

Communications Consumer Panel response to BIS' consultation on Enhancing Consumer Confidence by Clarifying Consumer Law: the supply of goods, services and digital content

1. The Communications Consumer Panel (CCP) welcomes this opportunity to respond to BIS' consultation on Enhancing Consumer Confidence by Clarifying Consumer Law: the supply of goods, services and digital content.
2. The CCP is an independent group of experts established under the Communications Act 2003. Its role is to provide advice to Ofcom to ensure that the interests of consumers and citizens, including small businesses, are central to regulatory decisions. The Panel also provides advice to Government and champions consumers' communications interests with industry. The Panel has members representing the interests of consumers in Scotland, Wales, Northern Ireland and England.
3. As the consultation notes, the UK market for digital content is a significant part of the economy and is growing rapidly. While many consumers' experiences are positive, findings such as the recent survey by Consumer Focus that reported 16% of purchasers of digital content had had a problem with a digital download, and the Which? Online survey that highlighted levels of disappointment with digital downloads, suggest evidence of significant consumer detriment.
4. Additionally, the legal framework on consumer rights for digital content is unclear, we therefore welcome action to tackle this unsatisfactory market-inhibiting situation; as highlighted by Professor Bradgate, consumers' confidence in entering into transactions for digital content may be damaged and the lack of clarity around what entitlements a consumer has if things go wrong is likely to dissuade some consumers from even attempting to claim redress. Businesses also face uncertainty about their rights and responsibilities for any digital content that they supply, a fact which does not help underpin innovation or promote competition in the digital content market. As the Panel also represents SMEs, it welcomes that the consultation explicitly notes that it aims not to impede innovation by creating inappropriate liabilities in this area.
5. As noted by Professor Bradgate, to be effective, consumer law must be clear, accessible and comprehensible (qualities that are currently lacking). The Panel

therefore welcomes this initiative which aims to provide clear quality standards for digital content within the Consumer Bill of Rights so that consumers' reasonable expectations can be defined, standardised and protected; so that the quality standards consumers can expect digital content to meet can be clarified; and so that consumer confidence increases. Specifically, the Panel supports the aims of the proposed new legislation to:

- Provide legal certainty for both businesses and consumers as to the rights available in relation to digital content;
- Provide a simple framework that is easy for business and consumers to understand and use, by aligning it where possible with goods and services legislation and with consumer expectations;
- Align as far as appropriate and achievable with emerging proposals from the European Commission;
- Support a growing and significant part of the UK economy and protect intellectual property rights, by taking into account the particular nature of digital content;
- Provide a framework that is principles-based and can therefore be more adaptable to future developments and innovations;
- Achieve a fair balance between rights and responsibilities for both businesses and consumers;
- Reduce consumer detriment, through easier access to redress mechanisms.

6. The Panel agrees that the issues will be more effectively addressed by:

- Clearly defining what is meant by 'digital content';
- Clarifying the rights and responsibilities that digital content should confer on consumers and traders;
- Who is responsible for ensuring those rights are met (the Panel agrees that this should be the trader); and
- Identifying the steps that a consumer can take if these rights are not met.

7. The Panel also welcomes the recognition of the importance, once consumer law has been revised, of communicating information about these changes to consumers. Recent research conducted by Ofcom has found that while there is high awareness of website terms and conditions / privacy statements, only one in four (24%) internet users say they read these thoroughly, with the same proportion (24%) saying they never read them¹. The Panel's research 'Online Personal Data: the Consumer Perspective'² found that consumers also need to understand the benefits of sharing their personal data online - for example, that providing personal data can have significant benefits in the form of

¹ Media Use and Attitudes, Ofcom 2012 <http://stakeholders.ofcom.org.uk/market-data-research/media-literacy/archive/medlitpub/medlitpubrss/adults-media-use-attitudes/>

² <http://www.communicationsconsumerpanel.org.uk/smartweb/research/online-personal-data>

services and applications that are more tailored to their needs, or that they might otherwise have to pay for. Otherwise they will not be able to make an informed decision between, on the one hand, withholding their data and protecting their privacy, and on the other hand, sharing their data and potentially enjoying benefits. The research findings suggest that the decisions consumers make might be influenced by how direct they perceive the benefits to be. Only a small minority (13% or less) of respondents were always happy for the methods of data collection we asked about to be used for any reason. Levels of concern were lower if the personal information was being used by companies to develop new business and services (where 31% had a high level of concern) than if it was being sold to third parties for them to target the consumer with products/services (here, 79% had a high level of concern).

