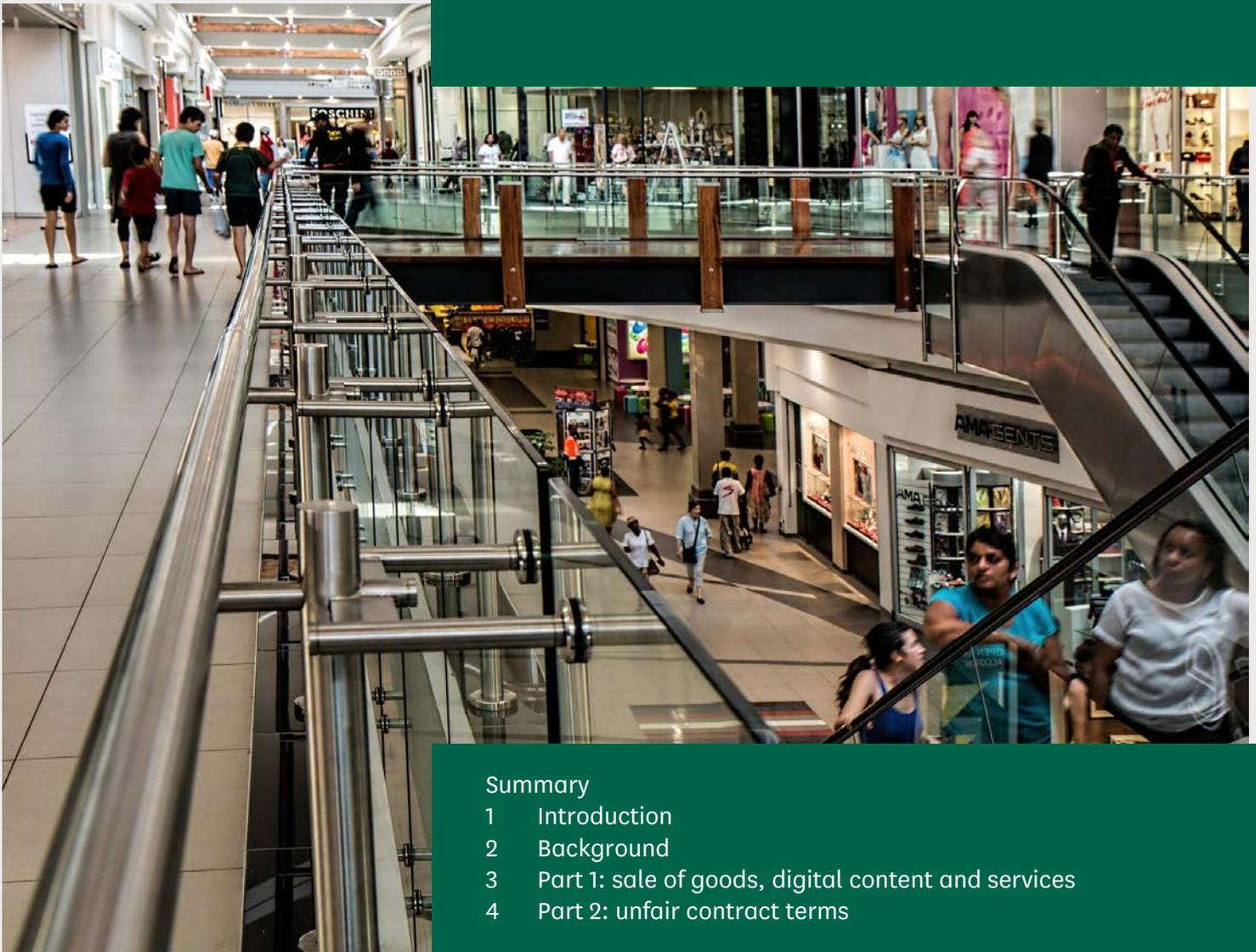


Research Briefing

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Consumer Rights Act 2015



Summary

- 1 Introduction
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Summary

The [Consumer Rights Act 2015](#) (the “CRA 2015”) came into force on 1 October 2015 and represents the biggest overhaul of consumer law for many decades. The CRA 2015 sets out a simple modern framework of consumer rights, with the aim of increasing consumer confidence and make enforcement easier.

