission and Scottish Law Commission have long been concerned to simplify the law on unfair contract terms. In 2005 we published a report on this subject,[9] which we updated in 2013.

1.20 The most controversial area is the exemption for subject matter and price, as set out in Article 4(2) of the Unfair Terms Directive (UTD).[10] The UTD states that a fairness assessment may not relate to "the definition of the subject mater of the contract" or to "the adequacy of the price and remuneration… as against the services or goods supplied in exchange", provided that the term is "in plain intelligible language". These words have been copied out in Regulation 6(2) of the Unfair Terms in Consumer Contract Regulations 1999 (UTCCR), and have proved particularly difficult to interpret.

1.21 The issue has generated complex litigation, culminating in the 2009 Supreme Court decision, *Office of Fair Trading v Abbey National plc*.[11] The Supreme Court overturned the Court of Appeal and held that charges for unauthorised overdrafts were price terms and thus exempt from a fairness assessment. A large majority of consultees agreed that the law was now unduly uncertain. Consumer groups and enforcement bodies felt that this undermined the effectiveness of the legislation.

1.22 In a world of price comparison websites, there is increasing pressure on traders to advertise low headline prices, whilst earning their profits through other charges. Given this potential undermining of competition, the law should provide effective tools to combat unfair charges buried in small print.

1.23 The current uncertainty has the potential to damage businesses as well as consumers. If a business uses an ancillary price term to subsidise a low headline price, the business is put at risk if the term is later found to be unfair.

Our recommendations

1.24 We made 33 recommendations to simply the law on unfair contract terms. The central reform was that the exemptions for price and main subject matter should be reformulated to apply only to terms which are transparent and prominent.

1.25 The Annex to the UTD contains "an indicative and non-exhaustive list of terms which may be regarded as unfair". This "grey list" is reproduced word for word in Schedule 2 of the UTCCR. We reviewed the grey list and recommended that:

(1) The grey list should be retained, substantially in its current form, with three additions to deal with systemic problems. These are terms which have the object or effect of:
   (a) permitting the trader to claim disproportionately high sums in compensation or for services which have not been supplied, where the consumer has attempted to cancel the contract;
   (b) giving the trader discretion to decide the amount of the price after the consumer has become bound by the contract; and
   (c) giving the trader discretion to decide the subject matter of the contract after the consumer has become bound by it.

(2) The legislation should clarify that all terms on the grey list should be reviewable for fairness, irrespective of whether they also fell within the exemption for main subject matter and price.

(3) The legislation should clarify that the exceptions to the grey list (in paragraph 2 of Schedule 2) may be reviewed for fairness unless they fell within the exemption for main subject matter and price.

The Bill

1.26 We are very pleased to see that the Bill implements almost all of our recommendations. In particular, clause 64 implements our recommendation that the exclusion for main subject matter and price should apply only if the term is transparent and prominent.

1.27 Meanwhile Schedule 2 includes our recommended additions to the grey list (at paragraphs 5, 12 and 14).

February 2014

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[9] Unfair Terms in Contracts (2005) Law Com No 292; Scot Law Com No 199.
[10] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, OJ 1993 L 95.
[11] [2009] UKSC 6, [2010] 1 AC 696.

Written evidence submitted by the Scottish Law Commission (CR 02)

Introduction

1. The Scottish Law Commission was set up by the Law Commission Act 1965 as an independent body to review and recommend reform to the law of Scotland. It aims to recommend ways of simplifying, updating and improving the law of Scotland.

2. The Consumer Rights Bill 2014 implements recommendations in two reports which we published jointly with the Law Commission for England and Wales. The reports are:

(1) Consumer Remedies for Faulty Goods; and

(2) Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills.

3. These reports are part of a wider joint project to simplify consumer law. Our joint report on Consumer Remedies for Misleading and Aggressive Practices is being given effect by the Consumer Protection from Unfair Trading (Amendment) Draft Regulations 2013.

4. The Scottish Law Commission is currently carrying out a general review of the law of contract and therefore also has an interest in other aspects of the Consumer Rights Bill. It has deferred work on breach of contract in order to take account of relevant provisions in the Bill. Similarly, it has been keeping a close eye on European developments in contract law in general and on the proposed Common European Sales Law in particular. The Commission has previously submitted comments in relation to services and digital content and concentrates mainly but not entirely on those areas in this written evidence.

Implied terms v mandatory non-excludable rules

5. There are clauses on non-excludable implied terms in each of the Chapters on goods, digital content and services (clauses 31, 47 and 57 respectively). Additionally, Part 2 deals specifically with unfair terms which could also apply to any such attempts at exclusion. This overlap could lead to confusion, and specific rules for goods, digital content and services may lead to uncertainty as to the intended scope of the general rules on unfair terms. A more straightforward solution could be achieved by expressing the current implied terms as mandatory non-excludable rules.

Goods

6. We continue to have concerns about the deduction for use in the final right to reject. In our Joint Report with the Law Commission on Consumer Remedies for Faulty Goods we recommended that such an allowance be abolished.[12] We adhere to that view.

7. In the Consultation Paper for that Report, we asked whether consultees agreed that "deduction for use" in the event of rescission should be abolished. Two-thirds of those who responded to this question were in favour of this proposal for consumer sales, mainly for reasons of simplicity, and to reduce uncertainty and the potential for disputes.[13] We found that consumers felt that if they had been unfortunate enough to buy a faulty product, and repairs and/or replacements had been unsuccessful, they would feel aggrieved if they were then charged for use of the product.[14]

8. On balance, we decided that the arguments in favour of the abolition of the deduction for use are more persuasive than those against. The deduction for use is uncertain and relatively rarely used. It adds complications to the law, and causes disputes as consumers retaliate with damages claims.[15]

Digital Content

9. We are pleased to note the adjustments to the Bill to extend its scope to digital content which is "free".

10. We continue to suggest, however, that it should be made explicit that exercising the right to a refund detailed in clause 45(1) involves a termination of the contract. As well as making it clear that neither consumer nor supplier remains bound by the contract, this would be consistent with the approach in developing EU law.

Services

Standard of Liability

11. With regard to the standard for determining liability of a service provider, we continue to be of the view that it would be preferable to express the statutory guarantee in terms of the consumer's reasonable expectations. This is for two main reasons.

12. Firstly, there may exist a gap between the knowledge and expertise of a service provider and that of a consumer. This renders it difficult for a consumer to determine whether or not reasonable care and skill has been used, and may discourage uncertain consumers from asserting their rights in relation to a service which has not

[12] Law Com No 317, Scot Law Com No 216, para 6.50.
[13] Joint Report on Consumer Remedies for Faulty Goods, para 6.45.
[14] Joint Report, para 6.43.
[15] Joint Report, para 6.49.

been adequately performed. A second reason involves situations where a service provider's performance has not only fallen short of consumer expectations, but has fallen short of what was contractually agreed. Our concern is that the use of care and skill as the standard for liability may lead to courts ruling that although the service was not performed in accordance with contract, as the service provider has carried it out with reasonable care and skill, he is not liable. We do not think that clause 53 (Relation to other law on contract terms) is enough to ensure that such a result cannot occur.

13. Application of a single standard across goods and services may simplify matters, particularly in contracts for services where goods or digital content is supplied, and therefore help achieve a clearer and more accessible consumer law.

Risk

14. The issue of risk of accidental (ie not through either party's fault) damage to or destruction of the goods after the formation of contracts under which: (i) the service provider also supplies goods or (ii) in which the service provider works on or with the consumer's property has not been addressed in the Bill. As the Commission stated in its response to the 2012 BIS Consultation on Enhancing Consumer Confidence by Clarifying Consumer Law, we think that the issue ought to be considered. Consumers will frequently be faced by these situations. In addition to the 'obvious' examples of the supply of a bespoke item within a service (eg design and manufacture of a wedding dress), installation of goods, or holding an item for repair, we would add the storage of electronic documents, pictures and videos on a 'cloud' storage server, of a car at an airport car-park, or the transport of furniture by a removals-van. Addressing where risk lies on the face of the Bill would clarify matters and help achieve a more accessible consumer law. We would see no difficulty in a UK-wide provision.

15. While the general principle—*res perit domino* (the owner bears the risk)—is quite clear, the accessibility of the law would be improved if this issue was addressed by a specific provision on the face of the Bill. At the moment the reader has to combine clauses 1(4) and (5) and 29 to see that the goods supplied by a service-provider as part of a service not including installation (eg repair work) are at that provider's risk until the consumer or its nominee takes possession of the goods in question. (For installation's inclusion as a supply of goods contract see clause 15.)

16. In the case of a service provider working with the consumer's goods in some way, we think that the basic principle *res perit domino* should apply, subject to alternative contractual provision (ie transferring the risk to the service provider while the work proceeds). Subjecting the basic rule to the contract does not seem capable of prejudicing the consumer-owner's interests. We think, however, that a particular difficulty arises where the consumer transfers possession of goods or digital content to a service-provider to allow the latter to provide its service (eg storage, carriage, keeping the consumer's car while it is repaired or serviced at the provider's garage). There may be a case for a default provision (ie one capable of contractual variation) that in such cases the risk of damaging events beyond the service-provider's control by reasonable care and skill (eg once-in-a-century flooding or other weather-caused damage at the provider's premises or to the provider's transporter, the arrival of a new virus against which existing digital security devices are useless) is on the service-provider. This would not apply, however, where the service-provider came to work on the consumer's property *in situ* (eg in the consumer's home).

17. What may also need further consideration is the extent to which the consumer with the risk should as a result have to pay for the service-provider's work, especially if that was not completed before the accidental damage or destruction took place. The default rule in present Scots law is that the risk remains with the owner. Thus, if a decorator has completed work on a room in a house which is then accidentally damaged or destroyed by fire before hand-back to the customer, the latter may still have to pay the contract price for the work done. We are not aware, however, of any recent authority on the question of what happens where the work being done is not completed at the point when the risk materialises. Is the supplier discharged or bound to start again? Can any payment be claimed for the uncompleted work? These are difficult questions on which some clear legal rules seem desirable.

Unfair contract terms

18. We are pleased to note that the Bill, in the main, reflects the Commissions' policy on unfair contract terms.[16]

Use of the term 'consideration'

19. We have some concerns with the way the word "consideration" is used in the Bill. It seems to be used in its ordinary language sense in clauses 9(2), 10(2), 19(5), 35(2), 42(7), 51(1), 54(7), 57(3) and 66(2). At any rate we think it would be so comprehended by a Scots lawyer. But defining the scope of a chapter of the Bill by using the word in its technical English law sense, as may be the case in clause 8, is problematic for Scotland. Further, the formulations in clauses 3(3) and 48(3) are clumsy, since consideration in its English law sense is being used to say to which contracts the Bill does not apply under Scots law. It would be better to say

[16] Law Commission and Scottish Law Commission, Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills, March 2013.

"No application to gratuitous contracts". Clause 3(3) may then not be needed at all, because sales, hires, hire-purchases, or other transfers of goods for obligatory non-money returns (eg exchange), cannot be gratuitous. Similarly, clauses 42(7) and 54(7) incorporate a technical usage ("failure of consideration"); this requires the addition of a Scots law analogue, perhaps along the lines of a reference to a right of mutual restitution.

20. Clause 48(3) may serve some purpose in excluding gratuitous service contracts—such things can exist, technically, unlike gratuitous sales etc (above). It may be, however, that this will leave an "escape route" through which some traders may slip when they should really in policy terms be caught.

February 2014

Written evidence submitted by Andrew Tettenborn (CR 03)

Summary: Two minor and technical, but still important, points about occupier's liability and notices excluding liability may have been overlooked in the Consumer Rights Bill.

1. May I raise two issues about the drafting of the Consumer Rights Bill, which perhaps ought to come to your attention?

2. **First,** there's a small point which may well have been missed by the draftsman, concerning occupier's liability and the right of a business to exclude its liability for personal injury to its visitors.

3. Under the present law, the Unfair Contract Terms Act completely prevents a business occupier excluding or limiting liability for personal injury (s.2(1)), save in one case: under s.1(3), he has an absolute right to do so where he admits people to his land for the purposes of recreation, such not being the main nature of his business, his ability to exclude liability remains unaffected.[17] The reason for this latter exception is to make it clear that (for example) a factory owner can admit a school party to tour his factory, or a farmer admit potholers onto his land, on the basis that he is not to be liable in negligence to them.[18]

4. This exception is carried over into the Consumer Rights Bill by Cl.66(4), stating:

> "Section 65 [which among other things re-enacts s.2(1) of the Unfair Contract Terms Act 1977] does not apply to the liability of an occupier of premises to a person who obtains access to the premises for recreational purposes if—
>
> (a) the person suffers loss or damage because of the dangerous state of the premises, and
>
> (b) allowing the person access for those purposes is not within the purposes of the occupier's trade, business, craft or profession."

5. Unfortunately, under the Bill as drafted this no longer gives the business occupier the protection he used to have. This is because under the Bill notices excluding a business occupier's liability to non-business visitors are now subjected not only to Cl.65 but to the unfair terms regime under Cls.61–64: and there is no exception under these latter provisions for recreational visitors. The result is that such notices now have to pass through the hoop of not being ones which "contrary to the requirement of good faith, [cause] a significant imbalance in the parties' rights and obligations" (see Cl.62(4)).[19]

6. I should add that in so far as notices (rather than contracts) are concerned, there seems no barrier in the underlying Directive (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts) to exempting them from control. The Directive applies only to "contracts concluded between a seller or supplier and a consumer" (art.1): so too the current UK unfair terms regulations (SI 1999 No. 2083, reg.4). The extension of the "requirement of good faith" criterion to mere notices is an innovation brought in by the Bill, and is not anything required by Euro-law.

7. If this was a change in the law that the draftsman intended, well and good: but I doubt whether it was. If it wasn't, then should there, perhaps, be a "recreational visitors" exception to ss.61–64?

8. **Secondly**, the draftsman may not have noticed that Cls.61–64 in their present form seem to apply in terms to notices excluding a business occupier's liability to trespassers, making them valid only if not "unfair".

9. Thus under Cl.61(4) "This Part applies to a notice to the extent that it ... (b) purports to exclude or restrict a trader's liability to a consumer."; and "consumer", if we take the definition in Cl.2 (although it technically is applicable only to Part I) is "an individual acting for purposes that are wholly or mainly outside that individual's

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[17] See the proviso to the subsection ("but liability of an occupier of premises for breach of an obligation or duty towards a person obtaining access to the premises for recreational or educational purposes, being liability for loss or damage suffered by reason of the dangerous state of the premises, is not a business liability of the occupier unless granting that person such access for the purposes concerned falls within the business purposes of the occupier").

[18] See See HL Deb., Vol.443, col.721 (Lord Hailsham, introducing the Occupiers' Liability Bill 1984, which inserted the above proviso).

[19] It could, I suppose, be argued that the definition of "trader" in Cl.2(2) (" "Trader" means a person acting for purposes relating to that person's trade, business, craft or profession, ...") excluded a farmer admiting people onto his land when this wasn't part of his business. But this is highly uncertain; and there's also the technical point that the definitions in Cl.2 are expressed only to apply to Part I of the Bill and not Cls.61-64.

trade, business, craft or profession". Read literally this is wide enough to cover a person trespassing on business premises.

10. This is a clear change in the law, because the Unfair Contract Terms Act 1977 does not affect such clauses (since s.2 of that Act, dealing with clauses exempting a person from liability for negligence, applies only to negligence at common law or under the Occupiers' Liability Act 1957, and not to liability under the Occupier's Liability Act 1984).

11. Again, was this a change that was intended?

February 2014

Written evidence submitted from the Association of British Insurers (CR 04)

THE ABI

The ABI is the voice of insurance, representing the general insurance, investment and long-term savings industry. It was formed in 1985 to represent the whole of the industry and today has over 300 members, accounting for some 90% of premiums in the UK.

SUMMARY

1. The ABI supports the recently published Consumer Rights Bill that consolidates and modernises consumer laws and rights. Well informed and engaged consumers are vital for competitive and thriving markets, however, there is a delicate balance between ensuring that consumers have appropriate protections and ensuring that unintended complexities are not created, especially for sectors with extensive sectoral rules and regulations like financial services.

2. The financial services sector has all-encompassing consumer protections and redress schemes that in many cases exceed the standards set out by the draft Bill. The ABI is eager that the draft Bill does not inadvertently lead to duplicate or conflicting regulation for businesses, or cause confusion and uncertainty for consumers as to the rights afforded to them. The best way to achieve this is to have clear and unambiguous rules in the draft Bill and robust provisions that highlight the primacy of sector specific rules and regulation.

SERVICES

3. The ABI strongly supports the proposed standards for services to be performed with *reasonable care and skill* as written in the draft Bill. We are aware that some stakeholders do not support this approach and have argued that the same standard should apply to the sale of services and the sale of goods, the *satisfactory quality* standard. While in theory this proposal may seem attractive, the practicalities are a very different matter and the ABI does not believe that the *satisfactory quality* standard would be appropriate or at all helpful for services for the following reasons:

- Most financial services do not have a tangible standalone product making it difficult to make an assessment as to whether they are of *satisfactory quality* or not. This standard would lead to more subjectivity and different interpretations as to what *satisfactory* means and how it would apply across the services landscape.
- Services have a wider range of customer needs and expectations and are more prone to unpredictable external factors impacting upon the service.
- Insurance services can provide a wide array of coverage and the price paid will vary depending on the cover required and the risk presented. The more extensive the cover, the higher the premium. Conversely, the more limited the cover, the lower the premium. If pricing was to be reviewed for 'satisfaction', this could imply that certain levels of cover are not satisfactory and so should not be offered, thus reducing choice for consumers.
- Adopting a 'satisfactory quality' standard potentially contradicts and confuses established rules and regulations in the financial services sector, which has been specifically tailored to ensure relevant and robust protection for consumers of financial services with the Financial Conduct Authority (FCA) handbook. This handbook sets out high level principles for business such as 'treating customers fairly' as well as specific rules governing the conduct of financial services business eg Insurance Conduct of Business Sourcebook. Further, the draft Bill is intended to create a 'de minimis' standard that is not contrary to existing sector specific legislation.
- In order to manage consumer expectations, risk adverse providers would have to review consumer literature, adding more detailed and lengthy information as to what the contract will and will not cover and what can and cannot be achieved. This would cause significant consumer detriment in terms of engagement and understanding, due to a reluctance to engage in long and complex literature.

Information about the trader or service to be binding—Clause 50

4. Clause 50 provides that information given by the trader either in verbal or written form and is taken into account by the consumer when deciding to enter into a contract is binding. While the ABI understands that

consumers are reliant on information given by the provider, however, if this is an absolute right as suggested in Clause 50 of the Bill, this could have the unintended consequence of stifling the provision of helpful and flexible customer service. There may be examples where consumers pose a hypothetical question or ask a provider a question that cannot be answered with any certainty. If the provider gives an incorrect answer or an illustration is used on a website that does not apply to a consumer's particular circumstances, there is the potential that it would give the consumer right to pursue the trader for a breach of contract. As providers often do not know what information a consumer will use when deciding whether to enter into a contract, the risks related to 'going the extra mile' are likely to lead to providers relying strictly on prescriptive information.

The right to repeat performance and price reduction—Clauses 55–56

5. Clauses 55–56 cover available remedies if statutory rights under a services contract are not met. While the ABI supports the clarity given by these clauses, there is a concern that either repeat performance or a price reduction may not always be possible or what consumers need in relation to insurance services.

6. We support the recognition in Clause 55 that repeat performance can be impossible, but also argue that this is the case with price reduction. The Financial Ombudsman Service uses the standard of 'putting the consumer in the position they would now be in—financially—if the business providing the financial service hadn't got it wrong in the first place'. The ABI believes that this is a good standard to use as it does not prevent price reduction or repeat performance where appropriate, and provides flexibility to provide other remedies when the highlighted remedies are not applicable.

Unfair contract terms

7. BIS have implemented the Law Commissions' Advice on Unfair Terms in Consumer Contracts. The ABI appreciates that the proposals are intended to bring clarity, but we have concerns as to how some of the clauses could be applied in practice, particularly in terms of how different regulatory bodies will interpret them and how they will interact with other sector specific legislation.

Requirement for contract terms and notices to be fair—Clause 62

8. The ABI supports the approach that has been taken in Clause 62 where terms used in contracts will only be binding upon the consumer if they are fair, determined by taking into account the nature of the subject matter of the contract and by reference to all the circumstances existing when the term was agreed.

Exclusion from the assessment of fairness—Clause 64

9. Clause 64 sets out an exemption from the fairness requirement if the contract terms are transparent and prominent. The contract terms that can be assessed under this clause must relate to the *price or main subject matter* of the contract and we support this approach. However, we are concerned that other stakeholders are proposing to narrow this price exemption to exclude only the *main price* that a reasonable consumer would take into account during the purchasing process. We believe that such an approach would be unhelpful because in practice there is a rarely a clear and simple dividing line between what is a main or core price and what is an ancillary price. This view was also supported by the Law Commission in 2013 whose views are represented in this clause.

10. The draft Bill has also extended the concepts of transparency and prominence causing us concern. The financial services industry is often criticised for confusing and overwhelming consumers with high volumes of information and insurers are already subject to increasing regulatory requirements to simplify pre-contractual disclosure and only provide key information to help avoid information overload and consumer disengagement. By adding an obligation to make terms *prominent* in the Bill, it increases the need for additional consumer information, creating contradictory requirements from different regulators and with no certainty for firms as to how to balance these requirements.

11. Furthermore, due to overwhelming consumer preference, the majority of insurance contracts are now sold via distance sales with the key contract terms set out in the policy summary document (as required by UK regulation) that the consumer is encouraged to read. While we believe this provision of this summary would meet the transparency requirement we are concerned that it might not satisfy a narrow interpretation of the requirement of 'prominence.' Some consumers already begrudge the time spent purchasing insurance, and the length of the documentation they receive, and if this process is elongated due to the need to point out additional terms, many may not take out policies.

Collective Actions for Competition breaches

12. The ABI understands the rationale for including provisions in the draft Bill to allow collective actions for competition breaches. However, the ABI along with number of other industries do not believe the Government has made the case that the use of opt-out collective actions will empower consumers and make it easier for them to take action. There is a lack of sufficient safeguards in the Bill to prevent abuse of the opt-out system, as experienced in other jurisdictions. We would urge the Committee to scrutinise the arguments made by BIS in relation to this matter whilst considering concerns raised by other industry bodies.

February 2014

Written evidence submitted from Which? (CR 05)

FROM: MARK MCLAREN, PARLIAMENTARY AND LEGAL AFFAIRS MANAGER ON BEHALF OF WHICH? POLICY, LEGAL AND CONSUMER ACTION DEPARTMENTS

1. Introduction to Which?

1.1 Which? is an independent, not-for-profit consumer organisation with around one million members and is the largest consumer organisation in Europe. Which? is independent of Government and industry, and is funded through our own activities, such as the sale of Which? consumer magazines, online services and books. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer. In early 2013 Which? re-launched and upgraded its Consumer Rights website: http://www.which.co.uk/consumer-rights. This provides online information and advice on common consumer problems that is free to *all* consumers and is not restricted to Which? subscribers.

2. Summary of Which?'s view of the Consumer Rights Bill

2.1 Which? has consistently welcomed the aims of the Consumer Rights Bill, the main part of the Government's reform agenda to update UK consumer law. We hope it will gain Royal Assent this year and be implemented in 2015. The Bill brings UK consumer law into the 21st century, extending rights into digital content for the first time and making it easier for people to understand their rights and challenge bad practice. The publication of the Bill is the end of a long gestation period that can be traced back many years.

2.2 In August 2013 we submitted detailed written evidence to the BIS Select Committee pre-legislative scrutiny inquiry of the draft Consumer Rights Bill and gave oral evidence in October 2013. Many of our suggestions were adopted as formal recommendations by the BIS Select Committee in their report published 23 December 2013; in this written evidence we focus on the specific points where the Government has *not* adopted the BIS Select Committee recommendations that we wanted to see.

2.3 The extent to which the Bill will achieve its aims, however, depends on how consumer rights are enforced through public and private enforcement; and on the private redress available to consumers through mechanisms such as Alternative Dispute Resolution (ADR). Which? believes that the Bill provided an opportunity to extend enforcement powers and streamline the ADR landscape at the same time as reforming consumer rights in the UK, and we would have liked to see the Bill cover these issues to a greater extent.

2.4 As the Public Bill Committee will know, a related and important aspect of the Government's changes to UK consumer law comes from the implementation of the EU Consumer Rights Directive. This must be in force by June 2014; the relevant secondary legislation was published on 13 December 2013. We have also welcomed this legislation; for example, it includes important consumer measures to require businesses to use "basic" rate phone lines for their customers (a provision that will be extended to passenger transport services), improvements to the law applicable to off-premises and distance contracts and requiring card payment surcharges to be cost reflective. As these measures are not included in the Consumer Rights Bill, this written evidence does not include our views on them but, if the Public Bill Committee would like further information about the Consumer Rights Directive, we would be happy to provide it.

3. Summary of Which?'s key concerns in the Consumer Rights Bill

In this section, we summarise our key concerns in the Consumer Rights Bill.

3.1 Part 1: Goods, Digital Content and Services (Clauses 1–60 and Schedule 1): Which? broadly welcomes the proposals set out in Part 1, in particular the ability for consumers to seek a refund or price reduction after one failed repair (Clause 24). We have some specific concerns including (i) the time limit for rejection (Clause 22) and repairs for goods (Clause 24), (ii) when a deduction for use may be applied to refunds owed to consumers (Clause 24), (iii) the lack of a right to a refund when digital content does not match the description (Clause 42), (iv) the obligation on consumers to always seek repeat performance of an unsatisfactory service (Clause 56). We would also like to see greater consumer education about consumer rights included in the Bill, for example via "point of sale" information, though acknowledge that the Government has asked the Implementation Taskforce, of which we are a member, to consider how to ensure that consumers and businesses are aware of their rights and responsibilities.

3.2 Part 2: Unfair Contract Terms (Clauses 61–76 and Schedule 2): Which? broadly welcomes the consolidation of, and clarifications to, the existing rules on unfair terms introduced by the Bill. However, there are several areas where we believe the proposals could and should go further by (i) limiting the range of price terms that are protected from an assessment for fairness (Clause 64); and (ii) strengthening the rules to help prevent consumers being forced to accept a variation to a contract in circumstances where they have a legitimate expectation that the bargain would not change (Clause 62 and schedule 2). The BIS Select Committee supported our recommendations but they were not adopted by the Government.

3.3 Part 3: enhanced consumer measures and other enforcement (Clause 79 and Schedule 7). Which? welcomes the Government's proposals to extend the range of remedies available to public enforcers of consumer

law. We believe that the proposed remedies should be extended to private enforcers as well and so welcome that the Bill now includes enabling provisions in Schedule 7 to this effect as recommended by the BIS Select Committee's report.

3.4 Part 3: Private Actions in Competition Law (Clause 80 and Schedule 8). Which? supports the introduction of opt-out collective proceedings for competition law infringements and were pleased the BIS Select Committee rejected the arguments made by some business stakeholders that this measure risked the creation of a US style litigation culture. To ensure the regime works in practice, amendments are needed in relation to (i) settlement offers and (ii) the requirements for certifying claims. The BIS Select Committee supported our recommendations but they were not adopted by the Government.

3.5 It is a regret that some measures, especially on ADR, are not included in the Bill. This is partly because the Government is about to consult on implementing the EU ADR Directive which must be transposed into UK law by July 2015.

In the following sections, we set out our detailed comments on each Part of the Bill. We do not have comments to make on all the Bill's Clauses and Schedules but, where we do have comments on specific Parts, Chapters, Clauses or Schedules, this is set out below in the same order as the Bill.

4. Part 1: Consumer Contract for Goods, Digital Content and Services

4.1 *Chapter 1: Introduction*

4.1.1 Which? welcomes Part 1 of the Bill. We note below our specific comments on each section: goods, digital content and services.

4.1.2 An overall point is that we regret that the Bill does not meaningfully address consumer education. While we acknowledge that the Government has asked the Implementation Taskforce, of which we are a member, to consider how to ensure that consumers and businesses are aware of their rights and responsibilities, the Public Bill Committee should probe this issue.

4.1.3 The empowerment of consumers will often be improved by ensuring they have the right information at the right time and in the right format. To aid consumer understanding of their rights and to be able to more easily exercise them, we suggest that the Committee considers if the Bill should require traders to provide simple and consistent basic consumer rights "point of sale" information in shops, off premises and online, eg the 30 day time limit for early rejection. Such summary would need to be short and user friendly, probably in diagrammatical form (eg as a flow chart).

4.1.4 Consumers are often ignorant of their rights and therefore do not exercise them. Which? wants the provisions of the Bill to be used and to be effective which means consumers being aware of their legal rights; this is one of the reasons why Which? in early 2013 re-launched and upgraded its "Consumer Rights Website'. This provides online information and advice on common consumer problems that is free to all consumers and is not restricted to Which? subscribers.

4.2 Chapter 2: Goods (Clauses 3–32)

For the most part, Which? considers the legislative framework and associated remedies for the sale of goods to be both well established and effective. In light of this, we do not recommend any significant changes to the existing body of law. As such, our comments are fairly specific and relate to a small number of areas where small modifications could make the law work more effectively. These issues are discussed below.

4.3 Clause 20: Right to Reject (bearing the cost of returning faulty goods)

The Bill makes it clear that the consumer should not bear any cost when seeking to have a faulty good repaired or replaced. However, it is not clear that the same principle applies when a consumer exercises the right to reject. Although we believe it is the Government's intention that the trader should bear the cost of a consumer returning faulty goods, we believe clarity on this point would be beneficial.

4.4 Clause 22: Time limit for short term right to reject

We would like to see some additional flexibility added into the provisions around the early right to reject. In particular, we would like it to be made clear in the legislation that the 30 day period can be extended if necessary, to allow for extenuating circumstances. It should not be necessary for this to be specified in advance but rather a judgment about whether an extension should be given should depend upon an objective review of the specific circumstances surrounding the case. There may even be merit is setting out in guidance some of the more obvious circumstances (such as Christmas shopping) where an extension could be presumed. We note the BIS Select Committee supported such a change in its recommendations but this was not adopted by the Government in the Bill.

4.5 Clause 23: Right to repair or replacement

4.5.1 At present, the Bill suggests that "*if the consumer requires the trader to repair or replace the goods, the trader must… do so within a reasonable time*". We understand that there may well be complications that

make it difficult to exactly predict how long a repair will take. However, we consider the current wording to be ambiguous and therefore likely to lead to uncertainty and possible inconvenience for consumers. As such, we think there is a strong case for greater clarity.

4.5.2 Our preference is for a "long-stop date" to be established and we have previously suggested that the following would be a reasonable approach: "*…the trader must conduct the repairs as soon as is reasonably practical and within **14 days** unless the consumer expressly agrees otherwise*". We think this represents a fair balance on the following grounds:

— For many repairs, 14 days should be adequate, even if spare parts need to be sourced from overseas.

— It provides for flexibility—the consumer can agree to a longer period where they wish to maintain their original.

But it means the consumer is not forced to accept a long repair period, and so risk being significantly inconvenienced.

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

4.6.1 The issue of making any deductions from the refund received by consumers when exercising the final right to reject is often contentious. Even where consumers are willing to accept some deduction, there is often a distinct difference of opinion as to what an appropriate amount would be. We welcome the Bill's attempts to introduce some much needed clarity to this area. However, we do not believe the current drafting is workable or achieves the Government's stated aims.

4.6.2 We have previously stated that we support the Law Commission's findings that there should be no deduction for use or, in the alternative, there should be no deduction for use within six months of purchase with any deduction thereafter being based solely on the value of any use obtained by the consumer.

4.6.3 In a recent Which? survey (September 2013) over a third of respondents stated a consumer should always get all their money refunded if they were exercising the final right to reject. A further 51% of respondents said this should definitely be the case within six months of the date of purchase.

4.6.4 Consequently, we are concerned with the proposed approach as currently set out in Clause 24 (sub-clauses 10 and 11). Whether there is an active second hand market for the goods in question is wholly irrelevant to the question of whether the consumer has derived any value from using the faulty goods. As a result this should not form the basis of any exception to the general rule. In addition, the current approach risks encouraging the development of secondary markets to help bring more goods within the scope of the exemption. This may be relatively straightforward if retailers routinely sell returned items. Consequently, rather than protecting the motor industry (as the Government seems to be intending) the current approach risks undermining consumer rights in relation to many typical purchases.

4.6.5 The BIS Select Committee identified concerns with the provisions on the deduction for use, and despite changes introduced by the Government, we do not believe those concerns have been adequately addressed in the Bill. We therefore suggest a pragmatic solution: to remove any exemption from the 6 month rule.

4.7 Goods under guarantee

There seems to be significant confusion amongst both consumers and retailers regarding the interplay between the consumer's rights under the Sale of Goods Act 1979 and any guarantee that comes with the product. The Bill provides the perfect opportunity to introduce much needed clarity and help correct common misconceptions such as that your statutory rights end when the manufacturer's guarantee ends and that a consumer should always seek a remedy from the manufacturer in the first instance.

5. Chapter 3: Digital Content (Clauses 33–47)

5.1 Which? supports the Government's aim to clarify the consumer law relating to the purchase of digital content. As the existing consumer protection framework pre-dates the digital content era, there is a clear need to clarify the rights that apply to the delivery of digital content and to ensure the regime is "fit for purpose" and future-proof. We welcome the Government's proposals to align the digital content regime with that of goods and in doing so provide a clear quality standard that digital content must meet and a clear set of remedies available for when it does not. However, there are a number of specific issues that we are still concerned about.

5.2 Clause 42 (sub-clause 5): Consumer's rights to enforce terms about digital content

Which? would like to see the Bill introduce a general right to reject for digital content. While the Government is not willing to introduce such a right, it does recognise that a right to a refund is appropriate where the trader does not have the right to supply the digital content (as set out in sub-clause 5). Which? believes it would also, at a minimum, be appropriate where the digital content supplied does not match the pre-contract description. In such circumstances, the ability to have a repair, replacement or price reduction may well not be an adequate remedy.

5.3 Clause 45: Right to a refund

Where a trader does not have the right to supply some or all of the digital content, the consumer is entitled to a refund. This should generally be a full refund, as provided for under clause 45(1). While we recognise the intention behind the exception in clause 45(2), we think it needs to be qualified. The consumer should not be obliged to pay for just part of the digital content if, even though it was unaffected by the breach, the consumer would not (or could not) have bought just that part of the digital content on its own, for example, 3 songs on a 12 track music album or one aspect of a suite of computer software. In particular, if the consumer wishes to reacquire the "affected digital content" from another source and/or an equivalent but cannot do so without also purchasing the "affected content" the consumer will end up being charged twice for the same content.

6. Chapter 4: Services (Clauses 48–57)

6.1 Overall, we welcome the proposed changes to the regime on services. As has previously been shown, both by the OFT's 2008 study and by our own research, there is considerable consumer detriment in the provision of services in the UK. Which? regularly receives feedback from consumers regarding the goods and services they purchase and the majority of consumer complaints relate to the UK services sector.

6.2 Complaints levels about services are quite high[20] two in five British consumers have made a complaint about a service in the last 12 months. This survey explores the extent of complaints in different sectors. It finds that broadband, mobile phones and energy are the most complained about sectors.

6.3 A number of service providers do not take responsibility for problems. Of these complaints, another two in five are not resolved by the provider—this tends to be because the provider does not take responsibility for the issue, or blames another company.

6.4 40% of complaints aren't resolved by the provider, although this varies by sector. And top reasons include a shifting of the blame. Problems not being resolved by the provider seem most prevalent in:

- Trades services—58%
- Airlines/holiday operators—56%
- Car/vehicle repairs—53%

6.5 The main reasons given for this are:

- That the problem was caused by circumstances out of their control—26%
- That another company was responsible—15%
- That it was not possible to fix the problem—15%
- That they have done what they had promised to do—13%
- That the terms and conditions of your contract said they weren't liable—11%
- That the problem was caused by consumer—10%
- The provider ignored the issue/gave no response—9%
- That they have complied with the industry standard—9%

6.6 In addition, previous Which? research has shown that consumers do not generally feel well protected when they purchase services and they are not confident they will be treated fairly. The same research also identified that 31% of consumers who failed to complain when they were unsatisfied with a service did so because they did not believe anything would be done. In light of this, we broadly welcome the direction of travel in the Bill. Addressing these issues through the Consumer Rights Bill will deliver considerable benefit for consumers and businesses alike. Clarity over supplier obligations will help drive up standards, benefitting the good businesses, while strengthened consumer remedies will improve consumer confidence and help stamp out bad practice. In addition, simple clear rules will reduce confusion and lead to fewer disputes saving both time and money.

