

# CONSUMER RIGHTS ACT 2015

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 3 Miscellaneous and General

##### *Chapter 1: Enforcement Etc.*

##### *Section 77: Investigatory powers etc.*

349. This section makes provision for the investigatory powers of consumer law enforcers. Consumer law, which includes enforcers' investigatory powers, has built up piecemeal, resulting in the investigatory powers, contained in around 60 pieces of consumer legislation, being unclear, inconsistent and overlapping each other. In its consultation published in March 2012 entitled 'Enhancing Consumer Confidence Through Effective Enforcement – Consultation on consolidating and modernising consumer law enforcement powers,' BIS proposed simplifying the powers by consolidating them into one generic set.
350. This section gives effect to Schedule 5 on Investigatory Powers and Schedule 6 which details the consequential amendments in relation to the investigatory powers.

##### *Schedule 5: Investigatory Powers etc.*

351. This Schedule contains a generic set of powers, which is based on those currently contained in Part 4 of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). This is because CPRs are relatively modern; reflect current business practices; build on similar existing legislation and can be used to investigate breaches which may lead to criminal or civil proceedings. Some specific powers contained in weights and measures and product safety legislation will be retained in that legislation alongside the generic set.
352. As well as consolidating powers that already exist, stronger safeguards have been added to the use of some powers in order to reduce the burdens on businesses. For example, subject to a number of exemptions, the power of entry into premises without a warrant cannot be exercised unless a notice in writing has been given to the occupier at least two working days before an inspection is carried out and the power exercised. This requirement applies to routine inspections only and the Schedule sets out those circumstances that would not amount to a routine inspection.
353. As a consequence of consolidating these powers, some modification has been necessary to the existing powers, either to ensure compliance with EU obligations, or to align powers across consumer law in order to ensure that the powers contained in the generic set are simple and consistent. For example, the generic set includes a power to require production of information under paragraph 14 of Part 3 of the Schedule, which is based on Part 8 of the EA dealing with civil enforcement but which will now apply to both civil and criminal consumer law enforcement.

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(c.15) which received Royal Assent on 26 March 2015*

354. In some instances, a limitation has been specifically placed on the use of a particular power. For example, the power to require production of information can only be used if the enforcer reasonably suspects a breach of legislation. This limitation does not apply, or apply in the same way, for all types of enforcer.
355. The generic set of powers applies to all enforcers detailed in the Schedule except where access to powers is specifically limited for particular enforcers. For example, the powers of unfair contract terms enforcers and public designated enforcers, are restricted to the power to require production of information.
356. [Paragraph 1](#) of Part 1 provides an overview of the Parts of Schedule 5.
357. [Paragraphs 2 to 6](#) detail the types of enforcers that have access to the powers in the Schedule and define the terms used to refer to those enforcers, *e.g.* EU and domestic enforcers. Paragraph 7 details what is meant by the term ‘officer’ in relation to enforcers whilst Paragraph 8 defines other terms used in the Schedule.
358. [Paragraphs 9 to 11](#) of Part 2 of the Schedule specify the legislation to which the generic set of powers applies.
359. [Paragraph 12](#) introduces a power for the Secretary of State by order to amend the list of legislation to which the generic set of powers applies. This is to ensure that the generic set of powers can be used to enforce any new duties that may in future be prescribed.
360. The order making power would also allow other legislation to be amended, repealed or revoked as a consequence of amending this list. The safeguards on the use of the powers of entry that replace those being repealed must be greater than those that existed before.
361. [Paragraphs 13 to 17](#) of Part 3 of the Schedule detail the power in relation to the production of information. These paragraphs set out the purposes for which the power can be used, the procedure to be followed when using it and how the power can be enforced, as well as limitations on the use of the information obtained.
362. [Paragraph 18](#) clarifies that Part 3 of the Schedule applies to the Crown to the same extent that the relevant powers in Part 8 of the EA (which are being replaced by the powers in the Schedule) applied to the Crown.
363. [Paragraph 19 to 20](#) of Part 4 of the Schedule sets out the purposes for which the further powers in the generic set detailed in this Part may be exercised by domestic and EU enforcers. These further powers are detailed in paragraphs 21 to 34. Table 1 and Table 2 below summarises how the powers in the generic set have been modified compared to those in the CPRs and other relevant legislation. The new safeguards that have been added are highlighted in bold.
364. These provisions in the Act give effect in part to certain EU legislation by providing domestic regulators with the necessary powers for enforcing such legislation. This includes the Regulation on Consumer Protection Cooperation<sup>1</sup>, the Regulation on Accreditation and Market Surveillance<sup>2</sup> and the General Product Safety Directive<sup>3</sup>.
365. The existing investigatory powers are being repealed or revoked in order to ensure that only the generic set of powers apply in relation to the consumer legislation within the scope of this Schedule.

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<sup>1</sup> (EC) No 2006/2004.

<sup>2</sup> (EC) No 765/2008.

<sup>3</sup> 2001/95/EC.

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TABLE 1: SUMMARY OF MAIN MODIFICATIONS FROM EXISTING INVESTIGATIVE POWERS IN THE NEW GENERIC SET IN [PART 3 OF SCHEDULE 5](#) (NEW SAFEGUARDS ARE HIGHLIGHTED IN BOLD)

<i>Power/Provision</i>	<i>Modelled on</i>	<i>Main modifications from existing provisions</i>
Paragraphs 13 to 17 – Power to require production of information (by way of a written notice only)	Section 224 to 227 EA	Certain enforcers, such as unfair contract terms enforcers and public designated enforcers, have access to this power only.
		<b>Some enforcers are required to reasonably suspect a breach before exercising the power.</b>
		Clarifies that it includes a power to require the creation of documents.
		Clarifies that local weights and measures authorities have access to this power specifically for the purposes of fulfilling duties conferred by the Estate Agents Act 1979.
		Can be used for both criminal and civil enforcement purposes.
		<b>Provision is made regarding protection from self-incrimination.</b>
Paragraph 18 Application to the Crown		Clarifies that Part 3 of the Schedule applies to the Crown when an enforcer is acting for certain purposes.

TABLE 2: SUMMARY OF MAIN MODIFICATIONS FROM EXISTING INVESTIGATIVE POWERS IN THE NEW GENERIC SET IN [PART 4 OF SCHEDULE 5](#) (NEW SAFEGUARDS ARE HIGHLIGHTED IN BOLD)

<i>Power/Provision</i>	<i>Modelled on</i>	<i>Main modifications from existing provisions</i>
Paragraph 19 – Exercise of powers in this Part: Domestic enforcers	Regulation 21(1) CPRs and section 9 Estate Agents Act 1979	Details the purposes and circumstances in which the powers in this Part can be exercised by domestic enforcers.
		Clarifies that for the power to require production of documents, the enforcer need not have reasonable suspicion where there is a statutory duty to hold the documents sought or when the enforcer is a market surveillance authority as defined by the Regulation on Accreditation and Market Surveillance (EC 765/2008).
		Clarifies that the powers can be used to investigate undesirable practices under Estate Agents Act 1979 as well as breaches of it.

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<b><i>Power/Provision</i></b>	<b><i>Modelled on</i></b>	<b><i>Main modifications from existing provisions</i></b>
Paragraph 20 - Exercise of powers in this Part: EU Enforcers		Details the purposes and circumstances in which the powers in this Part can be exercised by EU enforcers.
Paragraph 21 – Power to purchase products	Regulation 20 CPRs	A new express provision is added to clarify that enforcers may enter premises normally open to the public and inspect products.
		The definition of officer in paragraph 7(1) (d) extends this power to authorised persons (e.g. volunteers). Clarification that power may be exercised at all reasonable times.
		Clarification that this power can be exercised without first giving notice or obtaining a warrant.
Paragraph 22 – Power to observe the carrying on of a business	Section 227B(1) (a) EA	A new express provision is added to clarify that enforcers may enter premises accessible to the public to observe businesses.
		Clarification that the power may be exercised at all reasonable times.
		Clarification that this power can be exercised without first giving notice or obtaining a warrant.
Paragraph 23 – Power to enter premises without warrant	Regulation 21(1)(a) CPRs (Currently excludes premises used only as a dwelling)	The power excludes entry to premises which are wholly or <b>mainly</b> private dwellings.
		<b>In relation to routine inspections there is a requirement to give written notice. There must be two working days between the date of receipt of the notice by the occupier and the date of entry by the enforcer. A routine inspection is defined in <a href="#">Schedule 5</a> as one where none of the circumstances in sub-paragraph (6) apply. These include circumstances where notice would defeat the purpose of the entry, e.g. because an officer reasonably suspects that evidence may be lost or destroyed if notice is given, such as where counterfeit goods are suspected. Notice also need not be given where the occupier has waived the requirement.</b>
		<b>If advance notice is not given, enforcers are required to give notice to occupiers when entering the premises.</b>
		<b>Enforcers are required to provide evidence of their authorisation and</b>