Specifically, the CRA 2015 is designed to:

- Consolidate in one place key consumer rights covering consumer contracts for goods, digital content, and services (Part 1).
- Reform and consolidate the law relating to unfair terms in consumer contracts (Part 2).
- Consolidate and simplify enforcers’ powers as listed in Schedule 5 to investigate potential breaches of consumer law and clarify that certain enforcers (trading standards) can operate across local authority boundaries (Part 3).
- Give the civil courts and public enforcement bodies greater flexibility to take the most appropriate action for consumers when dealing with breaches or potential breaches of consumer law (Part 3).
- Introduce easier routes for consumers and small and medium enterprises (SMEs) to challenge anti-competitive behaviour through the [Competition Appeal Tribunal](#) (CAT) (Part 3).

The CRA 2015 extends to England, Wales, Scotland, and Northern Ireland. However, some parts of the Act include separate rules for Scotland.

This briefing paper outlines the background to the CRA 2015 and considers the consumer protection provisions found in Parts 1 & 2. It looks at statutory rights in respect of consumer contracts for goods, digital content and services and considers how the Act treats unfair terms in consumer contracts and notices. In the process, this paper outlines the main structural changes to consumer regulatory and enforcement bodies.

1 Introduction

Over the last few years, the UK's consumer protection regime has been reviewed, dismantled and completely rebuilt. Legislative reforms have been made against a backdrop of structural changes to consumer enforcement bodies, creating a new consumer landscape.

The main legislative change has been the introduction of the [CRA 2015](#). This Act consolidates consumer rights in one place, enhances consumer protections for consumers, and modernises the law to allow for digital advances. The Act is in three parts and contains 10 schedules; each part has a separate objective, namely:

- [Part 1](#) provides consumer rights and remedies in respect of contracts to purchase goods, digital content, and services.
- [Part 2](#) sets out consumer protections in respect of unfair terms in consumer contracts and notices. It draws on the recommendations of the Law Commission.
- [Part 3](#) contains miscellaneous and general provisions, including: investigatory powers; amendment of the [Weights and Measures \(Packaged Goods\) Regulations 2006](#); enhanced consumer measures and other enforcement under the [Enterprise Act 2002](#); a duty on letting agents to publicise fees and other information; and certain requirements relating to resale of tickets for recreational, sporting and cultural events.

Significantly, Part 3 introduces significant changes to private actions in competition law, including: expanding the jurisdiction of the [Competition Appeal Tribunal](#) (CAT), the introduction of opt-out collective actions and the establishment of voluntary redress schemes.

This briefing paper is concerned only with the consumer protection measures found in Parts 1 and 2 of the CRA 2015.

2 Background

2.1 Why was a new consumer act needed?

Prior to the coming into force of the new CRA 2015, there were 12 separate pieces of legislation covering consumer rights, and around 60 pieces of legislation setting out the investigatory powers of consumer law enforcers. This was the result of UK consumer law having developed piecemeal over a period of 30 years. Whilst offering a high degree of consumer protection, this old regime was criticised for being unnecessarily complex, fragmented and, in places, unclear. The law had also failed to keep up with technological change. In addition, there were overlaps and inconsistencies between EU and pre-existing UK legislation.

When introducing the new [CRA 2015](#) in October 2015, the Department for Business, Innovation and Skills (now replaced by the Department for Business, Energy and Industrial Strategy (BEIS)), said that despite spending an estimated £90 billion a month, UK consumers found it difficult to understand their legal rights and obligations.¹ This in turn, undermined competitiveness and growth in the economy. It was argued that new transparent rights embodied in a single act would help consumers to make better choices when they buy and save them time and money (**Box 1**).

1 Policy rationale for introducing the CRA 2015

There is general agreement across business and consumer groups that the existing UK consumer law is unnecessarily complex. It is fragmented and, in places, unclear, for example where the law has not kept up with technological change or lacks precision or where it is couched in legalistic language. There are also overlaps and inconsistencies between changes made by virtue of implementing European Union (EU) legislation alongside unamended pre-existing UK legislation.

[Explanatory Notes to the Consumer Rights Act 2015](#) (paragraph 5)

¹ Department for Business, Innovation and Skills press notice, [New rights for consumers when buying digital content](#), 1 October 2015

As already mentioned, [Part 2](#) of the CRA 2015 deals with unfair contract terms in consumer contracts and notices. Prior to the coming into force of the Act, the law on unfair terms was contained in two separate pieces of legislation, the [Unfair contract terms Act 1977](#) (UCTA 1977) and the [Unfair Terms in Consumer Contracts Regulations 1999](#) (UTCCRs).² Under the UCTA 1977, some contractual terms were automatically non-binding whilst others were subject to a test of reasonableness. The UTCCRs enabled consumers to challenge most non-negotiated terms of a contract on the basis they were unfair. The difficulty was that the UCTA 1977 and the UTCCRs had inconsistent and overlapping provisions, creating uncertainty for consumers and businesses.

