**Consultation on the Implementation of the New Subscription Contracts Regime**

**Response by the Centre for Commercial Law and the Centre for Scots Law at the University of Aberdeen**

This response is provided by a joint working group of the Centre for Scots Law and the Centre for Commercial Law at the University of Aberdeen. The members of the working group are Dr Euan West, Professor Péter Cserne and Mr Scott Styles.

**Question 1. In developing the approach to cooling-off returns and refunds, we have**

**sought to do the following (set out in paragraph 23):**

**Ensure that the existing level of statutory rights for consumers in the**

**CCRs is maintained – consumers should not lose a right they**

**currently have, even if they gain rights elsewhere.**

**Maintain the principle underlying the CCRs that if a consumer**

**exercises a cooling-off right, neither they nor the trader should be**

**unfairly out of pocket. For example, if a trader has already supplied a**

**perishable product that cannot be resold and has therefore incurred**

**non-recoverable costs, that is considered in calculating the refund.**

**Take into account the nature of the subscription, including the type of**

**product supplied, and whether or not the consumer has been supplied**

**a product in the cooling-off period before exercising a cancellation**

**right.**

**In keeping with the intention of the DMCCA, ensure the consumer has**

**the opportunity to reflect on whether they want to continue with a**

**contract. This is because they will be liable for ongoing payments**

**unless they take action to stop them.**

**Where possible, streamline the operation of the rules to make the**

**rules accessible to consumers and businesses.**

**Do you agree with the principles set out in this approach?**

**a. Yes / No / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

The principles given here seem sound and appropriate, although of course the appropriateness of the particular rules and provisions proposed is a different matter.

As to the purpose of a cooling-off period being to allow the consumer a period of reflection, this makes considerable sense, but some consideration might also be paid (if it has not already been paid) to the role of a cooling-off period in allowing a consumer to inspect the product (‘try before they buy’) and the extent to which the rules regarding a cooling-off period should also reflect that practical function of a cooling-period.

We understand (as the consultation document notes at paragraph 40) that protections regarding satisfactory quality etc. are conceptually separable from protections regarding reflection on the decision whether to enter into or to renew a subscription contract. However, it is conceivable that a consumer might, e.g., wish to sample a product which has no defects in terms of the Consumer Rights Act 2015 but which the consumer may yet decide he or she does not want. For instance, a consumer may wish to sample the quality of broadband that has been purchased. Finally, a given consumer’s decision whether to remain a subscriber may be made either totally in the abstract (i.e. without any sampling or inspection of the goods or services supplied, and simply in the light of the obligation to pay £X for so many months as the subscription lasts etc.) or at least partly in the light of the quality of the goods and services actually received.

We offer no concrete proposals on this last point. We simply thought that the issue might be worth raising.

**Question 2. Please provide any evidence you have on the extent to which consumers**

**cancel their contracts or take action to bring their subscription contract to an**

**end within 14 days after:**

**signing up for a subscription**

**a subscription trial period ending and rolling over into a paid or**

**higher cost subscription**

**a long-term subscription (12 months or longer) automatically**

**Renewing**

As we are academic lawyers, we lack expert evidence on this. However, we know anecdotally that such cooling-off periods can be useful.

**Question 3. We have taken the following factors into consideration (set out in paragraph**

**25) when developing refund and return policy proposals for goods:**

**The extent to which it is possible and practical for the consumer to**

**return the goods supplied under the subscription contract in the same**

**condition they were received.**

**Whether the goods have been dispatched by the trader, or whether**

**they have been supplied/delivered to the consumer.**

**How to fairly allocate responsibility and cost for returning the goods**

**between the trader and the consumer.**

**Whether goods have certain characteristics which require additional or**

**different rules.**

**Do you agree with the factors that we have taken into consideration when**

**developing the proposals for refunds for goods?**

**a. Yes / No / Not applicable**

**b. Please provide the reasoning and any evidence behind your answer**

Yes, we agree with the factors that have been taken into consideration here.

