



Unit C

Basic consumer rights

Version: 1.2

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Introduction

There are some basic rights which Cs get when they acquire goods, services or digital content (DigC) under a contract with a T [s3(1), s33(1) and s48(1) CRA]. These are contained in the Consumer Rights Act 2015 (CRA) and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs) and for each of these three products it is necessary to understand what type of transaction is covered, what exactly the rights are and what remedies might be available if products are supplied that do not comply.

In the case of a mixed contract, e.g. where both goods and services or digital content and a service, or even all three are supplied, it will be necessary to consider the rights and remedies for each element of the contract, as well as the two that apply specifically to mixed contracts [s1(6) CRA].

The CRA may apply to Ts based outside the UK if goods are marketed to Cs living in the UK (unit B).

The stages of C's journey addressed in this unit are as indicated below:



The contracts covered, as well as the rights and remedies available, will each be examined in the following sections, regardless of whether the contract is written, oral or implied from the conduct of the parties [s1(2) CRA]:

- C1: Goods
- C2: Services
- C3: Digital content
- C4: Alternative remedies
- C5: Information
- C6: Fairness

C1 Goods

C1.1 Types of contract for goods

Consumers have rights in relation to goods supplied in the following types of transaction: sales, conditional sales, hire, hire-purchase and other contracts where goods are transferred. Explanations are detailed below and summarised in table C1. Goods are defined as any tangible moveable item and specifically include water, gas and electricity when they are available for supply in a limited volume or set quantity, e.g. bottles of water, gas cylinders and batteries [s2(8) CRA & r5 CCRs].

C1.1.1 Sales

A sales contract exists where T transfers, or agrees to transfer, ownership of goods to C, who has paid, or agrees to pay, the price. This includes finished goods that are yet to be manufactured, such as made-to-measure curtains, or goods that are to also be installed as well as supplied [s5 CRA]. Various purchasing methods may apply, e.g.

- ✓ cash
- ✓ cheque
- ✓ part exchange

- ✓ credit sale
- ✓ credit card
- ✓ debit card

C1.1.2 Conditional sales

If T retains legal ownership of the goods but allows C to pay the price in instalments until certain conditions in the contract are met, then this will be a conditional sales (CS) agreement. Such arrangements are often used for car transactions, where C is given physical possession of the vehicle, although this is not a legal requirement for the existence of a CS agreement [s5(3) CRA]. C's contract will be with the finance company not the garage.

C1.1.3 Hire contracts

Where the agreement is simply for the possession and use of goods, for a period determined by the contract, e.g. a weekend hire of a carpet cleaner, this will be a contract of hire. It should not be confused with a hire-purchase agreement [s6 CRA].

C1.1.4 Hire-purchase contracts

The parties will have a hire-purchase (HP) agreement, where T initially hires out goods to C in return for payments by instalment, followed by the possibility of ownership transferring to C. This often occurs by C exercising an option to purchase, although, it could also happen because one of the parties performs an act specified in the contract or an event specified in the contract occurs [s7 CRA]. It is similar to a CS agreement, in that it is a form of credit for C, but ownership will transfer automatically at some point in a CS situation, whereas, with HP there is the element of choice for C. C's contract will be with the finance company not the garage.

C1.1.5 Other supplies of goods

When there is an agreement to transfer ownership of goods but it is not a sales or a HP contract, then it will be a "contract for transfer of goods" [s8 CRA], e.g. where C provides consideration in a non-monetary format, such as a straightforward exchange of goods, or by sending tokens from the packaging of a food item to acquire a toy. This will also cover mixed contracts, e.g. where there is an incidental transfer of ownership in goods alongside a service, such as when a plumber provides a washer to fix a leaking tap.

If a C does not know what type of finance agreement they have entered into, advisers should provide information and signpost for further support as per the Quick Reference Tool for Financial Capability.

Table C1: Summary of contract types for goods

Contract	Features	Examples	Other party	Ref
Sale	<p>T transfers or agrees to transfer ownership of goods to C</p> <p>C has paid or agrees to pay the price</p>	<p>C buys....</p> <p>a vacuum cleaner from a salesman in their home, paying by cheque and a part exchange</p> <p>a drink in the pub and pays cash</p> <p>a mobile phone handset with a debit card in a high street store</p> <p>a pair of shoes from an online T using a credit card and PayPal</p> <p>a washing machine from a second hand store financed by a loan from that store</p> <p>a park home from a landowner financed by a loan from the bank</p>	Seller	s5
Conditional sale	<p>T retains legal ownership of the goods</p> <p>C pays in instalments until certain contractual conditions are met</p> <p>C is given physical possession of the goods</p> <p>Ownership of the goods transfer to C when the conditions are met</p>	<p>C buys...</p> <p>a car, after visiting a garage and the salesman helps C to complete a credit application to finance the deal</p> <p>The credit agreement states that it is a Conditional sale agreement</p>	Finance company	s5(3)
Hire	<p>T retains ownership of the goods</p> <p>C contracts to take possession and use the goods</p> <p>The contract specifies the hire, rental or lease period</p>	<p>C hires a cement mixer for the weekend to build a garden wall</p> <p>C rents a car for a 2 week holiday</p>	Owner	s6
Hire-purchase	<p>T retains legal ownership of the goods</p> <p>C pays in instalments</p> <p>C is given physical possession of the goods and the right to use them</p> <p>Ownership of the goods transfers to C if C exercises the option to purchase</p>	<p>C visits a department store, chooses a three piece suite and the salesman helps C to complete an application for credit to finance the deal</p> <p>The credit agreement states that it is a hire-purchase agreement</p>	Finance company	s7

Other supplies	<p>T transfers or agrees to transfer ownership of goods to C</p> <p>C provides or agrees to provide some consideration other than a price</p> <p>The contract is not a sale or a HP agreement</p>	<p>A manufacturer supplies a free toy with a packet of cereal</p> <p>A retailer takes C's second-hand car in direct exchange for a new motorbike</p> <p>An electrical repairer provides 2 new screws to fix the door of a washing machine</p>	Supplier	s8
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C1.1.6 Exceptions

Certain contracts to supply goods are exempt from the CRA [s3(3) CRA]. These are contracts:

- for coins or notes for use as currency
- where goods are sold by execution or other legal authority
- if no consideration is provided by C
- intended to operate as a mortgage, pledge, charge or other security

The definition of goods does not include immovable items, such as houses or land, however, it would cover mobile or park homes, as they can be detached from the land and transferred to another site.

In Scotland, consideration is not a requirement to form a contract, but if C does not provide something in return for the goods, the provisions in the CRA will not apply.

C1.2 Rights when goods are supplied

When Cs are supplied with goods by Ts (*Stevenson v Rogers*, *Buchanan-Jardine v Hamilink*) the law states that the goods must comply with certain quality standards, meet marketing claims and T must have the right to supply them. This is achieved by saying that certain terms are presumed to be in that contract, implied terms (ITs). Most of these can be found in the CRA, namely those relating to description and quality, although some, concerned with the provision of information, are contained in the CCRs (section C5). If the standards are not met by T, then C may have the right to a remedy. Generally speaking it will be for C to prove that the goods do not meet the requirements, i.e. C has the burden of proof and the standard will be on a balance of probabilities, although for some of the remedies this is reversed for the first six months. The rights are sometimes categorised as:

- ✓ the 5 core rights (relating to satisfactory quality, fitness for purpose made known and compliance with any description, sample or model)
- ✓ mixed contracts rights (correct installation of goods, quality of digital content in goods)
- ✓ other rights (the right to supply, freedom from charges and encumbrances, compliance with information requirements under the CCRs)

Although the rights generally apply to second hand goods they do not necessarily apply to most of them when purchased at a public auction because a C is treated as a non-consumer in such a situation (unit J).

C1.2.1 Satisfactory quality [s9 CRA]

Goods supplied by T to C should be of satisfactory quality (SQ) and the test for this is based on what a reasonable person would expect, bearing in mind certain factors.

C1.2.1.1 The meaning of satisfactory quality

The quality of goods will be satisfactory if they meet the standard that a reasonable person expects, bearing in mind all the following:

- ✓ any description used
- ✓ the price paid (if this is relevant)
- ✓ all other relevant circumstances, e.g. age, history or any public claims about the goods' characteristics, made by the supplier, manufacturer or representative of either.

For example, an item sold as a "budget" model would create lower expectations of quality in the mind of a reasonable buyer, than one supplied as a "deluxe" model; however, it would still be reasonable to expect the budget model to work properly, otherwise T may be a breach of the SQ term.

The state and condition of the goods should always be borne in mind when considering quality, and in addition the CRA lists other aspects, which may or may not be relevant in each case, as judged on an individual basis:

- ✓ fitness for all the purposes for which the goods are generally used
- ✓ appearance and finish of the goods
- ✓ whether the goods are free from minor defects as well as major ones (*Lamarra v Capital Bank plc*)
- ✓ whether the goods are safe
- ✓ how long the goods last in a satisfactory state, i.e. durability (*Lambert v Lewis, Thain v Anniesland Trade Centre*)

This is not an exhaustive list and any factor that has a bearing on the issue of quality can be taken into account. Although freedom from minor defects appears in this list, the general principle of *de minimis* is likely to apply, which means that very trivial matters may not give rise to a breach.

C1.2.1.2 Public statements

The definition of SQ, specifically refers to "public statements" being included when considering "all the other relevant circumstances". This covers advertising and labelling, however, a public statement will not be considered to be a relevant circumstance in any of the following three circumstances:

- T was not aware of the statement when the contract was made and could not reasonably have been aware of it
- The statement had been publicly withdrawn or corrected before the contract was made
- C's decision could not have been influenced by the statement

C1.2.1.3 Situations when SQ is not applicable

There are three sets of circumstances when it may be appropriate for T to argue that there is no term in a particular contract requiring the goods to be of SQ:

- ✓ when T has specifically drawn C's attention to the fault before the contract is made

- ✓ when C chooses to examine the goods before agreeing to buy them, but misses the defect, which the examination ought to have revealed
- ✓ if the supply is by sample and the issue should have been apparent from a reasonable examination of the sample.

C1.2.1.4 Second-hand goods

Second-hand goods are covered as well as new goods, although, a reasonable person's expectations of quality will be different, for example, it is likely to be more acceptable for second-hand goods to have minor defects and or a flawed finish, such as scratches or blemishes, and it is possible that there is a lower expectation of durability, due to an item's age. The situation may be different if second-hand goods are bought at a public auction (unit J).

C1.2.2 Fitness for purpose made known [s10 CRA]

If C asks T for goods for a particular purpose, then the goods should be fit for that purpose made known to T (FFPMK). This purpose could be made known either expressly or by implication and applies even if the purpose for which C requires them is not a usual one, but will not apply if C does not rely on T's judgment or it is unreasonable for C to do so (*Priest v Last, Griffiths v Peter Conway Ltd, Flynn v Scott*). This also applies if T acts as a credit broker with the goods being sold to a finance company and then sold by the FC to C.

If T informs C that the goods are not suitable for their intended purpose, and C buys them anyway, then C will not be able to argue that there has been a breach of this term.

C1.2.3 Supply by description [s11(1) CRA]

If goods are supplied according to a description, then they should meet that description. There can be a supply by description even if C can see the goods and make their own choice, e.g. by virtue of the detail on the label or packaging, which is likely to have been provided by the manufacturer rather than the supplier. The supplier will still be liable if C has relied on this description (*Beale v Taylor*).

This includes the right for goods to comply with the "main characteristic" description, required before a contract is made by the CCRs. The CRA states that this information is then treated as a term of the contract. The express agreement of T and C is necessary to change any of this information before the contract is made. Goods supplied should match this main characteristic description, although there is no specific definition of what it means. The CCRs state that how much detail will be required depends on the medium of communication and the goods themselves. The EU guidance highlights the importance of explaining any restrictive conditions concerning the offer. The CPRs [r5(5)] state that the main characteristics of a product include many things, ranging from its availability, usage and composition to its specification and test results, as listed in Box 3 of Appendix E1, unit E).

If the supply is by sample as well as description, then C can expect the goods to comply with both.

C1.2.4 Supply by sample [s13 CRA]

If C sees or examines a sample of the goods before agreeing to acquire them, then the goods should match the sample, e.g. in terms of quality and description, unless any differences were brought to their attention beforehand. The goods should also be free from defects, apart from those that a reasonable examination of the sample would have revealed.

A sample is a small but representative part of the whole goods that will be supplied to C, e.g. a swatch of material used to select a sofa covering.

C1.2.5 Supply by model [s14 CRA]

If C sees or examines a model of the goods before agreeing to acquire them, then the goods should match the model, e.g. in terms of quality and description, unless any differences were brought to their attention beforehand.

A model will usually be an example of a whole item, displayed for marketing or demonstration purposes, e.g. an assembled piece of flat pack furniture in a department store.

C1.2.6 Mixed contracts [s2(5) CRA].

Where C buys goods and there is also a service or some DigC content involved, this is called a mixed contract and alongside the rights that would apply for the goods, service or DigC elements, there are two additional rights that could apply.

C1.2.6.1 Digital content in goods [s16 CRA]

Where goods include DigC, such content must be of SQ, FFPMK and as described [s35, 36, 37 CRA] otherwise the goods do not conform to the contract. Description includes the “main characteristics”, “functionality” and “compatibility” information (section C3) required under the CCRs.

C1.2.6.2 Installation of goods [s15 CRA]

If installation of the goods is part of C’s contract, then the goods should be installed correctly, either by T or someone under T’s responsibility. This could be something as straightforward as plugging in an electrical item or something more onerous including wiring and plumbing, e.g. for a shower. There may be some overlap with the requirement for any service to be provided using reasonable care and skill (section C2).

C1.2.7 Conformity with other pre-contract information [s12 CRA]

The CCRs require T to provide other pre-contract information (PCI) to C, concerning various aspects of the transaction, as well as that which would form part of the description of the goods. This has to be provided before a contract is made and the CRA states that this information is then treated as a term(s) of the contract. The express agreement of T and C is necessary to change any of this information before the contract is made. The obligation on T will be to make sure that the goods supplied meet the detail contained in the PCI.

C1.2.8 The right to supply goods [s17 CRA]

When T supplies goods to C then they must have the right to do so to the extent required for the nature of the contract. If supply is to take place after the making of the contract, then T only needs to have this right at the later date. T needs to be in a position to transfer:

- ✓ physical possession, in the case of hire contracts
- ✓ legal ownership, in the case of other supply contracts

There may be a breach of this provision, for example, if the goods have been stolen, as T would not have a good legal title and would not therefore, be able to pass good title on to the person acquiring the goods.

C1.2.8.1 Existing HP/CS agreements

Where motor vehicles are the subject of an HP/CS agreement and they are supplied to someone when there is an amount outstanding on such an agreement, it is possible that the goods will have acquired a good title by virtue of s27 of the Hire Purchase Act 1964. This section allows the first private purchaser of such a vehicle to gain a good title if the vehicle was bought in good faith and with no knowledge of the outstanding finance. It does not apply to other goods, only motor vehicles and it only applies to the first private purchaser. If a vehicle acquires a good title in this way, this title can then be transferred to subsequent buyers, regardless of their status or knowledge. Conversely, if the first private purchaser does not get good title, then subsequent purchasers do not acquire one either, even if they have good faith and no knowledge.

C1.2.9 No other person should have rights [s17(2) CRA]

This right specifically refers to the goods being free from any charge or encumbrance not notified to C beforehand and that C should therefore be able to enjoy quiet possession of them, e.g. there is no breach of intellectual property rights such as those associated with having copyright in the goods or a patent in connection with them. Where C is hiring goods, the owner will retain title to the goods but should not interfere with C's right to use them during the hire period.

C1.2.10 Delivery of goods [s28 CRA]

Delivery covers giving possession of the goods to C and so it could be that C simply hands over the goods to C in a store, in which case they are delivered then. It also covers situations where goods are subsequently dispatched to C and physically delivered at some point after the making of the contract, for example, when they are ordered online. The rights associated with delivery are not included in table C2 as the remedies are slightly different if the rights are breached.

C1.2.10.1 Meeting delivery dates

Where goods are to be dispatched, T and C can agree any delivery time or period that they wish, however, in the absence of an agreement on this, delivery should be without undue delay and within 30 days of the contract being made.

The time for delivery may be particularly important for C, in which case it may be possible to treat it as an essential term in the contract. This will affect the remedy available if a breach occurs.

C1.2.10.2 Risk associated with delivery [s29 CRA]

T bears the risk in relation to the goods until they are delivered to C so if they are lost or damaged in transit, it will be T's responsibility to provide a remedy, such as a replacement or a refund. However, if C arranged their own courier, using an option not offered by T, then C will bear the responsibility. C may have a claim against the courier in relation to poor service if they experience such.

