

THE CONSUMER RIGHTS ACT 2015: KEY CHANGES IN BUSINESS-TO-CONSUMER TRANSACTIONS IN THE UNITED KINGDOM

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The UK Consumer Rights Act 2015 (hereinafter referred to as “the Act”) received Royal Assent and came into effect on 1 October 2015. The Act largely derives its source, albeit in varying degrees, from EU Directives and Regulations. The relevant Directives are namely Directive 93/13/EEC of the Council on unfair terms in consumer contracts; Directive 99/44/EC of the European Parliament and of the Council on aspects of the sale of consumer goods and associated guarantees; Directive 2011/83/EU of the European Parliament and of the Council on consumer rights; Directive 2001/95/EC of the European Parliament and of the Council on general product safety and Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers’ interest.

The Regulations, on the other hand, are Regulation (EC) No. 765/2008 of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance relating to the marketing of products and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws. Collectively, these contributions, have over the years, been significant in striking the right balance between high level consumer protection and the competitiveness of enterprises.

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The Act also consolidates a number of important pieces of legislation and regulations on consumer laws into a single legislation.¹ In doing so, the Act aims to rectify the traditional complexities of consumer laws and introduce significant changes to the consumer landscape.² Further, it explicates how products should be offered to the consumer in the future. The Act is presented in three parts wherein Part 1 deals with consumer contracts for goods, digital content and services, Part 2 deals with unfair terms and finally, Part 3 contains miscellaneous provisions, including enforcement powers and general provisions.

The ambit of the Act rests firmly in the business-consumer sector, hence, applying only to contracts between the trader and the consumer, regardless of whether they were individually negotiated. All other transactions, involving business-to-business or consumer-to-consumer contracts continue to be governed by the provisions in the existing legislation.³ The application of this Act extends to England, Wales, Scotland and Northern Ireland, although several provisions in Part 3 of the Act provide separate rules for Scotland and Northern Ireland due to the differences in the law. These include, firstly, the provision relating to the issuance of injunctions in private actions by the Competition Appeal Tribunal which are inapplicable in Scotland, and, secondly, legislation which Part 3 proposes to amend which does not extend to Scotland and Northern Ireland, for example the Sunday Trading Act 1994. Further, Chapter 3 of Part 3 (duty on letting agents to publicise fees) extends only to England and Wales, and applies in relation to the fees charged by agents in the course of the letting and management of privately rented property in England and Wales.

¹ This was achieved by confining the application of the Supply of Goods (Implied Terms) Act 1973, Sale of Goods Act 1979, Supply of Goods and Services Act 1982, Sale and Supply of Goods Act 1994, Sale and Supply of Goods to Consumer Regulations 2002, Unfair Contracts Term Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 to certain relationships.

² Explanatory Notes on the Consumer Rights Act 2015, para 5.

³ Only provisions concerning business to consumer contracts in the existing legislation listed above have been repealed. All provisions which relate to other types of contract for example contracts between businesses will remain in the existing legislation.

This paper highlights the key changes introduced by the Act and how it impacts on trader-consumer relationships in the United Kingdom. It also examines these changes to ascertain the extent and magnitude of the changes which have been presented by the Act by focusing on some of the glaring and obvious weaknesses in the law as it were, preceding the Act.

Part 1 - Consumer Contract for Goods, Digital Content and Services

Part 1 is concerned with contracts between a trader and consumer where the trader agrees to supply goods, digital content or services or any combination of these to the consumer. The contracts may be written, oral, or implied from the parties' conduct, or a combination of these.⁴

Clearer Terminology

The Act has redefined commonly used terms which affect consumer transactions such as 'trader', 'consumer' and 'digital content'. This is an essential and much needed change as it ensures consistency and ease of interpretation, and, provides clearer application of the law. The term 'consumer' in the Act is wider in nature when compared to the extended definition of 'deals as consumer' found in section 12(1) of the Unfair Contracts Term Act 1977 (hereinafter referred to as "UCTA 1977") where it is defined as

- (1) A party to a contract "deals as consumer" in relation to another party if—
 - (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
 - (b) the other party does make the contract in the course of a business; and

⁴ Consumer Rights Act 2015, s 1(2).

(c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

Section 2(3) of the Act defines ‘consumer’ as an individual acting for purposes wholly or mainly outside the individual’s trade, business, craft or profession. The use of the word ‘individual’ in the definition limits consumers to being natural persons and excludes small business including a sole trader or legally incorporated businesses. The new definition also reinforces the fact that companies can no longer deal as a consumer even if they satisfy ‘a degree of regularity which is required before it can be said that they are an integral part of the business carried on and consequently entered into in the course of that business’ as observed in *R and B Customs Brokers Co. Ltd. v United Dominions Trust Ltd.*⁵ On the other hand, a group of consumers who contract for goods, services or digital content, are not left without protection even if the eventual contract is entered into with a trader by a consumer acting on behalf of the group. Depending on the circumstances, each member of the group may be able to enforce his rights or the consumer who entered into the contract may enforce the contract on behalf of the group.

