



# Consumer protection

Introduction to consumer law & consumer enforcement

Jason Freeman



# Did you know...



- You are all consumers...





# Overall Outline

## Session 1

- What is Consumer Law?
- Impact of Brexit...
- Consumer Rights for misleading and aggressive conduct
- Consumer Rights for Breach of Contract

## Session 2

- Consumer rights for unfair terms
- The impact of covid-19 on consumer contracts
- Consumer rights for distance and doorstep contracts
- Public Enforcement of consumer law



Session 1

# Why consumer law?

# What makes markets work well?

## Consumers drive competition

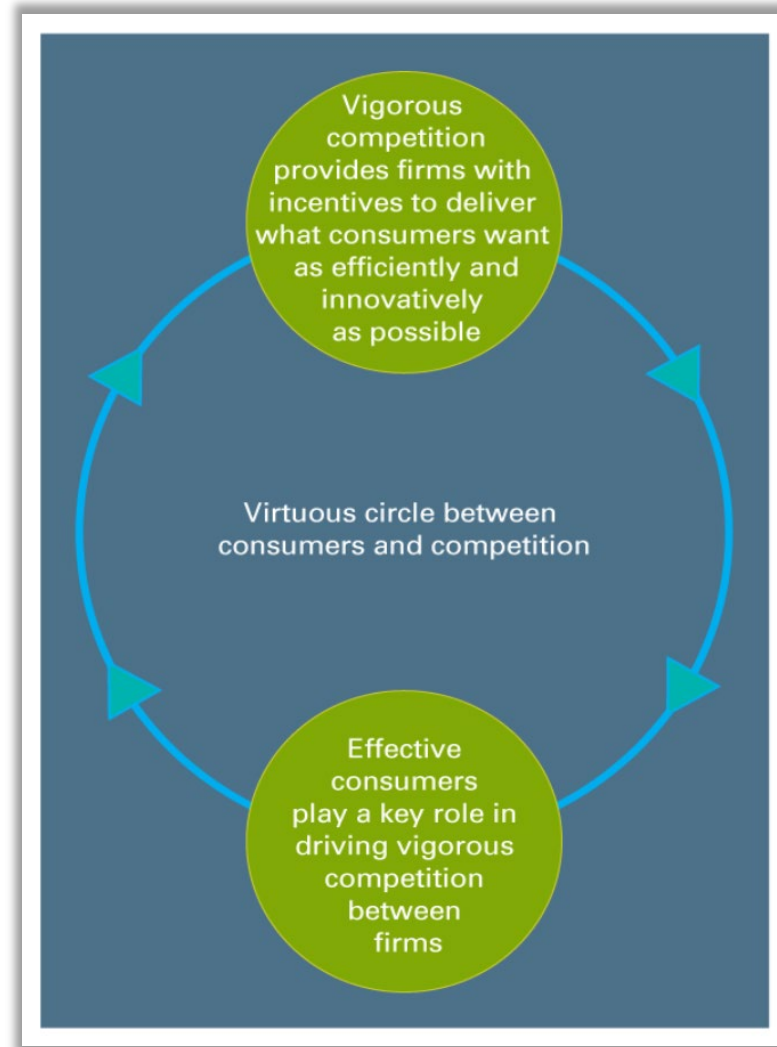
- Access, assess and act on information

## Firms compete fairly

- On price, quality, range and service
- Rewarded for best satisfying consumers' needs