C1.2.10.3 Deliveries by instalment and wrong quantity [s25 & s26 CRA]

C does not have to accept deliveries by instalment or a different quantity of goods from that ordered, unless this was previously agreed with T. If C ordered 10 items for delivery altogether, then T tries to deliver them in instalments or delivers either 8 or 12 as the full delivery, C does not have to accept any of these options.

C1.3 Statutory remedies when goods don't comply

If any of C's rights are breached, then C may be able to seek a remedy from the supplier. There are various remedies available in the CRA but which one applies depends to some extent on which right has been breached. As an alternative, other remedies from outside the CRA may also be available. These may apply to services and digital content too and so are discussed separately, where some practical considerations for pursuing any remedy, are also considered (section C4). Generally, the BOP is on C, who must show that the problem was present at the time of delivery before seeking a remedy, although there are some exceptions to this. A summary of the remedies available appears in table C2 below followed by an explanation of how they work. The remedies available for breaches of the core rights will be discussed first.

Table C2: Summary of rights and remedies for breaches of ITs concerning goods

If C's rights are breached, C may have the remedies ticked available to them, i.e. if, when supplied, goods.....	Short term right to reject	1 Repair or replacement	Reduction or refund	Recover costs incurred	Right to reject	Other remedies
CORE RIGHTS						
1. Were not of SQ	✓	✓	✓			✓
2. Were not FFPMK	✓	✓	✓			✓
3. Did not meet any description made, including the "main characteristics" information in the CCRs	✓	✓	✓			✓
4. Did not match any sample shown	✓	✓	✓			✓
5. Did not match any model seen or examined	✓	✓	✓			✓
MIXED CONTRACTS						
6. Contained digital content, which did not conform in terms of SQ, FFPMK or description, including the "main characteristics", "functionality" and "compatibility" information in the CCRs	✓	✓	✓			✓
7. Were not correctly installed (after supply)		✓	✓			✓
OTHER RIGHTS						
8. Did not conform with other PCI in the CCRs				✓		✓
9. Were not the supplier's to supply					✓	✓
10. Were not free from charges and encumbrances or did not allow C quiet possession						✓

C1.3.1 When no remedy may be available

If any of the following occur there will be no remedy available under the CRA. If C has:

- misused the goods
- damaged them accidentally
- used the goods to the extent that they are suffering from fair wear and tear
- bought goods where what appears to be a fault is actually a trait of the item
- had the fault specifically brought to their attention
- examined the goods before buying and should have noticed the fault
- changed his or her mind about keeping the goods; although, the CCRs may allow C to cancel certain contracts in specific circumstances (unit D).

C1.3.2 The short term right to reject (STRR) [s22 CRA]

This remedy enables C to return goods to T, within a 30 day period, for a full refund, if the core rights (1 - 6 in table C2) have been breached. T cannot enforce any term that reduces this period, even if C appeared to agree to it, because the CRA says that any such an agreement will not be binding on C.

The 30 day period starts the day after all of the following have taken place:

- ✓ transfer of ownership in the goods (or possession if hire, HP or CS)
- ✓ delivery of the goods
- ✓ installation of the goods and notification by T that this has been done (if required under the contract)
- ✓ any action required by T to enable C to use the goods and notification by T that this has been done (if required under the contract)

If the goods are likely to perish before 30 days, then the time limit for exercising this STRR will be the shorter period the goods are reasonably expected to last for. There is no statutory provision to allow for the 30 day period to be extended, even if goods are supplied outside their usual season, e.g. ski boots in the summer, although, C could negotiate with T for a longer period in which to exercise the STRR. The BOP is on C when exercising this remedy.

The STRR is also available if C has agreed to goods being delivered in instalments and one of the instalments is defective [s26(3) CRA].

C1.3.2.1 Agreeing to a repair or a replacement [s22(6) – (8) CRA]

If T offers a repair or a replacement, or C asks for one, then the 30 day, or shorter STRR period if the goods are perishable, is interrupted by a waiting period (WP). The WP is the time it takes T to carry out the repair or provide the replacement and starts on the day C asks for or agrees to this and ends when T returns the repaired goods or supplies C with the replacement. After this WP, C will have the remainder of the STRR period or a further 7 days, whichever is the longer. C can still exercise their STRR during this period if there is a breach, either in relation to the same issue or a different one.

C1.3.3 First tier remedies - Repair or replacement [s23 CRA]

These practical remedies are available to C if the core or mixed contract rights, 1 - 7 in table C2, have been breached. They are referred to as 1st tier remedies and are available alongside the STRR as an alternative to it for rights 1 - 6. C's right is to have the goods repaired or replaced:

- ✓ free of charge
- ✓ within a reasonable time (considering the nature and purpose of the goods)
- ✓ without being caused significant inconvenience (considering the nature and purpose of the goods)

However, once C has agreed to one of these options, they must allow T a reasonable period of time to achieve the one chosen before deciding they would prefer the other option or the STRR, unless this would cause C significant inconvenience. This will be a question of fact in each case and may include consideration of impacts on C's health, safety or financial situation.

T should repair or replace goods free of charge, which means that they should bear the costs of any labour, materials and postage involved (*Gebr Weber GmbH v Wittmer, Putz v Medianness Electronics GmbH*).

C may choose whether they would prefer a repair or a replacement, however, they cannot insist on their choice if T finds it impossible or disproportionate to comply. One remedy may be disproportionate to the other if it would impose costs on T that would be unreasonable in comparison with the other remedy, bearing in mind:

- the value of the goods
- the significance of the lack of conformity
- whether C would suffer significant inconvenience if the other remedy was provided

If both remedies are possible, it is a question of balancing how long each would take and how much inconvenience each would cause against how much it would cost T to provide each one, bearing in mind C's preference.

C1.3.3.1 The number of repairs or replacements [s24(5) CRA]

C is only obliged to accept either one repair or one replacement by T before being able to request a 2nd tier remedy. This is the case, even if a new problem arises after a repair or a replacement has been provided.

It is open to T and C to negotiate for further repairs or replacements before considering the 2nd tier remedies, if C would prefer this or is happy to have them and T is willing and able to offer them.

C1.3.3.2 What constitutes a repair or a replacement [s24(6),(7) CRA]

A repair will be complete when T:

- ✓ delivers the repaired goods to C, or
- ✓ if the repair is at C's premises, T indicates that the repair is finished

It may be necessary for T to carry out some diagnostic work to identify a fault and if this takes place in C's home, there is likely to be more than one visit by T to carry out one repair.

Following a repair, the goods should be of SQ, FFPPMK, as described, match any sample or model referred to or be properly installed. A repeat of the same problem or a new breach occurring will mean that C can, if they wish, select a 2nd tier remedy. T cannot insist on repairing each fault each time it arises. However, if there are several faults on the first occasion, this will count as one repair opportunity.

It is T's responsibility to ensure that the repair takes place but T may engage another contractor, a specialist or the manufacturer to do the work.

Replacement goods should be the same as the goods that did not conform, but without the non-conforming features. If goods are mass produced then they should be the same make and model as the goods they are replacing and virtually identical, otherwise they should be as close a match as possible. If an alternative make and or model is offered by T, then C does not have to accept it, but neither can C insist on such an offer being made.

C1.3.3.3 The burden of proof [s19(14) CRA]

The BOP is reversed for the first six months following delivery, for the practical remedies of repair or replacement and also the second tier remedies of price reduction and the FRR. So if C can show that goods are faulty then there is a presumption that they were faulty when they were supplied and the onus would be on T if he/she wishes to argue otherwise (*Faber v Autobedrijf hazet Ochten BV*). This does not apply to the STRR. If C wishes to exercise the STRR, the onus is on C to prove that the goods were faulty and that this was the case when they were supplied.

C1.3.4 Second tier remedies – Price reduction or final right to reject (FRR) [s24 CRA]

These 2nd tier remedies, of a FRR or a price reduction, are available to C if the core or mixed contract rights (1 - 7 in table C2) have been breached and C is in a position to move on from the 1st tier remedies. This will be because one of the following applies:

- ✓ C has had either one repair or one replacement but the problem has reoccurred
- ✓ C has had either one repair or one replacement and now there is a further problem with the goods
- ✓ it is impossible for T to repair or replace the goods
- ✓ T has not provided the repair or replacement within a reasonable time
- ✓ T has caused significant inconvenience to C whilst trying to provide the repair or replacement

C1.3.4.1 Final right to reject (FRR)

If C is exercising the FRR then they must make it clear to T that they are doing so. T can reduce the amount of the refund when the FRR is being exercised in the following timescales:

- more than 6 months after possession (or installation, or goods otherwise being ready for use if applicable)
- during the first 6 months for motor vehicles

The reduction in the refund can only be made to reflect any use that C may have had from the goods not for any other reason, e.g. that the goods have simply lost value in the market place because of the length of time that C has had them (their second-hand value). Any period when T failed to collect the goods as agreed can be ignored for this purpose.

A vehicle that has been made or adapted for use by one person, who is suffering from some physical defect or disability, is not a motor vehicle for these purposes, e.g. a mobility scooter. Therefore, a full refund would have to be given to C during the first 6 months if such a vehicle was not of SQ, FFPPMK, as described, in conformity with a make or model referred to or correctly installed.

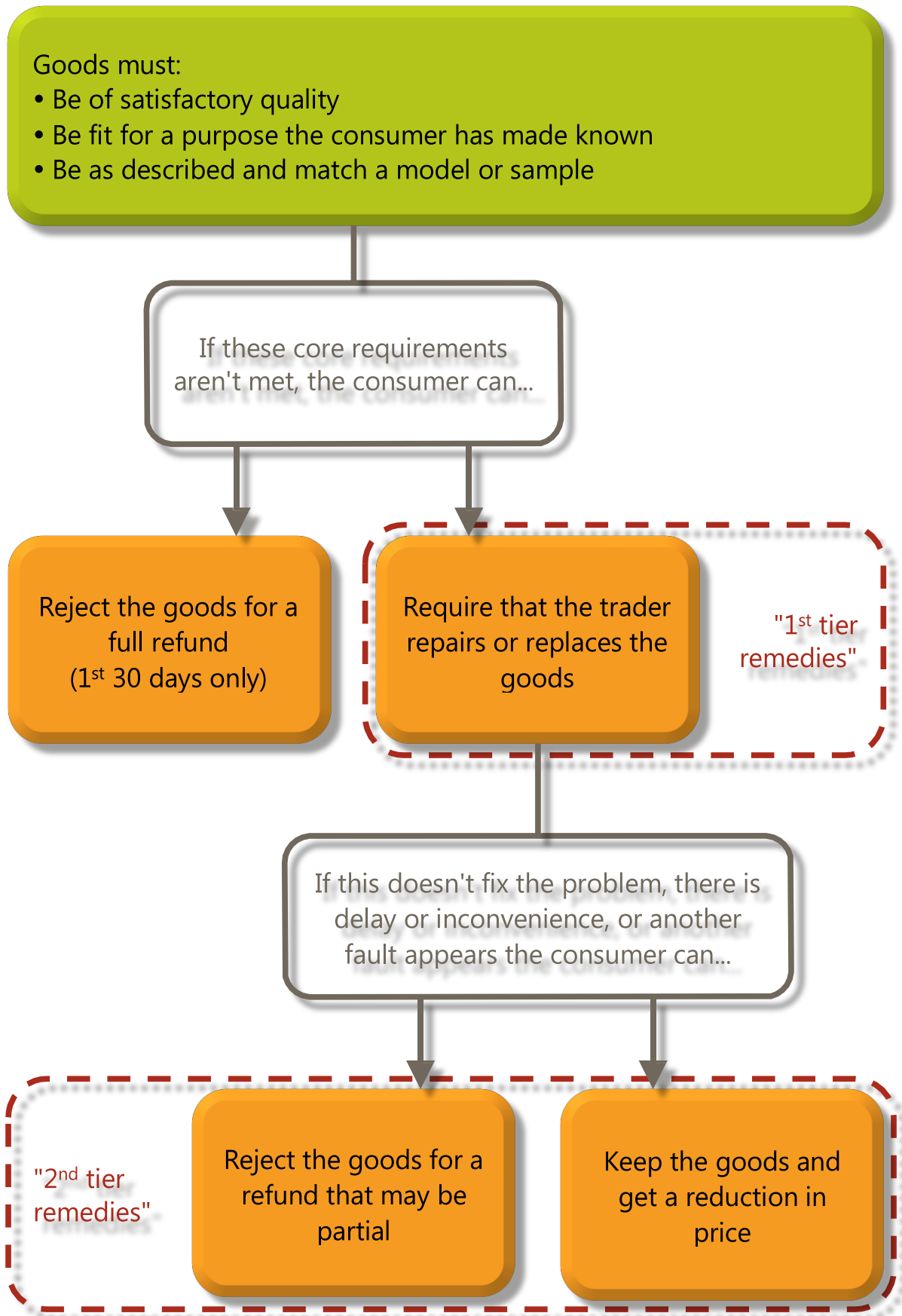
For most consumer goods, the usual position will be that during the first 6 months C will be entitled to a full refund when exercising the FRR.

C1.3.4.2 Price reduction [s24(2) CRA]

C could choose to keep the goods and receive a price reduction to reflect the non-conformity, instead of opting for the FRR. The reduction should be of an appropriate amount deducted from the agreed price, which would usually reflect the difference between the value of the goods when they were supplied and their value if there had not been a breach.

If C experiences a further fault with the goods they will still be able to seek a suitable remedy in relation to that issue.

Figure C1: Remedies available for breaches of the core goods rights (Source: BIS)



C1.3.5 Remedies for breaches of non-core rights

The STRR and the alternative tiered remedies of repair or replacement followed by a reduction or the FRR are available for breaches of the core rights. For breaches of other rights there are various remedies available that are tailored for the specific issues that C may encounter.

C1.3.5.1 Recovery of costs incurred [s19(5) CRA]

This is a specific remedy, which is available for breach of the term requiring goods to conform to the PCI supplied in accordance with the CCRs, other than that describing the main characteristics of the goods (right no.8), which is covered by the same remedies as a breach of a supply by description. C can recover costs incurred as a result of such a breach, up to the price paid.

C1.3.5.2 Right to reject [s19(6) and s20 CRA]

If T supplies C with goods where there was no right to supply them (right no.9), for example, because the goods had been stolen, then C can reject the goods for a full refund. T cannot make a deduction for use and the 30 day time period, relevant for the STRR, does not apply. This also applies to instalment deliveries that C has agreed to.

C1.3.6 Delivery problems

The remedies for delivery problems depend on whether there has been :

- a late delivery
- an incorrect quantity
- a defective instalment

c

C1.3.6.1 Late delivery [s28 CRA]

If goods are not delivered on time then what C can do about it will depend, to some extent, on whether the delivery time was essential or not as illustrated by figure C2. A delivery time could be essential, either because:

- C told T that it was before making the contract, or
- it is apparent from the circumstances, e.g. a wedding cake to be delivered on the wedding day

The diagram refers to the possibility of damages as an additional or alternative remedy and this is discussed in more detail in section 4 (*Charles Rickard Ltd v Oppenheim*).

C1.3.6.2 Incorrect quantity supplies [s25 CRA]

If C decides to accept the lesser or greater quantity of goods supplied by T, then C would have to pay for whatever quantity he or she decided to keep in accordance with the agreed contract price. C's options are:

- ✓ to reject the whole of what was delivered (whether the quantity was more or less than what was ordered)
- ✓ to keep the whole of what was delivered and pay at the contract rate
- ✓ where too many are delivered, to reject the excess and keep the ordered number

C1.3.6.3 Deliveries by instalments [s26(1) CRA]

C is not bound to accept deliveries of goods by instalments unless this was agreed beforehand. If the goods in any agreed instalment are defective, which is not defined, then, depending on the terms of the contract and the circumstances, C may be able to:

- exercise the STRR for the whole contract goods (rights 1 - 6)
- reject the whole contract goods (right 9)
- claim damages (any non-conformity)

If C fails to take delivery of an instalment, or refuses to do so, then T, depending on the terms of the contract and the circumstances, may be able to:

- end the whole contract
- claim damages, if the breach of contract is a severable obligation

C1.4 Powers of the court [s58 CRA]

If a C is seeking a repair or a replacement of goods, the court can make an order for specific performance of either of these (specific implement in Scotland).

If C is seeking repair, replacement, reduction or a FRR, the court can order whichever they think is the most appropriate from these.

