

# 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

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

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.