## Virtuous circle delivers growth

- Innovation
- Value
- Choice



# Why do some markets not work well?

Traders' practices may exploit consumer behavioural biases

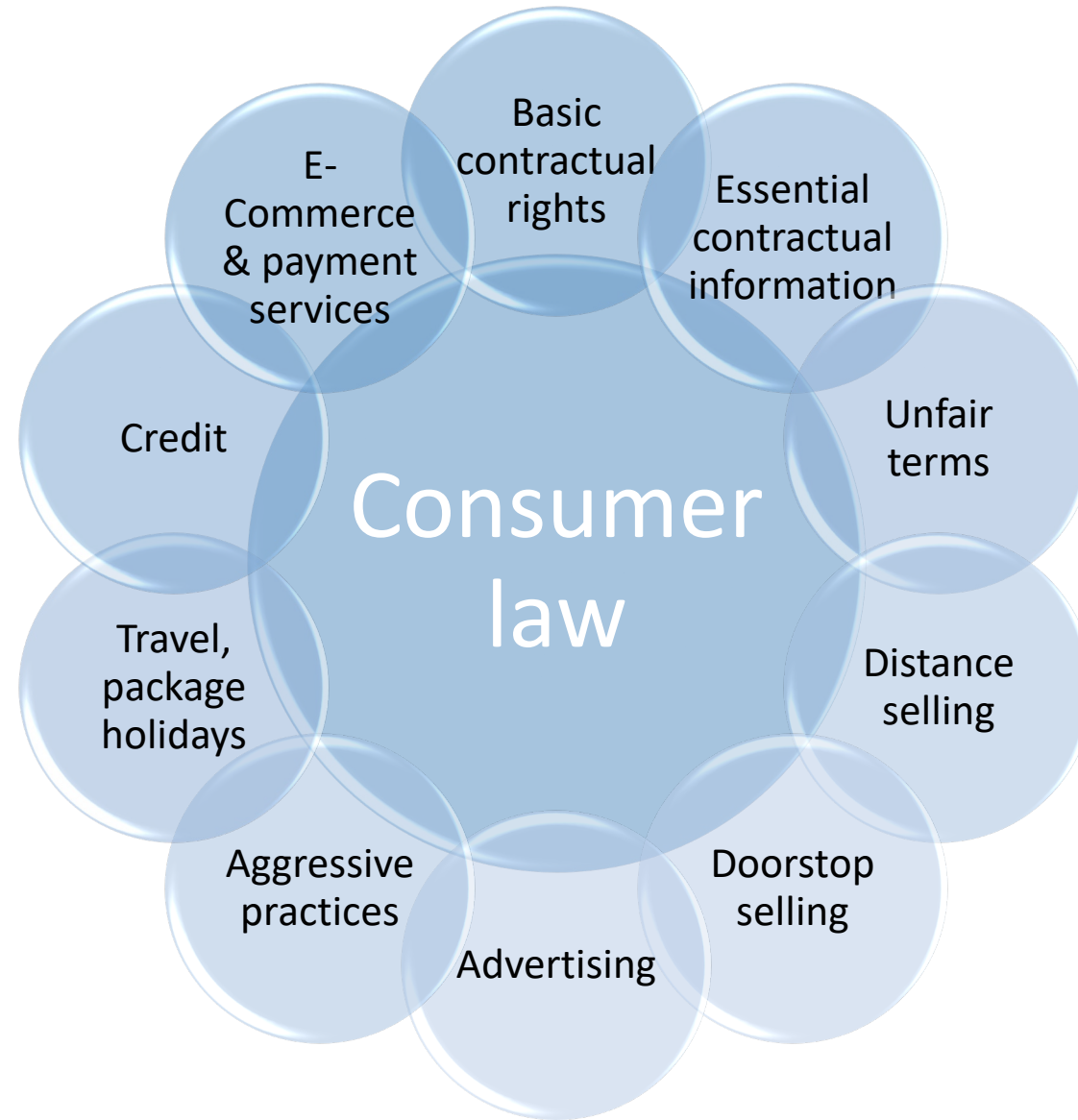


→ This harms consumers and the market

**What is consumer law?**



# What does EU consumer law cover?







# EU and UK consumer law

## EU consumer & competition policy

- Consumer protection
- Level playing field
- Full harmonisation of laws
- Limited protection for businesses

## EU consumer law

- Directives
- Regulations
- EU court judgments
- Guidance from Commission

## UK consumer law

- Consumer & competition policy (BIS)
- Consumer legislation
- Court judgments
- Sectoral rules
- Guidance from enforcers



# UK specific rules

## Competition remedies

- Point of sale warranties
- Home collected credit
- Payment protection insurance
- Payday lending
- Protection for SMEs?

## Sectoral rules

- Information Commissioner
- Financial services
- Energy, telecoms, rail, airlines, water

## Self regulation

- Advertising Standards Authority
- Phone Pay Plus
- Codes schemes

# Impact of Brexit...

- EU consumer law –including CJEU rulings- “fossilised” as at 31 December 2020
  - Future CJEU rulings = “persuasive”
- EU and UK law likely to diverge from 1 Jan 2021
  - Non implementation of EU law
  - UK domestic policy developments
- TCA preserves some limited consumer rights (esp in digital markets) (see also air travel rights)
  - Protection from deceptive & bad faith practices
  - Right to information
  - Right to access to redress
  - Risk of discrimination against UK businesses in the EU
- TCA level playing field rights
  - Restrictions on technical & legislative barriers to trade

# Consumer Rights



# Enforcing consumer law

## Criminal prosecution

- Consumer Protection from Unfair Trading Regulations 2008
- Business Protection from Misleading Marketing Regulations 2008