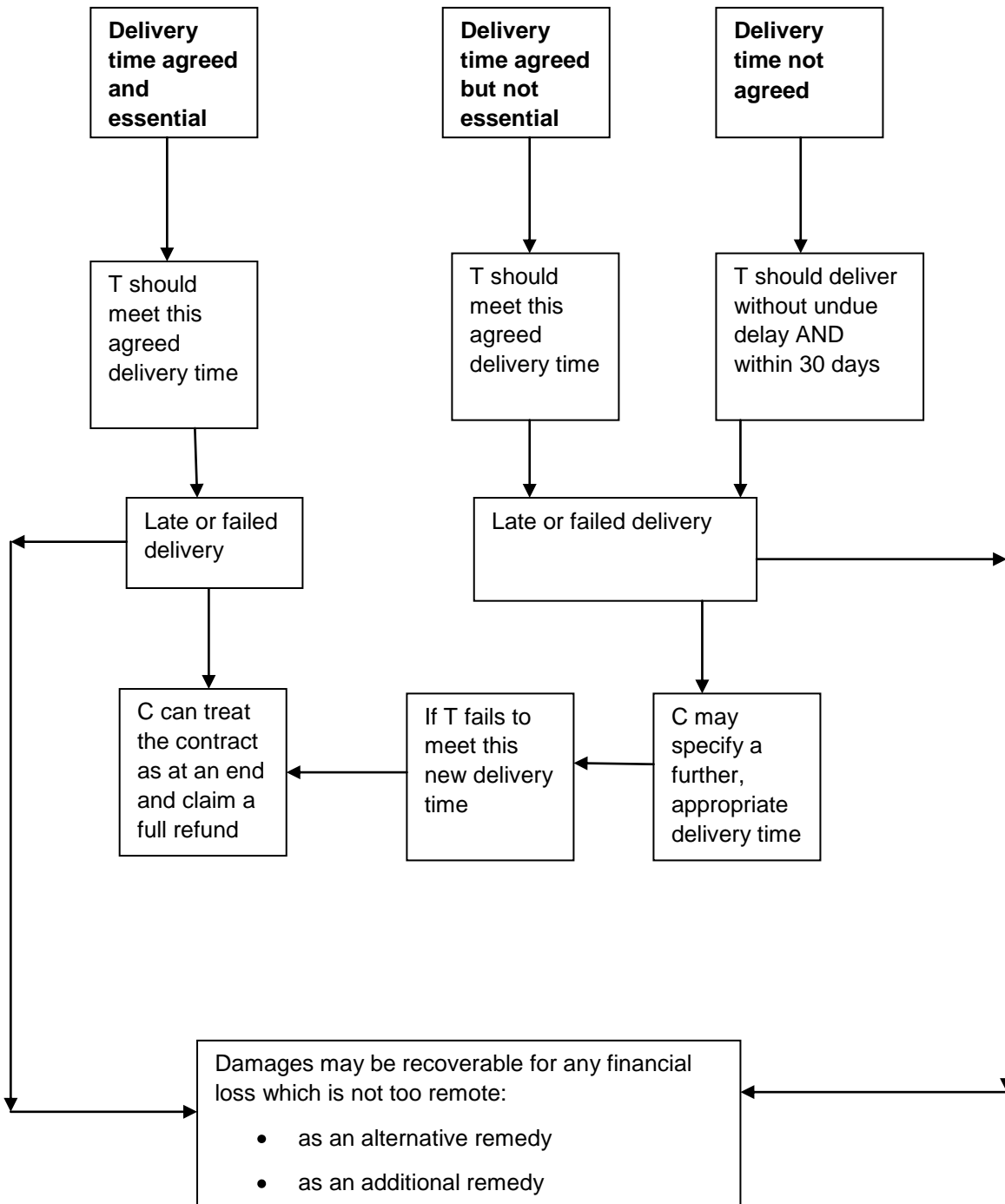
When awarding the FRR, the court can order that any reimbursement is reduced to reflect any use C may have had from the goods, unless this is during the first 6 months, although there is an exception for motor vehicles; the court can reduce the FRR refund during the first 6 months in relation to motor vehicles and any other government approved goods. Periods when T was due to collect the goods and failed to do so should also be ignored when considering C's use.

The court can impose any of the following when making an order:

- ✓ terms
- ✓ conditions
- ✓ damages
- ✓ payment of the price

as it thinks just in the circumstances.

Figure C2: Remedies for late or failed delivery of goods



C1.5 Practical considerations for rejecting goods

A number of the remedies involve C being able to reject goods and if this is the case there are some general, practical considerations that will apply concerning:

- ✓ how to exercise the right to reject
- ✓ whether C has a duty to return the goods
- ✓ T's duty to provide a refund
- ✓ whether C can reject some but not all of the goods

Table C3: Summary of when there may be a right to reject goods

Rejection type	When available	Comments
Short term right to reject (STRR) Rights 1 – 6	Goods were not of SQ, FFPPMK, as described, or in conformity with a sample, model or the main characteristics information DigC content in goods was not of SQ, FFPPMK or as described	Usually a 30 day period (less if perishable) Full refund C has the BOP
Final right to reject (FRR) Rights 1 – 7	Goods were not of SQ, FFPPMK, as described, or in conformity with a sample, model or the main characteristics information DigC in goods was not of SQ, FFPPMK or as described Goods were not correctly installed	2 nd tier remedy Full refund for 6 months (except motor vehicles) Then partial deduction for use not 2 nd hand value Reverse BOP for 6 months
Right to reject (RR) - Right 9	The goods were not T's to supply	Full refund C has the BOP
For breach of delivery requirements	T has failed to deliver the goods or has not met an essential delivery time or an appropriate, specified delivery period	Full refund Refuse delivery
Common law repudiation Express terms	The goods did not match up to a major express term in the contract	Full refund Subject to affirmation C has the BOP
Wrong quantity deliveries	Either more, or less, goods than C ordered, were delivered by T	Reject/keep what delivered If too many, 3 rd option to keep what was ordered and reject the excess Kept goods to be paid for at the agreed price
Instalments deliveries Rights 1 – 6, 9	C has agreed to delivery by instalments but one or more of them is defective	STRR (rights 1 – 6), RR (right 9) Whole contract or relevant instalment depending on terms & circumstances

C1.5.1 How to exercise a right to reject [s20(5) & (6)]

C needs to say or do something that clearly indicates to T that they are treating the contract as at an end and rejecting the goods. It does not matter how C does this, providing their intention is clear. Keeping copies of letters, emails etc. and or making notes of who said what to who and when, are likely to help C if there is a dispute later.

C1.5.2 C's responsibilities [s20(7) & (8) CRA]

C must make goods available for T to collect and should not continue to use goods they are rejecting them. If C was supplied with the goods at T's premises and they return them at their own expense (not CL repudiation) T does not have to bear the cost of this. But this does not prevent C from pursuing a damages claim against T, where for example, returning them incurs quite substantial costs. However, in other circumstances, T must bear the costs of them being returned, even if the duty to carry out the physical return is placed on C by the contract. So an online T may include a term that places the responsibility of actually returning faulty or mis-described goods on C but must bear the costs of C doing so, e.g. by refunding C with the postage costs or supplying a pre-paid returns label.

C1.5.2.1 Rejecting only some of the goods [s21 CRA]

If C was supplied with a number of goods, they have the following options, if some are faulty and some are not, providing the goods do not form a commercial unit. C can:

- reject all the faulty ones and keep all those that are not faulty
- reject or keep any number of the faulty ones and keep all those that are not faulty
- reject all the goods, regardless of whether they are faulty or not

If goods form a commercial unit then C cannot benefit from this partial rejection option. A commercial unit is where goods are sold together and splitting them up would materially reduce their value or character, e.g. C could not reject just one shoe from a pair where only one of the shoes was faulty.

C never has the option to keep only some of the non-faulty goods. They must either all be rejected with the faulty ones, or all retained.

C1.5.3 Making a refund [s20(15) CRA]

T must make refunds to C without undue delay and in any event within 14 days of agreeing that C is entitled to one. This allows T time to assess the issue and check the validity of C's complaint. In a hire situation the refund would relate to any period of the hire agreement which has not expired. If there is a HP or CS agreement, then the refund would relate to the instalments that C had already paid.

If C paid money then T must provide the refund using the same method of payment, unless C agrees otherwise. T cannot charge any fees for refunds issued in connection with breaches of contract.

The 14 day period does not apply to delivery failures so T must simply refund C without undue delay [s28(9) CRA]. Since the 14 day period is a statutory requirement, it will also not apply to the CL right to repudiate for breach of a major express term.

C1.6 Restricting liability [s31 CRA]

T cannot, when supplying goods to C, exclude or restrict liability to C with regard to C's rights relating to any of the 10 listed in the remedies table and those relating to delivery times and risk.

This includes clauses which try to do any of the following and they would be ineffective if they:

- exclude or restrict any of these rights or remedies available for breach of them
- make such rights or remedies subject to onerous conditions
- allow T to put someone at a disadvantage while seeking a remedy
- exclude or restrict any evidential or procedural rules

Excluding or restricting liability includes:

- preventing an obligation from arising
- preventing a duty from arising
- limiting the extent of any obligation
- limiting the extent of duty

A written agreement to submit differences to arbitration does not amount to an exclusion or restriction on liability, although such a term would be subject to the fairness test (section C6).

Summary

- **Consumers have rights under the CRA in relation to goods supplied via various types of transaction**, including: sales, conditional sales, hire, hire-purchase and other contracts where goods are transferred; **goods are defined as any tangible moveable item** and specifically include water, gas and electricity when they are available for supply in a limited volume or set quantity.
- The **core rights** that Cs have, by way of terms implied into their contracts, are that the goods should be of SQ, FFPMK, as described and in compliance with any sample or model seen or examined.
- Goods, including second-hand ones, will be of **SQ if they meet the standard that a reasonable person would expect**, bearing in mind the price, if relevant, any description and any other relevant circumstances, including any public statements made about them, unless one of the three exceptions applies; relevant items from the **quality checklist** should also be taken into account when considering whether an item was of SQ at the time of supply.
- The **supplier may be able to successfully argue that there is no term about SQ** in a particular contract if a fault was specifically drawn to C's attention beforehand or an examination was carried out, which ought to have revealed the fault.
- For the IT concerning **FFPMK** to apply, there must have been some reliance by C on the T's judgment and it must have been reasonable to rely on this, although the purpose could be implicit from the nature of the goods and does not necessarily need to be expressed.
- There can be a **sale by description** even if C can see the goods and make their own selections and this IT includes compliance with the main characteristics information, required by the CCRs.
- If C sees or examines a **sample** of the goods before agreeing to acquire them, then the goods should match the sample, in terms of quality and description, unless any differences were brought to

their attention beforehand; the goods should also be free from defects, apart from those that a reasonable examination of the sample would have revealed; a sample is a small but representative part of the whole goods that will be supplied to C.

- If C sees or examines a **model** of the goods before agreeing to acquire them, then the goods should match the model, in terms of quality and description, unless any differences were brought to their attention beforehand; a model will usually be an example of a whole item, displayed for marketing or demonstration purposes.
- Where C buys goods and there is also a service and or some digital content involved, this is called a **mixed contract** and there are **two additional rights** that could apply: firstly, where goods include DigC, such content must be of SQ, FFPPMK and as described, with description including the “main characteristics”, “functionality” and “compatibility” information required under the CCRs; secondly, if installation of the goods is part of C’s contract, then the goods should be installed correctly, either by T or someone under T’s responsibility.
- **Rights that C acquires under the contract, alongside the core ones**, are that: goods should comply with other PCI required by the CCRs as these will be terms in the contract, unless agreed otherwise before the contract is made and that T should have the right to supply the goods to C, either by way of physical possession (hire agreements) or legal ownership (other contracts) as required by the contract, including freedom from charges or encumbrances that might interfere with C’s quiet enjoyment of the goods.
- Where motor vehicles are the subject of an HP/CS agreement and they are supplied to someone when there is an amount outstanding on such an agreement, it is possible that the goods have acquired a good title by virtue of **s27 of the Hire Purchase Act 1964**, which allows the first private purchaser to gain a good title if the vehicle was bought in good faith and with no knowledge of the outstanding finance.
- There are **various remedies available in the CRA if there is a breach of contract**, however, which one applies depends to some extent on which right has been breached; as an alternative, other remedies from outside the CRA may also be available and **generally speaking, the BOP is on C**, who must show that the problem was present at the time of delivery before seeking a remedy.
- For a breach relating to the **core rights, C has 30 days** (less if perishable goods) to exercise the **STRR for a full refund**, however, if a repair or a replacement is agreed, then the 30 day period is put on hold until this is completed (waiting period) and an extra 7 days is added on if there is less than this remaining.
- As an alternative to the STRR, or after 30 days, **C can ask for a stage one remedy of one free repair or replacement**, depending on which is possible, proportionate and can be provided within a reasonable time and without causing C significant inconvenience; if after C’s one repair/replacement the problem re-occurs or a new problem reveals itself, then C can move to the stage 2 remedies, bearing in mind the same factors as above.
- The **stage 2 remedies** involve C either keeping the goods, but at a **reduced price**, or exercising the **FRR for a full refund** (except cars) for the first 6 months, or a reduced refund after 6 months or if the goods are a motor vehicle; any FRR refund should only be made to reflect any use by C; a reverse BOP applies for 6 months so if C is able to prove a fault, as opposed to wear and tear, misuse or accidental damage, then for the first six months it is presumed to have been present at the time of supply.
- For **non-core rights, different remedies apply**: so if goods do not comply with the PCI details required under the CCRs, C can recover the costs incurred as a result of such a breach, up to the price paid; if T is in breach of the right to supply provision, C can reject the goods for a full refund and this is not restricted to the 30 day time limit or subject to the diminishing amount rule.

- If C is seeking repair or replacement, the court can make an order for specific performance of either and if C is seeking repair, replacement, reduction or a FRR, **the court can order whichever they think is the most appropriate** from these; the court can impose any of the following when making an order: terms, conditions, damages or payment of the price, as it thinks just in the circumstances.
- Where goods are to be dispatched, **T and C can agree any delivery time, however, in the absence of agreement, it should be without undue delay and within 30 days** of the contract being made; if timing is important, it may be possible to treat it as an essential contract term, allowing C to end the contract if it is not met; other non-compliances with a delivery time would allow C to specify a further time, which if not met, would also permit ending the contract.
- **T bears the risk in relation to the goods until they are delivered to C** so if they are lost or damaged in transit, it will be T's responsibility to provide a remedy, such as a replacement or a refund; however, if C arranged their own courier, using an option not offered by T, then C will bear the responsibility but may have a claim against the courier in relation to poor service if they experience such.
- To exercise any of the various rights to reject, **C needs to do or say something that clearly indicates that they are treating the contract as ended** and have rejected the goods; then C must usually return goods at their own expense if they collected them from T's premises and should generally be refunded within 14 days.
- If C was **supplied with a number of goods, some of which are faulty, providing the goods do not form a commercial unit, C has several options**, C can: reject all the faulty ones and keep all those that are not faulty; reject or keep any number of the faulty ones and keep all those that are not faulty, or reject all the goods, regardless of whether they are faulty or not; C never has the option to keep only some of the non-faulty goods, so they must either all be rejected with the faulty ones, or all retained.
- If T delivers the **wrong quantity of goods to C, the options available are to either reject or keep what was delivered, or if too many were delivered there is a 3rd option** of keeping what was ordered and rejecting the excess; any retained goods should be paid for at the agreed contract rate price.
- **C is not bound to accept deliveries of goods by instalments unless this was agreed beforehand**, but if the goods in any agreed instalment are defective, then depending on the terms of the contract and the circumstances, C may be able to exercise the STRR for the whole contract goods, reject the whole contract goods and or claim damages; if C fails to take delivery of an instalment, or refuses to do so, then T, depending on the terms of the contract and the circumstances, may be able to end the whole contract or claim damages, if the breach is a severable obligation.
- **Other remedies**, outside those provided for in the CRA **may be available depending on various factors**, including the nature of the contract and or the breach itself (section C4).
- **T cannot**, when supplying goods to C, **exclude or restrict liability to C with regards to any of C's rights**, including those relating to delivery times and risk, which includes limiting the extent of a duty or obligation as well as preventing it arising in the first place, and also extends to remedies and evidential and procedural rules, as well as rights, by putting someone at a disadvantage while seeking a remedy or imposing onerous conditions; a written agreement to submit differences to arbitration does not amount to an exclusion or restriction on liability but is subject to the fairness test.

In Scotland, consideration is not a requirement to form a contract, but if C does not provide something in return for the goods, the provisions in the CRA will not apply

An order for specific implement can be sought in Scotland, as the equivalent of one for specific performance

C2 Services

C2.1 Contracts for services

When Ts perform or supply a service for a C, the law states that the service must meet certain quality standards and marketing claims, achieved by the use of implied terms (ITs) in the contract. Most of these can be found in the CRA, namely those relating to quality, time and cost, although some, concerned with the provision of information, are contained in the CCRs. If the standards are not met by T then C may have the right to a remedy. It will be for C to prove that the service does not meet the requirements, i.e. C has the BOP and the standard will be on a balance of probabilities.