Unlike section 12(1) of UCTA 1977, section 2(3) of the Act does not associate a consumer with the type of goods he buys. Section 2(3) of the Act does not prescribe that goods supplied under the contract must be of the type which is ordinarily bought for private use or consumption. ‘Goods’ is defined in section 2(8) of the Act to include ‘any tangible moveable items including gas, water and electricity where they are put up for sale in a limited volume or set quantity’. This

⁵ *R and B Customs Brokers Co. Ltd v United Dominions Trust Ltd.* [1988] 1 WLR 321, 331 (Dillon LJ).

definition essentially no longer distinguishes goods by their type or purpose for which they are bought. If the nature and purpose of the goods bought is no longer relevant, then the degree of duty owed by a trader who supplies goods to an ordinary consumer remains the same as that which is owed to another trader, regardless of whether the goods bought are of a type which is ordinarily supplied for private use or consumption or not. This means a higher degree of duty is now imposed on a trader to ensure that he meets all the statutory standards when he supplies goods to a consumer.

A ‘trader’, on the other hand, is defined as a person acting for the purposes relating to that person’s trade, business, craft or profession. The trader can become potentially liable for breach even if he contracts through an agent who uses his name or acts on his behalf.⁶ Further section 2(7) of the Act clarifies that a ‘business’ includes the activities of government departments and local and public authorities, which means that these bodies may therefore come within the definition of a ‘trader’ under the Act. In this respect, a trader is not just confined to natural persons or entities such as government departments and the local or public authorities but also includes companies, charities and non-profit organisations.

One of the highlights of the Act is the definition of digital content. Digital content has always had an uncertain status as it has always lacked a definition and had often loosely been treated in much the same way as the supply of goods or services. In the past, courts had frequently found it difficult to categorise digital content as ‘goods’ due to their intangible nature⁷ and identify which set of rights

⁶ (n 4) s 2(2).

⁷ See *International Computers Ltd v St Albans District Council* [1996] 4 All ER 481, *Salvage Association v CAP* [1995] FSR 654, *Beta Computers (Europe) Ltd. v Adobe Systems Ltd.* [1996] SLT 604, *SAM Business Systems v Hedley* (unreported).

and remedies a consumer might have if digital content is “faulty” or “sub-standard”.

The complexities surrounding digital content is evident from two recent analyses which emphasise how the law relating to digital content was far from clear not only in respect of its definition but also the remedies available to the consumer if digital content was faulty or sub-standard.⁸

Section 2(9) of the Act, defines digital content as ‘data produced and supplied in digital form’. This means that digital content supplied on a tangible medium falls within the ambit of the Act and this includes software, music and computer games and applications. Any digital content goods which are sold online or as ‘conduit’ services such as those provided by phone networks or ISPs however, are excluded from this definition. However, this definition includes software supplied via cloud computing where the digital content which is stored and processed remotely will be transmitted to a consumer’s device enabling the consumer to interact with the digital content product that he has contracted for. Digital content however, does not include a service provided by a trader to access digital content such as the Internet or the provision of mobile service.

Sale of Goods

Chapter 2 of the Act concerns contracts where a trader supplies goods to a consumer, This chapter has not only transformed the manner in which a trader would deal with a consumer in the future, but it also contains some of the most

⁸ Robert Bradgate, ‘Consumer Rights in Digital Products: A research report prepared for the UK Department for Business, Innovation and Skills’ (2010) <<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products>> accessed 25 June 2016. See also University of Amsterdam, ‘Digital content contracts for consumers: Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts’ <http://ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf> accessed 25 June 2016.

effective consumer protection laws, enacted in this century. Prior to the Act coming into force, contracts relating to the supply of goods had always been dealt with on a piecemeal basis. The law governing these transactions were contained in several different piece of legislation such as the Sale of Goods Act 1979 (hereinafter referred to as “SOGA 1979”), the Supply of Goods (Implied Terms) Act 1973 (hereinafter referred to as “SGIT 1973”), the Supply of Goods and Services Act 1982 (hereinafter referred to as “SGSA 1982”), the Sale and Supply of Goods Act 1994 (hereinafter referred to as “SSGA 1994”), the Sale and Supply of Goods to Consumers Regulations 2002 (hereinafter referred to as “SSGCR 2002”), the UCTA 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 (hereinafter referred to as “UTCCR 1999”). These laws contain provisions which apply depending on the type of contract the consumer enters into. Much of the provisions in them apply to recipients of goods regardless of whether they are consumers, but some protection is applied to only consumers. The Act, on the other hand, has consolidated all the key consumer rights embodied in the legislation and regulation with the intention to harmonise the existing provisions to give a single approach where appropriate. As a result, the provisions in the Act now apply uniformly to sales contracts, contracts for hire, hire purchase contracts, conditional sales, exchange contracts and work and materials contracts.⁹

