



---

Consumer contracts regulations

---

New rights of consumer redress

---

The Consumer Rights Bill

---

# The new UK consumer agenda and digital content

---

Consumers of digital content will be able to bring a claim in the civil courts for redress where misleading actions or aggressive practices by businesses are found to have occurred.

---

## Overview

Consumer law is undergoing a radical transformation. Both the EU and the UK government have expressed their desire to empower consumers by making sure they understand their rights and enforce them.

The digital content market is one of the areas the EU and national legislatures have been keen to address as part of their reforms. Despite accounting for around £1bn per annum in UK consumer sales, until very recently significant parts of the market have fallen outside mainstream consumer protection law. In particular, the rights that a person who downloads or streams software, games, music files or films have been uncertain.

But this is all now changing. New regulations which came into force last month see explicit reference to digital content for the first time. These impose pre-contractual, cancellation and refund obligations in relation to all business to consumer contracts, whether concluded online, by email or in-store, and penalties for those who fail to comply.

A further set of regulations mean that from 1 October, consumers of digital content will be able to bring a claim in the civil courts for redress where misleading actions or aggressive practices by businesses are found to have occurred.

And the Consumer Rights Bill that is currently being considered by parliament will, once it is adopted, complete the protection available to consumers of digital content, by extending the law on the sale of goods to digital products.

Some of the key changes are examined below.

---

## Consumer contracts regulations

Applicable from 13 June 2014, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 implement key provisions of the 2011 Consumer Rights Directive.

Digital content is for the first time in scope, no matter how it is sold or supplied to consumers. But online sellers of digital content need to be particularly alive to the changes the 2013 Regulations bring about. These include:

- **Pre-contract information requirements.** Certain pre-contract information must be given to the consumer before the contract is entered into. This information must be clear and prominent. The list includes information about the digital content and the systems or hardware it will work with, information on the total price, details about cancellation rights (if applicable – see below), and information concerning complaint and redress mechanisms.

- **Cancellation rights.** Supplies of digital content on an intangible medium do not attract cancellation rights provided certain rules are followed. The basic rule is that the seller must not begin the supply of digital content before the end of the cancellation period, unless the consumer has consented to this and has acknowledged he will lose his cancellation right, and the seller has confirmed this consent and acknowledgement to the consumer. Non-compliance means that consumer will be allowed to benefit from the digital content (whether in whole or in part) provided in the cancellation period (14 days from the date of conclusion of the contract) without cost.
- **Refunds.** Sellers must provide a refund within 14 days of cancellation of the contract (or receipt of any returned goods in the case of digital content delivered by tangible means).
- **Additional payments/pre-ticked boxes.** Consumers must expressly/actively agree to any additional payment before it is taken. This means that a pre-ticked box which results in an additional payment will no longer be permitted.
- **Delivery.** Unless agreed otherwise, the digital content or goods must be delivered within 30 calendar days.
- **Helplines.** Where businesses offer telephone helplines for consumers, consumers must not be charged more than the basic rate for the call. This means that a premium rate number would fall foul of the rules but a landline or mobile rate is acceptable.

BIS has already published implementing guidance and the European Commission intends to publish guidance on the overall application of the Consumer Rights Directive shortly.

---

## New rights of consumer redress

The Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) identify and then criminalise misleading and aggressive commercial practices by businesses towards consumers.

At the moment, where these occur, they can only be enforced by the new Competition Markets Authority or Trading Standards; consumers themselves have no direct right of action.

The Consumer Protection (Amendment) Regulations 2014 will change this, allowing consumers to bring a claim in the civil courts for redress where misleading actions or aggressive practices by businesses are found to have occurred; no right to bring a claim arises where there has been a misleading omission.

The new regulations apply as much to the sale of digital content as they do to goods and the supply of services.

To succeed in a claim, consumers will need to show that the relevant misleading action or aggressive practice was a significant factor in the actual consumer's decision to enter into the contract or make the payment.

Assuming the claim is made out, the new remedies available to the affected consumer of digital content are:

- **A right to unwind.** Assuming the digital content has not been fully consumed, and provided the consumer rejects it within 90 days of the later of the date of the contract or of its first supply, the consumer will be entitled to end the contract and receive a full refund (provided, in the case of digital content delivered by tangible means, any goods supplied are made available for collection by the trader).
- **A right to a discount.** This is available in respect of past or future payments due under the contract. The regulations entitle consumers to a 25, 50, 75 or 100 per cent discount on the payments. The level of the discount depends on the seriousness of the incident complained of, which is assessed by reference to behaviour of the trader, the impact of the practice on the consumer and the time which has elapsed. Note it is not possible to seek to unwind a contract as well as to receive a discount.

---

Online sellers of digital content need to be alive to the changes brought about by the Consumer Contracts Regulation 2013.

- **An entitlement to seek damages.** Damages will be available for two types of loss: (a) consequential financial loss; and/or (b) alarm, distress or physical inconvenience or discomfort as a result of the incident complained of. Traders have a due diligence defence in respect of the right to claim damages.

The new rights will apply to business and consumer contracts entered into, or payments made, on or after 1 October 2014. The government is expected to issue guidance for business and consumer organisations on the new rights before they come into force.

---

## The Consumer Rights Bill

The Bill aims to cut through the current complexity of consumer protection law and consolidate, and in the case of digital content extend, existing law in this area.

The Bill sets out in one place the minimum quality rights and remedies for consumers in sale of goods and services contracts, and introduces a new category of digital content. It also deals with unfair contract terms and deals with the investigation and enforcement of breaches of consumer, including the introduction of new enhanced consumer measures where a breach of competition law is found to exist. For further details about this, please see our briefing [Consumer Rights Bill receives first reading](#).