There is no specific definition of what amounts to a service, however, the CRA does exclude contracts of employment or apprenticeship [s48 CRA].

If a T is supplying something intangible to a C and it is not digital content, then it is likely to be a service. Where T is selling a skill or expertise, this is likely to be a service too. Examples of services include: hairdressing, plumbing, car servicing, repairing goods, decorating, building work, writing wills, providing courier services and supplying extended warranties.

Even if T is based outside the UK, if the services are being marketed in the UK then the Act will apply (unit B). The Act can also apply to services being supplied by a government department or a local authority, if there is a contract for that service between the organisation and C, e.g. a funeral.

The CRA does not apply in Scotland to a gratuitous service contract, i.e. where it is supplied for free [s48(3) CRA]

C2.2 Rights in service contracts

The CRA provides C with 4 rights when they contract with a T to supply a service by treating the contract as if it includes terms that, in certain circumstances, T must perform the service:

- ✓ using reasonable care and skill
- ✓ in accordance with information provided
- ✓ for a reasonable price
- ✓ within a reasonable period of time

C2.2.1 Use of reasonable care and skill [s49 CRA]

Every contract to supply C with a service is treated as including a term that T will perform the service using reasonable care and skill (RCS). The standard required will be that expected from a reasonably competent person working in that particular art or professional capacity, sometimes referred to as the Bolam test (*Bolam v Friern Hospital Management Committee*, *McIntyre v Callacher*). It may be appropriate to consider industry standards for some service providers, e.g. in a code of practice. If T holds himself or herself out as having a higher than expected level of expertise, then C will be entitled to that greater degree of skill and care, especially if C has paid more for it.

The use of RCS is concerned with how T performs the service rather than its end result. C may not be happy with the end result but if T has done everything that could be reasonably expected then it is unlikely that there will have been a breach of the RCS provision. What has gone wrong may be outside T's control.

On the other hand, the end result may be what C was expecting, but there could still have been some carelessness or lack of thoroughness on T's part, e.g. cement splashes on C's house windows when T was building C's garage.

Determining what level of care and skill is appropriate for a particular service may be difficult and may require the assessment of an agreed, independent third party.

C2.2.1.1 Mixed contracts [s1(4) CRA]

There is likely to be some overlap between the obligation to provide a service using RCS and that to install goods correctly. Installing goods is also a service and so if the contract provides for this and it is not carried out correctly, C may be able to choose which of the rights has been breached. The remedies differ slightly for the two breaches so C may be in a position to follow whichever is the most appropriate for their circumstances.

C2.2.2 Performance in accordance with information provided [s50 CRA]

There is a requirement to provide C with information about various details concerning T and certain aspects of the contract, as contained in the CCRs (Section 5). Once supplied, such information becomes part of the contract and any changes would need the express agreement of C.

T may also choose to give C other information, either verbally or in writing, about his or her business and the service being provided and if C relies on this information when making the contract or making any decision under it, then C may have a remedy if the service does not live up to that information.

C cannot, however, choose to ignore any qualification made by T at the time or any later proper withdrawal of information which C agreed to. T cannot escape liability by blaming other staff members.

C2.2.3 Supply at a reasonable price [s51 CRA]

If T and C have agreed the price, or method of calculation, to be paid for the service, then that is what will prevail. However, if there is no agreement on price then T can only charge a reasonable price. If T has not provided C with information about the price then this will be a breach of the CCRs, unless the contract falls within one of the exemptions, e.g. an off-premises contract for £42 or less, such as window cleaning. However, this will not generally enable C to avoid paying for the service at all (section C5).

What is a reasonable price is a question of fact and may depend on the particular industry and the circumstances surrounding the contract, e.g. geographical region, time of day and nature of the service (*Robert Allan and Partners v McKinstry*).

If Cs are unsure or confused as to what the actual price was, advisers should signpost as per the Quick Reference Tool for Financial Capability.

C2.2.4 Supply within a reasonable time [s52 CRA]

If T and C have agreed the timescale for the supply of the service, then that is what will prevail. However, if there is no agreement on time then T must supply the service within a reasonable time. Information about the time for performing a service should be provided in accordance with the CCRs and so if T has failed to supply this detail there may be a breach of these provisions, unless the contract is exempt from such a requirement. What is a reasonable time is a question of fact and may depend on the particular industry and

the circumstances surrounding the contract, e.g. geographical region and nature of the service (*Charnock v Liverpool Corporation, Davidson v Guardian Royal Exchange*).

C2.3 Statutory remedies when services don't comply

There are various remedies available for C depending on which right has been breached by T and also the nature of the service. Whatever remedy C chooses or is appropriate in the circumstances, C will have the BOP, which they must discharge on a balance of probabilities. Non-statutory remedies are discussed in section 4.

Table C4: Summary of consumer rights and remedies for services

If C's rights are breached, C may have the remedies ticked available to them, i.e. if, when supplied, services have not been performed.....	Repeat performance	Reduction in price	Other remedies	Whether liability can be limited (subject to fairness)
1. Using reasonable care and skill	✓	✓	✓	Not excludable Can be restricted to not less than the contract price, unless it results in death or personal injury
2. For a reasonable price			✓	Can be excluded or restricted
3. Within a reasonable time		✓	✓	Can be excluded or restricted
4. In line with information provided about the SERVICE	✓	✓	✓	Not excludable Can be restricted to not less than the contract price
5. In line with information provided about the TRADER		✓	✓	Not excludable Can be restricted to not less than the contract price

C2.3.1 Repeat performance [s55 CRA]

This remedy is available for breaches of two of the terms in the CRA, where the service has been supplied:

- without the RCS required, or
- not in accordance with information provided about it

C can require T to put the service right, unless this is impossible, by bringing it up to the level required for compliance and this should be done:

- ✓ free of charge
- ✓ within a reasonable time (considering the nature and purpose of the service)

- ✓ without causing significant inconvenience (considering the nature and purpose of the service)

Whether this requires T to do all the work again, or just some of it, will depend on the extent of the breach in each case. There is no statutory limit to the number of repeat performances of a service like there is for the repair or replacement of goods, although it is possible that more than one repair may amount to significant inconvenience for C.

C2.3.2 Price reduction [s56 CRA]

A price reduction is available as a second stage remedy in certain circumstances, when T has not used RCS or not provided the service in accordance with information supplied about it.

Following such a breach, a price reduction could be requested by C if a repeat performance is any of the following:

- impossible
- taking an unreasonable amount of time
- causing a significant inconvenience

A price reduction is also available as the only statutory remedy for a breach of other rights in the Act, i.e. where performance has not been carried out:

- within a reasonable time, or
- in accordance with information supplied about T

C can ask for some money back, if payment has already been made, or for the bill to be reduced, if not and the reduction should be for an appropriate amount, which could in some circumstances be a full refund. It will normally be the difference between the value of what C paid and what T supplied, although, this may be difficult to relate to some breaches, e.g. where T has not complied with information they supplied about themselves.

Refunds should be made without undue delay, within 14 days and using the same means of payment as that employed by C, unless C expressly agrees otherwise. No fees can be charged for paying a refund.

C2.3.3 Restricting liability [s57 CRA]

T cannot exclude liability to C with regard to a lack of RCS or in relation to information supplied to C about either the service itself or T. However, T can restrict or limit such liability, subject to the test of fairness (section 4) but not to the extent that T would be paying out less than the contract price.

The Act makes no mention of restricting liability in terms of the time for performance so any contract term that does so will be subject to the fairness test. Excluding or restricting liability has the same meaning as it does for goods.

C2.3.4 Mixed contracts [s1(4) CRA]

If goods are not fitted properly this could amount to a breach of either the requirement to:

- provide a service using RCS, or
- install goods correctly

C may be in a position to choose which provisions would afford the most appropriate remedy for their situation, bearing in mind the differences between how they work and the relevant restrictions on liability. Table C5 outlines the possible remedies.

Table C5: Remedies for mixed contracts (supply of goods and installation)

Potential Issue	Manufacturing defect in the goods	Goods not fitted properly	Fitter caused damage to other property of C's whilst doing the work
Potential breach	Goods may not be of SQ (s9)	Goods possibly not installed correctly (s15)	Fitter may not have used RCS (s49)
Initial statutory rejection	STRR 30 days (+ up to 7 WP days if agree to a repair or replacement) Full refund C has BOP (not the most practical remedy if already installed when discovered)	Not available	Not available
1 st stage remedy	1 repair or replacement (depending on which is possible, proportionate and can be done in a reasonable time without causing significant inconvenience) BOP reversed - 6 months	1 repair or replacement (depending on which is possible, proportionate and can be done in a reasonable time without causing significant inconvenience) BOP reversed - 6 months	Repeat performance (unless impossible, and should be done within a reasonable time and without causing significant inconvenience) BOP on C
2 nd stage remedy	Reduction or FRR (if further problems after 1 repair or replacement; or impossible or disproportionate to do either; or not provided within a reasonable time; or caused significant inconvenience) Full refund for 6 months After 6 months partial refund possible to reflect use If C keeps goods an appropriate reduction can be made	Reduction or FRR (if further problems after 1 repair or replacement; or impossible or disproportionate to do either; or not provided within a reasonable time; or caused significant inconvenience) Full refund for 6 months After 6 months partial refund possible to reflect use If C keeps goods an appropriate reduction can be made	Price reduction (if impossible to repeat performance; or not provided within a reasonable time; or caused significant inconvenience) An appropriate reduction should be made
Liability	Statutory remedies cannot be excluded or restricted	Statutory remedies cannot be excluded or restricted	Statutory remedies cannot be excluded but can be restricted to not less than the contract price
CL remedies (in addition or as an alternative) See section C4	Damages if arise directly and naturally from the breach and mitigated Repudiation if contract not affirmed and breach of express, major term (not very likely or practical)	Damages if arise directly and naturally from the breach and mitigated Repudiation if contract not affirmed and breach major (not very practical)	Damages if arise directly and naturally from the breach and mitigated Repudiation if contract not affirmed and breach major (not very likely or practical)

Alternative remedies	The goods may be covered by a statutory consumer guarantee (s30)	The installation may be covered by an express guarantee	T may have provided a specific guarantee for his/her services
See section C4	C may have a house insurance policy that covers such issues (not very likely)	C may have a house insurance policy that covers such issues (not very likely)	C may have a house insurance policy that covers such issues (probably subject to an excess)

C2.3.5 Powers of the court [s58 CRA]

If a C is seeking a repeat performance of a service, the court can make an order for specific performance of this (specific implement in Scotland). If C is seeking repeat performance or a price reduction, the court can order whichever they think is appropriate.

The court can also impose any terms, conditions, damages or requirement for the payment of the price when making an order, as it thinks just in the circumstances.

Summary

- When T supplies a service to C, the CRA provides C with certain rights, in the form of **ITs** in the contract, namely that the service should be carried out **using RCS**, for a **reasonable price** (unless fixed by the contract), within a **reasonable time** (unless fixed by the contract) and in **accordance with information provided** about both the T and the service itself.
- The **standard required for RCS**, will be that expected from a **reasonably competent person working in that particular art or professional capacity**, sometimes referred to as the Bolam test and this is concerned with how T performs the service rather than its end result; if T holds himself or herself out as having a higher than expected level of expertise, then C will be entitled to that greater degree of skill and care, especially if C has paid more for it.
- The requirement to provide the service in **accordance with information supplied** about both it and the T, **applies to that information required by the CCRs and also any other information that T has chosen to provide**, if C relies on this information when making the contract or making any decision under it; C cannot, however, choose to ignore any qualification made by T at the time or any later proper withdrawal of information which C agreed to. T cannot escape liability by blaming other staff members.
- If T and C have agreed the price, or method of calculation, then that will apply but, **in the absence of agreement, T can only charge a reasonable price**, which is a question of fact and may depend on the industry and circumstances surrounding the contract; if T has not supplied information about the price, this will be a CCR breach (unless exempt, e.g. an off-premises contract for £42 or less, such as window cleaning); however, this will not generally allow C to avoid paying at all.
- If T and C have agreed the timescale for the supply of the service, then that is what will prevail; however, **if there is no agreement, T must supply the service within a reasonable time**, again a question of fact and subject to industry and geographical variation; information about the time for performing a service should be provided in accordance with the CCRs and so if T has failed to supply this detail there may be a breach of these provisions, unless the contract is exempt from such a requirement.
- There are **various remedies available for C depending on which right has been breached** by T and also the nature of the service; whatever remedy C chooses or is appropriate in the

circumstances, C will have the BOP, which they must discharge on a balance of probabilities; non-statutory remedies may also be available.

- As a first stage remedy, **C can ask T to repeat their performance**, to the extent necessary to put the matter right, if the service has been supplied, either without the required RCS, or not in accordance with information provided about it.
- **A price reduction is available as a second stage remedy for such breaches, if a repeat performance is impossible, taking an unreasonable amount of time or causing a significant inconvenience for C**; it is also the only statutory remedy for a breach of other rights in the CRA, i.e. where performance has not been carried out within a reasonable time, or in accordance with information supplied about T.
- **A reduction should be for an appropriate amount**, which could in some circumstances be a full refund and will normally be the difference between the value of what C paid and what T supplied, although, this may be difficult to relate to some breaches, e.g. where T has not complied with information they supplied about themselves.
- **Refunds should be made without undue delay, within 14 days** and using the same means of payment as that employed by C, unless C expressly agrees otherwise and no fees can be charged for paying a refund.
- **T cannot exclude liability to C with regard to a lack of RCS or in relation to information supplied** to C about either the service itself or T; however, **T can restrict or limit such liability, subject to fairness** test but not to the extent that T would be paying out less than the contract price.
- If C is seeking a repeat performance of a service, the court can make an order for specific performance of this and the **court can order whichever they think is appropriate** between repeat performance or a price reduction; the court can impose any terms, conditions, damages or requirement for the payment of the price when making an order, as it thinks just in the circumstances.
- **If goods are not fitted properly this could amount to a breach of either the requirement to provide a service using RCS, or to install goods correctly** and C may be in a position to choose which provisions would afford the most appropriate remedy for their situation, bearing in mind the differences between how they work and the relevant restrictions on liability.

The CRA does not apply in Scotland to a gratuitous service contract, i.e. where it is supplied for free [s48(3) CRA]

An order for specific implement can be sought in Scotland, as the equivalent of one for specific performance

C3 Digital content

C3.1 Contracts for digital content [s33 CRA]

Digital content (DigC) is data produced and supplied in a digital form [s2(9) CRA] and so it includes: software, music, computer games, electronic books, ringtones and apps, whether streamed or downloaded onto a variety of electronic devices, such as: laptops, tablets, notebooks and mobile phones. It would also cover the result of bespoke DigC, e.g. a website design service.

If T is simply supplying the means for C to access the DigC, such as an Internet Service Provider (ISP) or a Mobile Network Operator (MNO), T would be providing a service not the DigC.

Cloud computing, which relies on sharing computing resources rather than using local servers, may result in C being supplied with DigC and or services, depending on what it is used for:

- if C pays to access software on the cloud, some DigC is likely to be supplied to their device and the rights associated with DigC will apply
- if C simply buys access to remote storage for their own DigC, this will be a contract for a service

The DigC is supplied to C when it reaches C's device or an independent ISP or MNO, with whom C has a contract to deliver it to their device, whichever happens first. This applies to each item of DigC if more than one is supplied under a contract, e.g. by subscription. If T uses a separate processing facility to give C access to their DigC, it must be available for this purpose for a reasonable time or whatever period is specified in the contract [s39 CRA].

Where DigC is contained in a tangible product, e.g. on a CD or DVD, then these will be classed as goods and the rights and remedies applicable to goods will apply, which requires the actual DigC on the goods to be of SQ, FFPPMK and as described, which includes in conformity with information about its main characteristics, functionality and compatibility.

The rights and remedies apply to DigC that is streamed or downloaded and has been:

- paid for with money
- associated with something that has been paid for, e.g. free software with a paid-for magazine, and which is not generally available to C for free
- paid for with a facility, such as tokens, virtual currency or a gift voucher, if these were originally paid for with money, e.g. a weapon in a computer game, purchased with magic stones that were bought with money

As a general rule, if T markets their digital content to UK Cs, then the DigC rights apply (unit B).

C3.2 Rights in contracts for digital content

When consumers are supplied with DigC by Ts, the law states that the DigC must meet certain standards, which are very similar to some of those required for goods. This is achieved by saying that certain terms are presumed to be in that contract. Most of these can be found in the CRA, namely those relating to description and quality, although some, concerned with the provision of information, are contained in the CCRs. If the standards are not met by T then C may have the right to a remedy. Generally, speaking it will be for C to prove that the DigC does not meet the requirements, i.e. C has the BOP and the standard will be on a balance of probabilities.