The Act now imposes several important new obligations on traders and provides remedies in relation to faulty or sub-standard goods supplied to the consumer. Firstly, the Act introduces statutory guarantees to replace the existing implied terms which govern transactions involving goods. The statutory requirements are very similar to that which are embodied in the SOGA 1979¹⁰, SGSA 1982¹¹ and SGIT 1973¹² wherein the trader must have the right to sell the

⁹ (n 4) ss 5-8.

¹⁰ (n 4) ss 12-15.

¹¹ Supply of Goods and Services Act 1982, ss 2-5.

¹² Supply of Goods (Implied Terms) 1973, ss 8-11.

goods, the buyer or hirer has the right of quiet enjoyment of his goods and the right to take the goods free from encumbrances, the goods must be of satisfactory quality and fit for the purpose it is supplied for and must conform with any antecedent description and/or sample provided by the trader. However, the Act has departed in a major way from the system of implied terms by adopting a new system of statutory guarantees which now clearly state the quality standards that goods must meet. The contractual language of “condition” and “warranty” which was used to determine the contractual remedies which flowed from a breach is now replaced by clearly expressed remedies which are available to the consumer if the statutory guarantees are contravened. The introduction of these statutory guarantees not only reduces the complexity involved in determining the appropriate remedies when a breach occurs but also increases transparency making it easier for consumers to understand their rights. In this respect, Howells and Twigg-Flesner, mutually agreed in their consultation paper that the move away from the implied terms towards a clearer system of statutory guarantee could be ‘easily achieved, highly desirable and unproblematic’.¹³

In addition to the statutory guarantees, the Act also introduces a new statutory duty where goods supplied must match any model seen or examined by the consumer prior to purchase.¹⁴ This is a duty which exclusively applies to transactions involving goods. Section 14(2) of the Act provides that a breach occurs if the differences between the model and the goods are not brought to the consumer’s attention before the contract is concluded. This new duty imposes an added burden on the trader to be more meticulous and duteous in the execution of his obligations.

¹³ Geraint Howells and Christian Twigg-Flesner (eds), ‘Consolidated and Simplification of UK Consumer Law’ (2010) 35

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31838/10-1255-consolidation-simplification-uk-consumer-law.pdf> accessed 30 June 2016.

¹⁴ (n 4) s 14.

The next major change introduced by the Act is the inclusion of a tiered system of remedies in respect of the supply of faulty or sub-standard goods to support the statutory guarantees. In contrast with the position prior to the enactment of the Act, where the consumer could reject goods supplied and/or seek compensation depending on the seriousness of the breach which occurred, sections 20 to 24 of the Act provide for a tiered system of remedies, in respect of faulty goods. While the consumer may seek the remedies provided under the tiered system, this does limit the consumer from pursuing other common law or equitable remedies as an alternative or in addition to the statutory remedies. The Act prescribes that the consumer may do so, provided he does not recover more than once for the same loss.¹⁵

The consumer has a short term right to reject goods supplied if they do not conform to the contract. This right may only be exercised within 30 days of delivery or installation of the goods in question.¹⁶ However, the burden lies on the consumer to show that the goods did not conform to the contract. If he is able to do so, the contract comes to an end¹⁷ and the trader has a duty to provide the consumer with a refund.¹⁸ On the other hand, if the goods are not rejected by the consumer, he may exercise the first tier of remedies to have the goods repaired or replaced by the trader within a reasonable time.¹⁹ If the consumer opts for this remedy, it is presumed under the Act that the goods were faulty when they were delivered unless the trader can produce evidence that the goods were not sub-standard at the time of delivery, or if the presumption is inconsistent with the nature of goods or the fault. If the repair or replacement is disproportionate or impossible or if the trader fails to act within a reasonable time and without significant inconvenience, the consumer is then entitled to a higher tier of remedy.

¹⁵ (n 4) ss 19(9) and 19(10).

¹⁶ (n 4) s 22(3).

¹⁷ (n 4) s 20(4).

¹⁸ (n 4) s 20(7)(a).

¹⁹ (n 4) s 23(2).

He may then exercise the right to receive a price reduction up to the full price of the goods under section 24(1) of the Act or invoke section 24(5) of the Act to exercise his “final right to reject” the goods entirely. However, the consumer may exercise any one of these rights and not both, only if the trader fails to repair or replace the goods after being given one opportunity to do so.²⁰ If the goods are rejected entirely by the consumer, the trader must refund the price paid by the consumer without any undue delay within a maximum period of fourteen days from the date of agreement to refund the money paid under section 20(15) of the Act.

