



An Roinn Post, Fiontar agus Nuálaíochta
Department of Jobs, Enterprise and Innovation

SCHEME OF CONSUMER RIGHTS BILL

MAY 2015

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CONSUMER RIGHTS BILL 2015

AN ACT TO AMEND AND CONSOLIDATE THE LAW RELATING TO THE RIGHTS AND REMEDIES OF CONSUMERS IN CONTRACTS FOR THE SUPPLY OF GOODS AND SERVICES; TO INTRODUCE RIGHTS AND REMEDIES FOR CONSUMERS IN CONTRACTS FOR DIGITAL CONTENT; TO AMEND THE LAW ON UNFAIR TERMS IN CONSUMER CONTRACTS; TO AMEND THE REGULATIONS THAT GIVE EFFECT TO DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CONSUMER RIGHTS OF 25 OCTOBER 2011, AND TO PROVIDE FOR RELATED MATTERS.

INTRODUCTORY NOTE

The Scheme of the proposed Consumer Rights Bill deals with transactions between consumers and traders, and does not regulate either transactions between consumers or those between traders. The focus of the Scheme is, first, on the rights of consumers, and the corresponding obligations of traders, in respect of the quality and other attributes of goods, services and digital content. It deals, secondly, with the remedies available to consumers when these rights are contravened. The Scheme incorporates, thirdly, the statutory provisions regulating the fairness or otherwise of the terms of consumer contracts.

The current legislative provisions in these areas are contained in the following enactments:

- the rules governing the quality and other aspects of goods (including digital content supplied in tangible form) under sales contracts, and the remedies for breaches of these rules, are set out in the Sale of Goods Acts 1893 and 1980 and the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003;
- the rules governing the quality and other aspects of goods supplied under consumer hire and hire-purchase agreements, though not remedies for breaches of these rules, are set out in Parts VII and VIII of the Consumer Credit Act 1995;
- the rules governing the quality of services supplied under service contracts, though not remedies for breaches of these rules, are set out in Part IV of the Sale of Goods and Supply of Services Act 1980;
- the fairness of the terms of consumer contracts is regulated by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000, the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014.

The consolidation of all of these provisions in a single enactment in the interests of regulatory simplification is a core objective of the proposed legislation.

The second main aim of the proposed legislation is to address the clear gaps in the protections afforded consumers by existing legislation, among them:

- the absence of statutory rules on the rights of consumers, and the obligations of traders, in respect of digital content supplied through downloads, streaming or other intangible media, and of a statutory scheme of remedies for breaches of such rules;
- the absence of a statutory scheme of remedies for breaches of the rules on the quality of services;
- the absence of statutory rules on the rights of consumers in respect of goods supplied under exchange transactions, and the absence of a statutory scheme of remedies for breaches of the rules on the quality and other aspects of goods supplied under consumer hire and hire-purchase agreements and exchange transactions.

The Department's objective in drawing up the proposals in the Scheme of the Bill has been to ensure that, as far as possible, its provisions are:

- clear, that is comprehensible and accessible,
- coherent, that is consistent to the fullest extent possible for different types of transaction,
- proportionate, that is fair and balanced, and
- effective, that is workable and enforceable.

A more detailed account of the background to, and the rationale for, the main proposals in the present Scheme can be found in the Department's Consultation Paper on the Reform of the Law on Consumer Contract Rights which was published in August 2014. This can be accessed at <http://www.djei.ie/commerce/consumer/issues.htm>

Many of the provisions in the Scheme of the proposed Bill are based on the recommendations of the Sales Law Review Group. The Group's final report can be accessed at <http://www.djei.ie/publications/commerce/2011/saleslawreviewgroupreport2011.pdf>

PART 1

PRELIMINARY MATTERS

Introductory Note

This Part deals with matters common to legislation generally (citation and commencement; interpretation; application; regulations; repeals and amendments), and with provisions of general application to other Parts of the proposed Bill (making of contracts; burden of proof; refunds; contract terms exceeding the provisions of the Scheme; and choice of law rules).

A more detailed account of the background to, and the rationale for, many of the proposals in this Part of the Scheme can be found in Parts I and II of the Department's Consultation Paper of August 2014 on the Reform of the Law on Consumer Contract Rights. The paper can be accessed at <http://www.djei.ie/commerce/consumer/issues.htm>

Further background information on the proposals in this Part of the Scheme can be found in chapters 1 to 3 of the Report of the Sales Law Review Group at <http://www.djei.ie/publications/commerce/2011/saleslawreviewgroupreport2011.pdf>

Head 1 Short title and commencement

(1) This Act may be cited as the Consumer Rights Act 2015.

(2) The Act shall come into operation on such days as the Minister may appoint by order.

Head 2 Interpretation

(1) In this Act -

“Act of 1893” means the Sale of Goods Act 1893 (1893, c. 71);

“Act of 1980” means the Sale of Goods and Supply of Services Act 1980 (No. 16 of 1980);

“Act of 2007” means the Consumer Protection Act 2007 (No. 19 of 2007);

“Act of 2014” means the Competition and Consumer Protection Act 2014 (No. 29 of 2014);

“alternative dispute resolution procedure” means a procedure which complies with the requirements of Directive 2013/11/EU on alternative dispute resolution for consumer disputes;

“by electronic means” means, in relation to a service, that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

“consumer” means an individual who is acting for purposes which are wholly or mainly outside the individual’s trade, business, craft or profession;

“contract for the supply of goods” means –

- (a) a sales contract,
- (b) a hire contract,
- (c) a hire-purchase contract, and
- (d) a contract other than a sales or hire purchase contract under which the trader transfers or agrees to transfer the ownership of the goods to the consumer and the consumer provides or agrees to provide consideration other than solely by payment of the price;

“delivery” means the voluntary transfer of the physical possession or control of goods;

“digital content” means data which are produced and supplied in digital form, whether or not according to the buyer’s specifications, including video, audio, picture, or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software, but excludes –

- (a) services supplied by electronic means, and

(b) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users;

“digital content contract” means a contract under which a trader supplies or agrees to supply digital content to a consumer and the consumer pays or agrees to pay the price of the digital content;

“distance contract” has the meaning given by Regulation 2 of the Regulations of 2013:

“durable medium” means any medium, including paper and e-mail, that –

(a) enables its recipients to store information addressed personally to them in a way accessible for future reference for a period of time adequate for the purposes of the information, and

(b) allows the unchanged reproduction of the stored information;

“EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2 May 1992, as adjusted by all subsequent amendments to that Agreement;

“EEA state” means a state which is a contracting party to the EEA Agreement;

“financial services” means any service of a kind normally provided in the ordinary course of carrying on a banking business, an insurance business or a business of providing credit, personal pensions, an investment service or a payment service;

“goods” means any tangible movable items, including gas, water and electricity put up for sale in a limited volume or set quantity, but excluding:

(a) items sold by way of execution or otherwise by authority of law, and

(b) coins and notes for use as currency;

“hire contract” means a contract under which the trader transfers or agrees to transfer possession of the goods and the right to use them to the consumer, subject to the terms of the contract, for a period determined in accordance with the contract, while the trader retains ownership of the goods;

“hire-purchase contract” means a contract under which, first, the goods are hired by the trader in return for periodic payments by the consumer, and second, the ownership of the goods will transfer to the consumer, if the terms of the contract are complied with and –

(a) the consumer exercises an option to buy the goods,

(b) any party to the contract does an act specified in it, or

(c) an event specified in the contract occurs;

“Minister” means the Minister for Jobs, Enterprise and Innovation;

“off-premises contract” has the meaning given by Regulation 2 of the Regulations of 2013;

“on-premises contract” has the meaning given by Regulation 2 of the Regulations of 2013;

“ownership” means the general property in goods and not merely a special or limited property;

“producer” in relation to goods or digital content means –

(a) the manufacturer,

(b) the importer, or

(c) any person purporting to be a producer by placing his or her name, trade mark or other distinctive sign on the goods or using his or her name, trade mark or other distinctive sign in connection with the digital content,

and includes any person acting in the name or on behalf of the producer,

“Regulations of 2013” means the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013);

“repair” in relation to goods or digital content means bringing the goods or digital content into conformity with the contract;

“sales contract” means a contract under which a trader transfers or agrees to transfer the ownership of goods to a consumer and the consumer pays or agrees to pay the price of the goods;

“services” means any service or facility, including without limitation –

(a) a service or facility for –

(i) financial services or advice,

(ii) other professional services or advice,

(iii) amusement, cultural activities, entertainment, instruction, recreation or refreshment,

(iv) accommodation, communication (including electronic communication), transport, travel, parking, or storage,

(v) the care and maintenance of persons, animals or things, or
(vi) the construction, maintenance or repair of buildings, and
(b) any rights, benefits, privileges, obligations or facilities that are, or are to be provided, granted, or conferred in the course of a service,
but does not include services provided under a contract of employment;

“services contract” means a contract under which a trader supplies or agrees to supply a service to a consumer and the consumer pays or agrees to pay the price of the service;

“trader” means -

- (a) an individual, or
- (b) a legal person, whether –
 - (i) privately owned,
 - (ii) publicly owned, or
 - (iii) partly privately owned and partly publicly owned,

who is acting for purposes related to the person’s trade, business, craft or profession, and includes any person acting in the name, or on behalf, of the trader.

(2) It is for a trader claiming that an individual was not acting for purposes wholly or mainly outside the individual’s trade, business, craft or profession to show that the individual was not so acting.

(3) The reference in the definition of -

- (a) contract for the supply of goods
- (b) digital content contract
- (c) sales contract, and
- (d) services contract

to the consumer paying a price includes a reference to the consumer using by way of payment any facility for which payment has been made.

(4) Where digital content, goods or a service are supplied free of charge with digital content, goods or a service for which the consumer pays a price –

- (a) the provisions of Part 2 apply to any goods,
- (b) the provisions of Part 3 apply to any digital content, and
- (c) the provisions of Part 4 apply to any service

so supplied.

(5) The reference in the definition of digital content contract to the consumer paying a price does not limit the application of –

- (a) head 41(4) (contracts for the supply of digital content), or
- (b) head 55 (remedies for damage to device or other digital content).

Explanatory Note

Subhead (1)

A number of the definitions in subhead (1) of this head are self-explanatory (for example, those referring to specified Acts or Regulations). Most of the other definitions are based on established or existing definitions as follows:

- the definition of “by electronic means” follows the definition at Regulation 3(1) European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68/2003) which give effect to Directive 2001/31/EC on Information Society Services and Electronic Commerce;
- the definition of “delivery” is based on the definition at section 62(1) of the Sale of Goods Act 1893 amended to take account of the provisions on delivery at Article 18 of Directive 2011/83/EU on Consumer Rights;
- The definition of “digital content” is a modified version of the definition at Article 2(j) of the proposal for a Regulation on a Common European Sales Law;
- The definition of “durable medium” is based on the definition at regulation 2(1) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013) which give effect to Directive 2011/83/EU on Consumer Rights
- the definition of “financial services” is based on the definition at regulation 2(1) of the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004 (S.I. No. 853 of 2004) which give effect to Directive 2002/65/EC on the distance marketing of consumer financial services;
- the definition of “goods” is based on the definition at regulation 2(1) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013): paragraph (b) of the definition on coins and notes for use as currency reflects the exclusion of “money” from the definition of “goods” at section 62(1) of the Sale of Goods Act 1893.

- the definition of “hire purchase contract” is based on a reformulation of the definition of “hire purchase agreement” at section 2(1) of the Consumer Credit Act 1995 with a view to providing a more accessible definition;
- the definition of “ownership” is based on the definition of “property” at section 62(1) of the Sale of Goods Act 1893;
- the definition of “producer” is a modified version of the definition at regulation 2(1) of the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 (S.I. No 11/2003) which give effect to Directive 1999/44/EC on Consumer Sales and Associated Guarantees;
- the definition of “repair” is based on the definition at regulation 2(1) of the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 (S.I. No 11/2003);
- the definitions of “sales contract” and “services contract” are based on the definitions at regulation 2(1) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013); and
- the definition of “services” is based, with some additions and alterations, on the definition at section 2(1) of the Consumer Protection Act 2007.

The definition of “contract for the supply of goods” is new to Irish law and its inclusion is in line with a recommendation of the Sales Law Review Group. It is intended, first, to provide an overarching term for the different types of transaction (sale, hire, hire-purchase, exchange etc.) under which goods are supplied by a trader to a consumer. It aims, secondly, to ensure that certain types of contracts involving goods - such as contracts of barter or exchange and part-exchange and transactions in which goods are supplied under loyalty schemes - which were previously not covered by statutory protections are brought within the scope of those protections.

The Scheme uses the terms “consumer” and “trader” throughout to refer to the parties to all of the transactions to be regulated by the proposed Bill. The definitions of “consumer” and “trader” are based on the definitions at regulation 2(1) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013) which give effect to Directive 2011/83/EU on Consumer Rights. These are now the established terms in in European Union consumer protection legislation, and their use is intended to standardise the terms used as follows in existing legislation to characterise the parties to consumer contracts and transactions:

- under the Sale of Goods Act 1893, the parties to sales contracts are referred to as “buyer” and “seller”: certain provisions of the 1893 Act and of the Sale of Goods and Supply of

Services Act 1980, however, apply only where the buyer “deals as consumer” as defined in section 3(1) of the Act;

- under the Sale of Goods and Supply of Services Act 1980, the trader party to consumer contracts for the supply of a service is referred to as the “supplier”, while the consumer is referred to as a party who “deals as consumer”;
- under the Consumer Credit Act 1995, the parties to consumer hire and hire purchase agreements are referred to as “hirer” and “owner”;
- under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, the parties are referred to as “consumer”, “seller” and “supplier”;
- under the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003, the parties to sales contracts are referred to as “consumer” and “seller”;
- under the Consumer Protection Act 2007, the parties to business-to-consumer commercial practices are referred to as “consumer” and “trader”;
- under the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013, the parties to sales, service and digital content contracts are referred to as “consumer” and “trader”.

The definition of “consumer” in head 2, unlike the definition in the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 on which it is based, states that a consumer is an individual who is acting for purposes *wholly or mainly* outside the individual’s trade, craft, business or profession. The purpose of this addition is to ensure that the protections of the Act will apply to transactions in which the consumer may be acting both for private purposes and for purposes related to his or her work or business, but where the private purpose is predominant – for example, a person who purchases a laptop primarily for personal use, but who uses it occasionally to send or receive e-mails to or from his or her place of work. Recital 17 of the Consumer Rights Directive which is given effect by the Regulations provides that in ‘the case of dual purpose contracts, where the contract is concluded partly for purposes within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered a consumer’. The ‘wholly or mainly’ stipulation in the proposed definition of “consumer” is in line with this clarification. Because of the constraints that apply to secondary legislation made under the European Communities Act 1972, it was not considered advisable to include this clarification in the definition of “consumer” in the Regulations of 2013 which implemented the Directive.

Subhead (2)

Subhead (2) which requires a trader claiming that an individual was not acting for purposes wholly or mainly outside his or her trade, business, craft or profession to show that the individual was not so acting is based on the provision at section 3(3) of the Sale of Goods and Supply of Services Act 1980.

Subhead (3)

Subhead (3) provides that references in the definitions of different consumer contracts to the consumer “paying a price” include references to the consumer using by way of payment any facility for which payment has been made. This is intended to cover situations where consumers make purchases using gift vouchers or tokens or virtual currency originally purchased with money, such as those used in some computer games.

Subhead (4)

Subhead (5) provides that where digital content, goods or services are supplied free of charge with digital content, goods or services for which the consumer pays a price, the provisions of the relevant Part of the Act will apply to any digital content, goods or service so supplied. The subhead will cover, among other things, goods, services or digital content supplied free of charge to consumers under promotional schemes or in return for a separate purchase. It is intended to remove any doubt about the application of the Act to goods or other products acquired, for example, under ‘buy one/get one free’ offers or products acquired gratis in return for purchases above a specified amount.

Subhead (5)

Subhead (4) provides that the reference in the definition of digital content contract to the consumer paying a price does not limit the application of certain provisions of Part 2, namely head 41(5) which gives the Minister for Jobs, Enterprise and Innovation power to make Regulations that would extend some or all of the provisions of Part 3 to digital content contracts for which no price is paid if such contracts are giving rise to significant consumer detriment, and head 55 which gives consumers remedies for damage to a device or other digital content of the consumer that was caused by digital content supplied by a trader regardless of whether a price was paid for this content.

Head 3 Application

- (1) This Act applies to contracts between a consumer and a trader as follows:
 - (a) Part 2 applies to contracts for the supply of goods,
 - (b) Part 3 applies to contracts for the supply of digital content,
 - (c) Part 4 applies to contracts for the supply of a service, and
 - (d) Part 5 applies to all contracts between a consumer and a trader.
- (2) Parts 2, 3 and 4 may apply to a contract that also comes within the scope of another Part.
- (3) The Act shall apply to contracts entered into after the date referred to in head 1(2).

Explanatory Note

Subhead (1) is intended to act as a general signpost to the subsequent parts of the Bill. Subhead (2) seeks to clarify the application of the different Parts of the Bill to 'mixed' contracts. Head 12(2) of Part 2 provides that, where a contract for the supply of goods is combined with a contract covered by another Part of the Act, Part 2 applies to the supply of goods element of the contract. Head 41(3) of Part 3 and Head 57(2) of Part 4 contain similar provisions on digital content and services contracts respectively. Subhead (3) provides that the Act will apply only to contracts concluded after its commencement.

Head 4 Regulations

(1) The Minister may by regulations provide for any matter referred to in this Act as prescribed or to be prescribed.

(2) The Minister may make different regulations under this Act for different classes or types of consumers, traders or contracts.

(3) Regulations under this Act may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations.

(4) Every regulation made under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done under it.

Explanatory Note

This is a standard provision that sets out the powers of the Minister for Jobs, Enterprise and Innovation to make regulations under the Act.

Head 5 Repeals

(1) The Acts specified in *Part 1 of Schedule 2* are repealed to the extent specified in *column (4)* of that Part.

(2) The statutory instruments specified in *Part 2 of Schedule 2* are revoked to the extent specified in *column (4)* of that Part.

Explanatory Note

Acts for Repeal

Subject to review in the light of the responses to this consultation, the main repeals to be provided for in Part 1 of the Schedule to the Scheme are as follows:

- Sale of Goods Act 1893: section 4 (contract of sale for ten pounds and upward)
- Trading Stamps Act 1980: the whole Act;
- Consumer Credit Act 1995:
 - Part VI (Hire-Purchase Agreements)*
 - section 74 (Implied terms as to title)
 - section 75 (Letting by description)
 - section 76 (Implied terms as to quality and fitness)
 - section 77 (Samples)
 - section 78 (Statements purporting to restrict rights of hirer)
 - section 79 (Exclusion of implied terms and conditions)
 - section 80 (Liability of persons conducting negotiations antecedent to hire-purchase agreements)
 - section 81 (Application of sections 12 and 15-19 of Act of 1980 to hire-purchase agreements)
 - section 82 (Application of section 13 of Act of 1980 to hire-purchase agreements)
 - section 83 (Antecedent negotiations and representations)
 - Part VII (Consumer- Hire Agreements)*
 - section 88 (Application of sections 75 to 84 to consumer- hire agreements)
- Sale of Goods and Supply of Services Act 1980:
 - section 3 (Dealing as consumer);
 - section 11 (Statements purporting to restrict rights of buyer)
 - section 14 (Liability of finance houses)

sections 15 to 19 (Guarantees); and section 53 (Size of type in printed contracts and other documents)

section 41 (Statements purporting to restrict rights of recipient of service.

Section 4 of the 1893 Act which provides that sales contracts of ten pounds and over are not enforceable unless they are evidenced in writing or satisfy other conditions is widely regarded as obsolete. Its repeal was recommended by the Sales Law Review Group.

With a small number of exceptions, the provisions of the Sale of Goods and Supply of Services Act 1980 and the Consumer Credit Act 1995 proposed for repeal are incorporated in the Scheme of the proposed Bill. Those exceptions deal with the provisions at sections 11 and 41 of the 1980 Act and section 78 of the 1995 Act on statements purporting to restrict the rights of buyers, the recipients of services or hirers. The Sales Law Review Group recommended the repeal of these provisions on the ground that the provisions of the Consumer Protection Act 2007 on misleading commercial practices, and those of the European Communications (Misleading and Comparative Marketing Communications) Regulations 2007, provided adequate protection from such statements.

The Trading Stamps Act 1980 was framed with reference to the trading stamps schemes in operation in the 1960s and 1970s, and is of little or no applicability to the loyalty schemes that are their closest contemporary equivalent. Goods supplied to consumers under loyalty schemes will come under the provisions of the Bill applicable to contracts for the supply of goods.

Statutory Instruments for Revocation

Part 2 of the Schedule provides for the revocation, in full or in part, of the following statutory instruments:

- European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 (S.I. No. 27 of 1995 and S.I. No. 307 of 2000);
- European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11 of 2003);
- European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 (S.I. No 160 of 2013);
- European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013), Part 6 (Passing of Risk and Delivery in Sales Contracts);
- European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014 (S.I. No 336 of 2014).

The provisions of the various Unfair Terms Regulations proposed for revocation are incorporated in amended form in Parts 5 and 6 of the present Scheme. The provisions of Part 6 of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 are incorporated in heads 32 and 35 of Part 2.

Head 6 Amendments

(1) The Acts specified in *Part 1 of Schedule 2* are amended to the extent specified in *column (4)* of that Part.

(2) The statutory instruments specified in *Part 2 of Schedule 2* are amended to the extent specified in *column (4)* of that Part.

Explanatory Note

Amendments to Acts

The amendments to Acts proposed in Part 1 of the Schedule mainly involve amendments to the Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980 which stipulate that specified sections of the Acts will not apply to consumer contracts to which the Consumer Rights Act will apply.

The main sections of the Sale of Goods Act 1893 to which an amendment along these lines will apply in full or in part are as follows:

- section 1 (Sale and agreement to sell);
- section 3 (Contract of sale, how made);
- section 5 (Existing or future goods);
- section 11 (When condition to be treated as warranty);
- section 12 (Implied undertaking as to title);
- section 13 (Sale by description);
- section 14 (Implied undertakings as to quality or fitness);
- section 15 (Sale by sample);
- section 20 (Passing of risk);
- section 29 (Rules as to delivery);
- section 30 (Delivery of wrong quantity);
- section 31 (Instalment delivery);
- section 32 (Delivery to carrier);
- section 34 (Buyer's right of examining the goods);
- section 35 (Acceptance);
- section 53 (Remedy for breach of warranty);
- section 55 (Exclusion of implied terms and conditions).

The main sections of the 1980 Act to which an amendment along these lines will apply are as follows:

- *Part II Sale of Goods*
 - section 12 (Implied warranty for spare parts and servicing);
 - section 13 (Implied condition on sale of motor vehicles);
 - sections 15-19 (Guarantees)
- *Part IV Supply of Services*
 - section 39 (Supply of services)
 - section 40 (Exclusion of implied terms)
 - section 42 (Conflict of laws)

While the other sections of the 1893 and 1980 Acts not affected by the proposed amendments are of little or limited relevance to consumer sales contracts in the main, they will continue to apply, where relevant, to these contracts and to commercial sales contracts. It is the Department's intention to introduce an updated and reformed Sale of Goods and Supply of Services Bill after the enactment of the proposed Consumer Rights Act.

