



Ofcom's response to the BIS consultation: Enhancing Consumer Confidence by Clarifying Consumer Law on the Supply of Goods Services and Digital Content.

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Section 1

Introduction

1.1

Ofcom welcomes the opportunity to respond to the Department for Business, Innovation and Skills' ('BIS') consultation on proposals to amend the law governing the supply of goods, services and digital content. As the independent regulator and competition authority for the UK communications industries, we have sought to focus our response on the issues and proposals that are more likely to affect – and where we are able to provide information and evidence relating to – the communications sector.

Our principal duty under section 3(1) of the Communications Act 2003 is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition. In carrying out our duties, we need to have regard, in particular, to the interests of consumers in respect of choice, price, quality of service and value for money (section 3(5)).

In our view, clear and simple rules on the quality of goods, services and digital content serve two purposes. First, they protect consumers from the obvious direct harm of sub-standard provision. Second, they promote effective competition, for the benefit of consumers and fair-dealing businesses.

Effective competition delivers choice, better service, lower prices and innovation. In order to benefit from competition, consumers must have confidence that they are able to exercise informed choice and assert their rights when things go wrong and they receive poor service. This means that consumers should be able to switch between services and providers and have faulty goods and service issues remedied without undue effort, disruption and anxiety. A lack of consumer confidence in relation to faulty goods and poor services may mean consumers choose not to switch to alternative providers and/or do not assert their rights when things go wrong. This could dampen the competitive process, allowing unfairly dealing businesses to prosper at the expense of those dealing fairly, and consumers will not receive the benefits from competition they should be able to expect.

It is important that a lack of clarity over consumers' rights and businesses' responsibilities does not get in the way of providers actively competing with each other to deliver benefits to all consumers through better service, lower prices, greater choice, innovation and value for money. We consider that proposals to clarify consumer law should seek to address problems that result in direct harm to consumers, as well as indirect harm via a dampening of the competitive process.

This is also to the benefit of fair-dealing businesses and traders who seek to treat their consumers properly. Informed, empowered and protected consumers who know and can enforce their rights effectively:

- act as a constraint on businesses and traders who act unfairly, stopping them prospering at the expense of those dealing fairly;
- encourage fair-dealing businesses and traders to innovate and provide good-quality goods, services and digital content, to meet consumer demand and prosper;
- limit the number (and time and cost) of complaints made erroneously to fair-dealing businesses and traders; and

- limit other burdens for fair-dealing businesses and traders (e.g. training and compliance costs).

We therefore support proposals to clarify the legal framework for individuals and businesses to strengthen individual consumers' rights as a complement to action that can be taken by regulators and other enforcement bodies to tackle consumer harm and protect the collective interests of consumers. This balance between individual and collective rights is critical to consumer protection in the communications sector. We note and endorse the point made in the consultation that the proposed changes will not over-ride sector or service specific regulations already in place.

We have focussed our responses to the questions raised in chapters 4 (introduction), 6 (supply of services) and make some general comments on the digital content proposals.

Section 2

Questions from Chapter 4: Introduction

2.1

Q1. Do you agree that all businesses should be subject to the same framework of consumer protection for the sale and supply of goods, services and digital content, or

Do you consider that micro businesses should be exempt from any or all of the new proposals and remain subject to the current framework? (4.21-22)

Comments:

The proposals seek to clarify consumer law, provide consumers with certainty over their rights and help them feel more confident when buying from businesses that are not household names. In many cases, it seems likely that consumers may not know whether a business they are transacting with is a micro enterprise or not. To provide clarity and certainty over the responsibilities of the business and consumers' rights, it would therefore seem appropriate that all businesses be subject to the same framework of consumer protection. This should make the law easier to understand and help give consumers confidence in their rights irrespective of the business they are transacting with. We agree this would also benefit fair-dealing smaller businesses who would suffer if consumers avoided dealing with them on the basis they have fewer rights when doing so.

Q2. Do you agree with the Government's proposal to introduce a single definition of 'consumer' and a single definition of 'trader'? (4.25-38)

We agree that there would be benefit in introducing a consistent definition of 'consumer' across all UK consumer legislation, [broadly] in line with the definition proposed in the consultation. We note that the proposed definition differs slightly from the definition set out in Part 8 of the Enterprise Act 2002 and the Consumer Protection Regulations 2008. In so far as possible, we would support harmonisation of the definition used to help increase clarity and certainty.

