

Communications Consumer Panel response to the draft Consumer Rights Bill

Introduction

The Communications Consumer Panel welcomes the opportunity to respond to this important draft legislation that seeks to streamline key consumer rights, clarify and modernise consumer law, enhance consumer protection and deregulate where appropriate to reduce business burdens and costs.

The Panel is an independent body that works to protect and promote people's interests in the communications sector. We were established by the Communications Act 2003. The Panel carries out research, provides advice and encourages Ofcom, Government, the EU, industry and others to look at issues through the eyes of consumers, citizens and micro businesses. The Panel pays particular attention to the needs of older people and people with disabilities, the needs of people in rural areas and people on low incomes, and the needs of micro businesses, which face many of the same problems as individual consumers. There are four members of the Panel who represent the interests of consumers in England, Northern Ireland, Scotland and Wales respectively.

Following the alignment of the Advisory Committee for Older and Disabled People with the Panel, the Panel is more alert than ever to the interests of older and disabled consumers and citizens.

As it develops, we look forward to progressing this area of consumer empowerment and protection with other partners in the consumer landscape, including Consumer Futures, the Citizens Advice Service and going forward, the Consumer Protection Partnership.

Response

The Panel welcomes the proposed provision of core consumer rights and the reform and consolidation of consumer law through the measures outlined in the draft Bill. So long as there is no unintended consequence of diluting them, we support the streamlining of consumer rights; we support clarification of the law, a consumer framework for the digital age and proportionate deregulation coupled with enhanced consumer protection. These should have the effect of reducing the

resources required by both consumers and businesses in the pursuit of redress and increase consumers' confidence in purchasing from a vibrant market.

We look forward to seeing the separate publication of reforms in respect of helping vulnerable consumers.

We particularly welcome the introduction of a new category of digital content in consumer law, new statutory rights for digital content and new statutory remedies for faulty digital content which will apply to data supplied in a digital form (including software, music, computer games and apps).

As we noted in our previous response¹, the UK market for digital content is a significant and rapidly growing part of the economy. No doubt many consumers' experiences are positive, but we believe there is cause for concern. Last year's survey by Consumer Focus (now Consumer Futures) found that 16% of purchasers of digital content had had a problem with a digital download. This finding suggests evidence of significant consumer detriment that may well increase over time as the market grows.

As the legal framework on consumer rights for digital content is currently unclear, we welcome action to tackle this unsatisfactory, market-inhibiting, situation. A lack of clarity could equal a wider-reaching lack of consumer confidence, which would be unsatisfactory for providers and users of digital content alike. As Professor Bradgate highlighted, legal rights in respect of digital content are far from clear; 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 that may militate against innovation or promotion of competition in the digital content market.

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 and is then maintained.

The application of quality rights

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 welcomes that rights will apply to paid for content (including that paid

¹ <http://www.communicationsconsumerpanel.org.uk/downloads/CCP-response-to-Enhancing-Consumer-Confidence-by-Clarifying-Consumer-Law.pdf>

for with a virtual currency), in app purchases in 'freemium' products and digital content supplied with a paid-for product. However we are concerned that these rights are not currently envisaged to apply to digital content provided in exchange for valuable information. As the Panel noted in 'Personal Data Online: the Consumer Perspective'², 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 consultation³, 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 (and associated privacy and security issues) of personal data online. We appreciate that the intention is to reserve the power to extend the scope of the definition - subject to consultation and parliamentary consideration - should there be evidence of considerable consumer detriment. However we are unclear how evidence of considerable consumer detriment is to be defined, identified, reported or measured. Could the definition not include content supplied in return for payment or other valuable consideration?

Short-term right to reject

As identified previously by BIS, the digital content market bears the unusual characteristic of not allowing the consumer to inspect or try digital content prior to purchase - 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 is one way of addressing this information asymmetry. However if transparency is not correctly applied - if digital content does not conform to the quality rights of being fit for a particular purpose or corresponding to the description given - then the proposed repair or replacement is unlikely to be adequate or to rectify the situation. In such cases, we believe that a short-term right to reject must be the preferred option - as in the case of physical goods (e.g. a DVD) - despite the fact that it is generally not feasible for a consumer to return digital content.

