



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

# **THE EUROPEAN UNION (CONSUMER INFORMATION, CANCELLATION AND OTHER RIGHTS) REGULATIONS 2013**

## **GUIDANCE NOTE**

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## I INTRODUCTION

1. The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013) give effect to Directive 2011/83/EU on Consumer Rights and were signed into law by the Minister for Jobs, Enterprise and Innovation on 11 December 2013. The Regulations come into operation on 14 June 2014 and apply to contracts concluded on or after that date.<sup>1</sup>

2. The Regulations are divided into eight Parts as follows:

1. Preliminary Matters (Citation and Commencement, Interpretation and Application)
2. Consumer Information for On-Premises Contracts
3. Consumer Information for Off-Premises Contracts and Distance Contracts
4. Right to Cancel Distance Contracts and Off-Premises Contracts
5. Payment Fees, Additional Payments and Charges for Communication by Telephone
6. Passing of Risk and Delivery in Sales Contracts
7. Unsolicited Goods and Services
8. Enforcement and Penalties.

3. This Guidance Note seeks to provide information and clarification for traders and consumers on the main provisions of the Regulations. As the operation of the Regulations will inevitably give rise to further issues and questions, the Note cannot be a final or definitive statement on the Regulations or the Directive. It should be read in conjunction with the Regulations and the guidance on the Directive published by the European

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<sup>1</sup> Regulation 1(2) of the Regulations originally provided that the Regulations would come into operation on 13 June 2014 and would apply to contracts concluded after that date. Section 16(4) of the Interpretation Act 2005 provides that where a statutory instrument is expressed to come into operation on a particular day, it does so "at the end of the day before the particular day". While the commencement of the Regulations, and the revocation of the existing Regulations on Contracts Negotiated Away from Business Premises and Distance Contracts, would take effect therefore at midnight on 12/13 June, the Regulations, in accordance with Article 28 of the Directive, would apply to contracts concluded after 13 June. In order to ensure that contracts concluded on 13 June were not without the protection of either the existing or the new Regulations, the European Communities (Consumer Information, Cancellation and Other Rights) (Amendment) Regulations 2014 (S.I. No. 250 of 2014) have amended Regulation 1(2) of the Regulations to provide that the Regulations "come into operation on 14 June 2014 and apply to contracts concluded on or after that date." The effect of the proposed amendment is that the Regulations will be operative from midnight on 13 June and will apply to contracts concluded from that time, while the revocations of the existing Regulations will also be operative from midnight on 13 June, thereby ensuring that consumers who conclude contracts on 13 June enjoy the protections of the Regulations on Distance Contracts and Contracts Negotiated Away from Business Premises.

Commission on 13 June.<sup>2</sup>

4. As their title indicates, the Regulations give rights to consumers, and impose corresponding obligations on traders, in respect of information, the cancellation of distance and off-premises contracts and other matters. Many of these rights and obligations are not new, but build on, and in some cases will replace, the provisions of existing legislation, in particular the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 and the European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) Regulations 2001. Both Regulations will be revoked with effect from the end of 13 June 2014. The Directives which they implement – Directive 85/577/EEC on Contracts Negotiated Away from Business Premises and Directive 97/7/EC on Distance Contracts – will also be repealed as of that date.

5. With the exception of the information requirements for on-premises contracts discussed in Part III and a limited number of regulatory options for Member States, Directive 2011/83/EU, unlike the Directives which it replaces, is a maximum harmonisation instrument.<sup>3</sup> Member States are prohibited accordingly either from adding to, or subtracting from, the Directive's fully harmonised provisions in national legislation. The harmonisation across the European Union of the rules on consumer information for, and the right to cancel, distance and off-premises contracts, and on delivery and the passing of risk in contracts for the sale of goods, will be of benefit accordingly to businesses selling goods or services to consumers in other Member States.

6. The Regulations do not apply to all consumer contracts, and many of their provisions apply only to certain types of contract. The starting point of this guidance must therefore be the scope or coverage of the Regulations.

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<sup>2</sup> The Commission guidance can be accessed at

<sup>3</sup> Article 4 of the Directive (Level of harmonisation) states that "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive."

## II SCOPE OF THE REGULATIONS

7. The Regulations apply only to contracts concluded between a trader and a consumer. Dealings of a non-contractual nature between traders and consumers – for example, advertising or other communications aimed at bringing goods or services to the attention of consumers – are accordingly outside the scope of the Regulations.

8. Contracts between two traders or two consumers are similarly outside the scope of the Regulations. The Regulations define “trader” as a person, whether an individual or a legal person such as a company, who is acting for purposes related to the person’s trade, business, craft or profession, including any person acting in the name, or on behalf, of the trader. Traders can be privately owned, publicly owned or a combination of both.

9. The Regulations define “consumer” as a natural person who is acting for purposes which are outside the person’s trade, business, craft or profession. Recital 17 of the Directive elaborates on the similar definition of “consumer” in the Directive to state that, in the case of dual purpose contracts concluded by a person for purposes partly within and partly outside his or her trade or profession, that person should be regarded as a consumer where the trade purpose of the transaction is so limited as not to be predominant in the overall context of the contract.<sup>4</sup> A person who purchases a laptop primarily for personal use, for example, but who uses it infrequently to send or receive e-mails to or from his or her place of work, would accordingly be considered a consumer for the purposes of the Regulations.

### Contracts Outside The Scope Of The Regulations

10. Regulation 3(2) provides that the Regulations do not apply to contracts -
- a) for social services;
  - b) for healthcare;
  - c) for gambling;
  - d) for financial services;
  - e) for the creation, acquisition or transfer of immovable property or of rights in immovable property;
  - f) for the construction of new buildings or the substantial conversion of existing buildings;

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<sup>4</sup> Regulation 2(3) of the Regulations provides that a court shall construe the Regulations in a manner that gives effect to the Directive, and for this purpose the court shall have regard to the provisions of the Directive, including its preambles.

- g) for rental of accommodation for residential purposes;
- h) within the scope of Council Directive 90/314/EEC on package travel, package holidays and package tours;<sup>5</sup>
- i) within the scope of Directive 2008/122/EC of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts;<sup>6</sup>
- j) 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 consideration and with knowledge of its legal scope;
- k) 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;
- l) concluded by means of automatic vending machines or automated commercial premises;
- m) concluded with a telecommunications operator through a public pay telephone for the use of the telephone;
- n) concluded for the use of one single connection by telephone, Internet or fax established by a consumer.

With the exception of Regulation 11 on information requirements for distance contracts concluded by electronic means, Regulation 25 on fees for the use of means of payment and Regulation 26 on additional payments, the Regulations do not apply also to contracts for passenger transport services.

11. The list of excluded contracts in the Regulations mirrors that at Article 3(3) of the Directive. Consumers and traders should be aware accordingly that the rights and obligations provided for in the Regulations do not apply to the contracts listed above.

12. The exemptions under the Regulations and Directive are somewhat broader than those under the existing Directives on Contracts Negotiated Away from Business Premises and Distance Selling. The first of these Directives expressly excludes only contracts for the construction, sale or rental of immovable property or for other rights relating to such property; contracts for the supply of foodstuffs and other items intended for current consumption in the household that are supplied on regular rounds; and insurance and securities' contracts. Some of the contracts excluded from the scope of the new Directive, such as those for contracts for the use of a public payphone or for a single telephone,

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<sup>5</sup> Given effect in Ireland by the Package Holidays and Travel Trade Act 1995 (No. 17 of 1995)

<sup>6</sup> 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 of 2011).

#### POINTS TO NOTE ABOUT CONTRACTS OUTSIDE THE SCOPE OF THE REGULATIONS

In accordance with judgments of the European Court of Justice [ECJ],<sup>7</sup> exemptions from the scope of the Regulations should be construed narrowly.

“Financial service”, “gambling”, “healthcare”, “passenger transport services”, and “social services” are defined in Regulation 2 of the Regulations.

Notwithstanding the general non-application of the Regulations to contracts for financial services, such contracts may be ancillary contracts for the purposes of the provisions on these contracts outlined at paragraphs 58-59 below. Though payments services form part of the definition of “financial services” in the Regulations, payments by consumers for the use of such services in other consumer contracts are within the scope of Regulation 25 on fees for the use of means of payment and Regulation 27 on additional payments.

As stated in recital 27 of the Directive, contracts for passenger transport services do not include car rental contracts.<sup>8</sup> These contracts are covered by the information and payments provisions of the Regulations, though, as outlined in Part V, not the right to cancel a distance or off-premises contract.

The non-application of the Directive to contracts for the rental of residential accommodation does not cover non-residential contracts such as the rental of a garage or of a hall for a party, or contracts for the professional services of an estate or letting agent.

As clarified by Recital 26 of the Directive, the exclusion of contracts for the substantial conversion of existing buildings covers conversions comparable to the construction of a new building – for example, where only the façade of an old building is retained. It does not cover contracts for the construction of annexes to buildings, such as a garage, patio or veranda.

The exclusion for foodstuffs and other items supplied by a trader on frequent and regular rounds will not generally cover home deliveries from a supermarket as, unlike milk deliveries, such deliveries are not typically made on frequent and regular rounds to the consumer’s home or workplace.

Contracts concluded by means of vending machines would include, for example, those for food or beverages, or for parking or other tickets, purchased from such machines. Contracts concluded by means of automated commercial premises would include those for photos taken in automatic photograph booths or for petrol bought in automated filling stations.

The exemption for contracts concluded for the use of a single telephone, Internet or fax connection would include, for example, an Internet connection established in an Internet café. It would also cover a contract concluded with a premium rate service provider provided that the contract was both concluded and fully performed by means of a single telephone connection made by the consumer. The exclusion would not apply to a contract for the on-going provision of telephone or broadband services which was concluded online or by telephone, or to a contract for electronic communication services concluded through the prior purchase of a Wi-Fi access code or a pre-paid SIM card which provides for multiple uses rather than a single connection.

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<sup>7</sup> Case C-481/99 *Heininger v Bayerische Hypo-und Vereinsbank AG*; Case C-215/08 *E. Friz GmbH v Carsten von der Heyden*.

<sup>8</sup> In *Easy Car (UK) Ltd v Office of Fair Trading* (Case C-336/03), the European Court of Justice held that ‘transport services’ under Directive 97/7/EC on Distance Contracts included car hire services.

Internet or fax connection, however, would not constitute off-premises contracts. Though the existing Distance Selling Directive excludes many of the contracts that are also outside the scope of the new Directive, its provisions apply to contracts for social services, healthcare and, with the exception of the right of cancellation, gambling.

13. The exclusions from the scope of the Consumer Rights Directive were adopted or retained for a variety of reasons. Some, such as the exemptions for financial services, package travel, timeshare, and passenger transport, were agreed largely because the sectors in question were already subject to detailed regulation under EU legislation. Others such as the exemptions for contracts in the areas of immovable property, social services, healthcare and gambling were included because it was considered that the nature of these activities made them more suited to regulation tailored to circumstances and needs in individual Member States. The exemptions for automatic vending machines; public payphones; one-off telephone, Internet and fax connections; the supply of foodstuffs and other items on regular rounds to the consumer's home or workplace; and contracts established with the involvement of a public office-holder reflect a view that the application of the Directive's provisions would be impractical or disproportionate having regard to the nature and purpose of these contracts.