The consultation paper notes that the bargaining power of small or micro businesses is often similar to that of residential consumers but does not consider these businesses should be included in the definition of a consumer. It is important that they are offered adequate protection under the law. Given that small and micro businesses often share characteristics with residential consumers, we think further consideration should be given to protecting small or micro businesses in the same way as residential consumers.

Section 3

Questions from Chapter 6: The Supply of Services

3.1

Q24. Are these helpful distinctions? What problems, if any, do you envisage in dividing up services in this way? (6.11)

Based on the definitions set out in the consultation, it is our understanding that communications services would in many cases fall under the second definition. That is, services relating to property where the service being provided relates to the property of the consumer (i.e. to goods that are also being purchased or have been purchased in the past). A fairly clear example may be the installation of a fixed voice phone line to a property.

There will, however, be circumstances where it is not clear whether a consumer has entered into such a contract. For example, where a consumer enters a contract for the provision of a mobile telephone and purchases a mobile phone handset, there may be contracts (or a mixed contract) for goods and services. Where a consumer enters into a contract for broadband services and also purchases a wireless router or other related hardware, this may be a contract for services relating to property (though not necessarily and the position may be unclear).

It is therefore important for consumers and communications providers that a clear, coherent and broadly similar and consistent set of rights and remedies exists for all these contracts.

Q25. Do you agree that these are the implied terms which may currently be introduced into consumer contracts for the supply of services? (6.16-31)

In addition to the implied terms set out in the consultation paper, we would note that there are sector specific requirements relating to consumer contracts for communications services. These include obligations arising under the General Conditions of Entitlement for communications providers we have made under the Communications Act (the 'GCs'), the Mobile Roaming Regulations and a range of industry codes of practice.

Q26. Do you think the proposals should apply in Scotland with the same effect as they would have in the rest of the UK? (Box 20)

Applying the same consumer protection framework across the UK should help to provide clarity to both consumers and businesses. We note that the aim would be to ensure that the outcome would be intended to be the same across the UK but that, due to differences in the legal systems, the precise wording may differ.

Q27. Do you agree that the remedies for breach of implied terms in consumer contracts are difficult for consumers to predict? (6.32-36)

As noted in the consultation paper, it will not always be clear to a consumer what remedies may apply when things go wrong. The same applies to businesses faced with complaints, which may lead both to inefficiencies and to detriment to those seeking to deal fairly with consumers (either because they face unjustified complaints and demands or because consumers are deterred from bringing justified complaints to unscrupulous competing businesses).

Q28 The Government is not proposing a solution to this problem as it cannot identify a deficiency in the law or any obvious clarification that would help. Do you have any suggestions?

As noted above, there will be circumstances in the communications sector where it is not clear whether a consumer has entered into a contract (or a mixed contract) for goods and/or services. Again, for example, where a consumer enters a contract for the provision of a mobile telephone and purchases a mobile phone handset, and possibly where there is a contract for broadband services in connection with which the communications providers supplies hardware.

There will be a deficiency in the position if it is not clear what rights and remedies apply to the contract(s) and the rights and remedies in respect of goods and services differ widely. This will be detrimental to consumers and fair-dealing businesses for the kinds of reason set out elsewhere in this response.

For this reason, we consider it key that consumers have sufficiently similar rights and remedies so that, if the consumer is left with sub-standard goods or services, there is a clear, understandable and enforceable right and remedy that rectifies the position (such that the consumer has goods and services of the required standard and/or remedy for any shortfall). There should not be a big difference in the right and remedy that can be exploited, at least where goods and services are supplied by the same trader, leaving the consumer and fair dealing businesses exposed to a lack of protection.