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<i>Power/Provision</i>	<i>Modelled on</i>	<i>Main modifications from existing provisions</i>
		<b>identity, whether or not advance notice has been given.</b> Clarification that proceedings are not invalid where there is a failure to provide notice or evidence of authorisation.
Paragraph 24 – Application of paragraphs 25 to 31		Clarifies that the powers in paragraphs 25 – 31 are only exercisable when the enforcer has entered premises under paragraph 23(1) or under a warrant under paragraph 32 - 33.
Paragraph 25 – Power to inspect products etc.	Regulation 21(1) (a) CPRs	This includes the power to inspect products, records and to examine any procedure on the premises, as well as inspecting any apparatus or fixed installation as defined in <a href="#">Electromagnetic Compatibility Regulations 2006 (SI 2006/3418)</a> .
Paragraph 26 – Power to test equipment	Weights and Measures Act 1985 and Weights and Measures (Packaged Goods) Regulations 2006	This power enables enforcers to test weighing and measuring instruments on the premises.
Paragraphs 27 – Power to require production of documents	Regulation 21(1)(b) CPRs	Clarifies that this power includes requiring an explanation of documents. <b>Clarification that the power does not permit an officer to require a person to create a document except where documents are held electronically.</b> Clarification that the power can be applied to a business under investigation or another person.
Paragraph 28 – Power to seize and detain goods	Regulation 21(c) CPRs	<b>Requirement for enforcers to provide evidence of their authorisation and identity, whether or not it is requested by the occupier, unless it is impractical to do so.</b> <b>Requirement to issue a written record of goods seized.</b> The power is available where an enforcer reasonably suspects goods may disclose a breach of legislation; that goods are liable to be forfeited or that they may be required as evidence in proceedings. The time limit on detention for goods is three months, unless they are reasonably needed for longer, e.g. for use in proceedings.

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<i>Power/Provision</i>	<i>Modelled on</i>	<i>Main modifications from existing provisions</i>
		<b>Requirement for certain enforcers to have regard to any relevant provision on property seizure in a code of practice under <a href="#">section 66</a> Police and Criminal Evidence Act 1984 or <a href="#">Article 65</a> Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)).</b>
Paragraph 29 – Power to seize and detain documents required as evidence	Regulation 21(d) CPRs	<b>Requirement for enforcers to provide evidence of their authorisation and identity, whether or not it is requested by the occupier, unless it is impractical to do so.</b>
		<b>Requirement to issue a written record of documents seized.</b>
		The power is available where an enforcer reasonably suspects they may be required as evidence in proceedings.
		The time limit on detention for documents is three months, unless they are reasonably needed for longer for use in proceedings.
		<b>Requirement for certain enforcers to have regard to any relevant provision on property seizure in a code of practice under <a href="#">section 66</a> Police and Criminal Evidence Act 1984 or <a href="#">Article 65</a> Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341 (NI 12)).</b>
Paragraph 30 – Power to decommission or switch off fixed installations	Regulation 37 Electromagnetic Compatibility Regulations 2006	Confers a power to decommission or switch off fixed installations (as defined in the Electromagnetic Compatibility Regulations 2006).
Paragraph 31 – Power to break open a container/vending machine	Regulation 21(2) CPRs	Clarification that the power includes access to information held on electronic devices, such as computers including those on a network.
		Clarification on what constitutes a container.
Paragraphs 32 to 33 – Power to enter premises with a warrant	Combination of Regulation 22 CPRs and 227C EA	Includes a condition that a Justice of the Peace must be satisfied that certain conditions have been met, such as that it is likely that goods or documents may be concealed or interfered with, if notice of entry were given.
		<b>Where premises are unoccupied or occupier is temporally absent, officers will be required to issue a notice</b>

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		<b>on leaving the premises stating that the premises have been entered under warrant and to leave the premises secured as found.</b>
Paragraph 34 – Power to require assistance from persons on the premises	Provision under Weights and Measures legislation	Requirement for persons on premises to provide assistance or information reasonably required by the officer.  Clarification that the power includes requiring a person on the premises to provide information about the name and address of the packer or importer of a package which the officer finds on the premises.

366. Additionally, Part 5 of the Schedule provides supplementary provisions. Paragraphs 36 and 37 respectively designate the acts of obstructing officers of enforcers and purporting to act as such an officer when not so authorised as offences. These and other provisions in the generic set are detailed in Table 3 below.

TABLE 3: SUPPLEMENTARY PROVISIONS IN **PART 5 OF SCHEDULE 5** (NEW SAFEGUARDS ARE HIGHLIGHTED IN BOLD)

<i>Provision</i>	<i>Modelled on</i>	<i>Main modifications from existing provisions in CPRs</i>
Paragraph 36 - Offence of obstruction	Combination of Regulation 23 CPRs and regulation 24(2)(b) General Product Safety Regulations 2005	Clarification that this offence applies in relation to powers exercised under Part 4.  Includes an offence of recklessly making a statement which is false. Maximum penalties are aligned at level 3 on the standard scale.  Clarification that a person commits an offence if they give misleading information.
Paragraph 37 - Offence of purporting to act as officer	Regulation 21(11) CPRs	Clarification that the level of the maximum penalty for this offence may be subject to amendment by section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and regulations made under that provision.
Paragraph 38 - Access to seized goods and documents		<b>Enforcers must grant reasonable access to goods and documents seized, e.g. so that copies of seized documents can be made. Enforcers may recover the reasonable costs of complying with such a request.</b>
Paragraph 39 - Notice of testing goods	Combination of Regulation 24 CPRs and Consumer Protection Act 1987 (CPA) and	Clarification that there is a requirement for notice also to be given where the test leads to issuing of a suspension notice or the forfeiture of the goods.

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<i>Provision</i>	<i>Modelled on</i>	<i>Main modifications from existing provisions in CPRs</i>
	Electromagnetic Compatibility Regulations 2006	
Paragraph 40 - Appeals against detention of goods	Section 33 CPA	None.
Paragraph 41 - Compensation	Regulation 25 CPRs	None.

367. Also in Part 6 of this Schedule, the law in relation to the ability of Trading Standards Services is clarified to ensure that they are able to operate across local authority boundaries efficiently and effectively. This is set out at paragraphs 44 to 46 of the Schedule.

***Section 78: Amendment of the Weights and Measures (Packaged Goods) Regulations 2006***

368. This section provides an automatic exemption from keeping records of checks for packers of bread which is sold unwrapped or in open packs.

***Section 79: Enterprise Act 2002: enhanced consumer measures and other enforcement***

**Introduction**

- 369. The intention of this part of the Act is to amend Part 8 of the EA to allow the courts to attach a range of enhanced consumer measures to enforcement orders and undertakings. Public enforcers will also be able to agree undertakings under Part 8 that include enhanced consumer measures.
- 370. The main aim of the section is to give the civil courts and public enforcers flexibility when dealing with persons who have given undertakings or who are subject to enforcement orders. The section will allow a range of enhanced consumer measures that are just, reasonable and proportionate, to be attached to enforcement orders and undertakings.
- 371. The section will also introduce a power for the Secretary of State to extend the use of the enhanced consumer measures to private designated enforcers.

**Background**

- 372. When there is a breach or potential breach of consumer law, the measures available to public enforcers are limited and there is a lack of flexibility in the ways that they can achieve better outcomes for consumers and compliant businesses. The main formal sanction is a criminal prosecution of the trader by an enforcer. While this can benefit consumers as it prevents the spread of instances of illegal trading, in practice there is generally no direct remedy for victims of the breach.
- 373. As an alternative to criminal prosecution, certain enforcers can seek civil injunctive relief under Part 8 of the EA against infringements of consumer protection legislation. The key mechanism is an enforcement order. Through an enforcement order, a civil court can order that the infringer stop engaging in the conduct in question. It can also order that the infringer publish the enforcement order and a corrective statement, aiming to eliminate the continued effect of an infringement. Alternatively, a court or an enforcer may accept an undertaking from the business that they will not engage in conduct that



involves an infringement. However, civil enforcement will not generally give remedies to individual consumers or secure positive action by businesses.