14. As recital 13 of the Directive makes clear, EU Member States are free, in accordance with Union law, to apply the provisions of the Directive to areas not falling within its scope. Member States may accordingly maintain or introduce national legislation corresponding to some or all of the provisions of the Directive in respect of contracts outside its scope. This was not an option in the case of the present Regulations, however, as the constitutional immunity for secondary legislation enacted under the European Communities Act 1972 applies only to legislation necessitated by the obligations of EU membership and not to extensions or elaborations of such obligations. As this legal constraint does not apply to primary legislation enacted by the Oireachtas, the possible extension of certain of the Directive's provisions to contracts excluded from the scope of the Regulations will be reconsidered in the context of forthcoming proposals for a consolidated Consumer Contracts Rights Bill.

## Subject-Matter Of The Contract

15. Consumer contracts can be classified, first, on the basis of the subject matter of the contract. The Regulations apply to the following types of contract:

- sales contracts – defined as contracts under which a trader transfers, or undertakes to transfer, the ownership of goods to a consumer and the consumer pays or undertakes to pay the price thereof, including –
  - a) contracts for the supply of digital content supplied on a tangible medium such as a CD or DVD,
  - b) contracts for the supply of water, gas or electricity in a limited volume or set quantity, and
  - c) contracts that have as their object both goods and services;
- service contracts defined as contracts other than sales contracts under which a trader supplies, or undertakes to supply, a service to a consumer, and the consumer pays or undertakes to pay the price thereof;
- contracts for the supply of digital content not supplied on a tangible medium;
- contracts for the supply of water, gas or electricity not supplied in a limited volume or set quantity; and
- contracts for the supply of district heating.<sup>9</sup>

16. Most of the provisions of the Regulations apply, if with modifications in some instances, to all these types of contract. Certain provisions, however, apply only to specified contracts; the provisions on risk and delivery examined in Part V, for example, apply only to contracts for the sale of goods. Where the provisions of the Regulations apply across the board, the main difference in their application to different types of contract is in the calculation of the cancellation period for distance and off-premises contracts subject to a right of cancellation. As outlined in Part V, this period expires fourteen days from the delivery of the goods in the case of sales contracts, and fourteen days from the day of the conclusion of the contract in the case of other contracts.

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<sup>9</sup> Recital 25 of the Directive states that “district heating” refers to “the supply of heat, inter alia in the form of steam or hot water from a central source of production through a transmission and distribution system to multiple buildings for the purpose of heating.” As this form of energy supply is not a feature of the Irish market, it is considered in any detail in this guidance.

#### POINTS TO NOTE ABOUT SALES, SERVICE AND DIGITAL CONTENT CONTRACTS

While the Directive's definition of "sales contract" includes "any contract having as its object both goods and services", the European Commission have clarified that, in accordance with the case law of the European Court of Justice, a contract whose main purpose is not the acquisition of the ownership of specific goods and in which the goods element is negligible (for example, pens and folders supplied under a contract to attend a conference) cannot be considered a contract for the transfer of ownership of goods and should be regarded instead as a service contract. A contract for the sale and installation of a washing machine, by contrast, would be a sales contract as the transfer of the ownership of the washing machine is the main purpose of the contract.

As contracts for the hire or lease of goods do not involve a transfer of the ownership of the goods, they should be classified as service contracts.

Recital 19 of the Directive states that "digital content" means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. If digital content is supplied on a tangible medium, such as a CD or DVD, it should be considered as goods within the meaning of the Directive and the Regulations, and contracts for its supply would be classified accordingly as sales contracts. Contracts for digital content not supplied on a tangible medium should be classified neither as sales contracts nor as service contracts, as should contracts for the supply of water, gas or electricity not put up for sale in a limited volume or set quantity and contracts for the supply of district heating.

The definitions of sales and services contracts include a stipulation that the consumer pays the price for the goods or services that are the subject of the contract. There are no equivalent definitions of contracts for the supply of digital content or contracts for the supply of gas, water or electricity and hence no corresponding stipulations as to price. Contracts for digital content supplied free of charge on an intangible medium will, therefore, come within the scope of the Regulations, as would contracts for gas, water or electricity supplied free of charge other than in a limited volume or set quantity. The application of the Regulations in such cases is likely to be of greater relevance to digital content as it is not uncommon for some such content, such as anti-virus software or online games, to be provided free of charge, albeit often in return for some other consideration such as access to personal data. While utilities are less likely to be supplied free of charge, this may be the case with some contracts for the supply of water depending on the terms and conditions that will govern such contracts.

Goods are sometimes supplied ostensibly free of charge in sales transactions as part of promotional campaigns. If a price is paid for the goods or service whose purchase is the precondition for the provision of the 'free' item, that item would come within the scope of the Regulations.

## Method Of Conclusion Of The Contract

17. Contracts can be categorised, secondly, according to the way in which the contract is negotiated and concluded. This distinction is important to the Regulations as some key provisions, notably the right to cancel a contract, apply only to contracts concluded in a specified manner. The substance and form of the information obligations on traders under the Regulations also depend in large part on the method of conclusion of the contract.

18. The Regulations, like the Directive, distinguish between the following types of contract:

- off-premises contracts – defined as
  - a) contracts concluded in the simultaneous physical presence of the trader and the consumer in a place which is not the business premises of the trader;
  - b) contracts for which an offer was made by the consumer in the simultaneous physical presence of the trader and the consumer in a place which is not the business premises of the trader;
  - c) contracts concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer; or
  - d) contracts concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer;
- distance contracts – defined as contracts concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, and with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded; and
- on-premises contracts – defined as contracts between a trader and a consumer which are not distance or off-premises contracts.

19. The Regulations maintain the approach of existing legislation by giving more extensive protections to consumers engaged in distance and off-premises transactions. The rationale for this approach remains similar to that which underlay the enactment of Directive 85/577/EEC on Contracts Negotiated Away from Business Premises and Directive 97/7/EC on Distance Contracts. Consumers approached by a trader at home or at work may be caught off guard or be more at risk of succumbing to pressure tactics and, as a consequence, require greater protection than consumers engaged in transactions in retail or other

business premises.<sup>10</sup> Consumers who purchase goods or services by means of distance communication such as the Internet or telephone are not in a position to examine the goods before purchasing them or to put questions to, or seek assurances from, the trader on a face-to-face basis. The additional protections afforded consumers in these cases involve, first, more comprehensive and detailed information about the goods or services, the trader and the consumer's rights and, secondly, in cases where the right to cancel applies, a mandatory cooling-off period within which the consumer can cancel the contract without giving a reason or incurring a penalty.

20. Though the Directive refers to "contracts other than distance or off-premises contracts", the Regulations use the term "on-premises contract" for the sake of simplification. These contracts are essentially contracts concluded on the trader's business premises without the use of means of distance communication. They constitute the multitude of contracts concluded daily on a face-to-face basis in shops, cafés, bars, cinemas and other places of business.

### **Exemption Of Off-Premises Contracts Of Up To Fifty Euro**

21. Article 3(4) of the Directive provides that Member States may decide not to apply the Directive to off-premises contracts for which the payment to be made by the consumer does not exceed EUR 50. It further provides that Member States may define a lower value in their national legislation. Recital 28 of the Directive states that this option has been included "in order to avoid an administrative burden being placed on traders."

22. This exemption mirrors a similar provision in Directive 85/577/EEC which permits Member States to apply the Directive only to contracts above a specified amount not in excess of 60 euro.<sup>11</sup> Ireland chose to avail of this regulatory option in the Regulations that give effect to the Directive. Regulation 3(2) of the European Communities (Cancellation of Contracts Negotiated Away From Business Premises) Regulations 1989 provided accordingly that the Regulations would not apply to "any contract the consideration whereof is less than £40", equivalent to just over fifty euro.

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<sup>10</sup> In *Travel Vac SL v Manuel José Antelm Sanchis* (C-423/97), the European Court of Justice held that the consumer does not have to prove that he or she was pressured or manipulated by the trader; it is sufficient that the contract was concluded in circumstances within the definition of off-premises contract.

<sup>11</sup> Article 3(1) of the Directive set the maximum threshold at 60 ECU, the ECU being the European Community's unit of account prior to its replacement at parity by the euro in 1999.

23. Following a public consultation initiated in May 2013, the Department concluded that the rationale for the exemption of lower-value off-premises transactions remained valid and that the threshold for their exemption should be set at the maximum level permitted by the Directive. The reasons for the decision on this and the other discretionary options for Member States contained in the Directive are set out in more detail in the Regulatory Impact Analysis on the transposition of the Directive published in tandem with this Guidance. Regulation 3(5) of the Regulations provides accordingly that the Regulations do not apply to off-premises contracts for which the payment to be made by the consumer does not exceed €50. Regulation 3(6) further provides that, where two or more off-premises contracts with related subjects are concluded at the same time, the total cost of the contracts is to be taken into account in applying the €50 threshold. This provision is based on recital 28 of the Directive and aims to prevent traders from splitting up a contract that properly constitutes a single transaction into a number of separate transactions in order to bring the payment for the contract below the monetary threshold that would exempt it from the requirements of the Regulations.

#### POINTS TO NOTE ABOUT OFF-PREMISES, ON-PREMISES AND DISTANCE CONTRACTS

Off-premises contracts concluded at the consumer's home or workplace are within the scope of the Regulations regardless of whether or not the trader's visit was solicited by the consumer. These contracts are outside the scope of the existing Directive on Contracts Negotiated Away from Business Premises if the visit was at the express request of the consumer and the contract was for goods or services which, at the time the consumer requested the visit, he or she knew to form part of the trader's commercial activities.<sup>12</sup>

The first three parts of the definition of "off-premises" contract refer to a contract concluded in a place "which is not the business premises of the trader". "Business premises" is defined as:

- a) any immovable retail premises where a trader carries out his activity on a permanent basis; or
- b) any movable retail premises where a trader carries out his activity on a usual basis.

A regular stall at a country market, for example, is a business premises therefore, and a contract concluded at such a premises would not be an off-premises contract. A "pop-up" store used by a trader on a purely temporary basis is likely to fall outside the definition of "business premises" and, if so, contracts concluded in such a store would be classified as off-premises contracts. The distinction between 'permanent' or 'usual' use and temporary or exceptional use may not be clear-cut, however, and will have to be assessed in the light of the circumstances of the case. In line with the European Court of Justice judgment in *Travel Vac*,<sup>13</sup> a relevant criterion will be whether or not the premises is one that is clearly identified as a business premises.

A contract concluded on the trader's business premises may be an off-premises contract in certain specified circumstances. The definition of "off-premises contract" includes contracts concluded on the business premises of the trader immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer. Where a consumer is approached by a trader on the street, for example, and proceeds straightaway to conclude a contract on the trader's premises, the contract would be classified as an off-premises contract. The approach to the consumer must be a personal and individual one, however, if the transaction is to be an off-premises contract. If a consumer is indiscriminately handed a flyer on the street and then decides to enter the trader's premises, any contract then concluded would not be an off-premises contract.