Q29. In your view, what problems are created for consumers by the current law? Can you estimate the impacts? What effects on the market do these problems cause? (6.55-68)

As a general proposition, in line with our introductory comments above, effective competition delivers choice, better service, lower prices and innovation. In order to benefit from competition, consumers must have confidence that they are able to exercise informed choice and assert their rights when things go wrong and they receive poor service. This means that consumers should be able to switch between services and providers and have faulty goods and service issues remedied without undue effort, disruption and anxiety. A lack of confidence in what consumers are entitled to if they receive poor service may mean they choose not to switch to alternative providers and/or do not assert their rights when things go wrong. This could dampen the competitive process, and consumers will not receive the benefits from competition they should be able to expect. This would similarly harm fair-dealing businesses. For example, by allowing unfairly dealing businesses to prosper at their expense.

We have identified more specific problems, and our view as to their effects on the market, in response to questions 24 and 28 above.

Q33. Do you agree that moving to a statutory guarantee will be easier for consumers and traders to understand? Do you foresee any problems with this approach? (6.78)

We agree that, if accompanied by appropriate rights to remedies, an express statutory guarantee should make the position both clearer and better for consumers and (fair-dealing) traders. In particular, if providers have certainty over their responsibilities under the law, this should limit burdens and costs of compliance, training staff and dealing with disputes arising out of unclear or uncertain laws. It should also make it easier for consumers to understand and assert their rights.

One possibility is that traders who currently go beyond what will be required under the statutory guarantee may be less willing to offer consumers such treatment in the future. However, they may still choose to do so where they think treating customers in this way is in the best interest of the consumer and offers them business benefits. And, a general improvement in clarity and protection across markets would, in any event, be a welcome development for the kinds of reason outlined.

Q34. Do you agree that there should be a statutory guarantee that a service will meet the description given pre-contractually including the information as to price and time for performance? (6.80-84)

We would note that communications providers are already required to offer contracts to consumers that meet a minimum set of requirements and that contracts specify these in a clear, comprehensive and easily accessible form. The minimum requirements are set out in GC9 and are based on the requirements in the revised EU regulatory framework for electronic communications. The minimum contractual requirements include: details of prices and tariffs; the minimum service quality levels offered, including the time for initial connections; information on procedures taken to measure and shape traffic; and compensation and/or refund arrangements which will apply if contracted service quality levels are not met.

GCs 23 and 24 place obligations on providers regarding the way in which they engage in their sales and marketing activities for fixed and mobile services. GCs 23.5(c) and 24.6(c) specify certain information that needs to be provided at the point of sale. Some of the requirements are similar to the information requirements in the Consumer Rights Directive. For example, both include requirements for the consumer to be provided with the identity of and contact details for the provider and details of charges and cancellation rights.

These requirements are, however, matters to which traders are subject in order generally to be authorised to act as communications providers, rather than necessarily terms incorporated or implied into individuals' contracts with those providers (though they may very well be). In other words, a provider may breach its obligations under GC9, and an individual consumer may not then have contractual rights (or the position would be uncertain).

In that context, a statutory guarantee that complements the GCs would likely be a welcome development for consumers and fair-dealing communication providers alike (so long as such a guarantee did not increase their burden in practice).

We would also note that there are industry codes of practice that include provisions relating to the level of service a consumer can expect to receive. For example, the broadband speeds code of practice specifies: information that is to be provided at the point of sale; the accuracy of information that should be provided to consumers about speeds; how consumer's speed related problems are to be managed; publication of information about fair usage policies; and traffic management and shaping policies. The code provides for consumers to be able to leave their contract free of charge within three months of its start if certain defined steps have been followed and the consumer still does not receive the minimum guaranteed access speeds of which the provider advised them. The code of practice was put in place following concerns that consumers were not receiving accurate information about the service they might expect to receive.

In addition, in the mobile sector, some providers will allow consumers to leave their contract free of charge within three months of the start of their contract if the mobile coverage they receive is poor or non-existent in the areas where the consumer explained to the provider that they expected to use their mobile. This followed concerns that consumers were not receiving the standard of service they were expecting to receive and in some cases no service at all.

It is important that consumers are given clear and accurate information about the quality and limitations of the service they are considering signing up to so that they can make an informed decision about the provider and service that will best meet their needs. There are a number of protections in place in the communications sector, combined with general consumer law (e.g. the Consumer Protection Regulations 2008), that seek to ensure this happens. These are important protections for consumers of communications services and ones that we think should be protected following the introduction of any new statutory guarantees.