Amendments to Statutory Instruments

The main amendments proposed to statutory instruments will involve amendments of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. 484 of 2013) in order to extend certain of its provisions to contracts currently outside the scope of the Regulations.

The Regulations give effect to Directive 2011/83/EU on Consumer Rights. Article 3(3) of the Directive provides that the Directive shall not apply to contracts in the sectors and activities listed in Box 1 below. The harmonisation of national laws effected by the Directive, however, governs only those transactions that come within its scope. Member States are free accordingly to apply legislative provisions similar to those in the Directive to the contracts outlined in Box 1. Recital 13 of the Directive states that:

Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive.

BOX 1

EXEMPTIONS FROM SCOPE OF CONSUMER RIGHTS DIRECTIVE

Contracts -

- a) for social services, including social housing, childcare, and support of families and persons permanently or temporarily in need, including long-term care;
- b) for healthcare, as defined in point (a) of Article 3 of Directive 2011/24/EU,¹ whether or not they are provided via healthcare facilities;
- c) for gambling, which involves wagering a stake with pecuniary value in games of chance, including lotteries, casino games and betting transactions;
- d) for financial services;²
- e) for the creation, acquisition or transfer of immovable property or of rights in immovable property;
- f) for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes;
- g) which fall within the scope of Council Directive 90/314/EEC on package travel, package holidays and package tours;³
- h) which fall within the scope of Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts;⁴
- i) which, in accordance with the laws of Member States, are established by a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope;
- j) for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;
- k) for passenger transport services, with the exception of Article 8(2) and Articles 19 and 22;⁵
- l) concluded by means of automatic vending machines or automated commercial premises;
- m) concluded with telecommunications operators through public payphones for their use or concluded for the use of one single connection by telephone, Internet or fax established by a consumer.

¹ This defines 'healthcare' as 'health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices'.

² Defined in Article 2(12) of the Directive as 'any service of a banking, credit, insurance, personal pension, investment or payment nature'.

³ Given effect in Ireland by the Transport (Travel Trade) Acts 1982 and 1995.

⁴ Given effect in Ireland by the European Union (Protection of Consumers in respect of Timeshare, Long-Term Holiday Product, Resale and Exchange Contracts) Regulations 2011, S.I. No. 73/2011.

⁵ Recital 8 states that, in relation to transport of goods and car rental which are services, consumers should benefit from the protection afforded by the Directive with the exception of the right of withdrawal. Article 8(2) of the Directive deals with information and related obligations on the trader where 'a distance contract to be concluded by electronic means places the consumer under an obligation to pay'. Article 19 of the Directive deals with fees for the use of means of payment) and Article 22 with payments additional to the payment for the trader's main obligation under the contract.

Subject to review in the light of responses to the consultation on the Scheme of this Bill, it is proposed to make a number of extensions of the scope of the Regulations. Part 2 of the Regulations (Consumer Information for On-Premises Contracts) would be extended to -

- healthcare contracts,
- social service contracts, and
- gambling contracts.

The proposed extension of Part 2 of the Regulations to on-premises healthcare contracts would, among other things, require general practitioners to inform consumers of the price of a consultation in the practitioner's surgery prior to the consultation. The amended Regulations may specify also the manner in which this information is to be provided.

Part 3 of the Regulations (Consumer Information for Off-Premises Contracts and Distance Contracts) would be extended to -

- distance healthcare contracts,
- distance and off-premises contracts for social services, and
- distance and off-premises gambling contracts.

Part 4 of the Regulations (Right to Cancel Distance and Off-Premises Contracts) would be extended to –

- distance healthcare contracts, and
- distance and off-premises social services contracts.

The provisions of Article 19 (Fees for the use of means of payment) and Article 22 (Additional payments) of Part 5 (Payment Fees, Additional Payments and Charges for Communications by Telephone) of the Directive would be extended to all of the contracts outside the scope of the Directive except contracts for financial services. The provisions of Article 21 (Communication with trader by telephone) would be extended to all of the excluded contracts, including contracts for financial services.

The Department set out the rationale for, and sought views on, these extensions of the scope of Directive 2011/83/EU on Consumer Rights in two public consultations on the implementation of the Directive.⁶ The responses to the consultations were generally supportive of the proposed extensions. It was not possible, however, to extend the provisions of the Directive to excluded

⁶ Department of Jobs, Enterprise and Innovation. September 2012. *Consultation on Article 19 (Fees for the Use of Means of Payment) and Article 22 (Additional Payments) of Directive 2011/83/EU on Consumer Rights*, paragraphs 69-73. Department of Jobs, Enterprise and Innovation. May 2013. *Consultation on the Implementation of Directive 2011/83/EU on Consumer Rights*, paragraphs 19-23, 40-41, 54-55 and 66-67. The Consultation Papers and the responses to them can be accessed at www.djei.ie/commerce/consumer/crdconsultations.htm

contracts in regulations made under the European Communities Act 1972 as the constitutional immunity afforded regulations made under that Act applies only to measures necessitated by the obligations of EU membership. This constraint does not apply, however, to primary legislation such as the present Bill.

NOTE

The changes to the scope of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 outlined are presented for the sake of convenience as amendments to the Regulations. The incorporation of the Regulations in full, along with the proposed amendments to their scope, in the present Bill is under consideration. As the proposed amendments do not affect the substance of the Regulations, it was not thought necessary to reproduce the text of the Regulations in the Scheme of the Bill.

Head 7 Making of contract

A contract -

- (a) for the supply of goods that is subject to the provisions of Part 2,
- (b) for the supply of digital content that is subject to the provisions of Part 3,
- (c) for the supply of services that is subject to the provisions of Part 4, or
- (d) a consumer contract that is subject to the provisions of Part 5

may be made in writing, by word of mouth, partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Explanatory Note

This head provides, in line with the position at common law, that no formal requirements will apply to the formation of the contracts to be covered by the proposed Bill. A similar rule applies to sales contracts under section 3 of the Sale of Goods Act 1893. As stated in the note on head 6, section 4 of the 1893 Act which provides that sales contracts with a value of £10 or more are not enforceable unless they are evidenced in writing or satisfy other conditions is to be repealed for both consumer and commercial sales contracts.

A great many sales and services contracts are concluded orally between traders and consumers every day, and imposing formal requirements in such cases would serve no purpose. The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013, however, require specified pre-contractual information to be provided in writing or on another durable medium prior to the conclusion of an off-premises contract and, in the case of distance contracts, to be provided in a manner appropriate to the means of distance communication used to conclude the contract. In both cases, the trader must also provide the consumer with a copy or confirmation of the concluded contract on a durable medium.

Head 8 Burden of proof

(1) For the purposes of the consumer remedies set out in Parts 2 and 3 and 4 of this Act, any lack of conformity with a contract for the supply of goods, a digital content contract or a services contract which becomes apparent within six months from –

- (a) the date of delivery of the goods,
- (b) the date of supply of the digital content, or
- (c) the date of supply of the service,

shall, unless the contrary is proved be presumed to have existed at the time of delivery or supply.

(2) Subhead (1) does not apply if, by reason of –

- (a) the nature of the goods, digital content or service concerned, or
- (b) the nature of the lack of conformity concerned,

it would not be a reasonable inference that the lack of conformity existed at the time of delivery.

(3) Where replacement goods or digital content are supplied as a remedy for goods or digital contract not in conformity with the contract, the presumption referred to in subhead (1) applies from the date of delivery of the replacement goods or the date of supply of the replacement digital content.

(4) Nothing in this head shall prevent or restrict a consumer from exercising a remedy after six months from the date of delivery of the goods or the date of supply of the digital content or service.

Explanatory Note

Article 5(3) of Directive 1999/44/EEC on Consumer Sales and Associated Guarantees provides that, unless proved otherwise, any lack of conformity of goods which becomes apparent within six months of delivery shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. This provision was given effect in Regulation 8 of the European Communities (Certain Aspect of the Sale of Goods and Associated Guarantees) Regulations 2003. As its implementation is an obligation on EU Member States, it must be retained in the proposed Bill.

The Scheme proposes the extension of the burden of proof provision to digital content and services contracts. The Department would welcome comments on these proposed extensions in responses to the consultation on the Scheme of the Bill.

Head 9 Refunds

- (1) This head applies where the consumer is entitled to a refund under Parts 2, 3 or 4.
- (2) A refund under this section shall be given without undue delay and not later than 14 days from the day on which the consumer is entitled to a refund.
- (3) If the consumer paid money under the contract, the trader shall, unless the consumer expressly agrees otherwise, give the refund using the same means of payment as the consumer used.
- (4) A trader shall not impose any fee on the consumer in respect of a refund.
- (5) This head is in addition to any provisions on refunds in Parts 2, 3 or 4.

Explanatory Note

The remedies that apply under Parts 2, 3 and 4 in cases where goods, digital content or services do not conform to the contract provide in some cases for the refund of payments made by the consumer. This head sets out a number of rules that would apply to such refunds.

Head 10 Contract terms exceeding provisions of Act

Nothing in this Act shall prevent traders from offering consumers contractual rights or remedies that exceed the provisions of the Act.

Explanatory Note

While the rights and remedies provided for in the proposed Bill would have to be fully observed by traders, there is nothing to prevent traders from offering consumers rights or remedies that would go beyond the provisions of the legislation. The law, for example, gives consumers the right to a remedy only where goods do not conform to the contract, but many retailers operate a 'no-quibble' returns policy that, for a specified period, permits consumers to return goods that are in conformity with the contract.

Head 11 Contracts applying law of non-EEA state

(1) If the law of a country or territory other than an EEA State –

(a) is chosen by the parties to be applicable to –

(i) a contract for the supply of goods that is subject to the provisions of Part 2,

(ii) a contract for the supply of digital content that is subject to the provisions of Part 3,

(iii) a contract for the supply of a service that is subject to the provisions of Part 4, or

(iv) a consumer contract that is subject to the provision of Part 5, and

(b) the contract has a close connection with Ireland,

Parts 2, 3, 4 and 5 will apply to the contract despite that choice.

(2) Where –

(a) the applicable law has not been chosen by the parties to the contract, or

(b) the law of an EEA State is chosen,

Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations will apply.

Explanatory Note

Subhead (1) provides that where the parties to a consumer contract covered by the proposed Bill choose as the applicable law for the contract the law of a country other than a state in the European Economic Area, the provisions of the proposed Act will apply notwithstanding that choice if the contract has a close connection with this country. The European Economic Area is the European Union plus Iceland, Liechtenstein and Norway. EU consumer protection legislation applies to EEA Member States as it does to EU Member States. The ‘close connection’ provision in subhead 1(b) is based on Article 6(2) of Directive 93/13/EEC on Unfair Terms in Consumer Contracts and Article 7(2) of Directive 1999/44/EC on Consumer Sales and Associated Guarantees.

Subhead (2) provides that, where the applicable law has not been chosen by the parties to the contract or the law of an EEA State is chosen, Regulation (EC) No. 593/2008 on the law applicable to contractual obligations, commonly known as the Rome I Regulation, will apply. Article 6(1) of the Regulation provides that, with certain specified exceptions,⁷ the law applicable to consumer

⁷ Article 6 of the Regulation does not apply to contracts for the supply of services where the services are to be supplied to a consumer exclusively in a country other than his or her country of habitual residence; contracts

contracts will be the law of the country where the consumer has his habitual place of residence if the trader either –

- a) pursues his commercial or professional activities in the consumer’s country of residence, or
- b) by any means, directs his commercial or professional activities to the consumer’s country of residence.

If a consumer contract does not satisfy the conditions of Article 6(1) of the Rome I Regulation, it will be governed by the law of the country chosen by the parties as the applicable law for the contract or, in the absence of such a choice, by the law of the country where the seller has his habitual residence. If the consumer and the trader choose the law of the trader’s country of residence as the applicable law for the contract, however, Article 6(2) of the Regulation provides that such a choice cannot have the effect of depriving the consumer of the protections of mandatory provisions of the law in the consumer’s country of residence. Irish consumers who conclude contracts with traders in other Member States would, therefore, enjoy the protections of the proposed Bill in many cases.

for carriage other than package travel contracts within the meaning of the Package Travel Directive; contracts relating to a rights or tenancies in immovable property other than timeshare contracts within the meaning of the Timeshare Directive; rights and obligations which constitute a financial obligation and certain other rights and obligations relating to the issuance or offer to the public, and public take-over bids, of transferable securities insofar as these activities do not constitute provision of a financial service; and contracts concluded within a multi-lateral system which brings together, or facilitates the bringing together, of multiple third-party buying and selling instruments in financial instruments.

PART 2

CONTRACTS FOR THE SUPPLY OF GOODS

Introductory Note

The rules on the quality and other aspects of goods supplied under contracts for the sale of goods are currently set out in two separate enactments – the domestic rules in the Sale of Goods Acts 1893 and 1980 and the rules of European Union origin in the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003. The Sales Law Review Group was highly critical of the existence of two separate sets of statutory rules regulating virtually the same aspects of sales contracts, stating that it had ‘aggravated the complexity and lack of coherence of Irish sales law and led to ‘a confusing and, in some respects, contradictory legislative framework’. This Part proposes to replace the existing dual set of rights and remedies for consumer sales contracts with a single set of rules.

Though contracts for the sale of goods are the most important form of goods transaction, goods are transferred from traders to consumers under a variety of other transactions as follows:

- hire agreements - defined in the Consumer Credit Act 1995 as agreements of more than three months duration for the bailment (transfer of possession) of goods to a hirer under which the property in the goods remains with the owner;
- hire-purchase agreements – defined in the Consumer Credit Act 1995 as agreements for the bailment of goods under which the hirer may buy the goods or under which the property in the goods will, if the terms of the agreement are complied with, pass to the hirer in return for periodical payments;
- exchange or barter – transactions in which goods are given in full or part exchange for other goods;
- contracts that include both the provision of a service and the supply of related goods (often referred to as work and materials contracts);

Part 2 of the Bill proposes also, therefore, to consolidate and rationalise the statutory provisions governing different types of goods transaction and to address the gaps that currently exist in the statutory protections for certain types of transaction. As the

provisions of the Sale of Goods Acts 1893 and 1980, for example, apply only to contracts where the goods are sold in return 'for a money consideration called the price', their application to contracts in which goods are supplied by way of full or part exchange (for example, a trade-in of a motor vehicle) is uncertain.

The provisions of Part 2 would accordingly apply a single set of rights and remedies to all transactions in which a trader supplies goods to a consumer (sales, hire-purchase, hire, exchange transactions in which consideration is given by the consumer in a form other than money, and work and material contracts in which the transfer of the ownership of the goods is the main purpose of the contract). Subject only to such modifications as are necessitated by the *sui generis* features of particular transactions, the rights and remedies of consumers in respect of the quality and other aspects of goods under the Bill would be the same regardless of the nature of the transaction under which the goods are supplied. This will require, among other things, bringing within the framework of the proposed Act the provisions of the Consumer Credit Act 1995 on the quality and other aspects of goods supplied under hire-purchase and hire agreements. Other aspects of hire purchase and hire agreements would continue, however, to be regulated by the 1995 Act.

The effect of these changes will be to substitute a unified set of rights and remedies for four separate sets of existing provisions dealing with transactions for the sale or supply of goods, while also strengthening those rights and remedies and extending them to transactions not currently covered by such provisions. The repeals and amendments to existing legislation required by the proposed changes are provided for in heads 5 and 6 and set out in Schedules 2 and 3. The rights and remedies proposed for goods contracts in Part 2 are mirrored to the fullest extent possible in the rights and remedies applicable to digital content contracts in Part 3 and to services contracts in Part 4. Subject only to adjustments necessitated by differences in the nature of the different types of transaction, the aim has been to create a coherent and harmonised regulatory framework for all of the main types of consumer contract.

A more detailed account of the background to, and the rationale for, the main proposals in this Part of the Scheme can be found in Parts III and IV of the Department's Consultation

Paper of August 2014 on the Reform of the Law on Consumer Contract Rights. The paper can be accessed at <http://www.djei.ie/commerce/consumer/issues.htm>

Further background information on the proposals in this Part of the Scheme can be found in chapters 4, 5, 6, 7, 8, 9, 13 and 14 of the Report of the Sales Law Review Group at <http://www.djei.ie/publications/commerce/2011/saleslawreviewgroupreport2011.pdf>

CHAPTER 1

APPLICATION

Head 12 Application (Part 2)

(1) This Part applies to a contract under which a trader supplies or agrees to supply goods to a consumer (a contract for the supply of goods).

(2) Where a contract for the supply of goods is combined with a contract covered by another Part of this Act, this Part applies to the supply of goods element of the contract.

(3) Subhead (2) is without prejudice to head 13(1)(a).

(4) A contract for the supply of goods includes –

(a) a contract that is absolute and a contract that is conditional, and

(b) a contract entered into between one part-owner and another.

(5) This Part does not apply to a contract intended to operate as a mortgage, pledge, charge or other security.

(6) Subhead (1) is subject to any provision of this Chapter that applies a head or part of a head only to some of the contracts within the meaning of contract for the supply of goods.

Explanatory Note

This head deals with the application or scope of Part 2. Subhead (1) introduces the overarching concept of “contract for the supply of goods”. This is defined in head 2(1) as comprising sales contracts; hire contracts; hire-purchase contracts; and contracts for the transfer of goods for a non-money consideration, the first three of which terms are also defined in head 2(1).

Subhead (2) provides that, where a contract for the supply of goods is combined with a contract covered by another Part(s) of the Act, Part 2 applies to the goods element. In the case, for example, of a mobile phone contract which includes both the supply of a handset and the provision of phone and other services for a specified period, matters relating to the handset would come accordingly within the scope of the rights and remedies for goods in this Part. Subhead (3) provides that subhead (2) is without prejudice to head 13(1)(a) which provides that a contract that has as its object both goods and services is a sales contract where the main purpose of the contract is the transfer of the ownership of the goods.

The remaining two subheads derive from the Sale of Goods Act 1893 and re-state some general principles from sale of goods law in the wider context of contracts for the supply of goods. Subhead (4) provides, first, that a contract for the supply of goods can be absolute or conditional and, secondly, that it can be entered into between one part-owner and another, for example the sale or transfer of a share in a boat or a racehorse. Subhead (5) restates the rule at section 61(4) of the Sale of Goods Act 1893 in the wider context of contracts for the supply of goods.

Article 2(3) of the Directive on Consumer Sales and Associated Guarantees provides that Member States may provide that the expression 'consumer goods' does not cover second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person. Ireland did not exercise this option in transposing the Directive in the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003. No such restriction is provided for in the present Scheme with the result that second-hand goods sold at public auction would come within the scope of the proposed Bill.

Head 13 Sales Contracts

(1) A sales contract includes -

- (a) a contract that has as its object both goods and services where the main purpose of the contract is the transfer of the ownership of the goods, and
- (b) a contract under which goods are to be manufactured or produced by the trader;

(2) A sales contract may be a transaction under which the ownership of the goods is transferred from the trader to the consumer (a sale), or a transaction under which the ownership of the goods is to be transferred from the trader to the consumer at a future time or subject to a condition to be fulfilled at a future time (an agreement to sell).

(3) An agreement to sell becomes a sale when the time elapses or the conditions are met subject to which ownership of the goods is to be transferred.

(4) A sales contract may be absolute or conditional.

(5) A sales contract is conditional where the trader retains ownership of the goods until the conditions specified in the contract for the payment of instalments or otherwise are met.

Explanatory Note

Contracts for the sale of goods are the most extensively regulated of the various contracts for the supply of goods. This head restates some of the rules applying to sales contract in existing legislation. Subhead (1) seeks, first, to clarify the relation between sales contracts and contracts for work and materials by providing that a contract that deals with both goods and services is a sales contract where its main purpose is the transfer of the ownership of the goods. This is in line with the definition of 'sales contract' in the Consumer Rights Directive which provides that such contracts include 'a contract that has as its object both goods and services.' The European Commission's guidance on the Directive states that, if the main purpose of a contract is the transfer of the ownership of goods, it should be classified as a sales contract even if it also covers a related service, and irrespective of the relative value of the goods and service.

Subhead (1) also clarifies that a contract under which goods are to be manufactured or produced by the trader is a sales contract. This is in line with section 5(1) of the Sale of Goods Act 1893 and Article 1(4) of the Directive on Consumer Sales and Associated Guarantees.

Subhead (2) distinguishes a sale from an agreement to sell at a future time or subject to a condition to be fulfilled at such a time, both of which constitute contracts for the sale of goods. Subhead (3) is new and clarifies that an agreement to sell becomes a sale when the time elapses or the condition is met subject to which ownership of the goods is to be transferred. Subheads (4) and (5) deal with conditional sales contracts.

Head 14 Liability of finance houses

(1) This head applies to a contract for the supply of goods where the consumer enters into an agreement with another person acting in the course of a business (referred to in this head as a finance house) for the repayment to the finance house of a payment by that finance house to the trader in respect of the price of the goods.

(2) Where the circumstances referred to in subhead (1) apply –

- (a) the finance house is deemed to be a party to the contract for the supply of goods,
and
- (b) the finance house and the trader are jointly and severally answerable to the consumer for breach of the contract for the supply of goods and for any misrepresentations made by the trader with respect to the goods.

Explanatory Note

This head re-enacts the provision at section 14 of the Sale of Goods and Supply of Services Act 1980. It applies to transactions in which the purchase price of goods sold to a consumer is paid to the seller by a finance house and the consumer enters an agreement with the finance house for the repayment of the money provided to fund the purchase. The main aim behind the inclusion of the provision in the 1980 Act was to address problems caused to consumers engaged in these transactions by the doctrine of privity of contract. As payment for the goods was made to the seller by the finance house, the consumer buyer could be held not to be a party to the contract of sale and, as a consequence, not to have a right of action under the contract if the goods proved defective or were otherwise in breach of contract. As the seller and the finance house were typically part of a joint venture in such cases, it was thought appropriate to make them jointly and severally liable for breach of the contract of sale and for any misrepresentations made by the seller. Though the provision overlaps with section 42 of the Consumer Credit Act 1995 and Regulation 18 of the European Communities (Consumer Credit Agreements) Regulations 2010, these provisions are more restrictive in scope than the proposed head. The retention of a provision along the lines of section 14 of the Sale of Goods and Supply of Services Act 1980 is in line with a recommendation of the Sales Law Review Group.

Head 15 Rights of recipient of gift

Where a consumer acquires goods from a trader and the consumer transfers ownership of the goods to another person by gift, that other person may, subject to any defence available to the trader against the consumer, exercise any rights or remedies under this Part as if he or she were the consumer.

Explanatory Note

This provision is new to Irish legislation and seeks to address the potential problem for the recipients of gifts arising from the doctrine of privity of contract. This doctrine provides that only the parties to a contract can enforce their own rights, or the obligations of the other party, under the contract. A person who receives a gift of goods that prove to be faulty may not be in a position consequently to take action to enforce the contract against the seller. The proposed head is similar to a provision in the Australian Competition and Consumer Protection Act 2010.

While head 15 applies only to goods, the option of extending it to digital content and services is under consideration. The Department would welcome views on this option in responses to the consultation on the Scheme of the Bill.