In the case of off-premises contracts concluded during an excursion, the trader must organise the excursion with the aim or effect of promoting and selling goods or services to the consumer. The European Commission have clarified that a regular shuttle bus or other transport service provided or organised by a shopping centre with the sole purpose of taking consumers to the shopping centre would not come within the scope of the definition

The definition of "distance contract" requires among other things that such contracts be concluded with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded. A contract negotiated online or over the telephone but concluded on the trader's premises, therefore, will not be a distance contract. While "means of distance communication" are not defined in the Directive, recital 20 states that these include "mail order, Internet, telephone or fax".

<sup>12</sup> The Directive permitted Member States to refrain from applying its provisions to contracts having a direct connection with the goods or services for which the consumer requested the visit, but this option was not exercised in the Irish Regulations that transposed the Directive.

<sup>13</sup> Case C-423/97.

### III INFORMATION REQUIREMENTS FOR ON-PREMISES CONTRACTS

24. Regulation 5 and Schedule 1 of the Regulations provide that, before the consumer is bound by an on-premises contract, the trader must provide the consumer with the following information in a clear and comprehensible manner:

- a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;
- b) the identity of the trader, including the trader's trading name and legal identity;
- c) the geographical address at which the trader is established, and the trader's telephone number;
- d) the total price of the goods or services inclusive of taxes, 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;
- e) where applicable, all freight, delivery or postal charges additional to the price referred to in paragraph (d) or, where those charges cannot reasonably be calculated in advance, the fact that such charges may be payable;
- f) where applicable, the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or perform the service;
- g) where applicable, the trader's complaint handling policy;
- h) in the case of a sales contract, the existence of a legal obligation on the trader to supply goods that are in conformity with the contract;
- i) where applicable, the existence and the conditions of after-sales services and commercial guarantees;
- j) the duration of the contract where applicable or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating it;
- k) where applicable, the functionality, including applicable technical protection measures, of digital content;
- l) where applicable, any relevant interoperability of digital content with hardware and software of which the trader is, or can reasonably be expected to have been, aware.

Once the information is provided in a clear and comprehensible manner, there are no additional requirements governing the manner in which, or the medium through which, it is to be provided.

25. As can be seen, only the first four of the twelve information obligations under the Regulation are of general application. The remainder are applicable to contracts involving additional charges or payment or other arrangements, of a fixed term or indeterminate duration, or with a specified subject matter (goods, or digital content). Where, as is commonly the case in on-premises transactions, for example, the consumer takes the goods

away after purchasing them, there would clearly be no requirement on the trader to provide information about freight, delivery or postal charges.

26. Article 5(3) of the Directive gives Member States the option not to apply the information requirements set out above to “contracts which involve day-to-day transactions and which are performed immediately at the time of their conclusion”. The transactions covered by this exemption involve goods or services purchased on a regular basis by consumers such as foodstuffs, toiletries like soap or shampoo, a newspaper, or a cup of coffee. The rationale for this optional exemption is that, as such goods or services are familiar to consumers and do not involve high-value items, a requirement to provide the full list of information specified in the Directive could be disproportionate. Following the public consultation referred to in paragraph 23, the Department decided to avail of this option in the implementing Regulations; the reasons for this decision are set out in more detail in the accompanying Regulatory Impact Analysis on the transposition of the Directive.

27. The information obligations on traders under Regulation 5 are further qualified by the fact that the information does not have to be provided where it is “already apparent from the context”. In an on-premises transaction, for example, the trader’s geographical address will generally be apparent. The “main characteristics” of many goods commonly purchased in stores are likely also to be readily apparent from an inspection of the goods and/or their packaging.

28. The impact on traders of the information requirements for on-premises contracts in the Regulations will also be offset to some extent by the fact that these requirements overlap to varying degrees with information obligations under other enactments. The main such obligations are as follows:

- The European Communities (Requirements to Indicate Product Prices) Regulation 2002 require traders to indicate the selling price and, where applicable the unit price, of products on sale to consumers.
- Section 46 of the Consumer Protection Act provides that if a commercial practice is or includes an “invitation to purchase”,<sup>14</sup> the trader must provide information on the main characteristics of the product, the address and identity of the trader, the price of the product, any applicable freight, delivery or postal charges, the handling of consumer complaints about the product, the arrangements for payment, delivery or performance if

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<sup>14</sup> Defined in section 2 of the Act as “a representation in a consumer transaction that –

- a) indicates characteristics of the product and includes its price, and
- b) enables the consumer to purchase the product.

these depart from established good practice and, where applicable, the consumer's right to cancel the contract.

- The European Communities (Provision of Services) Regulations 2010 require service providers to provide information to service recipients about a range of matters related to the service provider and the service, including the provider's legal status, address, contact details, general terms and conditions, the main features of the service, its price if pre-determined, and after-sales guarantees if given.

The information obligations on traders under these enactments thus largely replicate those under Regulations 5 of the new Regulations outlined at points (a) to (g) of paragraph 24.

The substantively new information obligations under Regulation 5 are those at points (h) to (l) of paragraph 24, the last two of which apply only to digital content. In addition to the horizontal information obligations outlined in this paragraph, there are also a range of information requirements which apply to specific sectors or activities – for example, those governing electronic communications networks and services under the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011).

## **IV INFORMATION REQUIREMENTS FOR OFF-PREMISES AND DISTANCE CONTRACTS**

29. The higher level of protection afforded consumers engaged in off-premises and distance transactions is evident from both the substance and form of the information requirements applicable to these transactions. The information to be provided by the trader prior to the conclusion of these contracts is set out at Schedule 2 of the Regulations and is reproduced at Box 1 across.<sup>15</sup> Where a right to cancel the contract exists, the trader must also provide the consumer with the model cancellation form set out in Part B of Schedule 3 of the Regulations.

30. The list of items of information that must be provided prior to the conclusion of a distance or off-premises contract is twice the length of that for on-premises contracts. As with the information provisions for on-premises contracts, however, many of these requirements will not apply to all distance or off-premises contracts. Their application will

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<sup>15</sup> Article 6(7) of the Directive gives Member States the option to maintain or introduce in their national law requirements regarding the language in which the contractual information is to be provided. The Department decided not to implement this option for reasons set out in the Regulatory Impact Analysis on the implementation of the Directive.

#### **BOX 1 INFORMATION REQUIREMENTS FOR DISTANCE AND OFF-PREMISES CONTRACTS**

- a) the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services;
- b) the identity of the trader, including the trader's trading name;
- c) if the trader is acting on behalf of another trader, the geographical address and identity of that trader;
- d) the geographical address at which the trader is established, and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with the trader efficiently;
- e) the geographical address of –
  - (i) the place of business of the trader, if different from the address provided in accordance with paragraph (d), and
  - (ii) where the trader acts on behalf of another trader, the geographical address of the place of business of that other trader if different from the address provided in accordance with paragraph (c), the geographical address of –  
to which the consumer can address complaints
- f) the total price of the goods or services inclusive of taxes, 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;
- g) where applicable, all additional freight, delivery or postal charges or, where those charges cannot reasonably be calculated in advance, the fact that such charges may be payable;
- h) in the case of a contract of indeterminate duration or a contract containing a subscription –
  - i. the total costs per billing period, or,
  - ii. where such contracts are charged at a fixed rate, the total monthly costs, or
  - iii. where the total costs cannot reasonably be calculated in advance, the manner in which the price is to be calculated;
- i) the cost of using the means of distance communication used for the conclusion of the contract where that cost is calculated other than at the basic rate;
- j) the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or perform the service;
- k) where applicable, the trader's complaint handling policy;
- l) where a right to cancel exists, the conditions, time limit and procedures for exercising that right in accordance with Regulation 17;
- m) where applicable, that the consumer will have to bear the cost of returning the goods in the case of cancellation and, in the case of distance contracts, if the goods by their nature cannot normally be returned by post, the cost of returning the goods;
- n) where the consumer exercises the right to cancel after having made a request in accordance with Regulation 21, that the consumer is liable to pay the trader reasonable costs in accordance with that Regulation;
- o) where a right to cancel the contract does not apply under Regulation 13, the information that the consumer will not benefit from that right or, where applicable, the circumstances in which the consumer loses the right;
- p) in the case of a sales contract, the existence of a legal obligation on the trader to supply goods that are in conformity with the contract;
- q) where applicable, the existence and conditions of after-sale customer assistance, after-sales services and commercial guarantees;
- r) the existence of relevant codes of practice, as defined in section 2 of the Consumer Protection Act 2007 and, where applicable, how copies of such codes can be obtained;
- s) the duration of the contract where applicable or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating it;
- t) where applicable, the minimum duration of the consumer's obligations under the contract;
- u) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
- v) where applicable, the functionality, including applicable technical protection measures of digital content;
- w) where applicable, any relevant interoperability of digital content with hardware and software of which the trader is, or can reasonably be expected to have been, aware;
- x) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism to which the trader is subject, and the methods for having access to it.

depend, among other things, on whether or not the contract provides for specified charges, delivery and other arrangements or financial guarantees, is of a fixed term or indeterminate duration, has goods or digital content as its subject matter or is subject to a right of cancellation.

31. Unlike in the case of on-premises contracts, however, the information requirements for distance and off-premises contracts do not contain a waiver for information that is already apparent from the context.<sup>16</sup> Nor is there an exemption for day-to-day transactions involving immediate performance. As indicated at paragraphs 21-23, however, off-premises contracts for which the cost does not exceed €50 are exempt from the information and other provisions of the Regulations.

32. The enhanced protection for consumers concluding distance and off-premises contracts is underlined by the fact that, as stated at Regulations 7(6) and 10(5), the information requirements outlined in Box 1 form part of the contract between the consumer and the trader. If the information provided by the trader prior to the conclusion of the contract proves incorrect or incomplete, therefore, the consumer may have a claim for breach of contract. The Regulations further provides that this information cannot be altered unless the contracting parties expressly agree otherwise. The European Commission have clarified that this provision applies to changes agreed by the parties after the provision of the pre-contractual information and before the conclusion of the contract – for example, agreement on a delivery date different from that originally specified by the trader.

33. The information requirements set out at points (a) to (f), (i) (l) and (s) of Box 1 are similar in large part to those applying to distance contracts under Directive 97/7/EC and, as such, do not involve new obligations on traders. As outlined at paragraph 28, a number of the information requirements for both off-premises and distance contracts also overlap with those under the Consumer Protection Act 2007, the European Communities (Requirements to Indicate Product Prices) Regulation 2002 and the European Communities (Provision of Services) Regulations 2010. In the case of distance contracts, there is a further overlap in some cases with the information requirements under Regulation 7 of the European Communities (Directive 2000/31/EC) Regulations. Directive 2000/31/EC, commonly known

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<sup>16</sup> The information on the main characteristics of goods, services, digital content or utilities, however, must be provided “to the extent appropriate to the goods or services”;

#### POINTS TO NOTE ABOUT INFORMATION REQUIREMENTS FOR DISTANCE AND OFF-PREMISES CONTRACTS

In the event of a dispute between the parties or of legal proceedings, the burden of proof as to compliance with the applicable information requirements is on the trader. Traders are advised accordingly to keep adequate records or other evidence of their compliance with the requirements.