**Question 4. To what extent do you agree with the regulatory proposal for returns and**

**refunds for returnable goods (category 1 goods)?**

**a. Strongly agree / Agree / Neither agree nor disagree/ Disagree / Strongly**

**disagree / Don’t know / Not applicable**

**b. Please provide the reasoning and any evidence behind your answer**

**c. If you are a trader and provide a subscription contract for goods in this**

**category, please provide any estimates of implementation and/or ongoing**

**costs you would incur because of this proposal. Please provide any**

**evidence and explanation of costs where possible.**

The proposals regarding returns of and refunds for returnable goods are reasonable.

**Question 5. To what extent do you agree with the regulatory proposal for refunds for**

**perishable and bespoke goods (category 2, non-returnable goods due to**

**their characteristics)?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly**

**disagree / Don’t know / Not applicable**

**b. Please provide the reasoning and any evidence behind your answer**

**c. If you are a trader and provide a subscription contract for goods in this**

**category, please provide any estimates of implementation and/or**

**ongoing costs you would incur because of this proposal. Please provide**

**any evidence and explanation of costs where possible.**

The proposals here are reasonable.

**Question 6. To what extent do you agree with the regulatory proposal for refunds for**

**sealed goods and inseparably mixed goods (category 3, non-returnable**

**goods due to circumstances)?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly**

**disagree / Don’t know / Not applicable**

**b. Please provide the reasoning and any evidence behind your answer**

**c. If you are a trader and provide a subscription contract for goods in this**

**category, please provide any estimates of implementation and/or ongoing**

**costs you would incur because of this proposal. Please provide evidence**

**and explanation of costs where possible**.

We agree.

**Question 7. In our proposals, we have taken into consideration (set out in paragraph 42)**

**that:**

**Due to their nature, services received by the consumer are not**

**returnable to the trader.**

**A consumer may have been supplied with the service before**

**exercising a cooling-off right.**

**By cancelling the contract, consumers should not be able to receive**

**services for free during a cooling-off period.**

**Do you agree with the factors that we have taken into consideration when**

**developing the proposals for refunds for services?**

**a. Yes / No / Not applicable**

**b. Please provide the reasoning and any evidence behind your answer**

Yes, this is appropriate. Services call for distinctive treatment for the reasons given. We also agree that consumers should not be able to use services for free merely because they have used those services during a cooling-off period.

**Question 8. To what extent do you agree with the regulatory proposal for refunds for**

**services?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly**

**disagree / Don’t know / Not applicable**

**b. Please provide the reasoning and any evidence behind your answer**

**c. If you are a trader and provide services under a subscription contract,**

**please provide any estimates of implementation and/or ongoing costs**

**you would incur because of this proposal. Please provide evidence and**

**explanation of costs where possible.**

We agree that a consumer should not receive the benefit of a free service received during a cooling-off period simply because the consumer has exercised a cooling-off right. There is a fundamental difference between a free trial and a cooling-off period. The regulations need only mandate the latter. Of course, as is common, the trader may *choose* to offer a free trial, but whether the trader wishes to do so is a matter of freedom of contract. Naturally, a trader may feel that the cost of offering a free trial is outweighed by the benefit of attracting a higher number of subscribers overall.

At the same time, where a cooling-off right is exercised, it seems appropriate to make the consumer’s liability to pay for services received during the relevant cooling-off period (and for a consequent reduction in any refund awarded) conditional on the trader’s having provided suitable pre-contractual information etc.

We also agree with what is said at paragraph 44, namely that to obtain the consumer’s express consent to the supply of a service during a *renewal* cooling-off period would be impracticable.