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

6.7.1 Whilst we are broadly supportive of the changes in the Bill, we do have a concern about the nature of the test that is being proposed. Specifically, we are not convinced that having a test based on reasonable care and skill is going to be the optimal way of ensuring high standards. The BIS Select Committee agreed with us and recommended that the Bill should apply an "*outcomes-based liability standard"* to services. The current wording may be defective for the following reasons:

- Proving that there has been a lack of reasonable skill and care is likely to be difficult for a consumer.
- This is likely to be a particular problem where there is a lack of clarity over the precise nature of the service to be provided and/or there has been use of contractual small print to limit the obligations of the trader.

[20] Populus study on behalf of Which?, interviewed a random sample of 2,021 GB adults aged 18+ online between 24th and 27th May 2013. Surveys were conducted across the country and the results have been weighted to the profile of all GB adults. Populus is a founder member of the British Polling Council and abides by its rules.

— Even where reasonable skill and care has been exercised, consumers can derive no meaningful benefit from the contract, but are nevertheless left without a remedy.

6.7.2 Our strong preference would be to see a "goods style" quality standard applied to the full range of service contracts such that all services should be of satisfactory quality. We believe this would help to address some of unjust outcomes currently experienced under the current regime. It would also create a simple message for both business and consumers—that all purchases must be of satisfactory quality—and this clarity is a core aim of the legislation. We do not share the Government's concerns that it would lead to significantly worse outcomes for business. While there will inevitably be some circumstances in which a business would be liable under this new regime (but wouldn't be so under the current regime), we do not believe this represents an unfair burden. The main advantages would be as follows:

— Whether something is of satisfactory quality is an objective test based on what was agreed, the price paid and what a reasonable person would expect in the circumstances.

— The trader is often in a better position to mitigate the risk of not delivering a particular outcome eg through his contractual relationships with third parties involved in the supply, through his own performance (eg checking materials before installation) or through the purchase of insurance.

— This test would largely reflect current best practice and as a result, should not significantly burden business with additional costs.

— Currently, whether a service has been performed with reasonable skill and care is largely assessed by reference to whether the outcome of the service was satisfactory. Where it is not, there is a presumption the service was not performed with reasonable skill and care.

— In most cases, therefore, the change in regime would only likely shift the burden of proof, rather than change the substantial liability.

6.7.3 We have identified the following scenarios where a change to a "satisfactory service obligation" is most likely to be of benefit to consumers (ignoring for now the general benefits previously discussed, such as empowerment from it being more intuitive and objective standard):

— Where the trader claims the consumer's dissatisfaction results from circumstances beyond their control.

— Where a third party is at fault (eg one of their suppliers was slow making the delivery).

— Where the trader has met industry standards, but this has not resulted in the envisaged service.

— Where the scope of the service has not been properly defined. For example, where the trader has agreed to "tile a wall" and the consumer assumes this includes an assessment of whether the wall is suitable to be tiled. (If it has been recently plastered, it may need longer to dry out, for example).

6.7.4 Further advantage of the proposed changes to the service regime is that by better aligning the goods and services regimes we will be better able to deal with the problems that can arise over "mixed contracts", where it can be uncertain which regime applies. In these circumstances, it can be difficult for a consumer to know whether a good or service is at fault and it can be even more difficult for them to prove one way or another. This is particularly complicated where the goods and services are provided by different companies. In these circumstances, it seems difficult to find a solution to the risk that consumers cannot tell whether the good or the service is at fault and therefore don't know who to go to to seek redress and don't know which remedies apply. We would welcome efforts to continue looking for a solution to this problem and to that end, we believe that fully aligning the regimes for goods and services would at least help limit the detriment in this area.

6.8 Clause 50: Information about a trader or service to be binding

The introduction of this clause is extremely welcome as we believe it will empower consumers to challenge traders where they or their service do not live up to the expectations. Sub-clause 2(a) states that consumers cannot be expected to rely on promises that are qualified during the transaction. While we appreciate the purpose behind this exception, we remain concerned that qualifications may be made in contractual small print and missed by consumers. We do not think the aim of sub-clause 2(a) is to enable traders to "qualify" marketing messages in this way, and given the current wording does not specifically exclude that scenario, we think clarifying this to exclude this possibility would be a valuable amendment.

6.9 Clause 55: Right to repeat performance and Clause 56: Right to price reduction

6.9.1 We strongly welcome the proposed introduction of a clear remedies regime. At present, the lack of clarity around issues such as requiring traders to put right poor or faulty service leads to uncertainty. The proposal to have a two part remedy regime that includes both the right to repeat performance and the right to a price reduction (in certain circumstances) seems appropriate to deal with most scenarios.

6.9.2 We are also pleased to see the Government has adopted several of the changes we recommended to the BIS Select Committee, including a clarification that any price reduction could be as much as a full refund in some circumstances and that where there is a price reduction, this should be calculated based on the value received by the consumer under the contract.

6.9.3 We would like to see one further improvement. As currently drafted, a consumer is not entitled to any type of refund if the service has not been performed with reasonable skill and care unless he has first given the

trader the chance to repeat performance. In some circumstances, a consumer may justifiably not want to invite the trader back to put things right. For example, where service provision has been dangerous; where the fault is so significant that the consumer has justifiably lost confidence in the trader to be able to put things right; or where the consumer does not feel safe inviting a trader back into their home. We would like to see the BiIl amended to allow consumers to move straight to a tier 2 remedy (price reduction) in such circumstances.

7. Part 2: Unfair Terms (Clauses 61–76 and Schedule 2 and 3)

7.1 Which? broadly welcomes the consolidation of, and clarifications to, the existing rules on unfair terms introduced by the Bill. However, there are several areas where we believe the proposals could and should go further—we focus on the key areas below. The BIS Select Committee accepted our recommendations but the Government did not include them in the published Bill.

7.2 *To ensure regulators have the ability to challenge hidden charges by limiting the range of price terms that are protected from an assessment for fairness (amending Clause 64)*

7.2.1 A key and disappointing consequence of the Supreme Court's 2009 decision[21] in relation to unauthorised overdraft charges is that it is much harder for enforcement bodies and consumers to challenge prices that are disclosed in contractual small print.

7.2.2 The purpose of the rules on unfair terms is to protect consumers from surprises "hidden" in contractual small print by allowing "suspect" contractual terms to be assessed for fairness. The rules explicitly exclude some contractual clauses—including some setting out the price—from any fairness assessment. The effect of the Supreme Court's decision was to significantly broaden the number of price terms that are protected from a fairness assessment.

7.2.3 Which? is concerned that regulators no longer have sufficient power to tackle charges hidden in contractual small print. Although the Government shares this concern, and has sought to narrow the scope of the price exemption, we do not think they have gone far enough. The Bill excludes prices if they are transparent and prominently disclosed to consumers. However, just because a price is prominent does not mean a consumer will properly factor that price into their purchasing decision for example, because they lack the understanding of how the product or market operates necessary to predict the likelihood of a charge being imposed. Some typical examples of charges that can be "hidden in plain sight" are set out in Annex A, along with further evidence in support of this position.

7.2.4 The Bill assumes that competition and market forces will keep prominent prices in check such that specific regulation is not required. However, this faith is misguided in relation to charges that consumers either do not or cannot properly take into account.

7.2.5 Which? believes the price exemption must be narrowed further to take into account the practical reality of a consumer purchase and that only those prices a consumer can be expected to take into account during the purchasing process should be excluded from a faireness assessment. This does not mean such charges are unfair—merely that they can be assessed for fairness. We note the BIS Select Committee supported the above approach.

7.3 *Strengthening the rules to help prevent consumers being forced to accept a variation to a contract in circumstances where they have a legitimate expectation that the bargain would not change (amending Clause 62(5) and Schedule 2).*

7.3.1 Where a consumer has committed to a minimum contract period (eg a mobile phone contract or a TV subscription package) there should be an equal commitment by the trader during the minimum term. Accordingly, it is extremely unlikely that a term enabling a trader to vary a contract during a minimum term will be fair. Similarly, in contracts of a fixed duration (eg a mortgage or long term protection products), consumers have a legitimate expectation that the bargain will not change. In the event a change is necessary, that change must only be for a valid reason and the consumer should not be placed in a position where he is forced to accept the change. Unfortunately, these principles are not adequately reflected in the Bill.

7.3.2 The simple ability to terminate a contract in a response to a change does not guarantee consumers are adequately protected, as was recognised by the European Court of Justice in its decision in RWE Vetreib[22]. To ensure the consumer is treated fairly, the right to terminate must offer the consumer a genuine ability to avoid the impact of the change. Otherwise, the practical reality is that a contract variation can be "forced" on a consumer where despite the right to terminate (i) a consumer is unable to switch to an equivalent product so is faced with accepting the change or going without; or (ii) switching to an alternative product leaves the consumer equally disadvantaged. This is exactly the kind of "surprise" that the unfair terms rules are designed to prevent.

7.3.3 But this was the situation faced by up to 13,500 Bank of Ireland customers last year when the Bank announced it was increasing the interest rate payable on some of its tracker mortgages by up to 3.99%, a change adding £100s to monthly repayments in some cases. Although the affected customers could in theory avoid

[21] *Abbey National and others v The Office of Fair Trading* [2009] UKSC 6, [2010] 1 AC 696.
[22] Case C-92/11 RWE Vetrieb v Verbrauchherzentrale Nordrhein-Westfalen

the price rise by terminating their contract, for most this was not the practical reality. For some, a change in circumstances (eg retirement, unemployment) meant alternative products were not available. For others, who could switch, there were significant costs associated with doing so (eg mortgage application fee, valuation fees etc) and the interest rate was unlikely to match their old rate at the Bank of Ireland. In other words, those customers faced Hobson's choice: stay and face a significant and unexpected price rise, or switch and pay significant and unexpected additional costs. Such scenario is not limited to mortgages, and similar situations have arisen, for example, in relation to long term insurance products and in the telecoms sector.

7.3.4 Accordingly, to help give effect to the ECJ findings in RWE Vertreib, we also suggest the wording of Clause 62(5) is amended to expressly set out that the impact on the consumer upon exercising a right to terminate a contract early is relevant to a fairness assessment. However, to properly give effect to the ECJ's case law, we think Schedule 2 also needs amending.

7.3.5 Schedule 2 of the Bill sets out a number of terms that are presumed to be unfair. While it includes some terms covering contract variations, it does not include variations in all the circumstances outlined above. The fact some, but not all, terms are covered presents difficulties when challenging unfair terms because some believe it to be the case that where a term is similar to, but not identical to a term on the indicative list, this indicates the term is fair (because otherwise it would have been included on the list).

7.3.6 This issue arises in particular in relation to the exceptions in paragraphs 21–25 of Schedule 2, where many traders take the view that if a term falls within an exception, it is presumably a fair term. Indeed, the fact that the mortgage term relied on by the Bank of Ireland fell within paragraph 22 seems to have been a significant factor in the clause avoiding regulatory action in the above example. We do not believe this was the approach envisaged when the current rules on unfair terms were enacted.

7.3.7 With this in mind, we believe the best way to give effect to the ECJ's case law and introduce the clarity needed to deliver fairer consumer outcomes in the circumstances outlined above would be to introduce a new indicative unfair term into Schedule 2. We note the BIS Select Committee supported the above approach.

8. Part 3: Miscellaneous and General

8.1 *Clause 79 and Schedule 7: Enterprise Act 2002: Enhanced consumer measures and other enforcement*

8.1.1 We welcome the Government's proposals to extend the range of remedies available to public enforcers of consumer law. When giving evidence to the BIS Select Committee, we argued that these powers should be extended to private enforcers (such as Which?) as well, which the Select Committee then recommended. We welcome that the Bill now includes enabling provisions to this effect in Paragraph 8 of Schedule 7.

8.1.2 We are concerned that the threat of court action is not always sufficient to encourage traders to engage meaningfully in negotiations with enforcers over remedies. Given the time, costs and resources involved with going to court, we consider the deterrent effect provided by the threat of court action is likely to have an equal, if not larger, impact on the enforcer. This risk is likely to be especially acute as enforcement budgets are streamlined. Accordingly, we feel that the enforcement mechanisms must be extended. This could include either the ability for enforcers to impose monetary penalties or a simplified and streamlined court process.

8.2 *Clause 80 and Schedule 8: Private actions in competition law*

8.2.1 We welcome the provisions around private actions in competition law. We are encouraged by the Government's focus on collective settlement as a viable alternative to formal proceedings, which will save considerable resources for the parties, the CAT and the public. We also strongly support the introduction of opt-out collective proceedings for competition law infringements. We were especially heartened that the BIS Select Committee rejected the arguments made by some business stakeholders that this measure risked the creation of a US style litigation culture. This measure will simply ensure that firms that have engaged in unlawful conduct by breaching competition rules are made to compensate consumers who have lost out as a consequence.

8.2.2 The key now is to ensure that the collective redress regime delivers the outcomes that it was designed to achieve. Other collective redress mechanisms in the UK have fallen into disrepute and disuse. We are keen to ensure that this is not the fate of the new regime. It must be emphasised that the practicalities of collective proceedings are not merely an aside; if bringing or settling collective proceedings becomes unviable (either legally or financially) then the commendable aims of the regime will fall away and access to justice will be hindered.

8.2.3 To this end, we propose two amendments to the Bill, aimed at ensuring that the regime works as intended in practice. Both amendments were endorsed by the BIS Select Committee.

8.2.4 First, it must be ensured that collective settlement is viable in practice.

— The Bill provides that a collective settlement must be "just and reasonable" in order to be approved by the CAT. But how will representatives know whether a settlement offer is just and reasonable? They will not be privy to the data needed to assess the true loss to victims of an infringement. This information lies exclusively in the hands of the defendants.

— So when a defendant makes a settlement offer, a representative must either accept the offer on behalf of the represented class without knowing whether it is reasonable, or reject the offer and risk paying the defendant's costs if it turns out the offer was in fact reasonable. The structure of the system thus motivates defendants to make unreasonably low offers and motivates representatives to under-deliver for represented victims.

— This can be resolved by a simple amendment to new section 49A Competition Act 1998 (inserted by paragraph 10(1) of Schedule 8), adding words to the effect of the underlined:

"(3) The representative and the defendant must provide agreed details of the claims to be settled by the proposed collective settlement and the proposed terms of that settlement, however it shall be the responsibility of the party that has made the offer to settle to demonstrate that the terms of the settlement are just and reasonable as required by subsection (5)." …

(5) The Tribunal may make an order approving a proposed collective settlement only if satisfied that its terms are just and reasonable. If the Tribunal is not satisfied that the settlement terms are just and reasonable, no costs consequences shall attach to the offer to settle."

— The same amendments would be required to subsections 49B(3) and 49B(8) Competition Act 1998 (inserted by paragraph 11(1) of Schedule 8).

8.2.4 Second, where early settlement is not possible, the process of certifying collective proceedings must be streamlined and efficient.

— The requirement to show that claims brought together as collective proceedings raise "the same, similar or related issues of fact or law" imports considerable uncertainty into the certification process, as shown by previous experience in the UK and abroad.

— This uncertainty will generate protracted disputes around the meaning of the certification requirements, causing cost and delay and undermining the efficacy of the regime.

— This can be overcome by adding a provision to new section 47B Competition Act 1998 (inserted by paragraph 5 of Schedule 8), such as:

"All end consumers of a product, where the price of that product has been affected by an infringement of competition law, are affected by the infringement in the same way, such that their claims raise the same, similar or related issues of fact and law."

— Representatives would still be required to show that consumer claims were "suitable" for inclusion in collective proceedings, as required by the Bill.

8.2.5 The BIS Select Committee considered *"…acceptance of this recommendation to be crucial to ensuring the effectiveness of, and preventing abuse of, the new collective actions regime"*. We agree.

8.2.6 Further details as to why these amendments are vital to the success of the regime can be found in Annexes B and C respectively.

8.2.7 We also note that the new CAT Rules will have a considerable impact on the practicalities of the regime. The BIS Select Committee recommended *"…that the CAT should publish draft revised Tribunal Rules before the Bill is introduced to Parliament"*. The Bill has now been introduced but no draft Tribunal Rules have yet been published. We would echo the BIS Select Committee's concerns and call for the Rules to be published as a matter of priority.

February 2014

ANNEX TO WRITTEN EVIDENCE ON THE CONSUMER RIGHTS BILL

Annexes

Annex A: Clause 64: Further evidence on the proposed changes to unfair terms

Annex B: Clause 80: Further evidence on issues around settlement and costs

Annex C: Clause 80: Further evidence on issues around certification

Annex A

PART 2: UNFAIR TERMS

Further evidence in relation to the proposed changes to Clause 64

1. Examples of prices disclosed but not properly taken into account by consumers in their purchasing decisions

We set out below some examples of charges which are unlikely to be taken into account by consumers when making their purchase, even though they may be transparent and prominently disclosed during the transaction process:

A consumer taking out a current account with a bank is unlikely to take into account the cost of an unauthorised overdraft if they either expect to stay in credit or they have agreed an authorised overdraft that they expect to stay within.

When renting a property, a consumer is focused on the monthly rent, deposit and other upfront charges imposed by the landlord or the lettings agent. Charges that occur later in the relationship, such as renewal fees, check out/inventory fees will not be properly considered, as they will not necessarily arise.

A consumer is unlikely to properly consider the out of tariff call charges where they expect to keep within the limits set down by the monthly package they are purchasing. Similarly, the costs of using a phone in Portugal, for example, will not be considered by the consumer unless they know they will be going to Portugal (and even then, only if they expect to spend a significant amount of time in Portugal).

A consumer purchasing car insurance will focus on the annual premium and will not, unless they are expecting to change cars or move house, consider the administrative charges applicable for making such changes to the policy.

Consumers will be unlikely to consider the cost of exceeding download limits when purchasing broadband or smartphones, especially where the limits are perceived to be high. This results, at least in part, due to difficulties for the consumer in assessing their required data needs.

Unless they expect to be using their credit card for cash advances, the costs associated with cash advances is unlikely to form part of the consumer's decision regarding the appropriate credit card to obtain.

When purchasing a flight, the cost of an airport check-in is unlikely to form part of your purchasing decision if you expect to check in online.

2. Why transparency and prominence are not enough

Just because a consumer is informed about certain charges that could arise, it does not mean they will properly factor those charges into their purchasing decision. In other words, you cannot expect to force an ancillary part of a deal to become part of the "core bargain" just by making it more prominent.

Today more than ever, it is less realistic to expect consumers to properly understand and apply all the information provided when they are making a purchase. There are a number of reasons for this, for example:

- Consumer products and markets are becoming increasingly complex. As a result there is 'more to tell" and a greater risk of a consumer reaching saturation point before they've taken on board all the important information.
- The increased complexity means there is an increasing risk that consumers simply do not understand the significance of the information being provided to them.
- Information asymmetries can create incentives for traders to "frame" the information in certain ways to take advantage of a consumer's lack of understanding.
- Many consumer purchases are ancillary or incidental to a more important goal. As a result, a consumer will tend to focus on the predominant element. For example, when buying a house, their focus is the house and taking out a mortgage is simply a means to achieve this aim.

In addition, the OFT's report on Consumer Contracts[23] provides compelling evidence to suggest that consumers are not adequately protected by disclosure alone. This reflects our experience. Consumer purchasing decisions are subject to a large number of influences and biases which limits the ability of consumers to act "rationally'. For example:

- the likelihood of a consumer walking away from a transaction decreases as a consumer moves closer to signing the contract meaning they are more willing to accept information—and so pay less attention to information—provided at a late stage of the transaction process.
- consumers tend to use "rules of thumb" to deal with situations where there is too much information to evaluate or where there is choice overload. A key consequence is that consumers tend to focus on only a limited number of variables. Recent evidence obtained by Which? suggests this is a particular risk with lower value purchases as consumers are more likely to read the contractual small print as the value of the contract increases.
- consumers tend to "overvalue" a benefit that is received now and "underestimate" the impact of any deferred costs eg the opportunity to acquire a great value broadband package now would normally be expected to outweigh the risk of significant costs were that consumer to move home within the minimum term.

[23] OFT 1312, February 2011

Value of purchase	*% of consumers who always read all the terms and conditions*
<£50	10%
£50-£500	20%
>£500	35%

— Consumers tend to underestimate their usage of goods that bring "pleasure" now but pain later eg a consumer is likely to overestimate their chances of staying within the inclusive call allowances of a well-priced monthly mobile phone package with high "out of package" call charges.

It is because traders can draft their contracts with this foresight (and consumers may often only realise the significance of a clause with hindsight) that these behavioural biases must be taken into account when deciding which terms are within the scope of the unfair terms legislation. Otherwise, some terms will remain "unchecked" by competition yet the regulator may remain powerless to intervene and address any consumer detriment that such terms may cause.

Annex B

PART 3: MISCELLANEOUS AND GENERAL (CLAUSE 80: PRIVATE ACTIONS IN COMPETITION LAW)

Further evidence in relation to issues around settlement and costs

1. OVERVIEW

In the context of a commercial dispute, it will almost always be in the interests of the parties to reach an agreed settlement at an early stage. This is particularly true in today's litigation landscape, where the cost of taking formal proceedings to trial can extend to many millions of pounds in complex cases. As we know from the private actions that are currently before the courts, follow-on damages claims for competition law infringements can be very complex. Consequently, they are often expensive to pursue.

For this reason (among others) Which? agrees with BIS and other stakeholders that efficient settlement should be at the heart of the new collective redress regime. Settlement must be achievable quickly and cost-effectively, in a manner that is fair to both claimants and defendants. We therefore support the introduction of a collective settlement regime in sections 49A and 49B of the Competition Act 1998 and endorse the Government's approach of setting out the detail of that regime in the primary legislation. We believe this will generate clarity and certainty for litigants.

There is, however, one issue that is central to the effectiveness of any collective settlement regime which is not currently addressed in the Bill. That issue is the interaction between the collective settlement process and the costs rules that will be applied in the CAT. Costs rules are inextricably linked to settlement and a collective settlement regime will be effective in practice only if the costs consequences of the parties' actions make fair and expeditious settlement a feasible option.

The costs rules that are of particular importance for settlement purposes are (i) the cost shifting principle and (ii) Part 36 of the Civil Procedure Rules, which earlier consultation suggests the CAT proposes to adopt (in spirit if not the precise letter). We do not contend that these cost rules should be abandoned. Which? agrees that cost shifting and Part 36 costs consequences should apply in the context of collective proceedings; they rightly form part of the suite of safeguards that BIS has constructed against unmeritorious claims. Rather, our concern is that if these rules are applied wholesale to the collective settlement regime as currently proposed, the effect will be to skew the risk profile of collective proceedings and to discourage—rather than encourage—efficient and fair settlement of claims. In our view, the collective settlement process needs to be tailored to ensure that the application of these rules does not have unintended consequences that are detrimental to all parties as well as the CAT.

This note briefly explores the ways in which the costs rules drive the settlement process and thereby govern whether early settlement is likely to be achievable in practice. It then proposes an addition to the collective settlement regime to take the impact of the costs rules into account.

2. THE INTERACTION BETWEEN COSTS AND SETTLEMENT

The costs drivers behind settlement decisions

In considering how costs drive the parties' approach to settlement, it is helpful to consider both claimants and defendants as rational economic agents seeking to maximise their utility. For defendants, utility is likely to be measured in monetary terms. Defendants will seek to minimise (i) their own costs (ii) any costs awarded against them and (iii) any damages payable. Claimants will also seek to minimise costs but will seek to maximise damages.

Representative bodies who act on behalf of a class may consider additional factors in calculating utility; for example, the desire to reach a fair deal for represented consumers or SMEs might override cost concerns that would prevail in a purely commercial context. Defendants, on the other hand, are less likely to place much weight on reputational considerations in cases of this kind. Those defendants that are primarily concerned with

preserving their market reputation are more likely to have taken proactive measures, such as participating in a voluntary redress scheme.

In order to enjoy the benefits of cost shifting and minimise exposure to costs, a claimant must achieve an award of damages for a positive value; that is, a value greater than nil. While we cannot speak for other representatives who intend to use the new regime, Which? has no interest in bringing collective proceedings on behalf of consumers unless we can be confident that we will "win" in this basic sense.

Assuming, then, that a representative will usually achieve some degree of "win", the cost shifting principle means that a defendant will bear both its own costs and a proportion of the representative's costs. To minimise this risk, a rational defendant will be incentivised to make a settlement offer under Part 36 (or its equivalent under the new CAT Rules).

The effect of Part 36 is to require a claimant to pay a defendant's costs if the claimant rejects a settlement offer from the defendant that is equal to or greater than the amount of damages the claimant ultimately receives after trial. In the case of an offer made by a claimant, the defendant must pay the claimant's costs on an indemnity basis if the claimant is awarded damages greater than or equal to its own offer. Part 36 thus encourages parties to reject a settlement offer only where they are confident that the offer is well below (or, in the case of a claimant's offer, well above) the level of damages that will ultimately be achieved.

Outside the context of collective redress, a claimant will assess the likelihood of beating a defendant's offer and will make a commercial decision about whether to proceed to settlement on that basis. The cost shifting principle and Part 36 do their jobs well here; the parties are incentivised to behave reasonably and reach settlement at an early stage, reducing the burden on the parties and the courts. However, this process does not translate to collective proceedings, primarily due to the information asymmetry that exists between representatives and defendants.

Information asymmetry

Even where a representative can be confident of a "win', they are unlikely to have any way of accurately predicting the size of that win and the precise quantum of damages that will ultimately be obtained. While the economic experts acting for the representative might be able to show that there was *some* level of overcharge in the retail market (perhaps using publicly available information) representatives will not be privy to the sales records of individual defendants or other data needed to more precisely assess the impact of an infringement on retail prices and volumes. This information will lie exclusively in the hands of the defendant(s).

The traditional answer to this kind of information asymmetry is disclosure of documents. Full scale disclosure serves this purpose well (subject to interlocutory debates about the scope of disclosure) and allows a representative's economic experts to build a more accurate picture of the overcharge suffered by consumers. But disclosure generally comes late in the day. In the case of collective proceedings for competition law infringements, disclosure will take place after any jurisdiction challenges have been resolved and after the battle over certification has been fought. This will be many months (perhaps years) after the commencement of a claim.

One response might be to bring the disclosure process forward. However, as the private follow-on actions which are currently before the courts demonstrate, the process of disclosure will itself take many months with many thousands of documents being reviewed by both the defendants' solicitors and economists (for the purpose of effecting disclosure) and the representative's solicitors and economists (for the purpose of digesting the documents disclosed). Significant cost will inevitably follow. The difficulty, then, is that early and cost-efficient settlement is largely incompatible with the considerable cost and delay often associated with full disclosure in cases of this kind.

Part 36 and the rational litigant

In the absence of full disclosure, how will settlement discussions play out where information asymmetry persists? In the same way as in cases outside the collective redress context, a rational defendant will be incentivised to make a Part 36 settlement offer. But for what amount? The short answer is: for an unreasonably low amount.

The purpose and effect of a defendant's Part 36 offer would usually be twofold:

i. to allow the defendant to feel comfortable that it will not be penalised in costs if a claimant rejects a "reasonable" offer; and

ii. to put pressure on a claimant to accept a "reasonable" offer by imposing a financial risk if the offer is rejected.

But where information asymmetry exists, only the defendant can assess with any degree of accuracy whether its offer is "reasonable". A representative—acting not in its own commercial interests but in the interests of the represented class—has no way to correctly assess whether the offer represents a fair deal for the class.

In this scenario, a rational defendant will have every incentive to make an unreasonably low offer; that is, an offer well below the level of damages that the defendant believes the CAT will ultimately award. This might do little to achieve the first objective set out above (the defendant's offer will provide little protection against an

adverse costs award, as the representative is likely to beat the unreasonably low offer). However, an unreasonably low offer will still have the second effect outlined above—putting pressure on the representative to accept the offer—because the representative does not know whether the offer is reasonable or not. In this way, transposing Part 36 wholesale into the collective proceedings regime effectively stacks the system toward promotion of unreasonable offers. There is little for a defendant to lose by attempting to settle for an unreasonably low sum at an early stage.

The representative will then be faced with an objectionable choice. The representative must either accept a settlement offer on behalf of the represented class without knowing whether the offer is reasonable or not, or reject the offer and face the risk of paying the defendant's costs if it turns out the offer was in fact reasonable.

It might be argued that, if representatives can assume that a rational defendant will always make an unreasonably low offer, then representatives should know to reject all opening offers, rendering the information asymmetry unproblematic. But this seems to run counter to the ultimate objective of promoting early and cost-efficient settlement. So what is the solution?

3. Proposal

Aim of the proposal

The answer to this problem is that the collective settlement regime must give the party who suffers from the information asymmetry (in this case, the representative) a means to be confident that a settlement offer is reasonable. This needs to be done without jeopardising the objective of reaching timely and cost-efficient settlement agreements. This will only be achieved by ensuring that the regime gives defendants an incentive, at an early stage, to make a reasonable settlement offer instead of an unreasonable one. The settlement process must be structured to ensure that the economically rational approach to settlement delivers a just and reasonable outcome—the result clearly envisaged in the Bill—right from the very first offer.

Content of the proposal

The above aim can be achieved by two straightforward additions to the collective settlement regime set out in the Bill, as follows:

— First, **specify that the party who makes an offer must demonstrate to the CAT that its terms are just and reasonable**. The opposing party can make submissions on matters within its knowledge to assist the CAT in its assessment.

— Second, **if the CAT is not satisfied that an offer is just and reasonable, make it clear that the consequences of Part 36 do not apply to that offer**. If the CAT cannot be sure that the offer is fair, then the party receiving the offer cannot be expected to be sure of this either, and should not suffer a costs penalty in such circumstances.

The requirement on a defendant to show that its offer is just and reasonable removes the incentive to make an unreasonably low offer. The representative can feel confident in accepting an offer, in the knowledge that if such offer does not represent a fair deal for the represented class this will be borne out before the CAT. Yet it also prevents a representative from being required to stand before the CAT and endorse an "agreed" settlement for approval, where the representative has no knowledge of whether the settlement terms are just and reasonable. Avoiding this kind of scenario is clearly in the interests of the representative, the represented class and the CAT.

Further, in cases where a representative is in a position to determine the level of overcharge in the relevant market prior to full disclosure (for whatever reason), and the representative makes a settlement offer which is accepted, the onus should be on the representative to show that the offer is just and reasonable. If the representative could not do so, Part 36 would not apply for the representative's benefit.

In this way, the proposal does not benefit either representatives or defendants to the detriment of the other. Rather, it ensures that the risk profile of collective proceedings is not skewed by attaching beneficial costs consequences to unreasonable offers. This also furthers the objective of Part 36; reasonable offers should be accepted to avoid incurring unnecessary cost and delay, while unreasonable offers should have no effect on the parties' positions.

4. Conclusions

The above proposal would ensure that the costs drivers which underpin the settlement process do not steer rational litigants away from early and efficient settlement. It gives rise to a logical, common-sense rule by which a party who makes an offer must show that it is fair and, if they cannot, no benefit is derived from the offer. Any other position is likely to render the collective settlement regime ineffective.

Given the level of detail in the Bill around the collective settlement process and the procedure for approaching the CAT with a settlement proposal, Which?'s view is that the above proposal should be implemented in the Bill itself.

Annex C

PART 3: Miscellaneous and General (Clause 80: Private Actions in Competition Law)

Further evidence in relation to issues around certification

1. Overview

The Bill seeks to incorporate a new section 47B into the Competition Act 1998, setting out the process for certifying collective proceedings. Which? agrees that certification can act as a legitimate safeguard against unmeritorious claims, ensuring that opt-out actions are available only in appropriate cases.

However, it is equally important that the certification process does not act as a barrier to effective redress. If the certification requirements make it legally or financially unviable to bring collective proceedings, there is a risk that the regime will fall into disuse and the problems it was designed to address will go unresolved. The certification process must therefore be structured in a way that enhances efficiency and certainty, with minimal scope for generating unnecessary cost and delay in meritorious cases.

Which? is concerned that one aspect of the certification process in particular will generate considerable uncertainty and open the door to long-running and expensive interlocutory disputes. Our concern centres around the requirement that all claims included in collective proceedings must "raise the same, similar or related issues of fact or law" (found in new section 47B(6), accompanied by an additional requirement that claims be "suitable" for inclusion in collective proceedings).

It is, of course, necessary for a nexus to exist between individual claims which are brought together as part of collective proceedings, otherwise those proceedings would be unworkable (the "nexus requirement"). However, it is imperative that the nature of the nexus requirement is set out as clearly and unambiguously as possible. Ambiguity leads to uncertainty, which in turn leads to interlocutory disputes, delay, excessive cost and a reduced likelihood of early settlement. In particular:

— The nexus requirement should not be framed with such generality that its content is entirely open to interpretation, leaving it vulnerable to being interpreted in ways that are unintended or unforeseen.

— The resources of the CAT, the appellate courts and the parties must not be expended on many months (or indeed years) of debate, attempting to understand what the nexus requirement actually means.

Past experience clearly demonstrates that an ambiguous nexus requirement will undermine the success of a collective redress regime. This note draws on two examples to illustrate the point, before proposing an addition to the Bill to overcome any ambiguity in the nexus requirement contained in section 47B(6).

2. Examples of the problems caused by ambiguity

Emerald Supplies v British Airways Plc [2010] EWCA Civ 1284 (Court of Appeal)

In *Emerald Supplies*, two co-claimants brought an action against British Airways on behalf of all direct and indirect purchasers of air freight services who suffered loss due to an alleged price-fixing cartel in the air freight market. The claim was brought by way of a representative action under Rule 19.6 of the Civil Procedure Rules (CPR). Representative actions are arguably the closest living relatives to the opt-out regime envisaged in the Bill; the aim of both is to achieve collective redress without all possible claimants having to appear before the court. Representative actions are not limited to cases relating to competition law infringements, but *Emerald Supplies* was a case of that kind.

The nexus requirement under CPR 19.6 stipulates that the representative and all represented parties must share "the same interest" in the claim. The court in *Emerald Supplies* interpreted this requirement so strictly and narrowly that it is now almost impossible to conceive of a case in which a representative action would be both available and necessary. The court found that:

— Liability would first have to be established against the defendant in order to determine whether any of its customers were entitled to damages, and thus whether any customers had the same interest as other customers in an entitlement to damages. This perceived inability to define the class prior to liability being established was held to scupper any argument that the customers had the "same interest" in the claim.

— If a defendant could raise different defences against different class members, then those class members would not have the same interest in the claim. On the facts of *Emerald Supplies*, the passing on defence would be available against some of the class members but not others. Thus, for this reason also, the nexus requirement was not met.

The decision in *Emerald Supplies* is considered to significantly curtail any future use of CPR 19.6, at least in the context of redress for competition law infringements. The Court of Appeal itself described the claim in *Emerald Supplies* as an "attempt at keeping a procedural novelty alive". It would be in no-one's interests if the new collective redress regime was also seen in this light.

Although the nexus requirement in CPR 19.6 is couched more narrowly than the nexus requirement in the Bill, defendants will inevitably argue that both requirements are intended to produce the same result and should be interpreted in the same way. It is hoped that the CAT will be willing to depart from the Court of

Appeal's analysis and reject this argument. It is also hoped that such rejection would be upheld on appeal (and subsequent appeal). But there is a risk that this will not be the case and that the new regime will suffer the same burdensome interpretation as CPR 19.6.

Regardless of which approach is eventually adopted, considerable cost, delay and uncertainty will be incurred by all parties in having the debate. As a partner at one leading defendant law firm recently stated (during a presentation at a Law Society seminar), the experience of *Emerald Supplies* "shows that the definition of the class will be strongly contested". This is not—and should not be—the intended fate of the new regime.

Wal-Mart Stores Inc v Dukes 131 S. Ct. 2541 (2011) (US Supreme Court)

The second example is drawn from the well-established class action regime in the US. Collective proceedings in the UK can (and hopefully will) depart from the US experience in a number of ways. But that does not mean that the UK should ignore the lessons learnt in other jurisdictions. Rather the UK should leverage off those lessons, to ensure that any foreseeable pitfalls are avoided.

In *Wal-Mart Stores*, an employee brought a class action against Wal-Mart for discriminatory employment practices. She purported to bring the action on behalf of all female employees of the company and sought to have a class certified on that basis. Under the relevant procedural rules, a class could be certified only if the court identified "questions of law or fact common to" the class. There are obvious parallels between a nexus requirement based on "common" questions of fact or law and a nexus requirement based on "same, similar or related" issues of fact or law.

The claim in *Wal-Mart Stores* failed at the certification stage, largely due to the absence of a common question among the class members. The majority of the Supreme Court described the nexus requirement as being the crux of the case. For present purposes, there are two key lessons emerging from *Wal-Mart Stores*.

The first is an appreciation of the monumental cost and delay incurred in adjudicating the nexus point. The motion for class certification was first filed on 28 April 2003. The Supreme Court handed down its judgment, which considered nothing other than certification, on 20 June 2011. The parties were embroiled in interlocutory litigation about the meaning of the nexus requirement for over eight years.

While there are features of the UK court system that differentiate it from the US, it must be kept in mind that the US courts are highly experienced in grappling with the issues thrown up by a collective redress regime. There is a real risk that the UK courts will not be significantly quicker in determining issues around certification, at least not in the formative years of the new regime. This demonstrates the acute importance of ensuring that the nexus requirement is clear if collective proceedings are to proceed efficiently and retain credibility.

