



The Consumers' Association of Ireland

Submission

to the

**Consultation on Scheme of
Consumer Rights Bill 2021**

June 2021

To independently protect, promote and represent the interests of consumers

Appendix – Reply Forms

1 Views are invited on the optional provisions on sale contracts included in Part 2 of the Scheme. Please limit your views to 500 words:

Head 23(1) and 24. Short-term termination. The directive places repair or replacement as first remedies for consumers but is also allowing an option to allow termination within max. 30 days after delivery, if the lack of conformity becomes apparent within that period, - the so-called short-term termination. Otherwise, termination is only allowed as a final remedy after other remedies have been tried and not in case of minor problems of conformity. The need for distinction between short-term termination and final termination and between minor/other lack of conformity may raise problems of application. However, it is apparently the only way of maintaining the existing possibility for maintaining termination as a first recourse for consumers, so we agree with the proposed text of the Scheme.

Head 21(2). Duration of trader liability The Directive allows to deviate from the normal two-year period for duration of trader liability, but to maintain or introduce longer periods. On this basis the Scheme proposes to maintain the existing 6-year period applicable according to the general rules on limitation. We agree that this is the most appropriate and straightforward solution.

Head 12(7), (8), (11). Additional remedies. The Directive allows application of remedies additional to those provided and this possibility is used in the Scheme. Along with claims for damages and the withholding of payment of the price other remedies this includes for example offsetting lack of conformity in the payment claim by the trader. We agree with including such additional remedies since this widens the scope for flexible solutions to the advantage of both consumer and trader.

Head 29. Time limit for reimbursement of payments. The Sales Directive does not set time limit for reimbursement of payments in case of consumer's termination. Both the Digital Content Directive and the Consumer Rights Directive require reimbursement to be carried out without undue delay and within 14 days of the trader being informed of the consumer's decision to terminate or cancel the contract. We agree with the Scheme that the same 14 days rule should also apply to goods in general.

Head 28(2) – (3). Reduction of reimbursement. The controversial issue of trader's reduction in reimbursement is proposed to be solved by allowing such reduction "in proportion to any depreciation in the value of the goods in excess of the depreciation that could reasonably be expected to result from their normal use." The rule is coupled with a reverse burden of proof. It is therefore for the trader to show that the depreciation in the value of the goods exceeded that which could reasonably be expected to result from their normal use. In our view there is not likely that any use - be it excessive or for that matter normal - will occur when lack of conformity exists from the outset. The possibility for deduction should in the view of CAI therefore not be open in cases of short-term termination.

2 Views are invited on the non-implementation of the above optional provisions in Part 2 of the Scheme. Please limit your views to 500 words:

The Sales Directive permits exclusion of contracts for the sale of **second-hand goods sold at public auction** and contracts for the sale of **living animals**. We agree with the Scheme that the provisions of the Directive are as they stand sufficiently flexible to take account of the particular characteristics of second-hand goods sold at auction and that there is no valid policy reason to exclude sales of living animals, given the significance of the market for pets.

The Sales Directive provides that any lack of conformity of the goods which becomes apparent within one year of the time when the goods were delivered shall be presumed to have existed at the time when the goods were delivered. Instead of the one-year period laid down in Article 11(1), Member States may maintain or introduce a period of two years for the duration of this **reversal of burden of proof rule**. We agree with the points made in paragraph 2.37 and the option should therefore not be used.

The Sales Directive provides that Member States may maintain or introduce a requirement that the consumer **must inform the seller of a lack of conformity within at least 2 months** of the date on which the consumer detected the lack of conformity. We agree with the points made in paragraph 2.39 concerning the unreasonableness and lack of practical benefit of such a requirement.

3 Views are invited on the optional provisions included in Part 3 of the Scheme. Please limit your views to 500 words:

1. Duration of the liability of the trader, and of the entitlement of the consumer to remedies, for a lack of conformity with a contract (head 21) Article 11(2) of the Digital Content Directive provides for a two-year liability period. The CAI supports the Department's solution to this issue in Irish Law as per the statute of limitations. In that case, the entitlement of the consumer to remedies for a lack of conformity, will not be subject to a two-year liability period but will apply instead in accordance with the six-year limitation period for contract actions as laid down in the Statute of Limitations Act 1957.

