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Consultation on Scheme of Consumer Rights Bill 2021

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Executive summary

I Introduction

Outline of Scheme

1. The Scheme of the Consumer Rights Bill 2021, the subject of this consultation, seeks to consolidate and update the legislative provisions that regulate the main types of consumer contract. A comprehensive, consolidated Consumer Rights Act along the lines proposed in the Scheme will bring about a legislative framework more appropriate to present-day conditions and requirements, create clearer rules for businesses, and improve protections for consumers. As the provisions of consumer contract legislation affect virtually every citizen and business in the State, it is desirable that the key statutory rules applying to these contracts can be accessed in a single comprehensive enactment.

2. The Scheme brings together in a single statute provisions that are currently contained in a number of different enactments or, as is the case with the provisions on digital content and digital services, deal with matters that are not currently subject to statutory regulation:

- rights and remedies in consumer contracts for the sale of goods (Part 2),
- rights and remedies in consumer contracts for the supply of digital content and digital services (Part 3),
- rights and remedies in consumer contracts for the supply of non-digital services (Part 4),
- consumer information and related rights and consumer rights on the cancellation of distance and off-premises contracts (Parts 5 and 6),
- unfair terms in consumer contracts (Part 7).

Part 1 of the Scheme contains definitions of terms that feature in more than one Part of the Scheme, outlines the application of the main Parts of the Scheme, and provides for regulations, repeals, amendments, and other matters. Part 8 deals with offences and penalties for contraventions of the provisions of the Scheme. Part 9 provides for a number of amendments to the Consumer Protection Act 2007 to give effect to the amendments of the Unfair Commercial Practices Directive made by the Better Enforcement Directive and to enhance the enforcement measures available to the Competition and Consumer Protection Commission. Part 10 deals with amendments to other enactments, including the Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980.

3. The Scheme gives effect to Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, Directive (EU) 2019/771 on

certain aspects concerning contracts for the sale of goods, and to the main provisions of Directive (EU) 2019/2161 on the better enforcement and modernisation of EU consumer protection rules.¹ These Directives are referred to in this consultation as the Digital Content Directive, the Sales Directive, and the Better Enforcement Directive respectively. Member States are required to adopt measures to give effect to the Digital Content and Sales Directives by 1 July 2021 and to apply those measures from 1 January 2022. The provisions of the Better Enforcement Directive must be transposed by 28 November 2021 and applied from 28 May 2022.

Focus of Consultation

4. With limited exceptions, Parts 2, 3, 5, 6 of the Scheme transpose maximum harmonisation Directives whose protections cannot be exceeded or supplemented in national legislation in EU Member States. As Member States must fully and strictly implement the maximum harmonisation provisions of EU Directives, the focus of the consultation on these Parts of the Scheme is on provisions where we have a freer hand. In some cases, this is because the Directives contain optional provisions that Member States can choose whether or not to implement, or minimum harmonisation provisions that can be extended or supplemented in national legislation. In other cases, Member States are free to extend the provisions of a Directive to areas outside the scope of the Directive. The discretionary provisions in the Directives concerned are outlined in the relevant parts of the consultation paper along with the reasons why they have, or have not, been implemented in the Scheme. The provisions on contracts for the supply of non-digital services in Part 4 of the Scheme are not regulated by EU legislation and views are sought accordingly on all of the substantive provisions of this Part. Directive 93/13/EEC on unfair terms in consumer contracts which is given effect in Part 7 of the Scheme is a minimum harmonisation measure and views are sought therefore on the provisions of the Part that extend the Directive's protections. While respondents are welcome to comment on any of the provisions of the Scheme, they should be aware that provisions which give effect to fully harmonised provisions in EU Directives must be implemented in full in accordance with our obligations under EU law.

5. As the Scheme's provisions apply to contracts between traders and consumers for different types of product and to different types of contract, some of its Parts will be of greater interest and relevance to traders in particular areas of activity. Part 2 of the Scheme

¹ Directive (EU) 2019/2161 provides for the amendment of the following Directives: (i) Directive 93/13/EEC on unfair terms in consumer contracts; (ii) Directive 98/6/EC on the indication of product prices; (iii) Directive 2005/29/EC on unfair commercial practices; and (iv) Directive 2011/83/EU on consumer rights. The amendments to Directive 93/13/EEC are provided for in Part 7 of the Scheme, the amendments to Directive 2005/29/EC in Part 9, and the amendments to Directive 2011/83/EU in Parts 5 and 6. The amendments to Directive 98/6/EC on the indication of product prices are not included in the Scheme but will be implemented by means of an amendment to S.I. No. 639/2002 which gives effect to the Directive. Part IX of the consultation paper seeks views on the implementation of the main amendment to this Directive.

on contracts for the sale of goods will primarily be of interest to retailers, Part 3 on contracts for the supply of digital content and digital services will primarily be of interest to traders in the digital economy, and Part 4 on contracts for the supply of services will primarily be of interest to providers of a wide range of non-digital services. Subject to specified exceptions, however, the provisions of Parts 5 and 6 of the Scheme on consumer information, cancellation and other rights apply to contracts for goods, digital content, digital services, and services. The provisions of Part 7 of the Scheme on unfair terms in consumer contracts apply to consumer contracts in all sectors. The amendments in Part 9 to the provisions of the Consumer Protection Act 2007 on unfair, misleading and aggressive commercial practices cover commercial practices relating to goods, digital content, digital services and services. The new Article 6a added to the Price Indications Directive on the rules applying to the presentation of price reductions will be of particular interest to retailers and to some service providers. Though all Parts of the Scheme are of relevance to consumers, some Parts of the Scheme may similarly be of greater interest or relevance to some consumers than to others.

6. Interested parties who wish to submit views on the Scheme of the Bill are asked to send their submission by e-mail to conspol@enterprise.gov.ie not later than Wednesday 30th June. Due to remote working, respondents are asked not to submit responses in hard copy. Submissions should be marked 'Consultation on the Scheme of the Consumer Rights Bill 2021'. Responses to the consultation will be made publicly available on the Department of Enterprise, Trade and Employment website at a future date. Any material contained in responses which respondents do not wish to be made public should be clearly identified as confidential. Respondents should be aware that submissions may be disclosed by the Department in response to requests under the Freedom of Information Act 2014. Information that is regarded as commercially sensitive should be clearly identified and the reason for its sensitivity stated. In the event of a request under the Freedom of Information Act, the Department will consult with respondents about information identified as commercially sensitive before making a decision on the request. Personal data included in a response to the consultation will be treated in accordance with the Data Protection Act 2018.

II Part 2 Contracts for the sale of goods

1. Basis of Part 2 of Scheme

7. Chapters 1-3 and 5 of Part 2 of the Scheme transpose Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods, the Sales Directive. Chapter 4 mainly incorporates provisions from the Sale of Goods Act 1893 that give effect to the provisions on the delivery of, and the passing of risk in, goods at Articles 18 and 20 of Directive 2011/83/EU on consumers rights, the Consumer Rights Directive. With very limited exceptions, the Sales Directive is a maximum harmonisation measure whose provisions may not be exceeded or supplemented in national legislation. For consumer sales contracts, the provisions of Part 2 of the Scheme will replace the main provisions of the Sale of Goods Acts 1893 and 1980 that apply to these contracts. The Acts will continue to apply to sales contracts between traders.

2. Scope of Part 2 of Scheme

8. Part 2 of the Scheme applies to contracts between a trader and a consumer for the sale of goods. Hire-purchase and consumer hire agreements for the supply of goods are outside the scope of Part 2 and will continue to be regulated by the Consumer Credit Act 1995. With the exception of the provisions of Chapter 4 of Part 2 on delivery and the passing of risk, digital content supplied on a tangible medium such as a CD or DVD comes within the scope of Part 3 of the Scheme on contracts for the supply of digital content and digital services.

3. Summary of Part 2 of Scheme

Chapter 1 (Application - heads 11 to 14)

9. Chapter 1 specifies the contracts to which Part 2 does, and does not, apply; the remedies additional to those required by the Sales Directive that may be available to consumers; and the rights of consumers who receive goods as a gift.

Chapter 2 (Consumer rights in contracts for the sale of goods - heads 15 to 22)

10. Chapter 2 sets out the rights of consumers in sales contracts and the requirements with which goods must comply in order to be in conformity with the contract.

Chapter 3 (Consumer remedies in contracts for the sale of goods - heads 23 to 29)

11. Chapter 3 sets out the remedies to which consumers are entitled if goods do not comply with the requirements of Chapter 2. It provides also that that the Competition and Consumer Protection Commission may take enforcement action against a trader who fails or refuses to provide a remedy or a reimbursement to which a consumer is entitled.

Chapter 4 (Other rules in contracts for the sale of goods - heads 30 to 35)

12. Chapter 4 deals with the delivery of, and the passing of risk in, goods; the right of redress for traders against persons liable in the chain of transactions; and with the prohibition of contract terms that exclude or limit the liability of the trader.

Chapter 5 (Commercial guarantees - heads 36 to 39)

13. Chapter 5 deals with commercial guarantees for goods.

4. Optional provisions in Sales Directive implemented in Part 2 of Scheme

14. In addition to giving full effect to the provisions of the Sales Directive, Part 2 of the Scheme includes a number of provisions which give effect to discretionary options for Member States contained in the Directive or which relate to matters outside the scope of the

Directive. The main such provisions on which views are invited in this consultation are as follows:

- the short-term right of consumers to terminate the contract (paragraphs 2.15-2.18);
- the duration of the liability of the trader, and of the entitlement of consumer to remedies, for a lack of conformity of the goods (paragraphs 2.19- 2.22);
- the remedies available to the consumer in addition to the Directive's primary remedies of repair, replacement, price reduction and termination of the contract (paragraphs 2.23-2.25);
- the conditions and modalities for the reimbursement of the price in the event of the termination of the contract (paragraphs 2.26-2.28);
- the deduction permitted in the reimbursement of the price to the consumer in respect of the use of the goods prior to termination of the contract (paragraphs 2.29-2.32).

5. Optional provisions in Sales Directive not implemented in Part 2 of Scheme

15. Views are invited also on the following optional provisions in the Sales Directive which have not been implemented in Part 2:

- the exclusion of contracts for the sale of second-hand goods sold at public auction (paragraph 2.33);
- the exclusion of contracts for the sale of living animals (paragraph 2.34);
- the duration of the period for the reversal of the burden of proof for a lack of conformity of the goods (paragraphs 2.35-2.37);
- the obligation on the consumer to notify a lack of conformity within two months of detecting it (paragraphs 2.38-2.39).

III Part 3 Contracts for the supply of digital content and digital services

1. Basis of Part 3 of Scheme

16. Part 3 of the Scheme transposes Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, the Digital Content Directive. The rights and remedies of consumers in contracts for digital content and digital services have not been the subject of similar regulation in previous EU or national legislation. With

very limited exceptions, the Digital Content Directive is a maximum harmonisation measure whose provisions may not be exceeded or supplemented in national legislation.

2. Scope of Part 3 of Scheme

17. Part 3 of the Scheme applies to contracts between a trader and a consumer for the supply of digital content or a digital service. Digital content is defined as data produced and supplied in digital form, and includes computer programs, applications, video files, audio files, music files, digital games, e-books, and other e-publications. Digital services are defined as services that allow the consumer to create, process, store or access data in digital form, or that allow the sharing of, or any other interaction with, data in digital form uploaded or created by the consumer or other users of the service. These services include video and audio sharing and other file hosting, social media, and word processing or games offered in the cloud computing environment. In a new departure for consumer law, the Digital Content Directive and Part 3 of the Scheme apply to contracts in which the consumer provides personal data to the trader as well as to contracts where the consumer pays the price of the digital content or digital service.

3. Summary of Part 3 of Scheme

Chapter 1 (Application - heads 40 to 42)

18. Chapter 1 defines a number of terms that feature only in Part 3; outlines the contracts to which the Part does, and does not, apply; and specifies the remedies additional to those required by the Digital Content Directive that may be available to consumers.

Chapter 2 (Consumer rights in contracts for the supply of digital content and digital services - heads 43 to 52)

19. Chapter 2 sets out the rights of consumers in contracts for the supply of digital content and digital services and the requirements with which digital content and digital services must comply in order to be in conformity with the contract.

Chapter 3 (Consumer remedies in contracts for the supply of digital content and digital services - heads 52 to 60)

20. Chapter 3 sets out the remedies to which consumers are entitled if digital content or a digital service do not comply with the requirements of Chapter 2. It provides also that that the Competition and Consumer Protection Commission may take enforcement action against a trader who fails or refuses to provide a remedy or a reimbursement to which a consumer is entitled.

4. Optional provisions in Digital Content Directive implemented in Part 3

21. In addition to giving full effect to the provisions of the Sales Directive, Part 3 of the Scheme includes a number of provisions that give effect to discretionary options for Member States in the Directive or that relate to matters outside the scope of the Directive. The main such provisions on which views are invited in this consultation are as follows:

- the duration of the liability of the trader, and of the entitlement of the consumer to remedies, for a lack of conformity of the digital content or digital service (paragraph 3.10);
- the remedies available to the consumer in addition to the Directive's primary remedies of bringing the digital content or digital service into conformity with the contract, price reduction and the termination of the contract (paragraphs 3.11-3.12);
- rules on the termination of bundle and ancillary contracts (paragraphs 3.13-3.16).

5. Optional provisions in Digital Content Directive not implemented in Part 3

22. Views are invited also on the following optional provisions in the Digital Content Directive which have not been implemented in Part 2:

- the consequences for the contract of a withdrawal of consent by the consumer to the processing of personal data (paragraphs 3.17-3.18);
- the application of Part 3 of the Scheme to metadata collected by the trader and to cases where access to digital content or digital services involves exposure to advertisements (paragraphs 3.19-3.20).