## Enterprise Act 2002 Part 8

- CMA (and other enforcers) can seek an Enforcement Order to stop traders breaching the law and secure redress for consumers
- Covers very wide range of laws
- Failure to comply with Enforcement Order is contempt of court

## Private Rights

- Breach of Contract
- Redress under CPUTRs

# Consumer or Trader?



Private individual

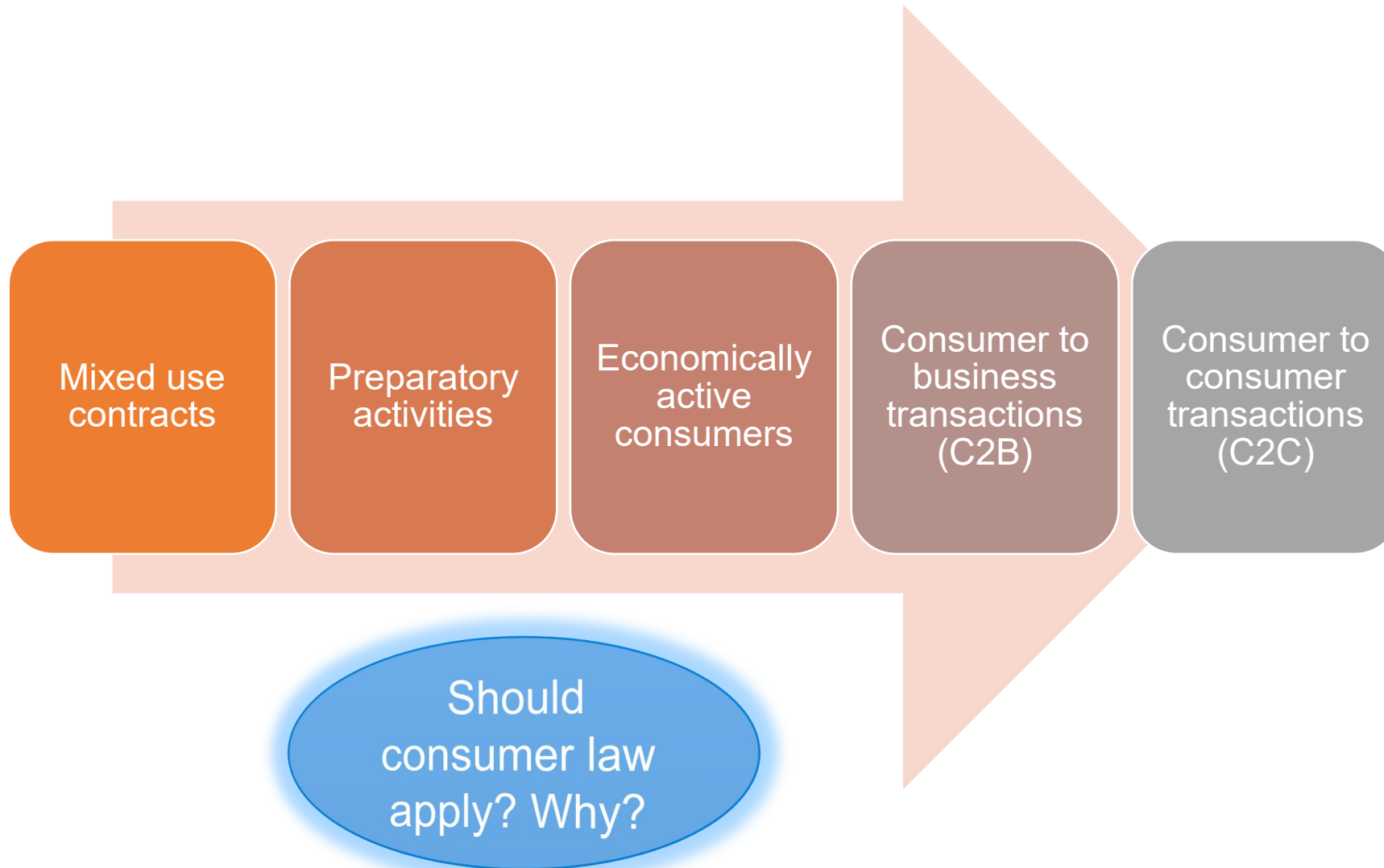
Wholly or mainly  
outside course of  
business



Any legal person

Acting for  
purposes related  
to business, trade  
or profession

# Challenging areas...



# **Consumer Rights for Misleading and Aggressive conduct**





# How would you...

- Draft a law to stop unfair trade practices?
- ...think about
  - Scope
  - The standard of protection
  - How you define what is harmful
  - What is the consequence if the law is infringed?