2. Right of consumer to withhold payment and other remedies Recital (15) of the Digital Content Directive states that Member States should be free accordingly to regulate whether a consumer, in cases of a lack of conformity, is to be entitled to withhold payment of the price or part thereof until the trader has brought the digital content or digital service into conformity with the contract.

Head 41(9) of Part 3 specifies a number of remedies additional to the Directive's primary remedies of bringing the digital content or digital service into conformity, price reduction and termination of the contract that may be available to the consumer. These remedies include the withholding of payment in full or part by the consumer until the trader has fulfilled his or her obligations.

The CAI supports these provisions which give consumers additional rights if they are confronted by a lack of conformity in the supply of digital content or digital services.

3. Termination of bundle and ancillary contracts Head 53(9) provides that where digital content or a digital service are supplied to a consumer under a contract that provides also for the sale of goods or the supply of a service, the consumer shall have the right to terminate that contract if -

(a) the consumer would be entitled to terminate the contract under Part 3 if it were a contract for the supply of digital content or a digital service only, and

(b) the value of the goods or service to the consumer would be materially reduced in the absence of the digital content or digital service.

The effect of the termination of a digital content or digital service contract on any ancillary contract is regulated in a similar fashion.

The CAI supports both provisions as they maintain maximum consumer rights in line with the Digital Content Directive.

4 Views are invited on the non-implementation of the above optional provisions in Part 3 of the Scheme. Please limit your views to 500 words:

4. Consequences for contract of withdrawal of consent to processing of personal data. The CAI agrees that the inclusion of a provision dealing with the contractual consequences of a withdrawal of consent by the consumer to the processing of personal data will only cause legal difficulties and anomalies. Recital 39 of the Directive states that the consumer's rights in terminating a contract are without prejudice to a consumer's rights under the General Data Protection Regulation (GDPR). The CAI believes that this division between consumer contractual rights and consumer personal data rights should be maintained in the interests of legal certainty.

5. Application of Directive to metadata collected by trader and cases where access to digital content or digital services involves exposure to advertisements. Recital 25 of the Directive adds however that Member States should remain free to extend the application of the Directive to metadata and exposure to advertisements or to regulate them in other ways.

The CAI agrees with the Department that it is best to await the Directive's review clause to add additional provisions relating to metadata and cases involving exposure to advertisements. Whilst the Consultation document notes that consumers will not be aware of metadata – in the case of advertisements the CAI thinks many consumers understand now via cookies & Adblockers that companies use all sorts of methods to use your data to advertise goods or other services to you on free sites & that the same would be the case on a digital content or digital service a consumer would purchase.

Additional Comments

Whilst Brexit has not resulted in an immediate significant change to UK consumer protection law, it is likely that UK law will start to diverge from the EU position in the coming years.

The UK is not obliged to implement EU directives that had not reached their implementation date, nor will any EU regulations be retained UK law if they were not applicable before the end of 2020. The Digital Content and Digital Services Directive (2019/770) is to be transposed into national law by 1 July 2021. In that case, there is no obligation on the UK authorities to transpose this legislation – they can enact similar legislation or leave this area with limited consumer protections – it is their choice. The Irish Authorities therefore will have to monitor the situation in the UK. This is very important as many digital content services will be sold to Irish consumers from a UK-base as in many cases they will be English-language services. Many difficulties may only become known when consumers are confronted by particular contractual problems – this is an issue the Department must look at closely in the coming months when preparing the draft Bill. It could be overcome by providing a clause in the draft Bill indicating that consumer rights will not be undermined or lessened if there is divergence in UK Law (as this will affect consumers in Northern Ireland who are theoretically in the Single Market). The Minister could be given specific powers to introduce regulations to remedy divergences between Irish (EU) Law & UK Law in order to protect the rights of Irish consumers.