CHAPTER 2

CONSUMER RIGHTS IN CONTRACTS FOR SUPPLY OF GOODS

Head 16 Trader to have right to supply goods

(1) Every contract for the supply of goods, except one to which subheads (2) or (3) apply, includes an implied term that —

- (a) the trader has the right to sell, or otherwise transfer ownership in, the goods at the time when ownership is to be transferred;
- (b) the goods are free from any charge or encumbrance not disclosed or known to the consumer before entering into the contract;
- (c) the goods will remain free from any such charge or encumbrance until ownership of the goods is to be transferred, and
- (d) the consumer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed.

(2) Every contract for the hire of goods includes an implied term that —

- (a) at the beginning of the period of hire, the trader has the right to transfer possession of the goods by way of hire for that period; and
- (b) the consumer will enjoy quiet possession of the goods for the period of the hire except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed to the consumer before entering into the contract.

(3) Where a contract shows, or the circumstances imply, that the trader and the consumer intend the trader to transfer only a limited title to the goods that he or a third person may have, the contract includes an implied term that —

- (a) all charges or encumbrances known to the trader were disclosed to the consumer before entering into the contract; and
- (b) the consumer's quiet possession of the goods—
 - (i) will not be disturbed by the trader or by the third person, and

(ii) will not be disturbed by a person claiming through or under the trader or the third person unless that person is claiming under a charge or encumbrance that was disclosed to the consumer before entering into the contract.

(4) Where the trader does not have the right to supply the goods, the consumer has the right to the remedies specified in Chapter 3.

Explanatory Note

This head restates the rules on the transfer of ownership at section 12 of the Sale of Goods Act 1893 in the wider context of contracts for the supply of goods. Subhead (1) sets out the trader's obligations in respect of the transfer of ownership of the goods to the consumer and of disclosing any charges or encumbrances attaching to the goods, and the consumer's right to quiet possession subject only to any such disclosed charge or encumbrance. Subhead (2) deals separately with hire contracts as these involve the transfer of possession rather than ownership of the goods. Subhead (3) deals with the situation in which the trader and consumer intend only a limited title to, or interest in, the goods to be transferred to the consumer.

This head, like the subsequent heads in Chapter 2, follows the established approach of the Sale of Goods Acts in expressing the rights of the consumer as terms implied into the contract by statute. Unlike the Sale of Goods Acts which identified the terms as either conditions or warranties,⁸ however, the implied terms throughout the proposed Bill are characterised as terms of the contract. The remedies for breach of the provisions of Chapter 2 are set out in detail in Chapter 3.

⁸ While the Sale of Goods Act 1893 does not expressly define 'condition', section 11 treats 'condition' by reference to its legal effect, namely that breach of it 'may give rise to a right to treat the contract as repudiated'. Section 62 of the Act defines 'warranty' as 'an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.' Section 11 further provides that whether a stipulation in a contract is a condition or warranty 'depends in each case on the construction of the contract.' With two exceptions, the terms implied into contracts of sale by the 1893 Act are stated to be conditions of the contract.

Head 17 Goods to be in conformity with contract

- (1) Goods supplied by a trader to a consumer must conform to the contract for the supply of goods.
- (2) Goods conform to the contract if they comply with –
 - (a) the terms implied into the contract by heads 18 to 24, and
 - (b) any other requirements of the contract.
- (3) Goods do not conform to the contract if –
 - (a) the goods are an item that includes digital content, and
 - (b) the digital content does not conform to the contract to supply the digital content in accordance with Part 3.
- (4) Where goods require installation or assembly to be fit for the purpose for which they are supplied, the goods do not conform to the contract if –
 - (a) the goods are installed or assembled by the seller or under his responsibility and are installed incorrectly, or
 - (b) the goods are intended to be, and are, installed or assembled by the consumer, and the incorrect installation is due to a shortcoming in the installation instructions.
- (5) There is no failure to conform to the contract if the failure is attributable to materials supplied by the consumer.
- (6) Where goods supplied by a trader to a consumer do not conform to the contract, the consumer has the right to the remedies specified in Chapter 3.

Explanatory Note

This head is an introductory provision to the provisions of Chapter 2 on the rights of consumers in contracts for the supply of goods. It first states the core requirement that the goods supplied by the trader must conform to the contract. The subsequent subheads elaborate on different aspects of conformity. Subhead (3) deals with the situation where goods include digital content, for example, music, film or software supplied on a disk. In such cases, the digital content must comply with the quality and other requirements that apply to digital content under Part 3. If it does not, the goods containing the digital content are not in conformity with the contract for the supply of goods, and the consumer is entitled to the remedies specified in Chapter 3 of this Part.

Subhead (4) deals with the situation where goods require installation or assembly. It re-enacts the provision at Regulation 6(2) of the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 which gives effect to Article 2(5) of the Directive on Consumer Sales and Associated Guarantees. While the existing provision refers only to installation, however, the proposed subhead applies also to goods that have to be assembled. Subhead (5) restates the rule at Regulation 5(3)(b) of the 2003 Regulations which gives effect to Article 2(3) of the Directive.

Head 18 Goods to be as described

- (1) Every contract for the supply of goods includes an implied term that the goods supplied match the description of the goods given by the trader.
- (2) A reference to goods on a label or other descriptive matter accompanying goods may constitute or form part of a description.
- (3) If a supply of goods is by sample as well as description, it is not sufficient that the bulk of the goods match the sample if the goods do not also match the description.
- (4) Any information about the goods provided by the trader in accordance with –
 - (a) Regulation 5 and Schedule 1, paragraph (a), or
 - (b) Regulations 7 and 10 and Schedule 2, paragraph (a)of the Regulations of 2013 is to be treated as an implied term of the contract for the purposes of the description of the goods.
- (5) The information referred to in subhead (4) must not be altered without the express agreement of the consumer and the trader.

Explanatory Note

Subhead (1) essentially restates the requirement of section 13 of the Sale of Goods Act 1893 that goods correspond with their description and that of Regulation 5(2) of the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) that goods are presumed to be in conformity with the contract if they comply with the description given by the seller. Unlike the provision in the 1893 Act, however, the head is not restricted in its application to contracts for the sale of goods by description.

Subheads (2) and (3) re-enact the provisions of sections 13(2) and (3) of the 1893 Act. Subhead (4) provides that the pre-contractual information about the 'main characteristics' of the goods that the trader is required to provide under the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 is an implied term of the contract for the purposes of the description of the goods.

Head 19 Other pre-contractual information included in contract

(1) Any information that the trader is required to provide in accordance with Regulations 5, 7 and 10 of the Regulations of 2013 is to be treated as an implied term of the contract for the purposes of this Part.

(2) The information referred to in subhead (1) must not be altered without the express agreement of the consumer and the trader.

(3) Subhead (1) does not apply to information about the goods referred to in paragraph (a) of Schedule 1 and paragraph (a) of Schedule 2 of the Regulations.

Explanatory Note

This head provides that, with the exception of the information about the main characteristics of the goods dealt with in head 18, any other information about the goods or the trader that the trader is required to provide under the 2013 Regulations is to be treated as an implied term of the contract for the purposes of Part 2. The 2013 Regulations provide that, in the case of distance and off-premises contracts, the pre-contractual information which the trader must provide under the Regulations ‘forms part of the contract’. This head and heads 45 and 62 will require this information to be treated as an implied term of contract in on-premises transactions also. In line with the approach of the Regulations, the information referred to in this head and head 18(4) can be altered only by agreement between the consumer and the trader.

Head 20 Goods to match sample or model

(1) Where goods are supplied to a consumer by reference to a sample or model of the goods, the contract includes an implied term that the goods match the sample or model.

(2) Subhead (1) does not apply where a difference between the goods and the sample or model is brought to the consumer's attention before the contract is made.

Explanatory Note

This head brings together the provision on the correspondence of goods with their sample or model in the Sale of Goods Act 1893 and the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003. Section 15(2)(a) of the Sale of Goods Act 1893 provides that, in the case of a contract for sale by sample, there is an implied condition that the bulk shall correspond with the sample in quality. Regulation 5(3) of the 2003 Regulations provides, in line with the provision of Article 2(2)(a) of the Consumer Sales and Associated Guarantees Directive to which it gives effect, that goods are presumed to be in conformity with the contract if they 'possess the qualities which the seller has held out to the consumer as a sample or model'.

Section 15(2)(b) of the Sale of Goods Act 1893 provides that contracts for sale by sample include an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. Head 20 does not retain this provision. The Sales Law Review Group recommended that it should not apply to consumer contracts as it was more applicable to commercial transactions and was liable to complicate the relation between the statutory provisions on the correspondence of goods with their sample and those on the quality of the goods.

Head 21 Goods to be of satisfactory quality

(1) Every contract for the supply of goods includes an implied term that the goods are of satisfactory quality, except there is no such implied term –

- (a) as regards a defect specifically drawn to the consumer's attention before the contract is made, or
- (b) if the consumer examines the goods before the contract is made, as regards a defect which that examination ought to have revealed.

(2) The quality of goods is satisfactory if they meet the standard that a reasonable person would consider satisfactory, taking account of—

- (a) any description of the goods,
- (b) the price of, or other consideration given for, the goods (if relevant),
- (c) any public statement about the specific characteristics of the goods made by the trader, the producer or any representative of the trader or the producer, including any statement made in advertising or labelling, and
- (d) all other relevant circumstances.

(3) The quality of goods includes their state and condition, and the following aspects (among others) are in appropriate cases aspects of the quality of goods:

- (a) fitness for all the purposes for which goods of that kind are usually supplied;
- (b) appearance and finish;
- (c) freedom from minor defects;
- (d) safety;
- (e) durability.

(4) A public statement is not a relevant circumstance for the purposes of subhead (2)(c) if the trader shows that—

- (a) when the contract was made, the trader was not, and could not reasonably have been, aware of the statement,
- (b) before the contract was made, the statement had been publicly withdrawn or, to the extent that it contained anything which was incorrect or misleading, it had been publicly corrected, or
- (c) the consumer's decision to contract for the goods could not have been influenced by the statement.

Explanatory Note

This head corresponds to the provisions on merchantable quality at sections 14(1) to (3) of the Sale of Goods Act 1893 and the provision at regulation 5(2)(d) of the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 that goods are presumed to be in conformity with the contract if ‘they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about by the seller, the producer or his representative, particularly in advertising or on labelling.’

The head makes a number of important changes to the existing statutory provisions in line with the recommendations of the Sales Law Review Group. First, it replaces what the Supreme Court has called the ‘archaic and somewhat mysterious’ concept of merchantable quality with the clearer, more contemporary criterion of ‘satisfactory quality’.⁹ Secondly, it fills out the concept of satisfactory quality by specifying a range of relevant aspects of quality, including several new aspects such as appearance and finish, freedom from minor defects and safety. The revised rules on ‘satisfactory quality’ proposed here are broadly in line with the corresponding provisions in other common law jurisdictions such as the United Kingdom, Australia and New Zealand.

The requirement in subhead 2(c) that the standard of satisfactory quality take account of public statements about the goods, and the qualification applicable to such statements in subhead (4), are based on Regulations 5(2)(d) and 6(1) of the 2003 Regulations.

⁹ *James Elliott Construction Ltd v Irish Asphalt Ltd*. 2014 [IESC] 74, paragraph 32.

Head 22 Goods to be fit for particular purpose

(1) This head applies where, before a contract for the supply of goods is made, the consumer makes known to the trader, expressly or by implication, any particular purpose for which the goods are being supplied.

(2) Every contract to which subhead (1) refers includes an implied term that the goods supplied under the contract must be reasonably fit for the purpose made known by the consumer, whether or not that is a purpose for which such goods are usually supplied.

(3) Subhead (2) does not apply where the circumstances show that the consumer does not rely, or that it is unreasonable for the consumer to rely, on the skill or judgment of the trader.

Explanatory Note

This head corresponds to the condition implied into contracts of sale by section 14(4) of the Sale of Goods Act 1893 that goods be reasonably fit for any particular purpose made known by the buyer and to the provision at Regulation 5(2)(a) of the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 that goods are presumed to be in conformity with the contract if they are fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the contract and which the seller has accepted. The exception to the implied term at subhead (3) is based on the provision at section 14(4) of the 1893 Act.

Head 23 Spare parts and after-sale service

Every contract for the supply of goods includes an implied term that spare parts and an adequate after-sale service will be made available by the trader –

- (a) in such circumstances as are stated in an offer, description or advertisement by the trader on behalf of the producer or on his own behalf, and
- (b) for such period as is so stated or, if no period is so stated, for a reasonable period.

Explanatory Note

This head restates the provision at section 12 of the Sale of Goods and Supply of Services Act 1980. Its retention was recommended by the Sales Law Review Group.

Head 24 Safety of motor vehicles

(1) Every contract for the supply of a motor vehicle includes an implied term that the vehicle must be free from any defect that would render it a danger to the public, including persons travelling in the vehicle.

(2) A person using a motor vehicle, with the consent of the consumer, who suffers loss as the result of a breach of the term implied into the contract by subhead (1) may maintain an action for damages against the trader in respect of the breach as if he were the consumer.

(3) In subhead (2), “consumer” means the consumer to whom the motor vehicle has been supplied under the contract for the supply of goods.

Explanatory Note

This head is a streamlined version of section 13 of the Sale of Goods and Supply of Services Act 1980. Though developments such as compulsory vehicle testing and the enactment of the European Communities (General Product Safety) Regulations 2004 could be argued to have made this provision less necessary, the Sales Law Review Group concluded that retention of the core elements of section 13 remained justified. The Group further recommended that the provision should be supplemented by a presumption that the defect existed in the vehicle at the time of the sale. This recommendation is addressed by the burden of proof provision at head 8. Section 13 of the 1980 Act will continue to apply to motor vehicles sold to commercial buyers.

CHAPTER 3

CONSUMER REMEDIES IN CONTRACTS FOR SUPPLY OF GOODS

Head 25 Overview of consumer remedies

(1) Where the trader does not have the right to sell, or otherwise transfer ownership in, the goods in accordance with head 17(1)(a), the consumer has the right to end the contract in accordance with head 30 and to receive a refund of the price paid or other consideration given.

(2) Where the trader does not have the right to supply the goods in accordance with the other provisions of head 17, the consumer has the right to claim damages but not to end the contract.

(3) Where goods do not conform to the contract in accordance with head 16(3), head 16(4), heads 18 to 24 or any other requirement of the contract, the consumer has the right in the first instance to the following remedies:

- (a) the right under head 26 to have the goods repaired;
- (b) the right under head 26 to have the goods replaced; or
- (c) the short-term right under head 27 to end the contract and to receive a refund of the price paid or other consideration given.

(4) Where a consumer exercises the right to the remedies of repair or replacement under head 26 and -

- (a) repair or replacement are impossible or disproportionate for the reasons specified in head 26,
 - (b) the trader has not completed the repair or replacement within a reasonable time or without significant inconvenience to the consumer, or
 - (c) the goods do not conform to the contract after either one repair or one replacement
- the consumer has a right to the remedies specified in subhead (5).

(5) The remedies to which the consumer has a right in the circumstances specified in subhead (4) are –

- (a) the right under head 28 to retain the goods and to receive a price reduction, or
- (b) the long-term right under head 29 to end the contract and to receive a refund of the price paid or other consideration given.

(6) The remedies referred to in subheads (3) and (5) are exercisable at the choice of the consumer.

(7) A consumer who has the right –

(a) to retain the goods and receive a price reduction, or

(b) to end the contract and receive a refund of the price,

may exercise only one of these rights.

(8) If the trader is in breach of a term that is included as an implied term of the contract in accordance with head 19 and the breach does not relate to the conformity of goods with the contract, the consumer has the right to recover from the trader any costs incurred as a result of the breach up to the amount of the price paid or other consideration given for the goods.

(9) The consumer's entitlement to a refund under this Part applies in accordance with head 9.

(10) This Chapter is without prejudice to the right of the consumer to pursue other remedies

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(a) for breach of a term implied into the contract in accordance with heads 18 to 24,

(b) on the ground that the goods do not conform to the contract in accordance with head 17(3) or head 17(4), or

(c) for breach of another requirement included in the contract

instead of or, in addition to, a remedy specified in this head provided that the consumer is not seeking to recover the same loss twice.

Explanatory Note

This head introduces and sets out the remedies that would apply where a consumer contract for the supply of goods does not comply with the provisions of Chapter 2. At present, different remedial frameworks apply to contracts for the sale of goods under the Sale of Goods Acts 1893-1980 and the Regulations that give effect to the Directive on Consumer Sales and Guarantees. The scheme of remedies under the Directive involves a two-tier hierarchy of remedies. The first-tier remedies are repair or replacement of the goods. The second-tier remedies are reduction of the price or rescission of the contract, and can be invoked only where the consumer is not entitled to the first-tier remedies, or where the seller cannot perform these remedies within a reasonable time or without

significance inconvenience to the consumer. By contrast, the remedial scheme under the Sale of Goods Acts 1893 and 1980 for breaches of the implied or express conditions of the contract gives primacy to the right to reject the goods and repudiate the contract. Where this right is lost through acceptance of the goods, however, the Acts afford a second-tier remedy of repair or replacement, with a restoration of the right of rejection and repudiation where the seller fails to provide the second-tier remedy within a reasonable time.

The Sales Law Review Group was critical of the existence of two overlapping sets of remedies for the same transactions. In its view, each of these schemes was complex in itself; having two parallel schemes compounded the complexity and potential for confusion. Head 25, and the subsequent heads in Chapter 3, aim accordingly to give effect to the Review Group's recommendations that a single set of remedies applicable to all consumer contracts for the supply of goods should, first, replace the current dual remedial schemes for sales contracts and, secondly, provide new statutory remedies for non-sale contracts for the supply of goods. In line with the Group's recommendations, the head proposes that the consumer would be entitled in the first instance to the following remedies where goods did not conform to the contract:

- replacement of the goods;
- repair of the goods.
- The short-term right to end the contract and receive a full refund of the price within a standard thirty-day period or, in specified circumstances, a longer or shorter period;

Where the consumer opted for the remedies of repair or replacement, he or she would have the right to a price reduction or a long-term right to end the contract where:

- repair or replacement were impossible or disproportionate; .
- the seller did not complete the repair or replacement within a reasonable time or without significant inconvenience to the consumer; or
- the goods did not conform to the contract after either one repair or one replacement. .

The remedies provided for in the head would be exercisable at the choice of the consumer.

As a failure to comply with the provisions of head 17 on the trader's right to supply the goods is of a different nature to a failure to comply with the provisions on the quality and other aspects of goods, subheads (1) and (2) specify the remedies that would apply in such cases. As a failure to provide information into implied the contract in accordance with head 19 which does not relate to the conformity of the goods with the contract is of a different character to a failure to comply with the other implied terms, subhead (8) provides that breach of this kind should entitle the consumer only to recover any costs incurred as a result of the breach.

The most significant change in the remedies provisions outlined above is perhaps the proposal for a standard thirty-day period after delivery within which the consumer would have the right to end the contract if the goods were not in conformity. The existing law does not specify a period for the exercise of the right to reject non-conforming goods and to repudiate the contract. Under the Sale of Goods Act 1893, the right to reject goods in breach of a condition of the contract is lost when the buyer is deemed to have accepted the goods in accordance with section 35 of the Act. Acceptance can be by intimation to the seller, by the doing of an act in relation to the goods that is incompatible with the ownership of the seller, or by retention of the goods without good and sufficient reason without intimating rejection of them to the seller. These are complex rules which are not readily understandable by either consumers or traders. Their complexity and lack of certainty mean that they do not offer a proper basis for the rights of consumers or the obligations of businesses. While the proposed 30 day period for the initial right to end the contract may be shorter in some cases than the period that might be allowed by the courts under existing law, this will be offset by the greater clarity and certainty offered by the provision. Consumers in particular will find it easier to enforce a thirty-day period for the ending of the contract than the indeterminate provision that currently applies.

Head 26 Right to repair or replacement of goods

(1) This head applies where the consumer has the right to the repair or replacement of the goods.

(2) If the consumer requires the trader to repair or replace the goods, the trader must do so

—

- (a) within a reasonable time,
- (b) without significant inconvenience to the consumer, and
- (c) free of charge to the consumer.

(3) For the purposes of subhead (2), “free of charge” means free of any costs necessarily incurred in bringing the goods into conformity with the contract, including the cost of carriage, postage, labour and materials.

(4) The consumer cannot require the trader to repair or replace the goods if either remedy is —

- (a) impossible, or
- (b) disproportionate relative to the other remedy.

(4) A remedy is disproportionate relative to the other remedy if it imposes costs on the trader which, compared to those imposed by the other remedy, are unreasonable, taking into account —

- (a) the value which the goods would have if they conformed to the contract,
- (b) the significance of the lack of conformity, and
- (c) whether the other remedy could be effected without significant inconvenience to the consumer.

(5) Any question as to what constitutes a reasonable time or significant inconvenience for the purposes of this head is to be determined by reference to —

- (a) the nature of the goods,
- (b) the purpose for which the goods were supplied, and
- (c) other relevant circumstances.

Explanatory Note

This head sets out the rights of the consumer and the obligations of the trader where the consumer opts to have a lack of conformity of the goods remedied by either repair or replacement. The head is based, with some adjustments, on the provisions of Regulation 7 of the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003.

Head 27 Short-term right to end contract

(1) This head applies where the consumer has the short-term right to end the contract and to receive a refund of the price paid or other consideration given.

(2) The short-term right to end the contract begins -

(a) when the goods have been delivered, or

(b) where, after delivery, the contract requires the trader to install the goods or take other action to enable the consumer to use the goods, when the trader has indicated that the installation or other action is complete

and expires 30 days later.

(3) Subhead (2) does not prevent a consumer who has a right to end the contract from ending it before the events referred to in subhead (2)(a) or (b) have occurred.

(4) Where the goods are of a kind that –

(a) can reasonably be expected to perish after, or

(b) whose purpose and use is compatible only with,

a period shorter than 30 days, the time limit for exercising the short-term right to end the contract is the end of that shorter period.

(5) It is for the trader to show that a period shorter than 30 days applies under subhead (4) to the consumer's right to end the contract under this head.

(6) Where it was reasonably foreseeable at the time of the supply of the goods that the consumer would need a period longer than 30 days to examine the goods, the time limit for exercising the short-term right to end the contract is the end of that longer period.

(7) It is for the consumer to show that a period longer than 30 days applies under subhead (6) to the consumer's right to end the contract under this head.

(8) If the consumer requests or agrees to the repair or replacement of the goods, the period in which the consumer can end the contract under this head is suspended while the repair or replacement is in progress.

(9) The period in which the consumer's right to end the contract is suspended under subhead (8) –

- (a) begins on the day the consumer requests or agrees to the repair or replacement of the goods, and
- (b) ends on the day the consumer receives the repaired or replacement goods from the trader.

(10) If goods supplied by the trader following repair or replacement do not conform to the contract, the time limit for exercising the short-term right to end the contract under this head is –

- (a) 7 days after the day on which the consumer receives the repaired or replacement goods, or
- (b) If later, the original time for exercising the right extended by the time taken to repair or replace the goods.

(11) The consumer's right to end the contract under this head applies in accordance with head 30.

Explanatory Note

This head sets out the rights of the consumer and the obligations of the trader where the consumer opts to exercise the short-term right to end the contract. Subhead (2) provides that this right applies for 30 days from the delivery of the goods or the completion of any action (such as installation of the goods) required of the trader under the contract in order for the consumer to be able to use the goods.