374. The Government's response<sup>4</sup> to the consultation 'Extending the Range of Remedies Available to Public Enforcers of Consumer Law'<sup>5</sup> sets out further information on the measures in this section. The response also confirms the Government's intention that the new enhanced consumer measures should always be just, reasonable and proportionate and aimed at achieving one or more of the following:
- redress for consumers who have suffered loss from breaches of consumer law;
  - improved compliance and a reduction in the likelihood of future breaches; and
  - more information being provided to consumers so they can exercise greater choice and in doing so improve the functioning of the market for consumers and businesses generally.
375. Details of possible measures are not included in the legislation as this may risk taking away flexibility from the courts and enforcers of consumer law to identify the most suitable measure or measures to deal with a person subject to enforcement orders or undertakings. It may also take away the flexibility for a person who is subject to enforcement orders or undertakings to put forward their own measures, which could be deemed suitable, to the court or enforcer of consumer law.

## **Part 8 Enterprise Act 2002**

376. Part 8 of the EA enables certain enforcers to take civil action in respect of infringements of specified domestic/Community consumer legislation which harm the collective interests of consumers.
377. The enforcement procedure is set out at sections 214 to 223 of the EA. Key to this procedure is an application for an enforcement order (under section 215), following consultation with the business and notification of the CMA<sup>6</sup>, which can then be issued by the court (under section 217). As an alternative to issuing an enforcement order, the court may accept undertakings (section 217(9)). Similarly, as an alternative to making an application for an enforcement order the enforcer may accept undertakings (section 219).

## **Enforcers**

378. There are a number of enforcers who are able to use this enforcement procedure. Some enforcers are specialist, within a particular market, for example the CAA; whereas others, like Trading Standards Services have a broader remit. The EA (section 213) provides for the following categories of enforcer: general<sup>7</sup>; designated<sup>8</sup>; community<sup>9</sup>; and CPC<sup>10</sup>.

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4 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/206373/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206373/bis-13-916-draft-consumer-rights-bill-governemnt-response-to-consultations-on-consumer-rights.pdf)

5 [www.bis.gov.uk/Consultations/consultation-rationalising-modernising-consumer-law?cat=closedawaitingresponse](http://www.bis.gov.uk/Consultations/consultation-rationalising-modernising-consumer-law?cat=closedawaitingresponse)

6 Consultation on extending the range of remedies available to public enforcers of consumer law

7 Section 214 was amended by Article 9 of [SI 2013/783](#).

8 Competition and Markets Authority, Trading Standards Services in Great Britain; Department of Enterprise, Trade and Investment in Northern Ireland.

9 Designated, see [SI 2003/1399](#) as amended [SI 2005/917](#) and [SI 2013/478](#): the Civil Aviation Authority, the Northern Ireland Authority for Utility Regulation, Ofcom, the Water Services Regulation Authority, the Gas and Electricity Markets Authority, the Information Commissioner, the Office of Rail Regulation, the Consumers' Association and the Financial Conduct Authority.

10 A qualified entity for the purposes of the Injunctions Directive EC 98/27 (Injunctions for the protection of consumers' interests) which is specified in the list published in the Official Journal of the European Community, but is not a general, designated or CPC enforcer.

11 Competition and Markets Authority, Civil Aviation Authority, Financial Conduct Authority, Secretary of State for Health, Department of Health Social Services and Public Safety in Northern Ireland, Ofcom, Department of Enterprise, Trade and Investment in Northern Ireland, every local weights and measures authority, Independent Committee for the Supervision of Standards of the Telephone Information Services, the Information Commissioner.

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379. Under section 213(4), the Secretary of State may designate a person or body which is not a public body only if the person or body (as the case may be) satisfies such criteria as the Secretary of State specifies by Order. Currently only the Consumers' Association (Which?) is designated as such.
380. The new enhanced consumer measures will only be available where the enforcer is a public body. A power is included to extend the use of the measures to private designated enforcers if certain conditions are met.
381. The section amends Part 8 of the EA to enable enforcement orders or undertakings to include new enhanced consumer measures, in addition to requirements that could be made under the existing legislation (i.e. generally a requirement to stop, or to not engage in the conduct that constitutes a breach of consumer law).
382. [Section 79](#) introduces Schedule 7 and limits the use of the enhanced consumer measures to breaches or potential breaches of consumer law that occur, or are likely to occur, after the commencement of this section.

***Schedule 7: Enterprise Act 2002: enhanced consumer measures and other enforcement***

383. The aim of Schedule 7 is to provide greater flexibility for public enforcers and the civil courts in relation to the contents of enforcement orders and undertakings made under Part 8 of the EA. If they are deemed suitable for a particular case, public enforcers and the civil courts will be able to attach (where they consider it just and reasonable) enhanced consumer measures to enforcement orders and undertakings. The enhanced consumer measures will need to fall into at least one of three specified categories (referred to as the redress, compliance and choice categories). Measures in the redress category will offer compensation or other redress to consumers who have suffered loss as a result of the breach of consumer law. Compliance measures are intended to increase business compliance with the law and to reduce the likelihood of further breaches. Measures in the choice category will help consumers obtain relevant market information to enable them to make better purchasing decisions.
384. [Paragraphs 2 and 3](#) amend sections 210 and 211 of the EA to widen the injunctive regime under Part 8. This will enable enforcers to use it for infringements of domestic legislation that harm the collective interests of consumers where either the supplier or the consumer is in the UK.
385. [Paragraph 4](#) updates the list of enforcers in the EA.
386. [Paragraph 5](#) amends section 214 (consultation), and sub-paragraph (2) extends from 14 to 28 days the consultation period for enforcers of consumer law before they can take action against a person for an enforcement order or undertaking in cases where the new subsection (4A) applies (see paragraph 389 below).
387. Sub paragraph (3) inserts a new subsection (4A) that describes when the extended 28 day period applies. It applies in those cases where the person that may be subjected to the enforcement order or undertaking is a member of, or represented by, a trade association or other business representative body that operates a consumer code of practice that has been approved by a public enforcement body or a community interest company whose role includes the approval of consumer codes.
388. In practice, the extended consultation period may be used, for example, by the person that may be subject to the enforcement order or undertaking to propose their own measures which may include addressing the detriment caused and be based on the requirements of the relevant consumer code. Depending on the circumstances of the case, this may be an indicator that the infringement will not be repeated. At the end of the 28 day period, the enforcer of consumer law may take further action if they consider it appropriate. They can either commence court action to seek an enforcement order and/or seek to work with the person to agree undertakings.