# The Consumer Protection from Unfair Trading Regulations – Key facts

Implement the Unfair Commercial Practices Directive (UCPD)

Intended to provide a high level of consumer protection

Broadly the legal standard across the whole EU

# What do the CPRs cover?

- **Commercial Practices**
- Basically everything a business does



# Is it a Commercial Practice?

Andrew sells his children's toys on eBay

Barbara runs a garage repairing cars

Colin offers training in sales techniques for doorstep salesmen

Derek manufactures cleaning products

Elizabeth is a builder advertising home improvements

FastNet Ltd provide a webhosting service

# What is the standard of protection?

Must (be likely to) have an effect on

The decision making

Of the average (vulnerable / targeted) consumer

# What is actually illegal?

<b>General prohibition</b> (Regulation 3)	Contrary to the requirements of professional diligence	(Likely to) appreciably impair the average consumer’s ability to make an informed decision And as a result	Causes (or is likely to cause) the average consumer to take a different transactional decision
<b>Misleading action</b> (Regulation 5)	False or deceptive practice (list of key factors)	And	
<b>Misleading omission</b> (Regulation 6)	Omission (or unclear / untimely provision) of material information	And	
<b>Aggressive practice</b> (Regulation 7)	Aggressive practice by harassment, coercion or undue influence	(Likely to) significantly impair the average consumer’s freedom of choice or conduct And as a result	
<b>Banned Practice</b> (Schedule 1)	One of 31 specified practices	No impairment or transactional decision tests	

# Is it illegal?

---

Andrew describes an old board game as ‘in pristine condition’. This is true, but a couple of pieces are missing

---

Barbara advertises “Free tyres with every MOT”, but charges a fitting fee of £25

---

Colin tells salesmen to charge a high price for products, and if customer doesn’t buy, to offer a 50% discount “valid today only”, and if they still quibble tell them the salesman needs the sale to pay his mortgage

---

Derek’s labelling describes his cleaning products as “100% organic”.

---

Elizabeth does work on some guttering, but gets the guttering crooked, so that water leaks

---

FastNet offer “bullet proof” hosting –they promise never to reveal who you are, or to take down any content



# What are the consequences of infringement?

## 1. Criminal prosecution

- Most infringements are criminal offences

## 2. Consumer's private right of redress

- If a consumer entered into a contract with, or made a payment to, a trader after 1 October 2014 **as a result of** a ***misleading action*** or an ***aggressive practice***
- Potential remedies
  - Unwind the contract and get money back
  - Discount on the purchase price
  - Damages



# The Private Right of Redress

- Applies to most transactions (some exceptions –eg immovable property & financial services)
- Enforceable as a **breach of contract**
- C must prove that the misleading action or aggressive practice was a **significant factor** in their decision to enter the contract/pay money
- AND that the action would be likely to affect the average/vulnerable/targeted consumer
- Pursuing this right exhausts other claims the consumer might have

# The Right to Unwind

- C must clearly indicate contract is at an end
  - Can't claim if already had price reduction
  - And only if product is capable of rejection
  - Must exercise within 90 days of the delivery of goods
- Parties must be restored to pre-contract position
  - C gets full refund
  - T must restore any item C gave (or pay market price)

# Right to a Discount

- For contracts under £5,000 a scale applies
  - 25% discount for minor infringements
  - Up to 100% for serious infringements
  - Consider the behaviour of the Trader, impact on Consumer and time elapsed since the practice took place
- For contracts over £5,000
  - Assess difference between price paid and **market price** of product
  - Eg if T uses pressure selling to supply a burglar alarm system for £7,000, if the market price of the system is only £500, C could claim a £6,500 discount



# Right to Damages

Applies **in addition** to rights to unwind and to discount

## Applies where

- The practice causes financial loss (beyond that incurred in entering the contract) or alarm, distress or physical inconvenience or discomfort
- This harm was reasonably foreseeable at the time of the practice
- T cannot prove the due diligence defence under the CPUTR reg 27J(5)

There is no legislative limit to the damages which can be awarded, but the government guidance suggests they should be “restrained and modest”



# John and the Garage

On 1<sup>st</sup> March 2020 John took car to Barbara's garage to be fixed. Garage said it would cost about £100.

When John picked up car, garage said they had to do extra work –bill was now £500. If John did not pay, he could not get car back.

John needed the car for work, as well as to take his elderly mother to her day care centre, so he paid the £500.

What do you advise?