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 goods and transact with brands which are unfamiliar to them, and from traders whose policies they do not know. As the earlier consultation noted, to clarify in law that there is no right to reject might open the market place to unscrupulous traders and undermine consumer confidence to try out new market entrants or smaller traders, thus weakening competition. This

² <http://www.communicationsconsumerpanel.org.uk/online-personal-data/online-personal-data-1>

³ <http://www.communicationsconsumerpanel.org.uk/downloads/CCP-midata-response.pdf>

situation is exacerbated by the often intangible nature of the digital market, where there are no physical shops or outlets and possibly no easy means of making contact if a consumer has a problem.

Tier 1 redress

Similarly, it does seem somewhat unduly onerous that, unlike the supply of goods where the Bill clarifies that consumers need only accept a single repair or replacement before being able to get some money back, there is no limit proposed to the number of repairs or replacements a trader can make to digital content before providing a refund to the consumer. In a streamlined and enhanced framework that protects consumers, we do not believe the nature of a product should restrict the consumer rights that accompany its purchase. Digital products and their consumers should be equal to other products and their consumers in this respect - be they microwaves or downloaded movies. As we understand it, consumers with faulty digital content will only be entitled to money back if the trader cannot repair or replace the faulty digital content without significant inconvenience to the consumer or within a reasonable time. This seems too open ended, and is likely to place the consumer at a disadvantage.

The burden of proof

We welcome that the Bill refers to compensation for damage to consumer property which has been caused by digital content if this could have been avoided had the trader exercised reasonable care and skill. However we are concerned that the burden of proving that digital content is faulty - a) that a fault exists, b) that any damage caused stemmed from a particular piece of content and c) was due to the trader failing to exercise due skill and care - still rests on the consumer and can be a complex undertaking. This is a very high bar of evidence for consumers to achieve. Internet forums can be useful for this purpose, but can also be imprecise given people's different setups - and they potentially assist only a certain segment of consumers who are more comfortable online.

Services - quality rights

The Panel welcomes that services must comply with information provided by the trader (not only that information captured in the contract) if that information was taken into account by the consumer when deciding whether to purchase the service. Proving this may cause some difficulty, but we would hope that the need to retain such information can be incorporated into consumer awareness material. Providers of digital content, we believe, have an important role to play here. In dealing with any queries or complaints we would also hope that a "balance of probability" approach would be taken, with the consumer receiving the benefit of any doubt.

We are disappointed that the current draft Bill does not refer to services being assessable for whether they are of satisfactory quality and fit for purpose. Although we accept that it is difficult to estimate the costs and benefits, from a consumer's point of view, we consider that it is inherently unfair if a consumer is unable to receive a refund for a purchased service that is not fit for purpose. If the consumer had been aware of this in the first instance, they are unlikely to have purchased the service. The key point is that there is an absence of informed choice. There is a risk that a system which deprives the consumer of any right to redress as a result of these elements is fundamentally flawed.

Unfair contract terms

The Panel has argued for the provision of key contractual facts in plain English, in a similar fashion to that required in the financial services market. The Panel believes that it is vital that consumers are made fully aware of the terms of any contract into which they are entering; that the potential for price increases must be communicated clearly; and that if there is any increase in the price for services applicable during the contract period, customers are able to withdraw from that contract without penalty. This is not an extension of consumer rights but a correction to ensure a basic principle of fairness.

We note the intent that, for terms to be exempt from fairness assessments, price and subject matter in contracts must be transparent - using plain, intelligible language; and prominent - brought to consumers' attention in such a way that a reasonably well informed, observant and circumspect consumer would be aware of the term. Terms that are especially onerous or unusual must be particularly prominent, clear and easy to understand in respect of what they mean for the consumer.

Most people are not legally trained - and nor should they need to be so to decide whether they wish to enter into a contract. Following its earlier work in this area⁴, the Panel takes the view that access to information alone cannot guarantee that consumers will be in a position to make an informed decision. The transparency, prominence, language, length and relevance of the information provided are all key.