IV Part 4 Contracts for the supply of a service

1. Basis of Part 4 of Scheme

23. The provisions of Part 4 of the Scheme on contracts for the supply of services differ from those of the other main Parts of the Scheme in that they do not give effect to the provisions of an EU Directive. The matters relating to service contracts dealt with in Part 4 are currently regulated by Part IV (Supply of Services) of the Sale of Goods and Supply of Services Act 1980. For consumer sales contracts, the provisions of Part 4 of the Scheme will replace Part IV of the 1980 Act. Part IV of the Act will continue to apply to service contracts between traders.

24. The four sections of the 1980 Act given over to contracts for the supply of a service contrast with the more than 60 sections dealing with contracts for the sale of goods in the

Sale of Goods Acts 1983 and 1980. The obligations which the 1980 Act places on the suppliers of services are considerably more limited and less detailed than the statutory obligations on the sellers of goods. Unlike the legislative provisions applying to sale contracts, moreover, the 1980 Act contains no remedies' provisions where services do not comply with the requirements of the Act. There is a need accordingly to strengthen the rights of consumers in service contracts and to introduce statutory remedies for consumers where the service provided by a trader does not comply with those rights. The provisions of Part 4 of the Scheme will, subject to some necessary modifications entailed by the specific character of service contracts, bring the rights and remedies in consumer service contracts more into line with those for other types of consumer contract. The main changes to the existing provisions on service contracts on which views are invited are outlined next.

2. Main changes to the regulation of service contracts in Part 4 of the Scheme

Time of supply of the service (paragraphs 4.10-4.12)

25. The time at, or by, which a trader is required to provide a service under a contract with a consumer is not regulated by the Sale of Goods and Supply of Services Act 1980. As consumers can experience inconvenience and, in some cases, loss when traders fail to supply a service at the agreed or specified time, Part 4 includes rules on the time of supply of service contracts and remedies for a failure to supply the service at the required time.

Conformity of the service with the contract (paragraphs 4.13-4.16)

26. The provisions relating to the conformity of services with the contract in the Sale of Goods and Supply of Services Act 1980 principally require the trader to have the necessary skill to render the service and to supply it with due skill, care and diligence. Part 4 of the Scheme provides for the following additional conformity requirements:

- the service must comply with any oral or written statement to the consumer by or on behalf of the trader on which the consumer relied when deciding to enter into the contract;
- the service must be reasonably fit for any purpose which the consumer made known to the trader before the conclusion of the contract and which the trader accepted;
- the service must be of a nature and quality that can reasonably be expected to achieve any result that the consumer made known to the trader as the result he or she wished the service to achieve and which the trader accepted;
- a trader who purports to provide a service to a higher standard of care and skill than the general standard of reasonable skill and care which applies under Part 4 must exercise that higher standard of care and skill in providing the service;

- a trader who is, or purports to be, a member of a professional body of service providers for which standards of care and skill have been set by that body or by a public authority must exercise those standards of care and skill in providing the service;
- a trader who is, or purports, to be bound by a code of practice relating to the supply of a service must abide by that code in providing the service.

Consumer remedies in contracts for the supply of a service (paragraphs 4.17-4.18)

27. As consumer remedies are as important and necessary in service contracts as in sales or digital content contracts, Part 4 of the Scheme sets out the remedies to which consumers are entitled for a lack of conformity of a service with the contract. These remedies are broadly in line with the remedies that apply in Parts 2 and 3 and provide –

- where a service is not in conformity with the contract, the right of the consumer to have the service brought into conformity free of charge, within a reasonable time and without any significant inconvenience to the consumer other than where this would be impossible or would impose disproportionate costs on the trader;
- the right of the consumer to a proportionate reduction of the price or to terminate the contract in specified circumstances, including where -
 - (a) the trader has failed to bring the service into conformity within a reasonable time or without significant inconvenience to the consumer,
 - (b) the same or a different lack of conformity becomes apparent despite the trader's attempt to bring the service into conformity with the contract;
 - (c) the lack of conformity is of such a serious nature as to justify an immediate price reduction or the termination of the contract;
 - (d) the service, or any goods produced by or resulting from the service, are unsafe.

28. Where the consumer terminates the contract, the trader must reimburse the consumer for all payments made under the contract without undue delay and not later than 14 days from the date on which the trader was informed of the consumer's decision to terminate the contract. Part 4 provides also that the Competition and Consumer Protection Commission may take enforcement action against a trader who fails or refuses to provide a remedy or a reimbursement to which a consumer is entitled.

Exclusion or limitation of liability of trader (paragraphs 4.19-4.20)

29. The Sale Goods and Supply of Services Act 1980 provides that the Act's requirements for the supplier of a service to have the necessary skill to render the service and to supply it

with due skill, care and diligence can be negated or varied by an express term of the contract if that express term is fair and reasonable and has been specifically brought to the attention of the consumer. By contrast, contract terms which exclude or restrict the terms implied into consumer sales contracts by the Sale of Goods Act 1893 are void. As the differential treatment of such exemption clauses is unjustified, Part 4 provides that a term of a service contract must not exclude or limit the liability of the trader under the relevant provisions of the Part.

V PART 5 Consumer information and cancellation rights

1. Basis of Part 5 of Scheme

30. Part 5 of the Scheme gives effect to Chapters I to IV of Directive 2011/83/EU on consumer rights, the Consumer Rights Directive. The Directive is currently given effect by the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013). Part 5 also implements the more than forty amendments made to the Consumer Rights Directive by Article 4 of Directive (EU) 2019/2161 on the better enforcement and modernisation of EU consumer rights, the Better Enforcement Directive.

31. The Consumer Rights Directive has been incorporated in the Scheme for two principal reasons. First, its provisions on pre-contractual information for on-premises, distance and off-premises contracts and on the right to cancel distance and off-premises contracts are closely related to the contract law provisions in other Parts of the Scheme.² Secondly, the number and nature of the amendments to the Directive are such that their implementation by means of amendments of the 2013 Regulations would make the Regulations difficult to follow for consumers and traders. Like the Sales and Digital Content Directives, the Consumer Rights Directive is, with limited exceptions, a maximum harmonisation measure.

2. Scope of Part 5 of Scheme

32. The Consumer Rights Directive and Part 5 of the Scheme apply to the following contracts between a trader and a consumer:

- (a) sales contracts;
- (b) service contracts;

² On-premises contracts are contracts concluded between the trader and the consumer in the trader's business premises. Distance contracts are contracts concluded through the exclusive use of means of distance communication such as online contracts and contracts concluded by telephone. Off-premises contracts are primarily contracts concluded away from the business premises of the trader, including at the consumer's home.

- (c) contracts for the supply of digital content not supplied on a tangible medium;
- (d) contracts for the supply of water, gas or electricity not supplied in a limited volume or set quantity;
- (e) contracts for the supply of district heating.

Article 3(3) of the Consumer Rights Directive specifies a range of contracts to which its provisions do not apply, including contracts for social services; healthcare; gambling; financial services; immovable property; the construction of new buildings; the substantial conversion of existing buildings; time share; and other than for a small number of provisions, passenger and package travel. Recital (13) of the Directive provides however that, in accordance with EU law, Member States may 'maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive'.

3. Summary of Part 5 of Scheme

33. Chapter 1 of Part 5 gives effect to Chapter I of the Consumer Rights Directive and defines the terms that feature only in Part 5 and specifies the contracts to which the Part does, and does not, apply (heads 74-75).

Chapter 2 of Part 5 gives effect to Chapter II of the Consumer Rights Directive and specifies the pre-contractual information requirements that apply to on-premises contracts (heads 76-77).

Chapter 3 of Part 5 gives effect to the pre-contractual information requirements for distance and off-premises contracts in Articles 6 to 8 of Chapter III of the Directive (heads 78-85).

Chapter 4 of Part 5 gives effect to the right of consumers to cancel off-premises and distance contracts in Articles 9 to 16 of Chapter III of the Directive and specifies the conditions governing the exercise of this right (heads 86-97).

4. Optional provisions in Consumer Rights Directive implemented in Part 5

34. Under Irish law, legislative provisions which implement optional measures in EU legislation, or which apply the provisions of EU legislation to areas outside the scope of that legislation, or which exceed the provisions of EU legislation in accordance with minimum harmonisation clauses, can be given effect only through primary legislation. The option to extend the provisions of the Consumer Rights Directive in these ways did not apply in 2013 as the Directive was implemented in Regulations made under the European Communities Act 1972. As the Consumer Rights Directive is now to be given effect in primary legislation, Part 5 of the Scheme includes the following measures that extend a number of the

provisions of the Directive to contracts outside its scope or that implement optional and minimum harmonisation provisions:

- the extension of the Directive's pre-contractual information requirements, and of the right to cancel off-premises and distance contracts, to contracts for social services such as childcare and nursing home care (paragraphs 5.13-5.14);
- the extension of the Directive's pre-contractual information requirements for on-premises contracts to healthcare contracts (paragraphs 5.15-5.16);
- a provision for the Minister for Enterprise, Trade and Employment to prescribe in regulations additional information requirements for on-premises contracts generally or for different classes or types of on-premises contract (paragraph 5.17);
- an increase from 14 to 30 days in the cancellation period for off-premises contracts concluded in the context of unsolicited visits by a trader to a consumer's home, or excursions organised by a trader with the aim or effect of promoting or selling products to consumers (paragraphs 5.18-5.19).

5. Optional provisions in Consumer Rights Directive not implemented in Part 5.

35. Part 5 does not provide for the implementation of the following optional provisions in the Consumer Rights Directive relating to the right of withdrawal for certain off-premises contracts:

- a derogation from the exception to right of withdrawal for specified off-premises contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers (paragraphs 5.20-5.21);
- A change in the conditions applying to the exception to the right of withdrawal for off-premises contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out repairs (paragraph 5.22).

VI Part 6 Other consumer rights

1. Basis of Part 6 of Scheme

36. Part 6 of the Scheme gives effect to Article 19 (Fees for the use of means of payment), Article 21 (Communication by telephone) and Article 22 (Additional payments) of Chapter IV of the Consumer Rights Directive, and Article 27 (Inertia selling) of Chapter V (General Provisions) of the Directive. These provisions are currently implemented in Regulations 24 to

27 and 32 of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013.

2. Scope of Part 6 of Scheme

37. In line with Chapters IV and V of the Consumer Rights Directive whose provisions it implements, Part 6 of the Scheme applies to the following contracts between a trader and a consumer:

- (a) sales contracts;
- (b) service contracts;
- (c) contracts for the supply of digital content not supplied on a tangible medium;
- (d) contracts for the supply of water, gas or electricity not supplied in a limited volume or set quantity;
- (e) contracts for the supply of district heating.

As outlined in paragraph 32 above, Article 3(3) of the Consumer Rights Directive excludes a range of contracts from the scope of the Directive, including contracts for social services; healthcare; gambling; financial services; immovable property; the construction of new buildings; the substantial conversion of existing buildings; time share; and other than for a small number of provisions, passenger and package travel. These exclusions apply to Articles 19, 21 and 22 of the Directive, though not to Article 27.

Extension of Part 6 of Scheme to contracts excluded from scope of Consumer Rights Directive (paragraphs 6.3-6.4)

38. As the Consumer Rights Directive permits Member States to apply the Directive's provisions to contracts outside its scope and as this is permissible under Irish law if it is done in primary legislation, Part 6 provides for the extension of the provisions of Articles 19, 21 and 22 of the Directive to all of the contracts excluded from the scope of the Directive other than contracts for financial services. The exclusions in Article 3(3) of the Directive were framed with the Directive's provisions on pre-contractual information and the cancellation of distance and off-premises contracts in mind and there is no policy or practical reason why the provisions of Articles 19, 21 and 22 should not, with the exception of financial services, apply to consumer contracts generally. As financial services contracts and transactions are subject to detailed sectoral regulation, an exception for these contracts is justified.

VII Part 7 Unfair terms in consumer contracts

1. Basis of Part 7 of Scheme

39. Part 7 of the Scheme gives effect to Directive 93/13/EEC on unfair terms in consumer contracts. Recital (9) of the Directive states that it seeks to protect consumers who acquire goods and services ‘against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.’ Unlike the Sales, Digital Content and Consumer Rights Directives implemented in Parts 2, 3, 5 and 6 of the Scheme, the Unfair Contract Terms Directive is a minimum harmonisation measure. The Directive is given effect principally by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995). While most EU Member States have availed of the Directive’s minimum harmonisation status to supplement its provisions in national legislation, the 1995 Regulations do not include any substantive additions to, or extensions of, the Directive’s provisions.

40. After almost three decades since the Directive’s adoption, it is now time to strengthen the statutory provisions governing unfair terms in consumer contracts. Developments such as the expansion of online transactions require more extensive and effective protections for consumers from unfair and one-sided contract terms. Part 7 of the Scheme provides accordingly for a number of significant changes to the provisions of the Unfair Contract Terms Directive as currently given effect in the 1995 Regulations.

2. Main changes to current provisions on unfair terms in consumer contracts

1. Scope of provisions (paragraphs 7.7-7.9)

41. The Unfair Contract Terms Directive applies only to contract terms that have not been individually negotiated. The provisions of Part 7 apply to both negotiated and non-negotiated contract terms. Terms agreed between a trader and a consumer may be thought to be more likely to be fair than ‘take it or leave it’ terms in a standard form contract, but there is no guarantee that they will be so given the asymmetry of information and bargaining power characteristic of consumer contracts.

2. Transparency of contract terms (paragraphs 7.10-7.11)

42. Article 5 of the Unfair Contract Terms Directive states that in ‘the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain intelligible language’. Recital 20 of the Directive expands on this relatively narrow stipulation and states that ‘whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms.’ In a number of judgments, the European Court of Justice has held that the requirement of

transparency cannot be reduced to a requirement that contract terms be 'formally and grammatically intelligible' but 'must be understood in a broader sense'.