The time spent debating the nexus requirement in *Wal-Mart Stores* was prolonged by another interpretation issue. There has been considerable debate in the US courts as to whether the underlying merits of a collective action should be assessed in the course of determining whether common questions of fact or law arise. The Supreme Court determined that the merits of the claim should be considered, and held that "significant proof" of the common question(s) of law or fact is required. The plaintiff class in *Wal-Mart Stores* adduced considerable evidence in pursuit of this requirement, including statistical evidence, factual witness evidence of class members (120 separate affidavits) and even an expert report. Wal-Mart adduced similar evidence in reply.

This approach has the effect of turning what should be an interlocutory issue into a mini-hearing of the substantive case, muddying and prolonging the certification process and again increasing costs for all parties. But cost and delay are not the only shortcomings here.

This also provides an example of how an ambiguous nexus requirement is open to various possible interpretations, some of which may depart significantly from the meaning or scope that was originally intended. The US class action regime is one of the most well-established and well-understood in the world. Arguments that have held sway before the highest US courts will inevitably be repeated within the UK framework.

3. Proposals to ensure the nexus requirement is workable

The examples above demonstrate just some of the ways in which an ambiguous nexus requirement can skew the certification process, often with unforeseen consequences. How will the proposed nexus requirement in the Bill operate in practice? Objectively, all consumers are affected in the same way by a competition law infringement. In the context of a cartel, consumers all pay a higher price for the cartelised product. The issues they want resolved are also the same; they want to know how much redress is payable and by whom. There should be no difficulty for an authorised representative to show that consumer claims for competition law infringements are appropriate candidates for opt-out collective actions. The problem is that by couching the nexus requirement in unclear terms, the door is left open for extensive debate about precisely what the requirement means and how it applies, including to consumer claims. The position is uncertain and unpredictable.

The most effective way of removing this uncertainty would be to remove the nexus requirement altogether. The Bill includes a provision requiring the CAT to determine whether opt-out collective proceedings are "suitable" on a case-by-case basis. If a sufficient nexus between the class members' claims is lacking, this would be addressed by the CAT at the point of considering suitability. An independent nexus requirement arguably adds an unnecessary further hurdle that merely confuses matters.

If there remains an appetite for an independent nexus requirement, then the lessons of *Emerald Supplies* and *Wal-Mart Stores* suggest that the Bill needs to be more explicit as to the meaning and application of that requirement. In our view, this would best be achieved by **clarifying that all end consumers of a product, where the price of that product has been affected by an infringement of competition law, are affected by the infringement in the same way, such that their claims raise the same, similar or related issues of fact and law.**

This addition to the Bill would generate a number of benefits for a variety of stakeholders. In particular:

- It would give statutory effect to the intended interpretation of the nexus requirement in the consumer context.
- It would limit the risk of disproportionate and unworkable criteria being read into the nexus requirement, as we saw in Wal-Mart Stores (with the requirement for "significant proof" at the interlocutory stage) and Emerald Supplies (with the restrictive reading of CPR 19.6 rendering it largely redundant).
- It would avoid the lengthy and costly interlocutory disputes that will inevitably be seen in the absence of such clarification.
- Finally, it would close the door to unscrupulous behaviour by any defendants who wish to elongate the interlocutory stages of proceedings merely to delay the moment at which compensating their victims becomes inevitable.

Written evidence submitted by the Finance and Leasing Association (CR 06)

1. The Finance and Leasing Association (FLA) represents a wide range of banks and non-banks in the consumer, motor and asset finance sectors. In 2013, our members provided £62.3 billion of consumer credit to their customers, representing a third of all consumer credit lending via credit and store cards, unsecured loans, store instalment credit and second charge mortgages. Within that total, FLA members provided £27.5 billion of motor finance to consumers and financed nearly three quarters of all new car registrations.

Summary

2. The Government has proposed new legislation to govern how businesses deal with consumers in relation to the provision of goods (including digital goods) and services. The Consumer Rights Bill (the Bill) has been laid in Parliament the aim of which is to simplify, clarify and consolidate key pieces of consumer rights legislation into one statute. However, the Bill introduces a number of changes which will have significant implications for the credit industry given that, in some cases, lenders are held jointly liable with suppliers under the Consumer Credit Act for providing redress in the event that a supplier has failed to meet its obligations to a consumer. Some of the provisions could also serve to confuse consumers rather than clarify their rights.

The current situation

3. The consumer credit industry is currently regulated by the Consumer Credit Act. This Act, together with the Supply of Goods and Services Act 1982, the Sale and Supply of Goods Act 1994 and the Unfair Terms in Consumer Contracts Regulations 1999, provides significant protection for consumers in relation to their dealings with traders. From 1 April 2014, the regulation of consumer credit will transfer from the Office of Fair Trading to the Financial Conduct Authority (FCA). As a result, the consumer credit industry will be subject to a much broader framework of regulatory requirements, similar to those that currently apply to the banking, savings and insurance markets. These will deliver enhanced consumer protection and additional rights of recourse to put things right when they go wrong.

Our main concerns

4. The FLA is not opposed in principle to the consolidation of consumer protection legislation. Our main concern is that the Government's proposals go beyond this remit and establish a number of new requirements, some of which lack clarity, fail to reflect commercial reality, adopt an inappropriate "one size fits all" approach and as such will have a number of potentially adverse consequences for the consumer credit industry—and cause confusion for consumers.

Our position

5. We believe that the following areas of the Bill should be revisited because they could lead to consumer confusion and will have significant implications for the consumer credit industry.

Clause 17—Trader to have right to supply the goods etc.

5.1. This clause requires that the trader should have the right to sell or transfer the goods or to transfer possession of them, at the time when the sale, transfer or hire takes place. It also requires that no other person should have rights over the goods, unless the consumer is made aware of this before making the contract, and further 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).

5.2. We are concerned that the current drafting of this clause of the Bill does not reflect commercial reality and will be difficult to implement in the consumer credit markets.

5.3. Clause 17(2) does not fit with the design of the hire purchase product. Although the Bill exempts hire contracts from these requirements, a similar exemption is not made for hire purchase contracts. This exemption is important as a main feature of the hire purchase product is that title passes at an agreed time. In addition, most traders hold stock subject to some form of encumbrance or charge, whether it is retention of title (ROT) arrangements from their suppliers, floating charges, or motor dealer stocking plans. At the time the trader enters into a contract to sell goods, the goods will still usually be subject to those ROT terms, floating charge, stocking plan etc. The current drafting of the Bill would potentially require traders to explain the complex issues that surround these types of stocking arrangements, to customers. Providing this information to consumers would be unnecessary and overly confusing. For the consumer, the primary concern would only be that that there are no charges or encumbrances attached to the goods at the point when title is transferred.

5.4. **Amendments required**: Clause 17(2)(a) and (b) should be combined into a single provision and redrafted (new words in bold) as follows:

> *17(1)(a) Every contract to supply goods, except a contract for the hire of goods **[or hire purchase]** or a contract within subsection (4) is to be treated as including a term that*
>
> (a) *The goods **will be** free from any charge or encumbrance, not disclosed or known to the consumer before entering into the contract, **at the time when ownership of the goods is to be transferred, and***
>
> (b) *[Existing wording currently in 17(2)(c).]*

Clause 22, Short-term right to reject

5.5. This clause allows the consumer to reject goods for even minor defects and could result in disproportionately high costs for businesses where it may have been possible to repair or replace the goods at a lower cost. This could have a significant effect on the motor market where the value of the goods depreciates significantly on initial use and is of particular importance given that the right for a seller to make a deduction for use does not apply to the short-term right to reject.

5.6. **Amendments required**: The clause should be amended so that it should not apply where rejection of the goods is disproportionate to the defects in the goods and to give the seller the opportunity to repair the goods where possible.

Clause 50—Information about the trader or service to be binding

5.7. Section 75 of the Consumer Credit Act 1974 (which makes some consumer credit lenders liable to provide consumers with redress where a supplier has failed to do so) applies to the new remedies set out in the draft Bill in relation to the provision of services.

5.8. Clause 50 provides that potentially all statements (written or oral) made by a trader may form part of the contract. This has the potential to give rise to contentious disputes about what was or was not said and could lead to businesses providing consumers with increased amounts of documentation to avoid opening themselves up to reprisals if innocent comments made face-to-face were misconstrued. Lenders could also face increased costs as they would be liable to provide redress to consumers for claims where traders failed to meet requirements under the draft Bill.

5.9. This clause was inserted by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 which come into effect on 13 June 2014 and from which financial services is excluded.

5.10. **Amendments required**: Section 75 CCA 1974 should be amended to exempt lenders from the requirements of this clause.

Clause 53—Relation to other law on contract terms

5.11. The Government must work with the FCA to ensure that the Bill does not create another layer of legislation which ends up confusing consumers as to what their rights actually are.

5.12. While this clause states that Chapter 4 of the Bill is subject in certain circumstances to 'other enactments' or rule of law that impose a stricter duty, it is not clear if this includes the forthcoming FCA Consumer Credit Sourcebook (the Sourcebook)—which will set out new rules for consumer credit regulation.

5.13. Clarification required: The Bill should clarify exactly how it will interact with requirements set by industry regulators such as the FCA's Sourcebooks.

Schedule 8—Collective Action

5.14. These provisions introduce a collective action opt-out regime which means that claimants are automatically included in a claim (currently only in relation to claims brought under the Competition Act 1998) unless they opt-out. The introduction of this regime could promote a "litigation culture" (which the Government

has indicated it wishes to avoid) and would potentially be open to abuse from unscrupulous claims management firms.

5.15. Amendments required: The Government's approach to collective action should be consistent with the European Commission's Recommendation that Member States should allow for an opt-in mechanism for collective action. The provisions of the Bill gold-plate the EC Recommendation which had been achieved following extensive deliberations at EU level.

Implementation

6. The Bill will be introduced at the same time when 50,000 consumer credit firms transfer to the FCA. This will be a difficult period and the Government will need to ensure that the implementation of this Bill and the transition period are co-ordinated to ensure minimum disruption to businesses.

February 2014

Written evidence submitted by Trevor Mayes (CR 07)

STUDENTS AS VULNERABLE CONSUMERS

Summary

1. Universities as charity companies have become more commercial to compete in a global market place; therefore trading standards and professional conduct should be put on the same footing as other professional and commercial services.

2. Student rights as consumers have failed to keep up with increased commercialisation and privatisation. The massive increase in tuition fees and predicted average debt of £53,000 has put students in a vulnerable position.

3. Universities while designated as public bodies are in fact autonomous, staff and officers are not in public office per see so cannot be charged with misconduct in public office, on the other hand regulation of company law is inadequate, regulated commercial companies would never get away with this conduct. However, privatised universities have the same regulation for standards as autonomous institutions without consumer safeguards.

4. Consumer law needs to address this situation by the designation of students that recognises their financial and welfare vulnerabilities as consumers and regulated via an independent agency separate from any academic regulation or funding.

5. The Office of the Independent adjudicator for Higher Education known as the OIA replaces the courts for student complaints. However, it is ineffective in enforcing the same degree of propriety and adherence to a course of public justice. The rules need to be enforced and complaints made without fear of retribution together with a duty of candour and personal responsibility. Compensation awards to students and requirements to improve should be made mandatory, they are currently unenforceable.

6. A University Teaching Council to act in the public interest with compulsory registration of teaching staff concerning professional conduct and to include scrutiny of 'academic judgement' and 'fit person' test.

7. Students should be fully informed with an information pack concerning the way in which universities are governed, regulated and the process of complaint.

8. An effective whistle blowing system needs to be put in place without fear of retribution, as current arrangements are inadequate. Gagging requirements under threat of legal action preventing students from repeating their experiences should be banned.

Further Details

9. The increase in tuition fees together with cuts in government funding has led to an increased globalised commercialisation of higher education institutions HEI's as charity companies. The nature of the commercial change is a contentious issue within higher education and reflected in job titles whereby Vice Chancellors are sometimes referred to as the chief executive.

10. The BBC reported on the 12th August 2011 "Average debts may reach £53,000 for UK students starting in 2012". Terms and conditions for the payment of tuition fees should be on the same basis and any other financial transaction concerning a service and the life consequences of being liable for that amount of debt.

11. Unfortunately, student rights as consumers have failed to keep up with the need for institutions to make money. This puts students in a vulnerable position on two grounds, firstly, there is a financial vulnerability and failure of service provision and secondly, welfare vulnerability as victims of institutionalised abuse concerning position and power with regard to making a complaint. With current higher education law, regulation and culture, the only way this can be resolved is by addressing the vulnerability of students as consumers and there are two ways to help achieve this.

11.1. The enforcement of the rules, regulations, company law and a whistle blowing process with a duty of candour administered separately from any existing process via a Commission.

11.2. Issues of professional conduct and competence to be address via a University Teaching Council separate from any institutional assessment.

12. From my experiences at a Welsh university, they play it dirty beyond most people's comprehension, rules and processes are flouted with impunity, blatant lies are told to to conceal misconduct and discredit a complainant, anonymous abusive emails sent which are obviously from staff involved. They portray people who tell the truth as being crazy and paranoid; they seem to gain some kind of gratification from inflicting as much financial and physiological damage as possible, and then take smug satisfaction that a student is powerless to do anything about it. What is worse is that this behaviour seems to be not only condoned but also concealed by regulators and government.

13. In England and Wales there are three main aspects of university regulation, Higher Education Funding Councils HEFCE and HEFCW for financial regulation, the Quality Assurance Agency QAA for standards and the Office of the Independent Adjudicator for Higher Education OIA for complaints.

The Higher Education Funding Council for Wales HEFCW

14. I have pursued a complaint of financial irregularities concerning the use of public funds for legal expenses to defend the personal liability of officers and staff contrary to the Company Acts 1985 and 2006 only to be told that I have no evidence. The fact that the auditors for the University concerned refused on four occasions to carry out any investigation was ignored. The right of public complaint concerning financial irregularities to respective Audit Offices under the Local Government Act 2000 was excluded under the Public Audit Act 2004 and replaced by a 'Letter of Understanding' between funding councils and governments.

15. The only concession that I have received from HEFCW is a written apology for publishing an abusive and derogatory comment concerning myself to the internet. Unfortunately, this conduct seems to reflect the attitude and culture within Welsh higher education, funding councils have the power to withhold funding, in reality that is never going to happen.

The Quality Assurance Agency QAA

16. The university regulator the QAA is a registered charity and from correspondence they have confirmed they have no powers of intervention or enforcement with regard to standards. Assessments of universities may be critical but there is no legal requirement for them to improve or correct any failure of standards or management. This is in contrast to the public perception of the schools regulator OFSTED or the Welsh Estyn.

17. The QAA runs a Cause for Concern process to deal with serious issues; I have used this process to pursue a complaint without success. It came to the point that the QAA said it could not proceed, as I was the only one complaining. They clearly stated this was my fault as I had failed to find another student complaining of exactly the same thing within the period they allowed. Would this response be acceptable from the regulator of a public utility or service provider saying as you are the only one in your town who has complained and as you have failed to find someone else complaining of the same thing there is nothing we can do? A complaint to the QAA Board got nowhere and as they are a registered charity, I complained to the Charity Commission stating they were putting vulnerable students at risk by presenting a process structurally ineffective. In reply, the Charity Commission stated they have no powers to intervene on how a charity runs its affairs.

18. A report entitled Students and Universities by the House of Commons Innovation, Universities, Science and Skills Eleventh Report of Session 2008–09 addressed some of these matters. The report said:

19. *"...the current system for safeguarding standards is out of date, inconsistent and should be replaced. The Quality Assurance Agency should be transformed into an independent Quality and Standards Agency with a specific standards remit."*

20. *"There is a lack of consistency across the higher education sector, despite excellent practice in places, and codes of practice applying to all institutions receiving public money should be introduced."* I would add that the same should apply to all both private and publically funded institutions.

21. *"Protection for whistleblowers should be addressed—current arrangements are inadequate."*

22. Phil Willis MP, the Chairman of the Committee, said: *"We are extremely concerned that inconsistency in standards is rife and there is a reluctance to address this issue. The QAA needs radical transformation if we as a country are going to meet the needs of a 21st century higher education system with 2 million students."*

Office of the Independent Adjudicator for Higher Educator OIA

23. The OIA replaced the Visitor with regard to student complaints in March 2004 in turn it replaces the courts as a process of public justice. I raised various concerns within a Peoples Petition P-03–204 Public Accountability and Consultation in Higher Education to the Welsh Assembly, however, it was closed down because the Petition Committee claimed there was nothing more that they could do, referring it to the education committee for investigation was an option that did not occur to them.

Report of the OIA Student Survey 2009

24. I have submitted a new petition to the Welsh Assembly and written to the First Minister for Wales on various matters regarding the Ministerial Code including a correction concerning this report submitted to the Petitions Committee regarding Petition P-03–204. Here is an excerpt.

> 24.1. *"Having raised serious concerns about the standards of the Students' Complaints Scheme administered by the Office of the Independent Adjudicator for Higher Education known as the OIA and the lack of an effective Whistle blowing process, Leighton Andrews AM Minister for Children, Education & lifelong Learning stated on the 5th May 2010.*
>
> 24.2.1. *"universities, students' unions and sector groups overwhelmingly endorsed the independence of the Independent Adjudicator, the Office and the Scheme."*
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> 24.3.2. "the evidence gathered shows a direct association between outcome of complaint and complainants' views of whether the OIA's process was independent."
>
> 24.4. *The first point is not an accurate representation of the conclusion of the report which stated:*
>
> 24.5. *"There was widespread dissatisfaction with the remit of the OIA. That academics escape any outside professional scrutiny in the way they conduct business is considered by many students to be inappropriate in the modern world. The inequality of arms between universities and students is a source of dissatisfaction, and the burden of proof on students considered by many to be inappropriately high. Many students were angry and frustrated that in the event of a conflict of evidence, they perceived that the HEI account was accepted and their own rejected for no satisfactory reason that they could see. The OIA was also criticised by students for failing to hold HEIs to account, failing to ensure fair procedures at the HEI level, and providing remedies that were insufficient and that would fail to ensure HEIs took the issues seriously. There was dissatisfaction with the time cases take, with a perceived failure to recognise the importance of timing to the student, particularly the academic year timetable, and a feeling that HEIs are indulged by the OIA, particularly over the summer. Many disabled students expressed dissatisfaction with the understanding of their complaints by the OIA. Students wanted to be told where they could go if dissatisfied with the OIA. Finally, it is important to recognise that for students a complaint starts at the beginning at the HEI, and ends at the end of the OIA process, and the holistic and continuous nature of this experience should be recognised." Page 82*
>
> 24.6. *Regarding the second point, the report showed dissatisfaction with the outcome was higher in older students who have more real world experience of acceptable standards. The conventional wisdom on this issue is that people are more likely to accept an unfavourable outcome if they feel that their concerns have been addressed, issues have been explained to them and there has been a fair and impartial due process. Clearly, this is not happening with regard to Universities and the OIA, to quote The Association for Consumer Research.*
>
> 24.7. *"...the expressed concern shown by service providers has an instrumental effect upon customer satisfaction with both the process and outcome. The degree to which the service provider indicated the following of policy also influenced customer satisfaction with the treatment received and the outcome."*
>
> 24.8. *I fail to see how the conclusion of the report constitutes an overwhelming endorsement of any aspect of this process and to clearly imply that the only reason students question the independence of the OIA is because they failed to have the complaint upheld only adds insult to injury. I also fail to see how there is any virtue in what is a blatant abuse of people and process and clearly not something to gloat over. The Students' Complaints Scheme replaces the courts as a process of public justice and this survey however read is a serious cause for concern."*

25. If a major company such as a bank ran its complaints procedures the same way as universities then it would be fined millions by the relevant regulator.

26. With regard to my own situation concerning a Welsh university, I have been campaigning for a fair hearing for the last ten years, as this predates the OIA it is heard by the Visitor. For the last three years, I have been unable to submit a further petition on the basis of new material because the Visitor with the knowledge of the Vice Chancellor has delegated his Visitorial duties to the Sub Visitor. The Sub Visitor can only act if there is absence or incapacity, he cannot deputise as it is not specifically stated in the articles of government, moreover, the University Council and the Privy Council must approve any change in governance. There is no effective remedy without going to a Judicial Review, nothing within higher education regulation has jurisdiction to intervene, or so they say, I cannot submit a petition to someone who has no jurisdiction or power to award any damages. I have confronted those responsible with my concerns, which have been 'noted'.

27. This raises the question of why they would do this and I am afraid I cannot give you the answer as you would not allow this to go before the committee or if it did, parts would be redacted. What I can say is that it is everything to do with reputations including a body outside of the university and nothing to do with the welfare or rights of students.

28. I have written to the Welsh Education Minister asking him why this institution is still in receipt of public funds, and a matter that he can take up with HEFCW. His refusal to answer a simple question is also a matter of complaint to the First Minister for Wales.

Gagging Requirements and Threats of legal Action

29. With all options for resolution closed down publishing to the internet is the only thing that can be done. However, because of doing this I was 'required' by legal giant Eversheds to sign an undertaking to remove all material and undertake never to tell the truth about my experiences, in return for the University not taking legal action for damages and a high court injunction. I refused and they backed down, as they knew that I was telling the truth.

30. Eversheds were involved in setting up the OIA where procedures are open to pure invention with impunity, it has been reported they have around 100 of the approximately 130 HEI's in England and Wales as clients. I have in the past complained to the OFT that this virtual monopoly worked against the interests of students as consumers to preserve reputations and crush any form of complaint.

Public Awareness

31. It is often stated that one of the most effective means of regulation is public awareness; however, getting this kind of story into the media is almost impossible. Clearly, there are issues concerning the image of students not being believed and universities simply telling lies in the knowledge they are never going to be challenged. I pursued a complaint against the BBC that it only reports on wrongdoing in registered charities who represent the lower classes and ethnic minorities and not exempt charities such as universities and the Church. However, this point was lost on the BBC Trust upholding editorial judgement as a reason. There should be some kind of naming and shaming of universities to bring public awareness to these issues, as the biggest deterrent against any form of wrongdoing is the likelihood of being caught and publically exposed.

University Teaching Council

32. Clearly neither the QAA nor Universities are able to regulate professional standards, therefore, the only remedy is a University Teaching Council to act in the public interest and not in the self-interest of 'autonomous' institutions. Everyone in a profession or trade is required to carry out their tasks with a duty of care and competence and this is usually done via a professional regulatory body. The direct example is the Teaching Council for schoolteachers, however, a council for university teaching needs to address the concept of academic judgement that is abused with impunity together with a fit person test concerning professional conduct.

Health and Safety—Self-Harm and Suicide Risk

33. With the information from the Report of the OIA Student Survey 2009 on student experiences, it is an obvious question to ask if this has a direct effect on self harm and suicide. Here is an excerpt from the Guardian 30th November 2012 that highlights the financial and welfare vulnerability of students.

34. *"The number of students who have taken their own lives in England and Wales has increased dramatically since the start of the recession. Between 2007 and 2011, suicides by male students in full-time higher education grew by 36%, from 57 to 78, while female student suicides almost doubled from 18 to 34, according to new figures released by the Office for National Statistics (ONS)."*

35. The increase in student suicide is being blamed on the recession; the article does not research if there is any correlation with student complaints or misconduct and abuse of position and power. Universities are required to provide a safe environment for students and their response to student complaints should be included in a formal risk assessment with external monitoring.

February 2014

References

1. BBC News—Average UK student debts 'could hit £53,000'

Available at http://www.bbc.co.uk/news/education-14488312.

2. Petition P-03–204 Public Accountability and Consultation in Higher Education.

Available at http://www.senedd.assemblywales.org/documents/s1119/P-03–204%20Public%20Accountability%20and%20consultation%20in%20HE%20-%20briefing%20pack.pdf.

3. Students and Universities by the House of Commons Innovation, Universities, Science and Skills Eleventh Report of Session 2008–09. No longer available on the internet.

4. Student Satisfaction with the Office of the Independent Adjudicator for Higher Education *Report of the OIA Student Survey 2009*.

Available at http://www.oiahe.org.uk/downloads/Final-Report-of-the-OIA-Student-Survey-with-Appendices_4.pdf

5. The Association for Consumer Research—The Application of Procedural Justice Principles to Service Recovery Attempts: Outcomes For Customer Satisfaction.

Available at http://www.acrwebsite.org/search/view-conference-proceedings.aspx?Id=8146

6. Student suicides rise during recession years—Guardian Newspaper 30 November 2012

Available at http://www.theguardian.com/higher-education-network/2012/nov/30/student-suicide-recession-mental-health

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Written evidence submitted by the Citizens Advice (CR 08)

Summary

1.1 Citizens Advice strongly welcomes the Consumer Rights Bill. The Bill, which consolidates and strengthens the wide range of consumer rights legislation currently in existence, has the potential to make it far easier for people to understand and use their rights when things go wrong. We would therefore like to see the Bill pass through the legislative process without undue delay.

1.2 There are, however, a few small changes we would make which have the potential to have a significant positive impact for consumers. These are:

— Changes to the requirements around the provision of point of sale information.

— Thirty day maximum time limits within which repairs, replacements and refunds must be carried out.

— The extension of collective redress provisions beyond competition cases, to include all instances of unfair practices.

About Citizens Advice

2.1 The Citizens Advice service provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities. It values diversity, promotes equality and challenges discrimination.

2.2 The service aims:

— to provide the advice people need for the problems they face

— to improve the policies and practices that affect people's lives.

2.3 The Citizens Advice service is a network of nearly 400 independent advice centres that provide free, impartial advice from more than 3,500 locations in England and Wales, including GPs' surgeries, hospitals, community centres, county courts and magistrates courts, and mobile services both in rural areas and to serve particular dispersed groups. In 2012/13 the Citizens Advice service in England and Wales advised 2.3 million people on 6.6 million problems.

2.4 In 2012/13 Citizens Advice Bureaux received 245,000 enquiries about consumer issues. These included 14,000 enquiries about second hand cars, 14,700 enquiries about building repairs and improvements and 6,300 about frauds and scams.

2.5 Since April 2012 we have also operated the Citizens Advice Consumer Service, formerly run as Consumer Direct by the OFT. This telephone helpline covers Great Britain and provides free, confidential and impartial advice on all consumer issues. In 2012/13 the Consumer Service dealt with 700,000 enquiries. These included 269,000 calls relating to defective goods and 186,000 relating to substandard services.

Introduction

3.1 Citizens Advice welcomes the opportunity to submit written evidence to the Consumer Rights Public Bill Committee on the Consumer Rights Bill. We have worked closely with officials at the Department of Business, Innovation and Skills (BIS) from the earliest development stages of the bill to ensure that the legislation meets the needs of consumers.

3.2 The primary purpose of the Bill is to bring together and rationalise the muddled array of consumer protection legislation which currently exists. This is crucial, as it will make it far simpler for people to understand their rights and responsibilities as consumers, and more importantly to exercise these rights affectively. This is currently not the case. A Citizens Advice survey of 1092 people found that 74% of respondents had had a problem with something that they had bought in the last 12 months. Of those that had had a problem, 94% said that they had complained, asked for a refund or tried to get the problem resolved. Only 10% were successful.[24]

3.3 Citizens Advice believes that the Consumer Rights Bill, with some minor adjustments, has the potential to meet its aims. We therefore strongly support the Bill.

[24] Citizens Advice. *Redressing the balance: Why consumers need better means of resolving problems with faulty goods and services*. (December 2012) http://www.citizensadvice.org.uk/index/policy/policy_publications/er_consumertravelandtransport/redressing_the_balance.htm

3.4 Provisions within the Bill which we believe have the potential to make a significant difference to consumers include:

— Consumers will only have to accept one repair or replacement before being entitled to a refund.

— Consumers will be entitled to require a trader to perform a service again if the initial result was not carried out to a satisfactory level, or receive a partial refund if this is not done.

— Consumers will have the right to receive a full refund when they return faulty goods within 30 days.

3.5 There are a few areas, however, in which we feel that minor adjustments to the Bill could have a significant positive impact for consumers, at a negligible additional cost to business. In summary these are:

— Changes to the requirements around the provision of point of sale information

— Thirty day maximum time limits within which repairs, replacements and refunds must be carried out

— The extension of collective redress provisions beyond competition cases, to include all instances of unfair practices

We outline the case for each of these changes in detail below.

Point of sale information

4.1 One of the key objectives of the Bill is for consumer law to be easy to use. In order for this to become a reality consumers and traders need to be aware of, and understand, what the new law means for them. Citizens Advice is calling for a requirement for traders to display point of sale information setting out key consumer rights.

4.2 A Citizens Advice report, *Redressing the Balance*, demonstrated that there is widespread mis-understanding amongst consumers and traders regarding their rights and obligations.[25] As the examples below demonstrate, this lack of understanding can cause considerable frustration and prevent people from exercising their rights effectively:

> 4.3 A CAB in the North West of England saw a 76 year old man who had bought a washing machine which stopped working less than 18 months later. He went to the shop which he had originally purchased the washing machine from but was told that there was nothing they could do as it was out of warranty. As a result the client paid an independent repairman to fix the washing machine at a cost of £150. The repairman said that the washing machine was of very poor quality and had a number of faults not consistent with 18 months wear and tear. Shortly before visiting the bureaux the client had seen a newspaper article which informed him that his consumer rights did not end when the warranty ends and that he should have been eligible for a repair, replacement or a partial refund. He was significantly out of pocket as a result of paying for the repair and upset as he felt that the shop had deliberately misled him about his rights.
>
> 4.4 A CAB in the South of England reported the case of a man who bought a tablet computer as a Christmas present for his son. After one use his son was not able to charge the tablet. The client returned the tablet to the shop from which he had purchased it but was told that as it had been more then 30 days since he had purchased the item he would have to contact the manufacturer directly. The client knew that this was not the case as he had recently seen media coverage about the company which highlighted similar problems experienced by other consumers. In this coverage a company representative had admitted that there was an issue with staff training and understanding of the issue. The issue did not seem to have been resolved in this particular store and the client was left frustrated and unable to exercise his rights.

4.5 Citizens Advice asked consumers taking part in a survey what would make resolving their consumer problems easier in the future. Forty three per cent of those responding said that information about their rights on receipts, at the till and on websites would help them to resolve problems with a trader.[26] We believe that traders should be required by law to display point of sale information outlining to consumers the rights afforded to them under the Bill. We have provided examples of how such a notice could look in Appendix A.

4.6 Regular interaction with this information would promote familiarity and understanding of the new law amongst both traders and consumers. Furthermore, more widespread understanding of these rights and responsibilities would reduce the number of disputes between traders and consumers, saving both parties time and money. In addition, enforcement penalties for failures by traders to comply with the law are included in the draft Bill. A model notice setting out the rights and responsibilities of consumers and traders at the point of sale will help traders to avoid this pitfall by getting it right first time.

4.7 We believe that such a measure is provided for in the Consumer Rights Directive at articles 5.1(e) and 6.1(i) which deal with pre-contract information requirements. The clauses require that consumers are provided with a "reminder of a legal guarantee of conformity for goods". Whilst the Consumer Rights Directive fails to define this term, the provision comes from the Directive on Sale of Goods and Associated Guarantees. Article

[25] Citizens Advice Redressing the balance (2012)
[26] Citizens Advice Redressing the balance (2012)

2 of this Directive provides a definition of when consumer goods are presumed to be in conformity with the contract for sale which includes:

— goods being as described;
— fit for purpose; and
— of satisfactory quality.

4.8 In our opinion the Consumer Rights Directive is logically conceding that this information is central to the pre-contract details consumers need.

4.9 The House of Commons Business, Innovation and Skills Committee supported this proposal in their pre-legislative report on the draft Consumer Rights Bill. The report stated:

> *"We support the recommendations of Citizens Advice for the inclusion of an express requirement in clauses 10 and 38 (Goods and Digital Content to be as described) and clause 52 of the draft Bill (information about the trader or service to be binding) for a trader to provide information about the relevant core statutory rights at the point of sale"*

4.10 We are disappointed that the Government chose not to include this requirement in the Bill. We acknowledge that the Government have committed to exploring the proposal further within the implementation working group, of which Citizens Advice is a member. However, we remain convinced that this requirement, which is so crucial to the success of the bill, should be included within the legislation. We are concerned that this requirement will cease to be a priority during discussions around the implementation of the bill and risks being introduced in a significantly watered down form at an undetermined later date or not at all.

30 day time limits for repair/replacement and for refunds

5.1 We believe that traders should be required to carrying out repairs, replacements and refunds within 30 days unless the consumer agrees to a longer timeframe. This would provide valuable clarity and empower consumers to demand a better level of service when traders unduly prevaricate.

Repair/redress

5.2 The Bill rightly aims to make complex consumer law easier to understand and we believe that in many aspects this goal is achieved. Where the Bill applies rights for goods, services and digital content, it makes use of the two tiered system outlined in the Sale of Goods and Associated Guarantees Directive, which has been transposed into UK legislation as the Sale and Supply of Goods to Consumers Regulations 2000. The tiers are repair or replacement followed (where the repair/replacement fails to resolve things) by part or full refund.

5.3 These layers of redress include the requirement that repairs or replacements are done within a 'reasonable time' and without 'significant inconvenience'. Citizens Advice supports the inclusion in the Bill of a limit to the number of repairs and replacement that can be attempted to one. However, this fails to address the essential problem of how long a period of time is considered to be 'reasonable' for the execution of a repair or replacement. Elsewhere in the Bill, a limit of 30 days is placed on consumers for the rejection of a product. We therefore suggest that the same 30 day limit is imposed on the time within which a repair or replacement must be carried out by the trader.

5.4 Consumer research carried out by Citizens Advice supports this proposal. In a survey conducted by Ipsos MORI on our behalf a representative sample of consumers were asked how useful it would be to have a right to have problems resolved within a set time and a right to have some or all of their money back if it could not be done in this time. Ninety one per cent said that this would be very or fairly useful.[27]

5.5 The following examples, taken from calls made to the Citizens Advice Consumer Helpline, demonstrate that people often find that they face a long, indeterminate wait to receive the remedy they are entitled to:

> 5.6 A man called the helpline for advice about a mattress she had purchased which had sagged in the middle. The trader had been promising to replace it for a number of months but kept delaying. He had first reported the problem to the trader in March 2013 and still had not reached a resolution by the time he called on 18 November.
>
> 5.7 A woman called the helpline for advice about her bathroom suite. She had purchased the new suite from the trader in June 2013. On the day the bath was fitted she noticed a blue mark on the inside of the bath and reported this to the trader. A member of the trader's staff visited her house to try and polish the mark out. The member of staff made the mark bigger and it turned black. The trader agreed the bath was faulty and agreed to provide a replacement but the client was still waiting over five months later. The client had rung a number of times to complain but seemed no closer to arranging a date for the replacement to be delivered or for an alternative remedy being agreed upon.

5.8 We understand that in some cases repairs will take longer than 30 days to carry out, perhaps because parts need to be transported from a distant location. Our proposal would not prevent the trader and consumer agreeing a longer time scale for the repair where appropriate. We want to ensure that the new law avoids

[27] Citizens Advice *Redressing the balance (2012)* p9

creating a loophole which allows unscrupulous traders to make consumers wait an unacceptably long time for a repair or replacement in the hope that they simply give up trying.

Refunds

5.9 The Bill offers consumers the right to reject goods and obtain a part or full refund where the repair or refund options have failed. We believe that the 30 day limit, as discussed above, should also be extended to include refunds. This would ensure that consumers do not face unreasonable delays to obtain the refund that they are entitled to. Calls to the Citizens Advice Consumer Helpline show that this is not always the case:

> 5.10 A man called for advice about a faulty speaker system. He had purchased the speaker system from the trader but had cancelled the order after 2 weeks as they still hadn't dispatched it. He was told that he would receive a refund. The client had called the company nearly every day for six weeks trying to get a refund. Each time he was told that it had been escalated and he should receive the refund in the next few days. One member of staff gave the client the managers email address and despite emailing and calling the manager a number of times nothing had happened.
>
> 5.11 A woman purchased some boots online in July 2013. When she received the goods they were not the size she had ordered. She sent the goods back and the trader agreed to refund within 30 days. The client was still waiting for her refund when she made the call on 30 September.

5.12 It is important to remember that the money owed to the consumer is recompense for the supply of a faulty or sub-standard product and so the consumer has already suffered a breach of contract and is unable to use the item they paid for. It is therefore in the interest of consumers, traders who abide by the law, and the wider economy that the consumer receives a refund within a timely manner so that they can then reinvest this money elsewhere. We can see no justifiable reason why a refund should not be paid to the consumer within 30 days.

Collective redress

6.1 When traders fail to meet their legal obligations, consumers often give up rather than take the case to court. The Bill recognises the need for a facility for collective actions for competition cases. We believe that access to collective redress should be widened to cover all unfair practice experienced by consumers.