# **Consumer rights for Breach of Contract**



# Overview



This part will cover

Part 1 of the  
Consumer  
Rights Act 2015  
(CRA)



By the end of this session  
you will be able to apply  
to a problem the law that  
creates legal obligations  
when traders supply

Goods  
Digital content  
Services



# What is a contract?

“Give me £2.50 and I will get you a coffee.”

- **IS THIS A CONTRACT?**
- **WHAT SORT OF CONTRACT IS IT?**







# Features of a contract

“Give me £2.50 and I will get you a coffee”

**Think  
about**

Invitation to treat or Offer?

Acceptance?

Consideration (moving from promisee)?

Intention to create legal relations?

Certainty of terms?



# What terms get into a contract?

## Express

- Oral or written

## Implied under common law

- Course of dealing
- Intention of the parties

## Implied by statute

- Cannot be excluded from consumer contracts

# Types of Contracts Covered

- **Goods**

- Test for satisfactory quality broadly unchanged
  - Reasonable person's view taking into account description, price, any public statement.
  - Consider –fitness for purpose, appearance/finish, freedom from minor defects, safety, durability
  - Exemption for any defect specifically drawn to C's attention, or which C ought to have seen on inspection
- Includes **installation** where seller is responsible
- Updated to cover **integrated software**

- **Digital content** is “data which are produced and supplied in digital form”

- The rights apply where it is supplied for a price, or free with something C has paid for (NB no rights for completely free software).
- Any later updates must not stop digital content from conforming to the contract (s.40).

- **Services**

# Terms implied by statute

	Goods	Digital Content	Services
Satisfactory quality	✓	✓	
Fit for a particular purpose	✓	✓	
As described	✓	✓	✓
Provided with reasonable skill and care			✓
Provided within a reasonable time (where not agreed)			✓
Reasonable remuneration (where not agreed)			✓

# Is it a breach of contract?

---

Andrew sells a 'nearly new' dress. When Anne puts it on, the stitching comes loose and underwiring digs into her flesh.

---

Chris orders a pair of green glasses. When he collects them, they are yellow. The optician says it's OK as the prescription is right.

---

Dave is going hiking in Morocco. He asks the shop if a pair of boots is suitable. When he uses them, the soles melt in the heat.

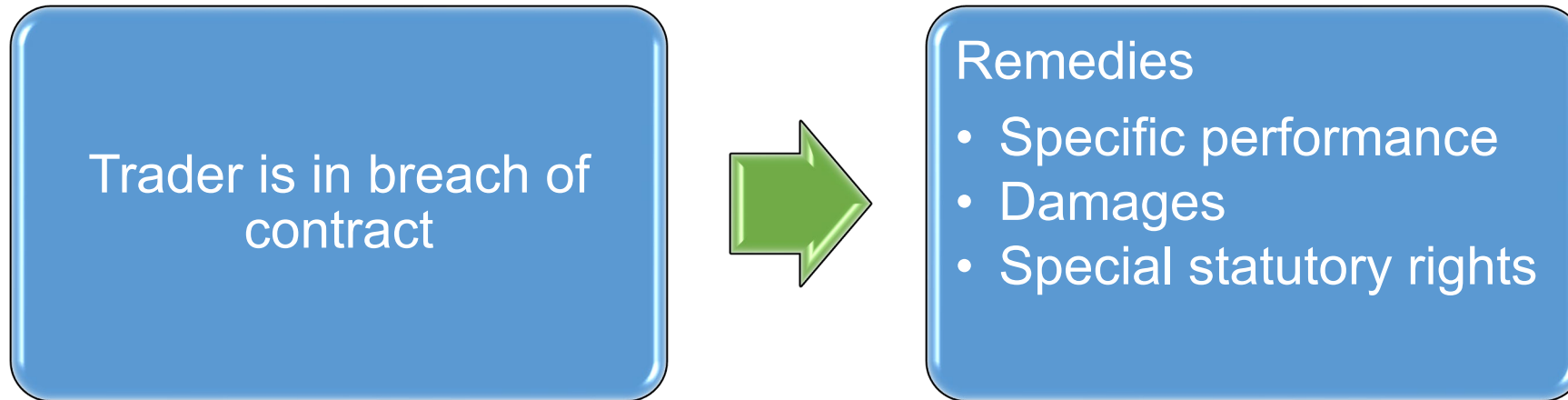
---

Erik buys a phone with several in built apps. One of them drains his phone's battery.