Again, we would welcome changes to the law that made the position clear, using statutory guarantees, in respect of pre-contractual descriptions in such a way as to complement existing provisions that benefit communications consumers and fair-dealing providers.

Q35. Do you agree that there should be a “default” period of 30 days in which a service must be carried out? (6.87)

Communications services are becoming increasingly important to consumers (e.g. when they choose to work from home and need to use their broadband connection and when accessing banking, health and education facilities online). It is also important that consumers are able to access communications services to contact the emergency services. We would expect, in light of the competition in communications services markets, that providers would perform services more quickly than this default time.

Q36. Do you agree that the statutory remedies for “faulty” or substandard services should be as similar as possible to those for goods? (6.89-96)

In general, we agree it is important that:

- consumers have access to statutory remedies (repair/price reduction) where the service they receive is faulty or substandard; and

- for the reasons set out in response to questions 25 and 28 – in particular, that contracts in the communications sector will provide for both goods and services – the remedies available for consumers are clear, coherent, consistent and sufficiently similar that differences in them cannot be exploited and/or leave consumers and fair-dealing businesses exposed to harm.

Such consistency and similarity should protect against such exploitation and exposure to harm at least where goods and services are provided to the consumer by the same supplier. Even where they are not so provided, and the consumer buys goods from one supplier and services from another, there would at least be the benefit of uniformity of remedy between the goods and services provided to the consumer.

As noted in response to question 34, we would welcome such similar and consistent remedies as a complement to the existing provisions in place for consumers of communications services.

However, we would also endorse the particular point picked up on in paragraphs 6.97 and 6.98 of the consultation document that, in respect of certain services, there may need to be differences in some of the remedies available. Communications services, like fixed and mobile voice telephony and broadband services, are services on which consumers increasingly rely. A failure to provide those services for any period could have serious consequences for consumers which are not necessarily adequately addressed only by a tier 1, repair or replacement remedy. In those circumstances, we agree it would be appropriate for the consumer to be able to move to a tier 2, price reduction remedy, in addition to the tier 1 remedy. This would help to protect consumers more appropriately and create a more level playing field as between fair-dealing and well performing businesses and those who do not meet that description.

We comment further on the appropriate tier 2 remedy in these circumstances in response to the following question (as to the 'appropriate amount' of any price reduction).

Q37. Do you agree that we should specify that the reduction in price should cover the element which has not been performed with reasonable care and skill? Or should we use the same wording as used in relation to goods; i.e. “an appropriate amount”?

We see merit in similar wording being used in relation to services as to goods. That is, the price that the consumer would pay would be reduced by 'an appropriate amount'. This would facilitate a consistent and helpful body of case law to develop and the nature of the remedy accordingly to become clearer.

In this connection, we note that there have been instances recently where consumers have been unable to access and use their communications services due to network failures. In some cases, providers have been quite proactive about giving consumers some form of compensation/payment adjustment but other providers have been reluctant to do so. We think it would be helpful for there to be clarity for businesses in terms of their responsibilities for giving consumers a reduction in the price the consumer pays for their service where the consumer has suffered a loss in their service. It is also important for consumers to know and understand that they are entitled to a reduction in price and that they have confidence to assert their rights.

In cases like these, we agree with paragraph 6.99 of the consultation document that the appropriate amount of the price reduction (in addition to the tier 1 remedy) should reflect at least the time for which the relevant service is not provided. This would, in our view, provide

the appropriate incentive for suppliers to implement tier 1, repair or replacement, remedies promptly.

It is also relevant to note that there are other losses that consumers may be able to recover and it is not entirely clear from the proposals where such losses stand.

Q38. Do you think that the tier 2 remedy should always include a facility for the consumer to terminate the contract from that point forward? (6.104)

This is a point on which we take a cautious view, for a number of reasons.

First, if consumers are able to obtain a price reduction of the appropriate amount, reflecting the period for which a service is not provided, a right of termination may be neither necessary nor appropriate in all cases (especially if contracts for communications services are amongst those in respect of which expedited tier 2 remedies are available). Second, if existing contract law continues to apply, to the effect that consumers would have the right to repudiate the contract for sufficiently serious breaches, this may be another reason why a right to terminate in all tier 2 remedy cases is inappropriate. Third, in light of the previous two points, such a right may have unintended consequences:

- it may increase uncertainty for fair-dealing businesses;
- it may lead to increased prices; and
- it may lead to businesses seeking to make greater use of up-front lump sum payments for ongoing services.