8. As identified by BIS, the digital content market bears the unusual characteristic of not allowing the consumer to inspect or try digital content prior to purchase, and the consumer is reliant solely on information provided about the digital product before purchasing. As in so many other areas in the communications market, transparency is key, and would be one way of addressing this information asymmetry. The consultation rightly points to studies which identified information issues as a significant concern - with 42% of relevant consumers in the Europe Economics research identifying a problem with either lack of or unclear/complex information.
9. The study's identification of the lack of information on complaints and redress mechanisms as the most commonly identified problem in relation to information provision is also regarded as a significant underlying issue in the Panel's experience. Research by Consumer Focus found that, of those consumers who experienced a problem with digital content, the main reasons that 32% did not take action were uncertainty about how to obtain redress (60%) and the low value of the download (40%). Similarly, a study by the Office of Fair Trading on consumer detriment found that consumers are less likely to seek redress for low value transactions. As noted, this is highly significant for the digital content market where there is a high volume of low value transactions, with music tracks and apps often selling for a pound or less.
10. The consultation also notes that the terms and conditions of many digital content traders may put consumers off from seeking redress for faulty or sub-standard digital content. The Panel has argued for the importance of providers giving consumers clear and reliable information. The Panel has particularly urged the provision of information for consumers about both the potential benefits and risks of apps, and the potential provision of key contractual facts in plain English, in a similar fashion to what is required in the financial services market. The Panel shares the concern that, where consumers expect to receive

redress that the business does not think it is obliged to provide, there is a risk to businesses of time and money spent on unnecessary disputes and a reputational risk to businesses if they decline to provide that redress. Additionally, when consumers do experience a problem and are unable to claim the redress they expect, consumer confidence in the market is undermined.

11. In relation to cross border purchases of digital content, given the international nature of the digital content market, the Panel is pleased to note the statement on page 136 that “Even if another country’s laws apply, if the trader pursued or directed their activities to the UK a consumer living in the UK will still be covered by our proposals... Pursuing or directing activities might, for example, include having a website translated into English or with a UK web address from which a consumer in the UK can purchase digital content in sterling.”
12. As stated in the consultation, although the Consumer Rights Directive addresses a proportion of existing detriment to do with information failures, it does not provide the consumer with any rights to quality for digital content and therefore fails to address a significant proportion of existing detriment.
13. The Panel notes that both options 1 and 2 outline the rights that a consumer can expect for the sale or supply of digital content and that they are, by and large, in line with those which currently apply to goods. Briefly these quality standards are that the digital content should meet the description given, correspond with any sample and be of satisfactory quality including being fit for purpose. Option 2 additionally includes that the consumer would have the remedy of a short term right to reject (with full refund) until they have accepted the digital content - with the proposal being that the consumer must have a ‘reasonable opportunity’ to examine the digital content before they lose the right to reject. This right would have to be exercised within 30 days of the purchase of the item and that the consumer must, in addition to showing evidence of a fault, prove that the fault existed on the day the contract was concluded. This seems to strike a balance between consumer rights and the commercial needs of the business in the Panel’s view.
14. The Panel notes particularly the research commissioned by the Law Commission that shows that strong remedies, particularly the right to reject, give consumers the confidence to purchase brands and goods which are unfamiliar to them, and from traders whose policies they do not know. As the consultation notes, to clarify in law that there is no right to reject might open the market place to rogues and undermine consumer confidence to try out new market entrants or smaller traders, thus weakening competition.

15. To introduce a legal requirement that the consumer removes such digital content from their system could raise significant issues where a consumer does not have the technical understanding to do so. It could also deter users who have less confidence online (and may also be more vulnerable, older or disabled consumers) from participating in the market for digital content.
16. The question of whether consumers should have the right to digital content meeting a certain quality, even if they do not pay money for it, is a complex one. The Panel notes that the proposal is that where the consumer has actually paid money for a digital content item, then their rights as to quality should be enforceable. As the Panel noted in 'Personal Data Online: the Consumer Perspective', although there may not always be a conscious recognition of the exchange, the provision of personal data by a consumer can have significant benefits in the form of services and applications that are more tailored to their needs, or that they might otherwise have to pay for. Building on this theme of the importance of awareness, in its response to BIS' midata consultation, the Panel noted that consumers will need to be made aware of how valuable their data is to businesses. We would encourage the consideration of this issue within the wider context of the commercial value of personal data online.
17. In summary:

The Panel supports the policy intention to define clearly what is meant by digital content; to clarify the standards that digital content should meet and who is responsible for ensuring that the ensuing rights are applied; and to identify the steps that a consumer can take if these rights are not met. The Panel stresses the importance of simple and reliable robust, clear and easily accessible information being available to consumers and information about these changes being communicated to consumers. The Panel is pleased to note that if a trader pursues or directs their activities to the UK, a consumer living in the UK would still be covered by the proposals. The Panel supports the provision of strong remedies, particularly the right to reject, and would encourage the consideration of this issue within the wider context of the commercial value of personal data online. Finally, the Panel endorses fully the need for simplicity as identified by Professors Howells and Twigg-Flesner. The need to foster understanding through clear communication is, in the Panel's view, of equal importance to the actions taken to clarify the law.