5 Views are invited on the provisions of Part 4 of the Scheme. Please limit your views to 500 words:

General comments. Part 4 is not aimed at implementing EU directives but rather at complementing Irish legislation on consumer contracts to include services in general. The approach as regards conformity requirements and remedies corresponds to Part 2 and 3 above. CAI supports this approach and share the view that full regulatory coverage of service contracts is becoming increasingly important for consumer protection. As regards the provisions specifically queried by the Department we have the following comments:

Head 63. Time of delivery. The proposed provision concerning time of delivery are in substance similar to the provisions applying to other contract types. In other words, in case of delays in delivery the consumer must as a first step call upon the trader to deliver. However, it is possible to proceed with termination if it is clear from circumstances that a correct service will not be delivered. We consider it important to have uniformity on this key-issue and agree with the proposal.

Head 64 – 67. Conformity of services. The provisions concerning conformity of services is introducing a liability for the supplier of services which goes beyond due skills, care and diligence and includes liability for the result that such services normally can be expected to achieve and any specific purpose indicated by the consumer. The definition of conformity includes in addition to supplier skills and adherence to legislative requirements that the supplier in fact exercises any higher standards prescribed by any professional body or code of practice that the supplier claims to follow. Where the price for the service has not been fixed in advance the price must be at a reasonable level and at the end of the day, the reasonableness is subject to court decision.

We consider that the proposal on the whole takes suitable account of the specific nature of service delivery. As regards Head 65 concerning the relevance for consumers of statements from the supplier we suggest to use the formulation “taking into account” as being more straightforward to apply than the proposed term “relied on”. The latter term could be understood to require a motivating effect on the consumer going well beyond what is necessary for effective application. As regards Head 67 concerning **price** we would consider it reasonable - given the relative weak position of the consumer and in light of the solutions proposed elsewhere in the Scheme - that it be considered to introduce reverse burden of proof for “reasonableness”.

Heads 68 – 72. Remedies and reimbursement of payments. The provisions introduce remedies and reimbursement of payments substantially as in Part 2 and 2 of the Scheme. We do not have comments other than the ones made concerning the similar provisions in Part 2 and 3 above. In that context it would be appropriate that specific guiding timelines are determined to inform the consumers actions in the event of non-conformity.

Head 73. Liability of the trader. The provision provides in line with the corresponding provisions in Parts 2 and 3 that a term of a contract for the supply of a service must not exclude or limit the liability of the trader under the relevant provisions of Chapter 2. A trader whose contract terms contravene the head will commit an offence. We have no comments to this propose provision.

6 Views are invited on the optional provisions included in Part 5 of the Scheme. Please limit your views to 500 words:

Extension of information requirements and cancellation right to contracts for social services. The Consumer Rights Directive 2011/83 did not apply to contracts for social services, including 'social housing, childcare and support of families and persons permanently or temporarily in need, including long-term care'. The draft Bill as it is primary legislation proposes to extend the Directive's pre-contractual information requirements for on-premises, off-premises and distance contracts in contracts for social services.

The CAI supports this extension of consumer rights to contracts for social services.

Extension of information requirements for on-premises contracts to healthcare contracts. The Consumer Rights Directive 2011/83 did not apply to contracts for social services, including those defined in point (a) of EU Directive 2011/24 on the application of patients' rights in cross-border healthcare.

Point (a) of Directive 2011/24 states is as follows: 'healthcare' means 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;

In principle, the CAI would be in favour of extending the Directive's pre-contractual information requirements for on-premises, off-premises and distance contracts to such contracts. The Consultation provides useful information on the present situation as regards doctor's & dentist's contractual information to patients. Yet as Directive 2011/24 relates specifically to 'cross-border healthcare' we are of an opinion that there is no legal basis in this Directive to add such contractual requirements to such healthcare contracts unless it relates to cross-border healthcare services. The CAI therefore would be grateful for clarification on this matter.

Additional pre-contractual information requirements for on-premises contracts. The CAI is supportive of the provision in the Bill to give the Minister for Enterprise, Trade and Employment to introduce additional requirements by means of Regulations to prescribe additional information requirements to apply to on-premises contracts generally or to different classes or types of on-premises contract, if that was seen to be necessary dependent on consumer surveys and the need to further protect consumers rights in the future.