Subhead (4) sets out the first exception to the standard 30 day period for the exercise of the right. Where goods can reasonably be expected to perish after, or their use is compatible only with, a period shorter than 30 days, the time limit for exercising the short-term right to end the contract is the end of that shorter period. Subhead (6) sets out the second exception to the standard 30 day period. Where it is reasonably foreseeable by both parties that a longer period will be needed to examine the goods – for example, a lawnmower bought in November or a pram bought in the early stages of a pregnancy – the time limit for exercising the right would be the end of that longer period.

Subheads (7) to (10) provide first that, if the consumer opts for the repair or replacement of goods, the period in which the consumer is entitled to exercise the short-term right to reject the goods is suspended while the repair or replacement is in progress. The subheads further specify when any such suspension begins and ends, and the time limit that applies to the right to end the contract if goods still do not conform to the contract following their repair or replacement.

Head 28 Right to price reduction

- (1) This head applies where the consumer has the right to a price reduction.
- (2) The right to a price reduction is the right to retain the goods, and to –
 - (a) require the trader to reduce by an appropriate amount the price or other consideration that the consumer is required to pay or give under the contract, or
 - (b) receive a refund from the trader of the price paid, or other consideration given, by the consumer in excess of the amount of the reduction.
- (3) The amount of the reduction may, where appropriate, be the full amount of the price or other consideration paid or given, or to be paid or given, by the consumer under the contract.
- (4) The right to a price reduction does not apply if the other consideration given or to be given by the consumer cannot be –
 - (a) divided up so as to enable the trader to receive or retain only the reduced amount, or
 - (b) given back in its original state.

Explanatory Note

This head provides additional detail about the operation of the remedy of price reduction. Subhead (2) clarifies that, where the consumer has paid for the goods, his or her entitlement is to a refund of the price paid in excess of the amount of the reduction. Subhead (3) clarifies that the amount of the reduction may be the full price paid. In cases where a consumer gives consideration other than in the form of money in payment for the goods, the refund would involve an appropriate reduction in, or refund of, that consideration. The right to a reduction would not apply in such circumstances, however, where the consideration given by the consumer could not be divided up or given back. Twenty per cent of a car traded in exchange for another car, for example, cannot be returned to provide a twenty per cent reduction in the consideration given by the consumer. A consumer who exchanges used computer games for a new game cannot enforce the right to have those games returned if they have been sold on by the trader.

Head 29 Long-term right to end contract

(1) This head applies where the consumer has the long-term right to end the contract and to receive a refund of the price paid or other consideration given.

(2) The consumer's right to end the contract under this head applies in accordance with head 30.

Explanatory Note

This head specifies out the long-term right to end the contract to which the consumer is entitled where the remedies of repair or replacement are impossible or disproportionate, have not been completed within a reasonable time or without significant inconvenience to the consumer, or where the goods do not conform to the contract after a failed repair or a failed replacement. This right corresponds to the consumer's buyer right to repudiate the contract under section 53(2) of the Sale of Goods Act 1893 if the seller refuses the buyer's request to repair or replace goods in breach of the contract or fails to do so within a reasonable time. It corresponds also to the consumer's right under Regulation 7 of the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 to have the contract rescinded where the consumer is not entitled to repair or replacement or where either remedy is not completed within a reasonable time or without significant inconvenience to the consumer.

Head 30 Exercise of right to end contract

- (1) This head applies where the consumer exercises –
 - (a) the right under head 25(1) to end the contract,
 - (b) the short-term right under head 27 to end the contract, or
 - (c) the long-term right under head 29 to end the contract.
- (2) The right to end the contract is exercised if the consumer indicates, expressly or by implication, and in a manner clear enough to be understood by a reasonable trader that the consumer is treating the contract as at an end.
- (3) When the consumer exercises the right to end the contract –
 - (a) the trader has a duty to give the consumer a refund of the price paid or other consideration given in accordance with this head and head 9 and
 - (b) the consumer has a duty
 - (i) to make the goods available for collection by the trader, or
 - (ii) where there is an agreement for the consumer to return the goods, to return them as agreed.
- (4) The consumer's entitlement to a refund operates as follows:
 - (a) to the extent that the consumer paid a price under the contract, the consumer shall be entitled to receive the price back in full;
 - (b) to the extent that –
 - (i) the consumer gave consideration by transferring anything else under the contract, and
 - (ii) what was transferred can be given back in its original state,the consumer shall be entitled to receive back the same amount of what he or she transferred; and
 - (c) to the extent that the consumer gave consideration by transferring under the contract something for which the same amount of the same thing cannot be substituted, the consumer shall be entitled to receive back in its original state whatever the consumer transferred.
- (5) The right to a refund under subhead (4) does not apply if the consideration given by the consumer cannot be given back in its original state.

(6) In the circumstances specified in subhead (5), it may be open to the consumer to claim damages or pursue other remedies in accordance with head 25(10).

(7) Whether or not the consumer has a duty to return the goods, the trader must bear any reasonable costs incurred in returning them, other than any costs incurred by the consumer in returning the goods in person to the place where the consumer took physical possession of them.

(8) Where the contract is a hire contract, the consumer's entitlement to a refund applies only to the price paid or consideration given for a period of hire in which the consumer does not have the use of the goods because –

(a) the goods do not conform to the contract, or

(b) the contract is at an end.

(9) Where the contract is a hire-purchase contract or a conditional sales contract and the consumer exercises the right to end the contract before the whole of the price has been paid, the consumer's entitlement to a refund applies only to the part of the price paid or other consideration given.

Explanatory Note

This head deals with the operation of the consumer's right to end the contract. Subhead (2) essentially restates the common law position that the right to end the contract is exercised if the consumer indicates, expressly or impliedly, that he or she is treating the contract as at an end: no other formalities are needed. Subhead (3) is new in that it expressly sets-out the duties of the trader and consumer when the consumer ends the contract. The trader's main obligation is to provide a refund to the consumer; the consumer's duty is to make the goods available for collection or, where there is an agreement for the consumer to return them, to do so in accordance with that agreement. Subheads (4) and (5) set out in more detail the obligation on the trader to provide a refund of the price paid or other consideration given by the consumer. Subhead (7) places the reasonable cost of returning the goods on the trader other than any costs incurred by the consumer in returning the goods in person to the place where the consumer took physical possession of them.

Subhead (8) clarifies that, in the case of a hire contract, the consumer's entitlement to a refund extends only to payments made by the consumer for the period in which the consumer did not have the use of the goods. Subhead (9) provides that, in the case of a hire purchase contract, the

consumer's right to a refund where he or she ends the contract extends only to the price paid by the consumer prior to the termination of the hire purchase agreement.

Head 31 Supply of goods in part conformity with contract

(1) Where the consumer has the right to end the contract by reason of a lack of conformity that affects some but not all of the goods supplied by the trader, the consumer may choose to accept the goods that are in conformity and not to end the contract.

(2) Where the consumer has the right under head 34 to end a contract for the supply of goods in instalments in which a lack of conformity affects some but not all of the goods in an instalment, the consumer may choose to accept the goods in the instalment that are in conformity and not to end the contract.

(3) Where the consumer declines to accept some of the goods in the circumstances specified in subheads (1) or (2), the trader must refund the price paid or consideration given for those goods in accordance with head 9.

(4) The right of the consumer to accept some of the goods under subheads (1) and (2) does not apply where the goods constitute a commercial unit.

(5) For the purposes of this head, a “commercial unit” is one whose division would materially impair the value of the goods or the character of the unit.

Explanatory Note

This head, first, brings together certain of the existing rules on the partial acceptance of goods supplied under a contract of sale and, secondly, seeks to make provision for a more general right of partial acceptance. The existing rule in sale of goods law is often characterised as an ‘all or nothing’ rule: other than in the case of severable goods or goods of mixed description,¹⁰ the buyer must either accept or reject all of the goods even where only part of the goods are defective. While this approach does not give rise to problems where one item such as a car is supplied under a single

¹⁰ The effect of section 11(3) of the 1893 Act is that, unless a contract of sale is severable, a buyer who accepts some of the contract goods will be treated as if he had accepted all of them. The sole exception to this rule in the Act is that at section 30(3) which permits partial rejection of the goods where the seller delivers goods that do not match the contract description mixed with goods that match it. In this case, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject all of the goods. This exception applies only, however, where goods are of a different description to that contracted for and not where they are defective in quality or some other respect. Though the Act does not define ‘severable contract’, it is essentially a single contract whose obligations are to be performed in a number of distinct stages.

contract, it is less satisfactory where a quantity of goods is supplied or where goods are supplied in instalments.

This head provides that, in cases where the consumer has the right to end of a contract by reason of a lack of conformity that affects some goods in a delivery or in an instalment, the consumer would have the option to accept the goods that were in conformity with the contract and to decline the non-conforming goods. This right of partial acceptance would not apply, however, in cases where the goods comprised a 'commercial unit' (such as a pair of shoes) whose subdivision would materially impair the commercial value of the unit.

CHAPTER 3

OTHER RULES IN CONTRACTS FOR THE SUPPLY OF GOODS

Head 32 Delivery of goods in sales contracts

(1) Unless the trader and the consumer have agreed a time or period of time for delivery, every sales contract includes an implied term that the trader shall deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay and not later than 30 days from the conclusion of the contract.

(2) If the trader does not deliver the goods –

- (a) at the time or within the time period agreed with the consumer or
- (b) where no such time limit or period have been agreed between the trader and the consumer, within the time limit specified in subhead (1),

the consumer shall require the trader to make the delivery within an additional period of time appropriate to the circumstances.

(3) Subhead (2) does not apply if—

- (a) the trader has refused to deliver the goods,
- (b) delivery of the goods within the time agreed with the consumer is essential, taking into account all the relevant circumstances at the time of the conclusion of the contract, or
- (c) the consumer has informed the trader prior to the conclusion of the contract that delivery on or by a specified date is essential.

(4) Where the trader—

- (a) refuses to deliver the goods,
- (b) fails to deliver the goods within any additional period of time for delivery applicable under subhead (2), or
- (c) fails to deliver the goods—
 - (i) within the time agreed with the consumer under subhead (3)(b), or
 - (ii) on or by the date the date specified by the consumer under subhead (3)(c),

the consumer may treat the failure as a breach of a term of the contract which entitles the consumer to end the contract.

(5) If the consumer ends the contract in accordance with subhead (4), the trader must, without undue delay, reimburse all payments made under the contract by the consumer.

Explanatory Note

Section 30(2) of the Sale of Goods Act 1893 originally provided that, where a seller is bound to send the goods to the buyer but no time for sending them is fixed, the seller is bound to send them within a reasonable time. The application of this provision to consumer sales contract ceased in 2013 with the enactment of the regulations that give effect to the Consumer Rights Directive. Article 18 of the Directive provides among other things that, unless the parties have agreed otherwise, the seller must deliver the goods to the consumer without undue delay and not later than 30 days from the conclusion of the contract. The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 which give effect to the Directive amended section 30 of the 1893 Act in line with the Directive's provisions on delivery in consumer sales. Head 30 restates the Directive's rules on delivery on with some changes to the text of the 2013 Regulations in order to clarify aspects of the provisions.

Head 33 Delivery of wrong quantity

(1) Every contract for the supply of goods includes an implied term that the trader delivers the correct quantity of goods in accordance with the terms of the contract.

(2) Where the trader delivers to the consumer a quantity of goods less than the trader contracted to supply, the consumer may –

- (a) accept the goods and pay for them *pro rata* at the contract price, or
- (b) treat the failure to deliver the correct quantity of goods as a breach of a term of the contract which entitles the consumer to end the contract.

(3) Where the trader delivers to the consumer a quantity of goods larger than the trader contracted to supply, the consumer may –

- (a) accept the quantity of goods specified in the contract and decline the rest, or
- (b) accept all of the goods delivered and pay for them *pro rata* at the contract price, or
- (c) treat the failure to deliver the correct quantity of goods as a breach of a term of the contract which entitles the consumer to end the contract.

(4) If the consumer ends the contract in accordance with subhead (2)(b) or subhead (3)(c), the trader must, without undue delay, reimburse all payments made under the contract by the consumer.

Explanatory Note

This head restates the rules of section 30 of the Sale of Goods Act 1893 on delivery of the wrong quantity of goods and extends those rules to other contracts for the supply of goods. It also provides that contracts for the supply of goods include an implied term that the trader should deliver the correct quantity of goods in accordance with the contract.

Head 34 Instalment deliveries

(1) In a contract for the supply of goods, the consumer is not bound to accept delivery of the goods by instalments unless that has been agreed between the consumer and the trader.

(2) Where the contract provides for the goods to be delivered by stated instalments that are to be separately paid for, subheads (3) to (5) apply.

(3) If the trader makes a delivery that does not conform to the contract in respect of one or more instalments, the consumer may be entitled either to —

(a) decline to accept the instalment that does not conform to the contract and receive a refund of the price paid or other consideration given for that instalment, or

(b) treat the failure of the instalment delivery to conform to the contract as a breach of a term of the contract which entitles the consumer to end the contract.

(4) Whether paragraph (a) or (b) of subhead (3) applies to a consumer depends on the terms of the contract and the circumstances of the case.

(5) In subhead (3), making a delivery that does not conform to the contract does not include failing to make a delivery in accordance with head 32.

Explanatory Note

This head is based on section 31 of the Sale of Goods Act 1893. While the structure and wording of the provisions differ from those of the provision of the 1893 Act, the substance of the provision is similar.

Head 35 Passing of risk in sales contracts

(1) In a sales contract, the goods remain at the trader's risk until the consumer, or a person indicated by the consumer for this purpose, acquires the physical possession of the goods.

(2) Subhead (1) does not apply where the goods are delivered to a carrier who—

- (a) was commissioned by the consumer to deliver the goods, and
- (b) was not proposed by the trader for that purpose.

(3) Where subhead (2) applies, the goods are at the consumer's risk upon delivery to the carrier.

(4) Subhead (3) is without prejudice to the rights of the consumer against the carrier.

Explanatory Note

Section 20 of the Sale of Goods Act originally provided that, unless otherwise agreed by the parties, the goods remain at the seller's risk until the property in (i.e. the ownership of) the goods is transferred to the buyer. Once that property has been transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Though the passing of the property in the goods will often coincide with their delivery, it may also precede it. If the property in the goods passes prior to delivery and the goods are then lost or damaged while still in the seller's possession or while in transit to the buyer, the loss or damage will fall on the buyer.

While the risk provision in the 1893 Act originally applied both to consumer and commercial sales, its application to consumer sales contracts ceased in 2013 with the enactment of the regulations that give effect to the Consumer Rights Directive. Article 20 of the Directive reflects a more consumer-friendly approach to the passing of risk. It provides, first, that, in contracts where the trader dispatches the goods to the consumer, the risk of loss or damage to the goods will pass to the consumer when he, or a third party indicated by him and other than the carrier, has acquired the physical possession of the goods. It provides, secondly, that, without prejudice to the rights of the consumer against the carrier, the risk will pass to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader. The risk of loss or damage to goods in transit will not lie with the consumer, therefore, where he or she has chosen a particular delivery method from a range of options offered by the trader.

Regulation 29 of the European Union (Consumer, Information, Cancellation and Other Rights) Regulations 2013 which give effect to the Consumer Rights Directive amended section 20 of the 1893 Act to give effect to the Directive's provision on risk in consumer sales. Head 35 restates the provision of the Regulations with one important change. The provision on risk at Article 20 of the Directive applies only to contracts where the trader dispatches the goods to the consumer. The Regulations retained this restriction as Regulations made under the European Communities Act 1972 enjoy constitutional immunity only insofar as they give effect to measures necessitated by the obligations of EU membership. As this constraint does not apply to primary legislation, head 35, and in particular the rule that risk passes with the transfer of physical possession rather than ownership, will apply to all consumer sales contracts.

Head 36 Exclusion or limitation of liability of trader

(1) A term of a contract for the supply of goods cannot exclude or restrict the trader's liability under any of the following provisions:

- (a) head 15 (Rights of recipient of gift);
- (b) head 16 (Trader to have right to supply goods);
- (c) head 17 (Goods to be in conformity with contract) ;
- (d) head 18 (Goods to be as described);
- (e) head 19 (Other pre-contractual information to be included in contract)
- (f) head 20 (Goods to match sample or model);
- (g) head 21 (Goods to be of satisfactory quality);
- (h) head 22 (Goods to be fit for particular purpose);
- (i) head 23 (Spare parts and after sale service);
- (j) head 24 (Safety of motor vehicles);
- (k) head 32 (Delivery of goods in sales contracts);
- (l) head 33 (Delivery of wrong quantity);
- (m) head 35 (Passing of risk in sales contracts).

(2) The reference in subhead (1) to excluding or restricting the trader's liability includes -

- (a) excluding or limiting a right or remedy in respect of a liability under a provision listed in subhead (1),
- (b) making such a right or remedy or its enforcement subject to a restrictive or onerous condition,
- (c) allowing a trader to put a person at a disadvantage as a result of pursuing such a right or remedy,
- (d) excluding or restricting rules of evidence or procedure, or
- (e) preventing an obligation or duty arising or limiting its extent.

(3) An agreement in writing to submit present or future differences to an alternative dispute resolution procedure is not to be regarded as excluding or restricting any liability for the purposes of this head.

Explanatory Note

Section 55 of the Sale of Goods Act 1893 originally provided that the terms implied into sales contracts by the Act could be negated or varied by agreement between the parties. Exemption or exclusion clauses that ousted or limited the quality and other conditions implied into consumer sales contracts by the Act became an increasingly common feature of standard form consumer contracts. In response, the Sale of Goods and Supply of Services Act 1980 amended section 55 to provide that any term of a consumer sales contract which exempted the provisions of sections 12-15 of the 1893 Act on the implied undertakings as to title, quality or fitness and sale by description and sample was void. Article 7 of the Directive on Consumer Sales and Guarantees provides that any contractual terms which directly or indirectly waive or restrict the rights resulting from the Directive are not binding on the consumer.

Subhead (1) provides, in line with head 56(1) of Part 3 and head 70(1) of Part 4, that the rights of consumers under the Act cannot be excluded or restricted by traders. Subheads (2) and (3) elaborate on what is meant by the exclusion or limitation of liability with a view to preventing other possible approaches to circumventing the provisions of the Act.

CHAPTER 4

GUARANTEES

Head 37 Application (Chapter 4)

(1) This Chapter applies where -

- (a) there is a contract for the supply of goods and
- (b) the goods are offered with a guarantee.

(2) For the purposes of this Chapter –

“guarantee” means any undertaking by a trader or producer to the consumer, in addition to any legal obligations applying to the supply of the goods, to -

- (a) reimburse the price paid for the goods or
- (b) to replace, repair or service the goods

if they do not meet the specifications or any other requirements set out in the guarantee statement or in the relevant advertising,

“consumer” includes all consumers who acquire ownership of the goods within the duration of the guarantee, and

“guarantor” means a producer or trader who provides a guarantee.

Explanatory Note

Chapter 4 deals with guarantees provided by retailers and producers, or commercial guarantees as they are sometimes called. The provisions in the Part are an amalgamation, with some adjustments, of the existing rules on guarantees in sections 15 to 19 of the Sale of Goods and Supply of Services Act 1980 and in Regulation 9 of the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003. Guarantees provided to commercial buyers will continue to be regulated by sections 15 to 19 of the 1980 Act.

While the provisions of this Chapter apply only to goods at present, the option of extending it to digital content and services, particularly the former, remains under consideration. The Department would welcome views on this option in responses to the consultation on the Scheme of the Bill. Information on guarantees currently provided in respect of digital content or services, and the form that such guarantees take, would be appreciated in this context.

Head 37 deals first with the scope of the Chapter and then defines a number of terms relevant to the provisions of the Chapter. The definition of “guarantee” is largely based on the definition in the Directive on Consumer Sales and Guarantees, though, unlike that definition, it is not restricted to guarantees ‘given without extra charge’. The definition of “consumer” is based on the definition of “buyer” in section 19 of the 1980 Act and aims to ensure that a guarantee remains effective where a consumer acquires ownership of the goods as a result of a gift or purchase from another consumer. “Producer” is defined in head 2(1).

Head 38 Form and content of guarantee

(1) A guarantee must set out in plain intelligible language the contents of the guarantee, including in particular:

- (a) the name, geographical address and contact details of the guarantor, including, where applicable, the guarantor's telephone number and e-mail address;
- (b) the duration of the guarantee from the date of purchase including, where applicable, any differences in the duration of the guarantee for different components or parts of the goods.
- (c) the territorial scope of the guarantee;
- (d) the procedure for making a claim under the guarantee;
- (e) what the guarantor undertakes to do in relation to the goods; and
- (f) what charges, if any, including the cost of carriage, the consumer must meet in relation to the undertakings in the guarantee.

(2) The procedure for presenting a claim under a guarantee referred to in subhead (1)(d) must not be more difficult than ordinary or normal commercial procedure.

(3) On request by the consumer, the guarantee must be made available within a reasonable time on paper or, if the consumer agrees, on another durable medium, and be legible.

(4) The guarantee must state that the consumer has legal rights in relation to the supply of goods and that those rights are not affected by the guarantee.

(5) The fact that a guarantee does not comply with the requirements of this head shall not affect the validity of the guarantee and the consumer can still rely on and enforce the guarantee despite any such non-compliance.

Explanatory Note

Subhead (1) sets out the information requirements applicable to guarantees. Its provisions are a combination of those at section 16 of the Sale of Goods and Supply of Services Act 1980 and Regulation 9(2) of the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003. Subhead (2) is based on the provision at section 16(4) of the 1980 Act, and subhead (3) on that at Regulation 9(3) of the Regulations. Subheads (4) and (5) are based on the provisions of Regulations 9(2)(a) and 9(4) of the Regulations.

Head 39 Liability and right of action under guarantee

- (1) A guarantee is a legally binding contractual obligation on the guarantor under the conditions laid down in the guarantee statement and the associated advertising.
- (2) The consumer may maintain an action against a producer who fails to observe any of the terms of the guarantee as if that producer had sold the goods to the consumer and had committed a breach of contract.
- (3) The court may order the guarantor to take such action as may be necessary to observe the terms of the guarantee and to pay damages to the consumer.
- (4) Where a trader gives a guarantee from the producer to the consumer, the trader shall be liable to the consumer for the observance of the terms of the guarantee as if he were the guarantor, unless he expressly indicates the contrary to the consumer at the time of giving the guarantee.
- (5) The right of the consumer to take action against the trader under subhead (4) is without prejudice to the consumer's right to maintain an action against the producer.
- (6) Where the trader gives the consumer his own guarantee, it shall be presumed, unless the contrary is proved by the consumer, that the trader has not made himself liable to the consumer under the guarantee from the producer.

Explanatory Note

This head deals with the liability of the guarantor and the right of action of the consumer under a guarantee. Subhead (1) provides that the guarantee is legally binding on the guarantor as 'a contractual obligation'. Subhead (2) provides that the consumer may enforce the guarantee against a producer as if that producer had sold the goods to the consumer and committed a breach of contract. Subhead (3) is based on section 19(1) of the 1980 Act and provides that the court may order the guarantor to take such action as may be necessary to observe the terms of the guarantee, and may order the guarantor to pay damages to the consumer. Subheads (4) to (6) restate the provisions of section 17 of the 1980 Act.