Again, as a general observation, it is worthwhile to consider whether the purpose of a cooling-off period is to allow the consumer to sample the product in question; to protect consumers from entering into subscription contracts without due reflection; or perhaps some combination of the two. Consider again the case of broadband: it may be difficult to tell how effective it is, if it has not been sampled, even if the product is not defective such as to put the provider of it in breach of contract.

**Question 9. In developing the proposals for digital content we have taken into**

**consideration (set out in paragraph 49) that:**

**• Due to its nature, digital content is not returnable.**

**• A consumer may have been supplied with the digital content before**

**exercising their cooling-off right.**

**• Consumers should not be able to receive digital content for free during a**

**cooling-off period.**

**Do you agree with the factors that we have taken into consideration?**

**a. Yes / No / Not Applicable**

**b. Please provide the reasoning and any evidence behind your answer**

Yes, this is sensible.

**Question 10. a. Considering the three options set out for how refunds could work for**

**digital content, which approach would you recommend?**

**• Option 1 (proportionate refund for both initial and renewal cooling-off**

**periods)**

**• Option 2 (waiver for initial cooling-off period and proportionate refund for**

**the renewal cooling-off period)**

**• Option 3 (waiver for initial cooling-off period, and waiver for renewal**

**cooling-off period)**

**• None of these**

**• Don’t know**

**• Not applicable**

**b. Please provide the reasoning and evidence behind your answer**

We would favour Option 1. It bears the closest similarity to the approach proposed regarding services (as the consultation paper notes at paragraph 54). For the reasons given in the consultation paper, this seems the most sensible approach.

Option 2, by contrast, is quite severe and inflexible. Under this approach, the consumer would be presented with a stark choice between, on the one hand, retaining the initial cooling-off right (in which case the content would not be supplied until that period had elapsed) and, on the other hand, receiving the product immediately in return for forfeiting the relevant cooling-off right for, say, the first month. If we accept that the initial cooling-off right is intended to protect the consumer, it seems odd that the consumer should be able to waive that right completely. To draw an analogy, if (at least from the perspective of Scots law) requirements of writing exist partly to compel a prospective obligant to think more carefully about undertaking the obligation in question (as where, again in Scots law, the obligation consists of a gratuitous promise), that protective function would be undermined if the requirement of writing could itself be waived. It is true that some protection would still be afforded to a consumer if Option 2 were adopted, because the consumer would still have to consent expressly to the supply of the product before the initial cooling-off period and acknowledge that their cooling-off right would be lost, but such a consumer may later have reason to regret that decision. We would argue that a better balance would be struck, both between the interests of the consumer and trader, and between commercial flexibility and consumer protection, by Option 1 than by Option 2. In effect, Option 1 would allow a consumer to waive the cooling-off period *but only* to the extent that he or she has used the services supplied during that period.

Further, it is true that Option 2, by presenting a consumer with a stark choice between (1) waiving the cooling-off period entirely and (2) having their access to the digital content be postponed so that they can continue to enjoy the cooling-off period, would mitigate the risk of the consumer’s ‘binging’ content and then cancelling via the cooling-off period. However, that risk could be mitigated by means of Option 1. It is worth considering in that regard what it is that the consumer under a digital content contract is paying for: *access* to a certain selection of content. One consumer to, say, a digital streaming service may watch very little during the first cooling-off period; another consumer may, within the same period, watch a comparatively large amount of content. Both consumers should, in principle, pay the same amount because they have had access to the same content for the same amount of time. Arguably, the flipside of that coin is that the law should not be punishing the consumer who, in such circumstances, decides to binge content. In any case, it is open to traders to charge more for certain content, as by having different tiers of subscription or by providing certain content on a one-off basis for an additional fee (e.g. on the BFI website, certain films are not included in the subscription and so must be ‘rented’ separately).

Option 3 is unworkable. If the consumer were able to waive all cooling-off rights on entering into the contract, that would run counter to the protective function of cooling-off rights, as the consultation itself acknowledges at paragraph 58. Conversely, it would be impracticablefor the trader to have to receive the consumer’s express consent to waive their renewal cooling-off right at the start of each relevant renewal period.