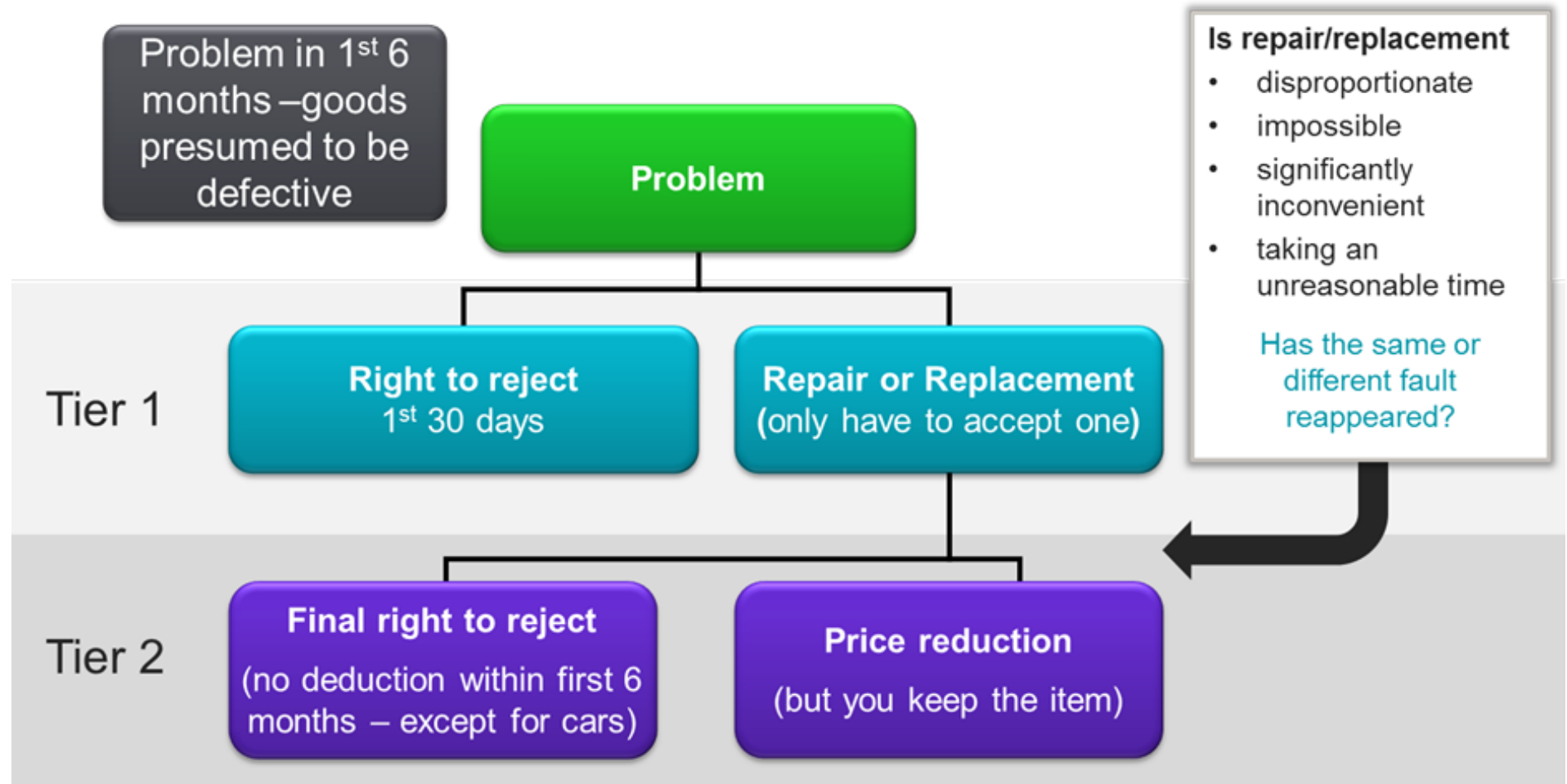
---

Barbara is asked to repair a gear box. But when Jeff collects the car, it seems to be no different. What can he do?