References to goods and services in Schedule 1 of the Regulations and Article 6(1) of the Directive should, as stated in Article 6(2) of the Directive, be read as including references to digital content not supplied on a tangible medium; gas, water and electricity not put up for sale in a limited volume or set quantity; and district heating. This point applies also to the information requirements for on-premises contracts in Regulation 5 and Schedule 1 of the Regulations outlined at paragraph 24.

In the case of a public auction, the information specified in paragraphs (b), (d) and (e) of Box 1 may be replaced by the equivalent details for the auctioneer. Public auction is defined in the Regulations and Directive as a method of sale under which (a) goods or services are offered by the trader through a transparent, competitive bidding procedure run by an auctioneer to consumers who attend, or are given the possibility to attend, the auction in person and (b) the successful bidder is bound to purchase the goods or services. As the definition requires that consumers have the possibility to attend the auction in person, it does not cover auctions conducted exclusively on online platforms.

The “geographical address” of the trader referred to in paragraph (c) of Box 1 is to be interpreted as the place at which the trader’s activities under the contract are carried out. The “place of business” of the trader referred to in paragraph (d) is to be interpreted, in accordance with the case law of the ECJ,<sup>17</sup> as the place where the essential decisions concerning the general management of the trader’s business are taken and where the functions of its central administration are exercised.

The requirement in paragraph (d) on the trader to provide a telephone number, fax number and e-mail address “where available” is to be understood as a requirement on the trader to provide contact details for these means of communication if the trader uses them in the course of his or her business activity. As the purpose of this information is to enable the consumer to contact the trader quickly and to communicate with the trader efficiently, there is an implied obligation on traders to respond in reasonable time to communications from consumers made by these methods.

If a trader fails to comply with the information requirements on additional charges or other costs specified in paragraphs (g) and (m) of Box 1, the consumer is not liable for those charges or costs.

Where a right to cancel the contract exists, the information which the trader is required to provide under paragraphs (l), (m) and (n) about the conditions, time limits and procedures for exercising this right, and the costs for which the consumer may be liable in exercising it, can be provided by means of the model instructions on cancellation in Part A of Schedule 3 of the Regulations. A trader who correctly supplies these instructions fulfils the obligations of paragraphs (l), (m) and (n).

Recital 19 of the Directive states that the reference to the “functionality” of digital content in paragraph (v) of Box 1 means the ways in which the digital content can be used, such as in the tracking of consumer behaviour. It also encompasses the absence or presence of any technical restrictions, such as protection via Digital Rights Management or region coding. The reference to the “relevant inter-operability” of digital content in paragraph (w) means information regarding the standard hardware and software with which the digital content is compatible, such as the operating system, the necessary version and certain hardware features.

<sup>17</sup> Case C -73/06, *Planzer Luxembourg Sarl v Bundeszentralamt für Steuern*.

as the E-Commerce Directive, imposes information and other obligations on traders engaged in the provision of an information society service, defined as a service normally provided for remuneration at a distance and by electronic means at the request of the recipient of the service. The information obligations on such service providers include their address and contact details, professional or other registration, and the price of the service.

### **Additional Rules Applicable To Information Obligations In Off-Premises Contracts**

34. As with on-premises contracts, the information which the trader is required to provide before the consumer is bound by an off-premises contract (or any corresponding offer) must be provided “in a clear and comprehensible manner”. Both off-premises and distance contracts are subject, however, to additional requirements about the manner in which the information is to be provided. In the case of off-premises contracts, the trader must give the information to the consumer on paper, or if the consumer agrees, on another durable medium. “Durable medium” is defined in the Directive as –

any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

Recital 23 states that such media include in particular “paper, USB sticks, CD-ROMS, DVDs, memory cards, or the hard disks of computers as well as e-mails”. A text message can also constitute a durable medium, as can a consumer’s personal account on a trader’s website provided that it meets the requirements of the definition regarding the storage and reproduction of the information provided.

35. A trader who concludes an off-premises contract with a consumer must also provide the consumer with a copy of the signed contract or the confirmation of the contract. This copy or confirmation must be provided on paper or, if the consumer agrees, on another durable medium. Where applicable, it must also include the confirmation of the consumer’s prior acknowledgement, in accordance with the provisions on the right of cancellation discussed in Part V, that he or she will forfeit this right in the case of contracts for the supply of intangible digital content where the performance has commenced with the consumer’s consent. Though such content is supplied by electronic means, contracts for its supply can be concluded on an off-premises basis.

## **Reduced Information Requirements For Specified Off-Premises Contracts for Repairs Or Maintenance**

36. Article 7(4) of the Directive sets out a reduced set of pre-contractual information requirements for off-premises contracts where –

- a) the consumer has explicitly requested the services of the trader for the purpose of carrying out repairs or maintenance,
- b) the trader and the consumer immediately perform their contractual obligations, and
- c) the payment to be made by the consumer does not exceed €200.

Member States may opt not to apply this lighter information regime and require instead compliance with the full set of information obligations specified in Box 1. Where the lighter regime applies, the trader is required only to provide, first, information about his or her identity, address and the price of the repairs in writing or, with the customer's agreement, on another durable medium. The trader is also required in such cases to provide information on the main characteristics of the service and on the rights and restrictions relating to the cancellation of the contract by the consumer, but may elect not to provide it on paper or another durable medium if the consumer expressly agrees. The trader's obligation to provide confirmation of the contract remains, however, and must include all of the information specified in Box 1. Following the public consultation referred to earlier, the Department concluded that the lighter information regime permissible for such contracts under the Directive offered adequate safeguards for consumers while reducing the compliance burden on traders who undertake repair and maintenance work below the two hundred euro threshold. Regulation 8 of the Regulations gives effect accordingly to this option.

### **Additional Rules Applicable To Information Obligations In Distance Contracts**

37. In addition to the obligation to provide the information outlined in Box 1 in a clear and comprehensible manner before the consumer is bound by a distance contract, Regulation 10(1) of the Regulations stipulates that the trader must give or make available that information to the consumer in "plain and intelligible language" in a way appropriate to the means of distance communication used by the trader. Insofar as the information is provided in writing, furthermore, it must be legible. These formal requirements are somewhat less prescriptive than those applying to off-premises contracts in acknowledgement of the fact that distance contracts can be concluded through a variety of means of communication,

including cases such as contracts concluded on a website or orally over the telephone that may not enable the provision of pre-contractual information on a durable medium.

38. Regulation 10(7) of the Regulations makes express provision for contracts concluded through a means of distance communication which allows limited space or time to display the information specified in Box 1. Recital 36 of the Directive gives as examples of such technical constraints the restrictions on the number of characters on certain mobile telephone screens or the time limitations on television sales spots. Contracts concluded over the telephone may also come within the scope of the provision. In such cases, the trader is required prior to the conclusion of the contract only to provide the information specified in paragraphs (a), (b), (f), (l), and (s) of Box 1. The other mandatory items of information can be provided in an appropriate way in accordance with Regulation 10(1) including, as suggested in Recital 36 of the Directive, by means of a toll free telephone number or a hypertext link to a webpage of the trader where the relevant information is directly available and easily accessible.

39. Regardless of the means of communication used to conclude a distance contract, Regulation 12 stipulates that a trader who concludes such a contract with a consumer must provide the consumer with confirmation of the concluded contract on a durable medium within a reasonable time after the conclusion of the contract and, at the latest, at the time of the delivery of the goods or before the commencement of the performance of the service, supply of digital content, gas, water, electricity or district heating.<sup>18</sup> It should be noted that this requirement refers to the provision of the confirmation by the trader rather than to its reception by the consumer; the trader is in compliance accordingly if he sends the confirmation within the stipulated time. This confirmation must include all the information specified in Box 1 unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the contract. Where applicable, it must also include the confirmation of the consumer's acknowledgement, in accordance with the provisions on the right of cancellation discussed in Part V below, that he or she will

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<sup>18</sup> Though Article 8(7) of the Directive states that the trader's confirmation of the concluded contract should be provided "at the latest at the time of the delivery of the goods or before the performance of the service begins", the European Commission have clarified that this confirmation must also be provided before the commencement of the performance of a contract for digital content not supplied on a tangible medium, water, gas or electricity not put up in a limited volume or set quantity, and district heating. Regulation 12 of the Regulations which transposes this provision makes express reference to its application to these other contracts.

forfeit this right in contracts for the supply of intangible digital content where the performance has commenced with the consumer's prior express consent.

40. Companies which stream or download digital content to consumers expressed concern that the requirement to provide confirmation of the concluded contract and of the consumer's acknowledgement of the loss of the right to cancel prior to the commencement of performance could give rise to difficulties in the case of content, such as pay-per-view films or sporting events, intended for more or less immediate consumption. The European Commission have clarified that the confirmation requirement must be viewed in the context of the conclusion of a contract. A contract, for example, for subscription to digital television services or the use of a mobile app game may be designed so as to encompass the subsequent accessing of additional paid content at the consumer's request, such as pay-per-view films or in-app purchases. In such cases, the act of accessing this content should not be seen as constituting a separate contract, but rather as a payment additional to the remuneration agreed for the trader's main obligation under the contract as regulated by Article 22 of the Directive. Article 22 is discussed further at paragraphs 70—71 below.

#### **Distance Contracts to Be Concluded by Electronic Means**

41. Regulation 11 of the Regulations gives effect to new provisions in the Directive which aim to provide greater protections for consumers incurring payment obligations under distance contracts to be concluded by electronic means. While these provisions are primarily aimed at contracts concluded on traders' websites, they also encompass contracts concluded by other electronic means such as digital television set-top boxes. The provisions of Regulation 11, unlike the other information provisions for distance and off-premises contracts, apply to contracts for passenger transport services. Contracts concluded by SMS are outside the scope of the Regulation, however, and are regulated instead by the provisions on contracts concluded through means of distance communication subject to space or time constraints discussed at paragraph 38 above.

42. In the case of distance contracts concluded by electronic means, the trader must first make the consumer aware in a clear and prominent manner, and directly before the consumer places an order, of the information specified in paragraphs (a), (f) to (h), (s) and (t) of Box 1. While the words "directly before" are to be understood as meaning "immediately before", the stipulation that the consumer be made aware of the information

in a clear and prominent manner also requires, as clarified in Recital 39, that this information be displayed “in the close vicinity” of the place on the website or other medium where the order to purchase is made. Secondly, the trader must ensure that the consumer, when placing an order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or similar function, the trader must ensure that the button or function is labelled in an easily legible manner only with the words “order with obligation to pay” or with a corresponding and unambiguous formulation.

43. The Regulations further require trading websites to indicate clearly and legibly and at the latest at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted. This provision aims to prevent consumers from spending time exploring the purchase of goods that are not supplied to the consumer’s place of residence or which require payment by a method to which the consumer may not have access.

#### **Distance Contracts to Be Concluded by Telephone**

44. Regulation 10(8) of the Regulations provides that a trader who makes a telephone call to a consumer with a view to concluding a distance contract must disclose his or her identity (or that of the trader on whose behalf he or she is acting) to the consumer along with the commercial purpose of the call. This provision reproduces a requirement from Article 4(3) of the existing Distance Selling Directive and, as such, does not impose a new obligation on traders.

