

A New Era for Consumer Rights



► Inside

Are you affected?

Supply of goods, digital content & services

Unfair terms

Enforcement

New remedies for misleading and aggressive practices

Extended online cancellation rights

Comment



Introduction

It has long been recognised that UK consumer law is not clear enough. Even the Department for Business Innovation & Skills (BIS) website says it is out of date, confusing and incomplete.

Now, the Government has published the eagerly awaited draft UK Consumer Rights Bill. At 117 pages, it's certainly not a quick read, but it should make consumer law clearer for businesses and consumers, as well as improving consumer rights.

Not only does the Bill give consumers the right to a full refund if they return faulty goods within 30 days, but it creates a right to a repair or replacement of faulty digital content, which will cover music and film downloads, online games and e-books.

The Bill also covers "mixed contracts", i.e. where a trader supplies a combination of goods and services and/or digital content.

This inbrief summarises some of the key consumer law changes which may be brought about by this Bill.

It was thought that the Bill would also implement provisions of the new EU Consumer Rights Directive (2011/83), which must be transposed into UK law by 13 December 2013 and take effect from 13 June 2014. However, only limited aspects of the Directive will be implemented by the Bill.

Most of the Directive will be implemented by way of secondary legislation. In this regard, the Government has just published two new draft regulations: the draft Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 and the draft Consumer Protection from Unfair Trading (Amendment) Regulations 2013. This inbrief also summarises these changes.

Are you affected?

The Bill will apply to all "business to consumer" (b2c) contracts in England, Scotland, Wales and Northern Ireland (although certain parts relating to enforcement powers will not apply to Scotland and Northern Ireland). The Bill does not directly affect existing "business to business" (b2b) contracts (although see below as to how wholesalers and other businesses selling to retailers might be impacted).

Traders will not be able to contract out of the Bill by changing the governing law clause if the trader pursues or directs its activities to the UK and the consumer is habitually resident in the UK.

The Bill adopts a new definition of a consumer, who must be "an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession". It will be up to traders to prove that an individual is not a consumer.

Supply of goods

Standards and information requirements

The Bill broadly retains existing standards applicable to the sale of goods (satisfactory quality, fitness for purpose and being supplied as described). However, it imposes additional obligations on traders. For example, goods

must match a model seen or examined by the consumer (except where differences are brought to the consumer's attention). Traders will now be bound by pre-contractual statements made to consumers.

Faulty goods

In short, consumers will be able to return faulty goods within 30 days and get a full refund (unless the consumer indicated that they accepted the goods). If faulty goods are returned after 30 days, the consumer will still be entitled to a replacement or repair. If the goods that have been repaired or replaced are also faulty, the consumer can receive a refund (or partial refund, to reflect any use of the goods) or a price reduction. If a fault arises in the first six months following delivery, there is a rebuttable presumption that the fault was present at the time of delivery - the trader would need to prove otherwise. After six months the onus will be on the consumer to show that the fault existed at the time of delivery.

This new, tiered remedy system means that traders only have one chance to repair or replace the goods, before having to offer a price reduction or a full refund if goods are subsequently returned.

Consumers will also be entitled to a price reduction if goods are not in line with pre-contractual statements made about material characteristics of the goods.

Delivery and risk

Goods must be delivered without undue delay and, in any event, within 30 days (unless otherwise agreed by the parties).

Goods containing digital content

If goods contain digital content (e.g. smart phones with games), they must conform, both with the standards that apply to the supply of goods and to the supply of digital content.

What is the exposure?

Traders are significantly restricted in their ability to exclude liability for breach of their statutory obligations. The Bill implies terms into consumer contracts and a breach of those contractual terms may give rise to damages claims. The Bill also sets out what the appropriate measure of damages would be. Also, even though a trader may have refunded the price of a faulty good, a



consumer may bring a claim if the cost of buying a replacement product has increased.