Supply of Digital Content

The Act is the first piece of legislation to define and regulate the supply of digital content. The supply of digital content is subjected to Chapter 3 of the Act on condition it is supplied for a price or is supplied free with goods and services which the consumer has paid for and would not otherwise be available to consumers.²¹ The requirement relating to the provision of pre-contractual information that must be given to consumers prior to the purchase of goods and services is also applicable to digital content. This includes the main characteristics, price, the relevant interoperability of the content and the functionality of the digital content as well as the name, address, contact details of the trader.

Further, some of the new statutory guarantees which are applicable to goods also affect digital content, in that, digital content must be satisfactory in quality and fit for the purpose it is supplied for and conform to the description provided by the trader. The Act also prescribes an objective test to determine whether the digital content provided is of satisfactory quality. Accordingly, the quality of

²⁰ (n 4) s 24(5).

²¹ (n 4) s 33(2).

digital content is said to be “satisfactory” under section 34(2) of the Act if ‘it meets the standard that a reasonable person would consider as satisfactory’ taking into consideration factors such as description, price and any other relevant circumstances described by subsection 5.

If the digital content fails to conform to the contract, the consumer is entitled in the first instance to repair and replacement under section 43 of the Act.²² If repair and replacement is impossible or too slow, section 44 of the Act provides the consumer with the right to a reduction or a full refund of the price paid. The price reduction as a result of the breach of contract can be up to the full amount of the price paid for the digital content (i.e. a full refund). However, unlike the remedy provided by the Act in a sale of goods transaction, there is no corresponding remedy available to a consumer to return or delete the faulty digital content. Generally, to impose a requirement for the return of the digital content was thought to be too impracticable and many consumers may be unaware of how to delete the digital content or may face difficulties in removing them.²³

In some cases, the trader and consumer may agree to a contract which provides for a mixed supply of goods and services or digital content. A common issue which may arise when dealing with a mixed contract is which law would apply to the transaction. In such cases, the Act expressly states the relevant provisions would apply separately for each type of article of trade supplied under the contract, in that the goods provisions apply to the relevant goods, the services

²² By 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.

²³ Department of Business, Innovation and Skills (BIS), ‘Enhancing Consumer Confidence by Clarifying Consumer Law – Consultation on the supply of goods, services and digital content’ (July 2012) para 4.172, 181.
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf> accessed 13 May 2016.

provisions to the relevant services and the digital content provisions to the relevant digital content.

It is important to note that there are distinct differences between how the law deals with sale of goods and the supply of digital content. Firstly, it is the issue of passing of property or ownership in digital content to the consumer. Where there is a sale of goods, the trader must have the right to sell or transfer the goods at the time when ownership of the goods is to be transferred.²⁴ Therefore, when goods are sold, ownership in the goods pass at the time of the sale, or, in the case of an agreement to sell, it will only pass when the trader himself has ownership of the goods. Passing of property in digital content is provided in section 41 of the Act which states that a trader must have the right to supply digital content to the consumer at the time when it is supplied. On a superficial level, the responsibility imposed on a trader dealing with digital content appears to be similar to that imposed on a trader selling goods. However, on close scrutiny, passing of property in digital content operates in a slightly different manner when compared to sale of goods. It is not uncommon for a consumer to receive only limited rights (not absolute rights) over digital content which he purchases from a trader. The trader may transfer the limited rights, on condition it is used within the boundaries of certain demarcated circumstances. This is because, firstly, in most cases the intellectual property right in the digital content may remain vested in another trader who has ownership over the digital content, usually the creator of the digital content. Secondly, unlike the remedies available in the case of sale of goods, there is no short term right to reject non-conforming digital content and to seek a refund of the purchase price. The only exception is where the trader has no right to supply the digital content, for example, where the trader has dealt with pirated content. Thirdly, there is also no second-tier remedy of rescission of contract, in relation to the supply of defective digital content. Here, there is no

²⁴ (n 4) s17.

corresponding right on the consumer to return or delete the faulty digital content. It was thought that it would be too impracticable to impose a requirement for the return of the digital content and many consumers would find it difficult to delete the digital content.

Supply of Services

The legal position relating to provision of services, prior to the introduction of the Act was surrounded by several ambiguities and *lacunas*. Firstly, it was unclear as to what remedies were available to the consumer if the services provided were substandard. Secondly, there was no statutory right to demand traders to repair the fault or re-perform the service if it was not carried out with reasonable care and skill. Thirdly, there was no automatic right to end the contract and this right often depended on how serious the breach was. Finally, a trader could seek to exclude or limit his liability, even if reasonable skill and care was not displayed as long as the exclusion or limitation clause was reasonable and expressly stipulated in the contract. Hence, the UK Government felt that it was its task to clarify and in some cases enhance consumer rights in a way which would benefit consumers, businesses and the market as a whole.