45. Article 8(6) of the Directive provides that, where a distance contract is to be concluded by a telephone call, Member States may provide that the trader has to confirm the offer to the consumer who is bound only after he has signed the offer or has sent his written consent. Member States may further provide that the trader’s confirmation of such an offer must be made on a durable medium. Following the public consultation mentioned previously, the Department decided on balance against including this option in the Regulations. A requirement for confirmation by both parties of all contracts concluded by telephone would create a significant administrative burden for traders in the hospitality sector in particular, and might also frustrate consumers who wished to conclude a contract quickly over the telephone. Consideration was given to applying the provision in cases where the telephone contact was initiated by the trader, but it was concluded that this

would introduce an additional complexity to an already complicated provision and would give rise to potential evidential issues in its enforcement. The consumer is arguably protected sufficiently in such cases by the obligation on the trader to provide confirmation of the concluded contract on a durable medium within a reasonable time of its conclusion and, at the latest at the time when the goods are delivered or the performance of the service, digital content or utility begins. In contracts subject to a right of cancellation, furthermore, the consumer will have the additional safeguard afforded by this right. If the evidence suggests, however, that the non-implementation of this provision is giving rise to appreciable detriment for Irish consumers, its adoption will be reconsidered at a future date.

## **V RIGHT TO CANCEL DISTANCE AND OFF-PREMISE CONTRACTS**

46. Regulation 14 of the Regulations provides that, subject to specified conditions, consumers may cancel distance and off-premises contracts within the applicable cancellation period. In exercising this right, the consumer does not have to give any reason for the cancellation and does not incur any costs or liability other than those arising in certain specified circumstances. Regulation 39 of the Regulations provides that a consumer cannot waive the right to cancel the contract, or any other right conferred, by the Regulations, though he or she is clearly free to choose not to exercise these rights.

47. As noted earlier, the right to cancel distance and off-premises contracts is not new and re-enacts the right conferred by the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 and the European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) Regulations 2001.<sup>19</sup> As subsequent sections will show, however, there are significant differences between the right of cancellation under these enactments and that under the new Regulations. Some of these differences relate to the scope of the right, the issue discussed next.

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<sup>19</sup> Directive 85/577/EEC on Contracts Negotiated Away from Business Premises refers to a right of cancellation, while Directive 97/7/EC on Distance Contracts and the Consumer Rights Directive refer to a right of withdrawal. Though the Consumer Rights Directive refers to the right of withdrawal, the new Regulations, like those which give effect to Directives 85/577/EEC and 97/7/EC, refer to a right of cancellation. As well as being more familiar, this term is considered clearer in the Irish legal context.

## Scope of the Right to Cancel

48. The right to cancel a distance or off-premises contract clearly does not apply to the contracts outside the scope of the Regulations listed in paragraph 10 above. In addition, the right does not apply to the contracts listed in Box 2 below, though all of the other provisions of the Regulations apply to these contracts. Unlike in the case of the exemptions from the scope of the Directive listed in paragraph 11, Article 16 of the Directive expressly provides that Member States shall not provide for a right of cancellation for contracts exempted from this right. All of the Directive's provisions relating to the application, exercise and effects of the right to cancel accordingly are mandatory for Member States.<sup>20</sup>

49. The exceptions to the right to cancel the contract at points (a) to (d), (f), and (i) to (l) of Box 2 are, with some divergences, similar to those which apply under the Regulations that give effect to the Distance Selling Directive. The most significant such divergence is perhaps that at Regulation 21 of the Regulations on contracts for the supply of services or utilities where performance has, with the consumer's agreement, begun within the cancellation period but not been fully completed.<sup>21</sup> While the Regulations that gave effect to the Distance Selling Directive excluded such contracts from the right of cancellation,<sup>22</sup> the new Regulations give the consumer the right to cancel the contract in these circumstances. If the consumer exercises this right, however, he or she must pay to the trader "an amount which is in proportion to what has been provided until the time the consumer has informed the trader of his or her exercise of the right to cancel the contract". The proportionate amount to be paid by the consumer is to be calculated on the basis of the total price agreed in the contract. If the total price is excessive, the proportionate amount should be calculated on the basis of the market value of what has been provided. The consumer will bear no cost for

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<sup>20</sup> In the case of off-premises contracts, Article 9(3) of the Directive provides that, notwithstanding the obligation on Member States not to prohibit parties from performing their contractual obligations during the cancellation period, Member States "may maintain existing national legislation prohibiting the trader from collecting the payment from the consumer during the given period after the conclusion of the contract". As Ireland has no such legislation, the provision is not applicable to this country.

<sup>21</sup> The other main differences are, first, that contracts for the supply of newspapers, periodicals and magazines were fully excluded from the right of cancellation under the existing Distance Selling Directive. Under the new Directive, the right to cancel applies to subscription contracts for the supply of such publications. Secondly, the exception for contracts concluded at auctions was general under the existing Distance Selling Directive but applies only to public auctions under the new Directive.

<sup>22</sup> Directive 85/577/EEC on Contracts Negotiated Away from Business Premises, and the Irish Regulations that gave effect to the Directive, were silent on the issue of whether the right to cancel a service contract could be exercised once performance of the service had commenced.

## Box 2

### EXCEPTIONS TO THE RIGHT TO CANCEL DISTANCE AND OFF-PREMISES CONTRACTS

- a) service contracts after the service has been fully performed if the performance has begun with the consumer's prior express consent, and with the consumer's acknowledgement that he will lose the right to cancel the contract once the contract has been fully performed by the trader;
- b) contracts for the supply of digital content not supplied on a tangible medium if the performance has begun with the consumer's prior express consent and with the consumer's acknowledgement that he or she thereby loses the right to cancel the contract;
- c) contracts for the supply of goods or services whose price is dependent on fluctuations in the financial market that may occur during the cancellation period and that cannot be controlled by the trader;
- d) contracts for the supply of non-prefabricated goods made on the basis of an individual choice of, or decision by, the consumer;
- e) contracts for the supply of goods that are clearly personalised;
- f) contracts for the supply of goods that are liable to deteriorate or expire rapidly;
- g) contracts for the supply of sealed goods that are not suitable for return for health protection or hygiene reasons and that were unsealed after delivery;
- h) contracts for the supply of goods that are, according to their nature, inseparably mixed with other items after their delivery;
- i) contracts for the supply of alcoholic beverages where (i) the price of which been agreed upon at the time of the conclusion of the sales contract, (ii) the delivery of the beverages can only take place after 30 days from the conclusion of the sales contract, and (iii) the value of the beverages is dependent on fluctuations in the market which cannot be controlled by the trader;
- j) contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance.
- k) contracts for the supply of sealed audio or sealed video recordings or sealed computer software that were unsealed after delivery;
- l) contracts for the supply of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;
- m) contracts concluded at a public auction;
- n) contracts for the provision of accommodation other than for residential purposes, the transport of goods, car rental services, catering or services relating to leisure activities where the contract provides for a specific date or period of performance.

the performance of the contract during the cancellation period, however, if the trader has failed to inform the consumer about the right to cancel or the consumer's liability to pay reasonable costs for the performance of the contract during the cancellation period.

50. The new exceptions to the right of cancellation in Box 1 include, first, contracts for the supply of sealed goods, such as certain cosmetics or underwear, which are unsuitable for return for health or hygiene reasons and which have been unsealed after delivery.<sup>23</sup> The right will not apply, secondly, to contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance.

51. The consumer's right to cancel does not apply, furthermore, to contracts for the supply of digital content not supplied on a tangible medium where the performance has begun with the consumer's prior express consent and acknowledgement that he or she thereby loses the right. This exception is probably within the scope of the exemption in the Distance Selling Directive for services whose performance had begun, with the consumer's agreement, within the cancellation period. Its status as an express exemption in the new Directive reflects the greatly increased importance of digital content supplied by way of download or streaming, an importance also evident from the fact that contracts for such content are now a separate category of contract and no longer a subset of service contracts. If the consumer has not, first, given his or her express consent to the performance of the contract (i.e. the commencement of the download or streaming) or, secondly, his or her acknowledgement that the right to cancel the contract will thereby be lost, or, third, the trader has failed to provide confirmation of this consent and acknowledgement, the consumer is not liable for the cost of the digital content.

### **Duration and Calculation of the Cancellation Period**

52. The most significant change in the right of consumers to cancel distance or off-premises contracts under the Regulations is the increase in the duration of the cancellation period

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<sup>23</sup> It is not clear whether the exception for wine and other beverages sold en primeur at point (g) of Box 2 was covered by the exemption in the existing Distance Selling Directive for contracts for the supply of goods or services whose price is dependent on fluctuations in the financial market which cannot be controlled by the supplier. The fact that it is now the subject of an express exemption under the new Directive suggests that it was not covered or that there was some uncertainty on the issue.

#### **POINTS TO NOTE ABOUT THE SCOPE OF THE RIGHT TO CANCEL AND THE CALCULATION OF THE CANCELLATION PERIOD**

The exemptions from the right to cancel at points (d) and (e) of Box 2 for the supply of goods of non-refabricated goods made in accordance with the individual choice or decision of the consumers and of goods that are clearly personalised must, like other exemptions, be construed narrowly. Choice and personalisation should be understood to mean that the good is, in principle, unique and produced according to the wishes and requirements communicated by the consumer. Recital 49 of the Directive cites tailor-made curtains as an example of clearly personalised goods. Goods chosen by the consumer on the basis of certain pre-set options generally offered by the trader – for example, a car that can be supplied in a range of colours or with additional specifications such as alloy wheels, or a sofa that can be provided in a number of fabrics and colours – would not generally be regarded as personalised or as made in accordance with the consumer's individual choice.

The exemption at point (j) of Box 2 for contracts concluded following a specific request from the consumer for a visit from the trader for the purpose of carrying out urgent repairs or maintenance applies only to services or goods supplied for the purpose of such repairs or maintenance. The consumer's right to cancel the contract will apply accordingly to services additional to the urgent repairs or maintenance requested by the consumer and to any goods supplied other than replacement parts necessarily used in carrying out the maintenance or making the repairs.

The exemption at point (m) of Box 2 for contracts concluded at public auction does not, as noted earlier, include auctions conducted exclusively on online platforms such as eBay. Contracts for goods or services not otherwise exempt from the right to cancel that are concluded through such platforms will accordingly be subject to this right.

In the case of the exemption at point (n) of Box 2 for contracts for non-residential accommodation, the transport of goods, car rental, and catering or leisure services which provide for a specific date or period of performance, Recital 49 of the Directive gives as a rationale the fact that the granting of the right to cancel could be inappropriate in the case of services where the conclusion of the contract implies the setting aside of capacity that the trader would find difficult to fill if the right were exercised. Where a consumer books tickets for a play, for example, designated seats are generally allocated for a specific performance. If the contract for the tickets is cancelled, the trader may not be in a position to allocate the reserved seating to another customer and will face a consequential financial loss. In other cases, such as long-term contracts for gym membership, the financial loss or other effects of cancellation may be small if there is no specific capacity reserved for an individual customer or if the time for which the capacity remains unfilled is short relative to the duration of the contract. Though this will depend on the specific circumstances, the exemption from the right to cancel might not apply in such cases.