As a result of the strengthened consumer remedies proposed by the Bill, retailers might, in turn, need to seek greater back-to-back protection from their own suppliers of goods (which might increase the potential exposure of these suppliers).

Supply of digital content

Scope

The Bill currently only covers free digital content where it causes damage to a consumer's device or other content.

However it does address a major omission in the previous legislation as it will now cover "paid-for" digital content. This will include digital content paid for by money or by a facility (e.g. tokens, virtual currency). Digital content is defined as "data which are produced and supplied in digital form" and would cover games, software and downloads.

Standards and information requirements

The Bill introduces similar standards to those for goods. As with goods, traders will now be bound by pre-contractual statements that have been made to consumers (e.g. in respect of the functionality, speed or interoperability of the digital content).

One notable difference from goods is that where a consumer examines a trial version of the digital content prior to purchase, the digital content actually supplied must match the description given by the trader, regardless of whether it matches or betters the trial version.

If a trader has a right to modify the digital content (e.g. by issuing a new release), the standards relating to satisfactory quality, fitness for purpose and description, continue to apply to the modifications.

If the contract requires digital content to be transmitted backwards and forwards (e.g. multi-player online games), the requirements relating to quality, fitness for purpose and description will apply on each occasion that content is transmitted back to the consumer.

Specific Remedies

Unlike goods, a consumer has no right to reject faulty digital content and obtain a refund (mainly because digital content is too difficult to return).

However, if digital content is faulty (e.g. due to software bugs), a consumer is generally entitled to have the digital content repaired or replaced within a reasonable time. The trader is not limited as to the number of times it can repair or replace the digital content, if it does so within a reasonable period of time. If the trader cannot repair or replace the digital content within a reasonable time, the consumer can receive a price reduction.

If a consumer purchases goods that include faulty digital content (e.g. Games console with pre-loaded content), the consumer has a right to reject the goods.

If a trader supplies free or paid-for digital content that damages a device or other digital content belonging to the consumer, a consumer also has certain rights to compensation if the trader has not used reasonable skill and care.

What is the exposure?

As with suppliers of goods, suppliers of digital content are significantly restricted in their ability to exclude liability for breach of their statutory obligations. The provisions relating to calculating damages apply to digital content as well as to goods. Similarly, even though a trader may have refunded the price of digital content, the consumer may still bring a claim if the cost of buying replacement digital content has increased.

Retailers might, as a result of the proposed strengthened consumer remedies need, in turn, to seek greater back-to-back protection from their own suppliers of digital content (e.g. app developers) which may therefore increase the potential exposure for these suppliers.

Supply of Services

The Bill also applies to any contract under which a trader agrees to provide a service to a consumer. This does not include a contract of employment or apprenticeship. In addition, certain sectors are exempt from some provisions due to the fact that more onerous obligations already exist within the

relevant sector. For example, providers of financial services and gambling products are exempt from information requirements under the Directive.

Standards and information requirements

The Bill broadly restates existing standards applicable to services – a trader must perform the service with reasonable care and skill, a reasonable price should be paid for the services (where a fixed price has not been agreed in advance) and the services should be performed in a reasonable time (where a fixed time has not been agreed in advance).

As with goods and digital content, a trader will also be bound by any pre-contractual statements.

The Bill acknowledges that other legislation may impose stricter obligations on the trader.

Specific remedies

If the service does not conform to the contract, a consumer can generally require the trader to re-perform the services, within a reasonable time and at the trader's cost. A consumer is entitled to a price reduction if:

- the service is not in line with the information provided concerning the trader;
- the service is not performed within a reasonable time; or
- the trader has not managed to re-perform the services within a reasonable time.

What is the exposure?

As with suppliers of goods and digital content, a trader providing services is significantly restricted in its ability to exclude liability for its statutory obligations. Further, a contract term that seeks to restrict liability in respect of these standards will be unenforceable if it limits the trader's liability to an amount that is less than the contract price.