This led to the incorporation of the implied terms concerning supply of services from the SGSA1994 and the SSGCR 2002 into Chapter 4 of the Act. Sections 49, 51 and 52 of the Act respectively provide that services must be performed with reasonable skill and care, that a reasonable price be imposed if it was not agreed upon earlier²⁵ and that the services must be performed within a reasonable time²⁶ if a specific time for performance was not agreed upon earlier. Again, as with the case of goods and digital services, the Act has removed the

²⁵ (n 4) s 51.

²⁶ (n 4) s 52.

legalistic reference to these provisions as “implied terms” and now treats them as statutory guarantees.

The Act provides that any service performed by a trader must be carried out with reasonable care and skill. Under section 49 of the Act the phrase ‘reasonable care and skill’ focuses on the way in which a service is carried out, rather than the end result of the service itself. This means that, if a trader does not provide a service with reasonable care and skill, he will be in breach of this statutory guarantee, regardless of the end result. The Act does not include a definition of ‘reasonable skill and care’, leaving the standard to be flexible depending on the codes of practice observed by different sectors and industries. The position of the law, in this respect, does not only demonstrate that the current case law can provide guidance on this meaning but it also suggests that there is opportunity for future case law to expand and elaborate on that guidance.

In most cases, a contract will set out the price for the service, and traders will be under an obligation to provide information about the price before the consumer is bound by the contract. In addition, the price could be paid up-front when the contract is agreed, in which case the consumer will know the price. If for any reason the price is not known from the outset, the consumer must pay a reasonable price.²⁷ What is “reasonable” is a question of fact.²⁸ Where the time for performance of the service has not been agreed on in advance, section 52(3) gives the consumer the right to have the service provided within a reasonable time after the contract is agreed.

Another notable improvement which has been introduced in this Chapter of the Act is the provision on remedies relating to supply of sub-standard services.

²⁷ (n 4) s 51.

²⁸ (n 4) s 51(3).

These include the opportunity to require the trader to rectify the fault by repairing or re-performing²⁹ the appropriate part of the service before moving to the second tier remedy to demand for a “price reduction”³⁰ if the service rendered fails to conform to the contract. However, the availability of these remedies is largely dependent on the degree of non-compliance with the statutory guarantees stated above. If the service is not provided with reasonable care and skill in breach of section 49 or where the service is not performed in line with information given about the service in breach of section 50, the service will not conform to the contract. If the former occurs, the consumer is entitled to require that the service is properly performed, through it (or part of it) being done again.

The consumer may also request a reduction in price in certain circumstances. These two statutory remedies are available as alternatives or, in some cases in addition to remedies available under common law or equity. This means a consumer does not have to ask for a statutory remedy of re-performance if they would prefer to seek damages.

Similar to the remedies set out in Chapter 2 which relates to goods,³¹ if the consumer asks for the service to be re-performed, a trader must do so within a reasonable time and without causing significant inconvenience to the consumer. If re-performance is not provided within a reasonable time or without causing significant inconvenience to the consumer or is impossible, the consumer is entitled to a reduction in price. The reduction will be of an appropriate amount depending on the circumstances of each individual case.

These remedies, however, do not prevent the consumer from seeking other common law remedies such as damages or specific performance provided they

²⁹ (n 4) s 55.

³⁰ (n 4) s 56.

³¹ (n 4) s 19.

are not recovered twice for the same loss. If, on the other hand, the information provided about the trader is not complied with resulting in a breach of section 50, the consumer has the right to a reduction in price of an appropriate amount. This is in addition to potentially having access to remedies at common law and equity. If the service is not provided within a reasonable time and so breaches the provision in section 52, the consumer has the right to a reduction in price of an appropriate amount.³² Again, this remedy is in addition to potentially having access to remedies at common law and equity.

Pre-contractual Statements

Sections 12, 37 and 50 of the Act have introduced a highly significant change in the law which affects consumer contracts entered into in reliance on pre-contractual statements made by traders. In general, all pre-contractual statements made by a trader or his representative relating to goods, digital contents or services are now implied by the Act in the trader's contract with the consumer as an express term. This new position considerably broadens the potential liability of businesses in a claim for breach of contract. In the past, an untrue pre-contractual statement which had the effect of inducing a consumer to rely upon it merely allowed an action in misrepresentation against the trader. By contrast, under the Act, all spoken or written voluntary statements made by the trader about himself or his goods or services can be deemed to be binding as contractual terms.³³ If such statements were relied upon by the consumer when deciding to enter into the contract, the consumer may raise a claim for breach of contract instead of misrepresentation.³⁴ This is an important change because claims for breach of contract are generally easier to prove and because damages will be awarded based on what the consumer's position would have been had the contract been performed.