43. In addition to the requirement that contract terms be expressed in plain intelligible language, head 106 provides that a term of a consumer contract is transparent if -

- it is made available to the consumer in a manner which gives the consumer a real opportunity of becoming acquainted with the term before the conclusion of the contract;
- it is given due prominence if novel or onerous;
- the economic costs and consequences deriving from the term would be comprehensible to the average consumer.

3. Contract terms exempt from assessment for unfairness (paragraphs 7.12-7.13)

44. Article 4(2) of the Unfair Contract Terms Directive exempts from assessment for unfairness contract terms that relate 'neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language'. Part 7 includes provisions that seek to ensure that this exemption applies in line with the case law of the European Court of Justice and is not interpreted too broadly. These provide that the reference to the price in the exemption provision does not include incidental or ancillary payments and that the price exemption does not include payments contingent on the occurrence or non-occurrence of a particular event.

4. Contract terms which are always unfair (paragraphs 7.14-7.16)

45. In the majority of EU Member States, the legislation that gives effect to the Unfair Contract Terms Directive includes a list of contract terms that are automatically and always unfair. Contract terms of this kind are commonly referred to as blacklist terms. The terms included in such lists do not have to be assessed consequently for unfairness by reference to the criteria for unfairness in Article 3(1) of the Directive. Part 7 of the Scheme lists nine contract terms that are always unfair. In the Department's view, the terms concerned are both sufficiently serious and clear to be accorded blacklist status.

5. Contract terms presumed unfair (paragraphs 7.17-7.18)

46. Article 3(3) of the Unfair Contract Terms Directive states that the Annex to the Directive contains an 'indicative and non-exhaustive list of the terms which may be regarded as unfair'. A contract term listed in the Annex is not necessarily to be considered unfair, while a term that does not appear on the list may be found to be unfair. The list of terms in the Annex, or the 'grey list' as it is commonly known, is reproduced in Schedule 3 of the 1995 Regulations which give effect to the Directive. While the Directive characterises the terms

listed in the Annex as terms 'which may be regarded as unfair', head 114 provides that the terms in the corresponding list in Schedule 4 of the Scheme shall be 'presumed to be unfair'. The list of terms presumed unfair at Part 1 of Schedule 4 includes additions at paragraphs 4, 8, 12, 14, 20, 21, 22 and 23 to the list of terms contained in the Annex to the Directive.

VIII Part 9 Amendment of Consumer Protection Act 2007

1. Amendments to Act (paragraphs 8.1-8.5)

47. Article 3 of the Better Enforcement Directive provides for a sizeable number of amendments to Directive 2005/29/EC on unfair commercial practices (UCPD). The UCPD is given effect in Parts 3 and 4 of the Consumer Protection Act 2007 and Part 9 provides for the required amendments to the Act. The Part also makes a number of amendments and additions to the enforcement measures available to the Competition and Consumer Protection Commission.

2. Optional provision in Unfair Commercial Practices Directive not implemented in Part 9 of Scheme (paragraph 8.6)

48. The Better Enforcement Directive also provides for the addition to the UCPD of an optional measure permitting Member States to adopt provisions to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits to the consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers. Part 9 of the Scheme does not include a provision giving effect to this regulatory option.

IX Amendment of Directive 98/6/EC on the indication of product prices (paragraphs 9.1-9.3)

49. Claims that the price of goods or services have been reduced by a specified percentage or amount can be a cause of detriment to consumers where the basis of the claim, in particular the previous price by reference to which the price reduction is calculated, is unclear or misleading. In order to regulate the manner in which price reductions are indicated, the Better Enforcement Directive has inserted the following new Article 6a in Directive 98/6/EC on the indication of the price of products offered to consumers:

- (a) Any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction.
- (b) The prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction.
- (c) Member States may provide for different rules for goods which are liable to deteriorate or expire rapidly.

(d) Where the product has been on the market for less than 30 days, Member States may also provide for a shorter period of time than the period specified in paragraph 2.

(e) Member States may provide that, when the price reduction is progressively increased, the prior price is the price without the price reduction before the first application of the price reduction.

50. The amendments to the Price Indications Directive will be implemented by amendments to the Regulations which implement the Directive, the European Communities (Requirements to Indicate Produce Prices) Regulations 2002 (S.I. No. 639 of 2002). As the Directive provision leaves a number of aspects of its implementation to Member States, views are invited on paragraphs 3 to 5 of the new Article 6a.

I Introduction

Outline of Scheme

1.1 The Scheme of the Consumer Rights Bill 2021, the subject of this consultation, seeks to consolidate and update the legislative provisions that regulate the main types of consumer contract. A comprehensive, consolidated Consumer Rights Act along the lines proposed in the Scheme will bring about a legislative framework more appropriate to present-day conditions and requirements, create clearer rules for businesses, and improve protections for consumers. As the provisions of consumer contract legislation affect virtually every citizen and business in the State, it is desirable that the key statutory rules applying to these contracts can be accessed in a single comprehensive enactment.

1.2 The Scheme brings together in a single statute provisions that are currently contained in a number of different enactments or, as is the case with the provisions on digital content and digital services, deal with matters that are not currently subject to statutory regulation:

- rights and remedies in consumer contracts for the sale of goods (Part 2),
- rights and remedies in consumer contracts for the supply of digital content and digital services (Part 3),
- rights and remedies in consumer contracts for the supply of non-digital services (Part 4),
- consumer information and related rights and consumer rights on the cancellation of distance and off-premises contracts (Parts 5 and 6),
- unfair terms in consumer contracts (Part 7).

Part 1 of the Scheme contains definitions of terms that feature in more than one Part of the Scheme and outlines the application of the main Parts of the Scheme. It deals also with regulations, repeals, amendments and other matters. Part 8 of the Scheme deals with offences and penalties for contraventions of the provisions of the Scheme. Part 9 of the Scheme provides for a number of amendments to the Consumer Protection Act 2007 to give effect to the amendments of the Unfair Commercial Practices Directive made by the Better Enforcement Directive and to enhance the enforcement measures available to the Competition and Consumer Protection Commission. Part 10 deals with amendments to other enactments, including the Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980.

1.3 The Scheme gives effect to Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods, and to the main provisions of Directive (EU) 2019/2161 on the better enforcement and modernisation of EU consumer

protection rules.³ These Directives are referred to in this consultation as the Digital Content Directive, the Sales Directive, and the Better Enforcement Directive respectively.⁴ Member States are required to adopt measures to give effect to the Digital Content and Sales Directives by 1 July 2021 and to apply those measures from 1 January 2022. The provisions of the Better Enforcement Directive must be transposed by 28 November 2021 and applied from 28 May 2022.

1.4 The need for an updated and consolidated Consumer Rights Act has been recognised for some time. In its final report, the Sales Law Review Group noted that the legislative framework for consumer sales contracts was ‘confusing and, in some respects, contradictory’ and concluded that there would be considerable benefit to both consumers and businesses in bringing together in an accessible way the main statutory provisions applying to consumer contract rights.⁵ In 2014, the Department of Jobs, Enterprise and Innovation published a consultation paper on the reform of consumer contract law which set out the case for a Consumer Rights Act of this kind.⁶ This was followed in May 2015 by the publication of the Scheme of a Consumer Rights Bill.⁷ While it was envisaged that this would be followed by the enactment of legislation in 2016, the Scheme was put on hold due to the publication by the European Commission in December 2015 of proposals for Directives on contracts for the online and other distance sale of goods and contracts for the supply of digital content. The view was taken that there would be little advantage in introducing legislation that would have to be substantially amended within a relatively short time of its enactment. In the event, it took until May 2019 for the Directives on the sale of goods and the supply of digital content and digital services to be adopted.

³ Directive (EU) 2019/2161 provides for the amendment of the following Directives: (i) Directive 93/13/EEC on unfair terms in consumer contracts; (ii) Directive 98/6/EC on the indication of product prices; (iii) Directive 2005/29/EC on unfair commercial practices; and (iv) Directive 2011/83/EU on consumer rights. The amendments to Directive 93/13/EEC are provided for in Part 7 of the Scheme, the amendments to Directive 2005/29/EC in Part 9, and the amendments to Directive 2011/83/EU in Parts 5 and 6. The amendments to Directive 98/6/EC on the indication of product prices are not included in the Scheme but will be implemented by means of an amendment to S.I. No. 639/2002 which gives effect to the Directive. Part IX of the consultation paper seeks views on the implementation of the main amendment to this Directive.

⁴ The text of the Digital Content Directive can be accessed at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0770&from=en> . The text of the Sales Directive can be accessed at

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0771&from=en> . The text of the Better Enforcement Directive can be accessed at

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2161&from=EN> .
⁵ <https://enterprise.gov.ie/en/What-We-Do/Consumer-Competition/Sales-Law-Review-Group/Report-on-the-Legislation-Governing-the-Sale-of-Goods-and-Supply-of-Services.pdf> .

⁶ <https://enterprise.gov.ie/en/Consultations/Consultations-files/Consultation-Paper-Reform-of-the-Law-on-Consumer-Contract-Rights.pdf> .

⁷ <https://enterprise.gov.ie/en/Consultations/Consultations-files/Scheme-of-a-proposed-Consumer-Rights-Bill-May-2015.pdf> .

Focus of Consultation

1.5 With limited exceptions, Parts 2, 3, 5, 6 of the Scheme transpose maximum harmonisation Directives whose protections cannot be exceeded or supplemented in national legislation in EU Member States. The heads of the Scheme which give effect to provisions of the Sales, Digital Content, Consumer Rights and Unfair Contract Terms Directives adhere closely to the wording of the Directives. A number of the heads in Parts 2 and 3 of the Scheme incorporate points from the recitals of the Sales and Digital Content Directives in order to clarify aspects of the Directives' provisions.

1.6 As Member States must fully and strictly implement the maximum harmonisation provisions of the EU Directives transposed in Parts 2, 3, 5 and 6 of the Scheme, the focus of the consultation on these Parts of the Scheme is on provisions where we have a freer hand. In some cases, this is because the Directives contain optional provisions that Member States can choose whether or not to implement, or minimum harmonisation provisions that can be extended or supplemented in national legislation. In other cases, Member States are free to extend the provisions of a Directive to areas outside the scope of the Directive. The discretionary provisions in the Directives concerned are outlined in the relevant parts of the consultation paper along with the reasons why they have, or have not, been implemented in the Scheme. The provisions on contracts for the supply of non-digital services in Part 4 of the Scheme are not regulated by EU legislation and views are sought accordingly on all of the substantive provisions of this Part. Directive 93/13/EEC on unfair terms in consumer contracts which is given effect in Part 7 is a minimum harmonisation measure and views are sought accordingly on the provisions of the Part that extend the Directive's protections. While respondents are welcome to comment on any of the provisions of the Scheme, they should be aware that provisions which give effect to fully harmonised provisions in EU Directives must be implemented in full in accordance with our obligations under EU law.

1.7 As the Scheme's provisions apply to contracts between traders and consumers for different types of product and to different types of contract, some of its Parts will be of greater interest and relevance to traders in particular areas of activity. Part 2 of the Scheme on contracts for the sale of goods will primarily be of interest to retailers, Part 3 on contracts for the supply of digital content and digital services will primarily be of interest to traders in the digital economy, and Part 4 on contracts for the supply of services will primarily be of interest to providers of a wide range of non-digital services. Subject to specified exceptions, however, the provisions of Parts 5 and 6 on consumer information, cancellation and other rights apply to contracts for goods, digital content, digital services and services. While the provisions of Part 5 apply mainly to distance and off-premises contracts, it also includes information requirements that apply to on-premises contracts. The provisions of Part 7 on unfair terms in consumer contracts apply to consumer contracts in all sectors. The amendments in Part 9 to the provisions of the Consumer Protection Act 2007 on unfair, misleading and aggressive commercial practices cover commercial practices connected with

the promotion, sale or supply of goods, digital content, digital services and services to consumers. Though the amendments made by the Better Enforcement Directive to Directive 98/6/EC on the indication of the prices of products offered to consumers are to be implemented by amendments to the Regulations that give effect to the Directive, Part IX of this consultation seeks views on the implementation of the amendments.⁸ The new Article 6a added to the Directive on the rules applying to the presentation of price reductions will be of particular interest to retailers and to service providers in some sectors. Though all Parts of the Scheme are of relevance to consumers, some Parts of the Scheme may similarly be of greater or lesser interest and relevance to some consumers than to others.

1.8 Interested parties who wish to submit views on the Scheme of the Bill are asked to send their submission by e-mail to conspol@enterprise.gov.ie not later than Wednesday 30th June 2021. Due to remote working, respondents are asked not to submit responses in hard copy. Submissions should be marked 'Consultation on the Scheme of the Consumer Rights Bill 2021'.

1.9 Responses to the consultation will be made publicly available on the Department of Enterprise, Trade and Employment website at a future date. Any material contained in responses which respondents do not wish to be made public should be clearly identified as confidential. Respondents should be aware that submissions may be disclosed by the Department in response to requests under the Freedom of Information Act 2014. Information that is regarded as commercially sensitive should be clearly identified and the reason for its sensitivity stated. In the event of a request under the Freedom of Information Act, the Department will consult with respondents about information identified as commercially sensitive before making a decision on the request. Personal data included in a response to the consultation will be treated in accordance with the Data Protection Act 2018.

⁸ The Price Indications Directive can be accessed at https://eur-lex.europa.eu/resource.html?uri=cellar:b8fd669f-e013-4f8a-a9e1-2ff0dfee7de6.0008.02/DOC_1&format=PDF . The Regulations that give effect to the Directive can be accessed at <http://www.irishstatutebook.ie/eli/2002/si/639/made/en/print> .

II Part 2 Contracts for the Sale of Goods

1. Basis of Part 2

2.1 Chapters 1-3 and 5 of Part 2 transpose Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods, the Sales Directive. Chapter 4 mainly incorporates provisions from the Sale of Goods Act 1893 which give effect to the provisions on the delivery of, and passing of risk in, goods at Articles 18 and 20 of Directive 2011/83/EU on consumers rights, the Consumer Rights Directive.