The Law Commission, in its report on [Unfair terms in consumer contracts](#), described the legislation as difficult to interpret, with regulators and business expressing different views.³ In particular, there was uncertainty attached to the construction of Regulation 6(2) of the UTCCR, by which a term in plain, intelligible language would not be subject to assessment for fairness if it relates to the definition of the main subject matter of the contract or the adequacy of the price (the so called “core terms exemption”). In the 2009 case of [Office of Fair-Trading v Abbey National Plc](#),⁴ the Supreme Court held that bank charges for unauthorised overdrafts were not subject to assessment. This led to calls to reform the unfair contract terms legislation and the core terms exemption.

2.2 Consumer strategy

The Coalition Government published its consumer strategy in April 2011, [Better Choices: Better Deals – Consumers Powering Growth](#). Its stated aim was to create a simple, modern framework of consumer law across all sectors. To this end, a series of consultation documents were published between March and November 2012 proposing measures to overhaul and reform UK consumer law. The responses received highlighted areas of uncertainty and inconsistency in consumer law and enforcement and provided evidence of consumer detriment.

Consumer reform was subsequently included in the Queen’s Speech in May 2013 and a draft Consumer Rights Bill was published on 12 June 2013. This draft Bill was subject to pre-legislative scrutiny by the BIS Select Committee, which published a report on 23 December 2013.⁵ The Government published its response to each of the Committee’s recommendations together with its

² The [Unfair Terms in Consumer Contracts Regulations 1999](#) implement the [Unfair Terms in Consumer Contracts Directive](#) (Council Directive 93/13/EEC)

³ Law Commission, [Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills](#), March 2013

⁴ [Office of Fair-Trading \(Respondents\) v Abbey National Plc \(Appellants\) \[2009\] UKSC 6, \[2010\] 1 A.C. 696](#)

⁵ House of Commons Business, Innovation and Skills Committee, [Draft Consumer Rights Bill](#), Sixth Report of Session 2013-14, HC 697, Volume I, II and III, 23 December 2013

[Statement on Policy Reform](#) on 23 January 2014.⁶ On the same day, the [Consumer Rights Bill](#) was introduced in the House of Commons.

The stated aim of the Bill was to establish, “a framework that consolidates in one place key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts.”⁷ This would make consumer law clearer and easier to understand, so that consumers could buy, and businesses could sell to them, with confidence; and consumer disputes could be resolved more quickly and cheaply.⁸

In addition, the Government said the reforms should deliver market wide changes which, in turn, should drive innovation and greater competitiveness, and help to build a stronger economy. It estimated that reform of consumer law could bring quantifiable net benefits of £4 billion to the UK economy over 10 years.⁹ Outlining the economic rationale for the Bill, the Government said:

The key motivation for simplifying and reforming consumer law is to make markets work more effectively and to drive economic growth. Well-functioning competitive markets encourage growth by creating incentives for firms to become more efficient and innovative. Markets can only be fully competitive if consumers are active and confident, meaning that they are willing to challenge firms to provide a better deal, switch between suppliers, and take up new products. Consumer law reform can play a central role in empowering consumers and hence supporting more effective competition.¹⁰

2.3 Interaction with consumer regulations

The CRA 2015 stands alongside regulations to create a greatly simplified body of consumer law. For example, under the [Consumer Protection from Unfair Trading Regulations 2008](#),¹¹ which came into force on 26 May 2008 and were later amended by the [Consumer Protection \(Amendment\) Regulations 2014](#),¹² businesses must trade fairly and honestly with consumers. The Regulations impose a general prohibition on traders in all sectors from engaging in unfair commercial practices with consumers. They protect consumers from unfair or misleading trading practices and ban misleading omissions and aggressive sales techniques. The Regulations apply before, during and after a consumer contract is made and consumers have rights of redress if there is a breach of the Regulations.

⁶ Department for Business Innovation and Skills, [Consumer Rights Bill: Statement on Policy Reform and Responses to Pre-Legislative Scrutiny](#), Cm 8796, January 2014

⁷ [Explanatory Notes to the Consumer Rights Act 2015](#) (paragraph 3)

⁸ Ibid

⁹ Department for Business Innovation and Skills, [Consumer Rights Bill: Statement on Policy Reform and responses to Pre-legislative Scrutiny](#), Cm 8796, January 2014

¹⁰ Department for Business, Innovation and Skills, [Consumer Rights Bill: Proposals on Unfair Contract Terms](#), Revised Impact Assessment (Final), January 2014, para. 16 & 17

¹¹ SI 2008/1277

¹² SI 2014/870

Similarly, the CRA 2015 sits alongside the [Consumer Contracts \(Information, Cancellation and Additional Payments\) Regulations 2013](#).¹³ In brief, these Regulations give consumers additional rights where contracts are concluded away from a retailer's shop or premises (for instance, where purchases are made online). A central requirement is that consumers are properly informed before any contract is agreed.