Our view is that the relevant rights and remedies should seek to create a fair balance between protecting consumers' interests and those of fair-dealing businesses. It would, therefore, be useful to understand what evidence is available on the potential impacts of this proposal in order to take an informed view on whether this would be likely to generate positive net benefits (e.g. are the potential benefits to consumers likely to outweigh the potential costs to providers or is there likely to be a negative impact on competition that would result in increased prices to consumers).

Q39. Alternatively, do you think that the right to terminate the contract should only be available in response to a failure to meet pre-contractual information requirements, or perhaps not at all? (6.105)

The list of information requirements specified in the Consumer Rights Directive (CRD) is quite extensive. Some of the information provided will likely have more of a direct link to the type of service the consumer can expect to receive; other information will be less material to their experience. It is not clear that there is a strong case for consumers to always have a right to terminate their contract without charge where the information provided is not strictly in accordance with the CRD (e.g. where the fax number provided was wrong but the rest of the contact and other information provided was correct). However, we would also note that it can be difficult to try and draw distinctions between information inaccuracies that might be considered to be more 'material' or 'significant'.

In any event, as noted in response to question 34, there are certain circumstances where communications consumers are able to leave their contracts earlier without penalty where the service they receive is not in line with the pre-contractual information they received. Any additional rights consumers are granted should complement these existing protections.

Q41. Do you agree that it would be disproportionate and also risky in terms of potential effects to try to codify current contractual remedies for damages in legislation?

It is not clear to us what would be the unintended consequences of codifying the existing contract law remedies that would be preserved. However, if the concern is that the law on existing contractual remedies is vast and complex, at least in its application to certain cases, and the aim is to create a straightforward set of remedies to apply in the majority of cases, we would endorse that.

The new remedies should, though, be both clear and robust, and, in our view, make explicit that existing contractual law continues to apply. This, we think, is particularly so if no right is introduced to terminate the contract where a tier 2 remedy is provided (so as to preserve any existing contractual right to repudiate the contract in the case of serious breach).

Q42 Do you agree that there are few cases at present where a service provider would be able to limit its core contractual liability to a consumer in a way that a court would find reasonable?

Q43. What impact do you think it would have on traders and insurers if liability were to be restricted as proposed above in future?

We agree that the effects of the Unfair Contract Terms Act and the Unfair Terms in Consumer Contracts Regulations mean that in few cases could traders effectively exclude their liability for failure to provide a service with reasonable care and skill. We also agree, however, that the use by traders of (unfair) terms that purport to have this effect may deter consumers from enforcing their rights.

An express prohibition on such exclusions would therefore empower consumers. But, it would not affect those fair-dealing businesses which neither seek to avoid such liability nor use unfair terms purporting to do so. Indeed, a prohibition should enhance their position by comparison to less scrupulous competitors.

Q44 – 53. Questions about strict liability standards for services

For the kinds of reasons outlined in connection with questions 25 and 28 above – that consumers often purchase communications goods and services together, without a clear distinction between each – we see merit in the gap between the rights and remedies applicable to goods and services being narrowed in at least some cases. On that basis, we see merit in the notion that a strict liability standard – relating to the satisfactory quality that could reasonably be expected – could be applied to some services.

We also see some merit in considering further whether communications services are in the category to which this standard should be applied, including as to the costs and benefits for consumers and businesses (as to which see the response to question 58 below). They will often be, or be akin to, services to property and/or in which the consumer is supplied with a mixture of goods and services (often by the same supplier). Moreover, they are services (and goods) from which the consumer expects (and the provider expects to provide) an overall outcome. For example, that the telephone handset and telephone network both work so as to enable the consumer to make and receive voice calls and data services, or that the broadband connection and hardware work so as to enable the consumer to use the internet.

It is correct that the provision of such services will often depend on third parties or other external factors, which we describe in more detail in connection with question 57 below. For example, telephone and broadband services may be provided over a third party's network. Broadband services depend on factors like the consumer's distance from the telephone exchange and the numbers and demands of other users. It may be, however, that the consumer's expectations in relation to these matters can be managed, as they often currently are, by the provision of information by service providers.