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389. [Paragraph 6](#) amends section 217 (enforcement orders) inserting new subsections (10A) to (10D). New subsection (10A) provides a power for the court to attach enhanced consumer measures defined in section 219A (paragraph 395 below) to an enforcement order and for the court to specify an appropriate time period for the person to comply with the enhanced consumer measures.
390. New subsection (10B) allows the court to attach enhanced consumer measures to an undertaking accepted under section (9) and for the court to specify an appropriate time period for the person to comply with the enhanced consumer measures.
391. New subsection (10C) restricts the court from attaching enhanced consumer measures to an enforcement order or undertaking sought by a private enforcer unless the conditions in new section 219C are met.
392. New subsection (10D) allows the court to include in an enforcement order or undertaking a requirement that the person subject to the enforcement order or undertaking provide information or documentation to the court to show that they have complied with the enhanced consumer measures.
393. [Paragraph 7](#) amends section 219 (undertakings) inserting new subsections (5ZA) and (5ZB). New subsection (5ZA) enables public enforcers to include enhanced consumer measures in undertakings and to be provided with documentation from the person subject to the undertaking and to specify an appropriate time period for the person to comply with the enhanced consumer measures. Subsection (5ZA) also requires the person subject to the undertaking to provide information or documents to the enforcer to enable them to determine if the person is carrying out the enhanced consumer measures agreed in the undertaking.
394. New subsection (5ZB) restricts private enforcers from agreeing an undertaking with enhanced consumer measures unless the conditions in new section 219C are met.
395. [Paragraph 8](#) inserts new sections 219A (definition of enhanced consumer measures) and 219B (inclusion of enhanced consumer measures etc) and 219C (availability of enhanced consumer measures to private enforcers). New section 219A(1) lists the three categories of enhanced consumer measures – redress, compliance and choice. Subsections (2) to (5) describe those measures.
396. New subsection (2) describes the first category of measures - the redress category. New subsection (2)(a) limits compensation or redress to those consumers who have suffered loss as a result of the breach of consumer law. This is mirrored in new section 219B(4)(a). Consumers retain the right to refuse offers of redress, whether in an enforcement order or undertaking, and instead take their own civil action against the person that has caused them detriment. Where the infringing conduct relates to a contract, new subsection (2)(b) states that measures in the redress category can include giving consumers the option to terminate that contract. New subsection (2)(c) allows for measures intended to be in the collective interests of consumers in cases where consumers who have suffered detriment cannot be identified or it would require a disproportionate cost to do so. Measures in these circumstances could include, for example, the non-compliant business making a charitable donation equivalent to the value of the detriment caused to consumers (where that charity acts in the interests of consumers). New subsection (2)(c) only applies in the circumstances outlined above. It does not apply in circumstances where consumers who have been identified as suffering detriment choose to decline the redress offered.
397. New subsections (3) and (4) describe the measures in the second and third categories – the compliance and choice categories. Measures in these categories might include the person subject to the enforcement order or undertaking:
- appointing a compliance officer;
  - introducing a complaints handling process;

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- improving their record keeping;
  - signing up to an established customer review / feedback site; or
  - publicising details of the breach or potential breach, and what they have done to put the situation right in the local or national press or on social media.
398. New subsection (5) excludes the existing publication requirements within Part 8 of the EA from the scope of the new enhanced consumer measures.
399. New section 219B sets out the requirements that apply to the inclusion of enhanced consumer measures within an enforcement order or undertaking. New subsection (1) confirms that only just and reasonable enhanced consumer measures can be attached to enforcement orders or undertakings under this Part. New subsections (2) and (3) set out the factors the court or enforcer must take into account. This includes a specific requirement that the measures must be proportionate, taking into account the costs of the measures (to business and consumers) and the benefit to consumers.
400. New subsections (4) to (5) make provision in relation to a loss case (which is defined in new subsections (9) and (10)). These provisions restrict the imposition of enhanced consumer measures in the redress category to cases where there has been a loss suffered by consumers and require that in those cases, the court or enforcer must be satisfied that the cost to the person subject to the enforcement order or undertaking of complying with the measures is unlikely to exceed the loss suffered by consumers. However, the administrative costs (i.e. the cost of setting up and running the redress scheme) should not be included in this calculation.
401. New subsections (6) and (7) limit any waiver sought by the person who is subject to an enforcement order or undertaking, from consumers as part of a compensation scheme, so that the waiver is not valid to the extent that it seeks to cover conduct which is not covered by the enforcement order or undertaking. For example, the waiver will not be valid if it relates to additional goods or services that were not covered by the enforcement order or undertaking.
402. New section 219C sets out the conditions that must be met before enhanced consumer measures can be sought in an undertaking or order sought by a private enforcer.
403. New subsection (3) sets out the first condition, which is that the enforcer must have been specified by the Secretary of State in an Order under this section.
404. New subsection (4) sets out the second condition, which is that the enhanced consumer measures must not directly benefit the enforcer or an associated undertaking. New subsection (5) sets out particular types of measure that would be considered as directly benefitting the enforcer or an associated undertaking. These include requiring a person to pay money to the private enforcer, requiring a person to participate in a scheme designed to recommend goods or services that is administered by the private enforcer or where the measure would give the private enforcer a commercial advantage over any of its competitors.
405. New subsection (6) provides that the Secretary of State can only exercise the power in subsection (3) to extend the use of the enhanced consumer measures to a private enforcer if they are satisfied that it will result in:
- more redress being paid to consumers;
  - more information being provided to consumers to enable them to make better informed purchasing decisions; and/or
  - more compliance by business with the law.
406. New subsection (7) provides that the Secretary of State can only use the power in subsection (3) if the private enforcer is subject to the principles of good regulation in

the Regulators Code and section 21 of the Legislative and Regulatory Reform Act 2006 (transparency, accountability, proportionality, consistency and targeting cases that need action).

- 407. New subsections (9) and (10) set out a requirement on private enforcers that when using enhanced consumer measures they must act consistently with advice or guidance given by a primary authority.
- 408. New subsection (11) defines “associated undertaking”.
- 409. [Paragraph 9](#) makes amendments to section 220 of the EA (further proceedings), which makes provision for further applications to the court where there has been a failure to comply with an enforcement order or undertaking made under sections 217 and 218 of the EA. Sub-paragraph (2) inserts a new subsection (1A) which provides that section 220 does not apply where the only failure is a failure to comply with the information requirement in new subsection 217(10D).
- 410. Subsection 220(2) of the EA gives the CMA the same right to apply to the court in respect of a failure to comply with an order or undertaking as the enforcer that made the application for the order. Sub-paragraph (3) amends subsection 220(2) to provide that any CPC enforcer (defined in section 213(5A)) has that right, not just the CMA.
- 411. Sub-paragraph (4) contains related or consequential amendments to Part 8 of the EA.
- 412. [Paragraph 10](#) updates the EA to reflect the enforcement of Schedule 5 in the Consumer Rights Act 2015.

### ***Section 80: Contravention of code regulating premium rate services***

- 413. Under sections 120 to 123 of the Communications Act 2003, providers of premium rate services are obliged to comply with the code published by the regulator, PhonepayPlus, and approved by Ofcom for the purposes of regulating such services. Premium rate services are a form of micro-payment for content, data services and value added services charged to a telephone bill. They include services such as directory inquiries, voting in competitions and quizzes, business information lines, making charity donations by text and making payment for digital goods and services.
- 414. PhonepayPlus may impose a maximum penalty of £250,000 in respect of a contravention of the code. For example, some providers may use intentionally misleading promotional material or fail to provide clear pricing information, leaving consumers out of pocket.
- 415. This section amends these provisions to make clear that the maximum penalty of £250,000 can be imposed in respect of each breach of the code and not, as has been argued by some providers, just once regardless of the number of provisions of the code that have been breached in any one set of proceedings against a provider.
- 416. This will allow PhonepayPlus to impose penalties of more than £250,000 in appropriate cases and where it is proportionate to do so.

## ***Chapter 2: Competition***

### **Summary and Background**

- 417. This Chapter deals with the scope and operation of the Competition Appeals Tribunal. It introduces provisions to make it easier for consumers and businesses to gain access to redress where there has been an infringement of antitrust provisions (“competition law”), and addresses the unintended barriers in the current process to the appointment of Scottish and Northern Irish judges to sit as chairmen in the Competition Appeal Tribunal (CAT).

### **Section 81: Private actions in competition law**

418. **Section 81** and Schedule 8 have three main aims:
- To widen the types of the competition cases that the Competition Appeal Tribunal hears (“CAT”) (see paragraph 420 to 433 below) and to make other changes to the procedure of bringing a private action before the CAT;
  - To provide for opt-out collective actions and opt-out collective settlements (see paragraphs 434 to 445 below);
  - To provide for voluntary redress schemes (see paragraph 446 to 450 below).
419. The Government’s response to the consultation “Private Actions in Competition Law”<sup>11</sup>, explains the proposals for reform of claims for damages under the private actions framework in Part 3 of this Act. There are also further proposed changes accompanying these sections in the CAT’s rules which govern how it deals with cases.