Most EU law applicable in the UK as on 31 December 2020 remains in effect within the UK indefinitely as "retained EU law"¹⁴ (unless or until the Government decides to repeal or amend it). This new body of retained EU law includes a raft of consumer protection measures.¹⁵

2.4 Changes to the consumer landscape

The CRA 2015 also needs to be viewed within the context of other important changes to the UK's consumer landscape. In April 2012, the Government announced a series of reforms to the bodies carrying out consumer enforcement functions. Significantly, on 31 March 2014, the Office of Fair Trading (OFT) closed and passed responsibility for consumer law enforcement to local authorities [Trading Standards Services](#) and to the new [Competition Markets Authority](#) (CMA). Trading Standards is responsible for preventing unfair trading practice (for instance, in advertising, promotion and selling practices) while the CMA is responsible for unfair terms enforcement (for instance, unfair ticket terms and conditions).

¹³ The Regulations implemented in the UK most of the provisions of the [EU Consumer Rights Directive \(2011/83/EU\)](#)

¹⁴ Retained EU law is a new category of UK law created under sections 2 to 4 of the [European Union \(Withdrawal\) Act 2018](#) at the end of the UK-EU transition period

¹⁵ See the Library's briefing paper, [Brexit: UK consumer protection law](#) (CBP 9126)

3 Part 1: sale of goods, digital content and services

3.1 Overview

2 Core consumer rights under Part 1

Since 1 October 2015, when the Act came into force, consumers have enjoyed the following legal rights:

- **The right to get what they pay for** – all information about the main characteristics of the goods, including statements made in advertising or on labels, to form part of the contract.
- **The right to have product faults put right free of charge or to be provided with a refund or replacement** - clearer tiered remedies if a consumer's rights are breached, including a mandatory 30-day period in which to reject faulty goods. Traders limited to one opportunity to repair/replace faulty goods (if possible), following which the consumer can demand a discount or return the goods and demand a refund.
- **The right that digital content be fit for purpose** - for the first time, digital content to have its own separate regime of rights and remedies to be applied both to paid-for content (including where paid for with 'virtual' currencies) and content that is provided free with paid goods, services or other digital content (e.g., apps and in-app purchases and open-source software). Provisions have been drafted to accommodate future developments (for example, content provided in return for consumer data).
- **Right that traders perform services with reasonable care and skill, within a reasonable time** - with the consumer obliged to pay a reasonable price. The consumer has the right to ask for a repeat performance of services not performed properly or, if that is not possible or done within a reasonable time, a right to a price reduction.

In addition, they have benefited from a simplification of enforcement powers - making it easier for consumers to deal with rogue traders.

Part 1 of the CRA 2015 sets out core consumer rights in relation to the sale of goods, digital content and services (see **Box 2**). The aim is to give consumers clearer shopping rights.¹⁶

In respect of the **sale of goods**, the new rules are very similar to the previous consumer regime. For instance, recognisable implied terms – “fitness for purpose”, “satisfactory quality”, and “goods corresponding to description” – remain unchanged. There are, however, improved statutory remedies available to consumers. The Act also gives consumers a clear right to repair or replacement of faulty **digital content** (such as online film and games, music downloads and e-books.)

In addition, the Act contains clear rules about what should happen if a **service** is not provided with “reasonable care and skill” or as agreed. For example, the business that provided the service must bring it into line with what was agreed with the consumer or, if this is not practical, must give some money back.

Part 1 of the Act applies to contracts and notices between a consumer and a trader. For the purposes of the Act, a consumer means:

[...] an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.

This definition of ‘consumer’ applies not only to Part 1 of the Act (which includes the provisions relating to contracts for the supply of goods or services or digital content), but also to Part 2 (which contains the provisions relating to unfair terms). In a dispute, it is the trader who bears the burden of proving that an individual is not a consumer. A trader is someone acting in connection with a business. The statutory definition is as follows:

[...] a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.

It is clear from this definition that traders remain liable even when acting via a third party (e.g., an agency relationships).