Q57. Do you agree that all services to consumers' property should be treated the same? Are there any particular problems with strict liability in respect of any of the other categories of services to property? (6.148)

Comments, including any particular problems with strict liability in respect of any of the other categories of services to property:

We have not identified any issues to date that appear to be unique to the communications sector when considering the introduction of a strict liability standard. There are a number of ways in which a communications service may not meet a strict liability standard. In seeking to comply with their responsibilities under a strict liability standard, providers may need to manage the legitimate expectations of the consumer and explain clearly what type of service they are able to provide and what factors may have an impact on the availability and quality of the service provided including how quickly issues may be resolved. Some examples of the sorts of thing that may affect a consumer's communications service are set out below. We expect many of these will similarly apply to other utilities/network services.

Examples of issues that may affect a consumer's communications service

- **Loss of service:** Consumers may suffer a loss in their communications service and the root cause of the loss in service is outside the 'direct' control of their provider (they have rights and access to remedies under their wholesale agreements). This may affect how quickly the provider is able to resolve the problem and restore service to the consumer. This may be more likely to come up in fixed voice and broadband communications where there are underlying problems with the switching processes that can lead to consumers losing service and where many providers are reliant on Openreach's management of its copper network.
- **Mobile coverage:** Mobile coverage is affected by a number of factors, some of which the provider can take steps to help remedy (e.g. provide accurate and clear information on likely coverage to help consumers make informed decisions, use of licensed repeaters to boost mobile reception) and others which may be outside their direct control (e.g. number of consumers using their phone within the same cell at a particular point in time).
- **Broadband speeds:** Similarly broadband speeds are affected by a number of factors (including the number of people using the network at the same time, distance from the exchange).

As set out in response to question 34, there are a number of existing provisions that communications providers are required to comply with to help ensure consumers are given accurate information about the service quality levels they can expect to receive. However, there is less clarity around the remedies/compensation that consumers should receive when these levels are not met.

Q58. What would be the impact of establishing a strict liability standard across these other services to property? (6.148)

Where providers face additional responsibilities following a change in the legislation and have to deliver a higher standard of service, they could face higher costs. Providers may pass these on to consumers through higher prices which could make services less affordable for some consumers. Increased costs could also potentially raise barriers to entry and expansion which in turn could lead to a dampening of the competitive process. Any potential negative impacts of a change in the legislation would need to be considered against the potential benefits such as harmonising requirements across goods and services and strengthening consumer protections.

Overall Services Questions:

Q59. How should business and consumers be informed of any changes at reasonable cost without adding additional burdens? (6.1-153)

Comments:

Use of existing communications channels can help to minimise the costs of informing businesses and consumers about changes in the law e.g. communicating through consumer advice agencies, regulatory bodies and existing information portals, explaining service quality levels and remedies/compensation available if things go wrong in consumer contracts.

Q60. Do you agree that a clearer law as outlined above, if communicated properly, would make a real difference to consumer understanding of their rights and thus to their assertiveness, making markets work better? (6.1-153)

Simplification and clarification of the law should make it easier: for businesses to understand and comply with their responsibilities; to explain and communicate to consumers what their rights under the law are; and for consumers to understand and assert their rights when things go wrong and they receive poor service.

Effective competition delivers choice, better service, lower prices and innovation. In order to benefit from competition, consumers must have confidence that they are able to exercise informed choice and assert their rights when things go wrong and they receive poor service. Consumers who know and understand their rights are more likely to be able to make informed decisions about the providers and services that best meet their needs, exercise informed choice and assert their rights. This means providers need to compete more vigorously with each other to win new customers and retain existing customers. This is all to the advantage of fair-dealing and well-performing businesses.

A lack of consumer confidence in relation to faulty goods and poor services may mean consumers choose not to switch to alternative providers and/or do not assert their rights when things go wrong. This could dampen the competitive process and consumers will not receive the benefits from competition they should be able to expect and unscrupulous and unfair-dealing businesses may prosper at the expense of those dealing fairly.