### **Widen the types of cases which the CAT can hear**

420. The CAT is a specialist tribunal whose function is to hear cases involving competition issues. However, at present, the CAT is restricted in which competition law cases it can consider. The CAT is able to hear follow-on cases. A follow-on action is brought after an infringement has been found by “a relevant competition authority”, which are the Competition and Markets Authority (“CMA”), European Commission and the following relevant sector regulators with competition powers:
- The Office of Gas and Electricity Markets (“Ofgem”);
  - The Office of Communications (“Ofcom”);
  - The Water Service Regulation Authority (“Ofwat”);
  - Civil Aviation Authority (“CAA”);
  - Office of the Rail Regulator (“ORR”);
  - Northern Ireland Authority for Utility Regulation (“NIAUR”);
  - Monitor.
421. In contrast, a stand-alone claim requires the party which brings the action to prove an infringement. In *Enron v EWS (I)*,<sup>12</sup> the Court of Appeal ruled that the scope for the CAT to go beyond the findings of the initial infringement decision is extremely limited. This judgment is widely thought to be one of the contributing factors restricting the role of the CAT in competition law actions in the current regime. Businesses or consumers who wish to bring stand-alone cases must bring their case in the High Court of England and Wales, the Court of Session or the Sheriff Court in Scotland or the High Court of Northern Ireland.
422. In addition, whilst the CAT may award damages for follow-on actions, it does not have the power to grant injunctions (an order which prohibits a party from doing a particular act). This restriction prevents a party from obtaining redress from the CAT in the form of an order prohibiting, for example, anti-competitive pricing. At present, a party seeking an injunction would need to apply to the High Court.
423. **Paragraph 4** replaces section 47A of the Competition Act 1998 (“CA”) which currently only provides for follow-on cases to be brought before the CAT. Paragraph 4 enables the CAT to hear a stand-alone claim as well as a follow-on claim and also to have the power to grant injunctions.

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<sup>11</sup> <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>

<sup>12</sup> *English Welsh & Scottish Railway Limited v Enron Coal Services Limited* [2009] EWCA Civ 647, 1 July 2009.

424. **Paragraph 31** inserts paragraph 15A of the EA to allow rules to be made providing for a fast-track procedure for claims brought under s.47A of the CA. The purpose of this is to enable simpler cases brought by small and medium enterprises (“SMEs”) to be resolved more quickly and at a lower cost.
425. **Paragraph 7** introduces a new section 47D of the CA. This provides that an injunction granted under s.47A and in respect of collective proceedings is enforceable as if it were granted by the High Court. This means that if the injunction is breached, a party may bring proceedings for breach of the injunction, such as contempt proceedings which could result in a penalty such as a fine.
426. **Paragraph 24** amends Schedule 4 of the EA providing for enforcement of injunctions granted under section 47A of the CA. It does this by providing that where a party fails to comply with an injunction, the CAT may certify the matter to the High Court, i.e. sets out the facts and evidence of the matter.
427. **Paragraph 34** amends Schedule 4 of EA to enable rules to be made about the grant of injunctions by the CAT.
428. **Paragraph 8** introduces a new section 47E of the CA. This provides that the limitation/prescription periods (the time limit for claims to be brought) for claims before the CAT are the same as the relevant limitation/prescription period for claims before the High Court in England and Wales, the Court of Session in Scotland, the High Court in Northern Ireland. At present, the limitation period for claims before the CAT is two years, compared with six years for a claim before the High Court of England and Wales and the High Court in Northern Ireland and five years for the Court of Session in Scotland. See paragraph 442 below for how the limitation/prescription periods may be suspended in the case of collective actions.
429. **Paragraph 13** amends section 58 of the CA to make clear that the CAT is bound by a finding of fact of the CMA, unless it directs otherwise. This is to ensure the CAT has sufficient flexibility when dealing with case and is in the same position as a court which hears a competition case. A court is already able to make such a direction.
430. **Paragraph 9** amends section 49 of the CA to provide for a right of appeal against a decision of the CAT in proceedings brought under section 47A of the CA (stand-alone or follow-on actions) or 47B of the CA (collective proceedings). Where the appeal concerns section 47B, it may only be brought by the representative in those proceedings.
431. **Paragraph 14** replaces existing section 58A of the CA. The purpose of this is to make clear when a court or the CAT is bound by a decision that there has been an infringement of competition law. This ensures the position is the same for the court and the CAT. New section 58A ensures that once an infringement decision has become final, the court or the CAT is bound by it. New section 58A sets out when a decision becomes final, for example when the time for appealing against the decision has expired without an appeal having been brought.
432. **Paragraph 32** amends paragraph 17 of Schedule 4 to the EA, to enable rules to be made to enable the CAT to order payments to a legal party who has been acting on behalf of a business or consumer for free (i.e. on a pro bono basis).
433. **Paragraph 33** inserts paragraph 20A of Schedule 4 to the EA which enables rules to be made which enable the CAT to stay or sist proceedings under section 47A and 47B. This is because the CAT may wish to stay (or sist) proceedings, for example if the original infringement decision is subject to appeal and that appeal has not yet been decided.

### **Collective actions and opt-out collective settlements**

434. The second aim is to introduce an opt-out collective actions regime and an opt-out collective settlement regime (both of which involve a case being brought forward on

behalf of a group of claimants to obtain compensation for their losses). Cases would be able to be brought by representatives on behalf of individuals and/or businesses.

435. The CAT can already hear opt-in collective actions under the existing section 47B of the CA. An opt-in regime requires claimants to “opt-in” to the legal action to be able to obtain any damages. However, the CAT does not currently have the power to hear opt-out collective actions. An opt-out regime means claimants are automatically included into the action unless they “opt-out” in a manner as decided by the CAT on a case by case basis. The purpose of introducing opt-out collective actions is to allow consumers and businesses to easily achieve redress for losses they have suffered as a result of breaches of competition law.
436. The function of a collective settlement regime is to introduce a procedure for infringements of competition law, where those who have suffered a loss and the alleged infringer may jointly apply to the CAT to approve the settlement of a dispute on an opt-out basis. The collective settlement regime will operate on the same opt-out principles as the opt-out collective proceedings.
437. [Paragraph 5](#) replaces section 47B of the CA so as to provide for opt-out collective proceedings, as well as continuing to provide for opt-in collective proceedings. Subsection (11) defines opt-out collective proceedings and also provides that a person who is not domiciled in the United Kingdom must opt-in to become part of the proceedings. Subsection (10) defines opt-in collective proceedings. Subsection (4) provides that collective proceedings may only be progressed if the CAT makes a collective proceedings order. Subsection (5) provides that that CAT may only make a collective proceedings order if it considers the person who brought the proceedings meets the requirements of subsection (8) and the claims are eligible for inclusion in collective proceedings (they fall within the claims provided for in section 47A of the CA, so the proceedings may either be stand-alone or follow-on). Subsection (8) provides that a representative must be a person whom the Tribunal considers it is just and reasonable to appoint as a representative. The current section 47B of the CA only allows for named representative bodies to bring opt-in collective actions. Currently, this only includes the consumer organization Which?. The new subsection (8) will enable any appropriate representative, such as a consumer body or trade association to bring claims on behalf of consumers or businesses, as long all the claims raise the same, similar or related issues of fact or law under section 49B(6).
438. [Paragraph 6](#) introduces new section 47C of the CA. Subsection (1) prohibits the CAT from awarding exemplary damages in collective proceedings, i.e. damages which are designed to be punitive rather than simply compensate for the actual loss suffered. This is to avoid very large damages being awarded which do not reflect the losses suffered. Subsection (2) enables the CAT to determine the damages due in collective proceedings without being required to consider each claim which forms part of the action. This is designed to avoid the CAT having to spend time assessing many individual claims and instead enables the CAT to group the claims together for the purpose of assessing damages. Subsection (5) provides that damages not claimed in opt-out collective proceedings must be paid to a charity specified by section 194(8) of the Legal Services Act 2007, unless under subsection (6) the Tribunal decides to award part or all of any unclaimed damages to the claimant's representative to cover their costs. Currently, the charity is the Access to Justice Foundation as recommended by the Jackson Review of Costs<sup>13</sup>, the Civil Justice Council and HM Treasury's Financial Services Rules committee as a suitable body to receive unclaimed sums. Subsection (7) allows the Secretary of State to make regulations to substitute a different a different charity for one being prescribed at the time. Subsection (8) provides that damages-based agreements are not allowed in opt-out collective actions. A damages-based agreement is where some of the damages are paid to the legal representatives. Paragraph 37 amends



*These notes refer to the Consumer Rights Act 2015  
(c.15) which received Royal Assent on 26 March 2015*

section 58AA of the Courts and Legal Services Act 1990, to make clear this restriction on damages-based agreements applies, notwithstanding the other provisions of that Act.