3.2

Sale of goods

Implied rights

Part 1 of the CRA 2015 has replaced the Sale of Goods Act 1979 (SGA 1979). It largely replicates and restates the terms implied by the SGA 1979 as to the quality standards for goods. Specifically, goods must:

¹⁶ The Consumer Rights Act 2015 replaced three major pieces of consumer protection legislation – the Sale of Goods Act 1979, the Unfair Terms in Consumer Contracts Regulations 1999, and the Supply of Goods and Services Act 1982

- Be of **satisfactory quality** (the test is what a reasonable person would consider satisfactory for the goods in question and the price paid).
- Be **fit for purpose** (i.e., the goods should be fit for the purpose they are supplied for, as well as any specific purpose the consumer made known to the retailer at the time of purchase).
- **Match their description** (i.e., the goods supplied must match any description given by the retailer, or any models or samples shown to the consumer at the time of purchase).

Part 1 also includes a new implied term that **the trader has the legal right to supply the goods**.

If a purchased good is faulty in some way, a consumer's rights under the CRA 2015 are against the retailer, with whom they have a contract, and not the manufacturer.

Statutory remedies

What the consumer can claim by way of redress would largely depend on how much time has passed since the good was purchased.

If the faulty good is returned within 30 days of purchase

Under the CRA 2015, a consumer has a legal right to reject goods that are faulty (i.e., not of satisfactory quality, unfit for purpose or not as described) and obtain a full refund. However, the consumer must act quickly once the fault is discovered. This right to reject the good and obtain a refund is limited to **30 days** from the date of purchase.¹⁷ This is commonly referred to as the “**short term right to reject**”. Time is paused if the consumer agrees to the repair or replacement of the faulty good, with a final right to reject the goods if still faulty (known as the “**final right to reject**”).¹⁸ The consumer need only accept **one repair or replacement** before moving on to the final remedies of price reduction or rejection and refund (known as the “**final right to reject**”).

If the faulty good is returned after 30 days

After 30 days, the consumer will not be legally entitled to a full refund if the good develops a fault. If the consumer is outside the 30-day right to reject period, they must give the retailer **one** opportunity to repair or replace any goods which are of unsatisfactory quality, unfit for purpose or not as described. In practice, the retailer can normally choose whichever option would be cheapest or easier for it to do.

Under Part 1, a consumer is entitled to a full or partial refund instead of a repair or replacement if:

¹⁷ The 30-day period is shorter for perishable goods, and will be determined by how long it is reasonable to have expected the goods to last

¹⁸ Prior to this new right in the [Consumer Rights Act 2015](#), the consumer had to rely on the common law right to reject within a ‘reasonable period’

A short term & final right to reject

- the cost of the repair or replacement is disproportionate to the value of the goods or digital content,
- a repair or replacement is impossible,
- a repair or replacement would cause the consumer significant inconvenience,
- or the repair would take an unreasonably long time to complete.

In circumstances where a repair or replacement is not possible, or an attempt at repair fails, or the first replacement is also faulty, the consumer has a right to reject the goods and claim a full refund (or a price reduction if they wish to keep the product). Alternatively, the consumer has the right to insist on another attempt at repair or a second replacement.

Burden of proof

Part 1 of the CRA 2015 makes an important distinction between a product fault discovered before and after the first **6 months** of its purchase.

In brief, if a consumer discovers a fault with the product **within the first 6 months of purchase** it is presumed to have been there at the time of purchase, unless the retailer can prove otherwise. If an attempt at repair or replacement has failed, the consumer has the right to reject the goods for a refund or price reduction, if they wish to keep the product.

The retailer cannot make any “deductions for use” from the price refund in the first 6 months following an unsuccessful attempt at repair or replacement. The only exception to this rule is motor vehicles, where the retailer may make a “reasonable” reduction for the use the consumer has already had of the vehicle after the first 30 days.

If, however, a fault is detected **after the first 6 months**, the burden of proof switches from the trader to the consumer. The consumer must prove that the product was faulty at the time of purchase.

Delivery

Under the CRA 2015, there is a default period of **30 days**, during which time the retailer must deliver the goods unless a longer period has been agreed with the consumer.

The retailer is responsible for goods (including digital content) until they are in the physical possession of the consumer (or someone appointed by the consumer) or delivered to a nominated safe place. If goods are not delivered, a complaint should be made to the retailer (with whom the consumer has a contract) rather than the courier, unless the consumer has arranged their own delivery service.