2.2 Member States are required to adopt legislative measures to give effect to the Sales Directive by 1 July 2021 and to apply those measures from 1 January 2022. The Directive will replace Directive 1999/44/EC on certain aspects of the sale of goods and associated guarantees which will be repealed with effect from 1 January 2022. Directive 1999/44/EC was a minimum harmonisation measure which permitted Member States to introduce or maintain additional protections in national legislation. With very limited exceptions, the new Sales Directive is a maximum harmonisation measure whose provisions may not be exceeded or supplemented in national legislation.

2.3 For consumer sales contracts, the provisions of Part 2 of the Scheme will replace the following provisions of the Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980:⁹

- Sale of Goods Act 1893 – sections 1, 3, 11, 12, 13, 14, 15, 20, 29, 30, 31, 32, 35, 53, 55 and 61.
- Sale of Goods and Supply of Services Act 1980 – sections 12, 13, and 15.

These provisions will continue to apply to sales contracts between traders. Part 10 and Schedule 6 of the Scheme provide for the required amendments to the 1893 and 1980 Acts.

2.4 Part 2 of the Scheme will also replace the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 (S.I. No. 68 of 2003).

⁹ The revised text of the Sale of Goods Act 1893 prepared by the Law Reform Commission which incorporates amendments to the Act made up to 28 May 2019 can be accessed at <https://revisedacts.lawreform.ie/eli/1893/bps/71/front/revised/en/html>. The revised text of the Sale of Goods and Supply of Services Act 1980 which incorporates amendments made up to the same date can be accessed at <https://revisedacts.lawreform.ie/eli/1980/act/16/front/revised/en/html>.

Head 5 of Part 1 and Part 2 of Schedule 5 of the Scheme provide for the repeal of these Regulations.

2. Scope of Part 2

2.5 Part 2 of the Scheme applies to contracts between a trader and a consumer for the sale of goods (sales contracts).

Sales contracts are contracts under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer –

- (a) pays or undertakes to pay the price of the goods,¹⁰ or
- (b) transfers or undertakes to transfer the ownership of goods to the trader in full or part payment of the price.¹¹

Hire-purchase and consumer hire agreements for the supply of goods are outside the scope of Part 2 and will continue to be regulated by the Consumer Credit Act 1995.

Goods are any tangible movable items and include goods with digital elements¹² and water, gas and electricity put up for sale in a limited volume or set quantity. With the exception of the provisions of Chapter 4 on delivery and the passing of risk, Part 2 does not apply to digital content supplied on a tangible medium such as a CD or DVD where the tangible medium serves exclusively as a carrier for the digital content. Digital content supplied in this way comes instead within the scope of Part 3 of the Scheme on contracts for the supply of digital content and digital services.

¹⁰ Unlike Part 3 of the Scheme on contracts for the supply of digital content and digital services, Part 2 does not apply to contracts where the consumer provides personal data to the trader. Heads 12(13) and (14) of Part 2 provide however that the Minister for Enterprise, Trade and Employment may by regulations provide that the Parts will apply to contracts where the consumer provides personal data to the trader if the Minister is satisfied that such contracts are being concluded on a significant scale and that their regulation would be in the interest of consumer protection and fair competition.

¹¹ For example, where a consumer trades in a motor vehicle as payment or part payment for another vehicle.

¹² Defined in head 2(1) as goods that 'incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions'. Goods of this kind are sometimes referred to as 'smart' goods. Article 3(6) of the Directive which is given effect in head 12(6) of Part 1 of the Scheme provides that in the event of doubt as to whether the supply of incorporated or inter-connected digital content or of an incorporated or inter-connected digital service forms part of the sale contract, the digital content or digital service shall be presumed to be covered by the sales contract.

2.6 More detailed information about the contracts covered by Part 2 can be found in the application provisions at head 3 of Part 1 and heads 12 and 13 of Part 2 and in the footnotes to these provisions. Definitions of the main terms used in Part 2 can be found in the interpretation provisions at head 2 of Part 1 and head 11 of Part 2.

3. Summary of Part 2

Chapter 1 (Application - heads 11 to 14)

2.7 Chapter 1 specifies the contracts to which Part 2 does, and does not, apply; the remedies additional to those required by the Sales Directive that may be available to consumers; and the rights of consumers who receive goods as a gift.

Chapter 2 (Consumer rights in contracts for the sale of goods - heads 15 to 22)

2.8 Chapter 2 sets out the rights of consumers in sales contracts and the requirements with which goods must comply in order to be in conformity with the contract. These include –

- the requirement for goods to be of the description, quantity, quality and other features required by the contract; to be fit for any particular purpose made known by the consumer and accepted by the trader; to be delivered with the accessories and instructions, and to be supplied with the updates, stipulated by the contract; (head 16);¹³
- the requirement for goods to be fit for all of the purposes for which goods of the same type would normally be used; to be of the quality and to correspond to any sample or model of the goods made available to the consumer; to be delivered, where applicable, with the accessories and instructions that the consumer may reasonably expect to receive; and to be of the quantity and possess the quality, durability and other features normal for goods of the same type and which the consumer may reasonably expect (head 17);

¹³ The provisions of Article 6 of the Directive which are given effect in head 16 are referred to in the Directive as the ‘subjective requirements’ for conformity with the contract. The provisions of Article 7 of the Directive which are given effect in head 17 are referred to as the ‘objective requirements’ for conformity with the contract. Similar terms are used for the corresponding provisions at Articles 7 and 8 of the Digital Content Directive which are given effect in heads 46 and 47 of Part 3. In the interests of consistency of the different Parts of the Scheme, these terms have also been applied to the provisions at heads 65 and 66 of Part 4 on the conformity of services’ contracts with the contract.

- in the case of goods with digital elements where the contract provides for a continuous supply of digital content or a digital service, the requirement to ensure the supply of updates necessary to maintain the goods in conformity (head 17);
- the circumstances in which a lack of conformity resulting from incorrect installation of the goods is to be regarded as a lack of conformity of the goods (head 18)
- the requirement for the trader to have the right to sell the goods unless the parties intend the transfer of a limited title to the goods (head 19);
- the right of the consumer to the remedies for a lack of conformity where a restriction resulting from a violation of a right of a third party, in particular an intellectual property right, prevents or limits the use of the goods in accordance with the requirements for conformity with the contract (head 20).

2.9 Chapter 2 also regulates the liability of the trader where goods are not in conformity with the contract at the time of delivery (head 21) and provides that any such lack of conformity that becomes apparent within one year of the time of delivery is presumed to have existed at the time the goods were delivered (head 22).

Chapter 3 (Consumer remedies in contracts for the sale of goods - heads 23 to 29)

2.10 Chapter 3 sets out the remedies to which consumers are entitled if goods do not comply with the requirements of Chapter 2. These remedies include –

- the right in the first instance to terminate the contract within a period of 30 days from the delivery or installation of the goods or to have the goods brought into conformity with the contract by repair or replacement (heads 23(1) and 24);¹⁴
- where goods are to be brought into conformity through repair or replacement, the requirement for the repair or replacement to be carried out free of charge, within a reasonable time and without any significant inconvenience to the consumer other than where both repair and replacement would be impossible or would impose disproportionate costs on the trader (heads 23(1) to (3) and 25);

¹⁴ Where the goods are of a kind that can reasonably be expected to expire or deteriorate within a period of less than 30 days, the time limit for the exercise of the short-term right to terminate the contract will be the end of that shorter period.

- the right to a proportionate reduction of the price of the goods or to exercise the final right to terminate the contract where¹⁵ -
 - (a) the trader has refused to bring the goods into conformity with the contract, or has not completed the repair or replacement or has not done so in accordance with the requirements of head 25;
 - (b) the same or a different lack of conformity becomes apparent despite the trader's attempt to bring the goods into conformity with the contract;
 - (c) the lack of conformity is of such a serious nature as to justify an immediate price reduction or the termination of the contract;
 - (d) the trader has declared, or it is clear from the circumstances that the goods will not be brought into conformity within a reasonable time or without significant inconvenience to the consumer (heads 23(3) to 23(8), 24 and 26).

2.11 Where the consumer terminates the contract, the trader must reimburse the price paid for the goods, along with any costs incurred by the consumer in returning the goods, without undue delay and not later than 14 days of the date on which the trader received the goods back or, if the trader so chooses, evidence of the goods having been sent back (heads 27 and 28).

2.12 Heads 24 and 29 provide that the Competition and Consumer Protection Commission may take enforcement action against a trader who fails or refuses to provide a remedy or a reimbursement to which consumers are entitled under Chapter 3.

Chapter 4 (Other rules in contracts for the sale of goods - heads 30 to 35)

2.13 Head 30 specifies the scope of Chapter 4, including its application to digital content supplied on a tangible medium.

Heads 31 to 33 deal with the passing of risk in, and the delivery of, goods and also with instalment deliveries. For consumer sales contracts, these provisions will replace sections 20, 29(B) to (F) and 31 of the Sale of Goods Act 1893.

¹⁵ The final right to terminate the contract does not apply where the lack of conformity of the goods is minor. The burden of proof as to whether a lack of conformity is minor will be on the trader.

Head 34 deals with the right of a trader liable for a lack of conformity resulting from an act or omission of a person in previous links of the chain of transactions relating to the sales contract to pursue remedies against that person.

Head 35 provides that a term of a sale contract must not exclude or limit the liability of the trader under specified provisions of Part 2. A trader whose contract terms contravene the head commits an offence.

Chapter 5 (Commercial guarantees - heads 36 to 39)

2.14 Chapter 5 gives effect to the provisions of Article 17 of the Sales Directive on commercial guarantees, defined as 'any undertaking by the trader or a producer to the consumer, in addition to the trader's legal obligations relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in relevant advertising'.

4. Optional provisions in Sales Directive implemented in Part 2

1. Short-term right to terminate the contract (heads 23(1) and 24)

2.15 While repair and replacement are the primary remedies for faulty goods in most EU Member States, the right to reject faulty goods and to receive a refund of the price has long been a cornerstone of sales law in Ireland and other common law jurisdictions. Though Directive 1999/44/EC on contracts for the sale of goods provided that the right of consumers to terminate the contract applied only where repair or replacement were impossible or had not been completed within a reasonable time or without significant inconvenience to the consumer, the minimum harmonisation nature of the Directive permitted the retention of the right to reject in the Sale of Goods Act 1893 alongside the Directive's remedies.

2.16 While the right to reject is an important protection for consumers, its value is significantly lessened by the fact that the right is lost when the consumer is deemed to have accepted the goods. As the Sales Law Review Group noted, the rules on the acceptance of the goods in the Act are complex and make it difficult in practice for consumers to exercise the right to reject as it is unclear when acceptance occurs and the right to reject no longer applies. The Review Group recommended accordingly that the right should normally apply for a period of thirty days from the delivery of the goods.

2.17 Like the 1999 Directive, the new Sales Directive provides that the repair or replacement of the goods are to be the remedies of first recourse for consumers. In response to demands from this country and a small number of other Member States, however, the European Council and Parliament agreed in the course of the discussions on the Directive to the addition of the following optional provision for Member States at Article 3(7) of the Directive:

This Directive shall not affect the freedom of Member States to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes apparent within a period after delivery, not exceeding thirty days.¹⁶

2.18 In accordance with the regulatory option for Member States in the Sales Directive and in line with the recommendation of the Sales Law Review Group, heads 23(1) and 24 of Part 2 provide that, in the event of a lack of conformity of the goods, the consumer will have the right in the first instance to terminate the sales contract within 30 days of the delivery of the goods. A shorter time limit will apply in the case of goods that can reasonably be expected to expire or deteriorate within a period of less than 30 days.

2. Duration of the liability of the trader, and of the entitlement of the consumer to remedies, for a lack of conformity with the contract (head 21)

2.19 Article 10(1) of the Sales Directive provides that the seller shall be liable to the consumer for any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time. This period of two years after delivery is referred to as the liability or guarantee period.

2.20 Article 10(5) of the Directive contains an optional provision however that permits Member States not to apply the two-year period for the trader's liability, but to maintain or introduce only a limitation period for the consumer's remedies for a lack of conformity of goods provided that such a period permits the consumer to exercise these remedies for the periods of time specified in Article 10. Limitation periods fix the period of time within which legal proceedings may be brought in order to bring finality to legal actions and to prevent parties being faced with potentially indefinite claims. The principal legislation governing limitation periods in Ireland is the Statute of Limitations 1957, Part II of which specifies the limitation periods that apply to a number of common causes of action. Article 11(1)(a) of the Statute provides that the limitation period for the contract actions relevant to the Scheme is six years from the date on which the cause of action accrued – that is, the date of the breach of contract.

2.21 The 1999 Sales Directive also included a two-year guarantee period for the trader's liability for a lack of conformity. While most Member States implemented this provision in their transposition of the Directive, the Regulations that gave effect to the Directive in Ireland

¹⁶ Recital (19) of the Directive states that the Directive 'should not affect the freedom of Member States to allow consumers a specific remedy if the lack of conformity of the goods becomes apparent shortly after delivery, namely national provisions which provide for a right to reject goods with a defect and to treat the contract as repudiated or ask for immediate replacement, within a specific short period of time after the delivery of the goods, which should not exceed 30 days.'

did not do so. The seller's liability for a lack of conformity of the goods was subject instead to the six-year limitation period for contract claims in the Statute of Limitations. **Head 21 of Part 2 provides similarly that the liability of the trader for a lack of conformity, and the entitlement of the consumer to remedies for a lack of conformity, will not be subject to a two-year liability period but will apply instead in accordance with the six-year limitation period for contract actions in the Statute of Limitations 1957. The Department can see no valid reason why the entitlement of consumers to a remedy for defective goods should cease after two years regardless of the type, cost and durability of the goods concerned or the nature of the lack of conformity.**

2.22 In a related provision, recital (44) of the Sales Directive states that the Directive should not regulate the conditions under which the liability period provided for in the Directive, or a limitation period under national law, can be suspended or interrupted. Member States are permitted accordingly to provide for the suspension or interruption of the liability or limitation period - for example in the event of the repair or replacement of goods or of negotiations between the trader and the consumer with a view to a settlement about non-conforming goods. Part 2 of the Scheme does not provide however for such a suspension of the limitation period when goods are being repaired or replaced. As the consumer's right to a remedy will apply for six years after a lack of conformity occurs, a provision of this kind was considered unnecessary. While the suspension of the thirty-day period for the short-term right to terminate the contract would be of benefit to consumers and received serious consideration, the European Commission advised the Department that the discretionary provision for this right at Article 3(7) of the Directive was not intended to be extended by a facility for its suspension.