If C's contract with T allows the right to modify DigC, once supplied, such a term will be subject to the fairness test (section C6). Any modified DigC should still comply with the rights explained below, however, if

C claims that modified DigC is not of SQ, FFP or as described, this will be taken to have arisen at the time of first supply, not at the time of modification.

C3.2.1 Satisfactory quality [s34 CRA]

DigC sold to C by T should be of SQ. This is a very similar requirement to that for goods, with an expectation of quality based on that of the reasonable person, bearing in mind any description, the price (if relevant) and all other relevant circumstances, which includes public statements about its characteristics. The state and condition of the DigC will also be an appropriate consideration, as may some of the aspects of quality listed, which are similar to those for goods, namely:

- ✓ fitness for all the purposes for which the DigC is generally used
- ✓ whether it is free from minor defects as well as major ones
- ✓ whether the DigC is safe
- ✓ how long the DigC lasts in a satisfactory state, i.e. durability or lifespan

This is not an exhaustive list and any factor that has a bearing on the issue of quality can be taken into account. A reasonable person's expectation of quality is likely to vary according to the nature of the DigC, e.g. a simple music file should probably be free from minor defects, however, it may be more common to experience some glitches in a complex piece of software or bugs in a computer game on first release.

C3.2.1.1 Situations when SQ is not applicable [s34(4) CRA]

There are three situations when it may be appropriate for T to argue that there is no term in the particular contract requiring the DigC to be of SQ:

- ✓ when T has specifically drawn C's attention to the fault before the contract is made
- ✓ when C chooses to inspect the DigC before agreeing to buy it, but misses the defect, which the inspection ought to have revealed
- ✓ if the supply follows a trial version and the issue should have been apparent from a reasonable examination of the trial version.

C3.2.2 Fitness for a particular purpose made known [s35 CRA]

If C specifies a particular purpose for the DigC, whether expressly or by implication, then it should be fit for that purpose, e.g. a downloadable game suitable for a certain age group. This will not apply if C does not rely on T's skill or judgment or it is unreasonable for C to do so. This also applies if T acts as a credit broker with the DigC being sold to a finance company and then sold by the FC to C.

C3.2.3 Supply by description [s36 CRA]

If T gives any description of the DigC then the DigC supplied should match the description(s) given. This is likely to be a very important right with regards to DigC as a trial may not be available and C will only have a description to basis a purchase on. This does not prevent T supplying DigC that goes beyond the description, a factor which is likely to be particularly relevant when considering the supply of updates and enhancing features. Even if C has examined a trial version, T needs to ensure that any DigC supplied matches both the trial version and also any description used.

C3.2.4 Conformity with a “main characteristic”, “functionality” and “compatibility” descriptions [s36(3) CRA]

The CCRs require T to provide information to C about the “main characteristics”, “functionality” and “compatibility” of the DigC before a contract is made, as part of the PCI, and the CRA states that these pieces of information are then treated as terms of the contract. The express agreement of T and C is necessary to change any of this information before the contract is made. DigC supplied should match any such descriptions.

“Functionality” may include information about applicable technical protection measures and also details of the the language, duration, file type, access, updates, tracking, internet connection, geographical restrictions and any additional purchase required for the DigC to work properly.

“Compatibility” refers to any potential issues regarding whether the DigC will operate effectively using particular hardware or software that T can reasonably be expected to be aware of.

C3.2.5 Conformity with other PCI detail [s37 CRA]

The CCRs require T to provide other PCI to C about various aspects of the transaction, e.g. price, period of supply and trader details, before a contract is made and the CRA states that all of these pieces of information are also then treated as terms of the contract. The express agreement of T and C is necessary to change any of this information before the contract is made.

C3.2.6 Right to supply [s41 CRA]

T must have the right to supply the DigC to C when it is to be supplied. Contracts are treated as if there is a term to this effect and T may be in breach if, for example, T has no intellectual property rights to the material and is acting contrary to laws covering copyright.

C3.2.7 Damage to other DigC or devices [s46 CRA]

If C can show that any DigC supplied, damages a device of C’s or other DigC, then a remedy may be available. This applies whether the DigC has been paid for by any of the means listed or whether it was provided free of charge [s33(8) CRA]; however, the supply of the DigC must still be under a contract. The damage to C’s device or other DigC must be of a kind that would not have occurred if T had used reasonable care and skill (RCS). If free updates are to be provided by the manufacturer of C’s device, it may be that the contract between the supplier of the device and C, provides for this, so if C can show that such DigC has caused damage to the device and T lacked RCS, C may have a claim.

The standard of care required would be that required by the standards of the profession. So T would be expected to do what other Ts do but there would not be an expectation that every single configuration on a C’s device would be checked before providing DigC.

C3.3 Remedies when digital content doesn’t comply [s42 CRA]

If any of C’s rights are breached, then C may be able to seek a remedy from their trade supplier (T). There are various remedies available in the CRA but which apply depends to some extent on which right has been breached. As an alternative, other remedies from outside the CRA may also be available. Generally, the BOP is on C, who must show that the problem was present at the time of supply before seeking a remedy. A summary of the remedies available appears in table C6 followed by an explanation of how the remedies work, which is basically in a similar way to those for goods, however:

- there is only one option for stage 2 following repair or replacement
- there is no alternative STRR
- there is no consideration of what is disproportionate for T when for moving from stage 1 to 2, only when choosing which of repair or replacement are appropriate

Table C6: Summary of consumer rights and remedies for digital content

If C's rights are breached, C may have the remedies ticked available to them, i.e. if, when supplied, DigC.....	1 st tier Repair or replace	2 nd tier Reduction	Recover costs incurred	Refund	Repair damage or compensate	Other remedies
1. Was not of SQ	✓	✓				✓
2. Was not FFPPMK	✓	✓				✓
3. Was not as described	✓	✓				✓
4. Did not conform with PCI in the CCRs concerning main characteristics, functionality or compatibility	✓	✓				✓
5. Did not conform with other PCI in the CCRs			✓			✓
6. Was not the supplier's to supply				✓		✓
7. Caused damage to C's device or other digital content *					✓	

* this is the only right, relating to DigC, for which liability can be restricted or limited (subject to fairness)

C3.3.1 First tier remedies - Repair or replacement [s43 CRA]

These practical remedies are available to C if any of the first 4 rights in table C6 have been breached. C's right is to have the DigC repaired or replaced:

- ✓ free of charge
- ✓ within a reasonable time (considering the nature and purpose of the DigC)
- ✓ without causing significant inconvenience (considering the nature and purpose of the DigC)

However, once C has agreed to one of these options, they must allow T a reasonable period of time to achieve the one chosen before deciding they would prefer the other option, unless this would cause C significant inconvenience. This will be a question of fact in each case.

C may choose whether they would prefer a repair or a replacement, however, they cannot insist on their choice if T finds it impossible or disproportionate to comply. One may be disproportionate to the other if it would impose costs on T that would be unreasonable in comparison with the other remedy, bearing in mind:

- the value of the DigC
- the significance of the lack of conformity
- whether C would suffer significant inconvenience if the other remedy was provided

If both remedies are possible, it is a question of balancing how long they would take and how much inconvenience each would cause against how much it would cost T to provide them, bearing in mind C's preference. The reverse BOP applies for the first 6 months following supply.

C3.3.2 Second tier remedy – Reduction in price [s44 CRA]

This 2nd tier remedy of a price reduction, is available to C if one of the first 4 rights in table C6 have been breached and C is in a position to move on from the 1st tier remedies. This will be because one of the following applies and the repair or replacement option has not resolved the matter:

- ✓ it is impossible for T to repair or replace the DigC
- ✓ T has not provided the repair or replacement within a reasonable time
- ✓ T has caused significant inconvenience to C whilst trying to provide the repair or replacement

The reduction should be of an appropriate amount deducted from the agreed price, which would usually reflect the difference between the value of the DigC when supplied and the value if there had not been a breach. It could be the full amount.

If C experiences a further fault with the DigC they will still be able to seek a suitable remedy in relation to that issue. The reverse BOP applies for the first 6 months following supply.

Refunds should be made without undue delay, within 14 days and using the same means of payment as that employed by C, unless C expressly agrees otherwise. No fees can be charged for paying a refund.

C3.3.3 Recovery of costs incurred [s42(4) CRA]

This is a specific remedy, which is available for breach of the term requiring DigC to conform with the PCI supplied in accordance with the CCRs, other than that describing the main characteristics, functionality and compatibility of the DigC, which are covered by the same remedies as a breach of a supply by description (repair or replace followed by reduction in certain circumstances). C can recover costs incurred as a result of such a breach, up to the price paid.

C3.3.4 Right to a refund [s45 CRA]

If T supplies C with DC where there was no right to supply it, then C can claim a full refund. T cannot make a deduction for use and the 30 day time period, relevant for the STRR for goods, does not apply. However, if the breach affects only some of the DigC supplied then there is no right to a refund in respect of any part of the price that is only attributable to the DigC which is unaffected by the breach.

Refunds should be made without undue delay, within 14 days and using the same means of payment as that employed by C, unless C expressly agrees otherwise. No fees can be charged for paying a refund.

C3.3.5 Remedy for damage to a device or other DigC [s46 CRA]

If damage is caused to either a device or other DigC of C's, then C can request one of the following remedies, if the damage is of a kind that would not have occurred if T had used RCS when supplying the DigC:

- ✓ repair of the damage
- ✓ compensation of an appropriate amount

If the repair option is chosen then T must carry it out:

- ✓ within a reasonable time (bearing in mind the nature of the device or DigC and C's purpose for it)

- ✓ without causing C significant inconvenience (bearing in mind the nature of the device or DigC and C's purpose for it)
- ✓ free of charge

If the compensation option is chosen, payment should be made without undue delay, within 14 days and no fees can be charged for paying it.

These remedies apply even if the DigC supplied was completely free, providing it was nevertheless supplied under a contract and to a device of C's, rather than one belonging to C's employer for example [s33(8) CRA]. The BOP will be on C.

C3.4 Restricting liability [s47 and s62 CRA].

T cannot exclude or restrict liability to C with regard to a breach of C's rights to be supplied with DigC which is of SQ, FFPPMK, as described, in conformity with PCI information required under the CCRs and T's to supply, namely those rights numbered 1 – 6, in table C6.

However, T can restrict or limit liability in relation to right number 7, the provision of remedies when DigC damages a device or other DigC of C's, subject to the test of fairness (section C6). Excluding or restricting liability has the same meaning as for goods, including the reference to submitting differences to arbitration.

C3.5 Powers of the court [s58 CRA]

If a C is seeking a repair or a replacement of DigC, the court can make an order for specific performance of either of these (specific implement in Scotland).

If C is seeking repair, replacement or a price reduction, the court can order whichever they think is appropriate, regardless of which C has requested.

The court can impose any terms, conditions, damages or requirement for the payment of the price when making an order, as it thinks just in the circumstances.

Summary

- **DigC is data produced and supplied in a digital form**, including: software, music, computer games, electronic books, ringtones and apps, whether streamed or downloaded onto a variety of electronic devices, such as: laptops, tablets, notebooks and mobile phones.
- **The DigC is supplied to C when it reaches C's device or an independent ISP or MNO, with whom C has a contract to deliver it to their device, whichever happens first**, and this applies to each item of DigC if more than one is supplied under a contract, e.g. by subscription; if T uses a separate processing facility to give C access to their DigC, it must be available for this purpose for a reasonable time or whatever period is specified in the contract.
- **Where DigC is contained in a tangible product**, e.g. on a CD or DVD, then these will be **classed as goods and the rights and remedies applicable to goods will apply**, requiring the actual DigC on the goods to be of SQ, FFPMK and as described, which includes in conformity with information about its main characteristics, functionality and compatibility.
- The **rights and remedies in the CRA apply to DigC that is streamed or downloaded and has been paid for** with money, associated with something that has been paid for, e.g. free software with a paid-for magazine not generally available to C for free, or paid for with a facility, such as tokens, virtual currency or a gift voucher, if these were originally paid for with money.
- **C's rights** in relation to DigC, are that it should be: of **SQ, FFPMK, as described and in conformity with PCI** detail required by the CCRs; the **supplier should have the right to supply** it and it should **not cause damage to C's devices or other DigC**.
- For a **breach of the three core rights**, relating to SQ, FFPMK and description (including the "main characteristics", "functionality" and "compatibility" information required under the CCRs), the **first stage remedies are for repair or replacement**, followed by a potential **second stage price reduction** if stage one remedies are not viable because they are not possible or T cannot provide them within a reasonable time or has caused C significant inconvenience whilst trying to do so.
- If both repair and replacement are possible, it is a question of balancing how long they would take and how much inconvenience each would cause against how much it would cost T to provide them, bearing in mind C's preference; the **reverse BOP applies for the first 6 months** following supply.
- The **remedies available for other breaches** include: recovery of costs incurred if DigC does not conform with the PCI supplied in accordance with the CCRs, other than that describing the main characteristics, functionality and compatibility of the DigC; a full refund if T did not have the right to supply the DigC and a repair or appropriate compensation if the DigC damages C's device or other Dig C through lack of RCS; in addition, common law and or equitable remedies may be available.
- A remedy of either **compensation or repair, for damage caused to C's device or other DigC applies** even if the DigC supplied was free, providing it was nevertheless provided under a contract, which is likely to cover device contract terms requiring C to allow the manufacturer to download software updates.
- **T can exclude or restrict liability in relation to damage caused by supplying DigC** to C's devices or other DigC, subject to fairness, **but cannot exclude or restrict liability for any of the other rights** C acquires under the CRA in relation to the supply of DigC.
- **The courts** have powers to order the specific performance (**specific implement**) of a repair or replacement but **can also order whichever of the 3 staged remedies it considers to be appropriate**, regardless of what C has requested and can impose any terms, conditions, damages or requirement for payment of the price, as it thinks just in the circumstances.

C4 Alternative remedies

C4.1. Common law remedies [s19(11), s42(7) and s54(7) CRA]

There are remedies available that fall outside the CRA and the Act draws attention to some of these. Some avenues are also open to C that are not mentioned in legislation at all. These may be in addition to, or as an alternative to the statutory ones discussed for breach of the implied terms relating to goods, services and DigC. They are summarised in table xx below, followed by a brief explanation and example of each. C will obviously not be able to claim for the same loss twice.

Table C7: Summary of alternative remedies

	Goods	Services	Digital Content	Examples
Damages	✓	✓	✓	Money to cover the cost of repairs to a faulty car
Ending the contract	✓	✓	✓	Repudiating (rescinding) the contract with a builder part way through due to major lack of reasonable care and skill
Guarantee	✓	✓	✓	The manufacturer of a fridge-freezer may choose to include a free guarantee with the goods offering specific remedies against faults
House insurance	✓	✓	✓	The express terms of a house insurance policy may offer compensation for accidental damage to a TV set

In addition, some of the remedies discussed in unit J may be available to C in limited circumstances.

C4.2 Damages

Damages are a monetary amount, awardable as a common law (CL) remedy for loss which arises directly and naturally from a breach of contract (*Hadley v Baxendale*). This will actually be the main remedy for a breach of C's right to enjoy quiet possession and have goods that are free from charges and encumbrances, but it will also be available as an alternative to the statutory remedies or in addition to them for other breaches of the implied terms or express terms in the contract. In all cases this will be subject to any clause that limits T's liabilities in terms of the amount of damages payable, in so far as the CRA permits this.

As a general rule the aim is to put C in the position they would have been in if the breach had not occurred and will therefore, will often encompass the difference in value between what was supplied and what should have been supplied. A consumer seeking damages will have to prove that their loss was:

- ✓ caused by the breach
- ✓ sufficiently foreseeable
- ✓ mitigated

C4.2.1 Additional remedy

If C has chosen the STRR or the more practical repair or replacement options, this will deal with the problem with the actual goods, however, C may have consequential loss for which they wish to make a claim, e.g. damage to flooring caused by a leak from a new faulty washing machine. A claim for damages could accommodate this, however, there is a legal duty to mitigate such loss.

C4.2.2 Alternative remedy

If C does not wish to reject goods, nor have them repaired or replaced, seeking damages may be an appropriate alternative and again the legal duty to mitigate any loss will apply. Sometimes it may be the most appropriate remedy, e.g. for a lack of RCS where there is nothing to reject, where building work does not meet the precise specification agreed but it is inappropriate to redo the work, or where it is appropriate to compensate C for distress or disappointment (*Ruxley Electronics and Construction Ltd v Forsyth*, *Jarvis v Swan Tours Ltd*, *Diesen v Samson*).