3.3

Sale of digital content

Implied terms

For the first time, consumer statutory rights on digital content have been set out in legislation. For the purposes of the CRA 2015, digital content is defined as “data which are produced and supplied in digital form”. For example, this would include:

- downloadable apps,
- downloadable films, music, computer games,
- e-books,
- and computer software.

The CRA 2015 will apply to digital content when it is supplied:

- for a price,
- or free with goods and services which the consumer has paid for (and would not be generally available to consumers otherwise).

Digital content must comply with certain standards, these broadly reflect the standard for goods. Specifically, digital content must be:

- of satisfactory quality,
- fit for a particular purpose,
- and as described by the seller.

In addition, the trader must have the legal right to provide digital content to the consumer.

Statutory remedies

Where digital content does not conform to these implied terms, the consumer can call upon the following statutory remedies:

- repair or replacement of the digital content,
- or a price reduction if a repair or replacement is impossible.

In contrast to the sale of goods, there is no statutory limit on the number of repairs or replacements undertaken by the trader to make the digital content conform, but they cannot do so indefinitely as the repair or replacement must be done within a ‘reasonable’ time without causing ‘significant’ inconvenience to the consumer. A price reduction can be up to the full amount of the price paid for the digital content.

Unlike with the sale of goods, there is no right to reject non-conforming digital content and obtain a refund of the price. The only exception is where the trader has no right to supply the digital content (e.g., pirated content). It was thought impractical to impose a requirement for the return of digital content.

In certain circumstances, the retailer may have to compensate the consumer (i.e., pay damages) if any device or other digital content owned by the consumer is damaged because of the faulty digital content downloaded (even where that content was provided free of charge). This would apply in situations where the damage would not have occurred had “reasonable care and skill” been used in the provision of the digital content

3.4 Sale of services

Implied terms

The CRA 2015 also applies to consumer contracts for services. Services can be provided alone without goods (such as dry cleaning, entertainment, hairdressing etc.) or may be provided with goods (such as repairing a vehicle, double glazing, building a conservatory, installing a kitchen etc). Under the Act, the following minimum standards are implied into a consumer contract for services:

- The trader must perform the consumer service with reasonable care and skill.
- Where the price is not contractually agreed in advance, the price paid for the service must be reasonable.
- Where a timescale for performing the service is not agreed in advance, the service must be performed within a reasonable time.
- Any spoken or written voluntary statement made by the trader (about the trader or the trader’s service) may be a binding contractual term where the consumer relies on it when deciding to enter into the contract or making any decision about the service after entering into the contract.¹⁹

It follows from this that a service will be “non-conforming” if it is not performed with reasonable care and skill, not performed within a reasonable time, or not performed in line with the information given. In certain circumstances, goods will not be in conformity with the contract if they have been incorrectly installed by the trader.²⁰

Statutory remedies for non-conforming service

Where services do not conform to the contract, the following statutory remedies are available to consumers:

- right to require “repeat performance”,
- or right to a reduction in price.

In respect of a repeat performance, the trader must either repeat the element of the service that is inadequate or perform the whole service again at no

¹⁹ [Section 50\(1\) - \(2\)](#) Consumer Rights Act 2015

²⁰ [Section 15](#) Consumer Rights Act 2015

extra cost to the consumer, within a reasonable time and without causing the consumer significant inconvenience. The consumer can claim a price reduction when:

- the service is not performed in line with information given about the trader,
- the service has not been performed within a reasonable time,
- it is impossible to re-perform the service,
- or the consumer has requested a repeat performance, but the service has not been re-performed within a reasonable time or without significant inconvenience to the consumer.

Depending on the severity of the problem, a refund might be up to 100% of the original price.

Regarding the provision of services, the CRA 2015 provides specific statutory remedies where none previously existed. However, the existence of these statutory remedies does not prevent the consumer from seeking other remedies, such as damages, provided they do not recover twice for the same loss.

3.5 Treatment of mixed supply contracts

It is possible to agree a consumer contract which provides for a mixed supply of goods, digital content, or services. In such cases, the CRA 2015 expressly states that the goods provisions apply to the relevant goods, the digital content provisions to the relevant digital content, and the services provisions to the relevant services. It is a much simpler regime.²¹

3.6 Enforcement

As outlined above, certain statutory terms are implied into a consumer contract by Part 1 of the CRA 2015. In respect of sale of goods, digital content or services contracts, individual consumers can begin or defend a legal action based on a breach of these statutory rights. However, before doing so, they should seek proper legal advice on the merits (or otherwise) of their case to avoid “throwing good money after bad”. There is a separate briefing on [Legal help: where to go and how to pay](#). Advice can also be sought free of charge from the consumer’s local [Citizens Advice Bureau](#) (CAB) or by contacting the [consumer helpline](#).