The minimum quality rights and remedies for consumers of digital content, which only apply when it has been paid for by some means, include the following.

- **A requirement that the digital content is of satisfactory quality.** This is judged by the standard of what a reasonable person would expect taking account of the description, price and other relevant circumstances. State and condition, fitness for purpose and freedom of minor defects may also be relevant to quality.
- **A requirement that it be fit for a particular purpose.** This applies whether or not it is one for which the digital content is usually supplied; if the consumer makes it known to the trader in any pre contract discussions that he intends to use it for that purpose, it appears to be that purpose that prevails.
- **A term that the digital content will be as described by the trader.** This does not have to be exactly as described in any trial, demonstration, etc, as long as it matches the description. Strangely, the Bill specifically provides, however, that if the digital content is modified, it has to remain as it was initially described for the duration of the contract.
- **A provision that any pre-contractual information provided to meet the requirements of the 2013 regulations (see above) will be treated as a term of the contract.**
- **A right to a repair or replacement, or a price reduction** where the digital content does not conform to the contract. In the case of the former, this must be without significant inconvenience to the consumer and undertaken in a reasonable time, and the trader must bear all costs. However, there is no requirement to do so if repair or replacement is impossible or disproportionate. The right to a price reduction, which can include a full refund, arises where a repair or replacement cannot be effected, ie because it is impossible or disproportionate, or the trader is in breach of the requirement to do so within a reasonable time and without significant inconvenience to the consumer.
- **A remedy for any damage caused to the device or other digital content** belonging to the consumer, regardless of whether the digital content was free or paid for, but provided it was supplied under a contract. The remedies available are the repair of the damage or compensation for it. Consumers will need to show that the trader failed to use reasonable skill and care in preventing the harm occurring.

In terms of unfair contract terms, among other matters, the Bill provides that terms relating to the subject matter or price in a contract will not be tested for fairness as long as they are prominent. This is a change to the existing regime, which exempts these terms from an assessment of fairness provided they are transparent and plainly intelligible.

---

The Consumer Rights Bill aims to cut through the complexity of current consumer protection law – and extend the law covering digital content.

## What the reforms mean for sellers and suppliers of digital content

The changes are far-reaching. Many clients are currently engaged in a thorough review of their online terms and conditions and sales processes in light of the 2013 and 2014 Regulations, and in anticipation of the Consumer Rights Act.

The 2014 Regulations increase the litigation risk to businesses. It is important that businesses remind themselves of the requirements of the CPRs in terms of understanding the behaviours and practices which are not permitted and that appropriate protocols are in place regarding staff training. Businesses need to be especially alive to the fact that they could face actions for damages from consumers, which, if awarded, could be significant. And this could be in parallel with enforcement action taken by regulators.

And all remains in the air for the time being in terms of what the adopted Consumer Rights Act will look like for digital content. A number of concerns about the Bill have though been identified by industry including:

---

All remains in the air for the time being in terms of what the adopted Consumer Rights Act will look like for digital content.

- **Requiring that digital content be fit for a particular purpose.** This could result in logistical problems for online traders where content is sold subject to standard terms and conditions – what do you do where the consumer notifies by email of his intended purpose and downloads the content before you have a chance to respond? And how does this fit with statements by the trader on the purpose it is to be used for? Further, the provision appears to be at odds with the underlying basis of most supplies of digital content – what is usually being sold is the contractual right to use the digital content as is, not a right to use it for whatever purposes the consumer may choose.
- **Requiring that digital content be of a satisfactory quality** is also an issue for an industry where traders often use third parties' software in their products and it is provided on a 'no warranties' basis. The implying of this term in the contract means traders will be forced to give warranties to consumers over and above those that it itself has recourse to, ie the trader is assuming the third party risk in addition to its own.
- **Updates and upgrades are a key feature of the digital content industry.** The Bill arguably does not adequately reflect this by requiring that digital content remain as initially described. This may make traders less willing to provide updates and upgrades.
- **Requiring remedies to be provided where the consumer's device or other digital content is damaged.** There are many reasons why damage may occur, including that the device itself is defective or that the digital content may be incompatible with other software on it, and the reason may be difficult to prove. Further, critical security software fixes may be delayed to enable extensive testing to avoid what could amount to unlimited liability for any resulting damage caused.
- In relation to the assessment of terms for fairness, **the Bill defines terms as being prominent 'if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term'.** Concerns have been expressed about what this means in practice and also how the provision interacts with the pre-contractual information requirements provided under the 2013 Regulations, which some suggest now require twice the amount of information to be provided.



---

### Andrew Austin

Partner, Dispute Resolution

T +44 20 7716 4048

M +44 7966 164830

E [andrew.austin@freshfields.com](mailto:andrew.austin@freshfields.com)

[freshfields.com](http://freshfields.com)

This material is provided by the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the law of England and Wales) (the UK LLP) and the offices and associated entities of the UK LLP practising under the Freshfields Bruckhaus Deringer name in a number of jurisdictions, and Freshfields Bruckhaus Deringer US LLP, together referred to in the material as 'Freshfields'. For regulatory information please refer to [www.freshfields.com/support/legalnotice](http://www.freshfields.com/support/legalnotice).

The UK LLP has offices or associated entities in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Russia, Singapore, Spain, the United Arab Emirates and Vietnam. Freshfields Bruckhaus Deringer US LLP has offices in New York City and Washington DC.

This material is for general information only and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP, August 2014, 01367