3. Withholding of payment of outstanding part of the price, damages and other remedies (heads 12(7) and 12(8) to (11))

2.23 While the primary remedies under Article 13 of the Sales Directive which is given effect in Chapter 3 of Part 2 are the right to have goods brought into conformity by repair or replacement, price reduction and termination of the contract, Article 13(6) provides that the consumer shall also have the right to withhold payment of any outstanding part of the price or a part thereof until the trader has fulfilled the trader's obligations under the Directive. It adds that Member States may determine the conditions and modalities for the consumer to exercise the right to withhold the payment. Head 12(7) provides that the remedies in Chapter 3 are without prejudice to the right of the consumer to pursue other remedies where a sales contract is not in compliance with the requirements of Part 2 provided that the consumer is not seeking to recover the same loss twice. Head 12(8) specifies the other remedies that may be available to the consumer, including at paragraph (b) the right to withhold payment of the price. Heads 12(10) to (11) specify the conditions for the exercise of this right.

2.24. Recital (61) of the Directive states that as the principle of the seller's liability for damages is an essential element of sales contracts, consumers should be entitled to claim compensation for any detriment caused by an infringement of the Directive by the trader,

including for damage suffered as a consequence of a lack of conformity. Such compensation should put the consumer as much as possible into the position in which the consumer would have been had the goods been in conformity with the contract. Head 12(8)(a) of Part 2 provides that the other remedies available to the consumer include claiming damages. Head 12(9) provides, in line with recital (61) and in accordance with the established measure of damages in Irish law, that damages for any loss or detriment caused by an infringement of the provisions of Part 2 by the trader should put the consumer as much as possible in the position in which the consumer would have been if the trader had complied with those provisions.

2.25 Recital (18) of the Sales Directive states that the Directive should not affect national law to the extent that the matters concerned are not regulated by the Directive. As this regulatory discretion for Member States applies to remedies additional to those provided for in the Directive, heads 12(8)(c) to (e) of Part 2 provide that, along with claims for damages and the withholding of payment of the price, the following remedies may also be available to the consumer where a sales contract is not in compliance with the provisions of Part 2:

(c) relying on a lack of conformity with the contract against a claim under the contract by the trader for payment of the price;

(d) seeking to recover money paid to the trader for goods that do not comply with the requirements of Part 2;

(e) having a lack of conformity of the goods with the contract remedied elsewhere and recovering from the trader all reasonable costs incurred in having the lack of conformity so remedied.

4. Modalities for reimbursement of the price in event of the termination of the contract (head 29)

2.26 Article 16 of the Sales Directive provides that where the consumer terminates a sales contract, the consumer shall return the goods to the trader at the trader's expense, and the seller shall reimburse the consumer for the price paid for the goods upon receipt of the goods or of evidence from the consumer of having sent back the goods. It adds that that 'Member States may determine the modalities for return and reimbursement'.

2.27 The approach of the Sales Directive to the requirements for the reimbursement of the price differs from that taken in both the Digital Content Directive and the Consumer Rights Directive. Each of these Directives requires reimbursement to be carried out without undue delay and within 14 days of the trader being informed of the consumer's decision to terminate or cancel the contract. Both also provide that, unless the consumer agrees otherwise, the reimbursement should be carried out by the same means of payment used by

the consumer and that the trader should not impose any fee in respect of the reimbursement.

2.28 It is not desirable in the Department's view, first, to have no statutory rules in Part 2 on as important a matter as the reimbursement of the price in the event of the termination of the contract. It is unsatisfactory, secondly, to have rules on reimbursement for digital content and digital services contracts in Part 3 and for distance and off-premises contracts in Part 5 and not to have similar rules for sales contracts in Part 2. Head 29 of Part 2 accordingly includes provisions on the time limits for, and means of, reimbursement by the trader where the consumer terminates a contract which are similar to the provisions of the Digital Content Directive given effect in head 57 of Part 3 and of the Consumer Rights Directive given effect in head 92 of Part 5.

5. Deduction for the use of goods prior to termination of the contract in the reimbursement of the price to the consumer (heads 28(2) and (3))

2.29. Whether or not traders should have the right to make a deduction from the reimbursement of the price payable to a consumer on the termination of a sales contract to take account of the consumer's use of the goods prior to termination is one of the more contentious issues in sales law. Consumers and consumer groups are opposed to any such right on the ground that the right of termination exists only where the trader has been in breach of the contract by delivering goods that are defective or that do not conform to the contract in some other respect. Traders may take the view that the refund of the price payable to a consumer who has been able to use goods satisfactorily for what may have been a considerable period of time prior to the termination of the contract should not have to be made in full and should take account of the consumer's use of the goods for the period of time in question. The Sale of Goods Act is silent on the issue, most likely because the right to reject was understood to be a relatively short-term right when the Act was originally enacted.

2.30 Recital (60) of the Sales Directive leaves it to Member States to determine whether deductions can be made from the reimbursement due to consumers on termination of contract in respect of the consumer's use the goods prior to termination, stating that the Directive 'should not affect the freedom of Member States to regulate the consequences of termination other than those provided for in this Directive, such as the consequence of the decrease of the value of the goods.' Head 28(2) of Part 2 regulates this consequence by providing that the reimbursement of the price to which the consumer is entitled on termination of the sales contract 'may be reduced in proportion to any depreciation in the value of the goods in excess of the depreciation that could reasonably be expected to result from their normal use.' Head 28(3) provides that, in case of dispute, it shall be for the trader to show that the depreciation in the value of the goods exceeded that which could reasonably be expected to result from their normal use.

2.31 Head 28(2) is based on a provision at Article 13(3)(d) of the European Commission's original 2015 proposal for the Sales Directive that was deleted in the subsequent discussions on the proposal.¹⁷ In the Commission's view, a provision of this kind on deduction for use would 'ensure the effectiveness of the right to terminate for consumers, while avoiding the consumer's unjustified enrichment'. The proposed provision is consistent also with the provision at Article 14(4) of the Sales Directive which is given effect in head 25(7) of Part 2 that a consumer who receives replacement goods where the goods originally delivered by the trader do not conform to the contract should not have to pay for the use of the original goods in the period prior to their replacement.

2.32 Section 24 of the UK Consumer Rights Act 2015 takes a different approach and provides that where a consumer exercises the final right to terminate the contract, any refund of the price to the consumer may be reduced by a deduction to take account of the use the consumer had of the goods in the period from their delivery.¹⁸ Other than in the case of motor vehicles however, no deduction for use is permitted if the contract is terminated within six months of the delivery of the goods. While these provisions may not appear unreasonable, their effect is to give the trader the power to determine what deduction for use should be made when a sales contract is terminated. The only course open to a consumer who considers such a deduction to be unreasonable or excessive is to challenge it in the courts. As consumers would not take an action in the courts in the great majority of cases, a provision of this kind would risk undermining the value and effectiveness of the right to terminate the contract where goods are not in conformity with the contract.

2.33 Heads 23(10) to (15) of Part 2 contain provisions contain provisions on the termination of bundle and ancillary contracts similar to those outlined at paragraphs 3.13 to 3.14 below.

Views are invited on the optional provisions on sale contracts included in Part 2 of the Scheme and can be submitted in the response forms in the Appendix to the consultation paper.

¹⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0635&from=EN>

¹⁸ <https://www.legislation.gov.uk/ukpga/2015/15/contents> .

5. Optional provisions in Sales Directive not implemented in Part 2

1. Exclusion of contracts for the sale of second-hand goods sold at public auction

2.33 Article 3(5)(a) of the Sales Directive permits Member States to exclude contracts for the sale of second-hand goods sold at public auction from the scope of the Directive. Part 2 of the Scheme does not provide for such an exclusion. Contracts for the sale of second-hand goods sold at public auction will be covered accordingly by the provisions of the Part.

Our transposition of the previous Sales Directive did not give effect to a similar option for Member States at Article 1(3) of that Directive. In the Department's view, the provisions of the Directive and in particular those on the conformity of goods with the contract are sufficiently flexible to take account of the particular characteristics of second-hand goods sold at auction.

2. Exclusion of contracts for the sale of living animals

2.34 Article 3(5)(b) of the Sales Directive permits Member States to exclude contracts for the sale of living animals from the scope of the Directive. Part 2 of the Scheme does not provide for such an exclusion. Contracts between a trader and a consumer for the sale of a living animal will be subject accordingly to the provisions of the Part.

There is a significant, and it would appear growing, market for the sale of animals as pets. In the Department's view, there is no valid policy reason to exclude such sales from the scope of the Scheme and the protections of its provisions.

3. Duration of reversal of burden of proof for lack of conformity

2.35 Article 11(1) of the Sales Directive provides that any lack of conformity of the goods which becomes apparent within one year of the time when the goods were delivered shall be presumed to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. This is sometimes referred to as the reversal of the burden of proof. Article 11(2) of the Directive provides that, instead of the one-year period laid down in Article 11(1), Member States may maintain or introduce a period of two years from the time the goods were delivered.

2.36 Head 22(1) of Part 2 which gives effect to Article 11(1) of the Directive provides that a lack of conformity which becomes apparent within one year of the delivery of the goods shall be presumed to have existed at the time of delivery. It is important in the Department's view that the provisions of the Scheme seek to achieve a reasonable balance between the rights of consumers and the obligations on businesses. The inclusion of the optional two-year period for the reversal of the burden of proof

provided for in the Directive would upset the balance of the rights and remedies in

Part 2. Under the 1999 Sales Directive, the reverse burden of proof currently applies for just six months after delivery. Increasing the duration of this period from six months to two years would represent too sudden and sharp a change in the scheme of remedies. The longer the lapse of time from the delivery of goods, moreover, the greater is the possibility that any lack of conformity that manifests itself may not have been present or latent at the time of delivery and that the manner of use of the goods may have been a contributory factor.

2.37 Other than where the contract provides for the continuous supply of digital content or a digital service over a period of time, the corresponding provision in the Digital Content Directive provides that the burden of proof with regard to whether the digital content or digital service was in conformity at the time of supply shall be on the trader for a period of one year from the time of supply. There is no option for Member States to increase this period to two years. It would be anomalous and difficult to justify having a two-year period for the reversal of the burden of proof for goods while a one-year period applied to digital content and digital services. As digital content, unlike goods, is not subject to wear and tear, there is a stronger case if anything for having a longer duration for the reverse burden of proof for digital content and digital services than for goods.¹⁹

4. Obligation on consumer to notify a lack of conformity within two months

2.38 Article 12 of the Sales Directive provides that Member States may maintain or introduce a requirement that, in order to benefit from the consumer's rights, the consumer must inform the seller of a lack of conformity within at least 2 months of the date on which the consumer detected the lack of conformity. This provision was not part of the original European Commission for the Directive but was included later in response to demands from a minority of Member States.

2.39 Part 2 of the Scheme does not include the Directive's optional requirement for the consumer to notify the trader of a lack of conformity of the goods within two months of its detection. A similar optional provision in the 1999 Sales Directive was not implemented in our transposition of the Directive. It is unfair and unreasonable to deny a consumer the protections of the Directive for a lack of conformity of goods because he or she fails to meet a two-month deadline for notifying the trader of that lack of conformity. It is in the interests of consumers to inform the trader promptly of a fault in the goods and a consumer who delays doing so for a significant length of time may find it more difficult to obtain redress. In addition to the absence of a convincing policy rationale for an obligation of this kind, its enforcement would give rise to obvious issues and difficulties.

¹⁹ The European Commission's original proposal for the Digital Content Directive provided for this reason that there would be no time limit for the reversal of the burden of proof.

Views are invited on the non-implementation of the above optional provisions in Part 2 of the Scheme and can be submitted in the response forms in the Appendix to the consultation paper.

III Part 3 Contracts for the supply of digital content and digital services

1. Basis of Part 3

3.1 Part 3 of the Scheme transposes Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, the Digital Content Directive. The rights and remedies of consumers in contracts for digital content and digital services have not been the subject of similar regulation in previous EU or national legislation. Member States are required to adopt legislative measures to give effect to the Directive by 1 July 2021 and to apply those measures from 1 January 2022. With very limited exceptions, the Digital Content Directive is a maximum harmonisation measure whose provisions may not be exceeded or supplemented in national legislation.

3.2 Though the original European Commission proposal of 2015 for a Directive on the supply of digital content differed significantly from the proposal for a Directive on the online and other distance sale of goods published at the same time, its provisions grew closer to those of the sales proposal during the digital content proposal's subsequent progress through the EU legislative process. As will be apparent, the provisions of the Digital Content Directive as adopted in 2019 are similar in many respects to those of the Sales Directive.

2. Scope of Part 3

3.3 Part 3 applies to contracts between a trader and a consumer for the supply of digital content or a digital service. It does not apply to contracts for the supply of goods with digital elements or 'smart goods.' As noted at paragraph 2.5 above, these goods come within the scope of Part 2.

A contract for the supply of digital content or a digital service is a contract under which the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer -

- (a) pays or undertakes to pay the price of the digital content or digital service, or
- (b) provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of –
 - (i) supplying the digital content in accordance with this Part 3, or
 - (ii) allowing the trader to comply with legal requirements to which the trader is subject;

and the trader does not process those data for any other purpose.

