



## Draft Consumer Rights Bill – Comments Proforma

We welcome any further comments either on the proposals set out in the Government Response or the draft Bill. If you would like to comment, please complete this form.

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Please tick a box from the list of options that best describes you as a respondent.

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	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
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## Comments

Please use this table for any comments that you may have either on the overall content and coverage of the proposals, the structure of the draft Bill or detailed comments on specific areas covered by the proposals.

Proposed Measures	Comments on the Draft Bill or Government Response
Overall Content, Structure and Coverage	<p>This is an ambitious attempt to create new primary legislation and we are rather concerned that the perceived benefits may be over-estimated and that that in reality there may be potentially significant cost implications.</p> <p>We do welcome any attempt to help consumers understand their legal rights as we believe that there is a lot of confusion about what “statutory rights” actually are.</p> <p>However, this new legislation is being introduced just as the provision of consumer advice is being moved into the voluntary sector and the primary enforcer is facing drastic cuts as part of the current reduction in the public sector.</p> <p>There is a risk that this new legislation will be publicised but that neither advice nor enforcement will be adequate to ensure that it is effective.</p> <p>We are also concerned by the introduction of additional options for private redress and particularly alarmed by the proposal to introduce “opt-out” collective actions which raise the spectre of a US style litigation-based approach which would have a drastic impact on the way that UK businesses operate. Once embedded in primary legislation there would be precedent for this option to be expanded into other areas of UK law.</p> <p>We also question the inclusion of amendments to the Enterprise Act in a piece of legislation related to sale of goods etc.</p>

Goods	<p>The new legislation purports to clarify and simplify existing rights rather than enhance them but several of the key proposals are seen by AMDEA as presenting certain risks.</p> <p>At present consumers have the right to return substandard goods within a “reasonable” time, and they are entitled to demand a full refund rather than a replacement or repair, if they so wish. The concept of “reasonable” is presumed to cover all scenarios from a deflating balloon (for which a week would be unreasonably long) to the lawnmower (or skis) bought in a sale and not unwrapped for several months (for which a week would be unreasonably short).</p> <p>It is now proposed that consumers should have 30 days to reject faulty goods after which they would have to accept a repair/replacement. However, the timescale for claiming that goods are substandard remains 6 years (5 in Scotland) with the burden of proof remaining at 6 months so it is not clear how this can operate in practice. The definition of “reasonable” remains open to interpretation each time it is mentioned.</p> <p>The new Act also proposes to list reasons why a product might be unfit for purpose to include safety, appearance and durability.</p> <p>The safety of goods on the market is required by other legislation so is superfluous in this Act – suggestions that this is what the current legislation includes is surely misleading as a new piece of primary legislation offers the opportunity to ensure that it is sufficiently clear in its intent to avoid future wrangling about interpretation.</p> <p>The idea that appearance would not be able to be judged in a face-to-face sale would seem superfluous (and indeed is expressly excluded by the following article).</p> <p>But the factor about which we are most concerned is the bald reference to durability. If this aspect is to remain in the list of “helpful” reasons to argue that a product is sub-standard (and the UK retains its 5/6 years for claiming non-conformity) there must be clear explanations of how exactly this applies. The idea that e.g. a washing machine needing repair after 5 years of hard use could possibly imply its non-conformity when sold is ludicrous yet potentially an argument under this article.</p> <p>Finally, given that many retailers offer 30 days (or even longer) for consumers to change their mind and get a full refund (giving many consumers the impression that this is a right), it is not clear how well consumers are going to accept the distinction. Not to mention how either option fits with the length of any commercial guarantee offered and whether the consumer would approach the warranty provider/retailer/manufacturer first.</p> <p>We are aware that many retailers already offer full refunds to anyone claiming a product is faulty even if it is subsequently found not to be. In practice we risk moving to a position where all</p>
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	<p>face-face purchases can be cancelled for 30 days even though distance sales only have 14. This is of particular concern in the case of large goods with significant delivery costs.</p> <p>In the event that the consumer finds a fault and has it repaired they will be entitled to insist that if this first repair fails or another fault develops they are entitled to money back.</p> <p>Within the first 6 months the consumer would be entitled to a full refund. Again where large goods are concerned, a consumer who has failed to understand (or even read) their instruction manual could demand that a product be removed and a full refund issued even if it then transpired that there was nothing wrong with the item. While we fully appreciate that a consumer should not have to endure numerous attempts to fix problems with a new product, we believe that a single opportunity to repair what may be a complex product (with complicated electronic components not easily understood by a “reasonable” consumer) is too strict a limit. It would not be practicable to attempt to reclaim a refund issued or to recover a replacement product if no fault was subsequently identified so all such losses would need to be assessed when setting prices.</p> <p>As a final point the example given in the draft is a new £20 toaster that “no longer works” after 3½ weeks – the consumer will be entitled to a full refund as it is within 30 days. We would suggest that there is an obligation on the consumer to check that they did not blow the fuse when they plugged the appliance into a multi-socket extension lead before claiming the product is faulty. We know that in practice this is unlikely to happen.</p>
Digital Content	<p>Aligning rights for digital content with those for goods is desirable but how far it can be done is questionable. Rights to repair or replacement or a price reduction are more difficult to evaluate in relation to digital content as it is not clear how fault will be proven in such cases. Returning digital content is not really an option so would you keep the content but still get a full refund?</p>
Services	<p>The Bill also proposes aligning the rights for services with goods – again judgement as to fault is more difficult than with goods.</p> <p>Warranty provision and/or service contracts would be subject to these cancellation rights (and refund options). Businesses will no longer be able to limit their liability for a breach of consumer rights on the basis that the terms were “reasonable”. There has already been argument about how to assess whether a service is defective – early proposals were that the consumer’s view should prevail but it is now suggested (sensibly) that as long as the service is in accordance with the terms offered then it should be deemed satisfactory. However this seems to be yet another area in which there could be more argument than there is at present. While a specific time limit for fulfilling a function may be met or missed, other aspects of service provision are unquantifiable so subject to interpretation as to their conformity .</p>
Unfair Contract Terms	<p>Changes to the legislation on unfair contract terms are intended to</p>