6.2 Ninety four per cent of consumers taking part in a survey conducted by Citizens Advice told us that they had complained, attempted to get a refund or tried to get a problem put right. Only 10% were able to say that they had been successful. Seventy four per cent said that they were not successful at all and 16% said that they were only partially successful.[28]

6.3 The Bill recognises the need for a facility for collective actions for competition cases. It allows for cases to proceed on an opt-out basis so that any affected consumer who does not opt out from proceedings will be compensated if the collective action is successful. Citizens Advice welcomes these provisions. We are, however, disappointed by the narrowness of the scope and would like to see the collective redress model widened to include all cases of unfair practice experienced by consumers, not just anticompetitive practices.

6.4 Research carried out by the European Commission in 2011 found that there was considerable appetite for collective redress in the UK—87% said that they would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing (see redressing the balance for reference).[29] We believe that widening collective redress to cover all unfair practice experienced by consumers, following the opt out model provided for in the current Bill, would be good for consumers, good for traders who treat customers fairly and good for the economy.

6.5 Allowing collective redress on a wider scale would send a clear message to traders that they will be required to compensate all affected consumers when they are found to have fallen foul of consumer law and allow consumer to reinvest the refunded money into responsible traders and the wider economy, contributing to economic growth.

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[28] Citizens Advice Redressing the balance (2012) p6

[29] Europeans, Development Aid and the Millennium Development Goals. Flash Barometer 299 Brussels: European Commission (2010)

APPENDIX A

Simple version—reflecting the rights contained in the Bill as currently drafted

YOUR LEGAL RIGHTS

Bought something faulty or sub-standard?

If something you buy is faulty or sub-standard:

- Within 30 days of purchase you can
  - **return it for a full refund**
    OR
  - **ask for it to be repaired or replaced.**
- After 30 days you can **get a repair or replacement for up to six years.**

Repair or replacement:

If after one repair or replacement the problem has still not been fixed then you can have a refund.

The refund will be in full if:

- it is less than six months since you bought it

After six months, the amount of the refund can be reduced to take account of the time you have been able to use it.

You have no legal right to money back just because you changed your mind. The trader may offer returns for any reason as part of their own returns policy if they choose to.

If you want to check up on your rights, get advice before you agree a solution with the trader. Go to your local CAB or visit the Adviceguide website at www.adviceguide.org.uk or contact the Citizens Advice consumer helpline on 0845 04 05 06.

Simple version including our suggested 30 day time limit on repairs, replacements and refunds

YOUR LEGAL RIGHTS

Bought something faulty or sub-standard?

If something you buy is faulty or sub-standard:

- Within 30 days of purchase you can
  - **return it for a full refund**
    OR
  - **ask for it to be repaired or replaced.**
- After 30 days you can **get a repair or replacement for up to 6 years.**

If the repair or replacement is not carried out within 30 days, or the problem has still not been fixed, you can have a refund

The refund will be in full if:

- it is less than six months since you bought it

After six months, the amount of the refund can be reduced to take account of the time you have been able to use the item.

Any refund must be provided within 30 days.

You have no legal right to money back just because you changed your mind. The shop may offer returns for any reason as part of their own returns policy if they choose to.

If you want to check up on your rights, get advice before you agree a solution with the trader. Contact your local CAB or visit the Adviceguide website at www.adviceguide.org.uk or contact the Citizens Advice consumer helpline on 0845 04 05 06.

Simple version including our suggested 30 day time limit on repairs, replacements and refunds plus the proposed sliding scale of minimum refunds

YOUR LEGAL RIGHTS

Bought something faulty or sub-standard?

If something you buy is faulty or sub-standard:

- Within 30 days of purchase you can
  - **return it for a full refund**
    OR
  - **ask for it to be repaired or replaced.**
- After 30 days you can **get a repair or replacement for up to 6 years.**

Repair or replacement

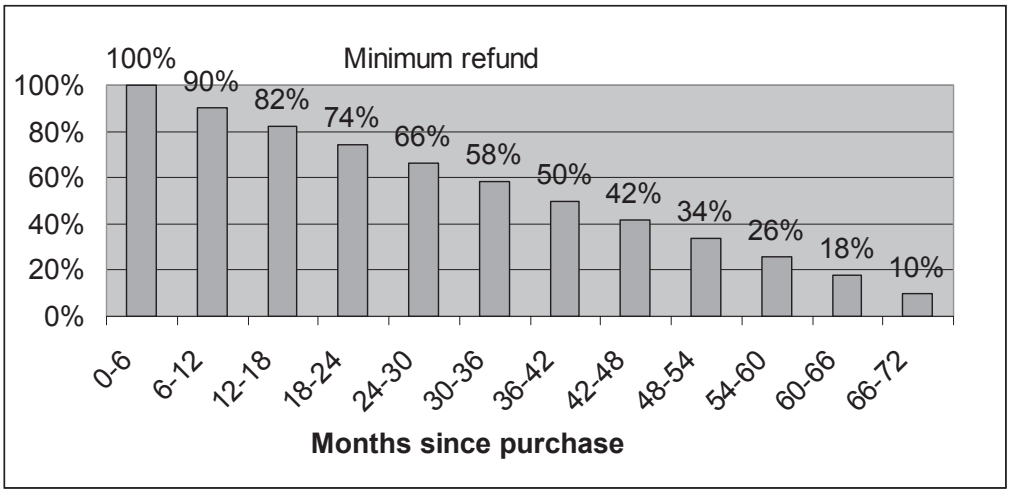
The trader can attempt one repair or offer one replacement. This must be carried out within 30 days.

If after repair or replacement the problem has still not been fixed you can have a refund.

The refund will be in full if:

- it is less six months since you bought it

After six months the amount of the refund can be reduced to take account of the time you have been able to use the item.



Any refund must be provided within 30 days.

You have no legal right to money back just because you changed your mind. The shop may offer returns for any reason as part of their own returns policy if they choose to.

If you want to check up on your rights, get advice before you agree a solution with the trader. Go to your local CAB or visit the Adviceguide website at www.adviceguide.org.uk or contact the Citizens Advice consumer helpline on 0845 04 05 06.

Suggested wording for distance selling

Extra rights buying on line, over the phone, by post (distance selling).

- You can usually change your mind and cancel within14 days of receiving the item
- If you haven't agreed to an earlier start you have 14 days from agreeing the service to change your mind and cancel.
- You must cancel in writing.

Check your cancelation rights form.

Your refund must be provided within 14 days.

Suggested wording for doorstep selling

Box to be added above the general information

Extra rights for buying in person from a person at home/ in the street/ at a sales promotion (doorstep selling).

- You can usually change your mind and cancel within14 days of receiving the item
- If you haven't agreed to an earlier start you have 14 days from agreeing the service to change your mind and cancel.
- You must cancel in writing.

Check your cancelation rights form.

Your refund must be provided within 14 days.

Written evidence submitted by the Confederation of British Industry (CR 09)

1. The CBI welcomes the opportunity to submit written evidence to the Bill Committee on the Consumer Rights Bill. The CBI is the UK's leading business organisation, speaking for some 240,000 businesses that together employ around a third of the private sector workforce. Overall, the rationale behind the majority of the Bill is sensible. The Department for Business (BIS) has stated that there are currently 12 pieces of legislation covering consumer rights and 60 covering the investigatory powers of consumer enforcement bodies. Law Commission studies have also shown that consumer law is confusing and unclear in the UK. On that basis, the Consumer Rights Bill could provide much needed clarity.

2. During the pre-legislative scrutiny stage, the CBI provided written and oral evidence to the BIS Select Committee. In most cases, our main concern was to ensure that proposed changes that were on the whole sensible were drafted with enough detail to prevent unintended consequences. Across most areas, we feel this is moving in the right direction and welcome the additional scrutiny that will be provided by the Bill Committee.

3. However, there is one area that remains a major concern for business. The CBI supports the objective of delivering effective redress for those that have suffered loss through anti-competitive practices but opposes the introduction of an opt-out scheme for competition private actions. It is the wrong measure at the wrong time and is an anomaly in a Bill that otherwise rationalises and updates existing legislation. It would be a substantial and detrimental change from the existing legal approach, introducing an opt-out scheme into UK law for the first time.

The Government's proposal gold plates EU recommendations without a clear mandate

4. The introduction of an opt-out scheme is a clear example of "gold plating" of EU legislation, with the UK position running counter to the position taken by the European Commission. In a series of common, non-binding principles for collective redress published in June 2013, the Commission states that "*collective redress should, as a general rule, be based on the opt-in principle"*. The Commission goes on to state that "*any exception to this principle, by law or by court orders should be duly justified by reasons of sound administrative justice"*. The Government introduced their proposal before the Commission recommendation and we do not feel they have presented strong reasons to justify their decision to move away from the opt-in principle.

5. While there have been efforts in the past to explore the use of an opt-out scheme, these have been blocked due to the lack of a compelling case. Under the previous Government, the Ministry of Justice rejected a general opt-out and proposals for an opt-out scheme included in the Financial Services Bill were also removed.

6. The current proposal was announced following a consultation launched in April 2012. Even here, there was no clear mandate for the changes that are now in the Bill. Opinions were split down the middle with opposition coming not only from UK business groups, but also European and international groups such as the International Chamber of Commerce, the US Chamber of Commerce, the European Justice Forum and the Federation of German Industries. Given the upheaval and uncertainty that will be caused by such a fundamental change to the UK legal system, it seems inappropriate to proceed when there is not even a majority in support of the measure.

An opt-out scheme could have a negative impact on the UK economy

7. The introduction of an opt-out scheme risks introducing a US style litigation culture to the UK that will increase costs without delivering meaningful benefits. A recent study[30], found that the United States has the highest liability costs as a percentage of GDP in the world, at 1.66%. The UK already has the third highest costs at 1.05%, well ahead of the Eurozone at 0.63% and between 2008-2011 litigation costs grew by 47%. The Government's opt-out proposal runs the risk of further exacerbating this problem and widening the gap to other international competitors.

8. A recent survey[31] in the UK also found that 57% of respondents felt the UK Government should not change the civil legal system to be more like the American system compared to only 16% who thought they should.

9. Aside from our serious concerns over the introduction of an opt-out scheme for competition private actions, we also believe it would be very hard to hold the line in the future and contain the use of opt-out actions solely to competition law. Once the principle has been breached, pressure will continue to grow to expand the use of opt-out which would only increase the move to a US style class action culture.

10. The debate around improving safeguards is also one that serves only to distract from the real problem. We oppose the introduction of an opt-out scheme as a whole and do not believe it is possible to strike the right balance on strong safeguards that will not erode over time. If safeguards are tightened significantly to prevent abuse, the scheme as a whole will be too restrictive to function effectively for consumers. But if they are loosened to allow an opt-out scheme to work, the risk that it will be open to abuse will be too high.

[30] The US Chamber Institute for Legal Reform, *International Comparisons of Litigation Costs: Europe, the United States and Canada*, May 2013

[31] Ipsos Mori, UK Consumer Research: Collective Action Lawsuits, May 2013

Alternative Dispute Resolution mechanisms provide a better route than an opt-out scheme

11. The CBI maintains that there are serious concerns over the introduction of an opt-out scheme and as a result, this should not be taken forward in legislation. We also strongly believe that once the principle of an opt-out scheme has been established in one area of consumer redress there is a real risk it will spread to others, while any proposed safeguards will erode over time.

12. Instead of introducing an opt-out scheme for competition private actions, the CBI has consistently argued that further use should be made of ADR mechanisms. These can provide a much more effective route to deliver redress, and can do so in ways that best suit the claimant i.e. cash payments, money off bills, discounts etc.

13. Positive work is already going on to promote ADR mechanisms. The CPR 21st Century Corporate ADR Pledge, established by the International Institute for Conflict Prevention and Resolution (CPR) and Centre for Effective Dispute Resolution (CEDR) is one such example. The pledge commits companies to resolving issues through ADR processes wherever appropriate. It is a good example of innovative work that is going on in this field, and exactly the kind of thing the Government should be encouraging rather than looking to introduce an opt-out scheme that will encourage the use of the much costlier legal route.

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Written evidence submitted from the Glass and Glazing Federation (CR 10)

1. The Glass and Glazing Federation (GGF) is the leading authority for employers and companies within the flat glass, glazing, home improvement, plastics and window film industries, and has over 500 members who can be found in over 1,500 business locations throughout the UK.

2. Our member companies are required to meet high entry standards and must show proof of previous experience, as well as meet a number of qualifying criteria. Once they are accepted as a member company they are continually vetted by the GGF, must follow our 'Code of Good Practice' and work to standards in the GGF's 'Glazing Manual'. Given our focus on providing high standards to consumers, the GGF is supportive of moves to increase consumer protection. However, although the GGF has been engaging with the Department for Business, Innovation and Skills (BIS) as the Bill has passed through its consultation and parliamentary phases, there remain some key issues which the GGF believe have not been fully addressed in the Bill which will have a significant and negative impact on businesses in the construction sector and consequently on consumers.

Key major concern

3. Our key area of concern is that the Bill will not protect businesses from a small number of consumers who may look to take advantage of the Bill in order to gain what they might see as "free goods". As the Bill is currently drafted, a consumer could reject a houseful of windows, or even a whole conservatory, based on one fault, even if the overall installation was satisfactory. This is referred to in sections 101 and 102 of the Explanatory Notes of the Bill. If the consumer's way of making the goods available is to say to the trader that the windows can be removed, that would be an added cost to the trader. Once a replacement window is fitted it legally becomes part of the fabric of the consumer's property, and if a trader had to refund the price of the whole contract for the goods and installation service to the consumer, it would not be worthwhile for the trader to then undertake the extra work of taking out the windows which they would then not be able to sell elsewhere. 99% of replacement windows are made bespoke to the consumer's specification (e.g. style, colour, made accurately to the size of the window apertures of their property) and as such cannot reasonably be sold or used elsewhere.

4. Whilst the GGF accepts that this is unlikely to occur in the majority of cases, the experience of our members shows that there are a small number of consumers (who are always a topic of conversation by our members) who look for loopholes in order to not have to pay for goods or to obtain unreasonable reductions in price. Whilst in previous meetings BIS have suggested that they do not think that this is a significant problem, we believe that there would be more cases of this happening than anticipated by BIS, particularly if it became known that it was possible to get windows for free. We consider that the aim of the Bill should be to protect both consumers and businesses and should not rely on an assumption that consumers will not exercise what would be a legitimate right under the Bill as it is currently drafted.

5. This would be particularly damaging for the many SMEs in the construction sector who would not be able to cope with covering these costs. In instances where consumers buy and install multiple windows made to their specification, the costs incurred by the trader if a consumer were to reject these goods (where only one has a fault) would run into thousands of pounds. If some businesses were forced to fold as a result of this—which is likely in cases where there are microbusinesses and SMEs—this will lead to a reduction in competition and innovation in the sector. This could also inadvertently have a negative impact on consumers by forcing businesses to increase costs and hence their prices to cover the potential for this happening.

6. This is an issue which will not only have a significant impact on the glazing sector but on the whole of the construction industry, for example with roofers, painters and decorators, kitchen fitters etc., where goods are made or supplied to the consumer's specification.

Solution

7. The GGF notes a disparity between the Consumer Rights Directive and the Consumer Bill of Rights. Whilst the Directive will recognise that windows made to the consumer's specification will be goods which are exempt from cancellation rights from date of delivery, the Bill does not make a distinction between goods which could be easily resold elsewhere (e.g. toasters, cameras) and goods made to the consumer's specification.

8. Under the Directive (due June 2014), a consumer could order a number of windows made to their specification. If they were then to change their mind after the trader had made the windows, they could not cancel under the Directive. However, due to the nature of this building product and on-site installation, there can often be a single fault or mark on just one window which a consumer could utilise under the Bill as drafted to wait for the windows to be delivered and then reject the whole set of windows for a fault on one and gain a full refund. The GGF does not believe that this would be in the spirit of the Bill, however at present the Bill provides traders with no protection against this happening, particularly in instances where complex goods such as windows are involved. This could lead to an increase rather than decrease in the number of disputes between traders and consumers.

9. The GGF therefore believes that the Bill should be amended to make a distinction between generic goods and goods made to a consumer's specification. In the instances where goods have been made to a consumer's specification, or materials have been cut to size on site and are of no other use, we believe that the Bill should be amended in the remedies and partial rejection clauses so that the consumer may only reject that part of the product or complete product which is not of satisfactory quality, and may not reject the remaining products. Taking an example of replacement windows, if a consumer were to order 10 windows made to their specification for their house, and one of these windows had a fault, then the GGF would propose that so long as the trader is able to repair or provide a replacement for the faulty window from the same design suite as the others, then consumers should only be able to access the remedies under the Bill to the one window rather than all 10 windows. We believe that this amendment would provide protection to consumers and businesses, particularly as the nine windows which are of satisfactory quality would be impossible for the trader to resell at their normal price, as there is no effective second-hand market for windows specifically made to a consumer's order. (Note: we recognise that such windows are sometimes sold on Ebay for very low prices).

Conclusion

10. The GGF is fully supportive of the Government's aim to increase and clarify the rights of consumers. However, we believe that there is a fundamental flaw in the Bill as it is currently drafted and this could have a significantly negative impact on businesses and ultimately on consumers as a result. If the Bill is not amended then we believe that there will be a damaging effect in the long-term on consumers, as it will result in less choice, less competition, and higher prices.

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Written evidence submitted from the Mobile Broadband Group (CR 11)

1. The Mobile Broadband Group ('MBG'), whose members are the UK businesses of EE, Telefonica UK (O2), Three and Vodafone, welcomes the opportunity to submit evidence to the Public Bill Committee in relation to its examination of the Consumer Rights Bill.

Summary

- In broad terms, the MBG supports the Consumer Rights Bill. This submission complements evidence previously submitted to the BIS Scrutiny Committee.
- With respect to Services, the Bill sets out in very clear terms that providers must supply what they contract to supply. This, along with the benefits from consolidation of the laws, will improve consumers' understanding of their rights and empower them to make markets work more effectively.
- By way of back ground to the mobile sector, a Government commissioned report (published in November 2012[32]) stated that, over the next ten years, "*the net present value (NPV) of the direct welfare benefits from public mobile services is estimated at £273–341 billion*".
- At the current time, our sector is faced with the enormous challenge of rolling out the new capacity and coverage demanded by consumers, investing billions each year. The MBG believes that these hoped for benefits to the economy will be more easily delivered by the Government's proposed evolutionary approach to clarifying consumer rights, as opposed to the more revolutionary approach of aligning the rights for goods with the rights for services.
- There is enormous pressure on operators to balance the need for further investment in capacity, coverage and innovation with the need to cut costs in order to reduce prices. In such a competitive market, there is no room for 'nice to have' expenditure. Every item has to be carefully assessed and prioritised. Unnecessary compliance costs ultimately feed through to customer charges.

[32] Analysys Mason: Impact of radio spectrum on the UK economy

With respect to the specific measures proposed, we make the following key points:

- Trying to align rights for goods and rights for services would introduce unnecessary extra compliance costs in our sector and the consequential upheaval will not deliver net benefits for the economy or consumers.
- An outcome based standard for services would not deliver net benefits for consumers in the communications sector. It would involve extra compliance costs for operators but would not be relevant to driving improvements in those areas that give rise to the bulk of consumer complaints, such as nuisance calls.
- With respect to other areas of the Bill, the MBG agrees that it will be very beneficial to clarify rights of consumers regarding digital goods, treating them largely the same as physical goods. We support the approach that the Government has taken on the 'short-term right to reject', as it is not practical for consumers to 'return' digital goods and not always straightforward for them to delete them. Allowing a short term right to reject may also introduce a loophole in the fight against copyright theft.
- For Goods, following parliamentary scrutiny of the draft Bill, the Government has amended the 'deduction for use' provision so that the value of a good is set by reference to a second business to consumer market. This seems to be a reasonable approach.
- On unfair contract terms, the Government has undertaken to provide Guidance on how providers will meet obligations for 'transparency and prominence'. This Guidance will be important to us, as there are some practical difficulties in the communications sector around the volume of price lists.

Services

A Government commissioned report published in November 2012[33] stated that, over the next ten years, *"the net present value (NPV) of the direct welfare benefits from public mobile services is estimated at £273–341 billion. (To put this in perspective, the proposed new high-speed rail line (HS2) is expected to generate benefits with an NPV of £47–59 billion over 60 years.*[34]*)*

Around 90% of this value will be enjoyed by consumers, who will be able to increase their usage of their mobile handsets for voice and increasingly data, while enjoying new services and lower prices. Operators will realise a lower surplus over the next ten years, owing to the investments needed to deliver 4G services and expand their networks to meet demand."

2. In view of the huge benefits delivered to date and the operators' (and Government's) ambitions for the future, the MBG supports the evolutionary approach to consumer rights in relation to services proposed by the Government, rather than the more revolutionary and costly suggestion of aligning the rights for services with the rights for goods.

3. With respect to goods, the seller is in a position to inspect all inputs during the process of manufacture (which today is usually a highly automated, controlled, mass produced process) and to inspect the assembled product before dispatch, offering a warranty to the customer for a limited period thereafter. Where the goods are sold through independent channels, the retailer is able to carry out additional inspections and offer a warranty underwritten by the manufacturer.

4. This is not the case for services, which are not usually mass produced; the customer experience tends to be very much particular to the individual. Moreover, for continuing services, a 'fit for purpose' outcome would effectively introduce an ongoing warranty or perpetual guarantee that was far more onerous than is the case for goods.

5. The MBG would not support an 'outcome based' approach for services in the communications sector for the following reasons:

6. *The Interdependence of Networks*

For any given customer communication, an individual communications provider is usually responsible for only one leg or element of what can be an extended chain of interdependent (as opposed to sub-contracted) Communications Service Providers (CSP) and content providers, underpinned by a network of interconnect, peering and access agreements, where each takes responsibility for their leg of the journey. The 'originating access provider' (i.e. the CSP to whom the customer pays his or her bill) cannot be responsible (nor should be held liable) for the overall customer experience across this extended chain.

7. The service that a mobile customer receives is extremely comprehensive and complex: voice communication (making calls, receiving calls) throughout the UK and overseas (through international roaming agreements with other providers), Internet access (within the UK and overseas), other data services (such as e-mail, text messaging and instant messenger), applications (e.g. mapping, information services, location services).

[33] Analysys Mason: Impact of radio spectrum on the UK economy
[34] http://assets.dft.gov.uk/publications/hs2-economic-case-appraisal-update/hs2-economic-case-appraisal-update.pdf

8. In order to provide such services, a mobile operator is dependent on third parties in the interconnected value chain. At its simplest, this can be connecting one UK mobile network to another UK mobile network for voice or SMS communication. When providing access to mobile data, the customer will receive data through many third parties e.g. the network providing the services and a chain of additional operators linking to servers hosting the website which may be located in any jurisdiction.

9. Generally CSPs have little overall control over the quality of the chain. Even if a CSP takes care to interconnect only with those that offer a high network quality, there is no guarantee that others in the chain will (or can—regulation often requires that there is no discrimination).

10. Thus the fault behind poor call quality or websites that are slow to download could originate with any of the CSPs along the chain (which is only as strong as its weakest link). It would cause customer confusion and frustration to hold out the expectation of 'satisfactory quality', if the originating CSP was not in a position to deliver it on every occasion.

11. *Independence of customers*

The actions of customers themselves also have an impact on the level of service that each experiences. For example, large numbers of people making calls or accessing web sites simultaneously can cause network congestion. In mobile, crowds congregating unexpectedly in one place can overload local cellular capacity.

12. *Costs of sub-contractors' warranties*

In addition to the independent interconnect partners, CSPs rely on perhaps hundreds of sub-contractors to design, build, maintain and operate their network. In order to mitigate exposures that could arise from sub-contractors in an 'outcome based' regime, CSPs would have to renegotiate supply contracts. (For example, a supplier causes some part of the service to go down by severing a cable with a digger, or making a mistake during a software upgrade). There would be significant transition costs in re-negotiating the supplier agreements and the suppliers would of course look to pass on the costs, ultimately to consumers, of their increased risk (with similar knock-on effects and costs building up down the supply chain).

13. *Measuring 'satisfactory quality'*

In order to base contracts on 'satisfactory quality', and to provide an element of legal certainty, it would be necessary, and extremely difficult and expensive, to establish exactly what 'satisfactory quality' entailed, particularly with such a multi-faceted service as mobile. For example, would it cover: level of network coverage (for different mobile services—e.g. 2G, 3, 4G etc.), network availability, number of dropped calls, internet access speeds, the reliability of international roaming, traffic management policies, or a combination of these factors? Mobile services are also affected by local variables outside the operators' control (tree coverage, weather, and building materials) that will change with time.

14. In our sector, clearly the regulator would have to be involved and, we believe, would have to spend considerable resources in establishing appropriate benchmarks. They would also have to consider whether 'satisfactory' was an absolute term across the industry or a term that applied only to the basis on which any given CSP had sold its service; presumably the latter would be the more appropriate. Furthermore, quality is a function of price. Given the scale of what might be involved, it is not surprising that Ofcom has not considered this approach to date. It has found other, more focused, ways of addressing particular consumer issues that have arisen in the communications sector.

15. *Not relevant to actual consumer complaints in the communications sector*

As can be seen in the table below, an 'outcome' based approach would not actually deliver any additional consumer rights that would be relevant to the great majority of issues that can cause customers difficulties.

The Ofcom Consumer Experience Report for 2013 breaks down the 7,000 or so complaints that it receives about telecommunications each month as follows[35]:

Silent calls	3,050
Complaints handling	950
Slamming	600
Early termination charge	190
Tariff charges	50
Other	2,160
Total	7,000

[35] Ofcom Consumer Experience; breakdown of complaints for October 2013

This table relates to the whole communications industry, not just the mobile sector.

Of the identified categories of complaints specified above, none is directly related to an 'outcome' based regime and so consumers would not benefit from any change of regime.

16. In summary, the MBG believes that there would be considerable transition and compliance costs involved with changing to an outcome based approach for services, where the potential marginal benefits for consumers are uncertain and small. We believe better outcomes will be achieved if services continue to be subject to the standards set by our regulators, particularly with regard to customer protections.

17. For all the reasons given, it would have the opposite effect of simplifying and clarifying consumers' rights and remedies. As mentioned above, the forecast consumer welfare to be delivered by our industry over the next ten years is considerable. It is absolutely right to clarify the rights at consumers, so that they become more confident at asserting them but there are no compelling reasons to jeopardise the hoped for benefits by risking a potentially disruptive and revolutionary change in the underpinning regime for Services.

Digital content

18. The mobile operators in the UK are active participants in the digital content value chain: providing mere connectivity to digital content, as a mobile Internet Service Provider, providing a portal through which customers can access third party digital content, and providing digital content directly to customers.

19. The MBG supports the Government's objective of clarifying consumers' rights in relation to digital content, which we agree have features that make them distinctive from physical goods and require a slightly modified approach if the rights of both consumers and producers are to be properly balanced.

20. For example, once a customer has loaded a piece of software onto his or her computer and backed it up, as is good practice, it is not practical to 'return' the digital good to the supplier and it can be difficult and onerous to delete all copies of the software, as would otherwise be the obligation. We agree that it is therefore not really practical to afford a short term right to reject.

21. Moreover, the Government has expended enormous resources trying to minimise the incidence of piracy. It would be unwise to open up another avenue that could be exploited to obtain software without paying for it.

22. We particularly support the provider's right under clause 43, without restriction, to modify digital content post sale. As the Government acknowledges on page 35 of its impact assessment on digital content '*Bugs are considered standard in digital content on issue and as such it is proposed that a reasonable person would expect a certain amount of bugs when purchasing digital content. Therefore the existence of bugs will not necessarily amount to a breach of the guarantee as to quality and fitness*.'

23. We will also need to be clear that providers will continue to be permitted, through the contractual arrangements, to discontinue customer support, as is often the current practice, in the event that the customer does not consent to receive necessary updates or is using software that has become uneconomic to support.

24. If the consumer experiences significant negative impact from an update, consumers would have the right to revert to the prior version. This is a less costly and burdensome way to reduce the potential consumer harm that could be caused by an update.

Unfair Contract Terms

25. In summary, the MBG generally supports the Government's proposals to refresh the law on unfair contract terms.

26. Our most significant area of uncertainty, though, is over the term 'transparent and prominent'.

27. The MBG strongly supports the principle of transparency. All mobile operators publish comprehensive, accessible price lists. However, some businesses—and communications service providers are a good example—face real practical difficulties in making every aspect of their pricing 'prominent' purely because of the sheer volume of information.

28. The price list for call charges for each operator runs to many pages and the whole price list for call charges should be regarded as forming the essential bargain, as customers are able to call any telephone number on the worldwide network, in accordance with the ITU settlement, and CSPs have no knowledge in advance of which numbers customers will call.

29. Ofcom, through regulation, requires that the pricing for calls to certain number ranges (such as 0870 numbers) should have equal prominence to other headline charges, such as the price of calling landlines. However, it is not practical (and would be self-defeating) to give equal prominence to all calling charges. Prominence is a relative term.

30. The MBG believes that drawing a customer's attention to the full price list would satisfy the requirements of clause 64.4 ('*A term is prominent for the purposes of this section if it is brought to the consumer's attention in*

such a way that an average consumer would be aware of the term'.) We welcome the Government's commitment to provide Guidance and would like them to provide clarity on this point in order to deliver legal certainty.

February 2014

Written evidence submitted by British Bankers' Association (BBA) (CR 12)

THE BBA

1. The BBA is the UK's leading association for the banking and financial services sector, representing the interests of more than 240 member organisations with a worldwide presence in 180 countries.

2. The BBA supports the Consumer Rights Bill as presented to Parliament. We believe the Bill provides robust and appropriate protections for consumers and has been drafted to meet the independent expert views of the Law Commission and Scottish Law Commission. We have the following comments on areas of the Bill that we understand are of particular interest to members of the Public Bill Committee.

KEY ISSUES

Section 49—Services to be performed with reasonable care and skill

3. The BBA understands that members of the Committee are exploring whether section 49 of the Bill should be amended to align it more closely to the relevant section on Goods, so that a Service must be performed with reasonable care and skill but also performed "satisfactorily".

4. We do not support such an amendment. We believe satisfaction, in relation to a service, is a highly subjective test that is likely only to be measurable against the individual consumer and therefore not easily translated into the execution of services (particularly financial services at large volume).

5. Whilst it is normally physically possible to assess that the quality of goods is satisfactory (i.e. it works, is free from defects, appears as described), it may not be possible to assess specific aspects of a service in a tangible form. Application of the "satisfactorily" test to the performance of services could therefore be reduced to reliance on the consumer's expression of whether they are satisfied.

6. We believe the uncertainty and subjectivity of applying a "satisfactory" test to the provision of services would fail to meet the aim of the Consumer Rights Bill to simplify and clarify existing consumer law.

Section 64—Exclusion from assessment of fairness

7. The BBA understands that members of the Committee may be asked to consider proposing an amendment to Section 64 so that only the "main price" of the goods, digital services or services is excluded from the assessment of fairness if suitably transparent and prominent.

8. We do not support such an amendment. Attempting to split the costs and charges for a product or service between those considered "main" and those "ancillary" would create a number of problems. Foremost would be how (and by which authority) a pricing element would be determined to be main or ancillary, and subsequently what impact such determinations might have on the way in which firms may choose to design and price products—which might not necessarily benefit the majority of consumers.

9. The Bill states that unless each price term is transparent and prominent it is assessable for fairness. This is clear and unequivocal and we do not believe it needs to be supplemented.

10. We believe the uncertainty and subjectivity of potentially limiting the exclusion of price to an un-established subset of the total costs and charges in a contract would fail to meet the aim of the Consumer Rights Bill to simplify and clarify existing consumer law.

Schedule 2: The 'Grey List'—number 9 (and paragraph 22)

11. The BBA understands that members of the Committee may be asked to consider proposing an amendment to Schedule 2 so that financial services providers are prohibited from changing the interest rate or charge of a service with a valid reason unless the consumer is free to dissolve the contract immediately and will not be disadvantaged by doing so.

12. We do not support such an amendment and do not understand how it could ever be achieved in practice. To illustrate—if a mortgage provider has a valid reason to change their interest rate but is prohibited from doing so unless the consumer would not be disadvantaged by dissolving the contract, then the mortgage provider would have to individually assess each of its customers to gauge whether (i) suitable alternative mortgage products are available in the market; and (ii) that the customer's financial risk profile and that of the providers of suitable alternative products were compatible such to the extent that if the customer choose to apply for an alternative mortgage they would be accepted by the new provider and offered the rate that was equal to or better than that they have left behind.

13. Of course in practice no mortgage provider would be able to take such an approach or accommodate for such an approach within its business model. The likelihood is therefore that mortgage providers would price their initial offers to account for any future (albeit unlikely) circumstance under which they might have had a valid reason to vary the contract.

February 2014

Written evidence submitted from the Advertising Standards Authority (CR 13)

1. Introduction and summary

1.1 The Advertising Standards Authority (ASA) is grateful for the opportunity to submit written evidence to the Public Bill Committee to help inform its consideration of the Consumer Rights Bill.

1.2 The ASA is the UK's self-regulatory body for ensuring that all advertisements, wherever they appear, are legal, decent, honest and truthful for the benefit of consumers, business and society. For over 50 years the ASA has provided effective advertising regulation at no cost to the tax payer.

1.3 The Committee has indicated that it would value an overview of:

- The regulatory framework for online advertising;
- The requirements of the UK Advertising Codes on clear pricing; and
- The role of advertising in informing people of their consumer rights

1.4 This submission provides information on the above and, to show how the ASA system works to protect consumers online, highlights recent ASA activity tackling misleading letting agent fees and ticket pricing, as well as our ongoing work around so-called 'copycat' websites.

2. An overview of the ASA's role as the UK's advertising regulator

2.1 The independent ASA administers the UK Advertising Codes that are written and maintained by two industry bodies, the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP)[36].

2.2 The Advertising Codes cover ads in all media including broadcast (television and radio) and non-broadcast (e.g. billboards, magazines, newspapers, direct mail and including video-on-demand). The non-broadcast rules also apply to online advertising (e.g. marketing communications on companies' own websites and social media under their control, pop-up and banner ads, email, paid-search).

2.3 In 2012 the ASA received complaints about 18,990 ads across all media (31,298 complaints). As a result of ASA action, 3,700 ad campaigns were amended or withdrawn.

2.4 **Enforcement**—The ASA is recognised by Government, Trading Standards and other regulators as being the 'established means' for bringing about compliance with the Consumer Protection from Unfair Trading Regulations 2008 in relation to misleading, aggressive or unfair advertising.

2.5 Whilst the majority of advertisers and the millions of ads that appear in the UK each year comply with the rules, non-broadcast advertisers who continue to break the rules on misleading advertising face referral to Trading Standards. Trading Standards has acted as our 'legal backstop' since November 2013, taking over from the Office of Fair Trading.

2.6 ASA referrals to the OFT were, historically, rare. This is testament both to the effectiveness of self-regulatory sanctions[37], the deterrent effect of the legal backstop and the advice and training[38] services provided by CAP and BCAP to ensure advertisers understand their responsibilities.

2.7 It is essential that Trading Standards is empowered to act as our legal backstop, and so the ASA welcomes the provisions within the draft Consumer Rights Bill to remove current restrictions in legislation and enable Trading Standards to enforce or take legal proceedings outside their own local area.

2.8 **Regulating online advertising**—The rapid growth of online advertising and marketing has been perhaps the greatest test facing advertising regulation in recent years. To meet this challenge, in March 2011 the ASA's online remit was extended to include advertisers' own marketing communications on their own websites and in other non-paid-for space online under their control (e.g. on Facebook and Twitter).

2.9 Previously, the ASA's online remit had applied only to advertisements in paid-for space (e.g. display ads and paid search) and sales promotions wherever they appeared.

2.10 With the landmark extension of the ASA's remit online, consumers and society benefit from a cost free, fast and established cross-media complaints-handling service. They do not have to track down different

[36] www.cap.org.uk
[37] http://www.asa.org.uk/Industry-advertisers/Sanctions.aspx
[38] http://www.cap.org.uk/Advice-Training-on-the-rules.aspx

complaints bodies for the same advertising appearing in different places, e.g. on a poster or a website, and can be confident that robust rules apply to advertising wherever it appears.

2.11 **Online sanctions**—Compliance with the Codes is mandatory for all advertisers; there is no opt-out.