# What if I don't get my rights?

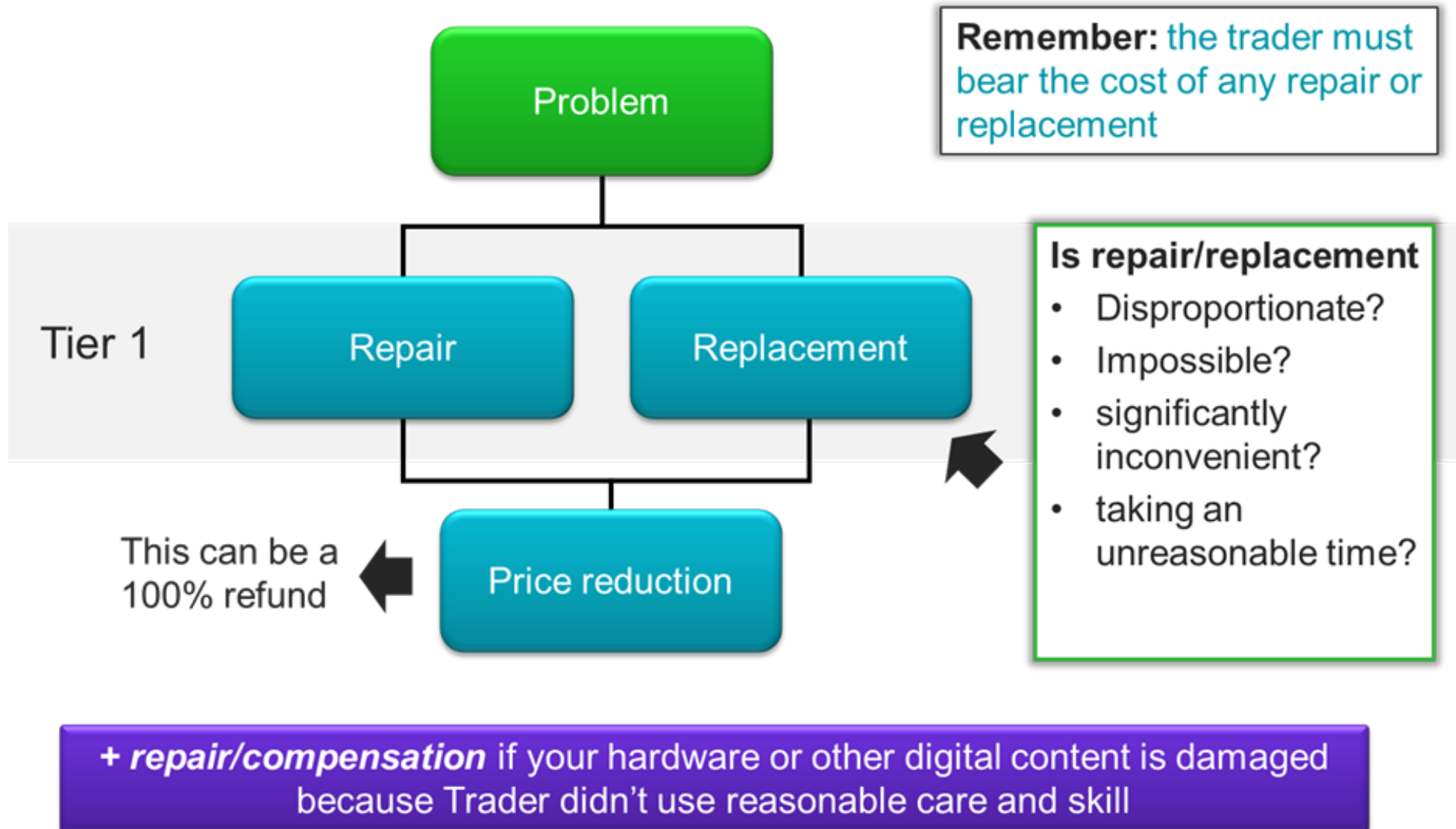


# Remedies for Goods



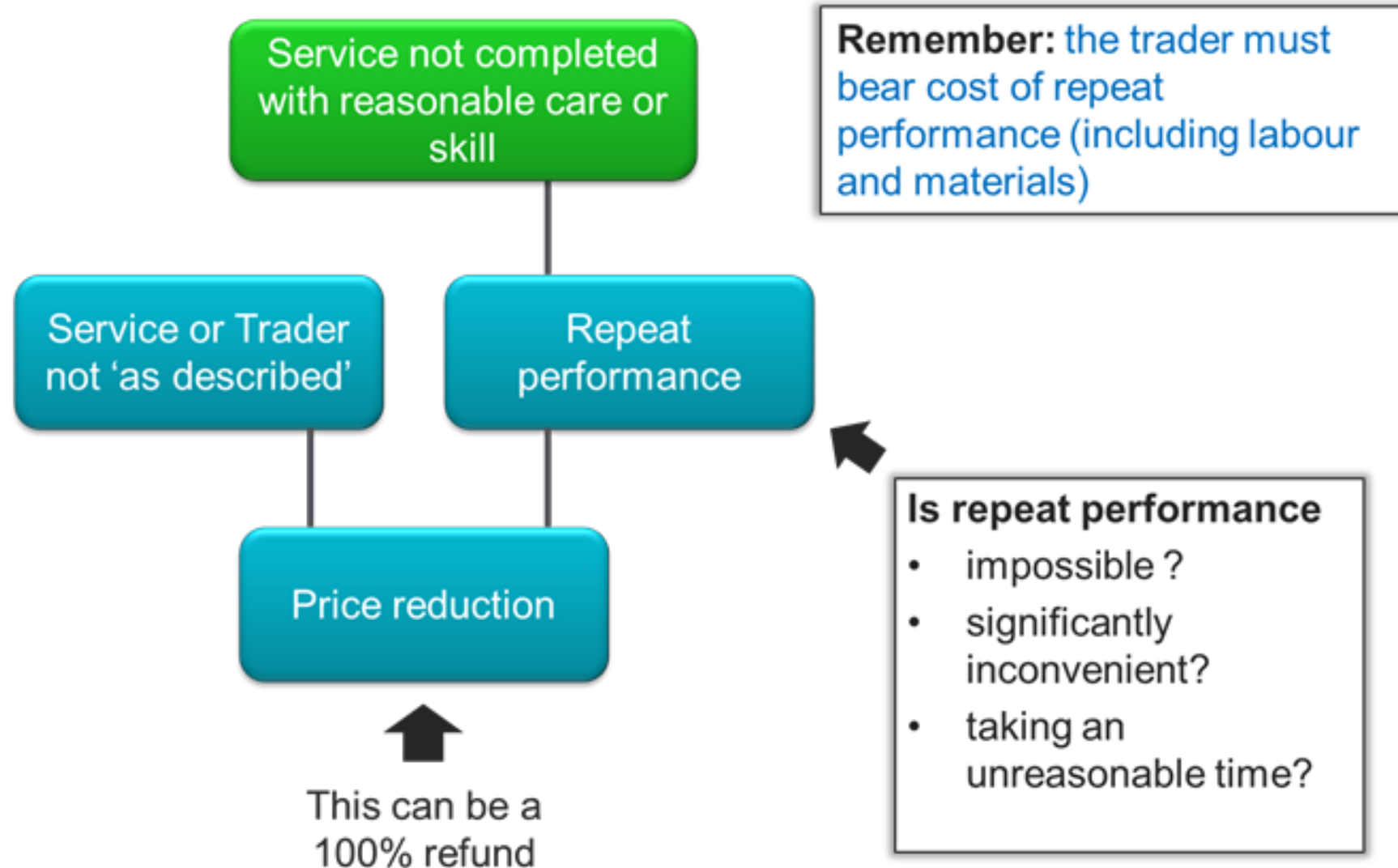
**Remember:** the trader must bear any costs or repair/replacement or the return of faulty goods

# Remedies for Digital Content





# Remedies for Services



# What can I do?



Frank buys a new TV to watch at Christmas. On 20 December, it breaks down. Store offer him replacement to be delivered on 27 December.



Elizabeth the builder installs some bathroom tiles for a customer. Half of them are a slightly different shade of green.



George's lawnmower has overheated, and broken after only 3 months. Store say he didn't use it properly, and in any event ought to pay for the 3 months' use he had.



Harry buys a DVD player program for his laptop for £10. However when he updates his operating system, it stops working.



Breach	Short term right to Reject	Repair/ replacement	Repeat Performance	Price Reduction (upto 100%)	Final right to reject
Goods					
Satisfactory Quality s.9	Y	Y		Y	Y
Fit for purpose s.10	Y	Y		Y	Y
As described s.11	Y	Y		Y	Y
Match Sample s.13	Y	Y		Y	Y
Match model s.14	Y	Y		Y	Y
Installed digital content does not conform s.16	Y	Y		Y	Y
Goods not installed properly s.15		Y		Y	Y
CCRs information s.12				Y	
No right to supply s.17					Y
No delivery s.28					Y
Digital content					
Satisfactory quality s.34		Y		Y	
Fit for purpose s.35		Y		Y	
As described s.36		Y		Y	
CCRs information s.37				Y	
No right to supply s.41				Y	
Services					
Skill and care s.49			Y	Y	
As described s.50			Y	Y	
Trader as described s.50				Y	
Provided too slow s.52				Y	

# So what have you learnt?

Why do we have consumer law?

What might be some of the impacts of Brexit?

What are some of the tricky areas where people might not have consumer protection rights?

What do you need to prove to get CPUTR private rights of redress?

What rights might I have if my mobile phone stops working properly after a few months?