³² (n 4) s 56(4).

³³ (n 4) ss 12(2), 37(2) and 50(3).

³⁴ (n 4) ss 19(5), 42(2) and 54(4).

Where goods are concerned, section 19(5) clarifies that if the trader is in breach of any pre-contractual information required to be treated as part of the contract by section 12, the consumer has the right to recover any costs which they incurred as a result of the breach. The consumer may recover the amount of these costs up to the full price of the goods or the full amount of the deposit paid. This applies equally where there is other consideration given instead of a price - the cap on the recoverable costs would be the value of that consideration. If the consumer incurs costs or losses above this amount, they may be able to seek damages for breach of contract under section 19(9).

For services on the other hand, section 50 requires that the trader providing the service must comply with information it has provided, orally or in writing, where the consumer has relied on this information when making any decision about the service. This information must be read in the context of everything else in the contract and other information given. This is to prevent the consumer being able to rely on some information, where the trader clearly qualified that information when giving it to the consumer.³⁵ The information given may cover both information about the service and other information the trader gives about the trader itself. Different remedies apply depending on whether the information is about the service or other information provided by the trader. If the service is not performed in-line with information provided concerning the service, the consumer has the right to ask for a repeat performance under sections 54 and 55, and if that is impossible or not done within a reasonable time without inconvenience, the consumer has the right to a reduction in price under sections 54 and 56. If the information provided about the trader is not complied with, the consumer has the right to a reduction in price of an appropriate amount.

³⁵ (n 4) s 50(2).

The requirement relating to the provision of pre-contractual information that must be given to consumers prior to the purchase goods and services is also applicable to digital content. This information includes the main characteristics of the digital content, its price, the relevant interoperability of the content and the functionality of the digital content as well as the name, address, contact details of the trader. Section 42(4) sets out the remedy that applies if the pre-contractual information provided pursuant to section 37 is not complied with. This remedy is similar to the remedy of a price reduction which will usually be calculated on the basis of the difference in value between the digital content the consumer receives and what they actually paid. Given that section 37 concerns information that does not describe the digital content such as the trader's name and address, if it is breached it is unlikely to affect the value of the digital content received and therefore it would not fit with the way it is anticipated a price reduction would be calculated. Section 42(4) therefore provides that the consumer has the right to recover any costs which they incurred as a result of the breach, which could be any amount up to the full price of the digital content (so they could receive a full refund in appropriate cases). Where the consumer has not incurred costs but has suffered other losses as a result of this breach, it may be open to them to claim damages in breach of contract, although it is unlikely that these damages would amount to a significant amount. This section does not prevent the consumer from seeking other remedies available to them as the terms are to be treated as contractual terms and if they are not met it means there is a breach of contract.

Part 2 - Unfair Terms

The UCTA 1977 and the UTCCR 1996 have always acted as the first points of reference when dealing with unfair terms. The UCTA and the UTCCR 1996 both set out tests and guidelines in determining whether a term found in a commercial transaction is fair. Part 2 of the Act now consolidates the UCTA 1977 and the UTCCR 1996 by retaining consumer protection as its overriding objective. Section 62 of the Act describes fairness in the following manner:

A term is unfair if contrary to the requirements of good faith, it causes a significant imbalance in the parties rights and obligations under the contract to the detriment of the consumer. Whether the term is fair is to be determined:

- (a) taking into account the nature of the subject matter of the contract, and
- (b) by reference to all the circumstances existing when the terms agreed and all the other terms of the contract or any other contract on which it depends.

With reference to the provision above, if a term is regarded as unfair, it will not bind the consumer and consequently become unenforceable.

Contract terms can be ambiguous and capable of being interpreted in different ways. To ensure that such terms do not act as a detriment to consumers, the Act has expressly codified the common law rule of construction - the *contra proferentum rule* in section 69(1). This section provides that if a term is ambiguous or is capable of being interpreted in more than one way, it shall be construed against the trader and the most propitious meaning will prevail in favour of the consumer.