The provisions relating to calculating damages apply to services as well as to goods and digital content.

Unfair terms

The Bill consolidates and replaces the Unfair Contract Terms Act 1977 and the Unfair Terms in



Consumer Contracts Regulations 1999 in respect of b2c contracts and consumer notices.

Fairness

All consumer contract terms and notices must be fair. Any consumer contract or notice that puts the consumer at a disadvantage by limiting its rights or disproportionately increasing its obligations (as compared to the trader's rights and obligations) will be unfair.

The Bill sets out factors that the Court should take into account when determining whether a term is fair. It also provides a non-exhaustive list of terms that may be deemed unfair. These include terms that allow a trader to:

- change the characteristics of a product unilaterally without giving a valid reason;
- increase prices without giving the consumer a right to cancel; or
- charge consumers disproportionately high sums if the consumer cancels a contract.

Transparency

All written terms in a consumer contract or notice must be transparent - they must be written in plain and intelligible language.

Enforcement

The Bill will grant Trading Standards bodies the power to investigate and bring proceedings outside their own local authority area (although this right would not allow a Trading Standards body to investigate or bring proceedings outside their own country). This will be important now that the Office of Fair Trading is to be abolished next year.

Remedies for misleading or aggressive practices

The Government has just published the draft Consumer Protection from Unfair Trading (Amendment) Regulations 2013 to implement various parts of the Directive.

In summary, the amended regulations will give consumers a new private right of redress against traders if they have been the victim of a

misleading or aggressive practice. Remedies will include a right to terminate and receive a full refund, the right to a discount and, in certain cases, a right to receive damages.

Online cancellation rights

The Government has also just published the draft Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 to implement further parts of the Directive.

These regulations extend consumers' rights in distance and off-premises selling situations.

In particular, the regulations give those with cancellation rights 14 calendar days to change their minds, rather than the currently available 7 working days for distance sales, and 7 calendar days for doorstep sales. If the trader does not provide information on the consumer's right to cancel, the cancellation period may be extended by up to 12 months depending on the trader's compliance with other pre-contractual information requirements.

The regulations also oblige traders to provide certain information to consumers prior to entering into the contract.

Finally the regulations ban traders from charging any additional costs (outside the agreed remuneration) without the express consent of the consumer. (Note that where a consumer does not change a default option such as a pre-ticked box, express consent cannot be inferred).

Comment and next steps...

The Bill, once finalised, is likely to come into force next year. It is a major step towards consolidating consumer legislation and should make it clearer for businesses and consumers to understand. However, traders will still need to be mindful of numerous pieces of legislation rather than being able to rely on the Bill as a 'one stop shop'.

Businesses will, in particular, need to think carefully about how they:

- update their returns policies and procedures to deal with both faulty and non-faulty goods;

- update their returns policies and procedures to cover faulty digital content, including in respect of any mixed goods;
- update their terms and conditions of sale in light of the new restrictions on excluding liability;
- manage pre-contractual information requirements including where transactions are made by sales staff and through online representations;
- train staff on the new rules; and
- ensure that they receive sufficient (back-to-back) protection from their wholesalers or other suppliers of goods, services and digital content.

For further information on this subject please contact:

James Gill

Partner

T + 44 (0) 20 7074 8217

james.gill@lewissilkin.com

Bryony Long

Associate

T + 44 (0) 20 7074 8435

bryony.long@lewissilkin.com



LEWIS SILKIN

5 Chancery Lane – Clifford's Inn
London EC4A 1BL
DX 182 Chancery Lane
T +44 (0)20 7074 8000 | F +44 (0)20 7864 1200
www.lewissilkin.com

This publication provides general guidance only: expert advice should be sought in relation to particular circumstances. Please let us know by email (info@lewissilkin.com) if you would prefer not to receive this type of information or wish to alter the contact details we hold for you.

© September 2013 Lewis Silkin LLP