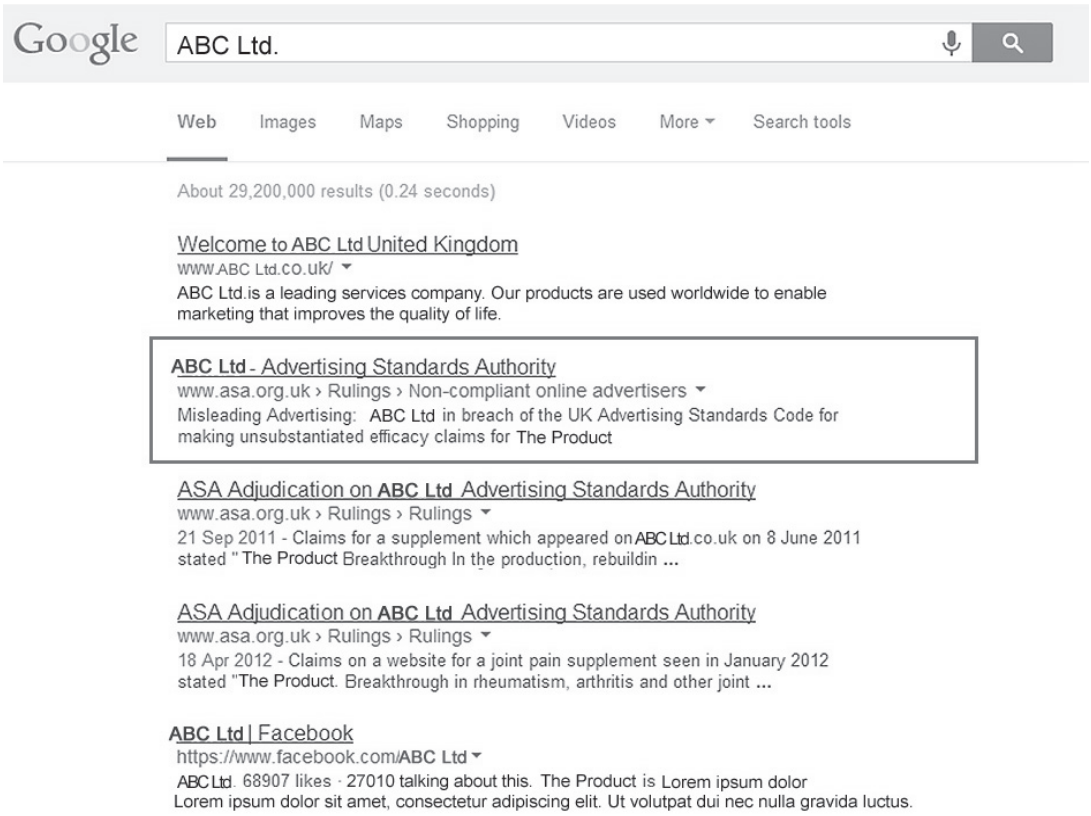
2.12 When we began regulating advertising on companies' own websites, new sanctions needed to be developed. In more traditional media, we can call upon the 'media gate-keeper', e.g. the billboard owner, to remove an ad or refuse to take one that we've ruled against.

2.13 However, when it comes to companies' own websites, such gate-keepers usually don't exist. As a consequence, CAP developed further sanctions to ensure that online advertisers comply with the Codes:

— CAP can ask internet search websites to remove a marketer's paid-for search advertisements when those advertisements link to a page on the marketer's website that hosts non-compliant marketing communications. An advertiser's name and non-compliance may be featured on a dedicated section of the ASA website.

— If necessary, CAP can launch an AdWords campaign against a misleading business to warn consumers about their services/products when they search for them on the internet (Figure 1, below).

Figure 1—Example CAP AdWords campaign



2.14 Copycat websites

2.15 One of the key online misleading practices we're currently dealing with is that of companies offering services including passport renewal, driving licences, tax returns and European Health Insurance Cards. These sites are commonly known as 'copycat' websites because they offer services from government departments and contain features similar to that of the official site making it appear as though they are 'official' or 'authorised'.

2.16 Many of these companies use website tools to achieve high positions in search engines often ranking them higher than the official site, and the majority of them charge a premium for a service that is often provided much cheaper or even free by Government departments.

2.17 Following a number of complaints about the misleading nature of some of these sites we've been taking action to ensure their ads are clear and up-front. We've banned 11 ads against 10 different operators, and have been working to raise awareness to help make sure people aren't misled into paying for a service that could have otherwise been free or cheaper. We've also been working with Government Digital Services and search engine providers to limit the activity of websites that advertise their services in misleading ways.

2.18 We're concerned, however, that problems remain around sites that might not yet have prompted complaints. Consequently we've commissioned consumer research to help us better understand the different

aspects of these sites that might cause confusion. Our research will help us understand how people find and use these sites and whether and how they understand they're a commercial service.

2.19 We expect to have the results from that in spring 2014, after which we'll be able to plan any further enforcement work as soon as possible. As highlighted above, we have recourse, ultimately, to refer misleading advertisers to Trading Standards for legal action.

2.20 It should be noted that there is no direct action which the ASA can take to prevent these websites from operating all together—our role is to make sure their ads and the claims on their websites are not misleading. The legitimacy of this kind of business practice, while we understand it is questionable to many, is a matter for Government and Trading Standards to tackle.

3. The requirements under the UK Advertising Codes on clear pricing

3.1 The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) contains a dedicated section on pricing[39]. Advertisers must have regard to the Department for Business Innovation & Skills (BIS) Pricing Practices Guide. Our rules include the following requirements:

- Price statements must not mislead by omission, undue emphasis or distortion.
- Quoted prices must include non-optional taxes, duties, fees and charges that apply to all or most buyers.
- If a tax, duty, fee or charge cannot be calculated in advance, for example, because it depends on the consumer's circumstances, the marketing communication must make clear that it is excluded from the advertised price and state how it is calculated.

3.2 Recent areas of ASA focus online: Letting agent fees and ticket prices

3.3 **Theatre tickets** In 2013 the Advertising Standards Authority (ASA) ruled against four theatre ticket providers for quoting misleading ticket prices on their websites. The rulings made clear that advertised prices for theatre tickets must include all compulsory fees either within or alongside quoted ticket prices.

3.3.1 Since September 2013 the ASA has been conducting comprehensive enforcement work to make sure that ticket sellers are up front about compulsory admin fees so consumers aren't misled. We've assessed 130 websites, including major ticket agents and London theatre websites, and have worked directly with 55 businesses to correct the pricing on their sites. We're now conducting the same exercise with regional theatre websites where around 50% of 650 sites are being contacted to bring them into line.

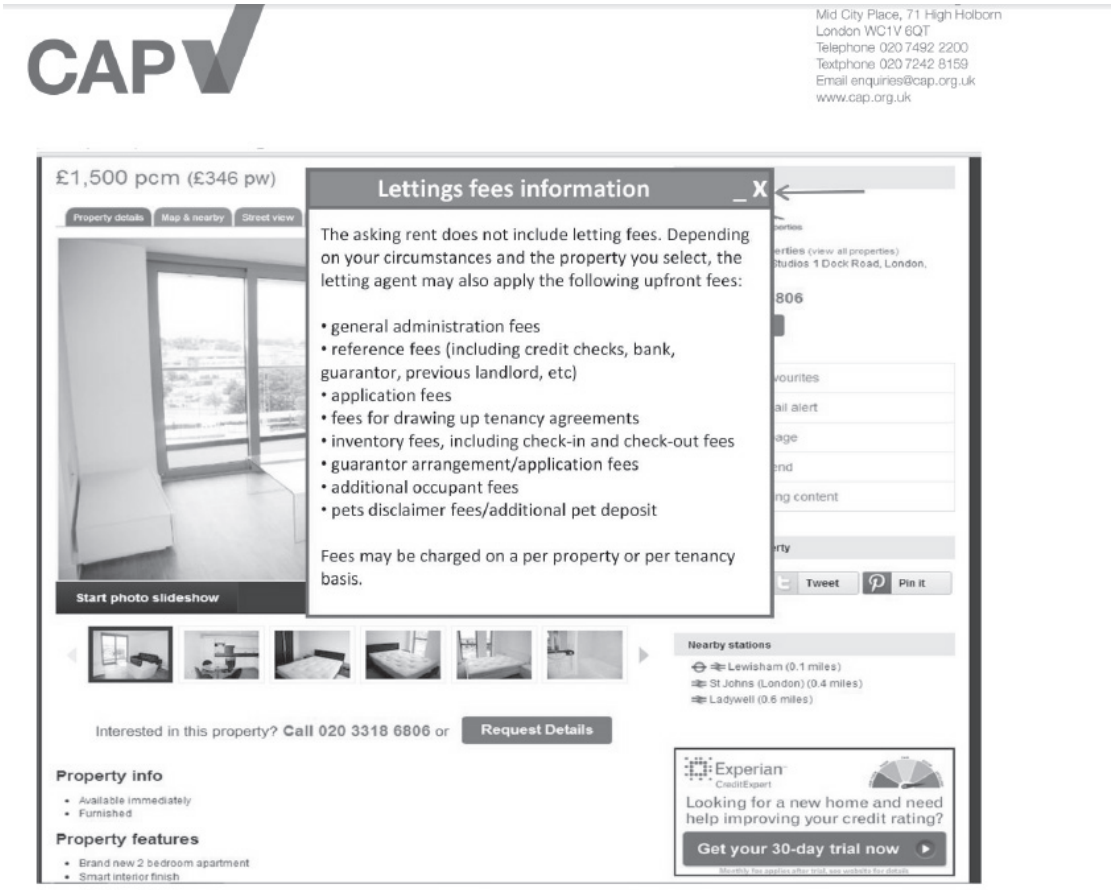
3.4 Letting agent fees Since November 2013 CAP has required lettings agents and private landlords to make sure that fees are prominently displayed in ads alongside rental prices. CAP's guidance was triggered by an ASA ruling against rental ads on an internet property portal; it reflects wider public concerns about the lack of transparency about fees in the rental sector.

3.5 Fees that can be calculated in advance must be quoted beside the asking rent. For example, a fixed admin fee of £100 per tenant should be displayed in ads as "£1500pcm + £100 admin fee per tenant" or similar. If non-optional fees can't be calculated in advance—because they depend on individual circumstances, for example—then ads must clearly state the nature of the fees and how they will be calculated.

3.6 Figure 2, below, is an extract from a guidance letter sent by CAP to advertising trade bodies on how to apply with the rules in practice.

[39] http://www.cap.org.uk/Advertising-Codes/~/media/Files/CAP/Codes%20CAP%20pdf/CAP%20Section%203_2013.ashx

Figure 2



Landlords and agents that do not charge any upfront fees should contact the portals to request removal of the statement.

The portals will disable the "fees apply" statement for properties with a Scottish postcode.

Sponsored search / Banners / Pop-ups / short-form social media (e.g. twitter)

Usually space is an important consideration for these platforms. We would suggest either not including an asking rent at all or making simple statements such as "2 beds from £1200pcm + fees". The landing page should feature the more detailed information about the fees and how they are calculated.

4. The role of advertising to inform consumers of their rights

4.1 In general, the CAP Code will require mandatory information in marketing communications when these are a requirement in law. If CAP was asked to consider introducing information requirements into the CAP Code, it would consider whether these were evidence-based, targeted and proportionate to the harm they were intended to prevent.

4.2 The CAP Code contains a section of rules on distance selling, defined under the CAP Code as the final written advertised stage in the process that allows consumers to buy products or services without the buyer and seller meeting face-to-face.

4.3 The distance selling rules cover websites that sell products or services and, reflecting the requirements of the Consumer Protection (Distance Selling) Regulations 2000 (as amended), include the provision that marketing communications must include a statement that, unless inapplicable, consumers have the right to cancel orders for products. Marketers of services must explain how the right to cancel may be affected if the consumer agrees to services beginning less than 7 working days after the contract was concluded.

4.4 To further protect consumers, CAP has also seen fit to introduce within the CAP Code a rule that prohibits ads from presenting rights given to consumers in law as a distinctive feature of the marketer's offer.

4.5 Mandatory information requirements, e.g. around terms and conditions, can have a varying impact on advertisers depending on the medium in which their ads are deployed—especially if those requirements are

detailed or lengthy. It can also have unintended consequences. For example, there are questions as to whether consumers can be overwhelmed by information and, consequently, find it unhelpful.

4.6 Should you require further information on any of the particulars in our response please do let us know, as we'd be happy to assist.

February 2014

Written evidence submitted by Alan Moss (CR 14)

1. I am a Trading Standards officer responding in my personal capacity.

2. I make this submission at a time when Trading Standards are being cut to shreds and serious scale frauds are being allowed to continue. This not even taking into account the 'minor' things like incorrect food labelling and dodgy weighing scales going unchallenged—something I see all the time.

3. Therefore I would like to ensure the Bill does not put burdens on struggling Trading Standards—but also makes it easier for consumers to resolve their own disputes. The truth is most Trading Standards departments do not have resources to offer assistance or intervene in disputes. Consumers therefore have to rely of sources of advice such as Citizens Advice—but advice is only advice—it is not the same as intervention by Trading Standards (which may involve looking at documentation and speaking to the trader).

4. I have personally seen many benefits of intervening in disputes—it is surprising how quick some businesses will refund money once they know Trading Standards are looking into their business practices. I have noted it is very common amongst large businesses to suddenly change their tune when they know Trading Standards are involved.

5. Services—ending a contract

6. I feel that the remedy for a faulty service does not go far enough—the consumer should have a way of ending a contract if the service is not being providing properly (a mobile phone contract)—rather than only being entitled to damages—which means they have to stick with the contract regardless. This will need to be tightly controlled as you don't want consumers making up excuses to get out of contracts but at the same time why should consumers be tied into long contracts when they cannot get the service? In the case of mobile phone contracts it may encourage providers to be more upfront about coverage—which can only be a good thing.

7. Another common one is Cable/Satellite TV or energy—where the service is not being provided due to faulty equipment at the consumers house or a connection problem of some sort. If cancellation is not possible then businesses should be forced to refund for months where no service was provided or even if only half a service was provided. That might encourage businesses to sort out problems quicker than they do now.

8. Services—losing faith

9. At the current time when a service is carried out poorly, the consensus is that the trader should be given a second chance to remedy this so that losses are mitigated. Usually the consumer will have paid up and will need to sue to get the money back or the consumer has not paid and is withholding money.

10. One very common scenario we come across is where the work has been carried out to a **very** poor and sometimes is even dangerous. In such cases the consumer does not want the trader back. This is understandable as it causes the consumer stress, causes friction between the parties and often delays a resolution.

11. Therefore, if the customer can show the work is so far below the standard required (reasonable care and skill) then they should have the right not to require the trader to come back. The onus would be on the consumer to prove the work was below reasonable skill land care standard should it go to court (to stop consumers using it as a reason to get a third party in when it was not necessary).

12. I feel this will make it far easier to advise consumers to cut their losses when they are in a dispute over **very** poor quality work.

13. An example might be—a trader has installed a boiler and consumer feels it is dangerous—usually the consumer will not want the trader back. However, they will often be advised they should give the trader a chance to fix things.

14. There should also be a time limit on how quickly a trader has to come back and fix things or lose their right to repair.

15. Business and consumer education

16. When the new Consumer Rights Act comes out there will be a need for a significant amount of education for consumers and businesses.

17. The Department for Business, Innovation and Skills recently brought out The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. The guidance documents for those

Regulations are totally inadequate. This means individual Trading Standards Officers have to interpret the law themselves. This had led to inconsistent advice being provided to businesses by individual Trading Standards departments (because there is not one single document everyone can refer to).

18. I believe the new Consumer Rights Act will require significant media publicity which must be backed up by detailed, quality guidance in the form of leaflets, a website and even a DVD presentation.

19. Due to budget cuts many (if not most) Trading Standards are starting to charge for business advice—upwards of £55 per hour. I would be interested to know how we will be providing support to business who cannot afford to pay for it—and in many authorities no staff left to actually deliver it.

20. Government will need to ensure support is provided centrally and free so that all traders are accessing the same information. It will also need to come into before the law does—not at the same time or after.

21. Trading Standards cuts

22. During oral evidence I noted that many MPs raised the question of whether Trading Standards are adequately resourced. I have made the point that we are probably not even adequately resourced to advice on the Act when it comes out.

23. Aside from that, compliance with the law requires enforcement. If businesses complied with the laws on unfair commercial practices (Consumer Protection from Unfair Trading Regulations 2008) then there would be less chance of civil disputes arising under the Consumer Rights Act. Due to cuts to Trading Standards, enforcement of the CPUTR is going down—so disputes under the Consumer Right Act are likely to go up. My departments pro active visit list is almost nonexistent. The most complained about sector is car dealers yet we do no visits to them at all. If we did then we could increase compliance and in the long term reduce civil disputes arising between traders and consumers.

24. It is easy for the Minister to say it is up to local authorities to fund Trading Standards but this is just an attempt to ignore the point—just like it was when the 'horsemeat scandal' happened and no one from Government wanted to explain why some Trading Standards were doing very little to ensure high food standards.

25. Finally on this point, I note that the Minister talked about the National Trading Standards Board—helping to co-ordinate the activities of Trading Standards—unfortunately I think that is something of a red herring. The main this NTSB do is provide resources to deal with cross border issues. They have no effect on day to day staffing levels of Trading Standards departments. In addition if there are no Trading Standards staff left to develop cases then there is nothing to pass on to the NTSB to deal with.

26. I also know of a case where a TS dept took 3 months to even fill out the referral form to send to the NTSB because they did not have the resources to get to it.

27. I am not criticising the NTSB but I think we need to be realistic about what they do and don't do.

28. Finally, on the point of resources I have issues with the requirement to give notice which I deal with below.

29. Enterprise Act—enhanced redress

30. The new rules for enhanced redress are dependent on a successful injunction being obtained under the Enterprise Act 2002—but it seems to ignore the fact the EA is hardly used. I know of many TS departments that actively avoid using it because they think it is too complex, time consuming, expensive and external legal support is needed to use it.

31. I note that in order to combat the last point it was suggested Trading Standards officers could present cases in court but this idea has been dropped.

32. The new enhanced measures may encourage some Trading Standards to pursue cases where significant redress would have to be made—but by the same token businesses are much less likely to co-operate if they are going to have to pay out large sums of money in redress—which means more formal court action may be necessary. Given that it hardly happens now—is it likely to happen in the future?

33. Court/Ombudsman

34. I noted the discussion around courts and Ombudsman. I think we have two types of disputes—disputes with genuine businesses and disputes with 'rogues', who if you took them to court and won, would still not pay. So simplifying the law and making court access won't really make a difference to those scenarios as the consumer will still be out of pocket.

35. It is also worth considering what an Ombudsman can do to traders who are not interested in complying when the new rules around Ombudsman coming in next year—making a judgement is one thing but if it cannot be enforced why bother? As I understand it most businesses currently subject to ombudsman services are big 'genuine' businesses—not very small ones that may be harder to pursue for money.

36. I believe consideration should be given to criminalising those who rack up multiple county court judgements (i.e. many of the same type which they refuse to pay). Or holding company directors personally liable (again where it is obvious they have done something wrong).

37. Company phoenixing is something we see all too often—losing in court means nothing to people who phoenix. It is also an area where significant losses can be incurred by consumers.

38. Point 35 and 36 are complex areas but ones that should be looked at as a lot of consumer detriment is caused by limited liability and the fact that CCJs don't really act as a deterrent for some.

39. Powers

40. *Requirement to give notice*

41. It appears that this new requirement will be pushed through regardless but I feel it puts an extra burden on Trading Standards at a time when we are already under pressure. All it will do is reduce the number of routine inspections (which are already falling). I find it odd that in the Government Impact Assessment one of the justifications for this is that routine visits are falling anyway so this won't much difference. If resources are falling then why add an additional burden?

42. To give you an example—if we wanted to conduct checks on Payday loan companies on the high street to see if they were complying with the relevant legislation we could pick 5 out and then visit them one by one (or do as many in a day as we can).

43. Under the new law we would need to identify who the owner of all 5 shops were and contact them—something that could take up a lot of time.

44. Under the new legislation if we were at one Payday lender shop, we then couldn't pop over to another we had spotted and do it whilst we were already in the area (but would have to come back after having given notice).

45. I also find it odd that the Minister thinks this well 'help' Trading Standards plan their time. I can assure her we don't waste time at premises and there is no problem to be solved from our perspective. If the business owner is not present we can still conduct a check and talk to them later. The point that seems to be missed is that often you need the element of surprise in these visits. Where we feel we need to talk to the business owner and no surprise is needed we will make an appointment.

46. This new law will means that a lot of stuff that is discovered from unannounced visits will no longer be found if a business can plan ahead.

47. It is unclear how this will apply to markets—do we give notice to the market owner or the individual stalls? In any case it will mean counterfeit goods or unsafe goods are not on sale on the day we visit (often the market owners will inform the stall holders of any visits). As far as markets goes we may suspect fakes are being sold but can we then apply blanket exemptions on giving notice to every stall on a market?

48. Dwellings

49. I know the Government wants to remove all powers from Local Authorities to enter domestic premises without a warrant but I would add these comments.

50. Under the old powers we could enter dwellings if they were being used as a business premise and we suspected an offence.

51. Under the new powers unless we could prove the dwelling was being used **mainly** as a business premises we cannot enter it. It will be impossible to know if a dwelling is being used **mainly** as a business premise unless it has been entered.

52. Even then, what is mainly? What if there are 3 bedrooms and 5 occupants but 1 computer which is where the business is run from? We have found people running businesses generating hundreds of thousands in illegal revenue in such dwellings. My understanding though is that such a premise would be **mainly** being used as a dwelling but with a business being run from there—therefore we could not enter it under the new power.

53. Please bear in mind more and more business are being run from homes over the internet.

54. I believe in my own authority the power to enter a dwelling using statutory powers has not been used routinely by anyone as we usually get a warrant but taking this power away could stop us gathering evidence in the future when we know a business is run from a dwelling and we need to enter quickly.

55. Getting a warrant is fine but it can add weeks of delay and cost.

56. There are 2 scenarios where this (old) power may be used—firstly is when we have been invited into someone's home and can see it is a business—we can then use the powers if necessary.

57. Second is when the Police arrest someone and use S18 of PACE 1984 powers to search their home. If they enter a dwelling and tell us it is being used as a business—we can enter and use our own powers. This is

common with counterfeit goods when the Police arrest someone and then find loads of counterfeit goods in their house.

58. The new powers as drafted would prevent us from doing either of the above because as long as the suspect can say the house is used mainly as a dwelling it doesn't matter how much counterfeit goods they have inside.

59. I also think businesses using dwelling addresses as mailing addresses should be classed a business premises by default.

60. Use of powers remotely

61. At the moment we receive complaints about businesses all over the country and often I will use my powers to obtain information from said companies.

Schedule 5

62. Section 14 allows information to be requested (remotely)—but it quite clearly does not allow it to be used in criminal proceedings against the person who provides it.

63. Section 23 allows entry on premises and to obtain information/documentation.

64. Therefore if I want to investigate a business 150 miles away it appears that I will now have to visit them to obtain the information using section 23 powers or not bother investigating them. This cannot be right.

65. Observing business

66. Section 22 allows officers to observe businesses (without prior warning or notice)—presumably if they see a breach they can then use their other powers of inspection because they can satisfy one of the exemptions to give notice?

67. So let's say you are at a supermarket and see pricing errors—can you then talk to the supermarket about pricing? Can you then start carrying out other checks—such as on advertising materials and so on?

68. These powers and powers from other laws

69. How will the Consumer Rights Act powers work with other powers? The Food Safety Act 1990 powers remain and apply to food—Trading Standards also enforce that law.

70. So let's say you visit a supermarket and check their use bys and then want to check prices—can you? Pricing are not within the scope of the Food Safety Act but they will be for the Consumer Rights Act.

71. Therefore effectively any food premises where you want to do non food stuff may require notice. EU law says food visits should be done without notice (though food officers will make appointments when they need to speak to a certain person). So now either 2 visits will be done or we will have to give notice (which is against EU law/guidance for food visits).

72. Use of powers—prescriptive

73. I am also concerned that the requirements to obtain information are quite prescriptive (s14)—often when we ask for information from a third party **not** being investigated it will be done verbally or through a simple email—will such evidence in future be questioned if we do not use a formal notice every time? Let's say we are investigating a rogue trader and we visit a builders merchant and ask if the whether anyone has ordered the materials in question. Most of the time the builders merchant will give us the information with no fuss. So under the new law are we required to give a notice?

74. I am also concerned that the prescriptive requirements to give notice now mean that if we are out and about and notice an infringement we will not be able to use evidence gathering powers as we don't have the forms. Currently when doing searches and seizures we provide paperwork because of PACE Code B but that code allows the paperwork to be provided later on.

75. Clarity of powers

76. The entire Schedule regarding power is extremely complex and I am not sure it will achieve the aim for businesses to find it easy to understand (unless appropriate guidance is introduced).

77. We have had people like accountants refuse to provide information on the basis of 'confidentiality'—it would be good if this could be clarified to say the only reason someone can refuse to provide information is legal privilege. We have also had large businesses refuse to provide information because they have contracts with other businesses—clearly they should provide the information as confidentiality is not a reason to refuse to provide the information.

My final comment is that we need minimum standards (i.e. staff levels) for Trading Standards—this was discussed briefly in the oral evidence session. As alluded to—we have some Trading Standards with 1 or 2 people which is totally unacceptable. Trading Standards should be a minimum size depending on how many

consumers or businesses are in a particular area. 197 Trading Standards is far too many departments. There could be a fifth or quarter of that.

February 2014

Written evidence submitted by UK Interactive Entertainment (Ukie) (CR 15)

About Ukie

1. UK Interactive Entertainment (Ukie) is the trade body that represents over 200 businesses and organisations involved in the games and interactive entertainment industry in the UK.

2. Ukie exists to make the UK the best place in the world to develop and publish games and interactive entertainment. Ukie's membership includes games publishers, developers, console manufacturers and the academic institutions that support the industry. We represent the majority of the UK video games industry; in 2011 Ukie members were responsible for 97% of the games sold as physical products in the UK. Ukie's membership list is set out as an annex to this document.

Introduction

3. Ukie have engaged with BIS from the beginning of the process that has resulted in this Bill. Our initial submission focused on three issues, which remain fundamental:

1. Bugs are an unavoidable and short-lived feature of all games given the specific and unique nature of gaming software development, which consumers understand and expect. As such, there must be no "freedom from minor defects" right in relation to games and other technologically complex digital content.
2. As the majority of faults in games will be the result of flaws in the code itself, they will be universal. This means that repair attempts will usually involve universal patches or updates which minimize any effects from initial software bugs on consumers. Policy around repair attempts—the reasonable amount of time allowed, the number of opportunities to repair—must reflect this.
3. The right to reject, or the return of content in exchange for a refund, would make no sense for digital content in general and for games in particular. The trader or provider would have to be able to see clear proof that the content had been deleted by the consumer from all their devices. In closed platforms this may just be possible, but for open content, considering the ease of copying digital works, this is simply untenable.

4. We are pleased to say that BIS have reflected this input in the final version of the Bill, as presented to Parliament. These issues remain absolutely fundamental; taking a different approach on any one of them could cause significant problems for companies selling games digitally in the UK.

5. The question of whether to include a short-term right to reject continues to be debated, we understand. This submission is focused on addressing the issue further.

Short-term right to reject

6. Our position on this matter remains firm—there should not be a short-term right to reject for digital content.

7. It is extremely difficult for a company to be certain that digital content a consumer wishes to 'return' has been deleted from the consumer's device, and not saved elsewhere in any form. This creates a great risk for abuse because the very nature of digital product means that it essentially can be perfectly replicated an infinite number of times at no additional cost

8. While Digital Rights Management and other technological solutions can be used to control access and further copying of content, including games, these solutions are not failsafe, can be expensive, and may not be appropriate or the best consumer experience for every type of game.

9. If a short-term right to reject existed for digital content, the possibility of unscrupulous consumers abusing this right to obtain free copies of games and other content would be very real. This may compel businesses to use stronger or less product-appropriate or consumer-friendly forms of controls to enable them to deny consumers access to games in the case of a refund. This would significantly reduce consumer choice, whilst offering them little additional benefit.

10. In almost all cases, a fault in a game would be the result of a problem with the underlying code. Thus, a problem with one copy will exist in all copies of the game, and if that problem creates a right to return that right could most likely be claimed by anyone who has purchased the game. However it also means that a patch or update can be used correct the fault and repair the content for all consumers at once.

11. Generally, any bugs or other faults can be and are fixed through a patch that is distributed universally in a reasonable time after a problem has been identified. This scenario is quite different from that of physical

goods, where manufacturing defects rarely impact more than a small percentage of goods in any product line and where a digitally delivered, universal fix is not the norm.

12. Put simply, if a short-term right to reject was in place, game companies would face the prospect of losing their entire UK revenue from a project shortly after its release, for problems that could otherwise be universally corrected relatively quickly. The inevitable outcome of this is that companies would take fewer risks innovating with different forms of service delivery and online play, ultimately hurting all consumers, when compared to the repair/replace route, which provides rapid redress for all affected consumers and still gives companies the security to offer new forms of content.

13. Introducing a short-term right to reject would risk causing significant disruption into a broad range of digital content markets, stifling innovation and greatly reducing consumer choice, whilst giving little additional consumer benefit on top of the remedies of repair/replace followed by a price reduction. We recommend the route BIS is currently taking—introducing digital content rights as currently proposed.

February 2014

Written evidence submitted by the National Franchised Dealers Association (NFDA) (CR 16)

1. About the NFDA

1.1 The NFDA represents the interests of franchised motor vehicle dealers and authorised repairers operating in the UK motor retail sector. The NFDA is the UK's leading retail trade association in this sector, with over 4,700 retailer (dealer) members. The vast majority of the NFDA's members are SMEs who sell directly to consumers (as well as corporate customers, fleets etc).

1.2 NFDA research suggests that the annual turnover of the motor retail sector in the UK is around £140 billion and it employs approximately 554,000 people. It follows that the motor retail sector is one of the most important business sectors in the UK.

1.3 The NFDA has, for many years, been pro-active in championing consumer welfare alongside the welfare of its members (whether in terms of greater commercial independence, more transparency in dealings, improved choice, better quality services or lower prices).

1.4 The NFDA's most recent consumer initiative is its Trusted Dealers used car portal.[40] This user friendly used car retail platform requires participating franchised dealers (NFDA members) to abide by key quality standards relating to the sale of used cars. Its *raison d'être* is to give UK consumers greater peace of mind when buying a used car. It has been endorsed by WhatCar?, the UK's largest independent car buyers' guide.

2. Summary

2.1 The Bill follows a House of Commons BIS Committee report, issued on 23 December 2013, which recommended major changes to a draft version of the Bill published for pre-legislative consultation last summer. Some of these changes have been provisionally adopted by the Government in the latest version of the Bill.

2.2 The changes to consumer (and competition) law represented by this proposed legislation have been hailed as the most radical overhaul of UK consumer rights in decades. While much emphasis has been placed on consolidating and clarifying consumer law into a single instrument, the Bill brings about a number of new developments, which will have very important implications for dealers and other retailers and service providers.

2.3 While some elements of the Bill represent positive developments, others have the potential to harm businesses (including those in the automotive retail sector) and create unintended adverse consequences for consumers. These relate primarily to the consumer's enhanced rights to reject goods and the retailer's ability (or otherwise) to make deductions for use in certain circumstances.

2.4 The NFDA would urge the Committee to consider these issues carefully in light of the points raised in this response as part of its deliberations.

3. Key observations

3.1 The purpose of this submission to draw the Committee's attention to certain problematic elements of the Bill and to invite the Committee to consider a more proportionate solution.

[40] www.trusteddealers.co.uk

3.2 In particular, the NFDA would like to focus on the following features of the Bill:

3.2.1 The Bill proposes that consumers will only have to accept one repair or replacement before being entitled to a refund (Section 24(5)).

3.2.2 The Bill proposes that consumers will have the right to receive a full refund when they return faulty goods within 30 days (Section 22(3)).

3.2.3 Even where the retailer is entitled to make a deduction for use in accordance with the Bill (which is an essential feature of the Bill in principle), as far as new car sales are concerned, it is difficult to arrive at a workable methodology which does not in some way need to take into account residual values (Section 24(10)).

3.3 The NFDA would stress that its comments in respect of the Bill have to be understood in the context of the automotive retail sector, which takes into account the following market features:

3.3.1 the very high value and complexity of the consumer goods (cars etc) being supplied;

3.3.2 the propensity for any complex goods to develop faults (particularly at an early stage in their lifecycle), albeit ones that can be rectified effectively;[41]

3.3.3 the challenges involved in diagnosing faults in complex products first time[42] (and how one fault may prompt another) and the associated retailer investment that is required, particularly on the part of franchised dealers;

3.3.4 the impact of residual values, which means that certain goods, particularly new cars, lose a significant proportion of their value following purchase (hence the very disproportionate impact on the retailer of a return for a minor issue);[43] and

3.3.5 the weak position of dealers vis-à-vis manufacturers in the supply chain, and their inability to seek recourse from vehicle manufacturers (in cases where the consumer elects not to rely on the manufacturer's warranty to address minor faults, but to exercise the enhanced rights set out in the Bill).

In other words, supply terms applied by vehicle manufacturers to dealers will mean that dealers, many of which are SMEs, will have to absorb most of the financial consequences of any defect, rather than the manufacturer who has in fact designed and produced the defective product.[44]

3.4 While there is some disagreement and very considerable variation in terms of both the occurrence of faults in cars and how different cars depreciate in value, the NFDA would urge the Committee to consider how certain provisions contained in the Bill might impact dealers as a result of these market features.

3.5 The NFDA would stress that careful consideration has to be given to ability of dealers, which operate on very narrow margins[45], to be able to absorb the impact of the changes introduced by the Bill (as highlighted above) without such changes manifesting themselves in indirect adverse consumer consequences, such as increased prices.

3.6 The NFDA has actively participated in the consultation process relating to the Consumer Rights Bill, the purpose of which is to consolidate, simplify and improve UK consumer protection law.

3.7 The NFDA is not asking for special treatment for the automotive retail sector, nor is it seeking to exaggerate the possible repercussions for car buyers; indeed, in many respects it considers the Bill will deliver real benefits. This should involve a wider understanding and recognition of how certain features of the Bill, which on the face of it, are attractive for consumers, are disproportionate and may manifest themselves in adverse economic effects in respect of high value and complex products. More importantly, the NFDA believes that with relatively modest adjustment, the elements of the Bill that give rise to concerns may be tempered so as to avoid these consequences without prejudicing the interests of consumers.

4. One repair or replacement

4.1 Current best practice in the automotive industry when a fault occurs is, initially, to repair, and then, if not successful, replace on a like for like basis or cancel.

41

42

43 The NFDA does not endorse AA data; however, AA research illustrates an important point in this area. According to the AA, the average new car will have a residual value of around 40% of its new price after three years (assuming 10,000 miles/year) or in other words will have lost around 60% of its value at an average of 20% per year—http://www.theaa.com/motoring_advice/car-buyers-guide/cbg_depreciation.html. The AA goes on to state *"A new car loses value as soon as you drive off the forecourt and by the end of the first year will have lost around 40% of its value. This varies a lot though and the best may lose as little as 10%."*

44 A 2011 market survey carried out by the European Commission (EBTP) in respect of Unfair Trading Practices revealed that a huge proportion of dealers were subjected to unfair terms and practices at the hands of their supplies. Some of the findings are reproduced in **Annex 1** of this submission. This research was supported by a subsequent Green Paper on Unfair Trading Practices. To date, the UK government has refused to engage positively on this issue with a view to encouraging fairer and more predictable trading relationships in the sector.

45 According to ASE UK dealers returned 1.47% net profit in 2013, up from 1.18% in 2012.

4.2 While the law does not define how many repairs are appropriate there is a general acceptance that several can occur depending on the severity of the failure.[46]

4.3 If the Bill is enacted in its proposed form, any goods sold by a retailer will be subject to either one attempt to repair or one replacement.

4.4 While this may be appropriate for many goods sold by retailers, it is not for cars and their associated parts for the reasons set out above. As highlighted, cars are by their nature complex and as such give rise to a variety of potential problems—both in terms of their greater propensity for faults and in terms of repairing. The franchised dealer sector is very successful in addressing these faults; nevertheless, faults occurring in the first 30 days and six months from the date of a car's purchase are not uncommon.

4.5 Further, not only can faults be hard to diagnose and isolate, but it is not unusual for the repair of one fault to trigger another. If the one repair rule is introduced this could lead to significant additional cost for dealers as they take precautionary measures to ensure the one repair is sufficient to avoid triggering a cancellation.

4.6 This is likely to include the replacement of potentially unnecessary parts at the cost of both the consumer and the dealer, either because the dealer believes the part *could* be the cause of the problem or to decrease the risk of a second fault.

4.7 More importantly, the one repair or replacement rule is disproportionate because it could lead to a situation where the occurrence of two very minor (and easily remediable) faults on a car (say, a faulty windscreen wiper or hazard light), which the dealer is perfectly willing and able to correct, enable the consumer to reject the car and expose the dealer to a very substantial loss.

4.8 This situation would not be addressed as a result of the dealer being able to make a deduction for use (because the major negative impact for the dealer would be the residual value of the car). This is discussed further below.

5. Deductions for use

5.1 The final right to cancel includes the right for the retailer to make a deduction for the use of the good by the consumer. The calculation for this is set out in the legislation, although relatively little detail is provided.

5.2 When the draft legislation was published last summer, it was implied that goods such as cars with a defined second hand value could have this value applied instead.