Extension of cancellation period for certain off-premises contracts. Member States may adopt rules in accordance with paragraph 1(a) of Article 9 of the Consumer Rights Directive to extend the withdrawal period of 14 days to 30 days for certain off-premises contracts.

The provision to include this option in the final Bill has still not been agreed, but the CAI would be in favour of availing of this option as consumers making such contracts may neglect to analyse the situation as seriously as they should therefore 30 days gives them sufficient time to ascertain that the contracts is the correct one for them and they understand all the obligations contained with such a contract.

7 Views are invited on the non-implementation of the above optional provisions in Part 5 of the Scheme. Please limit your views to 500 words:

Derogation from exception to right of withdrawal for certain off-premises contracts. The CAI has looked at the specific contracts covered by Article 16 (a), (b), (c) & (e) – where Member States have the possibility to cancel such contracts if they were concluded in the context of an unsolicited visits by a trader to a consumer’s home or an excursion organised by a trader with the aim or effect of promoting or selling products to consumers. The contracts covered by (c) & (e) certainly should stay as they are at present – consumers should not have a right of withdrawal for the supply of goods made to the consumer’s specifications or clearly personalised or the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery. In relation to contracts covered in (a) & (b), the CAI would like to work with the Department in assessing whether consumers should be given a right of withdrawal for such contracts.

Conditions applying to exception to right of withdrawal for specified off-premises contracts. The CAI agrees with the Department and would not want the Bill to include a provision that the consumer loses the right of withdrawal after the service has been fully performed provided that the performance has begun with the consumer’s prior express consent as this is an important contractual protection for consumers.

**8 Views are invited on the extension of the scope of Part 6 of the Scheme.
Please limit your views to 500 words:**

Head.98. Scope of application. We agree that there is no policy or practical reason why the provisions of Articles 19, 21 and 22 should not, with the exception of financial services, apply to consumer contracts generally. As financial services contracts and transactions are subject to detailed sectoral regulation, an exception for these contracts is justified. The proposed inclusion of contracts previously excluded tallies with the similar inclusion proposed under Part 5.

9 Views are invited on the provisions of Part 7 of the Scheme that extend the provisions and strengthen the protections of the Unfair Contract Terms Directive. Please limit your views to 500 words:

Head 105. Preformulated standard contract terms. The UCTD Directive only apply to preformulated standard contract terms, i.e. terms that have not been subject to negotiation. Instead, The Scheme proposes to have Part 7 apply to both negotiated and non-negotiated contract terms. The distinction between standard/negotiated terms has, as it is pointed out in paragraph 7.8, in fact little relevance for the relatively weak position of the consumer. We therefore agree with the proposed solution.

Head 106. Plain intelligible language. In addition to the requirement of Article 5 of the Unfair Contract Terms Directive that contract terms be expressed in plain intelligible language, head 106 spells out what this concretely means. Obviously, any clarifications often raise new questions. We would therefore think that It might be useful in complementing guidance material to explain further by means of examples the meaning of terms like “made available” or “due prominence”. In addition, the proposed ‘real opportunity of becoming acquainted’ would benefit from guidance in terms of timeframe and format of the documentation. ***CAI would be ready to provide any support required in this respect.***

Head 108. Core terms exemption. Head 108 concerns the so-called core terms exemption of the UCTD Directive and seeks to ensure that it applies in line with the case law of the European Court of Justice. Thus, the reference to the price in the exemption provision does not include incidental or ancillary payments. Head 108 furthermore provides that the price exemption does not include payments contingent on the occurrence or non-occurrence of a particular event. We support the importance of ensuring that the exemption is applied correctly and not too broadly and can therefore agree with the proposed clarification.