439. [Paragraph 25](#) amends Schedule 4 of the EA to allow representatives in a collective action to be able to take action to enforce an order concerning damages in collective proceedings.
440. [Paragraph 26](#) replaces paragraph 6(a) and amends paragraph 6(b) of Schedule 4 EA to provide that where damages are awarded in a collective action to a person who is not a party to the order (i.e. they are not the representative or another person who the CAT considers are suitable to hold the damages and then distribute) or costs or expenses are awarded to a person in respect of a claim made under section 47A of the CA before it became part of the collective proceedings, it may only be enforced if permission is granted by the High Court or the Court of Session. This is to provide some judicial control over the volume of enforcement claims being made by persons who are not the representative or another person who the CAT considers is suitable to hold the damages.
441. [Paragraph 27](#) amends paragraph 7 of Schedule 4 of the EA so that where any award of costs is made against a representative in collective proceedings, the person who is being represented (i.e. a particular business or consumer) may not be held responsible for those costs. This provision is designed to prevent legal costs being passed on from the representative to the persons who are being represented.
442. [Paragraph 8](#) (see paragraph 428 above) introduces new section 47E of the CA which makes provisions about the limitation/prescription periods for claims before the CAT. Subsection (4) provides for there to be a suspension of the limitation/prescription period where claims are made under section 47B of the CA (collective proceedings). The purpose of this is to discourage parties from also commencing separate section 47A proceedings before the CAT, so as to protect their position. This is because the collective proceedings may only progress if a collective proceedings order is made. As this may not be made for some time, a party may be tempted to bring separate section 47A proceedings before the CAT to avoid the limitation/prescription period expiring before it knows whether the collective proceedings can be continued. The suspension of the limitation/prescription period offers protection to claimants who might otherwise be time-barred in bringing a single claim if the collective proceedings fail. Subsection (5) sets out when the limitation/prescription period will resume, such as where the Tribunal declines to make a collective proceedings order. Paragraph 29 replaces paragraph 11(2)(a) of Schedule 4 EA to enable rules to be made about the operation of the limitation and prescription periods.
443. The Government is also keen to encourage parties to settle disputes. To do this it is providing for collective settlements in opt-out collective proceedings where a collective proceedings order has been made as well as in cases where a collective proceedings order has not been made. The Government is also introducing voluntary redress schemes (see paragraphs 446 – 450 below). Paragraph 10 provides for a new section 49A of the CA which provides for collective settlements where a collective proceedings order has been made. Subsection (2) provides that the representative and the defendant must apply for approval of the proposed collective settlement. Subsection (4) provides that where there are multiple defendants, the defendants who want to be bound by an approved collective settlement must apply to the CAT. Subsection (5) provides that the CAT may approve the collective settlement if it is satisfied the terms are just and reasonable. Subsections (6) to (10) describes which persons are bound by the collective settlement.
444. [Paragraph 11](#) introduces a new section 49B of the CA which enables a collective settlement to be made where a collective proceedings order has not been made. This procedure may be relevant if parties are at an early stage of the litigation. Subsection (4) requires that the CAT may only approve the collective settlement if it makes a collective settlement order. Subsection (5) provides that this requires the CAT to consider the person who proposes to be the settlement representative is a person who the CAT could

approve as being a settlement representative and that if collective proceedings were brought, the claims would be suitable for inclusion in such proceedings. Subsection (8) provides the CAT may only approve the collective settlement if it considers its terms are just and reasonable. Subsections (9) and (10) provide for who is bound by a collective settlement order.

445. [Paragraph 31](#) introduces paragraph 15C to Schedule 4 of the EA to provide that rules can be made about collective settlements. It also enables rules to be made to provide for costs to be paid by an underlying claimant who is not the representative in a collective action, in limited circumstances where he or she makes an application. For example, where a claimant makes an application to have their representative removed.

### **Voluntary redress schemes**

446. The third aim is to define a voluntary redress scheme (referred to in legislation as a “redress scheme”) so as to put it on a statutory footing. The government is keen for parties who are found liable for a breach of competition law to enter into negotiations with consumers or businesses where possible rather than the first route being a private action proceeding through the courts. The intention is to provide suitable, alternative mechanisms to allow for alternative dispute resolution. One mechanism is to allow the CMA to certify voluntary redress schemes that are entered into by businesses that have been found to have infringed competition law.
447. To support this goal, Government is introducing a new power enabling the CMA to certify redress schemes. Even without the certification, voluntary redress schemes can still be offered. However, Government wishes to place voluntary redress schemes on a firmer legal footing by allowing the CMA to approve binding, voluntary undertakings as to a compensation scheme. The intention would be that the CMA could take into account whether a business had bound themselves to provide redress when assessing the level of fine for the competition law breach.
448. Accordingly, paragraph 12 introduces new section 49C, which provides that the CMA may decide to approve a voluntary redress scheme (which may be put forward to the CMA prior to an infringement decision or after the decision has been made). Where a scheme is submitted prior to the CMA making an infringement decision, the CMA may approve an outline of the voluntary redress scheme, if it makes an infringement decision. The CMA may then require the business to create the full scheme afterwards which complies with any conditions imposed, such as the provision for further information by a set date. If the business does not comply with the conditions, the CMA may withdraw its approval of the voluntary redress scheme. Although the CMA will not determine the level of compensation that should be paid under the scheme, subsection (3) allows the CMA to take into account the amount or value of compensation when deciding whether or not to approve a voluntary redress scheme. This is to permit the CMA to reject a scheme, if the compensation on offer seems exceptionally low. Subsection (8) provides that the Secretary of State may make regulations about the approval of voluntary redress schemes. These regulations may make provisions about the procedure for approval, including the information to be provided. In addition, they may set out the factors the CMA should or should not take into account when considering applications for approval.
449. [Paragraph 12](#) also inserts new section 49D to the CA. Section 49D provides that the CMA may require a person who applies for the approval of a voluntary redress scheme to pay the CMA's reasonable costs. The CMA will incur costs in considering an application for approval. In addition, paragraph 12 also inserts new section 49E to CA which provides in subsection (1) that a party who has a voluntary redress scheme approved has a duty to comply with its terms. Subsection (3) provides that if a business or consumer suffers as a result of a breach by a business of the terms of voluntary redress scheme, they may bring legal proceedings before a court for damages or another

remedy, such as an injunction. This is to ensure there are remedies available for a breach of a voluntary redress scheme.

450. **Paragraph 17** amends Schedule 8 of CA to allow for a business to appeal to the CAT against any costs imposed by the CMA in respect of a voluntary redress scheme.

### ***Section 82: Appointment of Judges to the Competition Appeal Tribunal***

451. This section changes the current process for appointing judges to the CAT to make it easier for judges from Scotland and Northern Ireland to be able to sit in the Tribunal as chairmen. It does this by providing for the Lord Chief Justices of England and Wales, and Northern Ireland and the Lord President of the Court of Session to be able to nominate judges sitting in their respective High Courts or the Court of Session for deployment as CAT chairmen.
452. Under the new provisions, the Lord Chief Justice of England and Wales will be able to nominate suitably qualified judges sitting in any Division of the High Court to be deployed as a judge in the CAT to sit as a chairman; currently, only judges appointed to the Chancery Division are appointed as CAT Chairs.
453. As a consequence of the change, the current eight year limit on appointment of judges in the CAT to sit as chairmen will not apply to those judges nominated to sit in the CAT and they will be able to sit until their retirement from the judiciary.

### ***Chapter 3: Duty of Letting Agents to Publicise Fees Etc.***

#### **Summary and background**

454. This Chapter imposes a duty on letting agents to publicise their fees, whether or not they are a member of a client money protection scheme and which redress scheme they have joined (fees etc). It explains which letting agents and which fees etc the duty applies to and details the enforcement of the duty.
455. Currently, although consumer rights legislation and guidance recommend that traders are clear and upfront about the fees which they charge, there is no specific duty for letting agents to display or publish their fees.

### ***Section 83: Duty of letting agents to publicise fees etc***

456. This section imposes a duty on letting agents to publicise 'relevant fees' (see commentary on section 85) and sets out how they must do this.
457. *Subsection (2)* requires agents to display a list of their fees at each of their premises where they deal face to face with customers and *subsection (3)* requires them to also publish a list of their fees on their website where they have a website.
458. *Subsection (4)* sets out what must be included in the list as follows. Subsection (4)(a) requires the fees to be described in such a way that a person who may have to pay the fee can understand what service or cost is covered by the fee or the reason why the fee is being imposed. For example, it will not be sufficient to call something an 'administration fee' without further describing what administrative costs or services that fee covers.
459. Subsection (4)(b) requires that where fees are charged to tenants the list should make clear whether the fee relates to each tenant under a tenancy or to the property. Finally, subsection (4)(c) requires the list to include the amount of each fee inclusive of tax, or, where the amount of the fee cannot be determined in advance a description of how that fee will be calculated. An example might be where a letting agent charges a landlord based on a percentage of rent.