Section 4

Comments on Chapter 7: The supply of digital content

4.1

Introduction

The recent, and continuing, proliferation of portable internet-connected devices, including tablets and smartphones, has provided consumers with more opportunities - and new ways - to access, purchase and consume digital content. According to recent Ofcom research, smartphone take-up rose from 27% to 39% of UK adults in the last year - representing 43% of all mobile phone users. Tablet ownership has risen rapidly in the past year, from 2% of UK households in Q1 2011 to 11% of UK households in Q1 2012, with growth set to continue: 17% of adults said they intended to buy a tablet in the next year. One in ten (10%) UK adults owns an e-reader, an increase from 3% in 2011, and a growing proportion of UK TV households (5%) now have a smart TV.

The pace of development in the digital content sector, with new device launches, a broadening array of new products and services, and sharp growth in digital content sales of all types, makes efforts to clarify digital content rights and remedies in order to protect consumers timely and welcome. We support the aims set out in the consultation to promote fairness and increase consumer confidence by better enabling consumers to understand and assert their rights when they buy substandard digital content, and to reduce the burden on business of over-complex and unclear law..

The consultation's account of the lack of clarity in consumer law and the forms of consumer detriment is useful, but debate in this area has in the past been in the context of limited evidence – and an absence of research – so the specific nature of the types and extent of consumer detriment have often been misunderstood. It is for this reason that we welcome the contributions made to the discussion by the research of – among others - Robert Bradgate, the University of Amsterdam, Consumer Focus and Europe Economics.

Specific Points

Ofcom supports BIS's core proposition, set out in section 7 of the consultation, that consumer law in relation to digital content transactions should be clarified. The recent and forecast growth in digital content markets and BIS's evidence of sources of consumer harm in this area do suggest that the transposition of the Consumer Rights Directive (CRD) will benefit both consumers and, by clarifying the law, businesses as well.

Ofcom does not have evidence that would allow us to make recommendations among the detailed alternatives outlined by BIS – for example, in relation to the impact of introducing a short term right to reject (Q 86); or the removal of the “freedom from minor defects” aspect of quality (Q 75). However, we do have some general comments on the proposed approaches to digital content.

Definitions

Firstly, it does seem to be the case, as BIS argues in paragraphs 7.32 onwards, that the status of digital content transactions of the kind listed by BIS – relating to music, software, games, films etc. – is unclear; and furthermore that consumers may have legitimate

expectations of protection in relation to the quality of digital content which are stronger than currently exist.

We also think that the careful analysis of the “related” and “enabling” services linked to digital content draws out the potential complexity of digital content transactions, and the multiple parties who may play a role. However, we would suggest that further work may be necessary for a comprehensive analysis of the impact of BIS’s Options 1 and 2, under which a new category of digital content would be created in the Consumer Bill of Rights (Q 71).

There are two issues. Firstly, the proposed definition of digital content seems extremely broad, and would potentially cover large markets which are not discussed in the consultation, most notably broadcast pay television (cable/satellite). A definition of the scope of “digital content” which is more precise, or at least the implications of which are fully contemplated, would make the proposed legislation more useful to businesses and consumers.

Secondly, we believe it should be absolutely clear that internet access should remain outside the consumer protection regulation relating to digital content (Q 91). Within the framework proposed in the consultation, internet access should be an enabling service, and not be linked in some way to digital content transactions which the internet access service may enable. There is also a need to ensure that the treatment of the provision of internet access is consistent with the provisions of the E-Commerce Directive.

Consumer information

Consumer information in relation to digital content is a key aspect of the CRD. We welcome the provisions of the CRD which strengthen the requirements on digital content providers to provide pre-contractual information covering interoperability and/or Digital Rights Management which may apply to the digital content.

However, there may be a broader consumer information question raised by the proposals for digital content under BIS’s Options 1 and 2, in relation to the introduction of the quality right covering the digital content and, in addition under Option 2, the related services. These are complex rights for consumers to understand (and for businesses to comply with) – particularly under Option 1, where consumer rights will depend on whether the sub-standard feature of the digital content was a consequence of problems with the content itself or the related service. For this reason, we would recommend that BIS consider carefully how it will communicate the new rights which the legislation will provide to businesses and consumers in making a judgement about Options 1 and 2.

Ofcom is happy to contribute further to the development of these proposals and is keen to stay involved in discussions as thinking develops.