3.4 The application of the Digital Content Directive to contracts in which the consumer provides personal data to the trader as well as to contracts where the consumer pays the price of the digital content or digital service represents a new departure in consumer law.²⁰ Article 3(8) of the Directive provides that EU law on the protection of personal data will apply to any personal data processed in connection with contracts for the supply of digital content or digital services. It further states that the Directive is without prejudice to Regulation (EU) 2016/679 on the protection of natural persons with respect to the processing of personal data (the General Data Protection Regulation or GDPR) and to Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector. In the event of conflict between the provisions of the Directive and of EU law on the protection of personal data, the latter will prevail.

3.5 Digital content is defined by the Directive as data produced and supplied in digital form, and includes computer programs, applications, video files, audio files, music files, digital games, e-books and other e-publications. With the exception of head 40 on the supply of the digital content or digital service and head 52 on the remedy for the failure to supply the digital content or digital service, Part 3 applies to any tangible medium such as a CD or DVD which serves exclusively as a carrier of digital content.²¹

Digital services are defined by the Directive as services that allow the consumer to create, process, store or access data in digital form, or that allow the sharing of, or any other interaction with, data in digital form uploaded or created by the consumer or other users of the service. These services include video and audio sharing and other file hosting, social media, and word processing or games offered in the cloud computing environment.

²⁰ Recital (24) of the Directive on the supply of digital content and digital services notes that business models based on the supply of personal data are used in different forms in a considerable part of the market for digital products. While Parts 2 and 4 apply only to sales and service contracts where the consumer pays the price of the goods or service, heads 12(13) and (14) of Part 2 and heads 62(6) and (7) of Part 4 provide that the Minister for Enterprise, Trade and Employment may by regulations provide that these Parts will apply to contracts where the consumer provides personal data to the trader if the Minister is satisfied that such contracts are being concluded on a significant scale and that their regulation would be interest of consumer protection and fair competition.

²¹ Because of its tangible nature, digital content supplied in this way is subject to the provisions on delivery and the passing of risk in Chapter 4 that apply to goods (i.e. tangible movable items).

3. Summary of Part 3

Chapter 1 (Application - heads 40 to 42)

3.6 Chapter 1 contains definitions of a number of terms that are found only in Part 3; outlines the contracts to which the Part does, and does not, apply; and specifies the remedies additional to those required by the Digital Content Directive that may be available to consumers.

Chapter 2 (Consumer rights in contracts for the supply of digital content and digital services - heads 43 to 52)

3.7 Chapter 2 sets out the rights of consumers in contracts for the supply of digital content and digital services and the requirements with which digital content and digital services must comply in order to be in conformity with the contract. These include –

- the requirement on the trader to supply the digital content or digital service to the consumer, and the forms and modalities of such supply (head 43);
- the requirement on the trader to have the right to supply the digital content or digital service (head 44);
- the requirement for the digital content or digital service to be of the description, quantity, quality and to possess the functionality, compatibility, interoperability, security and other features required by the contract; to be fit for any particular purpose made known by the consumer and accepted by the trader; to be supplied with all accessories, instructions and customer assistance, and to be updated, as stipulated by the contract – these are termed the subjective requirements for conformity with the contract (head 46);
- the requirement for the digital content or digital service to be fit for all of the purposes for which digital content or digital services of the same type would normally be used; to be of the quality and to correspond to any sample or model of the goods made available to the consumer; to be supplied, where applicable, with the accessories and instructions that the consumer may reasonably expect to receive; to be of the quantity and possess the qualities and performance features normal for digital content or digital services of the same type and which the consumer may reasonably expect; the requirement on the trader to ensure that the consumer is informed of, and supplied with, updates necessary to maintain the digital content or digital service in conformity; unless otherwise agreed, the requirement for the digital content or digital service to be supplied in the most recent version available – these are termed the objective requirements for conformity with the contract (head 47);

- the circumstances in which a lack of conformity resulting from the incorrect integration of the digital content or digital service into the consumer's digital environment is to be regarded as a lack of conformity of the digital content or digital service (head 48)
- the right of the consumer to the remedies for lack of conformity where a restriction resulting from a violation of a right of a third party, in particular an intellectual property right, prevents or limits the use of the digital content or digital service in accordance with the requirements for conformity with the contract (head 49).

Chapter 2 also regulates the liability of the trader for any failure to supply the digital content in accordance with the requirements of the Chapter or for any lack of conformity of the digital content or digital service with the contract at the time of supply (head 50). It further provides that any such lack of conformity that becomes apparent within one year of the time of supply is presumed to have existed at that time unless the trader demonstrates that the consumer's digital environment was incompatible with the technical requirements of the digital content or digital service (head 51).

Chapter 3 (Consumer remedies in contracts for the supply of digital content and digital services - heads 52 to 60)

3.7 Chapter 3 sets out the remedies to which consumers are entitled if digital content or a digital service do not comply with the requirements of Chapter 2. These remedies include –

- where the trader fails to supply the digital content or digital service in accordance with Chapter 2, the right of the consumer to call upon the trader to supply it without undue delay or within an additional period agreed by the parties and, in specified circumstances, to terminate the contract (head 52);
- where digital content or a digital service is not in conformity with the contract, the right to have it brought into conformity free of charge, within a reasonable time and without any significant inconvenience to the consumer other than where this would be impossible or would impose disproportionate costs on the trader (heads 53(1) to 53(4));²²
- the right to a proportionate reduction of the price or to terminate the contract where²³ -

²² The Digital Content Directive does not include an option for Member States to give consumers a short-term right to terminate the contract along the lines of that at Article 3(7) of the Sales Directive outlined at paragraph 2.17 above. Unlike the case with sales contract, Ireland and other Member States could not argue that a long-established statutory right of this kind applied under national laws to digital content and digital services contracts.

²³ The right to terminate the contract will not apply where the lack of conformity of the digital content or digital service is minor. The burden of proof as to whether a lack of conformity is minor will be on the trader.

- (a) bringing the digital content or digital service into conformity is impossible or would impose disproportionate costs on the trader;
- (b) the trader has not brought the digital content or digital service into conformity in accordance with the requirements of the Chapter;
- (c) the same or a different lack of conformity becomes apparent despite the trader's attempt to bring the digital content or digital service into conformity with the contract;
- (d) the lack of conformity is of such a serious nature as to justify an immediate price reduction or the termination of the contract;
- (e) the trader has declared, or it is clear from the circumstances that the digital content or digital service will not be brought into conformity within a reasonable time or without significant inconvenience to the consumer (heads 53(5) to (6), 54 and 55).

3.8 Where the consumer terminates the contract, the trader must reimburse the consumer for all payments made under the contract without undue delay and not later than 14 days from the date on which the trader was informed of the consumer's decision to terminate the contract. Unless the consumer agrees otherwise, reimbursement must be made by the same means of payment used by the consumer for his or her payment and must not be subject to any fee imposed by the trader. Where the contract provides for the supply of the digital content over a period of time in exchange for the payment of a price, the trader is required to reimburse the consumer only for the part of the price paid for the period during which the digital content or digital service was not in conformity with the contract. In respect of the personal data of the consumer, the trader must comply with the obligations that apply under the Data Protection Act 2018. Subject to specified exceptions, the trader must refrain from using any content other than personal data provided or created by the consumer when using the digital content or digital service supplied by the trader and must make such content available to the consumer at his or her request. After the termination of the contract, the consumer must refrain from using the digital content or digital service and must on request from the trader return any digital content supplied on a tangible medium (heads 55 to 57). Heads 53 and 57 provide that the Competition and Consumer Protection Commission may take enforcement action against a trader who fails or refuses to provide a remedy or a reimbursement to which a consumer is entitled under Chapter 3.

3.9 Head 58 sets out the conditions under which a trader may modify digital content, or a digital service supplied to the consumer over a period of time beyond what is necessary to maintain the content or service in conformity with the contract. If such modification negatively affects the consumer's access to, or use of, the digital content or digital service, the consumer will have the right to terminate the contract. Head 59 deals with the right of a trader liable for a lack of conformity resulting from an act or omission of a person in previous

links of the chain of transactions relating to the digital content or digital service contract to pursue remedies against that person. Head 60 provides that a term of a contract for the supply of digital content or a digital service must not exclude or limit the liability of the trader under specified provisions of Chapter 2. A trader whose contract terms contravene the head commits an offence.

4. Optional provisions in Digital Content Directive implemented in Part 3

1. Duration of the liability of the trader, and of the entitlement of the consumer to remedies, for a lack of conformity with a contract (head 21)

3.10 Article 11(2) of the Digital Content Directive provides for a two-year liability period similar to that at Article 10(1) of the Sales Directive discussed at paragraphs 2.19 to 2.21 above. It states, first, that where a contract provides for a single act of supply of digital content or a digital service or for a series of such acts, the trader shall be liable for any lack of conformity which exists at the time of supply. It further provides that, if under national law, the trader is only liable for a lack of conformity that becomes apparent within a period of time after supply, that period shall not be less than two years from the time of supply. Like the Sales Directive however, Article 11 also permits Member States to provide that the consumer's entitlement to exercise the remedies for a lack of conformity of the digital content or digital service will be subject only to a limitation period as long as such a period permits the consumer to exercise these remedies for the periods of time specified in Article 11. **In line with the approach taken to the corresponding provisions on sales contracts in Part 2, head 50 of Part 3 provides that the liability of the trader for a lack of conformity, and the entitlement of the consumer to remedies for a lack of conformity, will not be subject to a two-year liability period but will apply instead in accordance with the six-year limitation period for contract actions in the Statute of Limitations 1957.**

2. Right of consumer to withhold payment and other remedies

3.11 Recital (15) of the Digital Content Directive states that Member States should remain free to regulate the rights of parties to perform their obligations or part thereof until the other party performs its obligations. Member States should be free accordingly to regulate whether a consumer, in cases of a lack of conformity, is to be entitled to withhold payment of the price or part thereof until the trader has brought the digital content or digital service into conformity with the contract.

3.12 Head 41(9) of Part 3 specifies a number of remedies additional to the Directive's primary remedies of bringing the digital content or digital service into conformity, price reduction and termination of the contract that may be available to the consumer. These remedies include the withholding of payment in full or part by the consumer until the trader has fulfilled his or her obligations under the Part. As outlined at paragraph 2.23 above, Article 13(6) of the Sales Directive provides that the consumer

shall have the right to withhold payment of any outstanding part of the price or a part thereof until the trader has fulfilled the trader's obligations under the Directive. This right, and the conditions applying to its exercise, are given effect in heads 12(8)(b) and (10) to (11) of Part 2. As it is desirable to have the maximum possible consistency between the rights and remedies in Parts 2 and 3, the right of the consumer to withhold payment until the trader has fulfilled his obligations has been included also in heads 41(9)(b), (11) and (12) of Part 3 along with conditions for the exercise of the right. In line with the approach taken in the corresponding provisions at heads 12(7) and (8) of Part 2, heads 41(7) and (8) provide also for the consumer's entitlement to the following remedies in addition to the primary remedies specified in head 53 provided that the consumer is not seeking to recover the same loss twice:

(a) claiming damages;

(c) relying on a lack of conformity with the contract against a claim under the contract by the trader for payment of the price;

(d) seeking to recover money paid to the trader for digital content or a digital service that do not comply with the requirements of Part 3;

(e) having a lack of conformity of the digital content or digital service with the contract remedied elsewhere and recovering from the trader all reasonable costs incurred in having the lack of conformity so remedied.

3. Termination of bundle and ancillary contracts

3.13 Article 3(6) of the Digital Content Directive provides that where a single contract between the same trader and the same consumer includes in a bundle, elements of the supply of digital content or a digital service and elements of the provision of other services or goods, the Directive shall apply only to the elements of the contract concerning the digital content or digital service. It further provides that, without prejudice to Article 107(2) of Directive 2018/1972 establishing a European Electronic Communications Code,²⁴ the effects that the termination of one element of a bundle contract may have on the other elements of the bundle shall be governed by national law. Recital (34) of the Directive states that the Directive should not affect national laws governing the conditions under which a contract for the supply of digital content or digital services can be considered to be linked or ancillary to another contract that the consumer has concluded with the same or another trader, the

²⁴ Article 107(2) of Directive 2018/1972 provides, among other things, that the right to terminate contracts for electronic communications services under Article 105 of the Directive applies also to contracts for a bundle of such services or a bundle of such services with terminal equipment if the bundle comprises at least an internet access service or a publicly available number-based interpersonal communications service.

remedies to be exercised under each contract or the effect that the termination of one contract would have on the other contract.

3.14 As traders offer, and consumers enter into, bundle or mixed contracts, it was considered advisable to regulate the effects of the termination of the digital content element of such a contract on the other elements of the contract. Head 53(9) provides accordingly that where digital content or a digital service are supplied to a consumer under a contract that provides also for the sale of goods or the supply of a service, the consumer shall have the right to terminate that contract if –

- (a) the consumer would be entitled to terminate the contract under Part 3 if it were a contract for the supply of digital content or a digital service only, and**
- (b) the value of the goods or service to the consumer would be materially reduced in the absence of the digital content or digital service.**

3.15. It was thought advisable similarly to regulate the effect of the termination of a digital content or digital service contract on any ancillary contract.²⁵ Article 16 of the Consumer Rights Directive which is given effect in head 96 of Part 5 provides that where a consumer exercises the right to cancel a distance or off-premises contract in accordance with the Directive any ancillary contracts will be automatically terminated.²⁶ It further provides that Member States shall lay down rules on the termination of such contracts. Head 53(11) provides, in line with the provision in head 96, that where a consumer terminates a contract for the supply of digital content or a digital service in accordance with heads 53 and 55, any ancillary contracts will be automatically terminated without any costs to the consumer. Heads 53(12) and (13) set out the rules applying to the termination of such contracts.