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(c.15) which received Royal Assent on 26 March 2015*

460. *Subsection (6)* applies to letting agents who hold money on behalf of their clients as part of their letting agent or property management work. As well as publicising their fees, the agent must publish a statement which states whether or not that agent is a member of a client money protection scheme.
461. *Subsection (7)* means that agents who are required to belong to a redress scheme for dealing with complaints must publish which redress scheme they are a member of.
462. *Subsection (8)* enables the appropriate national authority to specify in regulations other ways in which letting agents must publicise details of their fees and the details that must be published. This could be used, for instance, to require letting agents to include information about fees in advertisements.
463. *Subsection (9)* defines a client money protection scheme and a redress scheme. A client money protection scheme is defined as a scheme which enables a client on whose behalf a letting agent holds money to be compensated by that scheme if all or part of that money is not repaid in circumstances where the scheme applies. A redress scheme is defined as a scheme which has been approved by the Secretary of State by order under section 83 or 84 of the Enterprise and Regulatory Reform Act 2013.

***Section 84: Letting agents to which the duty applies***

464. This section defines who is a 'letting agent' and explains when someone who could be regarded as a letting agent is exempt from the requirements of this Chapter.
465. *Subsection (1)* defines a letting agent as someone who engages in 'letting agency work', which is defined in section 86.
466. *Subsection (2)* excludes a person who carries out letting agency work as part of their employment contract. This is to ensure that a salaried employee is not held responsible for publishing the fees.
467. *Subsection (3)* gives powers to the appropriate national authority to exclude other persons and activities in regulations.

***Section 85: Fees to which the duty applies***

468. This section defines 'relevant fees' for the purposes of the duty to publicise fees.
469. *Subsection (1)* provides that 'relevant fees' are the fees, charges or penalties which a landlord or tenant pays to the agent in relation to letting agency work, property management work or otherwise in connection with an assured tenancy or a dwelling-house let under an assured tenancy. *Subsection (2)* excludes certain payments from the definition of 'relevant fees'. *Subsection (2)(a)* excludes the rent payable to a landlord (many agents collect the rent on behalf of the landlord). *Subsection (2)(b)* excludes fees, charges or penalties which a landlord has to pay the agent but which the agent simply passes onto another person. For example, an agent may pay a gardener on behalf of a landlord and then reclaim this money from the landlord. *Subsection (2)(c)* excludes the deposit which is paid by the tenant in respect of the tenancy. *Subsection (2)(d)* gives the appropriate national authority the power to exclude other payments from the definition of 'relevant fees'.

***Section 86: Letting agency work and property management work***

470. This section defines letting agency work and property management work for the purposes of this Chapter.
471. *Subsection (1)* defines letting agency work as work undertaken on behalf of prospective landlords and prospective tenants and covers the process both of finding a tenant for the landlord or a property for a tenant and the work done to put the tenancy in place. It applies only to the letting of privately rented homes. *Subsection (2)* excludes from

the definition of letting agency work those businesses that simply allow landlords and tenants to find and communicate with one another, provided they do not otherwise participate in the transaction.

472. *Subsection (3)* provides that local authorities are not included and thereby ensures that, for example, any local letting agency business established by local authorities is not caught by the duty in section 83.
473. *Subsection (4)* defines property management work for the purposes of this Chapter. The premises managed must consist of a dwelling-house let under an assured tenancy. As with letting agency work, property management work applies only to privately rented homes (see commentary on section 88 below).

### **Section 87: Enforcement of the duty**

474. *Subsection (1)* places a duty on every local weights and measures authority in England and Wales to enforce the requirement for letting agents to publicise their fees etc in its area.
475. *Subsection (2)* sets out that, if an agent breaches the duty in section 83(3) to publicise fees on its website, that breach is taken to have occurred in the area in which the property to which the fees relate is located.
476. *Subsection (3)* enables local weights and measures authorities who are satisfied on the balance of probabilities that a letting agent has breached the requirement to impose a financial penalty on the agent in respect of that breach.
477. *Subsection (4)* provides that while it is the duty of local weights and measures authorities to enforce the requirement in their area, they may also impose a penalty in respect of a breach which occurs in England and Wales but outside that authority's area. However, *subsection (6)* ensures that an agent may only be fined once in respect of the same breach.
478. *Subsection (5)* requires a local weights and measures authority who wants to impose a fine in respect of a breach outside its own area but in the area of a Welsh authority, to seek the consent of that authority.
479. *Subsection (7)* provides that local weights and measures authorities may fine letting agents in breach of the requirement up to £5,000. When imposing a fine, *subsection (8)* states that authorities must follow the process described in Schedule 9.
480. *Subsection (9)* requires a local weights and measures authority in England to have regard to any guidance issued by the Secretary of State about how letting agents should comply with the duty to publicise their fees etc and on how the authority should carry out its enforcement duties.
481. Similarly *subsection (10)* requires a local weights and measures authority in Wales to have regard to any guidance issued by the Welsh Ministers about how letting agents should comply with the duty to publicise their fees etc and on how the authority should carry out its enforcement duties.
482. *Subsection (11) and (12)* give both the Secretary of State and the Welsh Ministers the power to make secondary legislation which amends the enforcement provisions and make the necessary consequential amendments for England and Wales respectively.

### **Section 88: Supplementary provisions**

483. *Subsections (1) to (4)* provide the remaining definitions of the terms used in this Chapter. The definition of an assured tenancy is relevant to determining firstly who is a letting agent for the purposes of this Chapter and, secondly, the fees to which the duty applies. *Subsection (1)* defines an assured tenancy (which is the most common type of tenancy in the private rented sector) for these purposes. In particular, the definition of

an assured tenancy excludes assured tenancies granted by a private registered provider of social housing and any assured tenancy that is a long lease. This ensures that the duty applies to agents who let properties in the private rented sector and to the fees, penalties and charges that they charge in connection with the letting, management etc. of such properties.

484. *Subsections (5) to (9)* set out the Parliamentary procedures for making the regulations detailed in this Chapter and *subsections (10) and (11)* provide a power for incidental provision to be made.

#### ***Chapter 4: Student Complaints Scheme***

##### ***Section 89: Qualifying Institutions for the purposes of the student complaints scheme***

485. The section expands the list of higher education providers which are required to join the higher education complaints handling scheme. All those delivering courses which are specifically or automatically designated to receive student support funding in England and Wales and providers with degree awarding powers will be required to join. This scheme was set up under the provisions of the Higher Education Act 2004 and is operated by the Office of the Independent Adjudicator for Higher Education.

#### ***Chapter 5: Secondary Ticketing***

##### **Summary and Background**

486. This Chapter concerns the online secondary ticketing market. That is, the market where tickets for sporting, recreational and cultural events are re-sold having been first bought or otherwise acquired on the primary market from an event organiser. It concerns:
- Information which must be provided in respect of a ticket to its buyer, when that ticket is resold online;
  - The original terms and conditions of a ticket;
  - Reporting of criminal activity on online ticket marketplaces; and
  - A review of the online secondary ticketing market.
487. Currently, there are no provisions in statute specifically regulating the online secondary ticketing market. There is, however, other legislation which applies generally and in so doing covers the market, including:
- The [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\)](#) which provide that certain information must be provided when goods, a service or digital content are sold by a trader to a consumer, including sales concluded at a distance (e.g. online);
  - Section 166 of the Criminal Justice and Public Order Act 1994 which regulates the re-selling of tickets for certain football matches;
  - The Fraud Act 2006 and the [Consumer Protection from Unfair Trading Regulations 2008 \(SI 2008/1277\)](#) which aim to protect buyers from misleading or fraudulent sales; and
  - The [Unfair Terms in Consumer Contracts Regulations 1999 \(SI 1999/2083\)](#) (which are to be replaced by Part 2 of the Act once Part 2 comes into force) which provide that terms in a consumer contract must be fair.