We welcome that the proposed new legislation will amend the grey list to additionally cover:

- Terms which permit the trader to claim disproportionately high sums in compensation or for services which have not been supplied, where the consumer has attempted to cancel the contract. These are also known as 'early termination clauses'

⁴ <http://www.communicationsconsumerpanel.org.uk/behavioural-economics-and-vulnerable-consumers/behavioural-economics-and-vulnerable-consumers>

- Terms which give the trader discretion to decide the amount of the price after the consumer has become bound by the contract.
- Terms which give the trader discretion to decide the subject matter of the contract after the consumer has become bound by it.

In January 2012, the Panel expressed its view that price increases within the life of a fixed-term contract could be seen as 'sharp practice'. Contracts are entered into so that each party knows on what terms they will conduct business. It is intrinsically unfair if one of the most fundamental parts of a contract, that is the cost of the provided service within a fixed contract, is subject to change at the behest of one party.

The Panel has noted that, of the 1,644 consumer complaints made to Ofcom's Consumer Contact Team (September 2011 to May 2012) about changes to terms and conditions of consumer contracts, 24% concerned a lack of transparency of variation terms and a further 25% concerned the principle of price rises in fixed term contracts which people considered unfair when they had already agreed to a fixed-term contract. These principally concerned price rises in fixed term contracts for mobile services.

The Panel believes that offering services where fixed contract terms allowing price increases are not highlighted to consumers is misleading; we further believe that the existence of such terms without giving the consumer the right to cancel without penalty places the consumer at a disadvantage and the terms are therefore liable to be unfair. Such a situation is also a de facto restriction on consumer choice.

The Panel believes that if a price increase is possible during the lifetime of a fixed term contract, this fact must be communicated clearly to consumers at the point of sale - and certainly before they enter into such a contract - along with advice that they may terminate the contract without penalty in the event of a price increase. Notice of any such price increase should also include clear information as to how the customer may terminate the contract.

Complaints and redress mechanisms

The Panel remains concerned by consumers' access to information about complaints and redress mechanisms. 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.

The previous consultation noted 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 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 being spent on unnecessary disputes along with reputational risk if they decline to provide that redress or if they make the process difficult. Additionally, when consumers do experience a problem and are unable to claim the redress they expect, consumer confidence in the market is undermined. The proposals refer to facilitating faster and lower cost redress. Whilst the right to receive redress is essential, it is the process used by the consumer to do this that is critical. We would highlight the need for established standards, consumer friendly processes (up to and including Alternative Dispute Resolution) and clear information.

We are unclear why the proposals refer to consumers in brackets in the following sentence: *The draft Bill proposes to facilitate faster and lower cost redress for businesses (and consumers) which have been disadvantaged by breaches of competition law.* We would urge clarity on this point, with due focus being on consumer needs.

We note, and welcome, that the Consumer Rights Directive will protect consumers from being charged more than the basic rate for telephoning a trader about something they have bought. This should apply equally to digital purchases; and we would go further and recommend that calls about specific complaints should have no cost to the consumer.

Communicating consumers' rights

The Panel also welcomes the recognition of the importance, once consumer law has been revised, of communicating information about these changes to consumers. Research published by Ofcom this year found that while 93% of internet users are aware of website terms and conditions / privacy statements, only 18% of internet users say they read these thoroughly, 47% say they skim through them without reading them thoroughly and 28% say don't read them⁵.

⁵ Media Use and Attitudes, Ofcom 2013 http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/adult-media-lit-13/2013_Adult_ML_Tracker.pdf

Summary

In summary, the Panel:

- welcomes the provision of core consumer rights and supports moves towards greater clarity of consumer rights in the digital market place;
- is concerned about the parity, or lack thereof, of consumer rights in the digital market place with those outwith it; and about the ubiquity, or lack thereof, of consumer rights in respect of digital content obtained in exchange for personal data;
- believes there should be a clear short-term right to reject digital content;
- believes there should be clear and accessible redress mechanisms without undue burden of proof on the consumer;
- is concerned that the current draft Bill does not refer to services being assessable for whether they are of satisfactory quality and fit for purpose; and
- supports the drive for fair and clear contract terms, with an unequivocal “no penalty’ exit if there is a price increase on a fixed term contract.