Recital 41 clarifies that all time periods contained in the Directive should be understood to be expressed in calendar days. The Recital further clarifies that, in accordance with Council Regulation No. 1182/71 on the rules applicable to periods, dates and time limits, where a period expressed in days is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place should not be considered as falling within the period in question. Article 3(4) of the Regulation further provides that, where the last day of a period expressed otherwise than in hours is a public holiday, Saturday or Sunday, the period shall end with the expiry of the last hour of the following working day.

from seven to fourteen days. As Ireland, unlike a number of other Member States, did not make use of the minimum harmonisation clauses in the existing Directives to extend the seven-day cancellation period in these enactments, the length of the period will be more or less or doubled when the Regulations come into operation.<sup>24</sup> As a balancing provision, however, the Regulations include the provision outlined in Box 3 below and not found in either of the existing Directives which makes the consumer liable for any diminished value of goods resulting “from any handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods”.

53. In the case of service contracts, contracts for digital content not supplied on a tangible medium and contracts for the supply of water, gas or electricity not put up for sale in a limited volume or set period, the cancellation period expires after 14 days from the day of the conclusion of the contract. In the case of contracts for the sale of goods, the cancellation period ordinarily expires on the day after 14 days from the day on which the consumer acquires physical possession of the goods. Special rules govern the expiry of the cancellation period, however, in contracts for the sale of goods in the following cases:

- 1) In the case of multiple goods ordered by the consumer in one order and delivered separately – for example, a number of DVDs purchased online - the cancellation period expires after 14 days from the day on which the consumer acquires physical possession of the last DVD. The consumer may therefore cancel the entire contract within fourteen days of the delivery of the last DVD and return all of the DVDs. There is nothing, however, to prevent the parties in such a case from agreeing on a partial cancellation under which not all of the goods would be returned.
- 2) In the case of delivery of a good consisting of multiple lots or pieces – for example, a multi-volume encyclopaedia - the period expires after 14 days from the day on which the consumer acquires physical possession of the last volume of the encyclopaedia.
- 3) In the case of contracts for the regular delivery of goods during a defined period of time, the period expires after 14 days from the day on which the consumer acquires physical possession of the first good.

54. Where the trader has not provided the consumer with the required information on the right to cancel, however, Regulation 16 provides that the cancellation period will expire 12 months from the day on which it would have expired had the information requirement been

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<sup>24</sup> As the cancellation period in the Distance Selling Directive is seven working days, its duration is somewhat more than half of the fourteen calendar days provided for in the Consumer Rights Directive.

complied with. If the trader has provided the consumer with this information within 12 months of the conclusion of a contract for services or the consumer's acquiring physical possession of the goods, the cancellation period will expire 14 days after the day upon which the consumer receives the information. The present Distance Selling Directive, by contrast, provides only for a maximum cancellation period of three months where the trader fails to meet his information obligations under the Directive.<sup>25</sup> The existing Directive on Contracts Negotiated Away from Business Premises, however, provides that the consumer's right to cancel the contract applies for a period of not less than seven days from his or her receipt of written notice of the right of cancellation from the trader.<sup>26</sup> In *Heininger v Bayerische Hypo- und Vereinsbank*,<sup>27</sup> the European Court of Justice held that, if the consumer had not received the required information on the right to cancel, Member States were precluded from applying a time-limit of one year, or other duration, to the cancellation period. The effect of the ECJ judgment was that the cancellation period could potentially be of indefinite duration in the case of off-premises contracts.<sup>28</sup> The extension of up to 12 months in the duration of the cancellation period provided for in the Consumer Rights Directive can be seen, therefore, as a compromise between the three-month extension of the period provided for in the Distance Selling Directive and the potentially indefinite extension applicable under the Directive on Contracts Negotiated Away from Business Premises.

### **Obligations Of The Consumer In The Event Of Cancellation Of A Contract**

55. The provisions of Part 5 of the Regulations on the right of cancellation differ from the information provisions of Parts 3 and 4 in that they entail obligations on the consumer as well as on the trader. Box 3 sets out the obligations on the consumer where he or she decides to cancel a distance or off-premises contract.

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<sup>25</sup> Article 6(1) .

<sup>26</sup> Article 5.

<sup>27</sup> Case C-481/99.

<sup>28</sup> In practice, however, the duration of the cancellation period would have been subject to national rules on the limitation period applicable to legal claims. In the case of actions founded on contract, the Statute of Limitations 1957 provides that actions shall not be brought after the expiration of six years from the date on which the cause of action accrued.

### **BOX 3 OBLIGATIONS OF CONSUMER IN THE EVENT OF CANCELLATION OF A DISTANCE OR OFF-PREMISES CONTRACT**

#### **OBLIGATION TO INFORM TRADER OF DECISION TO CANCEL THE CONTRACT**

Before the expiry of the cancellation period, the consumer must inform the trader, of the decision to cancel the contract by means of –

- a) the model cancellation form in Part B of Schedule 3 of the Regulations; or
- b) any other unequivocal statement, such as a letter, e-mail, or telephone call, setting out the decision.

Where the trader provides this option, the consumer may complete and submit the model cancellation form, or the statement of cancellation, electronically on the trader's website.

The consumer may exercise the right to cancel before he or she acquires the physical possession of goods by, for example, refusing to take delivery of them provided that he or she informs the trader of the decision to cancel in accordance with the Regulations.

In the event of a dispute between the parties or of legal proceedings, the burden of proof as to compliance with these requirements is on the consumer. Consumers are advised accordingly to keep adequate records or other evidence of their compliance with the requirements.

#### **OBLIGATION TO RETURN GOODS FOLLOWING EXERCISE OF RIGHT TO CANCEL**

Unless the trader is required to collect goods that have been the subject of the right to cancel, the consumer must return the goods without undue delay and not later than fourteen days from the day on which he or she informed the trader of the decision to cancel the contract.

The consumer must bear the direct costs of returning the goods unless (a) the trader has agreed to bear those costs or (b) the trader has failed to inform the consumer that he or she must bear them.

Regulation 20 provides that a consumer required to return goods to the trader following the exercise of the right of cancel –

- a) must take reasonable care of the goods prior to returning them, and
- b) is liable for any diminished value of the goods resulting from the handling of the goods beyond that necessary to establish their nature and functioning.

There is no liability on the consumer under the Regulation, however, if the trader has failed to provide the consumer with the required information on the right to cancel.

Recital 47 of the Directive clarifies that, in order to establish the nature and functioning of goods, the consumer should only handle and inspect them in the same manner as he or she would be allowed to do in a shop. A consumer may try on a garment, for example, but cannot wear it, or may examine a toaster but not use it.

In contracts for the sale of goods where the consumer exercises the right to cancel, the trader may, unless he or she has offered to collect the goods, withhold reimbursement of payments received from the consumer until the trader has received the goods back or, if this occurs first, the consumer supplies evidence to the trader that he or she has sent the goods back. As disputes may arise over whether goods have been sent back, it is in consumers' interest to use methods such as registered delivery which provide evidence that this has been done.

#### **OBLIGATION IN EVENT OF PERFORMANCE OF SERVICES OR UTILITIES DURING CANCELLATION PERIOD**

A consumer who wishes the performance of a contract for the supply of services, gas, water, electricity or district heating to commence during the cancellation period –

- a) must make an express request to this effect on a durable medium, and
- b) unless the trader has failed to inform the consumer of the right to cancel or the consumer's liability to pay reasonable costs for services performed during the cancellation period, must pay an amount proportionate to the service or utility provided until he or she informed the trader of the cancellation.

## **Obligations Of The Trader In The Event Of Cancellation Of A Contract**

56. Box 4 sets out the obligations on the trader in the event of the cancellation of a distance or off-premises contract by the consumer. The main such obligations relate to the requirement on the trader to reimburse the payments received from the consumer and to the method and timing of this reimbursement. The trader must reimburse the consumer's payment without undue delay and not later than 14 days after the day on which the trader is informed of the consumer's decision to cancel the contract. Though the time period for reimbursement is shorter than the 30 day period provided for in the Regulations which give effect to the Distance Selling Directive,<sup>29</sup> the new Regulations, unlike the existing Regulations, permit the trader to withhold reimbursement until he or she has received the goods back or, if this occurs first, the consumer supplies evidence of having sent them back.

### **Effects of Cancellation**

57. Cancellation of the contract terminates the obligation of the consumer and the trader to perform the contract or, in a case where an offer was made by the consumer, to conclude the contract. The consumer who cancels a distance or off-premises contract incurs no costs or liability other than those for which he or she is liable under the provisions of Regulation 19(2) on non-standard delivery, Regulation 20(5) on the direct cost of returning goods sent back following the exercise of the right to cancel, Regulation 20(6)(b) on the diminished value of goods caused by excessive handling by the consumer, and Regulation 21(3) on services or utilities provided during the cancellation period.

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<sup>29</sup>The Regulations which give effect to the Directive on Contracts Negotiated Away from Business Premises do not specify the period within which reimbursement must be made by the trader, but give the consumer a lien over any goods held under a lawfully cancelled contract until all monies owed by the trader are repaid in full. If the trader has not repaid the monies owed to the consumer in full three months after the date on which the consumer has delivered the cancellation notice to the trader, the title in the goods passes to the consumer.

#### **BOX 4 OBLIGATIONS OF TRADER IN EVENT OF CANCELLATION OF A DISTANCE OR OFF-PREMISES CONTRACT**

##### **REIMBURSEMENT OF THE CONSUMER**

The trader must reimburse all payments received from the consumer who exercises the right to cancel a distance or off-premises contract. Where, however, the consumer has expressly opted for a type of delivery costing more than the least expensive type of standard delivery offered by the trader, the trader is required only to reimburse the cost of that standard delivery.

The trader must reimburse the consumer's payment without undue delay and not later than 14 days after the day on which the trader is informed of the consumer's decision to cancel the contract. In the case of sales contracts, however, the trader may, unless he or she has offered to collect the goods, withhold the reimbursement until the trader has received the goods back or, if this occurs first, the consumer supplies evidence of having sent them back.

Unless the consumer has expressly agreed otherwise, the reimbursement must be made with the same means of payment used by the consumer to purchase the goods or service. Reimbursement should not be made by vouchers unless the consumer has used these for the initial transaction or has expressly accepted them. If the consumer agrees that the reimbursement may be made by a different means of payment, the trader must ensure that the consumer does not incur any fees as result of the use of that means of payment.

##### **COLLECTION OF GOODS IN EVENT OF CANCELLATION OF SALES CONTRACT**

Where a consumer cancels a sales contract, the trader must collect the goods at his or her own expense if (a) he or she has agreed to collect them or (b) the goods were delivered to the consumer's home under an off-premises contract at the time of the conclusion of the contract and the nature of the goods - for example bulky items such as fridges or washing machines - is such that they cannot normally be returned by post.

##### **PROVISION OF SERVICES OR UTILITIES DURING CANCELLATION PERIOD**

Where a consumer wants the performance of a service contract or a contract for the supply of gas, water or electricity not put up for sale in a limited volume or set quantity or of district heating to begin during the cancellation period, the trader must require the consumer to make an express request to this effect on a durable medium. If the consumer has not made such an express request, or the trader has failed to provide the consumer with the required information on the exercise of the right to cancel or on the consumer's liability to pay reasonable costs for the performance of the contract during the cancellation period, the consumer will bear no cost for the performance of the contract during that period.