Core Terms

Contract terms relating to the subject matter of the contract or to price were previously treated as core terms which were exempted from the fairness requirement. Although the core terms are still exempt from the fairness requirement under the Act, section 64 provides that this exemption is only available when the term in question is transparent and prominent. A term is said to be “transparent” if it is expressed in plain and intelligible language and in

legible writing.³⁶ Section 64(4) of the Act prescribes that it must also be brought to the notice of the consumer in such a way that the average consumer, who is well informed and observant, would be aware of it to fulfil the prominence requirement. The standard set out in the Act goes beyond that found in the UTCCR 1996 which does not mandate prominence. This change is of great consequence to traders especially as greater vigilance is necessary to ensure that key information is clearly brought to the attention of consumers. Businesses will need to rethink what core information the consumer truly needs to make an informed choice when entering into a contract. If a trader were to banish any key term to the end of a contractual document, amongst unrelated materials, he may lose the prospect of success in later proving that the terms were prominent and had been brought to the consumer's attention. Equally important to the trader is the fact that the Act imposes on the courts the need to increase scrutiny on contractual terms for fairness, even if neither party to the proceedings raises fairness as an issue.³⁷ The Act stipulates in section 62(6) that a term can be deemed to be unfair even if it has been individually negotiated. In this respect, it goes further than the law pre-existing the amendment and the EU Consumer Rights Directive.³⁸ However, this change may have a minor impact on consumer contracts as consumers rarely have the bargaining power to individually negotiate their contractual term with the trader.

The Grey List

Section 63(1) of the Act transposes the "grey list" from Schedule 2 of the UTCCR 1999 and adds three new items to it. The "grey list" is an indicative and non-

³⁶ (n 4) s 64(3).

³⁷ (n 4) s 62(4).

³⁸ This Directive is also referred to as Directive 2011/83/EU which was implemented by the Consumer Contract (Information, Cancellation and Additional Charges) Regulation which came into effect on 13 June 2014. The Directive aims to assist consumers in becoming better informed and protected when contracting with traders for goods and services giving rise to major changes to consumer rights in Member States.

exhaustive list of terms in consumer contracts which may be regarded as unfair.³⁹ The list provides an indication of the types of terms which are likely to be considered unfair without any proper justification. The three new terms include terms which firstly, impose disproportionately heavy charges or require the consumer to pay for services which have not been supplied when the consumer ends the contract; secondly, permit the trader to determine the subject matter of the contract after the consumer is bound and finally provides a trader with the discretion to determine price upon conclusion of the contract.

Part 3 - Miscellaneous and General Provisions

Part 3 essentially contains the miscellaneous and general provisions which extend the use of the enhanced consumer measures to private enforcers under certain conditions and subject to safeguards on their use, determines the maximum penalties that the regulator may impose on non-compliant and rogue operators, establishes the Competition Appeals Tribunal (hereinafter referred to as “CAT”) and changes the way in which judges are able to sit as chairs in the Tribunal and promotes ADR for competition cases. It also introduces limited opt-out collective actions regimes, with safeguards, for competition law.

Section 79 of the Act provides that Part 8 of the Enterprise Act 2002 (hereinafter referred to as “EA 2002”) has been amended to empower enforcement bodies to apply to the court for an enforcement order to address breaches of consumer law.⁴⁰ This section is aimed at providing flexibility for public enforcers and the civil courts when dealing with persons who have given undertakings and who are subject to enforcement orders. This section will allow a range of enhanced consumer measures that are just, reasonable and proportionate to be attached to enforcement orders and undertakings. The

³⁹ Unfair Terms in Consumer Contracts Regulations 1999, reg 5(5).

⁴⁰ The amendments to Part 8 of the Enterprise Act are found in Schedule 7 of the Consumer Rights Act 2015.

enhanced consumer measures must fall into at least one of the specified categories, known as the redress, compliance and choice categories.⁴¹

Under the compliance category, the enforcement bodies must first consult with the trader who commits an offence who may provide an undertaking and submit to a monitoring programme under section 220(1A) of the EA 2002. The Enhanced Consumer Measures (hereinafter referred to as “ECM”) created by the Act allows for the appointment of a compliance officer, the provision of necessary training to staff, collection of information from customers on compliance by the business, signing up to an alternative dispute resolution scheme to manage complaints and the setting up of a scheme to provide redress to customers and ensuring that the scheme is properly publicised.⁴² In addition to this, the sections of the EA 2002 have been further amended by the Act to also set out in detail consumer redress schemes.⁴³ These redress schemes too are regarded as another form of ECM. It is a statutory requirement that any ECM should be just, reasonable and proportionate, taking into account the benefit to consumers and the likely cost businesses will incur in complying with any measures.⁴⁴ At this juncture, it must be noted that the ECMs are enforceable redresses which are sanctioned by the courts. As such any non-compliance would amount to a contempt of court punishable with fine or imprisonment. The final measure under the ECM is the choice category. This measure helps consumers obtain relevant market information to enable them to make better purchasing choices and in doing so improve the functioning of the market for consumers and businesses generally.

Other important changes introduced by Part 3 of the Act to effectively control and deal with non-compliant and rogue traders are found in section 81 and

⁴¹ Enterprise Act 2002, s 219A(1).