Head 110 and Head 111. Blacklist/grey-list. The proposed blacklist (terms that are always unfair) and the grey-list (terms that are presumed to be unfair) are based on the list of the Annex to the UCTD Directive and other sources. Specifically as regards the grey-list in Head 111 a rule of presumption has been introduced so that the terms included are not merely a list of terms which may be regarded as unfair. Deciding whether a certain unfair term should be “blacklisted” or “grey-listed” must necessarily be based on estimates. However, due to the rule of presumption, which requires the trader to positively prove that the term is in fact not unfair, the difference between the two lists in terms of general prevention is likely in practice to be minor. A small matter of drafting concerns Head 111 (1) which talks about “an indicative and non-exhaustive list” in Schedule 4. The wording gives the wrong impression of an open-ended scheme, which hardly makes sense now where the list in Schedule 4 concerns terms presumed to be unfair.

Head 112. EX officio assessment. The provision provides that in proceedings before a court relating to a term of a consumer contract, the court shall be required to assess ex officio whether the term is unfair. This corresponds with prevailing ECJ case-law and we support the proposal as an important safeguard of consume interests.

10 Views are invited on the non-implementation of the above optional provision in Part 9 of the Scheme. Please limit your views to 500 words:

Consumer Protection Act

Section 74 of the Consumer Protection Act already provides a right of action for damages for consumers aggrieved by an act or practice prohibited under the Act. The draft Bill provides for the insertion of a new section 74A into the Act to give consumers a right also to a reduction of the price or to the termination of the contract. The CAI is very much in favour of this provision and will be happy to provide its views on the conditions under which consumers will have a right to these remedies which will be specified in regulations to be made by the Minister for Enterprise, Trade and Employment following the adoption of the Consumer Rights Bill 2021.

Heads 124, 125 and 128 of the Consumer Rights Bill 2021 make a number of amendments and additions to the enforcement measures available to the Competition and Consumer Protection Commission (CCPC). Head 130 provides that a person found guilty of an offence under the Consumer Protection Act will be liable on summary conviction to a Class A fine not exceeding €5,000 in place of the current maximum fine of €3,000. Section 85 of the Act currently fixes the amount payable under a fixed payment notice issued by an authorised officer of the CCPC at €300. Head 131 provides that the amount payable under such notices will be prescribed in Regulations by the Minister for Enterprise, Trade and Employment. The maximum amount will be €1,500 and different amounts may apply to the different offences subject to fixed payment notices. The CAI supports all these amendments to the level of fines available to the Competition & Consumer Protection Commission (CCPC) for breaches of consumer protection laws & regulations.

Optional

A new amendment to the Unfair Commercial Practices Directive (introduced via Directive 2019/2161) does not prevent Member States from adopting provisions to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits to the consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers. Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection.

There is no provision in the Consumer Rights Bill 2021 along these lines. The CAI would ask the Department to look at this issue again as they believe it is an important issue that could enhance consumers rights. The CAI will agree to provide the Department with the experience of other EU Member States its network of consumer organisations in BEUC.

11 Views are invited on the implementation of the optional aspects of the amendment of the Price Indication Directive outlined above. Please limit your views to 500 words:

The new Article 6a inserted in the Price Indications Directive 98/6 leaves it to Member States to regulate the following aspects of its implementation:

- whether or not different rules should apply to goods which are liable to deteriorate or expire rapidly and, if so, what those rules should be;

- in the case of a product that has been on the market for less than 30 days, whether or not the period for which the prior price of the product applied should be less than 30 days and, if so, how long should it be;

On these two items the CAI certainly believes that the Department should look at the possibility of introducing regulatory provisions covering these goods with a short shelf life, in particular food products. The EU at present with its Farm to Fork Strategy is planning to introduce a proposal for EU-level targets for food waste reduction by 2023. The CAI believes that the pricing issue in this context for food products could work in tandem with food waste targets and allow retailers to highlight the importance of food waste. The CAI would be interested to discuss this issue further with the Department as a means of aligning with the EU's Green Deal.

The announcement of temporary price reductions has been identified as both a real and potential cause of serious detriment and confusion to consumers. Every possible protection to ensure clear and verifiable clarity to the consumer must be a focus. The CAI would be interested to discuss this issue further with the Department.