

[REDACTED]

Dear [REDACTED]

My apologies for the delay in coming back to you. I have read all of the documents that you provided and there was a lot to consider but I am providing you with some quick observations as follows:-

1. GDPR is a standard regulatory requirement across all EU Ms, which should apply anyway no matter what, so it should be referred to in the draft Act along with the Data Protection Act 2018. Both pieces of legislation should be read together as there are some derogations to the GDPR, in the 2018 Act.
2. Unfair terms in contract would be if any entity tried to circumvent GDPR requirements without a proper and legitimate basis for doing so, i.e. affect any of the rights of data subjects. It appears that the Austrian Supreme Court has referred preliminary questions to the CJEU in a case involved whether Facebook is relying on the consent of its users or a contract with them for the collection and processing of user data. At the moment, the case reference in the CJEU is not available.
3. Children's rights should be protected when using digital services. Contract law for children should be at its most basic and safeguards built in to ensure their protection.

Other considerations for Unfair contractual terms as per European Parliament Report 2021

At Paragraph 2.7.1. Presence of automated decision-making mechanisms - The following comments are made :-

- (a) DSPs should be obliged to disclose fully how the use of automated decision-making impacts the provision of digital services. A consequence of introducing such an obligation for DSPs, could be that when they are in breach thereof, any terms that have been personalised through the use of automated decision-making, but not disclosed to consumers as such, could be considered unfair and, therefore, non-binding.*
- (b) We recommend explicitly recognising the obligation of DSPs to facilitate such human contact points for consumers and human oversight over the automated decision-making. If DSPs*

terms and conditions envisage only providing consumers with a contact option through the use of virtual assistants and chatbots, this could be considered an unfair term.

With regards to comment (a) this is very important because if the terms of a Digital contract are being effected by automated decision making then the consumer should be fully aware of this and not be put at a disadvantage from disclosing too much personal information or any special categories of data such as race, religion, gender that could influence the contractual terms . The DPC is also aware of many companies failing to comply with “Cookie” requirements when users access the website. See Link below re NOYB survey & complaint . Cookies have the potential to collect information on the user that together with A.I. technology can generate a profile of any potential user or customer to the digital service and this is very valuable information to have. Therefore it would be prudent that the digital supplier had to be fully transparent in how the automated decision making works and fully explain to the customer the effects of such automated decision making. Should there be a legislative penalty for any digital supplier that fails to be fully accountable and transparent to its customers, if it does not explain in proper terms as to how its automated decision making works?

Secondly, as to comment (b), we suggest that there should be a mandatory human customer service for large entities (i.e. over 1000 employees or large corporate income). There should be an alternative to using chat boxes, automated or not. There should be several customer service options either by email, letter or phone and if it is a phone service then the call should be answered within 15 minutes or penalties accrue. In the DPC we have noticed over the years that many complaints are vexed by the lack of engagement by an entity to their complaints . The complainants have to endure delay tactics and lack of engagement or proper answers to their complaints and it appears to be a deliberate tactic by some companies to frustrate customers from proceeding with their complaint.

https://noyb.eu/en/noyb-files-422-formal-gdpr-complaints-nerve-wrecking-cookie-banners?utm_source=POLITICO.EU&utm_campaign=46beff79ac-EMAIL_CAMPAIGN_2021_08_10_08_24&utm_medium=email&utm_term=0_10959edeb5-46beff79ac-190777636

Enforcement

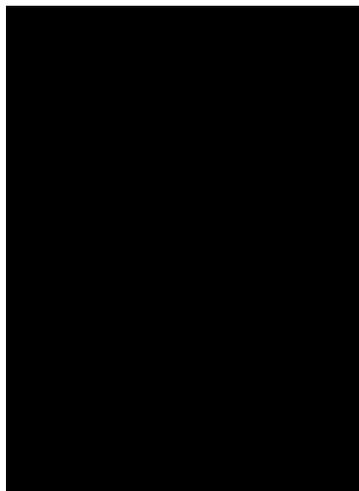
We presume that the Competition and Consumer Protection Commission, is the chief regulator for the supervision of these provisions, with the DPC the responsible regulator for any infringement of GDPR. Is it possible that there could be some provision in the new legislation that authorises an exchange of information between both regulators regarding their different competencies so that complaints are dealt with by the appropriate regulator.

Finally the EDPB has also done a guidance note to online retailers regarding “one off transactions and that the Credit card details should not retained on a “just in case “ the consumer wants to do another transaction in the future. Any retention of the credit card details must be on the consent of the consumer or a contract basis i.e. Netflix subscription for an On/Off basis.

https://edpb.europa.eu/our-work-tools/our-documents/recommendations/recommendations-022021-legal-basis-storage-credit-card_en

I am on holidays this week but I am available to discuss any of these matters further in the coming weeks if required.

Kind regards



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From: DPC Consultation Mail In <consultation@dataprotection.ie>

Sent: Wednesday 7 July 2021 09:41



Subject: Fw: Public consultation on Scheme of Consumer Rights Bill

**DPC Consultation
Mail-In Query**



Date : 23/06/2021

Subject: Public consultation on Scheme of Consumer Rights Bill

Further to the Department's request for the views of the Data Protection Commission on the relevant aspects of this consultation, I enclose a note setting out our previous engagement with the Commission on the provisions of the Scheme and outlining the issues on which its views would be particularly welcome. I enclose also the recent report prepared for the European Parliament on unfair contract terms and digital services which is referred to in the report.

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Competition and Consumer Policy Section
Department of Enterprise, Trade and Employment

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<https://enterprise.gov.ie/en/Disclaimer/Email-Disclaimer.html>

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*CRBillScheme2021NoteforDPCJune2021.docx)**(See attached file:*
UnfairContractTermsAndDigitalServicesEuropeanParliamentReport2021.pdf)

Status Information

Is le haghaidh an duine nó an eintitis ar a bhfuil sí dírithe, agus le haghaidh an duine nó an eintitis sin amháin, a bheartaítear an fhaisnéis a tarchuireadh agus féadfaidh sé go bhfuil ábhar faoi rún agus/nó faoi phribhléid inti. Toirmisctear aon athbhreithniú, atarchur nó leathadh a dhéanamh ar an bhfaisnéis seo, aon úsáid eile a bhaint aisti nó aon ghníomh a dhéanamh ar a hiontaoibh, ag daoine nó ag eintitis seachas an faighteoir beartaithe. Má fuair tú é seo trí dhearmad, téigh i dteagmháil leis an seoltóir, le do thoil, agus scríos an t-ábhar as aon ríomhaire. Is é beartas na Roinne Dlí agus Cirt agus Comhionannais, na nOifigí agus na nGníomhaireachtaí a úsáideann seirbhísí TF na Roinne seoladh ábhair cholúil a dhícheadú.

Más rud é go measann tú gur ábhar colúil atá san ábhar atá sa teachtaireacht seo is ceart duit dul i dteagmháil leis an seoltóir láithreach agus le mailminder[ag]justice.ie chomh maith.

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