5.3 The NFDA welcomed the idea of using this defined value where applicable, although this gave rise to some issues for dealers particularly in relation to very new vehicles. For example, although the sector has highly respected and sophisticated valuation guides they generally do not value vehicles under six months old, leading to obvious difficulties in providing a defined value.

5.4 However, even though this feature of the draft Bill exposed dealers to risk, the latest version of the Bill increases this risk further and precludes the application of residual values altogether. In other words, in its original form, the draft Bill allowed the dealer, where there is a clear (and independently evidenced or accredited) second hand value for the goods[47], to take this value into account when granting any refund to the consumer.[48] The Bill no longer makes this provision.

5.5 This will leave dealers very highly exposed. A brand new vehicle can lose up to a quarter of its value as soon as it driven off a dealer's forecourt by a consumer.

5.6 Therefore, if a consumer invokes their right to cancel within the first six months of ownership, a dealer could be exposed to significant financial loss, as the car would not only have lost substantial retail value but the dealer would also struggle to counteract this loss via taking deductions for usage from the consumer.

5.7 While there may be certain explanations for this change of approach on the part of the Government (in terms of the interface of the Bill with the Consumer Rights Directive), it is vital that the disproportionate risk faced by dealers is addressed. One option for discussion would be to increase the number of repairs that the dealer is entitled to attempt before any right of rejection is triggered.

6. Full refund for returns within 30 days

6.1 The concept of codifying early rejection is beneficial to both consumers and retailers, including dealers, however the right balance needs to be struck.

6.2 The issue with goods such as cars is the time of ownership does not generally reflect usage.

[46] Appeal Court case law (Bernstein v Palmerston Motors 1987) has held that the supplier must be given three chances to rectify the fault for which the goods are rejected and must have failed to do so.

[47] Which may, in itself, present a challenge for new cars where published residual values might not, currently, be available for vehicles which are less than six months' old.

[48] Rejections taking place within the first 30 days are carved out of this, even though the fault might be minor and easily remediable.

6.3 In the automotive retail sector, distance travelled is often more important than time of ownership and codifying a fixed period of 30 days for early rejection into the Bill shows no flexibility for a particular consumer's situation.

6.4 For example, a customer may have had the car 30 days but only travelled 10 miles whilst another customer may have only had the car a week and travelled 1,500 miles. To not take account of the potential range of circumstances can only prejudice the dealer.

6.5 A further issue with the changes in the 'rejection right' is the extension in the Bill allowing a consumer to accept the offer to have a fault repaired successfully but still retain the right to reject the vehicle within the 30 day period. This, coupled with the absence of the 'right to deduct' an amount for usage of the vehicle during the initial 30 days of ownership, has the potential for significant detriment to the dealer.

7. Conclusions

7.1 While the Bill is worthy in a number of aspects, in attempting to achieve a consumer-biased one-size-fits-all approach across all sectors, it risks doing more harm than good.

7.2 The NFDA continues to oppose, in particular, the proposed one repair or replacement rule. It will also continue to lobby for a fairer and clearer right of deduction. The right for a dealer to make a deduction from any refund to reflect a car's second hand value is vital. This is because it is the only way to mitigate the risk of the dealer suffering a disproportionate loss (taking into account residual values) where the consumer is unwilling to allow the dealer a fair opportunity to resolve a complex problem or to resolve a related or second defect in the six months following purchase.

7.3 The effect of any right of rejection in the case of an unsuccessful repair or subsequent defect is, in some respects, mitigated by the dealer's ability to make a deduction. Under the draft Bill, the fact that the dealer would at least have been able to deduct from any refund an amount to reflect the then residual value of the vehicle may, in itself, have brokered an amicable resolution. The Government's decision to reject the more radical BIS Committee proposal (to remove the right of deduction altogether) is sensible; however, limiting the measure against which the dealer can calculate the deduction is disproportionate and will give rise to adverse consequences.

7.4 Given the potential for increased costs to be passed on in the form of higher prices, it follows that much more needs to be done to ensure that dealers (and, indirectly, consumers) do not, as a result of certain disproportionate elements of the legislation in question, suffer undue harm.

7.5 The NFDA would be pleased to make further representations to the Committee on these issues.

February 2014

Annex 1

UNFAIR B-2-B TRADING PRACTICES

In early 2012, the European Commission (DG Internal Market) published its summary report on unfair B2B commercial practices following its review of evidence gathered from a 2011 pan-European EBTP consultation.[49]

The Commission received 746 responses from EU businesses. The businesses were invited to share with the Commission their experiences of unfair practices during all stages of a business relationship.

Most of the respondents (58%) declared that they had been affected by unfair practices within the last two years and an even higher percentage stated that they did not feel sufficiently protected by the legal systems operating in their home Member State (68%).

Key findings

The unfair practices experienced by respondents in the automotive retail sector (motor dealers) were so widespread and pronounced that the Commission devoted separate sections of its report to focus on unfair practices in this sector.

The massive scale of the problem can be seen from the fact that 250 responses (34% of all responses) came from dealers (almost twice as many as from the rest of the retail/wholesale sector as a whole), reporting on the practices of their vehicle manufacturers.[50]

[49] European Business Test Panel online consultation, July—October 2011

[50] Responses (across all sectors) came from 26 EU states as well as Norway and Iceland. The major automotive contributors were Austria (36%), Belgium (10%), Germany (14%), Poland (15%) and the UK (12%).

Extracts from the report, which speak for themselves, highlight the seriousness and the currency of the unfair practices affecting dealers:

— *"…the sector in which respondents feel least protected against unfair practices is the automotive retail sector. In this sector,* ***87%*** *of respondents indicated that they did not feel sufficiently protected against unfair practices"*[51]

— *"Looking at the* ***respondents' sectors of activity****, the sector in which most unfair practices were indicated is the automotive sector, where 87% of respondents experienced unfair practices during the past two years"*[52]

— *"In the automotive [retail] sector, the percentage of companies which had recently been party to an unfair contract is significantly higher than the average for all sectors, at 77% compared to an overall figure of 66%"*[53]

— *"Also as regards post-contractual unfair practices, recent experiences of unfair practices in the automotive retail sector account for 86%, ie significantly higher than the average for all sectors and also in comparison with each of the other sectors"*[54]

— *"the automotive retail sector once again had the highest percentage of respondents (83%) who were unhappy with existing enforcement mechanisms"*[55]

— *"In the wholesale and retail distribution sector [generally], only 8% of respondents gave 'Fear of contract being revoked' as a reason [for not making use of enforcement instruments], while 23% in the automotive [retail] sector had this fear. Indeed, also the fear of retaliation—at 26%—was also significantly higher in the automotive sector than in manufacturing (17%) or wholesale and retail distribution (16%)"*[56]

Written evidence submitted by Symantec (CR 17)

Symantec welcomes the opportunity to provide written evidence to the Public Bill Committee during its scrutiny of the Consumer Rights Bill. We support the work of the Department for Business, Innovation & Skills (BIS) in striving to provide a clearer, improved framework for consumer law, and we have engaged with the Department throughout the formulation of the Bill. We have also submitted evidence to the Business, Innovation & Skills Select Committee's pre-legislative scrutiny of the draft Bill.

We fully support the consultative approach the Government has taken during this process, however we remain concerned with some of the provisions in the Bill which we believe will have a negative impact on consumer protection if enacted as currently drafted.

A simpler framework will help consumers and industry by providing clarity on the available rights and remedies consumers have when undertaking commercial contracts for goods, services and digital content. However, the Bill does not acknowledge some of the implications for complex Internet security software and the complex environment in which it operates.

During pre-legislative scrutiny and Commons Second Reading of the Bill, a number of Members of Parliament commented that they welcomed steps to enhance the climate of trust in the UK for consumers making online transactions. This approach is clearly welcomed; however a prerequisite for engaging in the online world is the need for effective Internet security to protect consumers from the myriad of online threats from malicious software, infected websites to phishing attacks. The UK government has taken great strides to improve the awareness of Internet security threats that consumers are faced with and have launched a number of initiatives aimed at providing citizens with effective tools, advice and resources to help mitigate risks for consumers operating in the digital world.

However, we believe that some of the principles in the Bill will negate ongoing government initiatives aimed at improving consumer protection. It will also have a negative impact on the Internet security industry's ability to provide effective and timely protection for consumers that is able to adapt to the changing nature of the threat. If the Bill is enacted as currently drafted, it will encourage suppliers to slow down release of software updates, potentially resulting in critical protection being delayed for the majority of customers. It will also negatively impact well established business practices that have traditionally benefited consumers.

We have highlighted our concerns with the current draft of the Bill in more detail below; along with suggested improvements should the Committee wish to take these into consideration.

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[51] Page 14. It is worth noting that the average for all responses was 68% (page 12), highlighting the pronounced lack of protection experienced in the automotive retail sector. Unsurprisingly, micro and small businesses (based on employee numbers) felt less protected than their larger counterparts (page 13).
[52] Pages 15 and 16.
[53] Page 26
[54] Pages 29 and 31
[55] Page 36
[56] Page 38.

DIGITAL CONTENT TO BE OF SATISFACTORY QUALITY (CLAUSE 34)

The clause states that digital content must be of satisfactory quality and thus 'free from minor defects'. This is an extremely broad term and is consequently open to interpretation. This clause would prove problematic for all companies developing any type of software as it is not possible to guarantee that software will be free from all minor defects.

Software is a complex product, used in an even more complex environment, in conjunction with many other pieces of software. That bugs and errors may occur in the interaction of all these products without impairing usage or functionality is unavoidable. Moreover, due to the interoperation of one piece of software with other software components the risk of minor errors increases exponentially and is often out of the control of the manufacturer. Consumers should expect that an ebook or an mp3 music file come free from minor defects, however this is impossible to guarantee in complex software.

We welcome the revised Explanatory Notes clarifying that it is common to encounter some bugs in complex software, however we would prefer that this was expressly included in the Bill as it would provide greater certainty to industry.

Below is a version of the clause, with suggested amendments highlighted in bold. These are intended as suggested improvements that the Committee may wish to take into consideration when examining the clause.

1) *Every contract to supply digital content is to be treated as including a term that the quality of the digital content is satisfactory.*
2) *The quality of digital content is satisfactory if it meets the standard that a reasonable person would consider satisfactory, taking account of—*
   a) *any description of the digital content,*
   b) *the price mentioned in section 33(1) or (2)(b) (if relevant), and*
   c) *all the other relevant circumstances (see subsection (5)).*
3) *The quality of digital content includes its state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of digital content—*
   a) *fitness for all the purposes for which digital content of that kind is usually supplied;*
   b) *freedom from minor defects;*
   c) *safety;*
   d) *durability.*

   Minor defects in software products that do not affect the fitness for purpose or the main functionalities of the product as described by the trader or the producer shall not be regarded in principle as rendering the quality of the digital content unsatisfactory.
4) *The term mentioned in subsection (1) does not cover anything which makes the quality of the digital content unsatisfactory—*
   a) *which is specifically drawn to the consumer's attention before the contract is made,*
   b) *where the consumer examines the digital content before the contract is made, which that examination ought to reveal, or*
   c) *where the consumer examines a trial version before the contract is made, which would have been apparent on a reasonable examination of the trial version, or*
   d) ***which results from the consumer using the digital content outside the compatibility and functionality characteristics stated by the trader, the producer or any representative of the trader of the producer, or***
   e) ***which results from any alterations to the consumer's hardware configuration or software environment by the consumer or any third party subsequently to the digital content being supplied.***
5) *The relevant circumstances mentioned in subsection (2)(c) include any public statement about the specific characteristics of the digital content made by the trader, the producer or any representative of the trader or the producer.*
6) *That includes, in particular, any public statement made in advertising or labelling.*
7) *But a public statement is not a relevant circumstance for the purposes of subsection (2)(c) if the trader shows that—*
   a) *when the contract was made, the trader was not, and could not reasonably have been, aware of the statement,*
   b) *before the contract was made, the statement had been publicly withdrawn or, to the extent that it contained anything which was incorrect or misleading, it had been publicly corrected, or*
   c) *the consumer's decision to contract for the digital content could not have been influenced by the statement.*

8) In a contract to supply digital content a term about the quality of the digital content may be treated as included as a matter of custom.

9) See section 42 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

Digital content to be as described (clause 36)

The Bill also requires that digital content remain as it was initially described for the entire duration of the contract (clause 36). This has a number of practical implications when it comes to security software that Symantec considers problematic, due to its dynamic nature. Software updates typically follow the evolution of the technology landscape, and may for instance replace obsolete or vulnerable functionalities with state of the art and more secure ones, so that the software no longer necessarily entirely 'meet the description given' initially. The Bill would impose liability for non-conformity in such a case, even though the change is in the very interest of the consumer.

We welcome the addition in the Explanatory Notes stating that "as long as the digital content continues to match the original product description and the quality is not reduced, additional features would not necessarily breach this right." However this does not adequately take into consideration that functions may have to be removed from software, either due to a specific vulnerability or because the function is obsolete.

Clause 36(4) provides that changes to the digital content are only permitted when expressly agreed between the consumer and the trader. This would prove extremely problematic for Internet security software providers, as software requires frequent modification in order to enhance the product or to fix a vulnerability. In practice, this clause would mean that software providers would need to seek consent on a case-by-case basis in order to modify the product. In addition, there is no way of predicting future threats and therefore predict the changes that would need to be made to software.

1) Every contract to supply digital content is to be treated as including a term that the digital content will match any description of it given by the trader to the consumer.

2) Where the consumer examines a trial version before the contract is made, it is not sufficient that the digital content matches (or is better than) the trial version if the digital content does not also match any description of it given by the trader to the consumer.

*2a) **Where the trader or the producer modifies the digital content subsequently to the conclusion of the contract for the purpose of adapting its characteristics, functionalities or compatibility to the evolution of the circumstances in which the digital content is to be used, or for the purpose of protecting the safety or security of the consumer or the consumer's property, such modifications shall not be considered as violating subsection 1 provided that the trader or the producer informs the consumer of the modifications.***

3) Any information that is provided by the trader about the digital content that is information mentioned in paragraph (a), (j) or (k) of Schedule 1 or paragraph (a), (v) or (w) of Schedule 2 (main characteristics, functionality and compatibility) to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) is to be treated as included as a term of the contract.

4) A change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.

5) See section 42 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.

Remedy for damage to device or to other digital content (clause 46)

Regarding consumer compensation for damage to device or other digital content (clause 46), this clause again fails to appreciate the complexities of some digital content, in particular software. Software failure and malfunctions can happen for a number of reasons unrelated to the design or development of the software itself. Aside from improper use by the consumer, the device might have a hardware defect, or different pieces of software coexisting on the device might be incompatible. In the area of internet security solutions, with highly targeted attacks and unique malware on the rise, precautionary blocking of otherwise legitimate content (aka 'false positive') may occasionally happen, this is an acceptable risk to take in exchange for higher security.

The clause now includes a provision that the consumer will be entitled to a repair as a remedy. This will prove challenging for Internet security providers due to the dynamic nature of software. Repairs, such as a software patch, are costly, time and resource intensive, and therefore the proposals may encourage suppliers to slow down such releases/patches pending more tests, potentially resulting in critical protection being delayed for the majority of customers.

1) This section applies if—

a) a trader supplies digital content to a consumer under a contract,

*b) the digital content **in and of itself** causes damage to a device or to other digital content,*

ba) the damage is not caused by the consumer negligently or deliberately performing an action, or failing to perform an action, against the explicit recommendations of the trader or of the producer;

bb) the damage is not caused by the circumstances in which the consumer uses the digital content if those circumstances are not such as the trader could reasonably foresee when concluding the contract;

bc) the damage is not caused in the process of an urgent modification for security or safety purposes and under circumstances that the trader could not reasonably foresee when making the modification;

c) the device or digital content that is damaged belongs to the consumer, and

d) the damage is of a kind that would not have occurred if the trader had exercised reasonable care and skill.

2) If the consumer requires the trader to provide a remedy under this section, the trader must either—

a) repair the damage in accordance with subsection (3), or

b) compensate the consumer for the damage with an appropriate payment.

3) To repair the damage in accordance with this subsection, the trader must—

a) repair the damage within a reasonable time and without significant inconvenience to the consumer, and

b) bear any necessary costs incurred in repairing the damage (including in particular the cost of any labour, materials or postage).

4) Any question as to what is a reasonable time or significant inconvenience is to be determined taking account of—

a) the nature of the device or digital content that is damaged, and

b) the purpose for which it is used by the consumer.

5) A consumer with a right to a remedy under this section may bring a claim in civil proceedings to enforce that right.

6) The Limitation Act 1980 and the Limitation (Northern Ireland) Order 1989 apply to a claim under this section as if it were an action founded on simple contract.

7) The Prescription and Limitation (Scotland) Act 1973 applies to a right to a remedy under this section as if it were an obligation to which section 6 of that Act applies.

February 2014

Written evidence submitted from the U.S. Chamber Institute for Legal Reform (CR 18)

CONCERNING SCHEDULE 8 OF THE CONSUMER RIGHTS BILL

About the U.S. Chamber Institute for Legal Reform

1. The U.S. Chamber Institute for Legal Reform is a not-for-profit public advocacy organisation affiliated with the U.S. Chamber of Commerce, the world's largest business federation, which represents the interests of more than three million businesses of all sizes, sectors and regions, in addition to state and local chambers and industry associations. Many of the U.S. Chamber's members are companies that conduct substantial business in the UK. ILR is therefore deeply interested in the orderly administration of justice in the UK.

2. ILR's mission is to restore balance, ensure justice and maintain integrity within the civil legal system. We do this by creating broad awareness of the impact of litigation on society and by championing common sense legal reforms at the state, federal and global levels. Since its founding in 1998, ILR has worked diligently to limit the incidence of litigation abuse and has participated actively in legal reform efforts in the United States, the UK and elsewhere.

Summary

3. ILR's primary interest in the Consumer Rights Bill is not the reforms of consumer law contained in the body of the Bill but the changes to private actions in competition law that would be introduced by clause 80 and Schedule 8 of the Bill. In particular, paragraph 5 of Schedule 8 would introduce opt-out collective litigation to the UK for the first time.

4. ILR's experience of this model of litigation, not only in the U.S. but also in other jurisdictions such as Australia, is that it is prone to abuse and generates significant costs for businesses of all sizes. These costs sometimes arise as a result of businesses being pressured into taking strategic decisions to settle weak or altogether meritless cases. Therefore, these costs will not fall exclusively on those businesses that are adjudged by the Courts not to have complied with the Competition Act.[57] Even businesses that contest claims all the way to judgement and succeed cannot expect to recover their legal costs in full, let alone the costs incurred in devoting time and internal resources to litigation (especially if recoverable costs are capped). ILR calls on the

[57] Department for Business, Innovation & Skills, *Private Actions in Competition Law: A consultation on options for reform—final impact assessment* (January 2013). See summary analysis of Policy Options 2 and 3.

Committee to amend paragraph 5 of Schedule 8 of the bill by removing the possibility of opt-out collective proceedings, which would be the most costly aspect of any additional litigation that occurred as a result of the changes set out in Schedule 8.

5. If, despite the attendant risks, opt-out collective proceedings are to be introduced in the UK, ILR calls for clarification that it will not be possible for third party litigation funders to invest in such cases. As currently drafted, paragraph 6 of Schedule 8 to the Bill would prohibit "damages-based agreements" in relation to such proceedings. While it seems clear on the face of current legislation that third party litigation funding agreements would be captured by this prohibition (see paragraph 20 and footnote 14, below) the Bill would be improved by explicitly stating that this is the case.

6. ILR also comments below on: the authorisation of representatives in collective proceedings; the eligibility of claims for collective proceedings; the choice of whether proceedings should be opt-out or opt-in; and the assessment of damages in collective proceedings.

The Introduction of Opt-out Collective Proceedings

7. In 2012, the Department for Business Innovation and Skills carried out a public consultation on proposals for the UK regime on private competition litigation. In its response, published in January 2013, the Government reported that its proposals had provoked a strong reaction from stakeholders, particularly on the question of whether opt-out actions should be introduced.[58] Respondents were said to be sharply divided on this point.

8. ILR has significant experience of the negative consequences of opt-out collective or "class" litigation and was alarmed that the proposal to introduce an opt-out mechanism in the UK was taken forward in the Consumer Rights Bill. ILR also finds it difficult to understand why the Government proposes to expand the possibilities for collective litigation based on competition law when, in relation to consumer law, it has rightly recognised that collective litigation generally (not only opt-out proceedings) creates incentives for intermediaries which result in a heavy burden on businesses.[59] The attempt to distinguish collective litigation based on one particular area of law, which is well known to generate complex and protracted disputes, is unconvincing.

9. The experience of the U.S. class action system, and other jurisdictions that have opt-out proceedings such as Australia, is that they are inherently prone to abuse by profit-seeking third parties such as lawyers and litigation funders.[60] The scale of liability in such cases provides an opportunity for these parties to extract lucrative settlements from businesses which choose to settle claims as a means of avoiding the time, costs and negative publicity associated with large-scale litigation, regardless of the merits of the litigation itself.

10. Recent analysis shows that liability costs as a proportion of GDP are greater in the United States, where opt-out class actions are well established, than in other major jurisdictions (1.66% in 2011). Meanwhile, liability costs in the UK as proportion of GDP have risen in recent years and are already greater than in other European countries (1.05% compared with 0.63% in the Eurozone).[61] These high costs may deter investment and increase business's borrowing costs, which would have a negative impact on growth, investment and job creation at precisely the time when the UK economy is experiencing a fragile recovery. In the view of the Australian Institute of Company Directors, class actions, due to their size and scale "*can impose costs on the public in the form of higher consumer prices, the diminution in share value ... and decreased tax revenue*".[62]

11. ILR also opposes the provision in paragraph 6 of Schedule 8 to the Bill that envisages unclaimed damages in opt-out proceedings being distributed to charity. Without commenting on the merits of the work done by the designated charity (currently the Access to Justice Foundation), ILR considers the idea of distributing damages awards to non-parties to be at odds with the principle that damages should be compensatory. Furthermore, such a mechanism greatly reduces the incentive for representatives to identify those actually harmed. Instead it allows lawyers and third party funders to focus on their own reward, without having to be concerned about whether victims are actually compensated. Designating a particular charity to receive unclaimed sums may remove some of the problems associated with the use of *cy pres* mechanisms in litigation, but it does not address the fundamental issue that the damages awarded will not benefit the absent class members.[63]

12. Moreover, the fact that opt-out proceedings result in large sums going unclaimed calls into question whether opt-out collective actions are necessary to achieve the goal of compensation.

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[58] Department for Business Innovation & Skills, *Private Actions in Competition Law: A consultation on options for reform—government response* (January 2013). See paragraph 5.7.

[59] Department for Business, Innovation & Skills, *Civil Enforcement Remedies: Consultation on extending the range of remedies available to public enforcers of consumer law* (November 2012). See paragraph 3.10.

[60] King & Wood Mallesons, *Class Actions in Australia: The Year in Review 2012*, available at: http://www.mallesons.com/Documents/Class_Actions_in_Australia-The_Year_in_Review_2012.pdf.

[61] NERA Economic Consulting for ILR, *International Comparisons of Litigation Costs: Europe, the United States and Canada* (May 2013), available at: http://www.instituteforlegalreform.com/sites/default/files/NERA%20FULL.pdf.

[62] Australian Institute of Company Directors, *Corporations Amendment Regulations 2012* (27 January 2012), available at: http://www.companydirectors.com.au/Director-Resource-Centre/Policy-on-director-issues/Policy-Submissions/2012/Litigation-Funding_Corporations-Amendment-Regulations-2012.

[63] For an in-depth view of the problems associated with cy pres mechanisms in class actions, see ILR's *Cy Pres: A Not So Charitable Contribution To Class Actions Practice* (October 2012), available at: http://www.instituteforlegalreform.com/sites/default/files/cypres_0.pdf.

13. For the reasons set out above and in its submission to the 2012 consultation on private competition actions,[64] ILR does not believe that the case has been made for introducing an opt-out model in the UK, particularly given the attendant risk of further increases in liability costs to UK businesses and the wider economy.

14. Notwithstanding its opposition to the introduction of opt-out collective proceedings, ILR offers the following comments on the detailed provisions set out in Schedule 8.

Damages-Based Agreements in Collective Proceedings

15. It is proposed that damages-based agreements ("DBAs") (i.e., agreements pursuant to which lawyers are paid a proportion of the money recovered by their clients) should be unenforceable if they relate to opt-out collective proceedings.[65]

16. ILR welcomes this proposal but does not believe the absence of DBAs will necessarily prevent abuse, especially if DBAs are interpreted as encompassing only agreements by which claimants agree to give up a share of the proceeds of litigation to lawyers. After all, third party litigation financing also involves agreements by which claimants agree to give up a portion or percentage of litigation proceeds, in such instances to the litigation funders. The example of Australia is particularly instructive given that opt-out collective actions have been available there for some time, but, unlike in England and Wales, lawyers in Australia are not permitted to enter into agreements equivalent to DBAs. This has not prevented abuse in the Australian class actions system, primarily as a result of third party litigation funding, which is well-established in Australia[66] and is becoming increasingly prominent in the UK. Litigation funding is also problematic in opt-out collective actions because in an opt-out lawsuit where many, if not most, group members are absent, these absent group members will not have an agreement with the funder. This circumstance creates conflicts of interest within the group, especially where a funder seeks its premium in respect of recoveries by non-funded group members.

17. It has recently been reported that one Australian law firm created its own litigation funding vehicle, effectively circumventing the prohibition on DBAs.[67] It was proposed that this vehicle would co-fund class members who were participating in a class action conducted by the same law firm, with the class members waiving any conflict of interest that arose as a result. The law firm initially sought approval from the Court for this arrangement but withdrew its application following unfavourable statements by the Commonwealth Attorney-General. Those statements also reveal that the Attorney-General is to propose further regulation of litigation funding (something that should be done in the UK).

18. In many respects, third party litigation funding presents a greater risk in connection with opt-out collective actions than DBAs between claimants and lawyers, because lawyers are at least subject to professional conduct rules, whereas litigation funders in the UK have only a voluntary code of conduct. In a debate in the House of Lords on the Damages-Based Agreements Regulations 2013, Lord Beecham observed that, of 25 litigation funders then established in the UK, only nine were members of the Association of Litigation Funders which administers the voluntary code. He went on to remark that "*[t]hey [litigation funders] are not even joining their own association, let alone being responsible to any independent and impartial organisation to oversee their work*."[68]

19. In the recent English case of *Excalibur Ventures LLC v Texas Keystone and others*, three funders supported what were described by Lord Justice Christopher Clarke as "*a range of bad, artificial or misconceived claims*" with a "*grossly exaggerated*" quantum of US$1.65 billion.[69] None of the three funders, two of which were U.S. companies and the third a company incorporated in the Cayman Islands, were members of the Association of Litigation Funders, and there are doubts over whether one of them even continues to exist.

20. The prohibition contained in the Bill on damages-based agreements in opt-out collective proceedings already appears to capture litigation funding agreements on the basis that they fall within the definition of a DBA contained in section 58AA of the Courts and Legal Services Act 1990.[70] However, in the absence of case law to clarify whether litigation funding agreements do amount to DBAs, an express prohibition on litigation funding agreements in opt-out collective proceedings should be included in the Bill. The prohibition should also be extended to opt-in collective proceedings to avoid a scenario in which litigation funders rather than claimants become the driving forces behind collective litigation and are incentivised to promote spurious claims.

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[64] See: *http://www.instituteforlegalreform.com/uploads/sites/1/ILR_BIS_Response20287-24-201229-5.pdf*.

[65] Paragraph 6 of Schedule 8 (new section 47C(7) of the Competition Act 1998).

[66] King & Wood Mallesons, *Class Actions in Australia: The Year in Review 2012*, available at: http://www.mallesons.com/Documents/Class_Actions_in_Australia-The_Year_in_Review_2012.pdf.

[67] Jones Day, *Litigation Funding in Australia: More Swings and Roundabouts as Lawyers Withdraw Application to be Funders* (February 2014), available at: http://www.jonesday.com/files/Publication/90f16e70-74c5-4c29-9083-f68810f07e66/Presentation/PublicationAttachment/fd611866-6ffa-40be-8961-f76145057184/Litigation%20Funding.pdf.

[68] Hansard HL Deb 26 February 2013, vol 743, col GC130.

[69] *Excalibur Ventures LLC v Texas Keystone and others* [2013] EWHC 4278 (Comm), paragraphs [24] and [29].

[70] A "damages-based agreement" is defined as "*an agreement between a person providing advocacy services, litigation services or claims management services* [emphasis added] *and the recipient of those services which provides that—(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained"*. For these purposes, *"claims management services" means "advice or other services in relation to the making of a claim" including "the provision of financial services or assistance*" (section 4 of the Compensation Act 2006).

Comments on Other Aspects of Schedule 8 of the Bill

Authorisation to act as a representative in collective proceedings

21. Paragraph 5 of Schedule 8 to the Bill provides that the Competition Appeal Tribunal (the "Tribunal") could only authorise a person to act as representative in collective proceedings if the Tribunal considered it "*just and reasonable*".[71] The same condition would apply to the new collective settlement procedure contained in the Bill. It is further proposed that the factors to be taken into account by the Tribunal when deciding whether to authorise a person to act as a representative should be set out in the Tribunal's procedural rules.

22. In its response to the consultation, the Government stated that claimants or "*genuinely representative bodies*" should be permitted to act as representatives but not law firms, third party litigation funders or special purpose vehicles. ILR understands that the Government intends to publish draft Tribunal rules on collective actions that will address this point. The Bill must be read carefully alongside those draft rules.

23. To ensure that representatives are genuinely representative, the Bill or the Tribunal rules should require at least the following factors to be taken into account:

(a) *track record and expertise*—any non-claimant representative (i.e., any representative which is not itself a member of the class) should be required to demonstrate that it has acted in the interests of the parties making up the majority of the class (e.g., consumers) for a number of years and has the relevant expertise to serve their interests;

(b) *non-profit making character*—non-claimant representatives should not have any financial motive for commencing litigation beyond their desire to obtain redress for those who have genuinely suffered harm;

(c) *ownership, governance and sources of funding*—to ensure representatives are not merely fronts for profit-making enterprises with an interest in litigation (e.g., law firms, third party litigation funders and claims management companies), the Tribunal should take account of who owns, controls and funds (as applicable) parties seeking to act as representatives;

(d) *ability to comply with an adverse costs order*—the "loser pays" rule is an important deterrent against frivolous litigation and provides protection to parties who are forced to incur costs responding to cases which ultimately prove to be without merit. To ensure defendants are not deprived of this protection, it is essential that representatives have the financial means to pay defendants' costs if ordered to do so;

(e) *previous conduct*—the Tribunal should be permitted to take account of previous conduct, including, for example, whether the person seeking to act as representative has a history of being a vexatious litigant or failing to comply with regulations and codes on direct marketing.

Eligibility of claims for collective proceedings and choice of opt-in vs. opt-out

24. It is proposed that claims would only be eligible for inclusion in collective proceedings if the Tribunal considered that they raised "*the same, similar or related issues of fact and law and [were] suitable to be brought in collective proceedings*."[72] The same condition would apply in relation to the new collective settlement procedure contained in the Bill. It is envisaged that factors to be taken into account when the Tribunal determines whether claims are "*suitable to be brought in collective proceedings*" (but not whether they raise the same, similar or related issues of fact or law) will be set out in new procedural rules. However, ILR considers that given the importance of the certification process for preventing abuse, the Bill should at least specify that as a threshold matter:

(a) the common, similar or related issues of fact and law should predominate over other issues so that resolving them will go a substantial way to dispensing with all of the claims; and

(b) there should be a sufficient volume of claims to make individual proceedings impractical.

25. When considering an application for a collective proceedings order, the Tribunal will also have to decide whether, if it grants such an order, it should specify the proceedings as opt-in or opt-out. This decision will be crucial given the greater risk of abuse with opt-out proceedings, yet the Bill is silent on the point and it is unclear whether this will be dealt with in new Tribunal rules. If the Bill continues to include a provision for opt-out proceedings, it should clarify that the burden to be discharged by an applicant for a collective proceedings order will be greater where the order sought is for opt-out proceedings. The applicant should be required to demonstrate the existence of genuine interest in the proceedings, for example by producing evidence of a threshold volume of unsolicited complaints or claims, and give reasons why opt-in proceedings would be inadequate.

Assessment of damages

26. The Bill proposes that the Tribunal would be permitted to award damages in collective proceedings without assessing the amount of damages recoverable in respect of each individual claim but leaves further detail on the assessment of damages to be dealt with in new procedural rules.[73] To ensure genuine claimants

[71] Paragraph 5 of Schedule 8 (new section 47A(8)(b) of the Competition Act 1998).
[72] Paragraph 5 of Schedule 8 (new section 47A(6) of the Competition Act 1998).
[73] Paragraph 6 of Schedule 8 (new section 47C(2) of the Competition Act 1998).

receive a fair amount of compensation and avoid disputes over distributions, the Bill should at least require that any award of damages which is made on an aggregate basis specifies the terms upon which damages are to be divided among class members. In ILR's view, those terms should always require any unclaimed damages to be returned to the defendant.

27. ILR is grateful for the opportunity to provide this evidence to the Committee and should be happy to provide further information about the negative consequences of opt-out collective actions in other jurisdictions, if that would be of assistance.

February 2014

Written evidence submitted from Microsoft Ltd (CR 19)

Introduction

We welcome the opportunity to provide our comments to the House of Commons Public Bill Committee on the Consumer Rights Bill (the "CRB"). We support the introduction of a clearer consumer framework for the digital age which will give both consumers and traders clarity on quality standards, rights and remedies when buying digital content and services. However we have concerns that the CRB does not adequately engage with the complex, dynamic nature of digital content, and we believe that the quality standards and rights and remedies for digital content need further consideration to avoid creating serious uncertainty for the UK technology industry. The Bill will have a significant impact upon the UK's creative and digital sector which contains many start-ups and SMEs as well as large companies like Microsoft. We are concerned that the Committee is moving very quickly through the clauses in the Bill and we would like to request that it takes the time to adequately scrutinise these clauses and amend the legislation accordingly.

Microsoft's consumer business spans from gaming, music and video across multiple screens (such as Xbox One), PC and mobile interactive entertainment, productivity and collaboration products and services (such as Office), personal communication services (such Bing and MSN portals), Skype, Internet Explorer and software and services for Windows phones. We also work with 30,000 Microsoft partner companies across the UK, many of which are SMEs. We are therefore well positioned to understand the impact the CRB will have on the UK's creative and digital sectors.

Summary of our submissions

Our submissions focus on the following areas: (1) the introduction of liability for "free" digital content stifling technological innovation; (2) & (3) the inappropriateness of applying concepts of "satisfactory quality" or being "as described" to digital content; (4) the difficulties with requiring consumer consent for changes to pre-contractual information; (5) the need for clarification on how the concepts of "reasonable time" and "significant inconvenience" will apply in the context of complex repairs or patches for minor bugs; and (6) the negative impact the introduction of liability for digital content that causes device failures or loss of digital content would be likely to have on digital innovation and cyber security.

Our submissions on the CRB

1. *Clause 33—Liability for "free" digital content*

The introduction of (a) quality standards to digital content that was not paid for but provided free with paid for products (including other digital content) or services, and (b) liability for all free digital content that causes device failures or loss of digital content will undermine any incentives for innovation in the UK technology industry. Many of the internet's most successful innovations are based on "free" and "freemium" product models. Technology start-ups which don't have the infrastructure to offer quick repairs or the reserves to pay unquantifiable compensation in the event of a fault will be forced to stop releasing new products on a large scale which will inevitably limit innovation.

We would welcome guidance on the reasoning behind extending the Bill to cover digital content that is not generally available to consumers unless they have paid a price for it or for goods or services or other content (clause 33 (2)(b)). This extension is potentially extremely wide and seems to capture trial or beta versions of content, which increases the ways in which the CRB is likely to stifle innovation.

The Government has reserved power to extend the scope of the digital content provisions of the CRB in the event of considerable consumer detriment, whether by amendment, transitional or transitory provision or savings (clause 33 (6)). We would welcome clarification on how this considerable consumer detriment might be identified, reported or measured.

2. *Clause 34—Digital content to be of satisfactory quality*

Whilst the concept of satisfactory quality can be easily applied to tangible products, it fails to acknowledge the variety of forms of digital content and how it is sold or otherwise provided. Digital content such as software, computer games or apps are often reliant on a network of third party platforms and software owned by other

vendors. This software is often provided "as is" and free of warranties to the consumer-facing brand. It may therefore have to provide a third party's software to consumers to a standard which the producer of that software will not warrant, leaving the consumer-facing brand with a "liability gap" between the protection it receives from the producer of the software and the protection it must give the consumer.