⁴² These measures apply to the compliance and choice categories described in s 219B(3) and (4) of the Enterprise Act 2002.

⁴³ (n 41) s 219B (4).

⁴⁴ *Ibid* s 219B (1) and s 219B (2).

Schedule 8 of the Act. These include the widening the types of competition cases that the Competition Appeal Tribunal hears, enabling the CAT to hear private actions, providing for opt-out collective actions and opt-out collective settlement and also providing for voluntary redress schemes.

The CAT was already hearing opt-in collective actions under the section 47B of the Competition Act 1998 (hereinafter referred to as “CA 1998”). The opt-in regime requires claimants to “opt-in” to the legal action to be able to claim damages. The Act introduces a regime which enable claimants to be automatically included into an action unless they “opt-out” in a manner as decided by the CAT on a case to case basis. It is common procedure in most consumer law actions to allow for a representative action to be initiated when the action is brought by a large group of consumers. This is in order to prevent the litigant from incurring excessive cost and facing any other restrictions in bringing an individual action. Paragraph 5 of Schedule 8 of the Act allows individual claimants to bring a collective action against an infringer by jointly applying to the CAT to approve the settlement of a dispute on an opt-out basis. The purpose of introducing the opt-out collective actions is to allow consumers and businesses to easily achieve redress for losses they have suffered as a result of breaches of competition law. The collective settlement regime will operate on the same opt-out principles as the opt-out collective proceedings.

Finally, parties who are found to have infringed competition law may enter into negotiations with consumers or businesses where possible rather than the first route being a private action proceeding through the courts. The Act introduces a new section 49C which enables the Competition and Markets Authority (hereinafter referred to as “the CMA”) to certify redress schemes. Where the scheme is submitted before the CMA makes an infringement decision, the CMA may approve an outline of the voluntary redress scheme, if it later decides that an infringement has occurred. The CMA may then require the business to create the

full scheme afterwards which complies with any conditions imposed, such as the provision for further information by a set date. If the business does not comply with the conditions, the CMA may withdraw its approval of the voluntary redress scheme. The CMA may also reject the scheme if the compensation offered is exceptionally low.

Final Thoughts

On the whole, the Act introduces easier routes for consumers to challenge anti-competition behaviour and can be considered one of the most important commercial legislation enacted in this decade. It has not only brought about significant and necessary changes in consumer law but has eradicated much of the confusion among consumers and businesses in relation to their rights and liabilities. The Act has aligned rights, remedies and enforcement powers so consumers and businesses can have easy and effective access to the law.

From the business perspective, the Act attempts to deregulate business burdens and reduce costs. It also facilitates businesses in saving time and money when dealing with disputes as employees and customers will be clearer about their rights and responsibilities. The Act eliminates any confusion about investigatory powers vested and exercised by consumer law enforcers which have in the past caused inconvenience to businesses. It also provides for cheaper redress for businesses which have suffered as a result of breaches of competition law.

Consumers, on the other hand, now have clearer and more effective rights and sanctions available to them if their rights are breached. The Act ensures that consumers get what they contract for and equips them with the right to receive a refund if the contract fails. They are also able to challenge the fairness of the contract terms which are carefully concealed.

The introduction of this Act is indeed a welcome change to the already existing consumer law regime in the United Kingdom. However, the practical implementation of the changes will not prove to be an easy task and may pose numerous challenges to businesses. In this respect, it is interesting to note a number of helpful recommendations made by James Gill and Bryony Compson, as initial steps which businesses can take to pave the way to adopting the Act.⁴⁵ Firstly, businesses must consider undertaking both top-down and bottom-up reviews of sales practices and other affected operations to ensure not only that compliance with the Act can be achieved, but that consumers can be kept happy. Secondly, businesses must also ensure that pre-sales information, terms and conditions and consumer notices are not only accurate but are provided in a suitably prominent manner. This includes the review of terms and conditions and digital contents rights, returns, refunds and compensation policies stated in contracts, to ensure that they are in compliant with the Act. Thirdly, staff who deal closely with consumers must receive appropriate training on the Act and its implication, both for them personally and the business they represent. Fourthly, businesses must now begin to maintain a clear audit trail of the steps taken to achieve compliance and must ensure that adequate contractual protection is extended to the supply chain to minimise potential liabilities. Finally, financial and insurance arrangements and crisis management procedures must be reviewed and revised, where necessary to ensure that they are adequate to handle claims in consumer actions.

⁴⁵ J Gill and B Compson, 'The New Consumer Rights Act - 5 key things you need to know' (19 August 2015) Lewis Silkin Journal <<http://journal/2015/august/the-new-onsumer-rights-act-5-key-things-you-need-to-knowjournal-detail.aspx>> accessed 15 May 2016.