488. This Chapter applies to tickets for all recreational, sporting and cultural events taking place in the UK<sup>14</sup>.

### **Duty to provide information about tickets**

#### ***Section 90: Duty to provide information about tickets***

489. **Section 90** sets out the information which is to be provided when a ticket is re-sold online by virtue of these provisions. As noted above, additional statutory information requirements may also apply. This section applies when a ticket is re-sold through an online secondary ticketing facility. This might be a website but could equally be a web based application (or other type of online facility). This section applies to tickets first offered for re-sale after the entry into force of the section.
490. The duty to provide information rests on both the seller of the ticket and the person operating the online facility through which it is being sold. In practice, it will be for the seller to give the information when they go to list their tickets online, and for the operator then to ensure that this information is given to the buyer.
491. There are four pieces of information which must be given. *Firstly, subsection (3)(a)* requires information to enable the buyer to identify the particular seat or standing area of the venue to which the ticket applies. This includes, where applicable, the name of the relevant area of the venue, the block in which the seat or relevant area is located, and the row and number of the seat. Where the seat and row are identified by something other than a number, this identifier must also be given.
492. Secondly, under *subsection (3)(b)* the buyer must be given information about any restrictions that apply to the ticket and concern who can use it. For example, the ticket might be for a specific area reserved for disabled persons, or it might only be able to be used by those under 12 years old.
493. Thirdly, *subsection (3)(c)* requires the face value of the ticket to be given. This is the price printed on the ticket itself. This will likely be the price at which the seller originally bought the ticket for.
494. Fourthly, where the seller has a connection with the online facility on which they are selling, or the organiser of the event for which the ticket is being sold, under *subsection (6)* they must state that this is the case, and what that connection is. For example, if the seller is an employee of the facility which they are using to sell the tickets, they must give the buyer that information. Where the seller is the operator of the facility itself, this information must be given.
495. In each case, the seller only has to provide this information where it is applicable to them or the ticket they are selling. For example, where a ticket is for a standing section of a venue, the seller does not have to give a seat number. The seller must make reasonable attempts to obtain and then provide this information to the buyer, however it is acknowledged that there are circumstances where this might not be possible, such as where the ticket is resold before the event organiser has allocated seat numbers.
496. *Subsection (8)* requires the information to be provided in a clear and comprehensible manner, and before the buyer purchases the ticket. For example, the information would be clearly displayed in a legible font before the buyer clicks on a button marked “confirm purchase”.

#### ***Section 91: Prohibition on cancellation or blacklisting***

497. **Section 91** sits alongside section 90 and provides for consumer protections when the information required by section 90 is given. Information provided under section 90

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<sup>14</sup> This Chapter is, however, without prejudice to any existing restrictions on the resale of tickets, such as that set out in section 166 Criminal Justice and Public Order Act 1994.

*These notes refer to the Consumer Rights Act 2015  
(c.15) which received Royal Assent on 26 March 2015*

could be used by an event organiser to cancel a ticket or blacklist a seller. An event organiser may also seek to cancel a ticket or blacklist a seller for other reasons or based on other information.

498. **Section 91** provides that an event organiser cannot cancel a ticket (*subsection (2)*) or blacklist a seller (*subsection (3)*) merely because that ticket is resold or offered for resale unless two conditions are met:
499. Firstly, it must be a term of the contract under which the original buyer purchased the ticket from the event organiser that cancellation of the ticket and/or blacklisting of the seller may occur as a consequence of that ticket being resold or offered for resale.
500. Secondly, that term of the contract under which the original buyer purchased the ticket from the event organiser must not be unfair. The fairness of terms in consumer contracts is assessable under Part 2 of this Act (see paragraphs 287 to 348 of these notes) and, before the coming into force of those provisions, under the Unfair Terms in Consumer Contracts Regulations 1999. Unfair terms are not enforceable against consumers.
501. Blacklisting of a seller includes not just the placing of the seller on a list of those sellers who cannot, or cannot without restriction, purchase further tickets. Blacklisting covers any steps taken by an event organiser to prevent or restrict that seller buying tickets, in any form.
502. *Subsection (9)* applies this prohibition to actions taken by event organisers after this section comes into force. The ticket in question may have, however, been resold or offered for resale before that time.

***Section 92: Duty to report criminal activity***

503. This section provides that, where the operator of a secondary ticketing facility is aware of criminal activity on that facility, a relevant report must be made to the police and to the event organiser. This section applies to criminal activity related to the resale of tickets (though there may be other reporting requirements which apply where this is not the case).
504. Criminal activity means where an offence is committed, under the law of any part of the UK. There are several pieces of legislation breach of which could lead to an offence being committed. However this provision is intended to cover legislation for which the authorities listed here (that is, the police) are one of the principal enforcers. This includes offences under the Fraud Act 2006 and the Theft Act 1968.
505. *Subsection (3)* specifies that the information to be reported is—where this is known to the operator—the identity of the person committing the offence (for example their company name or an individual’s name) and the fact that the operator knows that a criminal offence is or has been committed.
506. The report must be made to a police force within the United Kingdom. Where, for example, the facility is aware that the person is based in England the report could be made to a police constable in England. Where there is a lead police force for a particular crime (for example fraud) that force might be the appropriate police force to which the report can be made. A report must also be made to the organiser of the relevant event(s), that is, where the criminal activity involves tickets for a particular event, the organiser of that event must be informed. However, under *subsection (5)* such a report is not required if it would prejudice the investigation of an offence (not just the one being reported). In practice, this might mean that—where the facility has some doubt—the report is first made to the police who can advise whether a report to an event organiser would prejudice an investigation.
507. The criminal activity can be either ongoing or have already occurred, however the operator of the facility need only report offences which it became aware of after this provision comes into force.



**Section 93: Enforcement of this Chapter**

508. This section provides for enforcement of sections 90, 91 and 92. Enforcement is by local weights and measures authorities in Great Britain (known as Trading Standards) and by the Department of Enterprise, Trade and Investment in Northern Ireland.
509. *Subsection (4)* allows these enforcers to levy a fine of up to £5000 for a breach of the requirements in those sections. That fine can be levied on a private individual or a business, depending on the nature of the breach.
510. This sanction is, however, limited by *subsection (5)* which states that an enforcer may not impose a fine for a breach of the duty in section 90 or the prohibition in section 91 if it is satisfied that the breach was the result of circumstances beyond a person's control, for example a mistake or accident, and the person had taken reasonable precautions and undertaken due diligence. For example, where an online ticket marketplace had been supplied with false information by a seller, and had taken reasonable steps to ensure that that information was correct, they would not be liable for a fine.
511. This section also gives effect to Schedule 10 (secondary ticketing: financial penalties) which provides for the procedure to be followed when enforcing the provisions in this Chapter:
- a) Before a fine is levied, paragraph 1 of this Schedule requires a relevant enforcer to give a notice of intent. This must be given within 6 months of the enforcer having evidence of a breach. Within 28 days of receiving that notice, the person on whom it is served can make representations. Once the 28 day period has expired, the enforcer can issue a final notice giving details of the level of the fine and how it is to be paid. The notice can be withdrawn at any time.
  - b) Once a final notice has been issued, the person on whom it is served can appeal on the grounds given in paragraph 5 of this Schedule.
  - c) Should the final notice not be appealed, or be upheld on appeal, and the fine not be paid, the enforcer can ask the county court (or in Scotland, a sheriff court) for an order to recover that fine under paragraph 6 of this Schedule.

**Section 94: Duty to review measures relating to secondary ticketing**

512. This section provides for a review of the online secondary ticketing market. The review must either be carried out by the Secretary of State or arranged by the Secretary of State to be carried out, *e.g.* by an external reviewer.
513. The review:
- a) must cover the online secondary ticketing market for recreational, sporting and cultural events in the UK;
  - b) must cover consumer protection measures in the secondary market, defined as such legislation, rules of law, codes of practice and guidance which the Secretary of State deems relevant;
  - c) must prepare and publish a report within 12 months of this section coming into force; and
  - d) must be presented to Parliament.

**Section 95: Interpretation of this Chapter**

514. This section gives the definitions that apply to terms used in this Chapter. It includes a power for the Secretary of State to change by regulations who this Chapter applies to through changing the definition of the operator of a secondary ticketing facility.