²¹ In contrast, under the previous legislation, different regimes (either under the *Supply of Goods and Services Act 1982* or *Sale of Goods Act 1979*) were applied depending on whether goods were transferred under a services contract or sales contract

If a consumer thinks a trader has broken the law or has acted unfairly, they can report them to their local Trading Standards Services (TSS) via the [Citizens Advice consumer service](#). The CRA 2015 does not give TSS a power to take up consumers' individual cases, but if appropriate, TSS can take a business to court to stop them engaging in unfair or illegal business activity (see section 4.3 below).

4 Part 2: unfair contract terms

4.1 Overview

The new unfair contract terms regime introduced by [Part 2](#) of the CRA 2015 includes:

- A ‘fairness test’ for the enforceability of terms in consumer contracts and notices.
- A provision that the main subject matter of the contract or terms that set the price (so called ‘core terms’) are only exempt from the test of fairness if they are transparent and prominent.
- A “grey list” of potentially unfair clauses in consumer contracts.

4.2 Unfair terms

[Part 2](#) of the CRA 2015 (including Schedules 2, 3 and 4) clarifies and consolidates the legislation on unfair terms in “business to consumer” contracts and notices.²² The law is now set out in one place. The main points to note are as follows:

- A court is now under an obligation to consider contractual terms for fairness, even if neither party to the proceedings raises fairness as an issue. However, the court must have sufficient information to make this assessment.
- There is a requirement for consumer contract terms and notices to be fair. Terms will only be binding upon the consumer if they are fair. It defines “unfair” terms as those which put the consumer at a disadvantage, by limiting the consumer’s rights or disproportionately increasing their obligations as compared to the trader’s rights and obligations.²³

When determining whether a term is fair, the court should consider the specific circumstances existing when the term was agreed, other terms in the contract and the nature of the subject matter of the contract. This

²² Part 2 of the [Consumer Rights Act 2015](#) amends the *Unfair Contract Terms Act 1977* in relation to business-to-consumer contracts and repeals the *Unfair Terms in Consumer Contracts Regulations 1999*. Unfair terms in business-to-business contracts fall outside the scope of the CRA 2015.

²³ No exclusion or limitation for liability for death or personal injury arising from negligence will be valid

assessment is known as the “**fairness test**”.²⁴ Where a term can have more than one meaning, the interpretation most favourable to the consumer must prevail.

- Where a term is deemed to be unfair, and therefore not binding, the rest of the contract will take effect as far as practicable.
- A contractual term can be deemed to be unfair even if it has been individually negotiated with the consumer. The CRA 2015 goes further than both the previous law and the EU’s Consumer Rights Directive (2011/83/EC). (However, in practice, few consumer contracts are individually negotiated).
- The main subject matter of the contract or terms that set the price (i.e., core terms) are only exempt from the test of fairness if they are “transparent **and** prominent”.²⁵ To satisfy the transparency requirement, the term must be in plain and intelligible language. To be prominent, the term must be brought to the consumer’s attention in such a way that the average consumer (who is assumed to be well informed, observant, and circumspect) would be aware of the term.²⁶ The fact that a core term does not meet these requirements does not make it automatically unfair, but it exposes that term to additional scrutiny.
- [Schedule 2](#) of the CRA 2015 sets out an ‘indicative and non-exhaustive’ list of consumer contract terms which may be regarded as unfair (the so-called “grey list”). Terms on the grey list are not automatically unfair but may be used to assist a court when considering the application of the fairness test to a case. Equally, terms not found on the list may be found by a court to be unfair by application of the fairness test. Examples of grey list terms include terms which have the object or effect of allowing disproportionate charges; or requiring the consumer to pay for services which have not been supplied when the contract ends; or allowing the trader discretion over the price after the consumer is contractually bound.

4.3

Consumer notices

A ‘consumer notice’ is a notice that relates to rights or obligations between the trader and the consumer or restricts the trader’s liability. Written terms in consumer notices (as with consumer contracts) must be transparent (i.e., in plain and intelligible language). It is important to note that a notice does not

²⁴ See [Section 63](#) of the Consumer Rights Act 2015, Part 1 of [Schedule 2](#) contains an indicative and non-exhaustive list of terms in consumer contracts that may be regarded as unfair – often referred to as the “grey list”

²⁵ [Section 64](#) of the Consumer Rights Act 2015

²⁶ Prior to the Consumer Rights Act 2015, the law included the ‘transparency’ requirement but not the ‘prominence’ requirement

have to be in writing; it can be any communication or announcement intended to be seen or heard by a consumer. Consumer notices are explicitly included in Part 2 of the CRA 2015.²⁷ The test for unfair consumer notices is the same as that for unfair terms.