C4.3 Ending a contract

The CL also allows for a contract to be ended in certain circumstances. If there is a major breach of the contract, this may allow C to repudiate it, i.e. end it, providing the contract has not been affirmed. Damages can be claimed in addition to repudiation, subject to them arising directly and naturally from the breach and being mitigated (*Aerial Advertising Co v Batchelors Peas Ltd*).

C4.3.1 Major breach

What amounts to a major breach of contract may not be clear from the outset. If terms cannot be easily assessed as being either a condition, (major term) or a warranty (minor term), then they can be treated as an intermediate term, which means that the effect of the breach will determine whether repudiation is available as a remedy or not. If not, damages will usually be the most appropriate remedy.

C4.3.2 Goods [s19(11)(e) & (12) CRA]

Repudiation of the contract is only available for breach of an express term not one of the implied terms. In addition, the express term allegedly breached, would have to be a major term, e.g. if T writes on the invoice that the car sold is suitable for towing a caravan. This will be subject to whether C has affirmed the contract.

C4.3.3 Services [s54(7) CRA]

Repudiation of a service contract may be possible, e.g. if there is a major breach of the requirement to use RCS, thereby allowing C to end the contract and find another supplier. Practically speaking this is not often likely to be a suitable remedy if the service has been completed. It is also subject to whether C has affirmed the contract or not. It may also be available as a remedy if C made time for the performance of the service into a condition of the contract, which T did not then meet.

C4.3.4 Affirmation

Once C is aware of a breach of contract that would permit repudiation and decides that this is the preferred course of action, then they should do this without delay, otherwise C will be deemed to have affirmed the contract. This is a CL concept, meaning that C has chosen to continue with the contract, knowing of the breach and the right to choose between ending it and carrying on with it. Once a contract has been affirmed, termination for a repudiatory breach will no longer be available as a remedy under the CL, only damages.

Agreeing to a repair and continuing to make payments under a HP or CS agreement, do not necessarily amount to affirmation (*Alpha Chauffeurs Ltd v Citygate Dealership*); continuing to use goods once a fault is known, is likely to be. Doing nothing for too long once the breach is known is also likely to be seen as affirmation of the contract.

C4.4 Practical considerations for pursuing a remedy

Some general considerations apply, regardless of the remedy being sought by C, i.e. statutory or otherwise. C should bear in mind the following points:

- ✓ remedies should be sought against the correct T, usually a supplier
- ✓ a claim for consequential loss may be possible in addition to a main remedy
- ✓ keeping a record of dates and times when T is contacted may be useful
- ✓ retaining copies of letters, emails etc. sent to T is a good idea
- ✓ guarantees, extended warranties and insurance policies are an alternative source of rights, in addition to those in the CRA and the CCRs
- ✓ it may be possible to seek a remedy against a linked creditor in certain circumstances
- ✓ there are time limits if court action is required

C4.4.1 Linked creditors

If C paid using a linked credit agreement or a credit card, there is a choice between pursuing the supplier or the creditor for a breach of contract, if the cash price was over £100 but not more than £30,000 [s75 CCA].

If the cash price was over £30,000 and the credit was in excess of £60,260, it may be possible to make a claim against a linked creditor but not a credit card company [s75A CCA].

These provisions are discussed further in unit F and will apply to any breach of contract, including:

- ✓ breach of an implied term
- ✓ breach of an express term
- ✓ non-delivery or supply

C4.4.2 Time limits

If C is taking T to court to enforce a contractual right then they must commence such action within 6 years of the contract being made [Limitation Act 1980]. This is covered in more detail in unit H.

The usual time limit for commencing court action in Scotland is 5 years and is laid down in the Prescription and Limitation (Scotland) Act 1973. However, this is not a straightforward timescale and can be extended depending on the circumstances of discovery of the problem and acknowledgement of it, but not beyond a “long-stop” prescriptive period of 20 years.

C4.5 Guarantees [s30 CRA]

Traders are under no obligation to offer consumers free guarantees in respect of any product, however, if they choose to do so in respect of goods then there are some basic requirements that must be met, regardless of whether T is the manufacturer or the supplier. If T promises to provide a free repair, replacement or refund or do something else in respect of the goods because they do not meet certain specifications, then T is treated as a guarantor and the promise becomes legally binding and is enforceable as a contract from when the goods are delivered. The guarantee must:

- ✓ be in plain intelligible language
- ✓ set out its contents
- ✓ set out the essential particulars for making a claim
- ✓ state that C has statutory rights and that the guarantee does not affect them
- ✓ be written in English (if the goods are offered within the UK)
- ✓ contain the name and address of the guarantor
- ✓ include the duration and territorial scope
- ✓ be made available to C within a reasonable time, in writing and in an accessible format

There is no specific statutory remedy for C if these requirements are not met and so it is likely that the CL remedy of damages is the most appropriate. The T could also be subject to possible civil enforcement action by TSS if they do not comply with promises made in guarantees.

The above provisions do not apply to guarantees offered by Ts for services or DigC but C may be able argue that guarantee provisions are express terms of the contract if they are being offered by the actual supplier of the service or DigC.

C4.6 Insurance policies

In the absence of any of the statutory remedies or options above being applicable to C's situation, it may be that C's loss or damage is covered by C's house insurance or a specific policy taken out to cover the item in question, e.g. a mobile phone, laptop or holiday (see unit G). Some such policies include provisions to deal with accidental damage. C would need to consider:

- ✓ the express terms of the policy
- ✓ whether any excess is payable
- ✓ the likely effect on any future premiums
- ✓ what any claim might cover
- ✓ any exemptions that might apply
- ✓ any time limits that may be relevant

In addition, Ts sometimes persuade Cs to buy extended warranties for certain products, to cover periods after any free consumer guarantee has expired, e.g. for cars or electrical appliances. These work in a similar way to insurance policies with similar considerations being relevant.

Summary

- There are **remedies available that fall outside the CRA**, with the Act drawing attention to some of these and some avenues may also be open to C that are not mentioned in legislation at all; these may be in addition to, or as an alternative to the statutory ones discussed for breach of the implied terms relating to goods, services and DigC; C will obviously not be able to claim for the same loss twice.
- **Damages** are a **monetary amount**, awardable as a CL remedy **for loss which arises directly and naturally from a breach of contract** and they will be the main remedy for a breach of C's right to enjoy quiet possession and have goods that are free from charges and encumbrances, but will also be available as an alternative to the statutory remedies or in addition to them for other breaches of the implied terms or express terms in the contract.
- In all cases, claiming damages will be subject to any clause that limits T's liabilities in terms of the amount payable, in so far as the CRA permits this and to seek damages, **C will have to prove that their loss was caused by the breach, was sufficiently foreseeable and has been mitigated**.
- As a general rule the **aim is to put C in the position they would have been in if the breach had not occurred** and will therefore, will often encompass the difference in value between what was supplied and what should have been supplied.
- The **CL also allows for a contract to be ended, or repudiated, if there is a major breach** and damages can be claimed in addition if they meet the above criteria; for goods, this is only possible if the breach is of an express term, not an implied one, providing the contract has not been affirmed; for services it is often not a practical remedy.
- Once C is aware of a potential repudiatory breach and decides this is the preferred option, then they should do this without delay, otherwise C will be deemed to have affirmed the contract, which is a common law concept, meaning that C has chosen to continue with the contract, knowing about the breach and the right to choose between ending it and carrying on with it; **once a contract has been affirmed, termination for a repudiatory breach will no longer be available as a remedy under the common law, only damages**.
- **Agreeing to a repair and continuing to make payments under a HP or CS agreement, do not necessarily amount to affirmation**, however, continuing to use goods once a fault is known, is likely to be; doing nothing for too long once the breach is known is also likely to be seen as affirmation.
- **Some general considerations apply, regardless of the remedy being sought by C, i.e. statutory or otherwise**, so C should: pursue the correct T, usually a supplier; claim for consequential loss where appropriate in addition to a main remedy; keep a record of dates and times when T is contacted; retain copies of letters, emails etc. sent to T; only use guarantees, extended warranties and insurance policies as an alternative source of rights; consider seeking a remedy against a linked creditor if the criteria are satisfied and bear in mind the time limits if court action is required.
- **If T offers C a free guarantee, there are some basic requirements that must be met** if T promises to provide a free repair, replacement or refund or do something else in respect of the goods because they do not meet certain specifications, because T is treated as a guarantor and the promise becomes legally binding and is enforceable as a contract from when the goods are delivered; the most likely remedy is damages.
- **A guarantee must: be made available to C within a reasonable time; be in written, English, plain, intelligible language; be in an accessible format and contain certain information**: its contents; the essential particulars for making a claim; that C has statutory rights and the guarantee does not affect them; the name and address of the guarantor; the duration and territorial scope.

- **Insurance policies or extended warranties may also provide a solution for C,** particularly in the absence of statutory remedies or other options, but these may be restrictive in terms of coverage and operation and may require excess payments.

The usual time limit for commencing court action in Scotland is 5 years and is laid down in the Prescription and Limitation (Scotland) Act 1973. However, this is not a straightforward timescale and can be extended depending on the circumstances of discovery of the problem and acknowledgement of it, but not beyond a “long-stop” prescriptive period of 20 years.

Rescission is used in Scotland to represent ending the contract for a major breach under the common law.

C5 Information

C5.1. The right to information

Consumers are entitled to receive pre-contract information (PCI) about the goods, services and DigC they intend to purchase, before they actually buy them, and also about other aspects of the contract they are entering into, e.g. in relation to the supplier, the cost and payment details and certain rights they may have under the contract. These rights are not in the CRA but in the CCRs, however, if T fails to comply, some of the remedies can be found in the CRA, while others are in the Regulations themselves. Exactly what information has to be provided and how, depends on where and how the contract is made and therefore, how it is classified. The categories are:

- off-premises contracts (OffP)
- distance contracts
- on-premises contracts (OnP) (any B2C contract that does not meet the definition of the first two)

The difference between them is explored in more detail in unit D, where there are also full lists of the necessary information and contracts that are exempt from certain requirements under the CCRs. Following the conclusion of the contract, T should also provide C with confirmation of it, in the case of OffP and distance but not OnP contracts.

Other legislation also requires T to provide certain information to C at various stages during a transaction, and these will be highlighted briefly, however, the emphasis here is on that required under the CCRs.

Ts who are part of an alternative dispute resolution scheme (ADR), must also provide information about this to Cs, and state the name and website address of the scheme on their website (if they have one) and in the T&C of sales and service contracts with Cs (unit H).

C5.1.1 Pre-contract information (PCI) [r9(1), r10(1), r13(1)]

The information required is listed in Appendix D2 to unit D, according to contract type and it should be provided in a clear and comprehensible manner. Further requirements about how it has to be supplied depend on contract type and can be seen in table C8.

Table C8: How PCI should be provided

On-premises contracts	Off-premises contracts	Distance contracts
<p>PCI should be given or made available</p> <p>Made available means that C should be reasonably expected to know how to it [r8]</p>	<p>PCI should be given on paper or, if C agrees, on another durable medium</p> <p>The PCI must be legible [r10(2)]</p>	<p>PCI should be given or made available in a way appropriate to the means of distance communication</p> <p>The PCI must be legible if on a durable medium [r13(2)]</p> <p>If time or space are limited some details of the PCI must be provided on that means of distance communication, items 1, 2, 6, 7, 8, 15 and 21 in Appendix B.</p> <p>The remaining items of PCI can be provided in some other appropriate way, for example, text or TV advertising may refer C to T's website</p>

C5.1.1.1 Exemptions

A full list of contracts that do not have to comply with the CCRs, is provided in Appendix D1 in unit D. This includes:

- off-premises contracts for £42 or less
- property sales and construction
- residential letting agreements
- the supply of foodstuffs, beverages or other goods for current household consumption by traders on frequent, regular rounds to C's home or workplace
- single telephone, internet or fax services established by C
- gambling, betting and lottery contracts
- contracts concluded by vending machines or other automated commercial premises
- where goods are sold by way of execution or otherwise under some legal authority
- NHS medicinal products
- passenger transport services (electronic contract provisions apply)
- the use of a public pay phone, where connection is through the operator

Contracts for the following services are also exempt from having to provide PCI under the CCRs but may have to comply with some similar requirements under more specific legislation:

- package holidays
- timeshare contracts
- financial services, including credit

In addition, on premises contracts benefit from further leniency: [r9]

- day-to-day transactions for immediate performance, do not have to comply with the PCI requirement, e.g. a cup of coffee, the daily newspaper or the weekly groceries; this is likely to apply to purchases that are low cost items and with which consumers are very familiar
- there is no need for information from the list to be provided if it is apparent from the context, e.g. a description of a dictionary if it can be picked up and examined and the front cover makes it clear what it is

C5.1.1.2 Examples of PCI detail

A full list of PCI is in Appendix D2 to unit D, some examples are provided in table C9 below, although they may not all apply to every contract, depending on the category of contract and product being purchased:

C5.1.1.3 Additional payments [r40]

C is not obliged to make any additional payments to T, over and above what has been agreed for the main obligation under the contract, unless T has obtained C's express consent. This will apply to charges for items such as packaging, delivery, gift wrapping, insurance and charity donations and means that C will have

to expressly choose to pay them rather than T requiring them to untick pre-ticked boxes, e.g. when shopping online. This requirement applies to financial services when they are additional purchases, even though financial services are exempt from part of the provisions in the CCRs.

Table C9: Categories of PCI requirements

Category	Detail
Product	Main characteristics, to the extent appropriate for both the medium of communication being used and the product being sold Functionality of any DigC Compatibility of any DigC
Trader	T's trading name Geographical address and telephone number
Payment	Total price Delivery and/or other charges Payment schedule Cost of using the distance means to conclude the contract, if above the basic rate Details of any deposits
Consumer rights	Delivery time Any complaints handling policy Nature of any guarantees Contract duration or termination rights Any minimum contract duration Any relevant codes of practice Cancellation rights Access to any ADR provision

C5.1.2 Contract confirmation [r12, r16]

When confirmation is required, it should be provided within a reasonable time after the contract has been concluded and:

- no later than when any goods are delivered, or
- before the performance of any service begins

For OffP contracts, a copy of the contract or confirmation of it, should be given on paper, or if C agrees, on another durable medium.

For distance contracts, confirmation must be given on a durable medium and it is treated as provided as soon as T has sent it or done whatever is necessary to make it available to C.

OnP contracts do not require confirmation.

C5.1.2.1 Details for confirmation

The contract confirmation or copy contract does not need to include the PCI if this was provided in a durable medium before the contract was binding, i.e. at the pre-contract stage. This will be particularly relevant if the contract was concluded verbally over the phone or the PCI was on a website as these are not durable media, but otherwise, the copy could just be of the order details and confirmation could just be an acknowledgement that a contract has been made.

C5.1.2.2 Confirming DigC [r37(4)]

If DigC is being supplied not on a tangible medium, e.g. by streaming or downloading, C's consent to start the supply during the 14 day cancellation period and their acknowledgement that they will then lose their right to cancel, must be included in the contract confirmation or C will not have to pay.

C5.1.3 Durable medium [r5]

A durable medium means paper or email, or any other format that allows:

- information to be addressed to the recipient personally, although the information itself does not need to be exclusive or tailored to a specific consumer AND
- the consumer's personal information to be stored AND
- for the information to remain unchanged and accessible for future reference

The following are all likely to be acceptable, if they meet the above criteria: letters, CDs, DVDs, emails, texts and personal accounts on T's website, although the latter may not be set up at the PCI stage.

C5.1.4 Specific information requirements in the CCRs

For some contracts there are specific PCI requirements and these are indicated in table C10 below.

Table C10: Specific PCI requirements

Off-premises contracts [r.11]
<p>Low cost service repair contracts - if C has explicitly requested T to carry out immediate repair or maintenance services, with no or only incidental goods, at a cost of £170 or less, the full PCI does not have to be given. T does, however, have to provide:</p> <ol style="list-style-type: none">(1) a reduced PCI list (items 1 - 4, 6, 7, 21 & 24 in Appendix D2, unit D)(2) an estimate of the total price (if it cannot be calculated in advance)(3) a cancellation form (unless exempt)(4) contract confirmation which does include the full PCI <p>Items 2, 3, 4, 6 and 7 in Appendix D2, unit D, the estimate and the cancellation form, can be given or made available on paper or on another durable medium if C expressly agrees before being bound</p> <p>Items 1, 21 and 24 can be given or made available on paper or another durable medium or otherwise if C expressly agrees, again before being bound by the contract</p>

Distance contracts

Telesales – Ts who ring Cs to conclude distance contracts over the phone, must disclose certain information at the start of the conversation, namely [r15]:

- ✓ the commercial purpose of the call
- ✓ T's identity
- ✓ the identity of the person on whose behalf they are making the call, if applicable

Electronic contracts – for any contract made using electronic means, C must explicitly acknowledge any obligation to pay, for example, by activating a button that says 'order with obligation to pay' or some comparable wording, for example, 'pay now' or 'buy now' [r14]

Some of the PCI must be clear and prominent directly before C places their order, this applies to items 1, 6, 7, 8, 15 and 16 in Appendix B

Also any trading website used for concluding contracts must indicate, clearly and legibly:

- any delivery restrictions
- which means of payment are accepted

at the latest by the beginning of the ordering process

Passenger transport contracts are subject to this requirement when made electronically even though they are exempt from the other PCI provisions

Limited space or time – if there is limited space or time to display the PCI, some items from Appendix B must be provided on that means of communication (numbers 1, 2, 6, 7, 8, 15 and 21) but the rest may be supplied in another appropriate way, e.g. text or TV advertising referring to T's website [r13(4)]

C5.1.5 Specific pre-contract information requirements in other legislation

Various pieces of legislation require Ts to provide Cs with PCI before a contract is made. Some brief details are provided in Appendix C2.