Head 40 Exclusion or limitation of liability under guarantee

(1) A guarantee must not –

- (a) in any way exclude or limit the rights of the consumer at common law or under statute;
- (b) in any way impose obligations on the consumer which are additional to his obligations under the contract; or
- (c) purport to make the guarantor or any person acting on his behalf the sole authority to decide whether goods conform to the contract or whether the consumer is otherwise entitled to make a claim under the guarantee.

(2) Any provision of a guarantee that is contrary to subhead (1) shall not be binding on the consumer.

Explanatory Note

This head deals with the exclusion or limitation of the rights of the consumer under a guarantee and is based on section 18 of the 1980 Act.

PART 3

CONTRACTS FOR SUPPLY OF DIGITAL CONTENT

Introductory Note

This Part creates a new category of contracts for digital content and provides for a regime of rights and remedies broadly similar to those which apply to contracts for the supply of goods under Part 2 with appropriate adaptations to take account of the special characteristics of digital content. The report of the Sales Law Review Group highlighted the considerable legal uncertainty that exists with regard to the classification of contracts for the supply of digital content and software. Because of the difficulties raised by the classification of such contracts as either goods or services, the rights of purchasers of digital content remain unclear. Treating contracts for the supply of digital content as a separate category of contract with a specific set of rights and remedies appropriate to the nature of such content will provide a clear and coherent basis for the rights of consumers who purchase digital content and the obligations of trader who supply it.

A more detailed account of the background to, and the rationale for, the main proposals in this Part of the Scheme can be found in Part V of the Department's Consultation Paper on the Reform of the Law on Consumer Contract Rights which was published in August 2014.

The paper can be accessed at <http://www.djei.ie/commerce/consumer/issues.htm>

Further background information on the proposals in this Part of the Scheme can be found in chapter 2 of the Report of the Sales Law Review Group at

<http://www.djei.ie/publications/commerce/2011/saleslawreviewgroupreport2011.pdf>

CHAPTER 1

CONSUMER RIGHTS IN CONTRACTS FOR SUPPLY OF DIGITAL CONTENT

Head 41 Application (Part 3)

(1) This Part applies to a contract under which a trader supplies or agrees to supply digital content to a consumer (a digital content contract).

(2) A trader does not supply digital content to a consumer for the purposes of this Part merely because the trader supplies a service by which digital content reaches the consumer.

(3) Where a contract for the supply of digital content is combined with a contract or contracts covered by another Part of this Act, this Part applies to the digital content element of the contract.

(4) Regulations made by the Minister under this Act may provide for this Part or a provision of this Part to apply to prescribed digital content contracts not otherwise covered by this Part if the Minister is satisfied that it is appropriate to do so because of detriment to consumers under the contracts concerned.

Explanatory Note

Subhead (1) provides that this Part applies to contracts for the supply of digital content. Digital content is defined in head 2(1) and covers data produced and supplied in digital form such as computer programs, applications, games, music, videos or texts accessed through downloads, streaming or other electronic means. Though most digital content is now supplied in intangible form, digital content supplied on a tangible medium comes within the definition of goods and, as such, is subject to the rights and remedies in Part 2 of this Scheme. Digital content supplied in tangible form is regulated on the same basis as digital content supplied through downloads or streaming by virtue of head 17(3) which provides that where goods are an item that includes digital content, the goods do not conform to the contract for the supply of goods if the goods are an item that includes digital content and the digital content does not conform to the contract to supply the digital content in accordance with Part 3.

Subhead (2) clarifies that this Part does not apply to a service supplied by a trader, such as an Internet or mobile phone service provision, that merely enables consumers to access digital content. Services of this kind are subject instead to Part 4 of this Scheme.

As the definition of digital content is limited to content supplied for the payment of a price (or by virtue of head 2(5), digital content supplied free with content for which a price was paid), Part 2 does not apply to digital content supplied gratis or in return for non-monetary consideration. Subhead (4) provides that the Minister may extend all or part of the provisions of this Part to digital content supplied other than for payment of a price if he is satisfied that its supply is a cause of consumer detriment. Head 55 (remedies for damage to device or other digital content) applies, however, irrespective of whether or not a price was paid for the digital content.

Head 42 Trader to have right to supply digital content

(1) Every digital content contract includes an implied term that the trader has the right to supply the digital content to the consumer at the time when it is to be supplied.

(2) Where the trader does not have the right to supply the digital content, the consumer has the right to the remedies specified in Chapter 2.

Explanatory Note

This head requires the trader to have the right to supply the digital content to the consumer. It diverges from the corresponding provision for goods contracts at head 17 by virtue of the fact that contracts for the supply of digital content differ from sales contracts in that the content is often supplied subject to licence. In such cases, the trader does not transfer ownership of the digital content but instead passes on a limited right to use the digital content subject to the conditions set out in the licence. The ownership of any rights to the digital content usually remains with the rights holder. The head takes account accordingly of the copyright and other intellectual property restrictions characteristic of digital content contracts.

Head 43 Digital content to be in conformity with contract

- (1) Digital content supplied by a trader to a consumer must conform to the contract when supplied or, where the contract is for a fixed or an indeterminate period, throughout the duration of the contract period.
- (2) Digital content conforms to the contract if the digital content supplied complies with –
 - (a) the terms implied into the contract by heads 44 to 48 and head 50, and
 - (b) any other requirements of the contract.
- (3) For the purposes of this Part, the digital content is supplied –
 - (a) when the digital content reaches the device on which it is to be accessed by the consumer, or
 - (b) if earlier, the digital content reaches another trader who has been contracted by the consumer to supply a service by which digital content is accessed by the consumer.
- (4) There is no failure of digital content to conform to the contract if the failure is attributable to -
 - (a) a defect affecting the device on which the digital content is accessed by the consumer, or
 - (b) a defect affecting a service by which the digital content reaches the device of the consumer that is supplied by another trader contracted by the consumer.
- (5) Where digital content supplied by a trader to a consumer does not conform to the contract, the consumer has the right to the remedies specified in Chapter 2.

Explanatory Note

This head provides, first, that digital content supplied by a trader to a consumer must be in conformity with the contract, including the terms implied into the contract by heads 44 to 48 and head 50. Where these requirements are not complied with, the consumer has the right to the remedies specified in Chapter 2.

Subhead (3) clarifies that the conformity requirements apply at the time when the digital content reaches the consumer's device or the consumer's internet service provider or supplier of another service by which the consumer accesses the content. If a lack of conformity of the digital content is attributable either to a problem with the consumer's device or service provider, subhead (4)

provides that the supplier of the digital content is not liable. The consumer may have redress, however, against the service provider under Part 4. Where the downloading or streaming of the digital content is provided under a service supplied by the supplier of the digital content or another trader contracted by that supplier, however, liability for failure to comply with the conformity requirements will rest with the supplier of the digital content.

Head 44 Digital content to be as described

- (1) Every digital content contract includes an implied term that the digital content supplied matches the description of the digital content given by the trader.
- (2) Where the consumer examines a trial version of the digital content before the contract is made, it is not sufficient that the digital content matches, or is better than, the trial version if the digital content does not also correspond with the description.
- (3) Subject to head 49, there is no failure of digital content to match its description for the sole reason that updated digital content has become available after the contract is made.
- (4) Any information provided by the trader about the digital content in accordance with -
 - (a) Regulation 5 and paragraphs (a), (k) or (l) of Schedule 1, or
 - (b) Regulations 7 and 10 and paragraphs (a), (v) and (w) of Schedule 2of the Regulations of 2013 is to be treated as an implied term of the contract for the purposes of the description of the digital content.
- (5) The information referred to in subhead (4) shall not be altered without the express agreement of the trader and the consumer.

Explanatory Note

This head provides that digital content must correspond with any description of it given by the trader to the consumer. Consumers who purchase digital content sometimes access a trial version before purchasing the full version. Subhead (2) clarifies that, where a consumer examines a trial version before the contract is made and where the full version corresponds with the trial version but does not comply with the description, the digital content will be in breach of this head. Head 46 contains a separate requirement for digital content supplied by reference to a trial version to match that trial version. Subhead (2) can be seen as the counterpart of head 18(3) of Chapter 2 which provides that, where a supply of goods is by sample as well as description, it is not sufficient that the bulk of the goods match the sample if the goods do not also match the description.

Software and digital content is often subject to updates that may replace obsolete or vulnerable functionalities with the result that the digital content may no longer comply with its original description. Subhead (3) clarifies that digital content is not considered as non-conforming under this

head for the sole reason that updated digital content has become available. The subhead is subject to head 49 which deals with the modification of digital content.

Under the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013, the trader is required to provide a range of specified pre-contractual information on to the consumer before the consumer is bound by the contract. The provisions of the Regulations referred to in subhead (4) relates to information about the digital content itself (main characteristics, interoperability and functionality). Subhead (4) clarifies that this information forms part of the description of the contract for the purposes of this Part.

Head 45 Other pre-contractual information included in contract

(1) Any information that the trader is required to provide in accordance with Regulations 5, 7 and 10 of the Regulations of 2013 is to be treated as an implied term of the contract for the purposes of this Part.

(2) The information referred to in subhead (1) must not be altered without the express agreement of the consumer and the trader.

(3) Subhead (1) does not apply to information about the digital content referred to in paragraphs (a), (k) or (l) of Schedule 1 or paragraphs (a), (v) and (w) of Schedule 2 of the Regulations.

Explanatory Note

This head provides that, with the exception of the information about the main characteristics, functionality and inter-operability of the digital content dealt with in head 44, any other pre-contractual information about the trader or the digital content or service that the trader is required to provide under the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 is to be treated as an implied term of the contract for the purposes of Part 3. The 2013 Regulations provide that, in the case of distance and off-premises contracts, the pre-contractual information which the trader must provide under the Regulations 'forms part of the contract'. This head and heads 19 and 62 will require this information to be treated as an implied term of contract in on-premises transactions also. In line with the approach of the Regulations, the information referred to in this head and in head 44(4) can be altered only by agreement between the consumer and the trader.

Head 46 Digital content to match trial version

(1) Where digital content is supplied to a consumer by reference to a trial version of the content, the digital content contract includes an implied term that the digital content matches the trial version.

(2) Subhead (1) does not apply where a difference between the digital content and the trial version is brought to the consumer's attention before the contract is made.

(3) Subject to head 49, there is no failure of digital content to match its trial version for the sole reason that updated digital content has become available after the contract is made.

Explanatory Note

This head requires digital content supplied by reference to a trial version of the content to match that trial version unless a difference between the two is brought to the consumer's attention before the contract is made. The head can be seen as a counterpart to the requirement under head 20 for goods to match their sample or model.

Head 47 Digital content to be of satisfactory quality

(1) Every digital content contract includes an implied term that the digital content supplied is of satisfactory quality, except that there is no such implied term -

- (a) as regards a defect specifically drawn to the consumer's attention before the contract is made, or
- (b) where the consumer examines the digital content before the contract is made, as regards a defect which that examination ought to have revealed.

(2) The quality of digital content is satisfactory if it meets the standard that a reasonable person would regard as satisfactory taking account of –

- (a) any description of the digital content;
- (b) the price of the digital content (if relevant);
- (c) any public statement about the specific characteristics of the digital content made by the trader, producer or any representative of the trader or the producer, including any statement made in advertising; and
- (d) all the other relevant circumstances.

(3) The quality of digital content includes its state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of digital content –

- (a) fitness for all the purposes for which digital content of that kind is usually supplied,
- (b) freedom from minor defects,
- (c) safety, and
- (d) durability.

(4) A public statement is not a relevant circumstance for the purposes of subhead 2(c) if the trader shows that –

- (a) when the contract was made, the trader was not, and could not reasonably have been, aware of the statement;
- (b) before the contract was made, the statement had been publicly withdrawn or, the extent that it contained anything which was incorrect or misleading, it had been publicly corrected, or
- (c) the consumer's decision to contract for the digital content could not have been influenced by the statement.

Explanatory Note

This head clarifies that digital content must be of satisfactory quality in line with the quality standard that applies to goods under head 21. It provides that the quality of digital content is satisfactory if it meets the standard that a reasonable person would consider satisfactory taking into account a range of factors including description, price and other relevant circumstances. The head also sets out a list of indicative factors that can be taken into account when assessing the quality of digital content such as its fitness for purpose, freedom from minor defects, safety and durability. Apart from the omission of 'appearance and finish', the list is similar to that in the corresponding provision on goods at head 21(3). As with goods, the quality standard is flexible in that it is based on what a reasonable person would regard as satisfactory having regard to these factors. In the case of complex products such as new versions of software and games, for example, a reasonable person may expect to encounter some 'bugs'. In the case of less complex and more established digital products, such as a music file or an e-book, consumers can reasonably expect the content to be free of such defects.

Head 48 Digital content to be fit for particular purpose

(1) This head applies where, before a digital content contract is made, the consumer makes known to the trader, expressly or by implication, any particular purpose for which the digital content is to be supplied.

(2) Every contract to which subhead (1) refers includes an implied term that the digital content supplied under the contract must be reasonably fit for the purpose made known by the consumer, whether or not that is a purpose for which such digital content is commonly supplied.

(3) Subhead (2) does not apply where the circumstances show that the consumer does not rely, or that it is unreasonable for the consumer to rely, on the skill or judgment of the trader.

Explanatory Note

Where the consumer specifies that the digital content is to be used for a particular purpose, the digital content must be fit for that purpose unless the consumer did not rely on, or it was unreasonable for him or her to rely on, the skill and judgment of the trader. The head corresponds to head 22 of Part 2.

Head 49 Modification of digital content

(1) Where under a digital content contract, a trader supplies digital content subject to the right of the trader or a third party to modify the digital content, the following provisions apply in relation to the digital content as modified as they apply in relation to the digital content as supplied under the contract –

- (a) head 44 (digital content to be as described),
- (b) head 46 (digital content to match trial version),
- (c) head 47 (digital content to be of satisfactory quality), and
- (d) head 48 (digital content to be fit for particular purpose).

(2) Subhead (1)(a) does not prevent the trader from adding to or improving the digital content provided that the digital content -

- (a) continues to match the description given by the trader in accordance with head 44(1), and
- (b) continues to comply with the information provided by the trader in accordance with head 44(4), subject to any change to that information agreed between the trader and the consumer.

Explanatory Note

Digital content products may be subject to regular updates after it has been supplied to the consumer, and the right of the trader to supply such updates may be set out in the digital content contract. The provision of updates is usually of benefit to consumers, and consumers generally understand and expect that they will receive an update when the software itself is updated. It is important nevertheless to ensure that, following any update, the digital content still meets the quality and other terms implied into the contract under this Part. This head permits the trader to update digital content where the contract states that such updates would be provided. Where such updates are provided, however, the content as updated must still comply with the requirements that it match its description and trial version, is of satisfactory quality and fit for any particular purpose made known by the consumer.

Head 50 Digital content to be supplied without undue delay

(1) Unless the trader and the consumer have agreed a time or period of time for the supply of the digital content, every digital content contract includes an implied term that the trader shall supply the content without undue delay and not later than 30 days from the conclusion of the contract.

(2) If the trader does not supply the digital content –

- (a) at the time or within the time period agreed with the consumer or
- (b) where no such time limit or period have been agreed between the trader and the consumer, within the time limit specified in subhead (1),

the consumer shall require the trader to supply it within an additional period of time appropriate to the circumstances.

(3) Subhead (2) does not apply if—

- (a) the trader refuses to supply the digital content,
- (b) supply of the digital content within the time agreed with the consumer is essential, taking into account all the relevant circumstances at the time of the conclusion of the contract, or
- (c) the consumer has informed the trader prior to the conclusion of the contract that supply of the digital content on or by a specified date is essential.

(5) Where the trader—

- (a) refuses to supply the digital content,
- (b) fails to supply the digital content within any additional period of time for delivery applicable under subhead (2), or
- (c) fails to supply the digital content —
 - (i) within the time agreed with the consumer under subhead (3)(b), or
 - (ii) on or by the date the date specified by the consumer under subhead (3)(c),

the consumer may treat the failure as a breach of a term of the contract which entitles the consumer to end the contract.

(6) If the consumer ends the contract in accordance with subhead (5), the trader must, without undue delay, reimburse all payments made under the contract by the consumer.

Explanatory Note

This head, the counterpart of head 32 on the delivery of goods in sales contracts, provides that, unless otherwise agreed by the parties, the digital content must be provided without undue delay and not later than 30 days from the conclusion of the contract. While digital content is normally provided simultaneously with, or soon after, the conclusion of the contract, there may be cases where its supply is delayed. Subheads (2) to (6) set out the consumer's rights and remedies where the trader fails to supply the digital content within the agreed time or period or, in the absence of such a time or period, within the 30 day default period.

CHAPTER 2

CONSUMER REMEDIES IN CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT

Head 51 Overview of remedies

(1) Where the trader does not have the right to supply the digital content in accordance with head 42, the consumer has the right to end the contract and to receive a refund of the price in accordance with head 54.

(2) Where digital content does not conform to the contract in accordance with heads 44 to 48 or any other requirement of the contract, the consumer has, in the first instance, the right under head 52 to have the digital content repaired or replaced.

(3) Where a consumer exercises the right to the remedies of repair or replacement referred to in subhead (2), and

(a) repair or replacement are impossible or disproportionate for the reasons specified in head 52,

(b) the trader has not completed the repair or replacement within a reasonable time or without significant inconvenience to the consumer,

the consumer has a right to the remedies specified in subhead (4).

(4) The remedies to which the consumer has a right in the circumstances specified in subhead (3) are –

(a) the right under head 53 to retain the digital content and to receive a reduction of the price, or

(b) the right to end the contract and to receive a refund of the price in accordance with head 54.

(5) The remedies referred to in subhead (4) are exercisable at the choice of the consumer.

(6) A consumer who has the right –

(a) to retain the digital content and receive a price reduction, or

(b) to end the contract and obtain a refund of the price,

may exercise only one of these rights.

(7) If the trader is in breach of a term that is included as an implied term of the contract in accordance with head 45, but which does not relate to the conformity of the digital content

with the contract, the consumer has the right to recover from the trader any costs incurred as a result of the breach up to the amount of the price paid or other consideration given for the goods.

(8) The consumer's entitlement to a refund under heads 53 and 54 of this Part applies in accordance with head 9.

(10) This Chapter is without prejudice to the right of the consumer to pursue other remedies

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- (a) for a breach of a term implied into the contract in accordance with heads 44 to 48 and head 50,
- (b) for damage to a device or other digital content belonging to the consumer, or
- (c) for a breach of another requirement included in the contract

instead of or, in addition to, a remedy specified in this Chapter provided that the consumer is not seeking to recover the same loss twice.

Explanatory Note

This head sets out the remedies where digital content does not meet the requirements set out in Chapter 1 of this Part. The remedies regime is similar in many respects to that applying to goods contracts under Part 2, but with some significant adaptations to take account of the particular characteristics of digital content. Where digital content does not conform to the contract, the consumer has the right in the first instance to require the trader to repairs or replace it. If the trader does not have the right to supply the digital content, the consumer has the right to end the contract and receive a full refund of the price. Unlike in the case of contracts for the supply of goods, it is not proposed to give the consumer a short-term right to end the contract. While goods can normally be returned to the trader when the consumer ends a contract, digital content cannot be returned in the same way. Such content can easily be copied in some cases and establishing that it has been deleted from the consumer's device presents obvious practical difficulties.

Where the consumer requests the repair or replacement of the digital content, the trader must do so within a reasonable time and without significant inconvenience to the consumer. A consumer cannot require these remedies if they are impossible or if repair is disproportionate vis-a-vis replacement or vice versa. If a repair or replacement is not provided within a reasonable time or without significant inconvenience to the consumer or is impossible, the consumer is entitled to a reduction of the price or to end the contract and receive a refund of the price. Unlike the

corresponding provision on goods contracts at head 25, no limit is placed on the number of repairs of digital content following which the consumer may have recourse to a reduction of the price or termination of the contract. This reflects the fact that the context in which repairs occur in the digital market is different to that of goods. The supply of digital content often involves issuing of patches, bug fixes and updates on a regular basis and it may not be clear whether these constitute a repair or can be considered a replacement. The head recognises that repairs and patches are a common and necessary feature in some parts of the digital content sector. A repair should not be seen as the same as an update to which head 49 applies. A repair takes place in the context of a response to a consumer who has shown that the digital content does not conform to the conformity requirements set out in heads 44 to 48.

Head 52 Right to repair or replacement of digital content

(1) This head applies where the consumer has the right to the repair or replacement of the digital content.

(2) If the consumer requires the trader to repair or replace the digital content, the trader must do so -

- (a) within a reasonable time,
- (b) without significant inconvenience to the consumer, and
- (c) free of charge to the consumer.

(3) For the purposes of subhead (2), “free of charge” means free of any costs necessarily incurred in bringing the digital content into conformity with the contract.

(4) The consumer cannot require the trader to repair or replace the digital content if either remedy is —

- (a) impossible, or
- (b) disproportionate relative to the other remedy.

(5) A remedy is disproportionate relative to the other remedy if it imposes costs on the trader which, compared to those imposed by the other remedy, are unreasonable, taking into account—

- (a) the value which the digital content would have if it conformed to the contract,
- (b) the significance of the lack of conformity, and
- (c) whether the other remedy could be effected without significant inconvenience to the consumer.

(6) Any question as to what constitutes a reasonable time or significant inconvenience for the purposes of this head is to be determined by reference to —

- (a) the nature of the digital content,
- (b) the purpose for which the digital content was supplied, and
- (c) other relevant circumstances.

Explanatory Note

This head sets out the rights of the consumer in respect of the remedies of repair or replacement of digital content and the obligations of the trader where the consumer requests these remedies. It corresponds, and is broadly similar in substance, to head 26 of Part 2.

Head 53 Right to price reduction

- (1) This head applies where the consumer has the right to a price reduction.
- (2) The right to a price reduction is the right to retain the digital content and to –
 - (a) require the trader to reduce by an appropriate amount the price payable by the consumer under the contract, or
 - (b) receive a refund from the trader of the price paid by the consumer in excess of the amount of the reduction.
- (3) The amount of the reduction may, where appropriate, be the full amount of the price paid or payable by the consumer under the contract.

Explanatory Note

This head sets out the rights of the consumer in respect of the remedy of price reduction and the obligations of the trader where the consumer has an entitlement to this remedy. It corresponds, and is broadly similar in substance, to head 28 of Part 2.

Head 54 Exercise of right to end contract

(1) This head applies where the consumer has the right to end the contract.

(2) The right to end the contract is exercised if the consumer indicates, expressly or by implication, and in a manner clear enough to be understood by a reasonable trader, that the consumer is treating the contract as at an end.

(3) When the consumer exercises the right to end the contract, the trader has a duty to give the consumer a full refund of the price.

Explanatory Note

This head set out the rules that apply where the consumer has the right to end the contract. While the trader is obliged to give the consumer a full refund of the price, there is no obligation on the consumer to return or delete the digital content that would correspond on the obligation of the consumer under head 30 to return the goods or make them available for collection. This reflects the fact that the nature of downloaded digital content would make it impractical to monitor and enforce any such obligation on consumers. This does not affect the intellectual property rights of the trader in the content.

Head 55 Remedies for damage to device or other digital content

- (1) This head applies where –
 - (a) the trader supplies digital content to the consumer under the contract,
 - (b) the digital content causes damage to a device or to other digital content belonging to the consumer, and
 - (c) the damage is of a kind that would not have occurred if the trader had exercised reasonable care and skill.