##### **PROVISION OF DIGITAL CONTENT DURING CANCELLATION PERIOD**

A consumer who cancels a contract for the supply of digital content not supplied on a tangible medium during the cancellation period is not liable for the cost of that supply where –

- a) The consumer has not given his or her prior express consent to the beginning of the performance of the digital content during the cancellation period or acknowledgement that the right to cancel would thereby be lost, or
- b) The trader has failed to provide confirmation of the consumer's prior express consent to the beginning of the performance of the contract and his or her acknowledgement of the loss of the right to cancel before, at the latest, the performance of the contract begins.

## Effects of Cancellation on Ancillary Contracts

58. Regulation 23 of the Regulations deals with the effect of the cancellation of distance or off-premises contracts on ancillary contracts, defined as contracts under which the consumer –

- (a) acquires goods or services related to a distance or off-premises contract, and
- (b) those goods are supplied, or services provided, by the trader or by a third party on the basis of an arrangement between the third party and the trader.

Ancillary contracts include, for example, linked credit agreements between a lender with whom the trader has an arrangement and a consumer for the purpose of enabling the latter to purchase the goods or services under the principal contract. As contracts for financial services are excluded from the general scope of the Regulations, Regulation 26 clarifies that such contracts may be ancillary contracts for the purposes of the Regulation. Ancillary contracts may also include, for example, contracts to maintain or service goods supplied under the principal contract provided, again, that such maintenance services are provided on the basis of an arrangement between the third party providing them and the trader supplying the goods under the principal contract.

59. Where a consumer cancels a distance or off-premises contract, Regulation 23 provides that any ancillary contract is automatically terminated. The provision for automatic termination aims to prevent consumers from continuing to incur costs or liability under a contract the rationale for which no longer remains following the cancellation of the principal contract. The ancillary contract is terminated without any costs for the consumer other than, where applicable, the costs arising under Regulations 19(2), 20(5), 20(6)(b) or 21(3) of the Regulations referred to in paragraph 57. If payment for the ancillary contract has been made to the third party providing the goods or service under that contract, the third party should reimburse the consumer. If payment for the ancillary contract was made to the trader with whom the principal contract was concluded, that trader should reimburse the consumer. The Regulation further requires a trader who is informed by a consumer of the latter's decision to cancel a distance or off-premise contract to inform any other trader with whom the consumer has an ancillary contract that is subject to automatic termination of the consumer's decision to cancel.

## **VI FEES FOR THE USE OF MEANS OF PAYMENT, ADDITIONAL PAYMENTS AND CHARGES FOR COMMUNICATION BY TELEPHONE**

60. Part 5 of the Regulations contains provisions on fees for the use of means of payment (Regulation 25), additional payments (Regulation 26) and charges for communication by telephone (Regulation 27). All of these provisions are new to EU consumer protection legislation and, though not directly connected, seek to protect consumers from excessive and/or stealth charges separate from, and additional to, the price paid for goods or services under a consumer contract.

### **Regulation 25 Fees for the Use of Means of Payment**

61. Regulation 25 gives effect to Article 19 of the Directive and provides that:

A trader shall not charge a consumer, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of that means of payment.

The Regulation applies to all contracts within the scope of the Regulations, including contracts for passenger transport services. It seeks to ensure that payment charges are not used as an additional revenue source by traders but reflect instead the real cost of payment instruments to the trader.

### **Fees for the Use of Means of Payment**

62. Like the Directive, Regulation 25 does not define “means of payment” or refer to any specific means of payment. It applies accordingly to all means of payment. In addition to existing methods of payment - such as credit card, debit card, direct debit, cheque, cash and electronic fund transfer - the term will cover new payment methods that may be introduced in the future. A “given” means of payment is one accepted by a trader in a particular transaction.

63. While it is reasonably clear what constitutes a “means of payment”, the scope of the fees charged for the use of such means is less straightforward. Where fees or charges are expressly stated to apply in respect of the use of a particular payment method or methods – most commonly payment by credit or, to a lesser extent, debit card - these will clearly come

within the scope of the Regulation.<sup>30</sup> In other cases, traders apply fees that are variously termed ‘administration’, ‘booking’, ‘handling’ or ‘service’ charges, and may represent these charges as encompassing the costs of all aspects of the processing of bookings or orders, including, though not limited to, the cost of processing payments for those bookings. If such charges demonstrably cover a broad range of costs other than those incurred in processing payments – most obviously, for example, where the charges account for the greater part of the trader’s income – they will not constitute fees for the use of means of payment within the meaning of the Regulation.

64. If, however, a fee described as an administration, service or other charge, can be avoided by the use of a specified means of payment, it should be regarded as a fee for the use of a means of payment within the scope of the Regulation. Though the practice now appears to be less common, a number of airlines and ferry companies, for example, have imposed ‘administration’ or ‘handling’ charges which do not apply where the purchaser uses a specified payment method such as Visa Electron or a pre-paid MasterCard.<sup>31</sup>

65. A number of businesses, mainly in the utilities sector, offer a price reduction to customers who pay their bills by direct debit. Where consumers have contracts of a fixed-term or indeterminate duration under which bills are issued at regular intervals, payment by direct debit can provide significant cost savings and efficiency gains for the trader. The European Commission have clarified that discounts granted to consumers for the use of certain means of payment, most typically direct debit, should not automatically be considered to involve fees on all other available means of payment within the meaning of Article 19. Such discounts may be based on the legitimate interest of the trader in encouraging means of payment that are more efficient in the context of the trader’s business structure and model rather than on the recovery of costs arising from less efficient payment methods.

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<sup>30</sup> For examples of such fees, see Department of Jobs, Enterprise and Innovation. 2012. *Consultation on Article 19 (Fees for the Use of Means of Payment) and Article 22 (Additional Payments) of Directive 2011/83/EU*, p.23. Not all of the charges listed may still apply.

<sup>31</sup> For examples, see *ibid.* p. 24.

## **Cost Borne by the Trader for Use of a Means of Payment**

66. Like Article 19 of the Directive, Regulation 25 does not define, or specify, the costs borne by the trader for the use of a means of payment. The European Commission have clarified that these costs should be confined to:

- 1) the Merchant Service Charge paid by the trader to his or her acquiring bank, and
- 2) where applicable, transaction and overhead fees paid by the trader to his or her acquiring bank, or to a payment intermediary providing some or all of the services normally provided by such an acquirer.

Other costs - such as equipment installation, set-up and maintenance costs, costs arising from fraud and risk management and administrative and training costs – should, in the Commission’s view, be regarded as part of the general cost of running a business. In the case particularly of businesses which process orders online and only accept electronic means of payment, the labour and administrative costs incurred in processing payments or managing fraud constitute core elements of the trader’s business model.

67. Traders who apply fees for the use of means of payment will need to identify the costs associated with these means in order to ensure that the fees charged do not contravene the Regulation. While these costs could be estimated on a per transaction basis, it will generally be more practicable for traders to estimate the average cost of a particular means of payment, such as payments by credit or debit card, on an aggregate basis over a period of time. Under Regulation 25, the burden of proof is on the trader to show that a fee charged for the use of a means of payment is not in excess of the cost of that means of payment to the trader.

## **European Commission Proposals on Payment Services**

68. Article 52(3) of Directive 2007/64/EC on Payment Services in the Internal Market permits Member States to prohibit or limit payment charges “taking into account the need to encourage competition and promote the use of efficient payment instruments.” Fourteen Member States have used this regulatory option to ban payment charges, while thirteen Member States, including Ireland, have opted not to do so. In those Member States which prohibit payment charges, Article 19 of the Directive is of no practical relevance to the means of payment concerned.

69. In July 2013, the European Commission announced proposals for a revised Payment Services Directive and a new Regulation on interchange fees for card-based payment transactions. These proposals include a ban on surcharging in consumer transactions under four-party card schemes such as MasterCard and Visa. As payment fees mainly apply to credit card payments and as the four-party schemes account for 95 per cent of all card payments in Europe,<sup>32</sup> the proposal, if adopted by the European Council and Parliament, would render Article 19 of the Consumer Rights Directive largely redundant.

### **Regulation 26 Additional Payments**

70. Regulation 26 gives effect to Article 22 of the Directive on additional payments and applies to all contracts within the scope of the Regulations, including contracts for passenger transport services. It provides, first, that before a consumer is bound by a contract or an offer, the trader must seek the consumer's express consent to any payment additional to the payment agreed to for the consumer's main obligation under the contract. An online trader who charges extra for gift-wrapping, for example, would need to obtain the consumer's consent to the imposition of such a charge. A charge for the transcript of a telephone conversation in which a contract was concluded may also be an additional payment within the meaning of the Regulation. The Regulation stipulates, secondly, that the consumer's consent cannot be inferred from the use of a default option, such a pre-ticked box, which the consumer is required to reject in order to avoid the additional payment. Pre-ticked boxes, or other default options, which commit consumers to paying for additional goods or services unless he or she un-ticks a box or other default option have been common in the airline sector in the past, though appear to be somewhat less so now. Misleading pricing practices, such as the advertising of 'free' services that entail sizeable costs for consumers, have also been a feature of the market in telephone content and other premium rate telecommunications services.

71. A trader who receives an additional payment from a consumer for which he has not sought the consumer's express consent, or for which he has inferred that consent from the use of a default option, must reimburse the payment to the consumer. In the event of a

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<sup>32</sup> The remaining 5 per cent of card payments are accounted for by three-party schemes such as American Express and Diner's Club under which the scheme owner acts also as the card issuer and acquirer.

dispute between the parties or of legal proceedings, the burden of proof as to compliance with the Regulation is on the trader.

### **Charges for Communication by Telephone**

72. Regulation 27 gives effect to Article 21 of the Directive on charges for communication by telephone and applies to on-premises, distance and off-premises contracts within the scope of the Regulations, though not to contracts for passenger transport services. The Regulation provides that, where a trader operates a telephone line for the purpose of permitting consumers to contact the trader about a contract concluded with the trader, calls by the consumer to that line for that purpose must not be charged at more than the basic rate. A trader who operates a telephone line that contravenes this provision is required to reimburse consumers who have been over-charged to the extent of the excess charge.

73. Though the Directive contains no definition of “basic rate”, it is defined in the Regulation as the rate charged for a call, to:

- a) an Irish geographic number,<sup>33</sup>
- b) an Irish mobile number, or
- c) any of the following non-geographic numbers as defined in the National Numbering Conventions
  - (i) Freephone
  - (ii) Shared Cost (Fixed)
  - (iii) Shared Cost (Timed)
  - (iv) Universal Access.

“Basic rate” does not include the rate charged for a call to a Premium Rate Number.

74. Freephone (1800) numbers involve no cost to the person making the call. Charges to Shared Cost (LoCall) numbers are split between the person making the call and the person called and, when made from a fixed line, are charged at the rate for a local call with the caller’s service provider. The cost to the caller of a call to a shared cost (fixed), or 1850, number does not vary with the duration of the call. The cost to the caller of a call to a shared cost (timed), or 1890, number varies with the duration of the call. The cost of a call to a universal access (0818) number is charged at the price of a national call regardless of

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<sup>33</sup> “Geographic number”, “non-geographic number” and “National Numbering Conventions” are defined in the Regulation.

the location from which a call from a fixed line number is made. The cost of calls to LoCall or Universal Access numbers made from mobile phones varies, however, as calls to these numbers are often excluded from call bundles.