C5.2 Remedies for breaches of the Consumer Contracts Regulations

There are various remedies and sanctions available, and for some breaches of the Regulations:

- ✓ there are remedies in the CRA (when PCI is supplied but the product does not match it)
- ✓ there are remedies in the Regulations (when specific PCI is omitted)
- ✓ there are common law remedies (when PCI is not supplied)
- ✓ TSS may choose to take civil enforcement action (whether remedies are available or not)

C5.2.1 Consumer Rights Act remedies

Which remedies are available for breaches of the requirements to provide information under the CCRs are indicated in the earlier respective tables relating to goods, services and DigC in sections C1, C2 and C3. There is a summary in table C11 below.

Table C11: A summary of the CRA remedies for breach of the CCRs information requirements

Product	Breach	Statutory remedies
Goods	Did not meet descriptions made, including the main characteristics information s11(1)	STRR Repair or replacement Reduction or refund CL remedies
Goods	Contained DigC, which did not conform with its description, including the main characteristics, functionality and compatibility information s16	STRR Repair or replacement Reduction or refund CL remedies
Goods	Did not conform with other PCI s12	Recover costs incurred (up to the amount paid)
Service	Was not performed in line with information provided about the service s50 (covers PCI and other information)	Repeat performance Reduction in price
Service	Was not performed in line with information provided about T s50 (covers PCI and other information)	Reduction in price
Digital content	Did not conform with PCI concerning main characteristics, functionality or compatibility s36(3)	Repair or replacement Reduction
Digital content	Did not conform with other PCI s37	Recover costs incurred (up to the amount paid)

C5.2.2 Consumer Contracts Regulations remedies

Various consequences may ensue as a result of non-compliance with the PCI requirements, as provided for by the CCRs themselves, depending on the breach, and these are examined below. If there is a dispute between T and C, the onus is on T to prove that PCI and contract confirmation were supplied, apart from in respect of OnP contracts. It will be up to C to show that the goods, service or DigC did not conform [r17(1)].

C5.2.2.1 Escaping payment

C will not have to pay whichever of the following costs might apply, if they have not been informed about them in the appropriate way as part of the PCI process for OffP and distance contracts. These relate to items 7, 8 and 22 in Appendix D2, unit D: [r10(4) & r13(5), Schedule 2 (g), (h), (m)]

- delivery charges
- any additional costs, although, the fact that they may be payable will suffice if they cannot reasonably be calculated in advance
- fixed rate costs per month where the contract is of indeterminate duration or there is a subscription total costs per billing period, if the contract is of indeterminate duration or there is a subscription with no fixed rate
- cost of returning cancelled goods, if C is not made aware that they will have to bear this cost

- cost of returning cancelled distance contract goods if due to their nature they cannot normally be returned by post and C was not informed of the cost of such a return

In other words, as a general rule, if T wants C to pay for something, they need to make sure that it is included in the PCI in accordance with table C8, although this will not generally allow C to escape paying for the main item purchased, even if the price is not agreed, apart from as described above for rolling contracts and subscriptions.

In addition, it is likely that DC supplied on a non-tangible medium will be streamed or downloaded immediately. If T fails to obtain one of the following from C, then C will not have to pay, either in full or part, for a supply during the 14 day cancellation period, if it is either an OffP or a distance contract [r12(5), r16(3), r37(4)].

- prior express consent to the supply starting during the cancellation period
- acknowledgement that such consent means that the right to cancel will be lost
- verification of the consent and acknowledgment in the contract confirmation

C5.2.2.2 Not being bound by the contract [r14]

For distance contracts, concluded by electronic means, C will not be bound by the contract or order, and so could ask for a refund or decline delivery, if T has not ensured that:

- C has explicitly acknowledged the obligation to pay when placing that order, or
- any button requiring activation, or some similar function, is not clearly labelled “order with obligation to pay” or some comparable wording, for example, “pay now”, when C places an order

If C chooses to remain bound by the contract, C will have to pay for whatever has been ordered.

C5.2.2.3 Extension of the cancellation period [r31]

Many OffP and distance contracts will afford C the right to cancel and if T does not provide the required details about it [item 21, Appendix D2, unit D – conditions, time limit and procedures for cancelling] before the contract is concluded, this may have the effect of extending the usual 14 day cooling off period.

C5.2.2.4 Reimbursement of additional payments [r40(4)]

If T receives an additional payment, e.g. for packaging, delivery, gift wrap, insurance or a charity donation, without having obtained the express consent from C to make such a charge, T must reimburse C with the amount of the payment.

C5.2.3 Common law remedies [r18 CCRs]

All contracts covered by the CCRs are treated as if they include a term that T has complied with the provisions requiring PCI and contract confirmation, where applicable, apart from r15 (see table C10). So if T fails to comply with such requirements C may be able to make a claim for damages or even end the contract, if the omission is significant and the contract has not been affirmed and it is practical to do so.

C5.2.4 Action available when no remedies are specified [r44 & r45]

LA TSS have a duty to consider complaints of contraventions of the CCRs unless they appear to be frivolous or vexatious. There is a power to apply for a court injunction (interdict) against anyone who appears to be responsible for a contravention, the aim of which is to prevent further infringements. In addition, the following could potentially amount to criminal offences:

- a lack of the required details about C's cancellation right for OffP contracts, contrary to the CCRs [r19 CCRs]
- a lack of other information required by the CCRs [CPRs]

Summary

- **Cs are entitled to receive PCI about the goods, services and DigC they intend to purchase, before they actually buy them**, and also about other aspects of the contract they are entering into, e.g. in relation to the supplier, the cost and payment details and certain rights they may have under the contract.
- **These rights are not in the CRA but in the CCRs**, however, if T fails to comply, some of the remedies can be found in the CRA, while others are in the Regulations themselves or available under common law; exactly what information has to be provided and how, depends on where and how the contract is made and therefore, how it is classified and the categories are: OffP, distance and OnP contracts, which is any B2C contract that does not meet the definition of the first two.
- The **information required and how it has to be supplied differs according to contract type and it should be provided in a clear and comprehensible manner**, so for OnP it should be given or made available, for OffP it should be on paper or if C agrees on another durable medium and for distance contracts it should be given or made available in a way that is appropriate to the means of distance communication used; any information on a durable medium should be legible.
- **A number of contracts are exempt** from having to provide PCI under the CCRs, although other legislation may require similar detail, e.g. for package holidays, timeshare agreements and financial services, including credit.
- **Exemptions include:** OffP contracts for £42 or less; property sales and construction; residential letting agreements; the supply of foodstuffs, beverages or other goods for current household consumption by Ts on frequent, regular rounds to C's home or workplace; single telephone, internet or fax services established by C; gambling, betting and lottery contracts; contracts concluded by vending machines or other automated commercial premises; where goods are sold by way of execution or otherwise under some legal authority; NHS medicinal products; passenger transport services, other than the electronic contract provisions, which do apply, and the use of a public pay phone, where connection is through the operator; but see appendix C2 for other miscellaneous statutory information requirements.
- In addition, **OnP contracts benefit from further leniency**, in that day-to-day transactions for immediate performance, do not have to comply with the PCI requirement, which is likely to apply to low cost items with which consumers are very familiar and there is no need for information from the list to be provided if it is apparent from the context.
- **For OffP and distance contracts, T must also provide confirmation of the contract within a reasonable time after conclusion** and no later than when goods are delivered or performance of any service begins; a copy of the contract or confirmation of it, should be given on paper, or if C agrees, on another durable medium, if it is an OffP contract and for distance contracts, confirmation must be given on a durable medium and is treated as provided as soon as T has sent it or done whatever is necessary to make it available to C.

- **Contract confirmation or copy contract does not need to include the PCI if this was provided in a durable medium before the contract was binding**, at the PCI stage, but otherwise, the copy could just be of the order details and confirmation could just be an acknowledgement of the contract.
- **If DigC is being supplied not on a tangible medium**, e.g. by streaming or downloading, **consent** to start supply during the 14 day cancellation period and **acknowledgement** that this means the loss of the right to cancel, **must be included in the contract confirmation** or C will not have to pay.
- A **durable medium means** paper or email, or any other format that allows: information to be addressed to the recipient personally; the consumer's personal information to be stored and for the information to remain unchanged and accessible for future reference
- **For some contracts there are specific PCI requirements** and these include: low cost service repair contracts; telesales; distance contracts made electronically and distance contracts where there is limited space or time to display the full list of PCI.
- **Various remedies and sanctions are available** in the CCRs themselves, in the CRA or at common law; for some breaches there are no remedies but TSS may choose to take civil enforcement action.

C6 Fairness

C6.1 Unfair terms and notices

Consumer notices and contract terms should generally be fair and transparent. This is to protect C against what is commonly called 'the small print' in standard form contracts, however, this requirement does apply to negotiated contract terms too and also consumer notices.

The requirement for fairness is contained in the CRA and operates alongside the various provisions which cover when T can and cannot exclude or restrict liability in relation to goods, services, DigC and negligence, referred to as the "blacklist". [s62(8) CRA]

C6.1.1 Consumer notices

The fairness test applies to consumer notices as well as contract terms. A notice: [s61 CRA]

- ✓ is not restricted to one that expressly applies to a C so long as it is reasonable to assume it is intended to be seen or heard by a C
- ✓ includes an announcement, whether or not in writing, and any other communication
- ✓ is something which either:
 - relates to the rights or obligations between T and C, or
 - tries to exclude or restrict T's liability to C

C6.1.2 Exemptions

The fairness test does not apply to contract terms concerning the main subject matter and the price, providing they are transparent and prominent [s64 CRA]. In addition, neither the fairness test nor the transparency test, apply to: [s61 and s73 CRA]

- contracts of employment
- contracts for apprenticeships
- contract terms or notices that are reflecting mandatory statutory or regulatory provisions
- contract terms or notices that are reflecting the provisions or principles of an international convention to which the UK or the EU is a party, e.g. the Warsaw or Montreal Conventions for airline flight bookings

C6.1.3 Secondary contracts [s72 CRA]

The fairness test will apply to a secondary contract (unless it is a settlement of a claim arising under the main contract):

- ✓ where the terms reduce the rights or remedies or increase the obligations under the main contract
- ✓ whether or not the parties are the same as the ones under the main contract
- ✓ even if the secondary contract is not a consumer contract

C6.1.4 Contracts applying the law of a non-EEA State [s74 (2) CRA and Reg (EC) 593/2008]

If the contract parties agree that the law of a non-EEA state applies to their contract, or have not made any choice, the unfair terms provisions will still apply if the contract has a close connection with the UK (unit B).

C6.2 Price and subject matter terms [s64 & s65 CRA]

Not all the terms in a contract are subject to the fairness test. The following terms cannot be assessed for fairness, as long as they are transparent and prominent:

- terms that set the price
- terms that define the subject matter being supplied, whether it be goods, services or DigC

So if the terms are not either transparent or prominent then they can be assessed for fairness.

- transparency means expressed in plain and intelligible language and if written, is also legible
- prominence requires a term to be brought to C's attention so that an average person (reasonably well-informed, observant and cautious) would be aware of the term

C6.3 Requirement for transparency [s68 CRA]

In addition to the fairness test, there is also a separate, general requirement for any written term or notice, which is that it must be transparent, again meaning that it should be in plain intelligible language and legible.

C6.4 Requirement for fairness [s62 CRA]

The main requirement is that terms and notices should be fair, and unfairness is defined as causing a significant imbalance in the parties' contractual rights and obligations to the consumer's detriment where this is contrary to good faith. This should be considered in the light of:

- the nature of the subject matter
- all the circumstances that existed when the term was agreed, or the rights or obligations arose
- all the other contract terms
- the terms of any other contract on which the notice or contract depends

Various EU and UK court cases have considered this definition and its applicability to contracts, e.g. DGFT v First National Bank, Mylcris Builders Ltd v G Buck, OFT v Ashbourne Management Services Ltd) The fairness test can be applied to contract terms which specify the main subject matter and price if they are either not transparent or prominent.

C6.4.1 The "grey" list [s63(1) and Schedule 2 CRA]

There is an illustrative, but not exhaustive, list of terms in Schedule 2 of the CRA '14, which may be regarded as unfair. A summary of the items in the list can be found in Appendix C1. T cannot argue that terms in this list might be exempt from the fairness test because they specify the main subject matter or concern the price payable. There is no need to firstly consider transparency and prominence because terms in this list can automatically be considered for fairness.

C6.4.2 Terms that are automatically unfair [s63(6) CRA]

A term will be automatically unfair if it has the effect of placing the BOP on C in relation to whether a distance supplier or intermediary has complied with any European obligation required under the Financial Services (Distance Marketing) Regulations 2004 or Financial Conduct Authority or Prudential Regulation Authority rule covering such obligations.

Regulations made under the Arbitration Act 1996 mean that a contract term, which requires disputes to be referred to arbitration, when the claim is for £5,000 or less, is automatically unfair.

C6.5 Effect of unfair terms [s62 and s67 CRA]

Any term or notice that is unfair, will not be binding on C, however, C can choose to rely on such a term or notice if they so wish. This does not affect the rest of a contract, if practically, it can continue without the unfair element.

A lack of transparency, on the other hand, offers no remedy for C, although it could be relevant to the assessment of fairness.

If a contract term or notice is ambiguous, then the meaning most favourable to C prevails, which is known as the ***contra proferentum*** rule [s69 CRA]. This does not apply if a regulator is applying for an injunction (or interdict).

A court has the duty to consider whether a contract term is fair when dealing with proceedings that involve the term, whether or not the parties have raised this issue, providing the court thinks it has sufficient legal and factual material to do so [s71 CRA].

The provisions on unfair terms are enforced by the CMA and other regulators, including TSS, who have certain powers under the CRA, including powers to seek information and apply for court injunctions (interdicts) to prevent the use of unfair terms or notices or ones that are not transparent.

C6.6 Liability for negligence [s65 & 66 CRA]

Contract terms or notices, which attempt to exclude or restrict T's liability to C for death or personal injury, caused by negligence, will not be valid, they are blacklisted. Nor will such terms or notices amount to a voluntary acceptance of risk by someone, based just on their awareness of, or agreement to, them.

Negligence includes a breach of any of the following, whether the breach was inadvertent or intentional and regardless of whether liability arises directly or vicariously:

- ✓ a contractual obligation to use RCS, whether this is implied or express
- ✓ a CL duty to use RCS
- ✓ a statutory duty of care imposed by occupiers' liability legislation

Personal injury includes any disease and any physical or mental impairment.