- (2) In the circumstances specified in subhead (1), the consumer has a right to –
 - (a) have the damage to the consumer’s device or digital content repaired, or
 - (b) appropriate financial compensation.

- (3) The remedies referred to in subhead (2) are exercisable at the choice of the consumer.

- (4) Where the consumer opts to have the damage repaired, the trader must –
 - (a) repair the damage within a reasonable time and without significance inconvenience to the consumer, and
 - (b) bear any costs incurred in repairing the damage.

- (5) Where the consumer opts for financial compensation, the compensation must –
 - (a) meet the cost of repairing or replacing the device or digital content, or
 - (b) where the device or digital content cannot be repaired within a reasonable time and without significant inconvenience to the consumer, meet the cost of replacing the device or digital content.

Explanatory Note

This head clarifies that where a consumer is supplied with digital content which causes damage to the consumer’s device or other digital content, the consumer is entitled have the damage repaired or to appropriate financial compensation. The compensation is limited to the cost of replacing the damaged device or content. This head applies to digital content supplied free or for a non-monetary consideration as well as to digital content supplied in return for the payment of a price.

Head 56 Exclusion or limitation of liability of trader

(1) A term of a digital content contract cannot exclude or restrict the trader's liability arising under any of the following provisions:

- (a) head 42 (Trader to have right to supply digital content);
- (b) head 43 (Digital content to be in conformity with contract);
- (c) head 44 (Digital content to be as described);
- (d) head 45 (Other pre-contractual information included in contract);
- (e) head 46 (Digital content to match trial version);
- (f) head 47 (Digital content to be of satisfactory quality);
- (g) head 48 (Digital content to be fit for particular purpose);
- (h) head 49 (modification of digital content);
- (i) head 50 (digital content to be supplied without undue delay);
- (j) head 55 (compensation for damage to device or other digital content).

(2) The reference in subhead (1) to excluding or restricting the trader's liability includes -

- (a) excluding or limiting a right or remedy in respect of a liability under a provision listed in subhead (1),
- (b) making such a right or remedy or its enforcement subject to a restrictive or onerous condition,
- (c) allowing a trader to put a person at a disadvantage as a result of pursuing such a right or remedy,
- (d) excluding or restricting rules of evidence or procedure, or
- (e) preventing an obligation or duty arising or limiting its extent.

(3) An agreement in writing to submit present or future differences to an alternative dispute resolution procedure is not to be regarded as excluding or restricting any liability for the purposes of this head.

Explanatory Note

Subhead (1) provides, in line with head 36(1) of Part 1 and head 70(1) of Part 4, that the rights of consumers under this Part of the Act cannot be excluded or restricted by traders.

Subheads (2) and (3) elaborate on what is meant by the exclusion or limitation of liability with a view to preventing other possible approaches to circumventing the provisions of the Act.

PART 4

CONTRACTS FOR THE SUPPLY OF A SERVICE

While contracts for the sale of goods have been subject to statutory regulation since the late nineteenth century, there was no equivalent regulation of contracts for the supply of services until the enactment of the Sale of Goods and Supply of Services Act 1980. The provisions on the supply of services in Part IV of the Act comprise just four sections: section 39 (implied undertakings as to quality of service); section 40 (exclusion of implied terms); section 41 (statements purporting to restrict rights of recipient of service); and section 42 (conflict of laws). This compares with over sixty sections on contracts for the sale of goods in the Sale of Goods Acts 1893 and 1980.

The requirement under section 39 of the 1980 Act that the service be supplied with due skill, care and diligence is a negligence or fault-based standard. Though the service may fail to achieve the desired result or even be defective, the supplier is liable only if he has failed to exercise due skill, care and diligence. This will normally be judged by reference to the degree of skill and care exercisable by a reasonably competent person in the same trade, business or profession. The courts may, of course, imply a term entailing a higher level of performance in the circumstances of a particular case, or take the view that the generally accepted level of skill and care in a particular trade or profession is not an acceptable benchmark.

While the implied statutory undertakings as to the quality and other aspects of goods cannot be excluded or restricted, the implied undertakings as to the quality of services can be negated or varied in consumer contracts where this is fair and reasonable and has been brought to the attention of the consumer. Unlike contracts for the sale of goods for which there are statutory remedies under both the Sale of Goods Acts and the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003, the 1980 Act sets out no statutory remedy for breach of the quality standard implied into services contracts by the Act.

This Part seeks to address these shortcomings in the current statutory framework for the regulation of services contracts. In addition to the retention of the implied term that services be carried out with skill, care and diligence, Chapter 1 proposes new rights for

consumers in respect of the fitness for purpose of services, the binding nature of information given by the trader about the service or the trader, and the requirement that a service be performed within a reasonable time. Chapter 2 sets out a scheme of statutory remedies for breaches of the provisions of Chapter 1 or of other requirements of the contract. It also provides that the quality and other terms into services contracts under Chapter 1 cannot be excluded or limited by the trader.

A more detailed account of the background to, and the rationale for, the main proposals in this Part of the Scheme can be found in Part VI of the Department's Consultation Paper on the Reform of the Law on Consumer Contract Rights which was published in August 2014.

The paper can be accessed at <http://www.djei.ie/commerce/consumer/issues.htm>

Further background information on the proposals in this Part of the Scheme can be found in chapter 14 of the Report of the Sales Law Review Group at

<http://www.djei.ie/publications/commerce/2011/saleslawreviewgroupreport2011.pdf>

CHAPTER 1

CONSUMER RIGHTS IN CONTRACTS FOR THE SUPPLY OF A SERVICE

Head 57 Application (Part 4)

(1) This Part applies to a contract under which a trader supplies or agrees to supply a service to a consumer (a services contract).

(2) Subject to head 13(1), where a contract for the supply of a service is combined with a contract covered by another Part of this Act, this Part applies to the services element of the contract.

(3) Nothing in this Part affects any enactment or rule of law that imposes a stricter duty on the trader in relation to the supply of a service.

(4) The provisions of this Part are subject to any other enactment that defines or limits rights, obligations or liabilities in relation to a service.

(5) Regulations made by the Minister under this Act may provide that this Part or a provision of this Part does not apply to a prescribed service or applies only in the circumstances specified in the regulations.

Explanatory Note

This head states the scope of Part 4 to be consumer contracts for the supply of a service. “Consumer contract” and “service” are defined in head 2 of Part 1. Some contracts – such as those for financial services or certain professional services – may be subject to statutory or common law rules that imposes duties on service providers that go beyond those contained in this Part of the Bill. Subhead (3) preserves any such enactments or rules of law, while subhead (4) makes the provisions of Part 4 subject to any other enactment that defines or limits rights, obligations or liabilities in relation to a service.

While subhead (5) provides that regulations made by the Minister for Jobs, Enterprise and Innovation may exclude a service specified in the regulations from a provision of Part 4, the provisions of this Part of the Act would otherwise apply to all contracts for the supply of a service. The application of the existing provisions on the supply of services in sections 39 to 42 of the Sale of

Goods and Supply of Services Act 1980 is currently excluded or restricted in the case of the following sectors or activities:

- The definition of “service” in section 2 of the 1980 Act excludes meteorological or aviation services provided by the Minister for Transport, Tourism and Sport.
- Section 40(5) of the 1980 Act provides that nothing in section 40 shall invalidate a term of an agreement for the international carriage of passengers or goods by land, sea or air, including an agreement between parties whose places of business or residence are situated in the State.
- Section 40(6) of the 1980 Act provides that section 39 (Implied undertakings as to quality of service) shall not apply to a contract for the carriage of passengers or goods by land, sea, air or inland waterway from one place to another within the State until such date, as the Minister for Jobs, Enterprise and Innovation, after consultation with the Minister for Transport, Tourism and Sport, by order provides whether in relation to such contracts generally or in relation to contracts of a class defined in the order in such manner and by reference to such matters as the Minister, after such consultation, thinks proper. No such order has been made to date.
- Section 3(3) of the International Carriage of Goods by Road Act 1990 provides, among other things, that the Sale of Goods and Supply of Services Act 1980 shall not apply in relation to contracts for the carriage of goods if the carriage is carriage in relation to which the Convention on the Contract for the International Carriage of Goods by Road applies. The Convention would seem to be mainly applicable to commercial contracts of carriage, particularly as it does not apply to furniture removal contracts.
- Section 26(3) of the Communications Regulation (Postal Services) Act 2011 provides that section 39 of the 1980 Act shall not apply in relation to the provision of a universal postal service by a universal postal service provider until such date as the Minister for Jobs, Enterprise and Innovation, following consultation with the Commission for Communications Regulation and the Minister for Communications, Energy and Natural Resources, by order so provides. No such order has been made to date. Prior to a legislative amendment enacted in 1999, section 39 did not apply to telecommunications services provided by Bord Telecom.

The amendment to Part IV (Supply of Services) of the 1980 Act provided for in head 6 and set out in Part 1 of Schedule 3 would mean that its provisions would no longer apply to consumer contracts covered by Part 4 of this Scheme. This change and the revised definition of ‘service’ proposed in head (2) would mean that the above exclusions and restrictions would cease to apply to consumer services contracts. Subject to consultations with the Minister for Transport, Tourism and Sport and

the Minister for Communications, Energy and Natural Resources, it is not proposed to include similar exclusions in the proposed Bill. The Sales Law Review Group considered that exclusions from, or restrictions on, the statutory rules applying to contracts for the supply of a service had no place in a competitive economy or modern regulatory system and should be repealed.

Head 58 Service to be in conformity with contract

(1) A service supplied by a trader to a consumer must conform to the contract when supplied or, where the contract is for a fixed or indeterminate period, throughout the duration of the contract period.

(2) A service conforms to the contract if the service complies with –

- (a) a term implied into the contract by heads 59 to 63, and
- (b) any other requirements of the contract.

(3) Where the trader supplies a service that does not conform to the contract, the consumer has a right to the remedies specified in Chapter 2.

Explanatory Note

This head sets out the trader's obligation to supply a service that complies with the provisions of Part 4 and any other requirement of the contract. Where these requirements are not complied with, the consumer would have the right to the remedies specified in Chapter 2.

Head 59 Service to be performed with skill, care and diligence

Every services contract includes the following implied terms:

- (a) that the trader has the necessary skill to supply the service;
- (b) that the trader will supply the service with due skill, care and diligence;
- (c) that where materials are used, they will be sound and reasonably fit for the purpose for which they are required; and
- (d) that where goods are supplied under the contract, they will be of satisfactory quality within the meaning of head 21.

Explanatory Note

This head corresponds to section 39 (Implied undertakings as to quality of service) of the Sale of Goods and Supply of Services Act 1980 and does not make any substantive change to the provisions of that section.

Head 60 Service to be fit for particular purpose

(1) Subject to subhead (2), every services contract includes an implied term that the service and any goods resulting from the service will be –

- (a) reasonably fit for any particular purpose that the consumer makes known expressly or by implication to the trader before or at the time of the supply of the service as the particular purpose for which the service is required, and
- (b) of such a nature and quality that it can reasonably be expected to achieve any result that the consumer makes known expressly or by implication to the trader as the result that the consumer wishes the service to achieve.

(2) Subhead (1) does not apply if the circumstances show that –

- (a) the consumer did not rely on the trader's skill or judgement, or
- (b) it was unreasonable for the consumer to rely on the trader's skill or judgement.

Explanatory Note

This is a new provision. It is in line with a recommendation of the Sales Law Review Group and is similar to provisions in the New Zealand Consumer Guarantees Act 1993 and the Australian Competition and Consumer Act 2010. The head seeks to bring the statutory rules governing services contracts closer to those applying to sales contracts, while taking due account of the differences between the two types of transaction. Under existing law, the supplier of a service is not liable if the service fails to achieve a purpose or result indicated by the consumer provided that the supplier has exercised due skill, care and diligence. The proposed head would cover situations such as a consumer who asked a builder to build a cabinet that would fit into an alcove of specified dimensions, or a consumer who asked a caterer to supply a birthday cake sufficient for a specified number of guests.

The fitness for particular purpose provision at subhead (1)(a) can be seen as corresponding broadly to that applying to goods under head 22 and to digital content under head 48. The provision at head (1)(b) can be seen as a counterpart to the satisfactory quality requirement that applies to goods under head 21 and to digital content under head 47. It is important to note that the provision does not require the service to achieve a particular result, but rather that it should be such that it can reasonably be expected to achieve the required result.

Subhead (2) provides that the requirements that a service be reasonably fit for any particular purpose, or be of a nature and quality that can reasonably be expected to achieve any result, made known by the consumer applies only where the consumer relies on the trader's skill and judgement or where it would be reasonable for the consumer to do so. If the supplier of a service considers that he is not in a position to provide a service reasonably fit for the purpose required or one that can reasonably be expected to achieve the required result, he or she can say so. If so, the supplier is unlikely to be held liable for a failure to achieve the required purpose or result as it would be unreasonable to maintain that the consumer had relied on the supplier's skill or judgment.

Head 64(5) contains a limitation on the remedies available to the consumer for breach of this provision.

Head 61 Information about service or trader to be binding

(1) Every services contract includes as an implied term of the contract any oral or written statement to the consumer by or on behalf of the trader about the service or the trader that is taken into account by the consumer when –

- (a) deciding to enter into the contract, or
- (b) making any decision about the service after entering into the contract.

(2) Any oral or written statement taken into account by the consumer under subhead (1) is subject to –

- (a) any oral or written statement made to the consumer by the trader on the same occasion which qualified that statement, and
- (b) any change to that statement expressly agreed between the consumer and the trader before or after the contract was entered into.

Explanatory Note

Subheads (1) and (2) are new. They aim to provide protection for consumers in cases where a trader says or writes something to a consumer about the service or the trader which the consumer relies on but which the trader does not subsequently comply with – for example a claim by a broadband provider that broadband would be supplied at a specified speed expressed in megabits per second. While statements made by traders may well be incorporated in the contract under the rules governing the construction of contracts, the head seeks to remove the scope for dispute or uncertainty over their incorporation. Any such statement by a trader supplying a service is subject, however, to anything said or written by the trader that qualified the information given to the consumer or any subsequent changes to the statement agreed between the parties. In line with the common law, ‘mere puffs’ - statements that are so vague that they have no legal effect – would not come within the scope of the provision. The relevant distinction is ‘between indiscriminate praise and specific promises or assertions of verifiable facts.’¹¹

These provisions can be seen as a form of counterpart to the requirement on goods and digital content to comply with their description under heads 18 and 44 respectively and the requirement under heads 21(2)(c) and 47(2)(c) that assessments of whether goods or digital content comply with the satisfactory quality standard should take account of any public statements by the seller or producer on specific characteristics of the goods. A similar provision is to be found at section 55 of the UK Consumer Rights Act 2015.

¹¹ Treitel, *The Law of Contract*. 2011 (13th ed.), (London: Sweet & Maxwell), paragraph 9-007.

Head 62 Other pre-contractual information included in contract

(1) Without prejudice to head 61, any information provided by the trader in accordance with Regulations, 5, 7 and 10 of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013) is included as an implied term of the contract.

(2) The information referred to in subhead (1) must not be altered without the express agreement of the consumer and the trader.

Explanatory Note

This head provides that any pre-contractual information about the service or the trader that the trader is required to provide under the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 is to be treated as an implied term of the contract for the purposes of Part 4. The 2013 Regulations provide that, in the case of distance and off-premises contracts, the pre-contractual information which the trader must provide under the Regulations 'forms part of the contract'. This head and heads 19 and 45 will require this information to be treated as an implied term of contract in on-premises transactions also. In line with the approach of the Regulations, the information referred to in this head can be altered only by agreement between the consumer and the trader.

Head 63 Service to be performed within reasonable time

(1) Where a services contract does not fix the time for the service to be performed or provide for it to be fixed by the parties in a manner set out in the contract, the contract includes an implied term that the service will be performed within a reasonable time.

(2) What is a reasonable time is a question of fact.

Explanatory Note

Consumer contracts for the supply of a service do not always specify the time for the performance of the service. In cases where the time for performance has not been agreed between the parties, subhead (1) gives the consumer the right to have the service provided within a reasonable time. The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 provide that, before the consumer is bound by the contract, the trader must indicate the time by which the service is to be performed. In accordance with head 62, this information is to be treated as an implied term of the service contract.

Provisions similar to head 63 can be found in UK, Australian and New Zealand legislation. In the case of sales and digital content contracts, heads 32 and 50 provide that, unless the parties have agreed otherwise, the trader must deliver the goods or digital content to the consumer without undue delay and not later than 30 days from the conclusion of the contract.

Subhead 2 provides that constitutes a reasonable time is a question of fact to be determined in the circumstances of the specific case. Section 56 of the Sale of Goods Act 1893 contains a similar provision. A finding of fact by a court is not usually subject to appeal to a higher court.

Head 64 Reasonable price to be paid for service

(1) Where a services contract does not fix the price to be paid for the service or provide for it to be fixed in a manner set out in the contract, the contract includes an implied term that the consumer must pay a reasonable price for the service.

(2) What is a reasonable price is a question of fact.

Explanatory Note

A consumer contract will generally set out the price to be paid for the service. In the case of contracts covered by the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013, the trader is required to provide information on the total price of the goods or services (or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated) before the consumer is bound by the contract. Where the price of a service is not fixed directly or indirectly at the time of the conclusion of the contract, subhead (1) provides that the consumer must pay a reasonable price. Similar provisions can be found in UK and New Zealand legislation. Subhead (2) states that what is a reasonable price is a question of fact.

CHAPTER 2

CONSUMER REMEDIES IN CONTRACTS FOR THE SUPPLY OF A SERVICE

Head 65 Overview of remedies

(1) Where a service contract does not conform to the contract in accordance with heads 59 to 64 or any other requirement of the contract and the lack of conformity can be remedied, the consumer has, in the first instance, the right under head 66 to have the lack of conformity remedied by the trader.

(2) The consumer has the right to the right to have the lack of conformity remedied elsewhere under head 67, the right to a price reduction under head 68, or the right to end the contract under head 69 where –

- (a) the lack of conformity of the service with the contract cannot be remedied,
- (b) the trader when required to remedy the lack of conformity fails to do so within a reasonable time or without significant inconvenience to the consumer,
- (c) the effect of the non-conformity of the service with the contract is to deprive the consumer of substantially the whole benefit that the consumer expected to obtain from the contract, or
- (d) the service, or any goods resulting from the service, are unsafe.

(3) If the trader is in breach of a term that is included as an implied term of the contract in accordance with head 62, but which does not relate to the conformity of the service with the contract, the consumer has the right to recover from the trader any costs incurred as a result of the breach up to the amount of the price paid or other consideration given for the goods.

(4) Where a trader does not comply with the reasonable price term implied into a services contract under head 64, the consumer's remedy is the right to refuse to pay more than a reasonable price.

(5) Subheads (1) and (2) do not apply where the lack of conformity with the contract -

- (a) relates to the fitness for purpose of the service under head 60(1)(a), the result that the consumer wishes the service to achieve under head 60(1)(b), or the failure to perform the contract within a reasonable time under head 63, and

(b) resulted from –

- (i) an act or omission of, or a representation by, a person other than the trader,
or
- (ii) a cause independent of human control.

(6) The remedies referred to in subhead (2) are exercisable at the choice of the consumer.

(7) A consumer who has the right to –

- (a) a reduction of the price, or
- (b) end the contract and obtain a refund of the price,

may exercise only one of these rights.

(8) The consumer's entitlement to a refund under this Part applies in accordance with head 9.

(9) This Chapter is without prejudice to the right of the consumer to pursue other remedies for breach of -

- (a) a term implied into the contract in accordance with heads 59 to 64, and
- (b) another requirement included in the contract

instead of or, in addition to, a remedy specified in this head provided that the consumer is not seeking to recover the same loss twice.

Explanatory Note

This head sets out the remedies available to the consumer where a service contract does not comply with the provisions of heads 59 to 64 or the other requirements of the contract. The operation of these remedies is set out in more detail in heads 66 to 69.

Where a service contract does not conform to the contract, the consumer has a right in the first instance to have the lack of conformity remedied by the trader. Where the lack of conformity cannot be remedied, or the trader fails to remedy it within a reasonable time or without significant inconvenience to the convenience, or the effect of the non-conformity is to deprive the consumer of substantially the whole benefit of the contract, or the service is unsafe, the consumer has the right to a reduction of the price, to have the lack of conformity remedied elsewhere, or to end the contract. These remedies are exercisable at the choice of the consumer. Separate remedies are provided in the case of a breach of information requirements under head 62 which do not relate to

the conformity of the service with the contract or of the requirement under head 64 that the price of the service be reasonable.

Where the lack of conformity relates to the fitness for purpose of the service under head 60(1)(a), the result that the consumer wishes the service to achieve under head 60(1)(b), or the failure to perform the contract within a reasonable time under head 62, and results either from the act or omission of a person other than a trader or from a cause independent of human control, the remedies provided for in this Part do not apply.

Head 66 Right to require service to be remedied by trader

- (1) This head applies where the consumer has the right to have the lack of conformity remedied by the trader.
- (2) The right of the consumer under this head is the right to require the trader to remedy the performance of the service to the extent necessary to ensure its conformity with the contract.
- (3) The right of the consumer under subhead (2) does not apply if it is impossible for the trader to remedy the performance of the service to ensure its conformity with the contract.
- (4) Where the consumer requires the trader to remedy the performance of the service, the trader shall do so –
 - (a) within a reasonable time,
 - (b) without significant inconvenience to the consumer, and
 - (c) free of charge to the consumer.
- (5) Any question as to what is a reasonable time or significant inconvenience for the purposes of subhead (4) shall be determined by reference to –
 - (a) the nature of the service,
 - (b) the purpose for which it is required by the consumer, and
 - (c) other relevant circumstances. .

Explanatory Note

This head corresponds to the provisions that apply to the consumer's right to the repair or replacement of goods which do not conform to the contract under the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003, the substance of which is retained in head 26 of Part 2 and is replicated also in head 52 of Part 3. Similar provisions applying to service contracts can be found in the New Zealand Consumer Guarantees Act 1993, the Australian Competition and Consumer Act 2010 and the UK Consumer Rights Act 2015.

Head 67 Right to have lack of conformity remedied elsewhere

(1) This head applies where a consumer has the right to the lack of conformity of a service with the contract remedied elsewhere.

(2) The right of the consumer under this head is the right –

- (a) to have the lack of conformity remedied otherwise than by the trader, and
- (b) to recover from the trader all reasonable costs incurred in having the failure so remedied.

Explanatory Note

This head permits the consumer in the circumstances set out in head 65(2) to have the lack of conformity of a service remedied otherwise than by the trader and to recover the costs of doing so from that trader. Similar provisions are to be found in Australian and New Zealand legislation.

Section 52 of the Sale of Goods and Supply of Services Act 1980 provides that, where a consumer buyer requests a seller to remedy or replace goods that are in breach of the contract and the seller either refuses to comply with the request or fails to do so within a reasonable time, the buyer is entitled to have the defect constituting the breach remedied elsewhere and to maintain an action for the cost of doing so against the seller.