4.4

Enforcement of unfair terms law

Schedule 3 to the CRA 2015

The [Competition and Markets Authority](#) (CMA) has a lead role in relation to unfair terms law. It shares most of its enforcement powers with local authority [Trading Standards Services](#) (TSS) and with other agencies who have enforcement responsibilities for particular economic sectors (such as [Ofcom](#) and the [Financial Conduct Authority](#) (FCA)). The CMA has a 'Memorandum of Understanding' with the TSS and certain sector regulators to ensure a joined-up approach to enforcement.

The CMA, TSS and other relevant bodies may take enforcement action where a term or notice is considered to be:

- unfair,
- in breach of the transparency provisions in the Act,
- and/or 'blacklisted' by virtue of the provisions in the Act.

A term may be challenged if it appears in a consumer contract, is proposed for use in such a contract or is recommended by a third party for use in a consumer contract.

Under [Schedule 3](#) to the CRA 2015, enforcement action may be taken to stop the use of such unfair terms or notices, if necessary by seeking a court order (an injunction or, in Scotland, an interdict). An order can apply to the use of terms in existing as well as future agreements and may include provision about any term or notice of a similar kind or with a similar effect. In some cases, a temporary order might be sought to prevent further use of the term or notice until the case can be fully argued in court.

It is important to note that these enforcement powers are 'discretionary' and do not mean enforcement action must or can properly be taken against every unfair or blacklisted contract term or consumer notice.²⁸ The CMA, in partnership with TSS, targets its enforcement action where it can secure wide-ranging changes to markets.²⁹

²⁷ Consumer notices were not expressly covered in previous legislation

²⁸ Competition and Markets Authority, [Unfair Contract Terms Guidance](#), CMA37, 31 July 2015

²⁹ Ibid

Undertakings in lieu of court proceedings

Under the CRA 2015, the CMA and TSS can accept appropriate undertakings from businesses about their use of consumer terms or notices.³⁰ If a business gives a satisfactory undertaking to stop using a term or notice, or to revise it to meet the concerns raised, court action will be unnecessary provided the undertaking is honoured.

Under [Schedule 5](#) to the CRA 2015 the CMA and other regulators can require traders to provide information necessary to identify whether, for instance, a business is complying with an undertaking or injunction.

Part 8 of the Enterprise Act 2002

Part 8 of the [Enterprise Act 2002](#) (EA 2002) gives the CMA and certain other bodies separate powers against traders who breach consumer legislation generally including the CRA 2015. It enables them to seek enforcement orders against traders who breach UK consumer laws and where there is a threat of harm to the ‘collective interests’ of consumers.

In effect, the EA 2002 provides an alternative or further enforcement mechanism to that provided in [Schedule 3](#) to the CRA 2015 itself. It is particularly useful in cases involving issues arising under several different pieces of consumer law.

Public action

Although the CMA, TSS and other enforcement bodies can act to protect consumers in general, neither the CRA 2015 nor the [EA 2002](#) give them a power to take up consumers’ individual cases on their behalf. In certain circumstances, an enforcement order or undertaking under the EA 2002 may include a provision where consumers who have suffered loss due to breaches of consumer law (including unfair terms) are offered redress. Individual redress (including the provision of monetary compensation where appropriate) is one of the ‘enhanced consumer measures’ contained in [Schedule 7](#) to the CRA 2015 which can be added to an enforcement order or undertaking.

Private action

In addition to the public enforcement action outlined above, individual consumers have certain legal rights under the CRA 2015. They can take legal action independently of any action by the CMA or TSS. In practice, if a trader refuses to accept that a term or notice is unfair or blacklisted, consumers may choose, based on their rights under the Act, either to:

- resist legal proceedings brought by the trader against them,

³⁰ Similar provisions are found in the [Enterprise Act 2002](#)

- or to instigate proceedings themselves.

If the consumer decides to instigate proceedings and the court agrees with them, the trader will not be allowed to rely on that term or notice against the consumer. If the court agrees with the trader, the consumer may face liability in costs. It is important, therefore, that the consumer seeks proper legal advice on the strength of their case.

Further detailed information on the unfair terms provisions in the CRA 2015 is available in published CMA [Guidance](#).³¹

³¹ Competition and Markets Authority, [Unfair Contract Terms Guidance](#), CMA37, 31 July 2015

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