3.16 Similar provisions on the termination of bundle and ancillary contracts have been included at heads 23(10) to (15) of Part 2 and at heads 68(13) to (18) of Part 4.

Views are invited on the optional provisions included in Part 3 of the Scheme and can be submitted in the response forms in the Appendix to the consultation paper.

²⁵ Head 40(1) defines ‘ancillary contract’ as a contract under which (a) the consumer acquires digital content, digital services, goods or services related to a contract for the supply of digital content or a digital service and (b) the digital content, digital service, goods or services are supplied by the trader or by a third party on the basis of an arrangement between that third party and the trader.

²⁶ A similar provision applies under Directive 2008/48/EC on consumer credit agreements.

5. Optional provisions in Digital Content Directive not implemented in Part 3

Consequences for contract of withdrawal of consent to processing of personal data

3.17 As noted above, the Digital Content Directive breaks new ground in the application of its provisions to contracts where the consumer provides personal data to the trader as well as to contracts where the consumer pays the price of the digital content or digital service. Recital (39) of the Directive states that the right of the consumer to terminate the contract in accordance with the Directive's provisions should be without prejudice to the right of the consumer under the General Data Protection Regulation (GDPR) to withdraw any consent given to the processing of the consumer's personal data. Recital (40) states that the Directive should not regulate the consequences for the contracts covered by the Directive of a withdrawal of consent to the processing of personal data by the consumer and that these consequences should remain a matter for law.

3.18 Though consideration was given to the inclusion in Part 3 of a provision dealing with the contractual consequences of a withdrawal of consent by the consumer to the processing of personal data, the Department decided against doing so after consulting with the Data Protection Commission. In the Data Protection Commission's view, the inclusion of such a provision risked creating a prescriptive rule that went beyond what was foreseen in the GDPR. This could result in a situation where new and potentially different data protection rules introduced in Member States could undermine a harmonised approach to such rules.

Application of Directive to metadata collected by trader and cases where access to digital content or digital services involves exposure to advertisements

3.19 Recital 25 of the Directive states that it should not apply to situations where the trader only collects metadata, such as information concerning the consumer's device or browsing history, except where this situation is considered to be a contract under national law. It further states that the Directive should not apply either to situations where the consumer, without having concluded a contract with the trader, is exposed to advertisements exclusively in order to gain access to digital content or a digital service. The recital adds however that Member States should remain free to extend the application of the Directive to such situations or to regulate them in other ways.

3.20 While Member States are free to apply the provisions of the Digital Content Directive where the trader collects a consumer's metadata or where a consumer is exposed to advertisements in order to gain access to digital content or a digital service, Part 3 of the Scheme does not provide for its application in such cases. A provision of this kind would substantially expand the scope of Part 3. While consumers may have some awareness that they are entering into contractual

relations when they open a social media account or give their consent to the processing of personal data for marketing purposes, they are unlikely to have a similar awareness about the collection of their metadata or their exposure to advertisements. The Digital Content Directive's review clause requires the European Commission to examine the case for the harmonisation of rules applicable to contracts for the supply of digital content or digital services other than that covered by the Directive, including rules on digital content or digital services supplied against advertisements. The review report must be completed by June 2024 and any extension of the Directive's scope should await its findings.

Views are invited on the non-implementation of the above optional provisions in Part 3 of the Scheme and can be submitted in the response forms in the Appendix to the consultation paper.

IV Part 4 Contracts for the supply of a service

1. Basis of Part 4

4.1 The provisions of Part 4 of the Scheme on contracts for the supply of services differ from those in the other main Parts of the Scheme in that they do not give effect to the provisions of an EU Directive. The matters relating to service contracts dealt with in Part 4 are currently regulated by Part IV (Supply of Services) of the Sale of Goods and Supply of Services Act 1980.²⁷ Part IV contains four sections as follows:

- Section 39 Implied undertakings as to quality of service;
- Section 40 Exclusion of implied terms;
- Section 41 Statements purporting to restrict rights of recipient of service;
- Section 42 Conflict of laws.

In sectors such as financial services, electronic communications, utilities and passenger travel, sector-specific legislation of EU and/or domestic origin regulates various aspects of the services concerned, including the rights of users of these services.

4.2 Section 39 of the 1980 Act implies certain terms into service contracts, principally that the supplier of the service has the necessary skill to render the service and will supply it with due skill, care and diligence. Section 40 provides however that a term implied into a consumer service contract by section 39 may be negated or varied by an express term of the contract if that express term is fair and reasonable and has been specifically brought to the attention of the consumer. Section 41 deals with statements likely to be taken as indicating that a right or a liability arising under section 39 is restricted or excluded other than in accordance with section 40.²⁸ Section 42 provides that where a term in a contract for the supply of a service in the course of a business has the effect of substituting the law of another country for the provisions of sections 39 and 40, those sections will apply to the contract notwithstanding that contract term.

²⁷ The revised text of the Sale of Goods and Supply of Services Act 1980 prepared by the Law Reform Commission which incorporates amendments to the Act made up to 28 May 2019 can be accessed at <https://revisedacts.lawreform.ie/eli/1980/act/16/front/revised/en/html>.

²⁸ Head 9 of Part 1 deals with representations purporting to restrict the rights of the consumer under all of the provisions of the Act and will replace section 41, and the corresponding provision relating to sales contracts at section 11, of the Sale of Goods and Supply of Services Act 1980.

4.3 The four sections of the 1980 Act given over to contracts for the supply of a service contrast with the more than 60 sections dealing with sales contracts in the Sale of Goods Acts 1893 and 1980.²⁹ As is apparent from the above summary of Part IV of the 1980 Act, the obligations it places on the suppliers of services are considerably more limited and less detailed than the statutory obligations on the sellers of goods. Unlike the Sale of Goods Act 1893 and the Regulations which give effect to the 1999 Sales Directive, moreover, the 1980 Act contains no remedies' provisions where services do not comply with the requirements of the Act.

4.4 The Department considers that there is a clear need to strengthen the rights of consumers in service contracts and to introduce statutory remedies for consumers where the service provided by a trader does not comply with those rights. The more extensive legislative regulation of consumer sales contracts reflects an earlier stage of economic development in which spending on goods accounted for the greater part of consumer expenditure. That is no longer the case and the statutory provisions regulating service contracts need to be updated and extended accordingly.³⁰ For consumer sales contracts, the provisions of Part 4 of the Scheme will replace Part IV of the Sale of Goods and Supply of Services Act 1980. Part IV of the Act will continue to apply however to service contracts between traders. Part 10 and Schedule 6 of the Scheme provide for the necessary amendments to the Act.

4.5 The provisions contained in Part 4 of the Scheme will, subject to some necessary modifications entailed by the specific character of service contracts, bring the rights and remedies in consumer service contracts more into line with those for other types of consumer contract. In Part 3 of the Scheme, the provisions applying to digital service contracts are, with limited exceptions, the same as those applying to digital content contracts. The rights and remedies applying to both digital content and digital service contracts in Part 3 of the Scheme are also largely the same as those applying to sales contracts in Part 2. The rules on unfair commercial practices in the Consumer Protection Act 2007 apply equally to commercial practices relating to goods, digital content, digital services and services.

²⁹ The Sale of Goods Acts 1893 and 1980 is the collective citation for the Sale of Goods Act 1893 and Part II of the Sale of Goods and Supply of Services Act 1980.

³⁰ According to the most recent Central Statistics Office Household Budget Survey, expenditure on goods accounted for less than a third of household expenditure in 2015-2016, <https://www.cso.ie/en/releasesandpublications/ep/p-hbs/hbs20152016/> .

2. Scope of Part 4

4.6 Part 4 applies to service contracts other than contracts for the supply of a digital service. Subject to the exclusion of digital service contracts, the provisions of the Part will apply to all contracts between a trader and a consumer for the supply of a service.³¹ Head 2(1) of Part 1 defines 'service' as any service or facility other than a service provided under a contract of employment, including without limitation -

- (a) a service or facility for –
 - (i) financial services or advice,
 - (ii) other professional services or advice,
 - (iii) amusement, cultural activities, entertainment, instruction, recreation or refreshment,
 - (iv) accommodation,
 - (v) communication, including electronic communication,
 - (vi) transport, travel, parking, or storage,
 - (vii) the care and maintenance of persons, animals or things, or
 - (viii) the construction, maintenance or repair of buildings,
- (b) the supply of water, gas or electricity not supplied in a limited volume or set quantity and of district heating;
- (c) any rights, benefits, privileges, obligations or facilities that are, or are to be provided, granted, or conferred in the course of a service.

³¹ In accordance with the definition of 'service contract' in head 2(1) of Part 1, Part 4 of the Scheme applies only to service contracts where the consumer pays the price of the service and, unlike Part 3, does not apply to contracts where the consumer provides personal data to the trader. Heads 62(6) and (7) of the Part 4 provide that the Minister for Enterprise, Trade and Employment may by regulations provide that the Part will apply to contracts where the consumer provides personal data to the trader if the Minister is satisfied that such contracts are being concluded on a significant scale and that their regulation would be in the interest of consumer protection and fair competition.

4.7 The definition of 'service' in section 2(1) of the Sale of Goods and Supply of Services Act 1980 states only that 'it does not include meteorological, or aviation services provided by the Minister for Transport or anything done under a contract of service'. The application of the provisions on the supply of services in Part IV of the Act is also excluded or restricted as follows:

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

4.8 In its final report, the Sales Review Group stated that the restrictions on the scope of Part IV of the Act had no place in a competitive economy or in a modern regulatory system and should be repealed. The exclusions in sections 2(1) and 40 of the 1980 Act are not retained in head 62 which specifies the application of Part 4. While the exclusions relating to universal postal services and the carriage of goods by road cited above will no longer apply to consumer service contracts following the restriction of section 39 to service contracts between traders, head 62(4) provides that the provisions of Part 4 are subject to any other enactment that defines or limits rights, obligations or liabilities in relation to a service and to

the provisions of international conventions to which Ireland or the European Union are party. This applies, first, to statutory provisions such as section 26A of the Solicitors (Amendment) Act 1994 which provides for a cap on the civil liability of solicitors and section 26 of the Communications Regulation (Postal Services) Act 2011 which limits the liability of a universal postal service provider. It applies, secondly, to international conventions such as the Warsaw Convention which regulates liability for the international carriage by air of persons, luggage and goods. Head 62(5) provides that regulations made by the Minister for Enterprise, Trade and Employment may provide that Part 4 or a provision of the Part will not apply to a service prescribed in the regulations or will apply only in the circumstances specified in the regulations.

3. Summary of Part 4

Chapter 1 (Application – heads 61-62)

4.9 Chapter 1 contains definitions of a number of terms that are found only in Part 4 of the Scheme; outlines the contracts to which the Part does, and does not, apply; and specifies the remedies additional to those in Chapter 3 of the Part that may be available to consumers.

Chapter 2 (Consumer rights in contracts for the supply of a service - heads 63 to 67) Supply of the service (head 63)

4.10 The time at, or by, which a trader is required to provide a service under a contract with a consumer is not regulated by Part IV of the Sale of Goods and Supply of Services Act 1980. As consumers can experience inconvenience and, in some cases, loss when traders fail to supply a service at the agreed or specified time, it is desirable to introduce rules on the time of supply of service contracts and remedies for a failure by the trader to supply the service at the required time.

4.11 The provisions of head 63 of Part 4 on the supply of the service are broadly similar to those of head 32 of Part 2 on the delivery of the goods and of head 43 of Part 3 on the supply of the digital content or digital service. The trader must supply the service at the time or within the time agreed with the consumer or the time specified in the pre-contractual information provided to the consumer. Where no such time or time period has been agreed or specified, the trader is required to provide the service within a reasonable time of the conclusion of the contact.

4.12 If the trader does not supply the service at the required time or within the required time period, the consumer's first recourse is to call upon the trader to supply the service within an additional period of time appropriate to the circumstances. The consumer is not required however to give the trader a second opportunity of this kind to supply the service if the trader has declared, or it is clear from the circumstances, that the trader will not supply the service; if the supply of the service within the

agreed time period is essential; or if the consumer has informed the trader that the supply of the service on or by a specified date is essential. Where the trader has refused to supply the service or has failed to supply it within the additional or required time, the consumer has the right to terminate the contract.

Conformity of the service with the contract (heads 64-67)

4. 13 Like the corresponding provisions at heads 16-17 of Part 2 and heads 46-47 of Part 3, the provisions on the conformity of the service with the contract in Part 4 distinguish between the subjective and objective requirements for conformity. **The subjective conformity requirements at head 65 provide, first, that the service must comply with the terms of the service contract, and with any oral or written statement to the consumer by or on behalf of the trader on which the consumer relied when deciding to enter into the contract. The latter requirement aims to offer protections to consumer when a trader says or writes something about the quality or other aspects of a service with which the service does not subsequently comply. It is a form of counterpart to the requirement on goods, digital content and digital services to comply with their description.**

4.14 Under section 39 of the Sale of Goods and Supply of Services Act 1980, the supplier of a service has no liability if the service fails to achieve a purpose or result indicated by the consumer provided that the supplier has exercised due skill, care and diligence. Head 65 of Part 4 provides that a service must be reasonably fit for any purpose which the consumer made known to the trader before the conclusion of the contract and which the trader accepted. It further provides that the service must be of a nature and quality that can reasonably be expected to achieve any result that the consumer made known to the trader as the result he or she wished the service to achieve and which the trader accepted. These provisions extend the rights of consumers in service contracts and bring them closer to the requirements applying in contracts for the sale of goods and the supply of digital content. It is important to note however that the provision relating to the result of the service does not require the service to achieve a particular result but rather that the service should be such that it can reasonably be expected to achieve the result in question. If the supplier of a service considers that he or she is not in a position to provide a service reasonably fit for the purpose, or one that can reasonably be expected to achieve the result, made known by the consumer, he or she can decline to accept the purpose or result proposed by the consumer. In accordance with head 3(10) of Part 1, the reasonableness of the consumer's purpose or expectation is to be objectively ascertained.