Head 68 Right to price reduction

- (1) This head applies where a consumer has the right to a price reduction.
- (2) The right of the consumer under this head is the right to –
 - (a) require the trader to reduce by an appropriate amount the price the consumer is required to pay under the contract, or
 - (b) receive a refund of an appropriate amount from the trader of the price paid by the consumer in excess of the amount of the reduction.
- (3) The price reduction or refund under subhead (2) shall be based on the difference in value between the service paid for by the consumer and the service provided by the trader.
- (4) Where appropriate, the amount of the reduction may be the full amount of the price paid or payable by the consumer under the contract.

Explanatory Note

This head sets out the consumer's right to a price reduction or refund and the basis for determining the amount of the reduction or refund. It also sets out the obligations of the trader in respect of the payment of a refund.

Head 69 Right to end contract

- (1) This head applies where a consumer has the right to end the contract.
- (2) The right of the consumer under this head is the right to -
 - (a) end the contract, and
 - (b) receive a refund of the price.
- (3) The price refund under subhead (2) shall be based on the difference in value between the service paid for by the consumer and the service provided by the trader.
- (4) Where appropriate, the amount of the reduction may be the full amount of the price paid or payable by the consumer under the contract.

Explanatory Note

The appropriate reimbursement for the consumer in the event of the termination of a service contract is less straightforward than in the case of a sales contract. In sales transactions, the goods returned by the consumer may have some resale value, and the trader may be able to recoup all or part of the cost of the returned goods from the manufacturer or distributor. These options will not normally be available in the case of a services contract. For these reasons, head 69 differs from the corresponding provisions at head 29 of Part 2 and head 54 of Part 3 in providing that the refund may not amount to the full price and should be based instead on the difference in value between the service paid for by the consumer and the service provided by the trader.

Head 70 Exclusion or limitation of liability of trader

(1) A term of a services contract cannot exclude or restrict the trader's liability under any of the following provisions:

- (a) head 58 (Service to be in conformity with contract),
- (b) head 59 (Service to be performed with skill, care and diligence),
- (c) head 60 (Service to be fit for particular purpose),
- (d) head 61 (Information about service or trader to be binding),
- (e) head 62 (Other pre-contractual information included in contract),
- (f) head 63 (Service to be performed within reasonable time),
- (g) head 64 (Reasonable price to be paid for service).

(2) The reference in subhead (1) to excluding or restricting the trader's liability includes -

- (a) excluding or limiting a right or remedy in respect of a liability under a provision listed in subhead (1),
- (b) making such a right or remedy or its enforcement subject to a restrictive or onerous condition,
- (c) allowing a trader to put a person at a disadvantage as a result of pursuing such a right or remedy,
- (d) excluding or restricting rules of evidence or procedure, or
- (e) preventing an obligation or duty arising or limiting its extent.

(3) An agreement in writing to submit present or future differences to an alternative dispute resolution procedure is not to be regarded as excluding or restricting any liability for the purposes of this head.

Explanatory Note

This head makes an important change to the existing law in line with the recommendation of the Sales Law Review Group. Section 40 of the Sale of Goods and Supply of Services 1980 provides that the implied undertaking as to the quality of services in section 39 of the Act can be negated or varied by an express term of the contract where (1) the recipient of the service deals as consumer and (2) the express term is fair and reasonable and has been specifically brought to the consumer's attention. The head would bring the statutory rules governing exclusion clauses in services contracts into line with those that currently apply to sales contracts and those applying to sales and digital content contracts under heads 36 and 56 of this Scheme.

PART 5

UNFAIR CONTRACT TERMS AND GIFT VOUCHER CONTRACTS

Chapter 1 of this Part deals with unfair terms in consumer contracts, and Chapter 2 with contracts for the supply of a gift voucher.

Directive 93/13/EEC on Unfair Terms in Consumer Contracts which has principally been given effect in Ireland by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 is generally acknowledged to be one of the most important pieces of consumer protection legislation. Recital 9 of the Directive states that it seeks to protect consumers who acquire goods and services 'against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts'. The Unfair Terms Directive applies to all contracts between a trader and a consumer, including the goods, digital content and services contracts covered by Parts 2 to 4 as well as other contracts outside the scope of those Parts, principally property contracts. Certain terms are excluded from the scope of the Directive, however, in particular terms that have been individually negotiated between the trader and consumer as well as what are sometimes referred to as the core terms of the contract.

The Unfair Terms Directive is a minimum harmonisation instrument. Article 8 of the Directive permits Member States to 'adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer'. While most other Member States have availed of the option to go beyond the Directive's provisions in national legislation, the Regulations that implemented the Directive in Ireland did not make any additions to the Directive's provisions. An addition to the Directive's provisions was subsequently made, however, with the enactment of the following provision at section 21(6) of the Arbitration Act 2010:

Without prejudice to the generality of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000, an arbitration agreement –

- (a) to which one of the parties to the agreement is a consumer, and
 - (b) a term of which provides that each party shall bear his or her own costs,
- shall be deemed to be an unfair term for the purposes of those Regulations.

Chapter 1 of this Part proposes to make a number of important changes to the existing legislation on unfair contract terms including –

- extending the scope of the unfair terms provisions to include contract terms that have been negotiated between the consumer and trader,
- strengthening the transparency requirements that apply to contract terms,
- narrowing somewhat the exemption from assessment for unfairness of core contract terms, and
- expanding the ‘grey list’ of contract terms presumed unfair and making one ‘grey list’ term a ‘black list’ term that is automatically unfair.

A more detailed account of the background to, and the rationale for, the main proposals in Chapter 1 of this Part of the Scheme can be found in Part VII of the Department’s Consultation Paper on the Reform of the Law on Consumer Contract Rights which was published in August 2014. The paper can be accessed at <http://www.djei.ie/commerce/consumer/issues.htm>

CHAPTER 1

UNFAIR CONTRACT TERMS

Head 71 Application (Chapter 1)

- (1) This Chapter applies to any contract between a trader and a consumer (a consumer contract).
- (2) A consumer contract is not excluded from the application of this Chapter by reason only of the fact that the contract or a term of the contract has been individually negotiated between the trader and the consumer
- (3) This Chapter applies to any term of a secondary contract that reduces the rights or remedies or increases the obligations of a consumer under a consumer contract.
- (4) Subhead (3) applies regardless of whether –
 - (a) the parties to the secondary contract are the same as the parties to the main contract, or
 - (b) the secondary contract is a consumer contract.
- (5) This Chapter does not apply to a contract term that reflects –
 - (a) mandatory statutory or regulatory provisions, including provisions that, according to law, apply between the parties on the basis that no other rules or arrangements have been established, or
 - (b) the provisions or principles of international conventions to which Ireland or the European Union are party.
- (6) This Chapter does not apply to:
 - (a) a contract of employment,
 - (b) a contract relating to succession rights,
 - (c) a contract relating to rights under family law, or
 - (d) a contract relating to the incorporation and organisation of companies or partnerships.

Explanatory Note

This head sets out the application of the Chapter. Subhead (1) states that it applies to any contract between a trader and a consumer, while subhead (2) provides that it applies both to negotiated and non-negotiated contract terms. Subhead (3) and (4) confirm the Chapter's application to secondary contracts in order to prevent the possibility of a trader using such a secondary contract to circumvent the provisions of the Chapter. The exclusions in subheads (5) and (6) are in line with those in the Directive and the Regulations that give it effect in Ireland.

Head 72 Contract terms to be transparent

- (1) A trader must ensure that each term of a consumer contract is transparent.
- (2) A term is transparent if –
 - (a) it is expressed in plain and intelligible language,
 - (b) in the case of a written term, it is legible and presented clearly, and
 - (c) it is readily available to any consumer affected by the term.
- (3) Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall be adopted.
- (4) Subhead (2) does not apply to proceedings under head 91(1) or head 91(4) of this Act.

Explanatory Note

The head substitutes more expansive transparency requirements for the narrower provision at Article 5 of the Directive that written contract terms should be drafted in plain and intelligible language. This is in line with judgments of the European Court of Justice which have held that the requirement of transparency ‘cannot be reduced’ to a requirement that contract terms be ‘formally and grammatically intelligible’ but ‘must be understood in a broader sense’.¹² Subhead (3) gives effect to the contra proferentem rule at Article 5 of the Directive. In accordance with Article 5 of the Directive and Regulation 5 of the 1995 Regulations, the rule would not apply to proceedings taken by an authorised body, such as the Competition and Consumer Protection Commission under Part 6 of the Act.

¹² Case C-26/13, *Kásler v OTP Jelzálogbank Zrt*, paragraphs 71 and 72. See also Case C-143/13, *Matei v SC Volksbank Romania*, paragraphs 73 to 75.

Head 73 Meaning of unfair

(1) A term is unfair for the purposes of this Chapter if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer

(2) The assessment of whether a term is unfair shall take account of –

- (a) the nature of the subject matter of the contract,
- (b) all the circumstances attending the conclusion of the contract, and
- (c) all of the other terms of the contract or of another contract on which it is dependent.

(3) The assessment of whether a term complies with the requirement of good faith shall have particular regard to -

- (a) the strength of the bargaining positions of the parties,
- (b) whether the consumer had an inducement to agree to the term,
- (c) whether the goods, digital content or services or other subject matter of the contract were sold or supplied to the special order of the consumer, and
- (d) the extent to which the trader has –
 - (i) dealt fairly and equitably with the consumer, and
 - (ii) taken the consumer's legitimate interests into account.

(4) Nothing in this head affects the operation of the following provisions:

- (a) head 36 (exclusion or limitation of liability of trader in contracts for supply of goods);
- (b) head 56 (exclusion or limitation of liability of trader in digital content contracts);
- (c) head 70 (exclusion or limitation of liability of trader in services contracts); or
- (d) head 76 (exclusion of liability for death or injury).

Explanatory Note

This head does not make any substantive changes to the corresponding provisions of the Directive or the Regulations that give it effect in Ireland. While the factors to be taken into account in assessing whether a contract term complies with the good faith requirement are to be found in Schedule 2 of the 1995 Regulations, they have been moved into the Scheme proper in the interests of clarity and comprehensibility.

Head 74 Exclusion from assessment for unfairness

(1) A term of a consumer contract may not be assessed for unfairness under head 73 to the extent that it relates to –

- (a) the definition of the main subject matter of the contract, or
- (b) the adequacy of the price as against the goods, digital content, services or other subject matter supplied in exchange.

(2) The reference in subhead (1)(b) to the price does not include any payment that is incidental or ancillary to the main subject matter of the contract.

(3) Subhead (1) excludes a contract term from assessment for unfairness under head 73 only if it is transparent and prominent.

(4) A contract term is –

- (a) transparent if it complies with head 72, and
- (b) prominent if it is brought to the consumer's attention in such a way that the consumer could reasonably be expected to be aware of the term.

(5) This head does not apply to a contract term specified in Part 1 of Schedule 1.

Explanatory Note

This head affirms the provision at Article 4(2) of the Directive which exempts from assessment for unfairness terms that do not relate to the definition of the main subject matter of the contract or the adequacy of the price-value ratio, but includes a number of amendments aimed at limiting the scope for this exemption to be interpreted too broadly. These involve, first, a stipulation in subhead (2) that the reference to the price in the exemption does not include incidental or ancillary payments; this amendment would not mean that contract terms which provide for incidental or ancillary payments would necessarily be impermissible or unfair, but simply that they would be assessable for unfairness.

The amendment proposed in subhead (2) seeks, among other things, to address the interpretation of the price-value exemption taken by the English Supreme Court in *Office of Fair Trading v Abbey National*.¹³ In 2007, the Office of Fair Trading commenced an investigation under the UK Regulations that implement the Unfair Terms Directive into the fairness of the contract terms relating to charges

¹³ [2009] UK SC 6.

for unauthorised overdrafts in personal current accounts. Though these charges were paid by fewer than a quarter of current account customers, over 1 million customers had paid more than £500. With the agreement of seven banks and one building society, the Office brought a test case on the question of whether the charges for unauthorised overdrafts were assessable for fairness under the Regulations. The High Court and the Court of Appeal found in favour of the Office of Fair Trading. The Supreme Court over-turned these judgments and found for the banks. It held that the charges for unauthorised overdrafts were not assessable for fairness on the ground that ‘any monetary price or remuneration payable under the contract would naturally fall within the language’ of the exemption at Article 4(2) of the Directive. This is arguably an excessively narrow interpretation of the core terms exemption and one that does not accord with the reasonable expectations of consumers.

Subhead (2) would appear, moreover, to be in accordance with recent judgments of the European Court of Justice on the core terms exemption. In these judgments, the Court has held that contractual terms falling within the ‘main subject-matter’ of the contract ‘must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it.’¹⁴ By contrast, ‘terms ancillary to those that define the very essence of the contractual relationship cannot fall within the notion of the main subject- matter of the contract’. The Court held accordingly that the exemption at Article 4(2) did not ‘in principle’ cover the type of terms in consumer credit agreements that allowed the lender under certain conditions unilaterally to alter the interest rate or which provided for a ‘risk charge’ applied by the lender.¹⁵

While the Directive and the Regulations that give it effect provide that a core term is exempt from assessment for unfairness only insofar as it is in plain intelligible language, subheads (3) and (4) provide that the exemption would apply only where such terms satisfied both the broader requirement of transparency proposed in head 72 and a new requirement of prominence. This is intended among other things to address the issue of hidden core terms.

A number of the contract terms presumed unfair set out in Part 1 of Schedule – for example, paragraphs (3) to (5), (7) and (16) - deal in one way or another with the price paid for goods or services. The European Court of Justice has held that a price escalation clause can be assessed for fairness under the Directive, stating that the exclusion from assessment for fairness of the main subject matter and the price-quality ratio ‘cannot apply to a term relating to a mechanism for

¹⁴ Case C-143/13, *Matei v SC Volksbank Romania SA*, paragraph 54 et passim. See also Case C-26/13, *Kásler v OTP Jelzálogbank Zrt*, and Case C-96-14, *Van Hove v CNP Assurances SA*.

¹⁵ Case C-143/13, op. cit, paragraph 78.

amending the prices of the services provided for the customer.¹⁶ It has been argued accordingly that the exemption for the main subject matter and the price-value ratio of the contract is not intended to apply to the terms set out in the grey list. Subhead (5) provides in keeping with this view that the exclusion from the assessment for unfairness of contract terms does not apply to a contract term in the list of terms presumed unfair at Schedule 1.

¹⁶ Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, paragraph 23.

Head 75 Effect of unfairness

(1) An unfair term is not binding on the consumer.

(2) Subhead (1) does not prevent the consumer from relying on the unfair term if the consumer chooses to do so.

(3) If a contract is capable of continuing in existence without the unfair term, it shall continue to bind the parties.

Explanatory Note

This head does not make any substantive change to the existing law. It states the effect of a finding regarding an unfair term and reaffirms that the contract as a whole remains binding on the parties if it is capable of continuing. It also includes an express statement that the consumer may choose to rely on the unfair term.

Head 76 Exclusion or limitation of liability for death or personal injury

(1) A trader cannot by a term of a consumer contract exclude or limit liability for death or personal injury arising from an act or omission by the trader.

(2) A term of a consumer contract that purports to exclude liability for death or personal injury arising from an act or omission by the trader has no effect.

(3) In subhead (1), “personal injury” includes any disease and any impairment of a person’s physical or mental condition.

Explanatory Note

A term to this effect is included in the ‘grey list’ of terms that may be regarded as unfair in the Directive and in the Regulations that give it effect in Ireland. It can reasonably be held, however, that a term of this kind should be automatically unfair. The term was proposed for ‘black list’ status in the European Commission’s 2008 proposal for a revision of the Directive and has had that status in the UK since 1977. The head also provides that any term included in contravention of this head shall have no effect

Head 77 Contract terms presumed to be unfair

(1) Part 1 of Schedule 1 contains an indicative and non-exhaustive list of contract terms that shall be presumed to be unfair for the purposes of this Chapter.

(2) Part 1 of Schedule 1 is subject to the provisions of Part 2 of the Schedule.

(3) Subject to head 74, a contract term referred to in Part 2 of Schedule 1 may be assessed for unfairness under head 73.

(4) The Minister may prescribe in regulations for the amendment of Schedule 1 so as to add, modify or remove any entry in Part 1 or Part 2 of the Schedule.

Explanatory Note

Article 3(3) states that the Annex to the Directive ‘shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair’. The Annex, or ‘grey list’ of contract terms as it is commonly known, is reproduced in Schedule 3 of the 1995 Regulations. A term in the Annex is not necessarily to be considered unfair, while a term that does not appear on the list may be found to be unfair. The European Court has held that the Annex ‘is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term’.¹⁷ In keeping with the Directive’s minimum harmonisation status, Recital 17 states that the scope of the Annex terms ‘may be the subject of amplification or more restrictive editing by the Member States in their national laws.’ Ireland was one of a minority of seven Member States which reproduced the Annex without addition or alteration in the legislation that implemented the Directive. As stated in the introductory note to this Chapter, however, the Arbitration Act 2010 included a provision stating that a term in an arbitration agreement to which one of the parties was a consumer which provided that each party would bear his or her own costs is deemed to be an unfair term for the purposes of the European Communities (Unfair Terms in Consumer Contracts) Regulations.

Subhead (1) clarifies and strengthens the status of the indicative list of unfair terms. While the Directive characterises the Annex as contract terms ‘that may be regarded as unfair’, the subhead proposes that the contract terms in the corresponding list in Schedule 1 should be ‘presumed to be unfair’. The presumption of unfairness would of course be rebuttable. The European Commission’s 2008 proposal for a revision also provided that the indicative list of unfair terms would comprise terms which ‘are presumed to be unfair’.

¹⁷Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, paragraph 26.

The list of terms that are to be presumed unfair is at Part 1 of Schedule 1. It proposes a number of additions at paragraphs 4, 6, 9, 13, 15 and 21 to the list of terms in the Annex to the Directive. These additions were endorsed by the National Consumer Agency and the Commission for Communications Regulation in their responses to the Department's public consultation of August 2014 on the reform of consumer contract law. Subject to consultations with the Department of Justice and Equality, it is also proposed to include in the Annex the provision of the Arbitration Act 2010 referred to above. This term can be found at paragraph 23 of Part 1 of Schedule 1.

The indicative list of contract terms in the Annex to the Directive also contains a number of qualifications to the scope of a number of the specified terms. These qualifications are set out in Part 2 of Schedule 1. The only substantive change to this Part of the Schedule is the addition in paragraph 4 to the terms relating to the sale of financial securities and foreign currency of a requirement that the consumer's attention is brought to possible fluctuations affecting the contract before the consumer is bound by it. While this requirement is largely covered by the requirements of other financial services legislation, it is included here to ensure that consumers are adequately informed about the nature of the contract into which they are entering.

Head 78 Duty of court to consider unfairness of term

(1) In proceedings before a court which relate to a term of a consumer contract, the court shall be required to assess whether the term is unfair regardless of whether a party to the proceedings has raised that question or indicated that it intends to raise it.

(2) The requirement in subhead (1) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to assess whether the term is unfair.

Explanatory Note

This is a new provision. Its aim is to make clear the obligation on national courts to assess of their own motion whether a clause in a consumer contract is unfair. This obligation has been clearly established by the European Court of Justice in a number of judgments.¹⁸ Subhead (2) qualifies this obligation by providing that it does not apply unless the court considers that it has sufficient legal and factual material before it to permit such an assessment. A similar provision is to be found in the UK Consumer Rights Act 2015.

¹⁸ Case C-168/05 *Mostazo Claro*; Case C-40/08 *Asturcom Telecomunicaciones SL v Maria Cristina Rodríguez Nogueira*; Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Tavkozlesi Zrt*; and Case C-488/11 *Asbeek Brusse and de Man Garabito v Jahani BV*.

CHAPTER TWO

CONTRACTS FOR THE SUPPLY OF A GIFT VOUCHER

Introductory Note

Chapter 2 contains a number of new provisions for the regulation of contracts for the supply of gift vouchers. While gift vouchers have been subject to the provisions of general consumer protection legislation, the proposals in the Chapter are the first legislative provisions to deal specifically with these products.

Head 79 Application (Chapter 2)

This Chapter applies to contracts for the supply of a gift voucher (gift voucher contract).

Explanatory Note

This head states the scope of Chapter 2 to be contracts for the supply of a gift voucher. “Gift voucher” and “gift voucher contract” are defined in head 80.

Head 80 Interpretation (Chapter 2)

In this Chapter -

“gift voucher” means a voucher in any form (including a card, an electronic credit or a written certificate) supplied by a trader which the consumer is entitled to apply towards the purchase of goods, digital content or services covered by the voucher;

“gift voucher contract” means a contract under which a trader supplies or agrees to supply a gift voucher in return for payment of the price of the gift voucher.

Explanatory Note

The definition of a gift voucher covers all forms of these products, whether card, electronic or written certificate or other. It includes gift vouchers that can be applied to the purchases of goods, digital content or services from a single trader or from a number of traders.

Head 81 No expiry date for gift vouchers

(1) A trader shall not include in a gift voucher contract a term that makes the future performance of the contract subject to an expiry date.

(2) A gift voucher contract which includes an expiry date on its future performance shall be effective as if it had no expiry date if the contract is otherwise valid

Explanatory Note

This is a new provision which prohibits traders from applying an expiry date to a gift voucher contract. The head also seeks ensures that any attempt to include an expiry date is ineffective by stipulating that, in such a case, the contract shall be effective as if it had no expiry date

Head 82 Fees for gift vouchers

(1) Before the consumer is bound by a gift voucher contract, the trader shall ensure that the consumer is informed of any fees provided for in the contract, including fees charged for –

- (a) the issue of a gift voucher,
- (b) the repayment to the consumer of any credit balance on the gift voucher,
- (c) the replacement of a lost or stolen gift voucher, or
- (d) an inactive balance on the gift voucher.

(2) The information referred to in subhead (1) shall –

- (a) in the case of on-premises contracts, be provided in accordance with Regulation 5 of the Regulations of 2013,
- (b) in the case of off-premises contracts, be provided in accordance with Regulation 7 of the Regulations of 2013, and
- (c) in the case of distance contracts, be provided in accordance with Regulation 10 of the Regulations of 2013.

(3) The fees referred to in paragraphs (b), (c) and (d) of subhead (1) shall be assessable for unfairness under head 73 of Chapter 1.

Explanatory Note

A range of fees can be charged in connection with the supply of a gift voucher. Subhead (1) imposes an obligation on the trader to inform the consumer of any such fees before the consumer is bound by the gift voucher contract. Subhead (2) provides that this information shall be provided in accordance with the requirements applicable under the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013. These Regulations do not apply to financial services contracts. As some gift voucher products come within the scope of the European Communities (Electronic Money) Regulations 2011 and contracts for their supply could accordingly be considered to be financial services contracts, Part 2 of Schedule 3 includes an amendment to the 2013 Regulations to provide that the definition of “financial services” does not include contracts for the supply of a gift voucher.

Subhead (3) clarifies that, with the exception of fees for the issue of a gift voucher, any fees charged in respect of a gift voucher are assessable for fairness in accordance with head 73 of Chapter 1. A

fee charged for a gift voucher can be regarded as one of the core terms of the contract that is exempt from assessment for fairness in accordance with head 74.

Head 83 Restrictions on use of gift vouchers

(1) Before the consumer is bound by a gift voucher contract, the trader shall ensure that the consumer is informed of any restrictions on the use of the gift voucher.