**Question 11. If you are a trader and supply digital content, please provide any estimates**

**of implementation and/or ongoing costs you would incur because of each**

**proposal. Please provide evidence and explanation of costs where possible.**

**• Option 1 (proportionate refund for both initial and renewal cooling-off**

**periods)**

**• Option 2 (waiver for initial cooling-off period and proportionate refund for**

**the renewal cooling-off period)**

**• Option 3 (waiver for initial cooling-off period, and waiver for renewal**

**cooling-off period)**

N/A.

**Question 12. To what extent do you agree with the following statement about Option 3**

**(waiver for initial cooling-off period, and waiver for renewal cooling-off**

**period):**

**“Permitting the use of a waiver for digital content subscriptions for the**

**renewal cooling-off period which is sought from the consumer at the start of**

**relevant renewal period (as set out in Option 3) is impractical”.**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly**

**disagree / Don’t know / Not applicable**

**b. Please provide the reasoning and any evidence behind your answer. If**

**you don’t agree with the statement, do you consider that there are ways**

**of mitigating these?**

For reasons that we give above (and which the consultation paper itself gives) we agree that this would be impractical.

**2.5 Refunds for mixed contracts**

**Question 13. Do you think that there should be regulations for how mixed contracts work,**

**or is guidance sufficient?**

**a. Regulations / guidance**

**b. Please provide the reasoning and any evidence behind your answer**

It seems sensible to apply the rules relating to mixed contracts according to the rules specifically applicable to goods, services and digital content, as appropriate.

Regulations would be desirable for the sake of legal clarity.

**2.6 Termination of ancillary contracts**

**Question 14. To what extent do you agree with the regulatory proposal for how ancillary**

**contracts are treated?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree /**

**Strongly disagree / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

What is proposed here appears sensible. Incidentally, and as the drafters of this consultation paper are most likely aware, there are at least some so-called ancillary contracts (e.g. consumer credit contracts) to which cooling-off rights already apply. In any case, it seems appropriate to extend similar protection to ancillary contracts as is afforded to the main subscription contract in the manner proposed in the consultation paper.

**Question 15. To what extent do you agree with the regulatory proposal for the extension**

**and operation of the cooling-off period if the trader does not comply with**

**their duties to inform the consumer of their initial or renewal cooling-off**

**right?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree /**

**Strongly disagree / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

Yes, this proposal seems reasonable. It is good that the cooling-off period can be extended in certain cases for the reasons given. At the same time, traders would be able to curtail the extension by rectifying their omission to provide relevant information. It is also appropriate that the consumer does not bear the cost of using non-returnable goods etc. during this period, and, again, the fact that the trader must bear these costs will act as a further incentive for the trader to rectify its omission to provide information. Conversely, it is appropriate that returnable goods must be returned. The purpose of these regulations is not to penalise the trader but to allocate losses fairly, as the consultation paper later makes clear at paragraph 88.

**Question 16. Do you have any concerns with the proposed approach in relation to**

**product categories (f) to (m)? Please focus your answers on categories (f)**

**to (m) as categories (a) to (e) were addressed in section 2.2.3 and 2.2.4**

**and questions 3, 5 and 6.**

**a. Yes / No / Not applicable**

**b. If yes, please state each product category and your concerns,**

**providing reasoning and any evidence for each**

We have identified no concerns.

**Question 17. We propose that these principles (set out in paragraph 88) underpin the**

**remedies when a consumer cancels because of a breach of the relevant**

**implied terms provided for under the DMCCA:**

**• The remedies available to the consumer should be straightforward so**

**they are easily understood by consumers and traders.**

**• The consumer should receive a sum which reasonably reflects the**

**financial loss caused by the trader’s breach.**

**• The trader should not be unfairly penalised. For example, the trader’s**

**liability to compensate the consumer should reflect the nature of the**

**trader’s breach and whether the consumer took reasonable steps to**

**reduce their financial loss.**

**• The trader should bear any responsibility or cost for the recovery of**

**returnable goods as they are in breach of their duties.**

**Do you agree with these principles?**

**a. Yes / No / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

Yes, these principles seem reasonable.