75. The Regulation seeks to ensure that consumers who contact by telephone a trader with whom they have concluded a contract do not have to pay a call charge that exceeds the normal price of an equivalent call charged by their telephone service provider. This charge will of course vary for different consumers depending on the charges applied by their telephone service provider. In particular, charges for calls to numbers provided by traders for after-sales communications by consumers should not provide traders with an additional revenue stream through, for example, arrangements under which part of the cost of the call is paid to the trader.

**POINTS TO NOTE ABOUT PROVISION ON CHARGES FOR COMMUNICATIONS BY TELEPHONE**

Regulation 27 applies only to telephone lines operated by a trader for the purpose of permitting consumers to contact the trader about a contract concluded with the trader. It does not apply to lines operated by the trader for other purposes, such as taking orders or providing general information about the trader's business or products.

The Regulation does not apply to a telephone line that offers specialist technical support to consumers provided that such a line is separate from a line on which consumers can call to discuss post-contractual problems with a purchase and which offers a service over and above that available on such a line.

The Regulation does not apply to calls to telephone lines providing information or other services such as weather lines.

The Regulation does not require traders to provide a telephone line for the purpose of after-sales communications nor, if they operate such a line, to subsidise the cost that consumers pay to their telephone service provider for calls to that line.

In the event of a dispute between the parties or of legal proceedings, the burden of proof as to whether a call to a telephone line within the scope of the Regulation was charged at the basic rate lies with the trader.

Regulation 27 does not affect the right of telecommunications service providers to charge for calls to telephone lines operated by traders for the purposes of after-sales communications from consumers.

## **VII PASSING OF RISK AND DELIVERY IN CONSUMER CONTRACTS OF SALE**

76. Part 6 of the Regulations implement the provisions of Articles 18 and 20 of the Consumer Rights Directive on delivery and the passing of risk in consumer contracts for the sale of goods, whether on-premises, off-premises or distance contracts. These provisions were included in the Directive partly in order to address a gap in Directive 1999/44/EC on the Sale of Goods and Associated Guarantees. That Directive's rules deal mainly with the quality standards applicable to goods and the remedies for consumers where goods fail to meet those standards, but are silent on matters relating to delivery and risk.

77. The provisions on risk and delivery in Part 6 of the Regulations are expressed as amendments to the rules on delivery and risk in the Sale of Goods Act 1893. This has been done in order to avoid having these aspects of consumer contracts of sale regulated by separate rules in different enactments.

### **Passing of Risk**

78. The purpose of rules on risk in sales law is to allocate responsibility between the seller and buyer of goods for any loss of, or damage to, the goods that is not attributable to the act or fault of either party. If goods are lost or damaged while at the seller's risk, he or she will be required to replace or repair them in order to perform the obligation to deliver the goods to the buyer. If the goods are lost or damaged while at the buyer's risk, the buyer must bear the cost of the loss or damage and remains under the obligation to pay the price of the goods to the seller. The point at which risk passes from seller to buyer is of pivotal importance accordingly to the rules on the issue.

79. The passing of risk in contracts of sale in Ireland, whether commercial or consumer contracts, is currently regulated by section 20 of the Sale of Goods Act 1893. This provides 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.

80. 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 the choice of carrier 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.

81. Regulation 29 of the Regulations amends section 20 of the 1893 Act to provide, first, that, where the buyer deals as consumer and the seller dispatches the goods to the buyer, the goods remain at the seller's risk until the buyer, or a person indicated by the buyer for the purpose, acquires the physical possession of the goods. It provides, secondly, that where the goods are delivered to a carrier commissioned by the buyer for the purpose of carrying the goods and who was not proposed by the seller for that purpose, the goods are at the buyer's risk upon delivery to the carrier. Regulation 31 further provides that section 32 of the 1893 Act (Delivery to carrier) does not apply to consumer contracts of sale. This section of the Act provides, among other things, that delivery of goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer, and is incompatible with the rule in Article 20 of the Directive.

82. It should be noted that the provisions on the passing on risk in the Regulations and the Directive apply only where the seller dispatches the goods to the consumer. Where the consumer takes delivery of the goods from the seller's premises, the rule in section 20 of the 1893 Act that risk passes with the property in the goods will continue to apply. In its final report, the Sales Law Review Group recommended that section 20 should be amended to provide that risk passes with delivery in all circumstances and that this rule should be a mandatory provision in consumer contracts of sale and a default provision in commercial contracts of sale. Though it would have been preferable to amend section 20 in this way in the Regulations, this was not possible because of the limitations applying to EU legislation enacted under the European Communities Act 1972 referred to in paragraph 14. A broader

amendment of section 20 will be considered in the context of the forthcoming proposals for a consolidated Consumer Contracts Rights Bill.

## **Delivery**

83. Recital 51 of the Consumer Rights Directive notes that “the main difficulties encountered by consumers and one of the main sources of disputes with traders concern delivery of goods, including goods getting lost or damaged during transport and late or partial delivery.” It was appropriate accordingly to “clarify and harmonise the national rules as to when delivery should occur”, though not the rules on the place and modalities of delivery which are to remain subject to national law in the Member States.

84. Article 18(1) of the Directive provides that, unless the parties have agreed otherwise, the trader must deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay, but not later than 30 days from the conclusion of the contract. Recital 51 clarifies that the consumer should be considered to have control of the goods when he, or a third party indicated by him, “has access to the goods to use them as an owner, or the ability to resell the goods (for example, when he has received the keys or possession of the ownership documents).” Where the trader has failed to deliver the goods at the time agreed with the consumer or within the default 30 day time limit, Article 18(2) provides that “the consumer shall call upon him to make the delivery within an additional period of time appropriate to the circumstances.”

85. The obligation on the consumer to afford the trader a second opportunity to deliver the goods does not apply, however, where:

- delivery within the agreed delivery period is essential taking into account all the circumstances attending the conclusion of the contract – for example, a wedding dress which must be delivered prior to the wedding, or
- the consumer informs the trader, prior to the conclusion of the contract, that delivery by or on a specified date, is essential.

In these circumstances, the consumer is entitled to terminate the contract immediately after the expiry of the delivery period agreed with the trader or the delivery date specified by the consumer. In all other cases, the consumer must afford the trader a reasonable

additional period of time in which to make the delivery before he or she is permitted to terminate the contract.

86. Article 18 of the Consumer Rights Directive replaces the provision at Article 7 of the Distance Selling Directive which stipulates that, unless the parties have agreed otherwise, the supplier in a distance contract must “execute the order within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier.” Unlike Article 18, this provision applies to contracts for services as well as goods.

87. The time of delivery in contracts for the sale of goods is regulated at present in Ireland by section 29(2) of the Sale of Goods Act 1893. Like Article 18 of the Directive, this is a default rule and states:

Where under the contract of sale the 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.

Regulation 30 of the Regulations amends section 29(2) to provide that this rule does not apply in consumer contracts of sale and that delivery in such contracts is regulated instead by provisions in line with those of Article 18 of the Directive outlined at paragraphs 84-85. Traders should be aware, accordingly, that, unless they have agreed an alternative delivery date with the consumer, they will now be required to deliver goods not later than 30 days from the conclusion of the contract.

## **VIII UNSOLICITED GOODS AND SERVICES**

88. Part 7 of the Regulations deals with unsolicited goods and services, or inertia selling as it is referred to in the Consumer Rights Directive. Article 27 of the Directive provides, first, that the consumer shall be exempted from the obligation to provide any consideration in the case of unsolicited supply or provision prohibited by Directive 2005/29/EC on Unfair Commercial Practices.<sup>34</sup> It provides, secondly, that the absence of a response from the

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<sup>34</sup> The blacklist of prohibited commercial practices at Annex I of the Directive includes at point 29: “Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (Inertia selling).” This provision is given effect in section 55(3)(f) of the Consumer Protection Act 1997.

consumer following such an unsolicited supply or provision shall not constitute consent to that supply or provision.

89. Article 27 essentially re-enacts the provision on inertia selling at Article 9 of the Distance Selling Directive, a re-enactment required by the repeal of that Directive provided for in the Consumer Rights Directive. The aim of the provision is essentially to provide a contract law counterpart to the prohibition on inertia selling in the Unfair Commercial Practices Directive and a contract law remedy that exempts the consumer from the provision of any consideration for unsolicited goods or services.

90. As the supply of unsolicited goods has been regulated in Ireland since 1980 by section 47 of the Sale of Goods and Supply of Services Act, Part VII of the Regulations give effect to Article 27 by means of an amendment of that section. Section 47, as enacted provides, among other things, that the recipient of unsolicited goods can treat them as an unconditional gift where (i) the sender did not take possession of them within six months of their receipt by the recipient and the recipient did not unreasonably refuse to permit the sender to do so, or (ii) not less than thirty days before the expiry of that six month period, the recipient gave written notice to the sender and the sender did not take possession of them during the following 30 days or the recipient unreasonably refuse to permit the sender to do so.

91. It is arguable that these conditions constitute a form of consideration and, as such, are incompatible with Article 27 of the Consumer Rights Directive. Section 47 of the 1980 Act, as amended by Regulation 32, will apply to both goods and services and provide that –

- the consumer is exempted from any requirement to provide consideration for unsolicited goods or services supplied by the trader;
- the absence of a response from the consumer following the supply of unsolicited goods or the provision of unsolicited services does not constitute consent to –
  - a) the provision of consideration for the goods or services, or
  - b) the return or safekeeping of the goods;
- in the case of an unsolicited supply of goods, the consumer may treat the goods as if they were an unconditional gift.

## **IX ENFORCEMENT**

92. Part 8 of the Regulations deals with enforcement. The National Consumer Agency (NCA), or the Competition and Consumer Protection Commission as it is due to become in the near future, will have overall responsibility for enforcing the provisions of the Regulations. The Commission for Communications Regulation (ComReg) will have an enforcement function, concurrent with that of the Agency, in respect of electronic communications networks and services and premium rate services.

93. The enforcement regime in Part 8 of the Regulations is based on that in Part V of the Consumer Protection Act 2007. It aims to give the NCA and ComReg a flexible set of enforcement tools with which to respond to contraventions of the Regulations having regard to the nature and seriousness of the breach and the consumer detriment associated with it. The main civil enforcement options under the Regulations are the prohibition order and the undertaking, while the principal criminal law enforcement options comprise criminal proceedings, compliance notices and fixed payment notices. Traders who are the subject of enforcement action under these provisions will also be included in the Consumer Protection List which lists persons against whom enforcement action is taken by the Agency under the various enactments for which it has responsibility. This list is published twice-yearly by the Agency.

94. Part 8 also provides in a number of cases for private law remedies by consumers and traders. Breach by a trader of the obligation to reimburse payments made by a consumer who has exercised the right to cancel a distance or off-premises contract is actionable by the consumer as a breach of statutory duty, as are breaches of the provisions of Regulation 25 on fees for the use of means of payment, Regulation 26 on additional payments and Regulation 27 on charges for communication by telephone. Breach by a consumer of the obligation to return goods where the consumer has cancelled a distance or off-premises sales contract is similarly actionable by the trader as a breach of statutory duty.