(2) The information referred to in subhead (1) shall –

(a) in the case of on-premises contracts, be provided in accordance with Regulation 5 of the Regulations of 2013,

(b) in the case of off-premises contracts, be provided in accordance with Regulation 7 of the Regulations of 2013, and

(c) in the case of distance contracts, be provided in accordance with Regulation 10 of the Regulations of 2013.

Explanatory Note

Gift voucher contracts can provide for restrictions on their use. This head provides that, before a consumer is bound by a gift voucher contract, the trader must inform the consumer of any such restrictions.

PART 6

ENFORCEMENT

Introductory Note

Parts 2, 3 and 4 of the proposed Act deal with the rights of consumers and the obligations of traders under contracts for the supply of goods, digital content and services, while Part 5 deals with the fairness of non-core terms in consumer contracts. The enforcement of contractual rights is, and has always been, a matter primarily for the parties to a contract. That is why it is particularly important that the rights of consumers and the remedies available to them if those rights are breached are set out in a manner that is as clear and comprehensible as possible. If a consumer does not obtain redress directly from the trader, he or she may be able to avail of the alternative dispute resolution arrangements that are due to take effect later this year under the regulations that will give effect to Directive 2013/11/EU on alternative dispute resolution for consumer disputes. The consumer also has the option of taking civil proceedings under the small claims procedure of the District Court if the claim does not exceed €2,000. Claims in excess of this amount can be pursued in the District, Circuit or High Court in accordance with the applicable monetary jurisdictions of these courts.

Though the Competition and Consumer Protection Commission cannot act on behalf of individual consumers in disputes arising under any given contract for the supply of goods, digital content or services, it will have a critical public enforcement role in ensuring that traders do not apply contract terms that contravene the Act or engage in practices contrary to the obligations imposed on them by the Act.

Chapter 1 of this Part deals with the public enforcement role of the Competition and Consumer Protection Commission under Parts 2, 3 and 4 and, with the exception of applications for prohibition orders or injunctions, under Part 5 of the proposed Act. A separate regime currently applies to applications for prohibition orders in respect of contraventions of the existing Regulations on unfair contract terms, and the retention of this regime is provided for in Chapter 2. As is also the case under those Regulations, public enforcement of Part 5 of the Act will be the responsibility of the Central Bank and the

Commission for Communications Regulation as well as of the Competition and Consumer Protection Commission.

CHAPTER 1

AMENDMENT OF ACT OF 2007 AND ACT OF 2014

Head 84 Amendment of section 2 of Act of 2014

Subsection (1) of section 2 of the Act of 2014 is amended, in the definition of “relevant statutory provisions”, by inserting the following paragraph after paragraph (c):

“(d) the Consumer Rights Act 2015”;

Explanatory Note

This amendment of the Competition and Competition and Consumer Protection Act 2014 would bring Parts 2, 3 and 4 of the Consumer Rights Act within the remit of the functions and investigative and enforcement powers of the Competition and Consumer Commission. References in sections 10, 17, 24, 35 and 36 of the Act to “relevant statutory provisions” would be construed accordingly as including a reference to the Consumer Rights Act. These sections of the 2014 Act deal with the following:

- section 10 (Functions of Commission);
- section 17 (Review of legislation);
- section 24 (Disclosure of information relating to offences);
- section 35 (Appointment of authorised officers); and
- section 36 (Powers of authorised officers for purposes of enforcing relevant statutory provisions).

Similar amendments will be necessary to the Central Bank Act 1942 and the Communications Regulation Act 2002 to make provision for Part 5 of the Act to be included among the functions and powers of the Central Bank and the Commission for Communications Regulation.

Head 85 Amendment of section 67 of Act of 2007

Section 67 of the Act of 2007 is amended by substituting the following paragraphs for paragraph (g):

“(g) any contravention of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013);

(h) any contravention of the Consumer Rights Act 2015;

but subject to the exclusion of one or more of the foregoing provisions provided for in section 71, 73, 74 or 75.”

Explanatory Note

Section 67 of the Consumer Protection Act 2007 defines “prohibited act or practice” for the purposes of the application of the following sections of the Act:

- section 71 (Civil relief by way of prohibition orders);
- section 72 (Prohibition orders against code owners);
- section 73 (Undertakings with the Commission);
- section 74 (Consumer’s right of action for damages); and
- section 75 (Compliance notices).

The section is subject to the exclusion of any provision of the 2007 Act or other enactment covered by it which is provided for in sections 71, 73, 74, or 75.

The addition of the proposed Consumer Rights Act to the enactments covered by the definition of “prohibited act or practice” in the 2007 Act would allow the Competition and Consumer Protection Commission to apply the enforcement provisions in the specified sections of the 2007 Act to contraventions of the proposed new Act. The enforcement provisions most relevant to the enforcement of the proposed Act are section 71 on prohibition orders or injunctions and section 73 on undertakings with the Commission. As a separate injunctions regime will apply in the case of Part 5 of the Act under Chapter 2, however, this Part of the proposed Act would be excluded from the application of section 71 of the 2007 Act.

It is proposed also in heads 86 and 87 to exclude the proposed Act from the application of sections 74 and 75 of the 2007 Act. As consumers would have a right of action for damages under the contract for breach of the express terms of the contract or the terms implied into the contract by the Act, the right of action for damages provided for in section 74 of the 2007 Act is unnecessary. As the compliance notice provision at section 75 of the 2007 Act is essentially an alternative to criminal

proceedings and non-compliance with a compliance notice is an offence, it is not appropriate to statutory provisions dealing with the rights of consumers under contracts.

Head 86 Amendment of section 71 of Act of 2007

Section 71 of the Act of 2007 is amended by substituting the following subsection for subsection (1):

“(1) In this section, “prohibited act or practice” does not include –

- (a) a contravention of section 59(2) (respecting weighing facilities in grocery retail),
- (b) a contravention of section 60(1) (respecting preventing the reading of prices), or
- (c) a contravention of Part 5 of the Consumer Rights Act 2015.”

Explanatory Note

This amendment would remove contraventions of Part 5 of the proposed Act from the application of section 71 of the Act of 2007 (Civil relief by way of prohibition order) for the reason given in the note on head 85.

Head 87 Amendment of section 74 of Act of 2007

Subsection (1) Section 74 of the Act of 2007 is amended by substituting the following paragraphs for paragraph (b):

- “ (b) a contravention of section 65(1) (respecting pyramid promotional schemes), or
- (c) a contravention of the Consumer Rights 2015.”

Explanatory Note

This amendment would remove contraventions of the proposed Act from the application of section 74 of the Act of 2007 (Consumer’s right of action for damages) for the reason given in the note on head 85.

Head 88 Amendment of section 75 of Act of 2007

Section 75 of the Act of 2007 is amended by substituting the following subsection for subsection (1):

“(1) In this section, “prohibited act or practice” does not include –

- (a) a contravention of a regulation under section 57 (respecting price display regulations), or
- (b) a contravention of the Consumer Rights Act 2015.”

Explanatory Note

This amendment would remove contraventions of the proposed Act from the application of section 75 of the Act of 2007 (Compliance notices) for the reason given in the note on head 85.

Head 89 Amendment of Schedule 4 of Act of 2007

Schedule 4 of the Act of 2007 is amended by inserting after the last item –

- (a) in column (1), the following “(No. – of 2015), and
- (b) in column (2), the following “the Consumer Rights Act 2015”,

Explanatory Note

Schedule 4 of the 2007 Act lists the enactments that apply for the purpose of section 73 of the Act on undertakings by a trader to the Competition and Consumer Protection Commission in respect of a prohibited act or practice. This amendment would bring a contravention of the proposed Consumer Rights Act within the scope of the undertakings provision in the 2007 Act.

CHAPTER 2

APPLICATION TO COURT FOR DECLARATION OR INJUNCTION IN RELATION TO PART 5

Head 90 Interpretation

In this Part -

“authorised body” means the Competition and Consumer Protection Commission, the Central Bank of Ireland, the Commission for Communications Regulation or a consumer organisation;

“consumer organisation” means –

- (a) a company, the memorandum of association of which states the company’s main object or objects to be the protection of consumer interests, or
- (b) a body corporate (other than a company) or an unincorporated body of persons in relation to which there exists a constitution or a deed of trust which states the body’s main object or objects to be the protection of consumer interests.

Explanatory

This head restates, first, the definition of “authorised body” at regulation 2 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995) (as substituted by Regulation 2 of of the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014 (S.I. No. 336 of 2014)). This definition governs the bodies entitled to apply for a court declaration or order under the Regulations. The head restates, secondly, the definition of “consumer organisation” at Regulation 2 of the 1995 Regulations (as inserted by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000 (S.I. No. 307 of 2000)).

Head 91 Application to court for declaration or injunction

(1) An authorised body may apply to the Circuit Court or High Court for a declaration that any term drawn up for general use in contracts concluded by traders is unfair and may, at the discretion of the Court, be granted an order prohibiting the use or continued use of such a term or similar terms of like effect.

(2) An authorised body shall cause to be published notice of intention to apply to the Circuit Court or High Court for a declaration under subhead (1) in *Iris Oifigiúil* and at least two national newspapers and in such further or other manner as the Court may direct.

(3) Every person claiming to have an interest in an application under subhead (1) shall be entitled to appear before and be heard by the Court on the hearing of the application.

(4) Further and ancillary to the power provided for under subhead (1) of this head, an authorised body may apply for an injunction (including an interim injunction) against any trader using, or recommending use of, a term which the authorised body considers to be an unfair term drawn up for general use in contracts concluded with consumers and the Court may grant an injunction on such terms as it deems appropriate.

(5) An application under subhead (1) or (4) by an authorised body, other than the Competition and Consumer Protection Commission, shall be on notice to the Commission.

(6) An injunction granted pursuant to subhead (4) may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any trader.

(7) On any application under subhead (1) or (4) it shall not be necessary for an authorised body to prove—

(a) actual loss or damage, or

(b) recklessness or negligence on the part of the trader.

(8) In the exercise of its jurisdiction under subheads (1) and (4) the court shall take account of all the interests involved and in particular the public interest.

(9) Subheads (1) and (4) are without prejudice to the right of a consumer to rely upon the provisions of these Regulations in any case before a court of competent jurisdiction.

(10) An application under this head to the Circuit Court shall be made to the judge of the Circuit Court in which the trader is ordinarily resident or carries on any profession, trade or business.

(11) If, in relation to an application under this head to the Circuit Court, that Court becomes of the opinion, during the hearing of the application, that it is not appropriate for the Circuit Court to deal with the application, it may, if it so thinks fit, transfer the application to the High Court.

(12) Subhead (11) is without prejudice to the jurisdiction of the Circuit Court to determine an application under this head which, at the time of the making of the application, it was satisfied it had jurisdiction to deal with.

(13) Where an application is transferred to the High Court under subhead (11), the High Court shall be deemed to have made any order of a procedural nature that was made by the Court from which it is so transferred in the proceedings in relation to the application.

Explanatory Note

This head reproduces with minor changes in wording regulation 8 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995) (as substituted by Regulation 5 of the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 (S.I. No. 160 of 2013)).

SCHEDULE 1

PART 1

CONTRACT TERMS PRESUMED UNFAIR

1. A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.
2. A term which has the object or effect of making an agreement binding on the consumer whereas provision of services by the trader is subject to a condition whose realization depends on the trader's will alone.
3. A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.
4. A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.
5. A term which has the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.
6. A term which has the object or effect of permitting the trader to claim compensation where the consumer has cancelled the contract where the object of such compensation is to prevent or impede the facilitation of a change of service provider.
7. A term which has the object or effect of authorizing the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by him where it is the trader who dissolves the contract.
8. A term which has the object or effect of enabling the trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.

9. A term which has the object or effect of, in the event that the consumer has cancelled the contract, allowing a trader to retain payment which, had the contract been performed, would have been paid to a third party.
10. A term which has the object or effect of automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early.
11. A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer had no real opportunity of becoming acquainted before the conclusion of the contract.
12. A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.
13. A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.
14. A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or service to be provided.
15. A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by the contract, where no price or method of determining the price has been agreed with the consumer before the consumer becomes bound.
16. A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.
17. A term which has the object or effect of giving the trader the right to determine whether the goods, digital content or services supplied are in conformity with the contract, or giving the trader the exclusive right to interpret any term of the contract.
18. A term which has the object or effect of limiting the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.
19. A term which has the object or effect of obliging the consumer to fulfil all his obligations where the trader does not perform the trader's obligations.

20. A term which has the object or effect of giving the trader the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the consumer's agreement.
21. A term which has the object or effect of requiring a consumer to pay a fee in order to exercise a statutory right or a right under the contract.
22. A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.
23. A term which has the object or effect of providing that the consumer party to an arbitration shall bear his or her own costs.

PART 2

RESTRICTIONS ON THE APPLICATION OF PART 1

1. Term 8 (cancellation without reasonable notice) does not include a term by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the financial services supplier is required to inform the consumer and another other contracting party or parties of the cancellation immediately.

2. Term 14 (variation of contract without valid reason) does not include a term whereby a supplier of financial services reserves the right to alter the rate of interest payable by or due to the consumer, or the amount of other charges for financial service where there is a valid reason for doing so, provided that the supplier is required to inform the consumer and any other contracting party or parties of the alteration at the earliest opportunity and the consumer is free to dissolve the contract immediately.

3. Term 13 (determination of characteristics), Term 14 (variation of contract without valid reason), Term 15 (determination of price) do not include a term under which a trader reserves the right to alter unilaterally the conditions of a contract of indeterminate duration provided that the trader is required to inform the consumer of the alteration with reasonable notice and the consumer is free to dissolve the contract.

4. Term 8 (cancellation without reasonable notice); Term 14 (variation of contract without valid reason); Term 15 (determination of price) and Term 16 (increase in price) do not apply to:

- (a) transactions in transferrable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control, or
- (b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency

provided that the consumer is made aware of the possibility of changes in the contract before the consumer is bound.

5. Term 15 (determination of price) and Term 16 (increase in price) do not apply to a price-indexation clause, where otherwise lawful, provided that the method by which prices may vary is explicitly described.

SCHEDULE 2

PART 1

Acts Repealed

Section 5(1)

Number and Year (1)	Short Title (2)	Extent of Repeal (3)
(1893, c. 71)	Sale of Goods Act 1893	Section 4
No. 16 of 1980	Sale of Goods and Supply of Services Act 1980	Sections 3, 11, 14, 41 and 53
No. 23 of 1980	Trading Stamps Act 1980	The whole Act
No. 24 of 1995	Consumer Credit Act 1995	Part VI Sections 74 to 83 Part VII Section 88
No. 1 of 2010	Arbitration Act 2010	Section 21(6)

Part 2

Statutory Instruments Revoked

Section 5(2)

Number and Year (1)	Title of Instrument (2)	Extent of Revocation (3)
S.I. No 27 of 1995 and S.I. No 307 of 2000	European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000	The whole Instrument
S.I. No 11 of 2003	European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003	The whole Instrument
S.I. No 160 of 2013	European Communities (Unfair Terms in Consumer Contracts)(Amendment) Regulations 2013	The whole Instrument
S.I. No 484 of 2013	European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013	Part 6 of the Instrument
S.I. No 336 of 2014	European Communities (Unfair Terms in Consumer Contracts)(Amendment) Regulations 2014	The whole Instrument

SCHEDULE 3

PART 1

Amendments to Acts

Section 6(1)

Short Title, Number and Year (1)	Provision Affected (2)	Amendment (3)
Sale of Goods Act 1893	<p>Section 1 (Sale and agreement to sell)</p> <p>Section 3 (Contract of sale, how made)</p> <p>Section 11 (When condition to be treated as warranty)</p> <p>Section 12 (Implied undertaking as to title)</p> <p>Section 13 (Sale by description)</p>	<p>The Sale of Goods Act 1893 is amended as follows:</p> <p>After subsection (4) insert- “(5) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>At the beginning of the section insert “(1)”.</p> <p>At the end of the section insert- “(2) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>After subsection (4) insert- “(5) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>After subsection (2) insert- “(3) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>After subsection (3) insert- “(4) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p>

	<p>Section 14 (Implied undertakings as to quality or fitness)</p> <p>Section 15 (Sale by sample)</p> <p>Section 20 (Passing of risk)</p> <p>Section 29 (Rules as to delivery)</p> <p>Section 30 (Delivery of wrong quantity)</p> <p>Section 31 (Instalment delivery)</p> <p>Section 32 (Delivery to carrier)</p>	<p>After subsection (6) insert- “(7) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>After subsection (2) insert- “(3) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>Delete subsections (3) to (7).</p> <p>After subsection (2) insert- “(3) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>Delete subsections (2A) to (2F).</p> <p>After subsection (5) insert- “(6) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>After subsection (4) insert- “(5) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>After subsection (2) insert- “(3) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>Delete subsection (4).</p> <p>After subsection (3) insert- “(4) This section does not apply to a contract to which Part 2 of</p>
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	<p>Section 34 (Buyer's right of examining the goods)</p> <p>Section 35 (Acceptance)</p> <p>Section 53 (Remedy for breach of warranty)</p> <p>Section 55 (Exclusion of implied terms and conditions)</p>	<p>the Consumer Rights Bill 2015 applies.”</p> <p>After subsection (2) insert- “(3) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>At the beginning of the section insert “(1)”.</p> <p>At the end of the section insert- “(2) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>In subsection (1) delete “Subject to subsection (2),”.</p> <p>Delete subsections (2) and (3).</p> <p>After subsection (4) insert- “(5) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p> <p>After subsection (8) insert- “(9) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2015 applies.”</p>
<p>Sale of Goods and Supply of Services Act 1980</p>	<p>Section 12</p> <p>Section 13</p>	<p>After subsection (3) insert- “(4) This section does not apply to a contract to which Part 4 of the Consumer Rights Bill 2015 applies.”</p> <p>After subsection (9) insert- “(10) This section does not apply to a contract to which</p>

Part 2

Amendments to Statutory Instruments

Section 6(2)

Citation, Number and Year (1)	Provision Affected (2)	Amendment (3)
European Union (Consumer Information, Cancellation and Other Rights Regulations) 2013 (S.I. No. 484 of 2013)	Regulation 2(1)	For the definition of “financial service” substitute: “financial service” means any service of a kind normally provided in the ordinary course of carrying on a banking business, an insurance business or a business of providing credit, personal pensions, an investment service or a payment service, but excludes a service related to the supply of a gift voucher that is within the meaning of “electronic money” in the European Communities (Electronic Money) Regulations 2011 (S.I. No 183/2011).
	Regulation 3(2)	Substitute: (2) These Regulations do not apply to contracts concluded between a trader and a consumer for financial services.
	Regulation 4	Substitute: (1) Subject to paragraph 2 and Regulation 3, this Part applies to each of the following on-premises contracts concluded between a trader and a consumer: (a) sales contracts; (b) service contracts other than contracts for passenger

		<p>transport services;</p> <p>(c) contracts for the supply of digital content not supplied on a tangible medium;</p> <p>(d) contracts for the supply of water, gas or electricity not put up for sale in a limited volume or set quantity;</p> <p>(e) contracts for the supply of district heating.</p> <p>Insert after paragraph (1):</p> <p>(2) This Part does not apply to any of the following on-premises contracts concluded between a trader and a consumer:</p> <p>(a) contracts for the creation, acquisition or transfer of immovable property or of rights in immovable property;</p> <p>(b) contracts for the construction of new buildings or the substantial conversion of existing buildings;</p> <p>(c) contracts for rental of accommodation for residential purposes;</p> <p>(d) contracts within the scope of Council Directive 90/314/EEC¹⁹;</p> <p>(e) contracts within the scope of Directive 2008/122/EC of the European Parliament and of the Council²⁰;</p> <p>(f) contracts established, in accordance with the law of a Member State, by a public office-holder who has a statutory duty to be independent and impartial</p>
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² OJ No. L 158, 23.6.1990, p. 59.

²⁰ OJ No. L 33, 3.2.2009, p. 10.

	<p>Regulation 6</p>	<p>and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope;</p> <p>(g) contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household which are physically supplied by the trader on frequent and regular rounds to the consumer's home, residence or workplace;</p> <p>(h) contracts concluded by means of automatic vending machines or automated commercial premises;</p> <p>(i) contracts concluded with a telecommunications operator through a public pay telephone for the use of the telephone;</p> <p>(j) contracts concluded for the use of one single connection by telephone, Internet or fax established by a consumer.</p> <p>Substitute for paragraph (1):</p> <p>(1) Subject to paragraphs 2 and 3 and Regulation 3, this Part applies to each of the following distance contracts and off-premises contracts concluded between a trader and a consumer:</p> <p>(a) sales contracts;</p> <p>(b) service contracts;</p> <p>(c) contracts for the supply of digital content not supplied on</p>
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		<p>a tangible medium;</p> <p>(d) contracts for the supply of water, gas or electricity not put up for sale in a limited volume or set quantity;</p> <p>(e) contracts for the supply of district heating.</p> <p>Insert after paragraph (1):</p> <p>(2) This Part does not apply to any of the following distance or off-premises contracts concluded between a trader and a consumer:</p> <p>(a) contracts for the creation, acquisition or transfer of immovable property or of rights in immovable property;</p> <p>(b) contracts for the construction of new buildings or the substantial conversion of existing buildings;</p> <p>(c) contracts for rental of accommodation for residential purposes;</p> <p>(d) contracts within the scope of Council Directive 90/314/EEC;</p> <p>(e) contracts within the scope of Directive 2008/122/EC of the European Parliament and of the Council;</p> <p>(f) contracts established, in accordance with the law of a Member State, by a public office-holder who has a statutory duty to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal</p>
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	<p>Regulation 13(2)</p>	<p>consideration and with knowledge of its legal scope;</p> <p>(g) contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household which are physically supplied by the trader on frequent and regular rounds to the consumer's home, residence or workplace;</p> <p>(h) contracts concluded by means of automatic vending machines or automated commercial premises;</p> <p>(i) contracts concluded with a telecommunications operator through a public pay telephone for the use of the telephone;</p> <p>(j) contracts concluded for the use of one single connection by telephone, Internet or fax established by a consumer.</p> <p>Insert after paragraph (2):</p> <p>(3) Except for Regulations 10, 11 and 12, this Part does not apply to contracts concluded between a trader and consumer for healthcare services.</p> <p>Insert after paragraph (3):</p> <p>(4) Except for Regulation 11, this Part does not apply to contracts concluded between a trader and a consumer for passenger transport services.</p> <p>Substitute for paragraph (1):</p> <p>Subject to paragraphs (2), (3) and (4)</p>
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		<p>and Regulation 3, this Part applies to each of the following distance contracts and off-premises contracts concluded between a trader and a consumer:</p> <ul style="list-style-type: none"> (a) sales contracts; (b) service contracts; (c) contracts for the supply of digital content not supplied on a tangible medium; (d) contracts for the supply of water, gas or electricity not put up for sale in a limited volume or set quantity; (e) contracts for the supply of district heating. <p>Insert after paragraph (1):</p> <p>(2) This Part does not apply to any of the following distance or off-premises contracts concluded between a trader and a consumer:</p> <ul style="list-style-type: none"> (a) contracts for healthcare; (b) contracts for gambling; (d) contracts for financial services; (e) contracts for the creation, acquisition or transfer of immovable property or of rights in immovable property; (c) contracts for the construction of new buildings or the substantial conversion of existing buildings; (d) contracts for rental of accommodation for residential purposes; (e) contracts within the scope of Council Directive 90/314/EEC; (f) contracts within the scope of
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