**Question 18. To what extent do you agree with the regulatory proposal for refunds and**

**treatment of goods, services and digital content (subject to refunds) if a**

**consumer cancels because a trader has breached an implied term?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree /**

**Strongly disagree / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

Yes, what is proposed seems reasonable. It is appropriate, e.g., that, in defining consumers’ rights here, some account is taken of how quickly consumers possessed of relevant information act.

**Question 19. To what extent do you agree with the regulatory proposal for how**

**repayment of refunds work?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly**

**disagree / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

Presumably, the terminology is supposed to be *payment* of refunds. That linguistic quibble aside, what is proposed seems reasonable.

**Question 20. To what extent do you agree with the regulatory proposal for when the**

**consumer can be made liable for a renewal payment?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree /**

**Strongly disagree / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

We agree. Consumers should not be tripped up by renewal payments falling due earlier than the actual renewal date.

**Question 21. To what extent do you agree with the regulatory proposal for when a**

**consumer can exercise a contractual right to bring a subscription contract to**

**end?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree /**

**Strongly disagree / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

We agree that there should be clear rules on this. The Consumer Rights Act 2015 may help but, as is noted in the report, the provisions would be within the ‘grey zone’ of potentially unfair terms depending on the circumstances. Clear, fact-specific rules are preferable, both for the purpose of leaving consumers in no doubt as to their rights and, again as the report itself acknowledges, to create certainty and predictability for traders.

**Question 22. Do you have any views on the proposals about arrangements to exit a**

**contract? Please provide specific examples and evidence where possible.**

We agree with what is proposed. Regarding online exit, the mode of cancellation should be easy to locate on the relevant website.

**Question 23. To what extent do you agree with the regulatory proposals for reminder**

**notices?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree /**

**Strongly disagree / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

We agree.

Regarding paragraph 131, it might be worth considering whether this right is or ought to be without prejudice to an obligation to restore an overpayment at common law (i.e. under what in Scotland is called the law of unjustified enrichment). On this, we offer no concrete proposals; we simply think the issue is worth considering (particularly where prescription and limitation is concerned).

**Question 24. To what extent do you agree with the regulatory proposals for end of**

**contract notices?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree /**

**Strongly disagree / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

Yes, we agree.

**Question 25. To what extent do you agree with the regulatory proposals for cooling-off**

**notices?**

**a. Strongly agree / Agree / Neither agree nor disagree / Disagree /**

**Strongly disagree / Don’t know**

**b. Please provide the reasoning and any evidence behind your answer**

Yes, we agree.

**Question 26. Do you have specific operational concerns about the provision of precontract information?**

**a. Yes / No / Don’t know**

**b. If yes, please provide the reasoning and any evidence behind your**

**answer**

Regulation would be preferable to guidance for the sake of legal clarity. Comparisons may helpfully be drawn with existing consumer credit legislation (including secondary legislation) regarding pre-contract information and the way in which it must be provided.

**Question 27. Is there anything else that you would like to provide comment or evidence**

**on?**

Some consideration might be given (if it has not already been given) to flagging up potential price increases to consumers where, e.g., those price increases result simply from inflation, and/or to the availability of alternative products to what it is usually supplied. For instance, suppose that a consumer under a subscription contract receives twelve cans of craft beer a month. Should the trader be able to vary this arrangement (as by offering only eight cans of craft beer a month) without the express consent or opt-in of the consumer at the time of the supply, simply because the consumer agreed to that variability of supply in advance? This sort of issue may have already been considered but we thought it would be worthwhile to raise it.