The quality of such digital content will also be impacted by the actions of third parties. The definition of "satisfactory quality" needs to acknowledge that traders may not have control over every aspect of the quality of the digital content, and the Bill needs to enable traders to limit their liability to the extent that quality standards are genuinely out of its control (e.g. in relation to interoperability with third party devices). Failure to acknowledge the fact that digital content is supplied within the context of a network of software and hardware products created by multiple vendors, in conjunction with the prohibition on a trader limiting its liability clause 47 (a) creates an unfair competitive advantage for traders who own or control both digital content and the related platforms, operating systems or software which will inevitably limit consumer choice. This is also likely to disproportionately affect SMEs.

3. *Clauses 36 and 40—Digital content to be as described and the right to modify digital content*

The requirement for digital content to match its description for the entire duration of the contract remains problematic given the dynamic nature of digital content.

The Explanatory Notes to the CRB now acknowledge that digital content may be enhanced or updated as long as the content continues to match the original content description. But the Bill still fails to address the complexities of digital content. For example, a computer game might feature a significant online component that is later discontinued by the games publisher as the game falls in popularity. Would this change mean that the game is no longer "as described" or would the existence of this online functionality, now dormant, mean the code provided to the consumer is still "as described"? Conversely, if the operator of a user interface (which is advertised on TV and on the packaging of the product) uses a software update to improve the user interface and add in new functionality this may no longer match the original content description. Would the consumer be entitled to a remedy even though the changes benefit the consumer?

In addition, clause 40 of the Bill legislates for modifications but at the same time the "grey list" (Paragraph 12, Part 1, Schedule 2) suggests that a term allowing a trader to make changes to the subject matter of a contract may be unfair. It is not clear if this "grey term" precludes modifications even if they are of benefit to a consumer. Both consumers and traders would benefit from the Bill clarifying that changes to digital content are only prevented to the extent they are detrimental to the consumer.

4. *Clauses 36 (4) and 37 (3)—Requirement for express consumer consent for changes to pre-contractual information*

New sub-clause 36(4) provides that pre-contractual information relating to the main characteristics of the content, its functionality or its compatibility with other hardware or software can only be changed with the express consent of the consumer. Digital content is by its nature constantly evolving: functions might have to be suspended or removed if they become vulnerable to cyber-attacks, or an update to enhance consumer experience could necessitate replacing or removing a function of software, all of which would mean a change to the pre-contractual information supplied to the consumer before it purchased the relevant content. The reference to "expressly agreed" indicates that a general clause in the relevant terms and conditions enabling any necessary or beneficial changes to be made from time to time will not be adequate. Requiring express consumer consent for these changes will lead to an impossible logistical situation for traders and mean consumers no longer benefit from changes which could improve user experience or security. It would be of consumer benefit for the Bill to instead allow that digital content can change from information provided to consumers pre-sale if the change benefits the consumer or improves the functionality or compatibility of the content or is required by law.

New sub-clause 37(3) provides that other information which traders must provide to consumers pre-sale (such as the identity of the trader, its registered address and phone number, its complaint handling policy, and its after sales services) is not effective unless expressly agreed with the consumer. The Bill needs to reflect that traders cannot be precluded from changing its location or its trading name simply because a consumer may not give its consent.

5. *Clauses 43—Right to repair or replacement*

Where a consumer agrees to a repair or replacement of digital content, the trader has a "reasonable time" to carry out the repair or replacement unless giving the trader that time would cause significant inconvenience to the consumer. This does not acknowledge that complex repairs may necessarily take a trader time, which means that the consumer could be entitled to a refund before the trader has had the amount of time it requires to rectify the fault. It seems more sensible to set the trader the task of repairing the content within a timeframe which is reasonable given the nature of the repair required.

In addition, traders often develop patches that fix digital content if and when minor bugs are developed which are then made available to all consumers. As download is at the consumer's own discretion, under the Bill a consumer may require (and the trader will have to bear the cost of) a repair or replacement in relation to a

minor bug for which a patch has already been released but the customer has not opted to download. We would welcome guidance on how the current practice of developing patches will fit within this new remedy regime.

6. *Clause 46—Remedy for damage to device or to other digital content*

The introduction of liability for digital content that causes device failures or loss of digital content will have a negative impact on digital innovation and cyber security. Digital content and devices can malfunction for any number of reasons, for example digital content could conflict with software or hardware installed on the same device, or the device on which the digital content is stored might not be functioning. If consumers are unable to evidence a clear chain of causation, who will be liable: the trader who supplied the original content, the ancillary software or hardware or the device?

We request that the Government consider the negative impact this liability will have on the UK technology industry. In the fast-paced digital world, content providers need to be able to release updates as quickly as possible to protect consumers and their own liability in the event that an update causes unforeseen damage if a consumer incorrectly installs the update. The liability introduced by clause 46 will force traders to release upgrades with less frequency, and with fewer features. This could slow innovation and delay critical security protection from reaching consumers.

Finally, we would welcome further guidance on the following aspects of clause 46:

(a) What constitutes an appropriate amount of compensation in certain circumstances, for example if a device holds irreplaceable photos of sentimental value will this be taken into account in assessing appropriate compensation?

(b) Will a replacement constitute a repair for the purposes of clause 46 (3)?

(c) Will consumers be entitled to compensation if they initially opted for a repair and the repair doesn't work?

February 2014

Written evidence submitted by techUK (CR 20)

Executive Summary

1. The UK technology sector has a number of concerns with the Consumer Rights Bill as introduced to Parliament.

2. Aside from our comments on the principles of the Bill and the text itself, we understand that the Bill process is moving much faster than anticipated and are concerned that it is moving forward too quickly and without adequate scrutiny. We would like to ask that the Bill Committee allows more time for the scrutiny of the Bill, particularly the clauses relating to Digital Content and Remedies.

3. One of our major concerns relate to the quality requirements set out in clause 34(3), specifically that digital content must be 'free from minor defects'. This term is both too broad and too simplistic, and therefore open to misinterpretation. Furthermore, greater guidance on how clauses will be implemented is required within the text of the Bill itself as opposed to its inclusion within the guidelines and explanatory notes.

4. Software is an incredibly complex product operating in a complex environment, and therefore does not operate in isolation. As the Bill currently stands, software providers will be forced to dramatically slow down their testing and development lifecycles leading to a worse consumer environment which goes against what the Bill is trying to achieve.

5. In order to reflect the complex landscape in which software operates and maximise the best possible consumer experience, the Bill must have an outcome focused approach.

6. Only through the remedy of these concerns will consumers and industry avoid being put into a precarious position by the lack of current certainty and definition within the Bill.

About techUK

techUK represents the companies and technologies that are defining today the world that we will live in tomorrow. More than 850 companies are members of techUK. Collectively they employ more than 500,000 people, about half of all tech sector jobs in the UK. These companies range from leading FTSE 100 companies to new innovative start-ups. The majority of our members are small and medium sized businesses.

Overarching Concerns

7. The Bill fails to understand the complexities of software and Government have misinterpreted what consumers need. The definition of 'digital content' taken from the Consumer Rights Directive is open to confusion, and we are concerned that all digital content will be classified under the same banner and that all 'digital content' will be treated the same. Greater consideration should be given to complex software, as

opposed to more simple digital content such as an app. Since the Bill stipulates that all digital content should be of 'satisfactory quality' and therefore 'free from minor defects', this could have implications for software that requires regular updates in response to changing risks and threats in the digital environment.

8. The sector requires greater clarification with regards to the implementation of a number of clauses in the Bill. Government do not seem willing to make the necessary detailed edits to the bill, and will not have gone far enough if they only consult on the related guidance. We are therefore asking for Government to acknowledge our concerns within the text of the legislation itself and not just the guidelines. This is to ensure certainty for consumer and industry alike.

9. We have outlined below a number of concerns related to specific clauses. Owing to the tight timeframe of the Bill process we have not been able to go into a significant level of detail. We will of course be happy to provide further clarification and examples of those issues covered should more time be allocated to us doing this.

Digital Content

10. *Clause 33 'Contracts covered by this chapter'*

10.1 The definition of digital content taken from the Consumer Rights Directive is open to confusion, and we are concerned that all digital content (from ebooks and MP3 files to complex Internet security software) may be classified under the same banner and that all digital content will be treated the same. Greater consideration should be given to complex software, as opposed to more static digital content, due the complex environment in which it operates, as set out below.

10.2 Government are provided with the discretion to broaden the scope of the law in this section. We are concerned both around the scope itself, and the uncertainty created as a result of Governments ability to widen the scope of the bill going forward.

10.3 The explanatory notes state that the scope of the law will include software provided over the 'cloud'. We strongly feel that the full implication of including software over cloud needs further consideration, and what this would mean in practice to the consumer and businesses understood.

11. *Clause 34 'Digital Content to be of satisfactory quality'*

11.1 The Bill stipulates that all digital content should be of 'satisfactory quality', which includes a requirement that digital content must be 'free from minor defects'. We believe that greater clarification is required here to prevent major implications for software that requires updates in response to changing risks and threats landscape and the complex environment in which software operates.

11.2 Not only is the term 'minor defects' itself far too broad, but it is not clear what would constitute a 'minor defect'?

11.3 It is important to clearly acknowledge the differences between a 'bug' and 'free from minor defects'. For example, reasonable 'bugs' are expected within complex pieces of software and should not be the basis for seeking remedies other than for that bug to be resolved. Where the revised explanatory notes within the Bill do state that it is common to get bugs, this should be included in the text of the bill itself.

11.4 Fixing minor defects is part of the developmental life cycle of software and 'defects' are often linked to specific configurations or operating environments. Due to the way in which software operates with other software or operating systems it's impossible to always foresee how the specific software in question will operate in this environment.

11.5 The provider may need to make necessary updates to software throughout its lifecycle in order to adequately protect the consumer and they should not be regulated against doing this.

12. *Clause 35 'Digital Content to be fit for purpose'*

12.1 Due to the complexity of the supply chain, landscape, and software itself, it is simply not possible for software providers to guarantee that software will be bug free throughout its lifecycle.

12.2 It is important to note in relation to this clause, that content is rarely modified for individual consumers, and can in many cases be completed on a mass scale involving millions of consumers across the globe. Therefore the term 'intended purpose' does not make sense in a market where software is not adapted for individual consumers.

13. *Clause 36 'Digital Content to be as described'*

13.1 This clause does not fully grasp the intricacies of software and the complex environment in which software operates.

13.2 Complex software is not a static product. It needs to evolve in order to continue to meet consumers' expectations and the purpose for which the consumer bought the product.

13.3 In the case of Internet security software, an update to the software may be necessary for a number of reasons which will not impact the functionality of the software itself. The provider may replace, remove or even add functions to the software to such a degree that it would not meet the original description. The update may be necessary in order to fix a security vulnerability, improve functionality, or to ensure that the software is compatible with other software or operating systems installed on consumers devices.

13.4 The clause fails to appreciate the developmental cycle of software, and if this clause is enacted as currently drafted then software providers may be restricted from providing critical updates to its software, to the consumers disadvantage. This clause would have the opposite effect and instead of protecting consumers, could potentially harm consumer operating and transacting in the digital world.

13.5 The clauses should have an outcome-based focus, which would allow providers to update or modify their software if it benefits the consumer and improves the functionality of the software, regardless of whether it differs from original description.

13.6 Furthermore, consideration should be given to whether Clause 36 could be removed altogether on the basis that the consumer is protected by Clause 35. This would be reliant upon ensuring we create outcome based legislation which is not overly prescriptive.

14. *Clause 37 'Other pre-contract information included in contract'*

14.1 Further consideration must be given to this Clause since some of its consequences appear unlikely. For example, one could infer from the Bill as it currently stands that changes to pre-contractual legislation can only be made when expressly agreed by both trader and consumer—would mean that a trader would not be able to change their address without the express consent of potentially millions of customers.

Remedies

15. *Clause 43 'Right to repair or replacement'*

15.1 As it currently stands Clause 43 fails to understand that in some circumstances it would be in the consumers best interests for the software provider to provide a replacement rather than a repair.

15.2 The related amendment to this clause fails to recognise that if a repair is complex the trader will need appropriate time to repair the fault. As the Bill currently stands the consumer would be allowed to move on to the next stage of the remedy process before the trader has had a chance to repair the fault.

15.3 With regards to complex software, an updates function is part of the constant service provision from the software provider. The Bill would restrict software providers ability to do this and offer a good ongoing consumer experience around their product.

15.4 Not only is it open to misinterpretation as to the justifiable period of time that a how 'reasonable' person expects a product to be repaired, but it does not suit the complex environment that software operates within.

Compensation

16. *Clause 46 'Remedy for damage to device or to other digital content'*

16.1 This clause fails to understand both the complexity of software, and the complex environment in which it operates. Complex software can malfunction for reasons that do not relate to the actual design of the software itself, and despite the software industry going to great lengths to minimise such occurrences, it is impossible to guarantee. Therefore, given that the trader will be no longer able to limit its liability, there is a possibility that the provisions contained within the Bill may discourage providers from issuing critical fixes to their software, and therefore impact the overall protection of the consumer.

16.2 It is not clear either what an appropriate amount of compensation would be, or whether a replacement is the same as a repair.

16.3 Greater clarity is required over what remedies would be available to consumers.

February 2014

Written evidence submitted by Christopher Burley (CR 21)

1. Introduction about me

I am 65 years old and an experienced consumer. Before I retired from professional work I was a solicitor with my own practice in Gray's Inn Square, London. I so worked for thirty years. The bulk of my practice was drafting or reviewing commercial contracts. I had the good fortune of dealing with barristers of the stature of Nicholas Phillips, Robert Alexander, Jonathan Sumption, and Sydney Kentridge (as they then were). I detected that the greater the legal mind the shorter their drafting.

2. Introduction about my amendment

(a) Things have changed, possibly added to by the ease of drafting, re-drafting and document printing brought about by computers. For instance, one can tell in which decade a commercial lease was entered into. They became thicker and thicker as each decade past. We now live in an age where it is almost impossible to understand what it is a document is intended to state.

(b) Another reason for this is that once professional indemnity insurance ceased to be captive within the profession and became open market, insurers against negligence claims insisted upon the insured taking more and more safeguards. It is only natural for an insurer to wish to maximise premiums but to minimise risk. Such required safeguards have increased considerably over the years. Also, if claims are made against those insurers the insured's annual premium can go up substantially. Professionals now live almost in fear of being sued for negligence.

(c) And the result of this—longer and longer contracts. However, the lawyers and their clients could not possibly present consumers with lengthy contracts to sign. So what do they do? They print their terms and conditions in the tiniest print they think they can get away with on the reverse of the page the consumer is expected to sign and very often in the lightest of grey print. Indeed, if a consumer held back from signing the contract whilst the consumer tried to read (or even understand) that small print they would be regarded as having taken leave of their senses, not least, for instance, if they are standing in a queue at an airport car rental booth.

(d) The situation is similar regarding on-line services and purchase of goods. Does a retailer of software downloads or any other on-line service really expect consumers to read their terms and conditions?

(e) No one seems to take issue with this. People just sign contracts with no idea what the small print states. The commercial world would grind to a halt if consumers stopped to read the small print, even though it can be very important.

(f) I see that the clauses 61 to 72 of the Consumer Rights Bill are intended to help ameliorate this situation. However, the actual practical effect of those clauses will not be known without much argument between parties' lawyers and judgments handed down by the courts.

(g) My amendments are intended to see an end to traders and their lawyers seeking to perfect for their own benefit (and that of their insurers) the small print of consumer contracts. The contemporary motto seems to be, 'If in doubt, add some more words.' (This tends to be the practice of third tier lawyers.)

(h) The essence of my suggested amendments is simply to stop the 'small print' from being small print. If the print size of the 'small print' had to be the same size as the majority of the rest of the main contract (i.e. that containing the description of the good or services, the price, the parties and the date), I believe traders would insist that their lawyers substantially reduced the so called 'small print'. A trader and their lawyer would be too embarrassed to present consumers with what would otherwise be a lengthy document to sign.

3. The Amendment

The suggested amendments are by way of additional sub-clauses (3) and (4) to Clause 68 ("Requirement for transparency").

> "(3) Except where it is manifestly impractical the terms and conditions of a consumer contract shall be in print size no smaller than seventy-five per cent of the main body of the contract (containing the description of the good or services, the price, the parties and the date) and in black ink or black print.
>
> (4) Where it is clear from the circumstances in which a consumer contract arises that a reasonable trader would have no reasonable belief that the consumer would have read the detailed terms and conditions of that contract before the consumer signed it those terms and conditions shall be unenforceable against the consumer (or any guarantor of the consumer)."

February 2014

Written evidence submitted by David Peacock (CR 22)

There is a need to increase consumer protection regarding dangerous electrical accessories

1. *Summary:* The BS 1363 system of plugs and sockets, as enforced by the Plugs and Sockets etc. (Safety) Regulations 1994, has ensured that the UK has a level of domestic electrical mains connector safety unparalleled elsewhere, but this is subject to a number of threats. These include unregulated socket covers, counterfeit plugs, inadequate enforcement of the existing regulations, and sub-standard plug-like devices which are not subject to the Plugs and Sockets Regulations. There is also inadequate regulation of online traders, particularly those operating under the auspices of various online marketplaces which disguise the true nature of many electrical products on offer, as well as the actual identity of the trader and origin of the goods. This submission makes some suggestions for much needed improvements in both regulation and other aspects of consumer protection.

2. *About me:* I am an electrical engineer, a Fellow of The Institution of Engineering and Technology, and the co-founder of two electrical safety groups, FatallyFlawed and PlugSafe, both are concerned with threats to the integrity and safety of UK domestic mains plugs and sockets. FatallyFlawed campaigns against the use of unnecessary and unregulated plug-in socket covers, misleadingly claimed to be child safety aids. PlugSafe identifies counterfeit UK mains plugs and other substandard plug-like devices sold for use with BS 1363 sockets. Both groups are entirely voluntary, raise no funds, and have no connection to commercial entities concerned with selling electrical accessories. In this submission I am commenting on behalf of FatallyFlawed, PlugSafe and myself.

3. *BS 1363 Plugs and Sockets—Regulation*

4. The system of UK domestic plugs and sockets to British Standard 1363 is generally agreed to be the safest in the world, it was designed in the 1940s to be inherently child-safe, a feature which other countries have started to introduce only recently. Statutory Instrument 1994 No. 1768, The Plugs and Sockets etc. (Safety) Regulations 1994, requires standard plugs to comply with BS 1363, however it does not apply to other plug-like devices. This is a matter of great concern as the standard is (correctly) written in a manner which closely defines the dimensions of a plug, and requires that sockets are made to accept compliant plugs. This means that if non-compliant devices are inserted into compliant sockets there is no way to predict what will happen, such non-compliant devices can damage sockets and/or result in a combination which fails to meet a satisfactory level of safety. There needs to be an effective method of regulating all devices sold for use with BS 1363 sockets.

5. *Socket Covers (child protective devices)*

6. The use of socket covers is unnecessary in the UK because BS 1363 has, from its inception, required automatic shutters which block access to live parts when there is no plug inserted. *"Socket-outlets to BS 1363 are the safest in the world and have been since they were first designed in the 1940s. Socket protectors are not regulated for safety, therefore, using a non-standard system to protect a long established safe system is not sensible."* This is a quote from an article by Mark Coles, Technical Regulations Manager at The Institution of Engineering and Technology. (See references) There is no standard for socket covers, which is not surprising as they unnecessary.

7. None of the major safety organisations recommend the use of socket covers. Some local authorities and some individual officials (such as health visitors) encourage parents to use them, despite the fact they are unregulated. Their advice is not based on any research and is believed to result from ignorance of the facts and influence from other countries which do not have the same level of safety as the UK. Ofsted has reminded all inspectors that *"Inspectors should not set actions or make recommendations in relation to the use of socket covers and should not refer specifically to these in their reports."* (See references)

8. There are no socket covers which comply with BS 1363 dimensions, and, currently, no regulatory requirement for socket covers to provide the same level of protection which exists for an empty socket, or a socket with a BS 1363 plug inserted. There is good evidence that all currently available socket covers significantly reduce or even negate the inherent safety protection of a BS 1363 socket and there is potential for permanent and probably unseen damage to sockets which can create fire and electrical shock hazards. Many of these hazards resulting from the damage caused by socket covers will only take effect after the use of the socket covers is discontinued; this means that such damage is very unlikely to be attributed to the use of socket covers by the forensic investigation of a fire. The lack of regulation is completely illogical. It has been suggested by BIS that the General Product Safety Regulations provide a route for Trading Standards to take action, but in the absence of a standard for socket covers it is very difficult for TS to act effectively to control those products which cause damage or otherwise degrade the safety of a socket. There is a serious need for socket covers to be included within the regulatory system.

9. *Other plug-like devices*

10. Although there are relevant standards for other plug-in accessories, such as chargers, air fresheners and travel adaptors, those standards do not in themselves require that these items are made to the correct dimensions specified for a plug, this also hinders Trading Standards as they are required to use scarce resources in proving a problem exists, whereas for standard plugs there is a very simple remedy—if they do not comply with the BS 1363 plug dimensions they are illegal.

11. Both FatallyFlawed and PlugSafe believe strongly that socket covers and other plug like devices should be regulated in the same way as standard plugs.

12. *The sale of mains plugs, cord sets including mains plugs, and other electrical products for connection to mains electricity:*

13. The Plugs and Sockets etc. (Safety) Regulations 1994 requires that domestic mains powered appliances are fitted with a standard plug conforming to BS 1363. This requirement is often ignored by on-line sellers and many products are sold with European (and sometimes American) mains plugs instead of UK standard plugs. To help reduce this widespread flouting of the current law, PlugSafe believes that all online sales descriptions for products covered by the regulations should be required to state that they are supplied with a standard UK plug conforming to BS 1363, or alternatively are fitted with an approved conversion plug as permitted by the regulations (note: the regulations do not permit conversion plugs supplied unfitted, and other types of adaptors).

Consideration should be given to requiring suppliers to state full details of the plug or conversion adaptor supplied (manufacturer, approval details and rating).

14. PlugSafe volunteers engage in identifying plugs and power cords which do not meet the requirements of the Plugs and Sockets etc. (Safety) Regulations 1994, and provide information to Trading Standards departments to allow them to take corrective action. By this means we have found that a major source of such items are the UK internet marketplaces where illegal products are offered by both local and foreign independent suppliers who use such marketplaces to advertise their goods, relying on the marketplace operator to handle the payment transactions, and sometimes also the warehousing and shipping. As a general rule we have found that marketplace operators are inefficient at policing the sellers who use their services, and routinely fail to spot products which are illegal.

15. PlugSafe has also noted that there are significant differences in the way that marketplace operators react to being notified of illegal goods being offered on their websites. Some operators offer a means for customers and potential customers to report such offerings of illegal goods, but as a general rule the operators are very unlikely to take any action based on such reports. When a report is made via Trading Standards some operators take immediate action, although others do not. There is at least one major marketplace operator which simply ignores the law, despite having major UK investments in warehouse facilities. We have noted that this is true not just for illegal and substandard electrical accessories, but also for such things as CS spray, Pepper Spray and Mace, all of which are proscribed under the Firearms Act. The latter has been the subject of a BBC "Watchdog" investigation, but the practice continues. See references.

16. PlugSafe recognizes that there is general customer confusion about operators who are web retailers in their own right, as well as offering marketplace facilities. Marketplace operators offer a mix of their own products, products from third party sellers who use the marketplace fulfilment services, products from third party sellers shipping from their own UK facilities, foreign third party sellers who use independent UK warehousing and shipping facilities, and foreign third party sellers who ship directly from abroad, often Hong Kong or China. More needs to be done to ensure that consumers are fully aware of who they are dealing with, where the seller is based, and where the goods are coming from. Consumers should not be left in any doubt as to with whom they are entering a contract, and who is responsible for delivering on that contract.

17. It is common on at least one of the major marketplace operator websites for there to be a choice of all of the various supplier types for what purports to be a single product listing! A product listing will be accompanied by reviews submitted by existing purchasers, but there is no way of identifying which review relates to which supplier, and there may be as many as 50 suppliers on a single listing. In fact it is common that accessories may have a generic description and when multiple orders are placed against a number of different suppliers on the same listing the actual products received may all be from different manufacturers, which clearly negates the reviews posted.

18. In a typical case which I have worked on in the days immediately prior to writing this submission we received a consumer report about a power lead supplied with a battery charger ordered from the major UK internet marketplace. This lead had an illegal plug which does not meet the BS 1363 standard in any way, it even has no fuse. We see a number of variations of this type of non-rewirable moulded plug, and invariably the attached flex has undersized conductors which can easily break and overheat leading to both fire and electrocution risk. In this case there were 5 suppliers offering the listed product, and the customer had chosen the most expensive because it was fulfilled by the marketplace, although not sold directly by them. Also of interest was that in this case the product listing illustrated a power lead with a completely different plug, but the illustrated plug was also clearly identifiable as being of a different, but also illegal, design!

19. PlugSafe has noted that one of the results of its actions in visually identifying thousands of unsafe product listings, which TS officers have then caused to be withdrawn, has been an increase in the number of product photographs in which the plug has been obscured, this makes it difficult for even a consumer who understands the issues to realize that an unsafe device is being offered.

20. To ensure that consumers are provided with sufficient information to properly compare electrical accessories offered by online vendors, and that Trading Standards officers have sufficient information to identify counterfeit and sub-standard electrical goods, we suggest that the following provisions be made:

21. It should not be permitted for multiple suppliers to offer fulfilment against a single listing, customer reviews should be allowed only for a specific product from a specific vendor.

22. Sales descriptions of all mains plugs should be required to include the following information for the plug: manufacturer's identity and type reference, approval body, and approval license number. (Note: The Plugs and Sockets etc. (Safety) Regulations 1994, require standard plugs to be clearly marked with the information regarding the approval of the plug to BS 1363. BS 1363 itself requires that plugs are marked with the identity of the manufacturer.)

23. It should be required that all electrical accessories offered for online sale should be illustrated by photographs which clearly show the following features: A general and clear view of the product; The actual markings (type, manufacturer, approvals etc) with sufficient resolution to be easily read; In the case of a mains plug, or other device intended to be inserted into a mains socket; a clear view of the plug pins; and in the case of a mains socket, or device incorporating a mains socket, a clear view of the face of the socket(s).

24. It should be a specific offence for online marketplace operators to facilitate the sale of illegal items.

25. Online marketplace operators should be held directly responsible for refunding the cost of items which are not in accordance with the sales description, eg when a legal plug is described but an illegal plug is supplied. It is also important for there to be a freepost return mechanism for misrepresented goods. Note that travel adaptors and power cords are sometimes sold for around £1 with free delivery, but the minimum cost for an individual to return an item by Royal Mail is £2.60!

26. Consideration should be given to prohibiting online UK marketplaces from facilitating the direct shipping of mains related electrical goods to UK consumers from outside the EU. Currently, direct shipping from China and some other countries is a preferred way of circumventing UK customs controls.

27. Online retailers and online marketplace operators should be required to draw consumers' attention to information regarding the importance of ensuring that they only insert approved devices into sockets, and assisting consumers in identifying counterfeit or substandard products. Such information should be linked from every product listing requiring connection to mains electricity. The information would preferably be provided by a third party such as the IET, Which? or the Electrical Safety Council.

28. *References—Socket Covers*

29. FatallyFlawed website: www.fatallyflawed.org.uk

30. IET article: "Socket Protectors", Mark Coles, Technical Regulations Manager at the IET http://electrical.theiet.org/wiring-matters/44/wall-socket-protectors.cfm?type=pdf

31 IET article: "The Remarkable Evolution of BS 1363" (explains importance of plug dimensions) David Peacock FIET, Co-founder of FatallyFlawed http://electrical.theiet.org/wiring-matters/49/bs-1363-plug-and-socket.cfm?type=pdf

32. Specific information on socket contact damage caused by socket covers with wrongly sized pins: http://www.fatallyflawed.org.uk/html/size_matters.html

33. Specific information on socket shutter damage caused by socket covers: www.fatallyflawed.org.uk/html/socket_damage.html

34. Report prepared for ANEC (European Association for Consumer Representation in Standardisation): "Child protective products—protective function of socket protectors, hob guards, locks and locking devices", Erica Waller, Swedish National Testing and Research Institute http://www.anec.org/attachments/r&t005–04.pdf

35. Ofsted policy on socket covers, "Early years inspection and regulation", September2011, p11 http://www.ofsted.gov.uk/filedownloading/?file=documents/other-publications/e/Early%20years%20September%202011.pdf

36. *References—Counterfeit and Sub-standard Electrical Accessories*

37. PlugSafe website: www.plugsafe.org.uk

38. IET article: "Fake electrical goods", Rebecca Pool http://electrical.theiet.org/wiring-matters/46/counterfeiting.cfm?type=pdf

39. IET article: "Buyer Beware, many plugs and chargers—often obtained online—pose a serious risk to users", David Peacock FIET, Co-founder of PlugSafe http://electrical.theiet.org/wiring-matters/47/counterfeit-plugs-chargers.cfm?type=pdf

40. Sample compilation of electrical accessory listings on Amazon Marketplace (March 2014): http://www.bs1363.org.uk/Amazon.co.uk_sample_illegal_products_March_2014.pdf

41. Sample compilation of electrical accessory listings on eBay (March 2014): http://www.bs1363.org.uk/ebay.co.uk_sample_illegal_products_March_2014.pdf

42. Which? article and discussion on illegal supply of appliances with two pin plugs instead of UK standard plugs;

43. Archived copy of a BBC Watchdog report on Amazon selling CS and Pepper Spray http://web.archive.org/web/20111210085752/http:/www.bbc.co.uk/blogs/watchdog/2008/12/amazon_marketplace_offering_da.html

44. Sample compilation of Pepper Spray listings on Amazon Marketplace (March 2014): http://www.bs1363.org.uk/March2014_sample_listings_Pepper_Spray_etc.pdf

March 2014

Written evidence submitted by Newspaper Society and the Newspaper Publishers Association (CR 23)

Consumer Rights Bill 2014

I am writing on behalf of the Newspaper Society and the Newspaper Publishers Association to bring forward some further concerns about Part 3 of the Consumer Rights Bill which had its second reading in the House of Commons on 29 January 2014. The Newspaper Society represents the local and regional media in the UK, and the Newspaper Publishers Association represents the national print media. Many of our members have online editions some of which are subscription only or paywall protected. My former colleague Sue Oake has previously made representations to you in October 2012 in relation to your Consultation on the Supply of Goods, Services and Digital Content, and a copy of that note is attached.

Chapter 3 of the Bill is clearly designed to protect consumers who buy and download products such as books, films, music, computer programmes, etc and discover that these are in some way defective. Digital content is defined however as "data produced and supplied in digital form" and Chapter 3 of the Bill covers such content if it is "supplied for a price to be paid to the consumer". Our concern is that as drafted these definitions would also apply to newspapers available online for cost, which we submit is not appropriate because:

1. Newspapers are a transient constantly changing product,
2. They are in some cases subject to different legal obligations, or the beneficiaries of legal concessions which are inconsistent with some of the provisions of Chapter 3.

Section 34 of the Bill requires the digital content to be of satisfactory quality, and read in conjunction with section 42(8) of the Bill to be of satisfactory quality for a period of six months from the date on which it was downloaded. Should this provision not be met, the Bill provides the consumer with potential remedies, including cancelling their subscription in its entirety, requiring reinstatement of the material or a partial refund of their subscription fee.

Our concern is that if a publisher were to remove parts of an online newspaper from view within that six month period, it could fall foul of section 34 (particularly if the article in question was of a substantial length or on a matter of considerable interest to the public).There are, however, circumstances in which by law (or by way of good practice) a publisher may need to remove some material from its online archive before six months elapse. The current proposed bill does not permit the publisher to limit or restrict liability for removing content, even should these circumstances apply. Some examples are:

1. Where material has been published entirely properly in relation to the commission of a crime and detail has been given which would create a substantial risk of serious prejudice to a fair trial once an arrest has taken place and proceedings become active. There is clearly a public interest in the police and other authorities being able to use the press during the course of their investigations to release information to the public, and a general public interest in the open reporting of unsolved crimes. However online content might be removed or modified by court order or voluntarily to avoid any risk of contempt if ordered by a court under the Senior Courts Act (*R* v *Begg, Harwood*) *HM Advocate* v *Beggs (No 2) and Harwood*.
2. Even the most responsible publisher sometimes makes factual errors in its reporting of events. Currently where a complaint is notified to a publisher and found to have merit, the common practise is to remove the material from the online archive, or to attach a correction to the material, in addition to publication of an apology or clarification in the current issue. Under the new proposals, removing incorrect or defamatory material could expose the publisher to liability to its subscribers under the Bill.
3. The new Bill would prevent publishers from purchasing copyrighted material under a license only to make such material available for a limited period of time, if that period were shorter than six months, and it would also prevent them from removing material submitted by a contributor if it subsequently discovered the contributor was not in fact the owner of the copyright in that material.
4. For user generated content, it would prevent the publisher from using any of the existing libel defences contained in s1 Defamation Act 1994, s5 Defamation Act 2013 or reg 15 of the Ecommerce regulations, all of which require the operator of the website to be able to take down material which is alleged to be defamatory.

Section 36 of the Bill requires the digital content to be as described (including that it should be similar to any content supplied as a sample). Again this raises issues for an online newspaper due to its transient and ever changing nature. Subscriptions to such products are typically sold by duration, rather than per issue, and "samples" usually consist of free access to one or more editions before a decision to purchase is made. We submit that it is not the intention of the Bill to make a newspaper liable to a consumer for damages because for example the consumer takes out a subscription when the newspaper has just started to serialise a popular memoir but the serialisation ends before the subscription does, or where a consumer requests a sample copy which contains for example a "World Cup special section" but subsequent editions available on subscription do not. However, under the current wording of the Bill, the publisher could be so liable.

We would ask you to look again at Chapter 3 of the Bill in light of these concerns and include in that part of the Bill express provisions to enable publishers of online periodic publications such as newspapers to remove or alter individual articles or items within the six month period without liability, and to exempt them from the provisions of section 36.

March 2014

Written evidence submitted by the Office of Fair Trading (CR 24)

Introduction

1. The Office of Fair Trading (OFT)'s mission is to make markets work well for consumers. We aim for competitive, efficient and innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices, and where businesses comply with consumer and competition laws but are not overburdened by regulation. In April 2014 the OFT and the Competition Commission will merge to become the Competition and Markets Authority (CMA).

2. We fully support and welcome the Government's proposals to rationalise and modernise consumer law. However taking the package of measures in the Bill as a whole, we consider that further improvements are required in order to fully achieve the stated aims of simplifying and clarifying consumer legislation.

Summary of key issues

3. **Goods, services and digital content proposals:** As drafted, the remedies relating to **price reductions/ limitations on the levels of refunds** and the **lack of a right to reject for intangible digital content** are likely to have a negative impact on the level of consumer protection available and are therefore unlikely to increase consumer confidence.

4. **Unfair contract terms:** Although we welcome revision to the price/main subject matter exemption, we do have some concerns about the scope of the prominence test. For instance, we are concerned that using the standard of an "average consumer" is inflexible and sets the bar too high for a case where the business has targeted its goods and services towards a particular group which includes vulnerable consumers.

5. The proposed **enhanced consumer measures** will require a complex cost benefit analysis before a redress scheme can be set up which many enforcers may find burdensome. This could result in them being unable, or reluctant, to use the proposed measures because of a lack of specialist resource.

6. **Private actions under competition law:** We support the proposals and agree that opt-out collective actions should be introduced. In our view, the safeguards proposed within the Bill are sufficient to address concerns about abusive litigation.

Goods—Chapter 2

Deduction for use

7. We note the changes to the provisions relating to deduction for use following the BIS Select Committee's recommendations, but remain concerned about the potential for detriment to consumers who exercise their final right to reject. We consider that neither the application of the deduction for use within the first 6 months, nor the amount deducted, should depend on the existence of an active second-hand market. In our view the measure should be based solely on the consumer's actual use of the product as indicated in s.24(8). However, s.24(10) (b) may imply to businesses and consumers that calculation of the deduction can be related to market value and not actual usage.

8. We are also not confident that the changes here to limit the "market" to business-to-consumer transactions will avoid the problem of an active second-hand market being able to be established in relation to any goods regularly traded on a second-hand basis on internet selling platforms such as eBay, for example, where there is an equally active business to consumer market for second-hand goods. We also disagree with a policy of treating new cars or other high cost goods as a special case, that is, not benefiting from the usual rules on deduction for use. Consumers are at greater risk of financial detriment in such high value transactions.

Time limit for short-term right to reject

9. We remain of the view that where a consumer gives the trader a chance to repair or replace goods found to be faulty within the 30 day right to reject period, the 30-day period should be restarted at the point when the consumer receives the repaired or replaced goods. The current proposals could provide a consumer with only 7 days in which to exercise the right to reject repaired or replaced goods, which may be insufficient time to check whether the fault has been remedied or for a different fault to manifest itself. The consumer should not be disadvantaged by giving the trader this option and consumers who are aware of this risk may then be less likely to initially seek a repair or replacement for a fault appearing within 30 days of purchase.