There are some contracts and liabilities that are not subject to these blacklisting provisions, as follows, although they will be subject to the fairness test:

- x insurance contracts
- x contracts to pay an annuity on human life
- x contracts that create or transfer an interest in land
- x liability of an occupier to someone obtaining access to premises for recreational purposes that are outside the occupier's business and where the loss or damage suffered is due to the dangerous state of the premises

The bar on excluding or restricting liability for negligence in relation to death or personal injury does not apply to liability which is excluded or discharged as mentioned in s4(2)(a) of the Damages (Scotland) Act 2011 and neither does it affect the operation of section 5 [s66(3)]

C6.6 The “blacklist” and other statutory provisions covering restrictions on liability

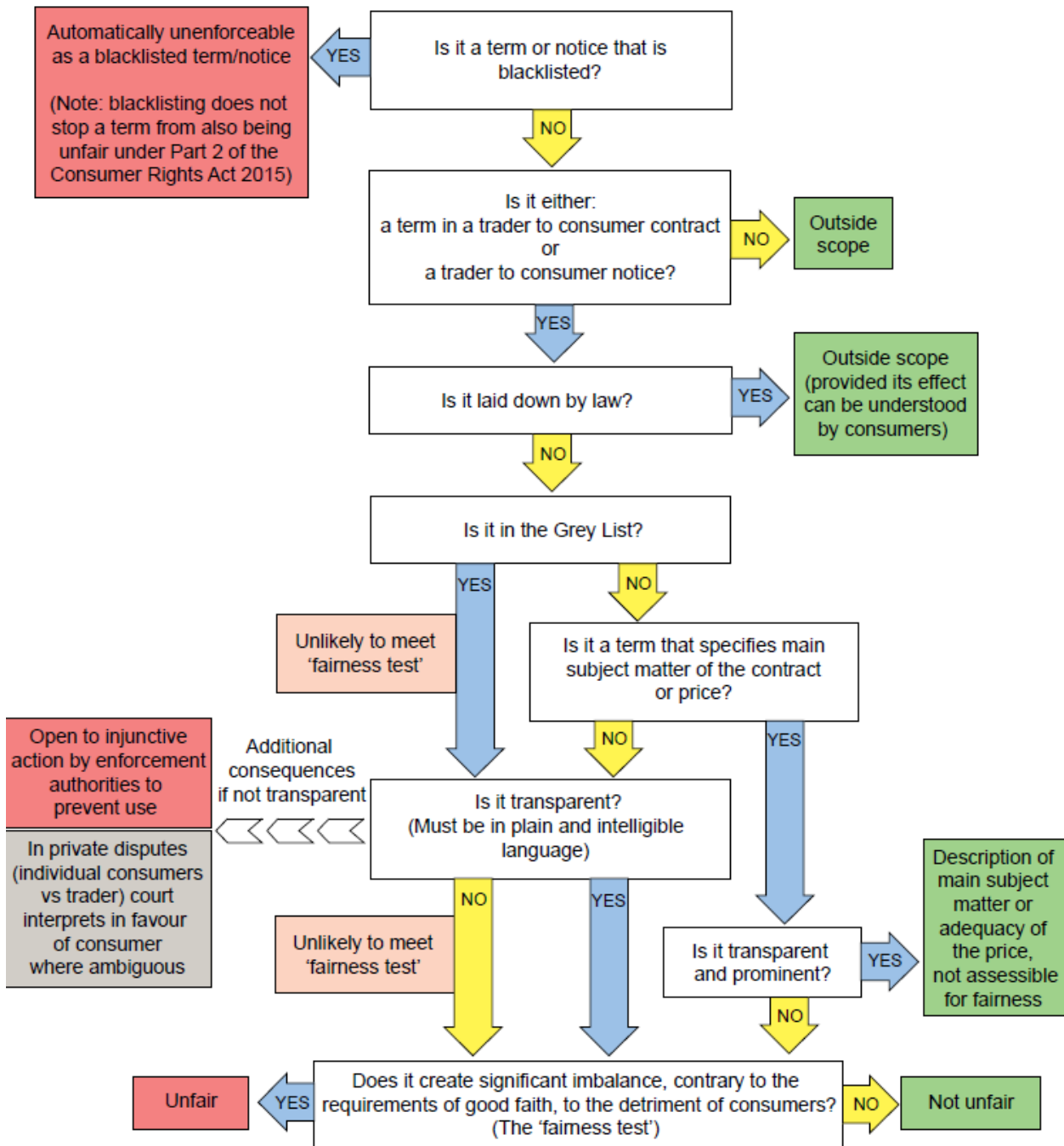
There are various statutory provisions which qualify when liability can be restricted in certain circumstances, some of which have already been covered. Table C12 below summarises the most relevant.

Table C12: Legislative provisions that apply to exclusion or limitation clauses

Topic	Restriction	Reference
Goods	Liability in relation to the rights in the CRA 2014 cannot be excluded or restricted	s31 CRA 2014
Services	Liability for a lack of RCS or in relation to information supplied to C cannot be excluded. Such liability, can be limited (if fair) but not to less than the contract price, and not if it causes death or personal injury	s57 & s65(1) CRA 2014
Digital content	Liability in relation to the rights in the CRA 2014 cannot be excluded or restricted so far as it relates to SQ, FFPPMK, T's right to supply and description, including conformity with main characteristics, functionality and compatibility information	s47 CRA 2014
Secondary ticketing	Event organisers cannot cancel tickets or blacklist sellers just because tickets have been resold unless there is a term pointing out this possibility in the original contract between the organiser and the original buyer, and such a term meets the fairness requirements	S91 CRA
Death or personal injury	Contract terms or notices, which attempt to exclude or restrict liability caused by negligence, will not be valid	s65 CRA 2014
Unsafe products	Liability to someone who has suffered damage caused by the supply of such a product cannot be limited or excluded	s7 CPA 1987
Regulated credit agreements	Any term which is inconsistent with a provision in the CCA '74, which aims to protect a debtor, will be void	s173(1) CCA 1974
Regulated credit agreements	A negotiator cannot be treated as an agent of a debtor because they are an agent of the creditor	s56(3)(a) CCA 1974
Regulated credit agreements	Liability for the acts and omissions of a negotiator cannot be excluded	s56(3)(b) CCA 1974

Figure C3 indicates how the provisions relating to fairness and transparency operate.

Figure C3: Application of the provisions concerning fairness and transparency
 (Source: CMA)



The flowchart aims to provide an ‘at a glance’ simplified overview of the unfair terms provisions in Part 2 of the Consumer Rights Act 2015 (the Act). It should not be used, in isolation, to determine the fairness or otherwise of a particular term, and should be read in light of the guidance documents as a whole. It is not a substitute for legal advice.

Summary

- **Consumer notices and contract terms, standard and negotiated ones, should generally be fair and, if written, also transparent** and these requirements operates alongside the various provisions, the “blacklist”, which cover when T can and cannot exclude or restrict liability in relation to goods, services, DigC and negligence.
- A **consumer notice is not restricted to one that expressly applies to a C so long as it is reasonable to assume it is intended to be seen or heard by a C**; it includes an announcement, whether or not in writing, and any other communication; it is something which either relates to the rights or obligations between T and C, or tries to exclude or restrict T’s liability to C.
- **Contract terms that set the price or define the product or service being supplied, cannot be assessed for fairness, as long as they are transparent and prominent**; also if the parties agree that the law of a non-EEA state applies to their contract, or have not made any choice, the unfair terms provisions will still apply if the contract has a close connection with the UK.
- **Neither the fairness test nor the transparency test, apply to the following exempted contracts**: contracts of employment; contracts for apprenticeships; contract terms or notices that are reflecting mandatory statutory or regulatory provisions and contract terms or notices that are reflecting the provisions or principles of an international convention to which the UK or the EU is a party, such as the Warsaw or Montreal Conventions for airline flight bookings.
- **Transparency requires plain intelligible language and legibility** if written; prominence means that an average consumer would be aware of it and an average consumer is someone who is reasonably well-informed, observant and circumspect.
- A term, or notice, will be **unfair if it causes significant imbalance in the parties’ contractual rights and obligations to the consumer’s detriment and is contrary to good faith**; this should be considered in the light of: the nature of the subject matter; all the circumstances that existed when the term was agreed, or the rights or obligations arose; all the other contract terms and the terms of any other contract on which the notice or contract depends.
- There is an **illustrative, but not exhaustive, list of terms in Schedule 2 of the CRA ’14, the “grey” list, which may be regarded as unfair**; T cannot argue that terms in this list might be exempt from the fairness test because they specify the main subject matter or concern the price payable; there is no need to firstly consider transparency and prominence because terms in this list can automatically be considered for fairness.
- **A term will be automatically unfair** if it has the effect of placing the BOP on C in relation to whether a distance supplier or intermediary has complied with any European obligation required under the Financial Services (Distance Marketing) Regulations 2004 or FCA or PRA rule covering such obligations; Regulations made under the Arbitration Act 1996 mean that a contract term, which requires disputes to be referred to arbitration when the claim is for £5,000 or less, is also automatically unfair.

- **Any term or notice that is unfair, will not be binding on C**, however, C can choose to rely on such a term or notice if they so wish, however, this does not affect the rest of a contract, if practically, it can continue without the unfair element; **there is no remedy for C for a term that is not transparent**; if a contract term or notice is ambiguous, then **the meaning most favourable to C prevails**, the *contra proferentum* rule, which does not apply if a regulator is applying for an injunction (or interdict).
- A **court has the duty to consider whether a contract term is fair when dealing with proceedings that involve the term**, whether or not the parties have raised this issue, providing the court thinks it has sufficient legal and factual material to do so.
- The **provisions on unfair terms are enforced by the CMA and other regulators, including TSS**, who have certain powers under the CRA, including powers to seek information and apply for court injunctions (interdicts) to prevent the use of unfair terms or notices and also ones that are not transparent.
- **Contract terms or notices, which attempt to exclude or restrict T's liability to C for death or personal injury, caused by negligence, will not be valid**; nor will such terms or notices amount to a voluntary acceptance of risk by someone, based just on their awareness of, or agreement to, them.
- **There are other legislative provisions that prevent T from excluding liability or regulate how T can limit liability**, including in relation to: rights when buying goods, services, secondary ticketing or digital content; the supply of products by manufacturers and EU importers and regulated consumer credit agreements.

The bar on excluding or restricting liability for negligence in relation to death or personal injury does not apply to liability which is excluded or discharged as mentioned in s4(2)(a) of the Damages (Scotland) Act 2011 and neither does it affect the operation of section 5 [s66(3)].

The name for an injunction in Scotland is an interdict.

Appendix C1

Consumer contract terms which may be regarded as unfair - Schedule 2, CRA 2015

PART 1 - List of Terms

Terms which have the object or effect of....

1.excluding or limiting T's liability for death or personal injury to C resulting from an act or omission of T
2.inappropriately excluding or limiting C's legal rights when T, or another party, partially, inadequately or totally fails to perform their contractual obligations (including the option of offsetting a payment)
3.making an agreement binding on C where the provision of services by T is subject to a condition whose realisation depends on T's will alone
4.permitting T to retain C's money, if C cancels, without allowing C to claim compensation from T if they cancel
5.requiring that if C cancels, C must pay a disproportionately high amount
6.requiring that if C fails to fulfil the contractual obligations, C must pay a disproportionately high amount
7.authorising T to dissolve the contract at will, without giving C the same option, or allowing T to retain money paid for services not supplied when T has dissolved the contract
8.enabling T to terminate a rolling contract without reasonable notice unless there are serious grounds to do so (see paras 21 and 24)
9.automatically extending a fixed contract where C does not opt out, if the deadline is unreasonably early
10.irrevocably binding C to terms where there is no real opportunity to become familiar with them before the contract is concluded
11.enabling T to alter terms unilaterally without a specified valid reason (see paras 22, 23 and 24)
12.allowing T to determine the characteristics of the contract's subject matter after conclusion (see para 23)
13.enabling T to unilaterally alter the characteristics of the goods, services or DigC to be supplied, without a valid reason
14.giving T the discretion to decide the price after C bound, if no price or method of determining price was agreed (see paras 23, 24 and 25)
15.permitting T to increase the price without giving C the right to cancel if it is too high compared with that agreed on contract conclusion (see paras 24 and 25)
16.giving T the right to determine that what was supplied is in conformity with the contract, or giving T the exclusive right to interpret any term of the contract
17.limiting T's obligation to respect commitments undertaken by T's agents or making them subject to compliance with a particular formality
18.obliging C to fulfil all of C's obligations where T does not perform theirs
19.allowing T to transfer T's rights and obligations without C's agreement, where this may reduce C's guarantees
20.excluding or hindering C's right to take legal action or exercise a legal remedy, in particular by doing any of the following:
 - (a) requiring C to take disputes exclusively to arbitration not covered by legal provisions
 - (b) unduly restricting the evidence available to C
 - (c) imposing a BOP on C where the applicable law states that it should lie elsewhere

PART 2 – Scope of Part 1

Financial services

21. Para 8 does not include a term where a financial services (FS) supplier (S) reserves the right to unilaterally terminate a rolling contract without notice for a valid reason, providing the supplier is required to inform C of such cancellation immediately
22. Para 11 does not include a term where a FS S reserves the right to alter the interest rate or other charges without notice for a valid reason, providing S is required to inform C of the alteration at the earliest opportunity and C is free to dissolve the contract immediately

Rolling contracts

23. Paras 11, 12 and 14 do not include a term where T reserves the right to unilaterally alter the conditions of a rolling contract if T is required to inform C with reasonable notice and C is free to dissolve the contract

Sale of securities, foreign currency etc

24. Paras 8, 11, 14 and 15 do not apply to:
 - (a) Transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that T does not control, and
 - (b) Contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency

Price index clauses

25. Paras 14 and 15 do not include price-indexation clauses (where otherwise lawful), if the method by which prices vary is explicitly described

Terms listed in Part 2 can be assessed for fairness [s64(2) CRA] unless sections 65 or 74 apply.

Section 65 exempts terms specifying the main contract subject matter or the price, providing they are transparent and prominent

Section 74 exempts terms and notices that reflect mandatory statutory or regulatory provisions, or provisions or principles of an international convention to which the UK or the EU is a party

Appendix C2

Miscellaneous statutory information requirements

Who has to provide information	What information has to be provided	Where, when and how does the information have to be provided
<p>Secondary ticket sellers</p> <p>People (private and trade) who resell tickets for recreational, sporting or cultural events and operators of internet based secondary ticketing facilities [s90 – s95 CRA]</p>	<p>Applicable information about the ticket in relation to:</p> <ul style="list-style-type: none"> ✓ the seat or standing area ✓ any restriction which limits its use ✓ its face value <p>Also any connection the seller has to the online facility or event organiser</p>	<p>In a clear and comprehensible manner</p> <p>Before the buyer is bound by the contract</p>
<p>Letting agents</p> <p>Those undertaking letting agency or property management work (not LAs) on behalf of landlords and prospective tenants in relation to privately rented homes, including finding tenants and properties, starting tenancies and arranging repairs, maintenance and insurance [s83 – s88 CRA]</p>	<ul style="list-style-type: none"> ✓ details of relevant fees (tax inclusive) ✓ if money is held for clients whether the agent is a member of a client money protection scheme ✓ if membership of a redress scheme is required, an indication of this and the scheme's name <p>Sufficient detail about fees must be given to allow a clear understanding of what is covered or its purpose and whether it is per tenant or property</p>	<p>A list must be displayed at any premise where agents deal face to face with customers</p> <p>A list must also be published on the website if the agent has one</p> <p>Rent, tenancy deposits, statutory fees and charges received from a landlord on behalf of another, are not relevant fees</p>
<p>Service providers</p> <p>Those providing any self-employed economic activity in the UK, which is usually provided for money (some exemptions including: financial services; electronic communications services and networks; transport; temporary work agencies; healthcare; audiovisual services; gambling; state provided social services; private security; notaries and bailiffs) [PSRs]</p>	<p>Compulsory information includes: business name; legal status; contact details; geographic address; any public register name and number; any authorization scheme; VAT number; professional body details; general T&C; applicable law details; guarantees; service main features; price (if pre-determined); professional liability insurance details; ADR details</p> <p>Information to be provided if requested: price (if not pre-determined); relevant professional rules; details of other activities provided; measures to avoid conflict of interest; any relevant codes plus websites</p>	<p>Should be clear, unambiguous and easily understood</p> <p>To be provided in good time before any contract is concluded or before the service is provided if there is no written contract</p> <p>Should be supplied: at provider's own initiative; made easily accessible where the service is provided/contract concluded or electronically; or included in documents</p>

Who has to provide information	What information has to be provided	Where, when and how does the information have to be provided
<p>Internet sellers</p> <p>Applies to those marketing or selling goods and services using electronic equipment and also suppliers of information society services</p> <p>The requirements are complex and vary according to who is doing what, to who and how [ECRs]</p>	<p>PCI includes: full business name; geographic address; contact details for rapid, direct and effective communication; any relevant trade register details (name and reference); VAT number; details of any relevant supervisory authorisation scheme; any relevant regulated profession details (body, titles, MS where granted, description of professional rules, how to access them)</p> <p>If prices referred to they must be clear and unambiguous and state whether they are inclusive of taxes and delivery</p> <p>If contracts are concluded by electronic means further details are required as PCI: different technical steps to follow to conclude a contract; whether or not the contract will be kept and be accessible by T; how customers can identify and correct input errors before placing an order; languages offered for contract conclusion; any relevant codes subscribed to and how to consult them electronically</p> <p>Where goods, services or the business are promoted electronically, any electronic commercial communication, e.g. text or email, must clearly identify: itself as a commercial communication; who is making it; any promotional offer, competition or game; any conditions necessary for such offers, competitions or games (they must be presented clearly and unambiguously and be easily accessible)</p>	<p>Must be easily, directly and permanently accessible</p> <p>Must be clear and comprehensible, on a website or other means used to conclude the contract</p>