	<p>clarify that price and subject matter are not assessable for fairness as long as they are <i>transparent</i> and <i>prominent</i>. The term prominent in particular seems open to differing interpretations as well as being difficult to apply when there are numerous price terms within a contract. The requirement for more onerous and unusual terms to be especially brought to the consumer's attention is also potentially in conflict with the earlier provision.</p>
<p>Consumer Law Enforcement Powers</p>	<p>In principle we support the consolidation of generic enforcement powers based on the Consumer Protection from Unfair Trading Regulations 2008 for Trading Standards and other enforcers.</p> <p>However powers of entry will still be different under other pieces of legislation related to e.g. food and health. Balancing adequate protection for legitimate businesses against the desire to deal with rogue traders is a particular issue in relation to the requirement to give notice (or not).</p> <p>We are also concerned about the idea of allowing "enforcers" expanded powers of entry in primary legislation with the expectation that future secondary legislation would permit other organisations (as yet unknown) to use those powers.</p> <p>A key aspect as always is the definition of terms - <i>'just, reasonable and proportionate'</i> may be open to differing interpretations.</p> <p>Section 81 and Schedule 6 of the draft Bill will amend Part 8 of the Enterprise Act 2002, which provides for specified enforcers to agree statutory undertakings or to seek enforcement orders against traders suspected of having breached specific legislation.</p> <p>Currently, civil sanctions under Part 8 are limited to undertakings or orders to stop/not to repeat offending conduct. This reflects the fact that Part 8 derives from the EU's Injunctions Directive (2009/22/EC). The draft Bill proposes to go far beyond this and require compensation for affected consumers as well as requirements for certain actions by the trader. These additional requirements will incur costs and would seem to be overly prescriptive.</p> <p>We would point out that certain consumer-related sectors are already highly regulated, with mechanisms already in place for civil enforcement, remedies etc. How will this Act avoid duplication?</p> <p>We are also unhappy about the standards of proof required. The Regulatory Enforcement and Sanctions Act 2008 requires a regulator seeking civil remedies to be satisfied that, if the case proceeded to criminal trial, it would achieve a conviction. These proposals imply an altogether less robust approach.</p> <p>We also have concerns about resources and the role of the civil courts vs. alternative dispute resolution.</p>

<p>Enhanced Consumer Measures</p>	<p>The draft Regulations introduce a private right of redress for consumers who have been victims of misleading or aggressive practices; standard remedies for victims of misleading or aggressive practices; and an entitlement to seek damages, as well as a 90 day period for cancellation. How does this avoid affecting all consumer contracts? Are we in fact allowing 90 days for a consumer to change their mind?</p> <p>It is not clear how any redress could be fairly apportioned if all affected consumers could not be identified. Or indeed how such monies are to be elicited from the “rogue traders” cited as the intended target for such claims.</p> <p>It would also imply the demise of current self-regulatory regimes such as the ASA.</p>
<p>Private Actions in Competition Law</p>	<p>The Competition Appeal Tribunal (CAT) will have an enhanced role but there is still no detail of how exactly this will work.</p> <p>The concept of an opt-out collective regime triggers alarm bells, partly because it is in conflict with emerging pan-European initiatives but primarily because of the risk of American style litigation companies springing up in the UK.</p> <p>It appears that the rationale for suggesting such a regime is that the single example of an “opt-in” action in the UK failed to achieve high levels of monetary recompense for affected consumers. This implies a somewhat patriarchal approach to the consumer who is intended to be empowered by this legislation.</p> <p>In fact there has been an increase in damages claims in recent years, with several claimants frequently being represented by a single law firm so there seems little evidence that the current processes are inadequate.</p> <p>Opt-out actions are not compatible with the long-standing principle of compensatory damages in English law. They also create the potential for large sums of money to be paid by the defendant which the victims of the infringement may never claim. If a fine has already been imposed by the regulator this then serves as a second financial penalty with no additional benefit to the affected consumers.</p> <p>Both the UK Government and the EU Commission have emphasised the need to avoid the excesses of US-style litigation.</p> <p>A particular concern is the extent to which opt-out actions can lead to very large settlements (based on an unidentified group of potential claimants) even if the claimants’ case is weak because the defendants will settle rather than embark on the costly and lengthy process of fighting the claim.</p> <p>We do not believe that the proposal that the tribunal will control class certification is sufficiently detailed to avoid the issues that we have outlined.</p>

	<p>We would reiterate that any collective redress mechanism should not be used as a substitute for enforcement action by public authorities.</p> <p>We would also emphasise that ADR is the most effective form of providing collective redress, and more should be done to encourage parties to engage in ADR.</p>
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Thank you for taking the time to provide feedback on the draft Consumer Rights Bill. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would you be content if we were to contact you again either for research or to send through consultation documents?

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