Digital Content—Chapter 3

Right to reject intangible content

10. The Bill contains different rights in respect of digital content depending on whether it is in a tangible or intangible format. We supported the BIS Select Committee's recommendation for an equal right to reject both intangible and tangible digital content. We consider differentiating consumer rights based on how digital content is delivered is likely to be confusing for consumers and has the potential to distort market incentives (although we have not researched this). We welcome the clarification that the amount of a price reduction 'may, where appropriate, be the full amount of the price'. However, the consumer will be entitled to a price reduction only after he/she has given the trader opportunity to repair or replace the faulty content and such attempts at repair or replacement are, unlike the proposals for goods, not limited to a single attempt.

Remedy for damage to device or other digital content

11. Under s.46(1), a consumer has a remedy if a trader in supplying digital content damages the consumer's device or other digital content and the *'damage is of a kind that would not have occurred if the trader had exercised reasonable care and skill'*. We doubt whether the remedy will be workable in practice as few consumers will have the knowledge and/or resources to demonstrate that the trader failed to exercise reasonable care or skill and that that failure led to the damage caused.

Services—Chapter 4

Outcomes-based liability standard

12. We support the BIS Select Committee's recommendation that the Bill should apply an additional outcomes-based liability standard for services. We consider that such a standard could better address problems in services contracts, which are typically subject to far more consumer complaints than goods contracts and this would increase consumer confidence when purchasing services.

Right to repeat performance and price reduction

13. We are not confident that the new statutory remedies in ss.55 and 56 will always provide consumers with adequate redress. The provisions require the consumer to give the trader an opportunity to repeat the service before being entitled to request a price reduction. We believe that in many circumstances it would be appropriate for a consumer to move straight to the tier 2 remedy of a price reduction or compensation particularly when the original service provided was exceptionally poor and the consumer has lost faith in the ability of the trader to provide the required service to an acceptable standard. Many services are carried out on a consumer's person or personal property, or in their home, and a consumer who has lost trust in a trader may understandably not want the trader to perform the service again.

14. Where the trader's repeat performance is unsuccessful, we consider that the consumer should be entitled to compensation for losses caused by defective performance, not merely a price reduction, even if the price reduction is for the full amount under the contract. This would allow consumers to have confidence that in the event of a service not meeting the required standard, they would be able to repurchase the service, or remedy the faulty elements of the service, without incurring additional expenditure. If the current proposed remedies remain, we believe the Bill should be clearer about what other legal rights consumers have.

Unfair Contract Terms—Part 2

15. The proposals exclude from the assessment of fairness a term in a consumer contract that relates to the main subject matter of the contract or the price, providing that the requirements of transparency and prominence are met. A term is prominent *'if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term'*.

16. The introduction of the concept of prominence should give the courts more leeway to reach decisions which will have the effect of protecting consumers from being surprised by ancillary charges, which we welcome. However, there is a risk that traders may attempt to meet this requirement by overcrowding the information they provide to consumers up-front with terms which then make it difficult for consumers to distinguish between them.

17. We believe that without further clarification, the prominence test might be taken by traders as requiring no more than the consumer is *informed* about relevant terms. In line with the BIS Select Committee's recommendations, taking into account what consumers can reasonably be expected to do in practice, we believe more clarity is needed on the exclusion of ancillary or contingent terms from the fairness test[74]. We seek an exemption which recognises that particular kinds of terms have certain characteristics, as a result of which it can be proved that consumers do not typically take those terms into account when entering the contract. Examples of such terms include transparent ancillary charges which the consumer is insensitive to when entering the contract as well as contingency charges, particularly those which arise from an event that the

[74] See in particular paragraphs 184 and 185 of the House of Commons, BIS Committee, Draft Consumer Rights Bill, sixth report of session 2013-2014, Volume 1.

consumer does not expect to happen or which relate to services which the consumer does not think they will use. The overriding objective of our approach, consistent with the BIS Select Committee's policy, is to ensure that terms which are not genuinely subject to the constraint of competition and informed decision-making are clearly made assessable for fairness in the proposed legislation. If enforcers are unable to scrutinise these terms they may give rise to consumer detriment.

18. We consider that further consideration should be given to the Law Commission's recommendation in their advice to BIS that an element of relativity should be introduced into the prominence test[75]. Clause 64 does not expressly recognise that *different levels of prominence may be needed for terms that impose different levels of burden on consumers*. A sliding scale approach to prominence would go some way to address the concern that the practical benefit of prominence will be lost if many terms are made equally prominent. As the Law Commission has pointed out, such an approach would reflect existing case law.

19. In addition, we believe that the average consumer test, which is set out in clause 64(5) as *'a consumer who is reasonably well-informed, observant and circumspect',* sets the bar too high for appropriate use where a trader has targeted its goods or services, and therefore its contracts, at a particular group including vulnerable consumers. The Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) provides a helpful model of a flexible standard, of a type which may avoid the problems we have identified. There, the "average consumer" test, though still embodying an objective standard, is a variable test depending on the circumstances. It is also desirable that there should be consistency between the two pieces of legislation, which often both apply to the same cases.

Fixed contracts: Addition to Schedule 2, Part 1

20. We would support an addition to the grey list, or amendments to the existing provisions covering variation, to ensure less scope for Schedule 2, Parts 1 and 2 being interpreted incorrectly. Currently they permit unilateral variations on the basis of whatever the trader considers being a valid reason, regardless of whether it protects the consumer against encountering unexpected and unacceptable changes. In particular, in line with the BIS Select Committee's stated policy intentions, we would welcome an addition, or amendments to the grey list, which put beyond doubt that variation terms in a minimum fixed contractual period are potentially unfair. If adopted, we recognise the need to reflect the fact that, even when a deal is 'fixed' for a certain period (particularly a longer period), it may be acceptable for the price to be linked to a relevant published price index outside the trader's control, provided this is clear from the outset. Additionally, in some circumstances variation may in principle be appropriate even in "fixed" contracts where consumers are genuinely able to end a contract without suffering loss or inconvenience. This is subject to the criteria for such variation being clearly set out in the contract in such a way that consumers can foresee the alterations that may be made.

Discretion to decide the price after the consumer is bound: Schedule 2, paragraph 14

21. We are concerned by the addition of the following to the grey list term at paragraph 14, Schedule 2 of the Bill: *"where no price or method of determining the price is agreed when the consumer becomes bound"*. This addition may undermine the purpose of paragraph 14 by in fact allowing the mischief that it is aimed at tackling. Paragraph 14 was added to make clear that the price exemption does not apply to any term which purports to give the trader discretion to decide the amount of the price, after the consumer has become bound by the contract. The Law Commission provided an example of such a term where a plumbing firm charged £50 an hour for "the number of hours which we deem to be required". In these circumstances the trader may argue, for instance, that its terms provide the "method of determining the price" and therefore paragraph 14 is irrelevant to a fairness challenge. Thus, we think that the Law Commission's proposal is preferable and the additional words in Schedule 2 should be deleted.

Enforcer Investigatory Powers—Schedule 5

22. Schedule 5, Part 3, paragraph 13(8) introduces a "reasonable suspicion" test in relation to information requests relating to unfair terms. Limiting the use of this power to those cases where an unfair terms enforcer reasonably suspects the use or proposed use of an unfair term, restricts enforcers to a purely reactive role and limits their ability to carry out 'own initiative' investigations into the terms and conditions used in particular markets. Such a restriction does not currently exist under the Unfair Terms in Consumer Contracts Regulations 1999, nor will it exist in relation to the equivalent power relating to functions under Part 8 of the Enterprise Act 2002 (which allows the investigation of breaches of EU Directives relevant to unfair terms). This is consistent with the fact that standard form consumer contracts are not normally in any way confidential or deserving of protection. In addition, *the only investigatory power available to unfair terms enforcers is the power to require the production of information,* in contrast to domestic enforcers and EU enforcers who also have 'on-site' powers of entry and seizure.

Enhanced Consumer Measures—Schedule 7

23. While we welcome the enhanced consumer measures proposals, we consider that the complex cost-benefit calculations required may be too burdensome to apply in practice for many enforcers to make use of them. An enforcer will have to demonstrate that measures are 'just and reasonable' and 'proportionate', taking

[75] See the Law Commission's Unfair Terms in Consumer Contracts: Advice to BIS, March 2013 at paragraph 4.45.

into account the likely benefit to consumers, the likely costs incurred by the subject, and the likely cost to consumers of obtaining the benefit.

24. In addition to the practical challenges of estimating the relevant costs and benefits, such an analysis is likely to require specialist economic resource, which not all enforcers may have in-house. Given the challenges in accurately ascertaining costs and benefits, and the degree of uncertainty that exists in estimating them, there is a significant risk that enforcers will choose not to make use of the enhanced consumer measures. There is a risk that the evidential bar set by the cost-benefit analysis requirement will be so high that only certain schemes could be considered, or that such a conservative estimate of consumer loss has to be used that the value of the measures are significantly diminished. Our concern is not with the need to show reasonableness and proportionality, but with the specific requirement to do so by reference to an assessment of comparative costs.

25. We consider that a more pragmatic approach would be preferable. Such an approach could, for example, require enforcers to demonstrate the measures are reasonable, proportionate and likely to have benefits exceeding their costs, without requiring enforcers to undertake a detailed cost-benefit analysis that is likely to be complex and burdensome.

26. If, however, the proposed provisions remain, we would welcome guidance on how enforcers should assess the level of redress that is appropriate against the level of detriment.

Private Actions in Competition Law—Schedule 8

27. We welcome the Government's proposals. This includes the introduction of opt out collective proceedings, and we consider that the proposed safeguards should be sufficient to address any concerns about abusive litigation. In relation to the proposed Competition and Markets Authority's (CMA) power to approve voluntary redress schemes, we welcome recognition by Government and the BIS Select Committee that the CMA's role should not divert significant resources away from its core public enforcement work. It will be important that the criteria for setting up redress schemes, which the CMA will have to certify have been followed, are appropriate. We understand that BIS will set these out in draft regulations in due course.

March 2014

Written evidence submitted by Scott Mycock & David Weston (CR 25)

POSSIBLE GLAZING INDUSTRY CASE STUDY FOR CONSUMER RIGHTS BILL

1. Introduction

We are writing to provide a possible Case Study for the Consumer Rights Bill, 2013-2014, with particular reference to the Double Glazing Industry, the GGF, the supply of goods and services, and Section 75 of the Consumer Credit Act too.

2. Overview

We purchased almost 30 replacement double glazed aluminium windows and doors from a company pitching at the 'Grand Designs' end of the market in May 2012. Problems were encountered since day 1 of install, and we have been complaining ever since, both to the merchant/supplier, and to the credit card.

The goods cost £24,000 and almost £7,000 to fit; they are architectural quality with high performance and an eco specification. This was the first, and most significant step in the renovation of our new property, and the renovation has ground to a halt as a result.

3. Defects

3.1 Goods were fabricated incorrectly, including wrong parts, mis-cut parts and drainage holes undrilled so rainwater spilled into the house.

3.2 Low quality glass supplied, partially replaced with more of the same (they insisted we pay the fitting), then all replaced again but with more defects.

3.3 The supplier continually tried to fob us off and blame problems on our fitter.

3.4 The supplier would not acknowledge us as consumers and has unfair terms in their Ts&Cs such that the CAB reported them to Trading Standards.

3.5 4 site visits and the goods remain defective, and their attempted fixes have compounded problems and made them worse.

3.6 We opened 2 lines of enquiry with GGF, the first time they wanted to charge £800 for a site visit before offering any help but then stopped responding when we asked for more information. We approached them again

and after initial dialogue (after them giving inaccurate information) they stopped responding to our emails when we explained the details of the case.

3.7 We commissioned an independent fenestration expert (cost £900)—he stated we had been supplied glass of agricultural quality (not the advertised Pilkington) and that serious errors had been made in the fabrication & repair of the frames.

3.8 Merchant asserted several times that the glass should be judged by GGF standards, despite them not even being GGF members, and the expert stated that to judge this 'defective glass' against GGF guidelines was a 'dishonest travesty'.

3.9 The supplier (having rebranded to a different name during the course of our dispute) is no longer responding to our emails after we sent videos of water spouting into the house through the defective doors last December.

3.10 We have rightful concerns over the ongoing warranty on these goods henceforth.

3.11 We uploaded videos of leaks and draughts to *Youtube* for diagnostic purposes for the supplier and independent expert—and were threatened with legal action from the frames' 'system company' unless we removed them.

3.12 We have now been threatened with legal action again over our blog stating that our doors and windows leak—we feel it's shameful that a multimillion pound international company would rather take legal action than fix the problems.

4. Section 75

4.1 Having paid for the goods on credit card (John Lewis Partnership Card—HSBC) we apprised them of the situation immediately problems arose with a view to a backup Section 75 claim.

4.2 When resolve was looking unlikely from the merchant, we opened dialogue with JLFS who initially tried to process our claim as a chargeback.

4.3 They required us to obtain the Independent Expert's report, which they simply used as leverage to have the merchant return again to try and fix, against our wishes and the expert's recommendation (they actually told us they weren't interested in contacting the Expert), and they closed the case even before this final visit.

4.4 We felt they mishandled the case such that we sought advice from the Financial Ombudsman Service who wanted to open a case (and who remain waiting in the wings)…

4.5 We gave JLFS/HSBC another opportunity and they have agreed that the route to resolve is not from the merchant... however it's now several weeks on and we've heard nothing.

5. Summary

5.1 We've been mis-sold goods, in terms of advertising claims, promises of quality and quality control in the frames and the glass, and errors in fabrication have rendered our doors unfit for purpose.

5.2 We've been fobbed off—even at one point being told that the doors should let air and water in.

5.3 Our renovation has ground to a halt.

5.4 Countless hours over the past 18 months have been lost in site visits, research, photographing, videoing, emailing, letter writing, telephone calls, visits to the CAB, solicitor, calls to WhichLegal...

5.5 We are self-employed, running a small design agency from home—the impact on our business has been significant the time and distraction has resulting in a 30% decrease in our earnings.

5.6 The impact to our wellbeing has been significant too.

6. In Context

6.1 We are looking to have all the windows/doors removed and replaced with goods from another company—that's our aim, and having reached the end of the road with the merchant, we hope Section 75 will provide the route to resolve.

6.2 Had the Consumer Rights Bill been in place, this would not only have saved untold time and money, but it would also, crucially, have made the supplier 'measure twice and cut once'—the goods would doubtless have been made with due care and attention, glass supplied of the advertised quality, and all transported carefully and properly to minimise probems and reasons for complaint.

6.3 It is our experience that the glazing industry, and standards and practices therein are far from transparent, and raising the level of expectation and accountability can only be a good thing to save others going through what we are still enduring.

7. Additional

7.1 We have a raft of documentation, photographs, videos and communcations arising from our dispute.

7.2 We also have a password-protected page on our website compiled for JLFS/HSBC showing a sample of the problems… we could provide access to this if you wish.

March 2014

Written evidence submitted by Ticketmaster UK Limited (CR 26)

CONSUMER RIGHTS BILL 2013-14

SUBMISSION TO THE HOUSE OF COMMONS PUBLIC BILL COMMITTEE

Overview: this submission contains a proposal for new statutory provisions to make unlawful the use of automated computer programmes to acquire large volumes of live event tickets for resale, which is regarded as to the detriment of consumers.

1. About Ticketmaster UK

Ticketmaster is the ticketing business of Live Nation Entertainment, Inc. Live Nation Entertainment is the world's leading live entertainment company comprised of four market leaders: Ticketmaster, Live Nation Concerts, Artist Nation Management and Live Nation Media/Sponsorship.

Live Nation seeks to innovate and enhance the live entertainment experience for artists and fans: before, during and after the show.

Ticketmaster's family of ticketing companies includes GET ME IN!, a leading UK based online ticket marketplace dedicated to the resale of live event tickets.

In the UK we employ nearly 1,000 people across our London Headquarters, Manchester contact centre and offices in Stoke-on Trent and Glasgow.

2. Our ideas for enhancing consumer protection

Recognising the broad scope of the Consumer Rights Bill, and its objective of consolidating legislation and making it fit for the age of digital commerce, we see a pertinent opportunity to protect fans from those seeking to exploit technology to make access to tickets harder. We would commend our proposal for introducing new clauses to the Bill at Committee stage, and have prepared sample legislation as part of this briefing.

Technology is our business. Yet the e-commerce nature of ticketing means that we are in a constant battle against those that want to exploit the lawful ticket market. Nowhere is this problem more acutely represented than in the use of automated computer programmes—or 'bots'—to syphon tickets on an industrial scale.

We believe that the use of bots should rightly be regarded as a criminal activity and in no way should it be viewed as part and parcel of lawful ticket resale, which we strongly support. Fans tell us that they want the option to buy and resell tickets, and through our safe and transparent GET ME IN! platform, we enable this.

However, it is our responsibility as an industry to help protect fans from those who seek to abuse the system by syphoning off tickets. The use of advanced technologies to tackle bots is having an impact, we are vigilant and our investment in cutting edge technologies is significant. But this is an arms race that needs industry, government, consumer and retail groups to come together and tackle the issue head on. That is why we would welcome consideration of this issue, and our call for a clear law relating to it, in the House of Commons Public Bill Committee on the Consumer Rights Bill.

3. The proposed clauses and their meaning

Anti-Bot legislation:

(1) A person is guilty of an offence if:

  (a) he uses or sells an application, software, program, device or code to, or attempt to, manipulate or circumvent a security measure, access control system, or other control system or measure on an Internet website;

  (b) the manipulation or circumvention is unauthorised; and

  (c) he knew or was reckless as to whether the manipulation or circumvention caused or attempted to be caused was unauthorised.

(2) A person is guilty of an offence if he intentionally or knowingly hinders or provides another with the technological means of hindering or interrupting, without right, the functioning of a computer system, Internet website, or any part thereof by inputting, transmitting, damaging, deleting, deteriorating, altering, suppressing data or rendering data inaccessible.

(3) A person is guilty of an offence if he knowingly purchases, sells or resells goods obtained through the commission of an offence under Section (1) or (2).

Explanatory Notes:

Section 1

Our proposed Section 1 is designed to criminalise the use (and sale) of bots. Our proposed Section 1(a) has been drafted to be broad in scope and technology-neutral in order to allow for advances in technology.

Our proposed Section 1 is based on the "anti-bot law" implemented by California[i] and Section 1 of the Computer Misuse Act 1990[ii] ("CMA 1990").

Section 1 of the CMA 1990, requires an individual to have "knowledge" for an offence to be committed, whilst our proposed Section 1(c) requires knowledge *or* recklessness. The lower test of recklessness is aimed at a seller of a bot.

Section 2

Our proposed Section 2 is drafted to be consistent with the Cybercrime Directive,[iii] which has been adopted by the UK and Ireland and must be implemented by 4 September 2015.

The Cybercrime Directive aims to introduce laws to deal with the offences of: (i) unauthorised access to information systems; (ii) system interference; and (iii) data interference. Article 9 of the Cybercrime Directive provides for maximum terms of imprisonment for each of the offences.

Our proposed Section 2 would make an offence of activity that "hinders" the functioning of a website (and that would not necessarily fall within the scope of our proposed Section 1 (for example, rental of IP addresses to disguise a customer's originating IP address)).

Our proposed Section 2 is widely drafted to make an offence of "knowingly" assisting with the commission of an offence. Those who "knowingly" assist could include individuals who complete Captchas for a fee.

Section 3

Our proposed Section 3 is designed to make an offence of knowingly dealing in goods obtained through the commission of an offence (under our proposed Section 1 or Section 2).

Our proposed Section 3 has been limited to those who "knowingly" purchase goods, rather than "knowingly or recklessly" as it is arguable that those utilising the secondary market, due to their *knowledge* of the prevalence of bots, will be *reckless* as to whether a ticket was purchased by a bot. The intention of the legislation is not to prosecute individual purchasers of a ticket for an event on the secondary market.

Sanctions

Proposed sanctions have not been provided for the offences in the proposed Sections 1-3. A starting point for considering sanctions would be Article 9 of the Cybercrime Directive (as above) and Section 1(3) CMA 1990:

> "A person guilty of an offence under this section shall be liable—
>
> (a) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both;
>
> (b) on summary conviction in Scotland, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both;
>
> (c) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both."

March 2014

References

[i] California amended Section 22505.5, Assembly Bill 329 to include a specific measure against bots, as follows:

> "Notwithstanding Section 22503.5, 22503.6, 22504, or 22511, a person who intentionally uses or sells software to circumvent a security measure, access control system, or other control or measure on a ticket seller's Internet Web site that is used to ensure an equitable ticket buying process is guilty of a misdemeanor."

[ii] Section 1(1) CMA 1990:

> "(1) A person is guilty of an offence if—
>
> (a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer or to enable any such access to be secured;
>
> (b) the access he intends to secure, or to enable to be secured, is unauthorised; and

(c) he knows at the time when he causes the computer to perform the function that that is the case."

[iii] Directive 2013/40/EU of the European Parliament and of the council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems ("Cybercrime Directive").

Available at: http://new.eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0040&from=EN

Written evidence submitted by Energy UK (CR 27)

1. Introduction

1.1. Energy UK is the trade association for the energy industry. Energy UK has over 70 companies as members that together cover the broad range of energy providers and supplies and include companies of all sizes working in all forms of gas and electricity supply and energy networks. Energy UK members generate more than 90% of UK electricity, provide light and heat to some 26 million homes and last year invested £10 billion in the British economy.

1.2. Energy UK strongly believes in promoting competitive energy markets that produce good outcomes for consumers. In this context, we are committed to working with Government, Parliament, regulators, consumer groups and our members to develop reforms which enhance consumer confidence, trust and effective engagement. At the same time, Energy UK believes in a stable and predictable regulatory regime that fosters innovation, market entry and growth, bringing benefits to consumers and helping provide the certainty that is needed to encourage investment and enhance the competitiveness of the UK economy.

1.3. These high-level principles underpin the following response which reiterates a number of points made to the BIS Committee in its inquiry, particularly concerns around the move to US-style 'class actions'.

2. Executive Summary

2.1. Energy UK supports the aim of the Draft Consumer Rights Bill ("the Bill"). We agree that helping consumers understand their rights when things go wrong will empower them to engage with markets with confidence, driving improvements in price and customer service. We also support the aim of reducing regulatory burdens for businesses, since this will reduce costs, barriers to entry and growth.

2.2. Energy UK considers that, in general, the Bill meets these aims. We welcome the consolidation of the complex architecture of consumer law into a simpler and more accessible framework, and the new incentives to ensure that contract terms are transparent and prominent.

2.3. There are a number of concerns around the Government's proposal to introduce an opt-out collective actions regime for competition law, where private "representatives" can take alleged infringements to the Competition Appeals Tribunal (CAT) on behalf of a group of consumers that are automatically included in the lawsuit unless they actively opt out. We believe that it will have damaging consequences for consumers and make the UK a less attractive place to do business.

2.4. Energy UK and a number of other organisations have made strong representations to Government highlighting the risk that the opt-out collective actions regime is subject to abuse and leads to US-style class-actions, causing huge unnecessary costs to business without benefiting consumers as well as being contrary to the European principle that collective actions be based on an opt-in regime. Government clearly shares this fear, and has built in what it sees as sufficient protections to prevent this from happening. As it now seems unlikely that the Government will remove the provisions around opt-out collective actions from the Bill entirely, we would urge the Government to provide reassurance on record in Parliament that the opt-out provisions will be reviewed if there is evidence that the system is being abused in the way that is feared. Allowing an abusive regime to continue would be damaging to perfectly legitimate business, vexatious for customers and costly for all involved, the Government should ensure that it provides powers to stop this from happening should it occur. Further detail on how these provisions should be caveated is provided in paragraph 3.4.

2.5. These concerns are based on the following beliefs that opt-out CATs are not appropriate:

a) They are unnecessary. The energy sector is highly regulated and already has a competition law enforcer in Ofgem.

b) They are prone to abuse, imposing both direct costs and risk premiums on business, which will ultimately be passed onto consumers.

c) They will undermine, and not complement, public law enforcement by substituting private financial interests with public interest duties.

d) They will not empower consumers. They will empower lawyers and funding companies. Improved information on opt-in actions would be a better solution.

e) They will deter legitimate business activity, potentially constraining innovation and efficiency.

f) They could be the start of a slippery slope towards the US-style class actions and litigation culture that BIS fears. There will inevitably be pressure from beneficiaries of collective actions to remove safeguards and expand beyond competition law.

g) It runs counter to the European Commission's recommendation that "collective redress systems should, as a general rule, be based on the "opt-in" principle"[76].

2.6. As a separate issue, Energy UK agrees that a specialist competition tribunal should be able to hear stand-alone private competition law cases, as well as follow-on cases, provided that the litigants are single individuals or companies, or a collective action is opt-in.

2.7. Energy UK supports the "redress" and "compliance" categories of the "enhanced consumer measures" that the courts will be able to impose on companies that have breached consumer law. However, we believe that the "choice" category should be removed from the Bill. Whilst we support reforms that enable consumers to choose between providers of goods and services more effectively, we do not think that the courts have the expertise to intervene in markets in this way, risking distortions of competition and unintended consequences. These activities should be left to sectoral regulators.

3. Opt-out collective actions

3.1. As stated above, Energy UK supports the principle of redress. Energy companies have shown their willingness to admit responsibility when they make a mistake, and take corrective actions. Energy UK has supported the introduction of several statutory and voluntary redress mechanisms over the past few years. Some examples are listed in 2.3 and 2.4 above. However, Energy UK opposes the Government's proposal to introduce an opt-out collective actions regime for competition law.

3.2. Opt-out collective actions will have damaging consequences for both energy consumers and businesses without bringing the intended benefits. To provide further detail, Energy UK opposes the introduction of opt-out collective actions for a number of reasons explained below:

a) They are unnecessary. Ofgem, the sectoral regulator for the energy industry, is an enforcer of competition law and consumers and their representatives are able to notify Ofgem if they are suspicious of illegal activity. Introducing a new private litigation route (in addition to the High Court) seems to imply that there are breaches being left unprosecuted by Ofgem; there is no evidence to suggest that this taking place. It also creates a duplicate enforcement regime for companies which could lead to confusion and uncertainty.

b) As experiences from the United States and Australia illustrate, opt-out collective actions or "class actions" are prone to abuse, with lawyers and funding companies taking advantage of a company's potential ruin (via huge aggregated costs) to coerce them into settling unmeritorious cases. This will impose both direct costs and risk premiums on businesses, which will ultimately be passed onto consumers. The US Institute for Legal Reform has specific examples of abuse in the US and Australia.

c) Ofgem, as the energy sector's competition law enforcer, is a statutory body with a duty to act in the public (consumers') interests. Representatives in private opt-out collective actions have no such duty; they are acting to further their own financial interests. This is not necessarily a problem in itself. What is a problem is that those involved in the case "representatives" are often divorced from the majority of the people that they are representing (since they are automatically opted-in). Therefore, not only can opt-out collective actions run counter to the public interest, they can run counter to the interest of the bulk of consumers supposedly represented.

d) Consumers encompassed by any opt-out collective action are not "empowered"; the exercise of an individual's rights is transferred to another party without the person's explicit consent, and in many cases without their knowledge. This does not happen with opt-in collective actions, where a person exercises a positive choice. Energy UK supports a regime where informed consumers decide to opt-in, and in this regard encourages better dissemination of information about opt-in collective actions.

e) The introduction of opt-out collective actions will make businesses fear expensive lawsuits filed against their legitimate activities. This is likely to make them highly risk averse, which could stifle innovation and efficiency, failing to bring important benefits to consumers that would otherwise be realised.

f) Currently, BIS is proposing to restrict opt-out collective actions to the field of competition law. However, given how lucrative these lawsuits have proved elsewhere, we would expect those who consider themselves potential "representatives" to lobby the UK Government to extend collective actions to other areas of law. If the Bill was passed in its current form, this extension would become a much easier "sell" owing to the creation of a precedent. We therefore urge the Government not to open the door to unnecessary, coercive, costly and disempowering litigation.

3.3. If the Government does proceed with the introduction of opt-out collective actions for competition law, then Energy UK agrees that safeguards should be put in place to prevent US-style class actions. Those safeguards that BIS has proposed include—

a) Certification by the CAT that the case is suitable for opt-out;

[76] http://europa.eu/rapid/press-release_IP-13-524_en.htm

b) Proceedings to be initiated only by representatives authorised by the CAT;

c) Maintaining the loser pays rule;

d) No treble damages; and

e) No contingency fees (ie damages based agreements to be unenforceable).

3.4. Energy UK supports all of the above safeguards. However, we believe that additional safeguards are required. We would ask the Committee to consider the following suggestions—

a) The CAT should be obliged to consult before making Tribunal rules in respect of collective proceedings. Clause 31 of Schedule 7 to the Bill allows the Tribunal to make provision for a number of matters including but not limited to: "the factors which the Tribunal must take into account in deciding whether a claim is to be brought in collective proceedings" and "the factors which the Tribunal must take into account in deciding whether to authorise a person to act as a representative in collective proceedings". Whilst Energy UK has no reason to doubt the competence of the CAT in producing such rules, we note that the Bill provides it with considerable discretion in areas which might normally be deemed policy. We therefore suggest that the CAT is obliged to consult on the rules and/or BIS issues some guidance on the direction it would like the CAT to take, which itself should be subject to consultation (as BIS has done with its draft steer to the Competition and Markets Authority.

b) Third-party funding of collective actions should be prohibited because they further alienate the supposedly-represented consumers by becoming a collaboration between the funder and the lawyer. The extra resources and ability to subsidise new cases with previous payments (being serial litigants) also allows claims to be pursued regardless of merit. The only protection in the Bill is that actions must be initiated by a proposed representative who must subsequently be authorised by the CAT. The Government should go further and explicitly preclude third-party funding.

c) Any unclaimed damages should not be provided to the Secretary of State's charity of choice (as provided within Schedule 7, Clause 6 of the Bill); doing so would provide a windfall to a party that has not suffered harm. Damages may go unclaimed for many reasons, including an overestimate by the Tribunal, claimants having insufficient proof of harm or claimants considering the award insufficiently material to claim. In any of these scenarios, the unclaimed damages should be returned to the company which paid them; Energy UK believes that this should be the default arrangement. Indeed, the possibility of sums going unclaimed is a compelling argument against an opt-out regime, whereby an illusion of compensation disguises a needlessly inefficient deployment of capital.

d) There should be no restrictive time limits imposed for the resolution of cases. Energy UK would be extremely concerned at the inclusion of any "fast-track" provisions in the Bill. Competition law cases are inherently complex; due process is essential in any system of justice.

3.5. Energy UK understands from BIS' Impact Assessment that the CAT has previously handled an average of 2.25 cases a year. We are concerned that the provisions for opt-out collective actions could lead to a dramatic increase in its case load, potentially with damaging knock-on effects on its other work including regulatory appeals.

3.6. As a separate issue, Energy UK agrees that a specialist competition tribunal should be able to hear stand-alone private competition law cases, as well as follow-on cases, provided that the litigants are single individuals or companies, or a collective action is opt-in. We are unsure whether the most appropriate body would be the CAT or Competition and Markets Authority (CMA), and would urge the Committee to inquire about the Government's rationale for its choice of the CAT.

March 2014

Written evidence submitted by Financial Services Consumer Panel (CR 28)

Consumer Rights Bill Call for Evidence

1. This is the Financial Services Consumer Panel's response to the House of Commons Public Bill Committee call for evidence on the Consumer Rights Bill.

2. The Consumer Panel supports the Consumer Rights Bill and the numerous positive benefits it will undoubtedly bring for consumers and businesses. However, for the Bill to be further improved it is our view that amendments need to be made in the following three areas:

Exemption from the 'fairness' test

3. The Panel submitted an amendment (no. 72 in the marshalled list) which would have required that the exemption should apply only to a transparent price, agreed by the consumer at the point of entering the contract, and not to variable future fees or charges which are unknown at the time the contract is signed.

4. During the debate on 6th March the Minister argued that the introduction of the requirement for terms to be both transparent and prominent, in line with the views of the Law Commission stated in 2013, would adequately protect consumers. Consequently the amendment was withdrawn.

5. The Panel believes it to be helpful that it is on the record that the intention is that future fees and charges can be assessed for fairness.

6. However, not making the Minister's interpretation explicit on the face of the Bill will undoubtedly give rise to the scope for different legal interpretations and legal disputes. Consumers are often at a practical disadvantage when it comes to litigation against firms, and we would not want to see consumers having to engage in litigation which is then clouded by arguments over statutory interpretation. It would be much better for consumers if the Minister's interpretation was reflected in the relevant clauses of the Bill to avoid any ambiguity.

The definition of 'average' consumer

7. The Panel submitted an amendment (no 73) that the phrase 'taking into account social, cultural and linguistic factors' should be added to the definition in the Bill, to account for groups of consumers with different characteristics, and to allow for the ways in which individuals interact with information. This would also bring the definition in line with European Courts of Justice jurisprudence.

8. During the debate the minister argued that this amendment is not required on the grounds that it is not an objective test, and that all the circumstances relating to whether an individual consumer is vulnerable can be taken into account when assessing the fairness of the terms. The amendment was subsequently withdrawn.

9. However, the Panel still believes that a mismatch between UK and European legislation may lead to a lack of clarity that may have to be resolved in the courts in future, and therefore wishes to continue to argue for the specific wording suggested.

10. As in paragraph 6 above, not making the Minister's interpretation explicit on the face of the Bill will give scope for different interpretations putting consumers at a practical disadvantage.

The right to cancel for mortgage prisoners

11. The Panel submitted an amendment (no. 67) dealing with the issue of 'mortgage prisoners', as the right to cancel may not protect consumers who are unable to secure an alternative mortgage product. This set of circumstances should be added to the indicative list of unfair contract terms.

12. The minister argues that Financial Conduct Authority rules require firms to treat their customers fairly at all times (FCA Principle 6), and has a wide margin in which it can consider all the circumstances of a case and take some situations into account. The amendment was subsequently withdrawn.

13. However, the Panel remains to be convinced that the FCA's powers in this area are sufficient to address the problem.

14. In March 2013 the Panel wrote to the FCA expressing its concerns about the Mortgage Market Review (MMR) rules affecting mortgage prisoners (MCOB 11.8.1E[77]).

15. This particular provision, unlike the rest of the MMR rules which do not take effect until April 2014, was implemented in 2012. Its aim, as indicated in Policy Statement PS12/16, was to protect "those borrowers who find themselves 'trapped' with their current lender", the group often described as 'mortgage prisoners'. The provision was switched on with immediate effect as it was aimed at protecting not only those borrowers who may find themselves trapped in future following the implementation of the MMR, but also those borrowers who find themselves trapped today because they do not meet current tightened lending criteria.

16. The Panel fully supported the notion of MCOB 11.8.1E, given that we consider there is real potential for detriment to existing creditworthy borrowers if they are unable to get an affordable mortgage under revised lending criteria. However, we believe that as currently drafted the provision does not achieve its intended aim.

17. In its response to CP11/31, the FSA's substantive MMR consultation, the Panel suggested a specific rule to protect mortgage prisoners from being treated unfairly, and we maintain that suggestion would be more effective in mitigating the risks that exist in this space.

Open to interpretation

18. The Panel believes that the current drafting of the provision creates uncertainty.

19. For example, the wording sets out that providers should not treat the customer (mortgage prisoner) less favourably than other customers with similar characteristics. It is not clear to us, or others, whether "customers with similar characteristics" refers to other mortgage prisoners, or other non-trapped customers (e.g. people on the same income, repayment history, etc).

20. The Panel therefore believes that an amendment such as it proposed to the Consumer Rights Bill still remains necessary.

[77] FCA Handbook at http://fshandbook.info/FS/html/FCA/MCOB/11/8

21. The Panel's amendments are attached. We would be happy to provide further information on request or to discuss any of these issues in more detail if necessary.

March 2014

AMENDMENTS PROPOSED BY THE FINANCIAL SERVICES CONSUMER PANEL

AMENDMENT 67

Schedule 2, page 51, line 37, at end insert—

'(23) A term which has the object or effect of enabling a trader to increase the price of the contract unilaterally without a valid reason and where the consumer is unable to—

(a) enter into a new regulated mortgage contract or home purchase plan or vary the terms of an existing regulated mortgage contract or home purchase plan with the existing mortgage lender or home purchase provider; or

(b) enter into a new regulated mortgage contract or home purchase plan with a new mortgage lender or home purchase provider. The terms "regulated mortgage contract" and 'home purchase plan' have the same meaning as in the Financial Services and Market Act 2000 (Regulated Activities) Order 2001 as amended.'.

AMENDMENT 72

Clause 64, page 37, line 19, leave out from 'that' to end of line 23 and insert 'the assessment is of the appropriateness of the price payable under the contract, by comparison with the goods, digital content or services supplied under it, but only where the price payable does not relate to future variable fees or charges payable under the contract.'.

AMENDMENT 73

Clause 64, page 37, line 32, after 'circumspect', insert ', taking into account social, cultural and linguistic factors.'.