4.15 The objective requirements for the conformity of a service with the contract in head 66 of Part 4 provide in line with section 39 of the Sale of Goods and Supply of Services Act that the trader shall have the necessary skill to provide the service and

shall provide it with reasonable care and skill. Head 66 also includes the following additional requirements:

- the trader must provide the service in accordance with any applicable statutory or other binding legal rules;
- a trader who purports to provide a service to a higher standard of care and skill than the general standard which applies under head 66 must exercise that standard of care and skill in providing the service;
- a trader who is, or purports to be, a member of a professional body of service providers for which standards of care and skill have been set by that body or by a public authority must exercise those standards of care and skill in providing the service.
- a trader who is, or purports, to be bound by a code of practice relating to the supply of a service must abide by that code in providing the service.

4.16 Head 67 provides that where the consumer has not paid the price for the service or the price has not been fixed by the contract or in some other way, the price payable for the service shall be a reasonable price.

Chapter 3 (Consumer remedies in contracts for the supply of a service - heads 68-72)

4.17 As noted above, Part IV of the Sale of Goods and Supply of Services Act 1980 is silent on the remedies available to consumers where the services provided by a trader are not in compliance with the Part's provisions. As consumer remedies are as necessary and important in service contracts as in sales or digital content contracts, Chapter 3 of Part 4 sets out the remedies to which consumers are entitled for a lack of conformity of a service with the contract. These remedies are broadly in line with the remedies that apply in Parts 2 and 3 and provide –

- where a service is not in conformity with the contract, the right of the consumer to have the service brought into conformity free of charge, within a reasonable time and without any significant inconvenience to the consumer other than where this would be impossible or would impose disproportionate costs on the trader;³²

³² As with digital content and digital service contracts, Part 4 does not provide for the short-term right of the consumer to terminate the contract which applies to sales contracts in Part 2.

- **the right of the consumer to a proportionate reduction of the price or to terminate the contract where³³ -**
 - (e) the trader does not have the necessary skill to provide the service,**
 - (f) bringing the service into conformity is impossible or would impose disproportionate costs on the trader,**
 - (g) the trader has declared, or it is clear from the circumstances that the service will not be brought into conformity within a reasonable time or without significant inconvenience to the consumer**
 - (h) the trader has failed to bring the service into conformity within a reasonable time or without significant inconvenience to the consumer,**
 - (i) the same or a different lack of conformity becomes apparent despite the trader's attempt to bring the service into conformity with the contract;**
 - (j) the lack of conformity is of such a serious nature as to justify an immediate price reduction or the termination of the contract;**
 - (k) the service, or any goods produced by or resulting from the service, are unsafe (heads 68(8) to (12)).**

4.18 Where the consumer terminates the contract, heads 71 and 72 provide that the trader must reimburse the consumer for all payments made under the contract without undue delay and not later than 14 days from the date on which the trader was informed of the consumer's decision to terminate the contract. Unless the consumer agrees otherwise, reimbursement must be made by the same means of payment used by the consumer for his or her payment and must not be subject to any fee imposed by the trader. Where the contract provides for the supply of the service over a period of time, the trader is required to reimburse the consumer only for the part of the price paid for the period during which the service was not in conformity with the contract. Heads 68 and 72 provide that the Competition and Consumer Protection Commission may take enforcement action against a trader who fails or refuses to provide a remedy or a reimbursement to which a consumer is entitled under Chapter 3.

³³ The right to terminate the contract will not apply where the lack of conformity of the digital content or digital service is minor. The burden of proof as to whether a lack of conformity is minor will be on the trader.

Exclusion or limitation of liability of trader (head 73)

4.19 As noted above, section 40 of the Sale of Goods and Supply of Services Act 1980 provides that the terms implied into service contracts by section 39 of the Act - including the terms requiring the seller to have the necessary skill to render the service and to supply it with due skill, care and diligence - can be negated or varied by an express term of the contract if that express term is fair and reasonable and has been specifically brought to the attention of the consumer. By contrast, contract terms which exclude or restrict the terms implied into consumer sales contracts by the Sale of Goods Act 1893 are void. The Sales Directive and the Digital Content Directive provide that any contractual agreement which, to the detriment of the consumer, excludes, derogates from, or varies the national measures which give effect to the Directive shall not be binding on the consumer.

4.20 The Sales Law Review Group observed that the differential treatment of exemption clauses in sales and service contracts was the legacy of a period in which the regulation of service contracts was new and, as a result, was undertaken in a tentative and qualified way. The Review Group recommended that the statutory provisions governing exemption clauses in service contracts should be put on the same footing as those for sales contracts and should provide that such terms would be void in consumer contracts. Head 73 provides in line with this recommendation and with the corresponding provisions on sales and digital content contracts in Parts 2 and 3 that a term of a contract for the supply of a service must not exclude or limit the liability of the trader under the relevant provisions of Chapter 2. A trader whose contract terms contravene the head will commit an offence.

Views are invited on the provisions of Part 4 of the Scheme and can be submitted in the response forms in the Appendix to the consultation paper.

V Part 5 Consumer information and cancellation rights

1. Basis of Part 5

5.1 Part 5 of the Scheme gives effect to Chapters I to IV of Directive 2011/83/EU on consumer rights, the Consumer Rights Directive.³⁴ The Directive is currently given effect by the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013).³⁵ Part 5 also implements the more than forty amendments made to the Consumer Rights Directive by Article 4 of Directive (EU) 2019/2161 on the better enforcement and modernisation of EU consumer rights, the Better Enforcement Directive.³⁶

5.2. The Consumer Rights Directive has been included in the Scheme for two principal reasons. First, its provisions on pre-contractual information for on-premises, distance and off-premises contracts and on the right to cancel distance and off-premises contracts are closely related to the contract law provisions in other Parts of the Scheme.³⁷ Secondly, the number of amendments made to the Directive by the Better Enforcement Directive is such that their implementation by means of amendments of the 2013 Regulations would make the Regulations difficult to follow for consumers and traders. Incorporating the Directive as amended in Part 5 will help to make its provisions more accessible and comprehensible.

5.3. Like the Sales and Digital Content Directives, the Consumer Rights Directive is, with limited exceptions, a maximum harmonisation measure. The focus of the consultation on Part 5 accordingly is, first, on the extension of the Directive's provisions on pre-contractual

³⁴ The text of the Consumer Rights Directive can be accessed at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&from=EN> .

³⁵ The text of the Regulations that give effect to the Directive can be accessed at <http://www.irishstatutebook.ie/eli/2013/si/484/made/en/print>. The Department of Jobs, Enterprise and Innovation undertook two consultations on the implementation of the Directive. These can be accessed at <https://enterprise.gov.ie/en/Consultations/Consultation-on-Article-19-and-Article-22-Directive-2011-83-EU-on-Consumer-Rights.html> and <https://enterprise.gov.ie/en/Consultations/Consultation-on-the-Implementation-of-Directive-2011-83-EU-on-Consumer-Rights.html> .

³⁶ The text of the Better Enforcement Directive can be accessed at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L2161&from=EN> .

³⁷ On-premises contracts are contracts concluded between the trader and the consumer in the trader's business premises. Distance contracts are contracts concluded through the exclusive use of means of distance communication such as online contracts and contracts concluded by telephone. Off-premises contracts are primarily contracts concluded away from the business premises of the trader, including at the consumer's home. These terms are more fully defined in head 74(1) of Part 5.

information and the right of cancellation to certain contracts excluded from the scope of the Directive and of the 2013 Regulations. Views are also sought on a number of new optional provisions relating to off-premises contracts inserted in the Directive by the Better Enforcement Directive.

2. Scope of Part 5

5.4 The Consumer Rights Directive and Part 5 of the Scheme apply to the following contracts between a trader and a consumer:

- (f) sales contracts;
- (g) service contracts;
- (h) contracts for the supply of digital content not supplied on a tangible medium;
- (i) contracts for the supply of water, gas or electricity not supplied in a limited volume or set quantity;
- (j) contracts for the supply of district heating.³⁸

More detailed information about the contracts covered by Part 5 can be found in the application provisions at heads 75, 76 and 86 of the Part and in the footnotes to these heads. Definitions of the main terms used in Part 5 can be found in the interpretation provisions in head 74 of the Part and in head 2 of Part 1.

5.5 Article 3(3) of the Consumer Rights Directive as adopted listed a large number of contracts to which its provisions did not apply, including contracts for social services; healthcare; gambling; financial services; immovable property; the construction of new buildings; the substantial conversion of existing buildings; time share; and package travel. With the exception of three specified provisions, passenger travel contracts were also excluded from the application of the Directive. An amendment to the Directive made by the Better Enforcement Directive provides that a fourth provision will now also apply to passenger travel contracts. A new Package Travel Directive adopted in 2015 also amended the previous blanket exclusion of package travel contracts from the scope of the Consumer Rights Directive to provide that a number of its provisions would apply to these contracts.

³⁸ Recital (19) of the CRD states that contracts for the supply of digital content; 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 should be classified as neither sales nor service contracts for the purposes of the Directive. Contracts for the supply of digital services are regarded as service contracts however for the purposes of the Directive.

5.6 Recital (13) of the Consumer Rights Directive states however that Member States remain competent in accordance with Union law to apply the provisions of the Directive to areas not falling within its scope. Member States may therefore ‘maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive’. As the Directive was transposed by Regulations made under the European Communities Act 1972, the option to extend its provisions in this way did not apply to its transposition in 2013 as Regulations made under the 1972 Act can be used only to implement measures ‘necessitated by the obligations of EU membership’. National measures which give effect to optional provisions in EU legislation, or which apply the provisions of EU legislation to areas outside the scope of that legislation, or which exceed the provisions of EU legislation in accordance with minimum harmonisation provisions, can be given effect only through primary legislation.

5.7 As the Consumer Rights Directive is now to be given effect in primary legislation, Part 5 proposes to extend the Directive’s information and cancellation provisions to social services contracts, and its information requirements for on-premises contracts to healthcare contracts. It further provides in accordance with the minimum harmonisation status of the information requirements for on-premises contracts in Chapter II of the Directive that the Minister for Enterprise, Trade and Employment may make Regulations prescribing additional information requirements for on-premises contracts generally or for different classes or types of on-premises contract. Lastly, Part 5 provisionally proposes to implement an optional provision added to the Directive by the Better Enforcement Directive which permits Member States to increase the cancellation period for certain off-premises contracts from 14 days to 30 days. These provisions are outlined in greater detail below. Two further optional provisions relating to certain off-premises contracts added to the Directive by the Better Enforcement Directive which are not implemented in Part 5 are also considered below.

3. Summary of Part 5

5.8 Chapter 1 of Part 5 gives effect to Chapter I of the Consumer Rights Directive and defines terms that feature only in Part 5 and specifies the contracts to which the Part does, and does not, apply (heads 74-75).

Chapter 2 of Part 5 which gives effect to Chapter II of the Consumer Rights Directive specifies the pre-contractual information requirements that apply to on-premises contracts (heads 76-77).

Chapter 3 of Part 5 gives effect to the pre-contractual information requirements for distance and off-premises contracts in Articles 6 to 8 of Chapter III of the Directive (heads 78-85).

Chapter 4 of Part 5 gives effect to the right of consumers to cancel off-premises and distance contracts in Articles 9 to 16 of Chapter III of the Directive and sets out the conditions governing the exercise of this right (heads 86-97).

Chapter IV of the Directive which is given effect in Part 6 of the Scheme deals with a miscellaneous set of other consumer rights.

Amendments made to Consumer Rights Directive by Better Enforcement Directive

5.9 As indicated above, Directive (EU) 2019/2161 on the better enforcement and modernisation of EU consumer protection rules has made a large number of amendments to the Consumer Rights Directive. These amendments are implemented as follows in Part 5, Part 1 and Schedules 1 to 3 of the Scheme:

- the amendments and additions to the definitions in Article 2 of the Directive are given effect in head 2(1) of Part 1 and head 74(1) of Part 5;
- the amendments to the application provisions in Article 3 of the Directive are given effect in heads 75, 76 and 78 of Part 5;
- the amendments to the pre-contractual information requirements for on-premises contracts in Article 5 of the Directive are given effect in head 77 of Part 5 and in Schedule 1;
- the amendments to the pre-contractual information requirements for off-premises and distance contracts in Article 6 of the Directive are given effect in head 79 of Part 5 and in Schedule 2;
- the additional specific information requirements for contracts concluded on online marketplaces inserted at Article 6a of the Directive are given effect in head 83;
- the amendment of Article 7(3) of the Directive on the commencement during the cancellation period of the performance of off-premises contracts for the supply of a service, for the supply of water, gas or electricity not put up for sale in a limited volume or set quantity, and for the supply of district heating, is given effect in head 94;
- the amendment of Article 8(4) of the Directive on the provision of pre-contractual information in contracts concluded through means of distance communication which allow limited space or time to display the information is given effect in head 82(7);
- the amendment of Article 8(8) of the Directive on the commencement during the cancellation period of the performance of distance contracts for the supply of a service, for the supply of water, gas or electricity not put up for sale in a limited volume or set quantity, and for the supply of district heating, that place the consumer under an obligation to pay is given effect in head 94;
- the optional provision inserted in Article 9(1a) of the Directive for an increase from 14 to 30 days in the cancellation period for off-premises contracts concluded in the context of

unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, and the consequential amendment to Article 9(2), are given effect in heads 88 and 89;

- the consequential amendment to Article 10(2) of the Directive arising from the optional provision inserted in Article 9(1a) is given effect in head 89;
- the additional paragraphs (4) to (8) added to Article 13 of the Directive on the obligations of the trader in the event of the cancellation of the contract are given effect in heads 92(7) to (11);
- the additional paragraph 2(a) inserted in Article 14 of the Directive on the obligations of the consumer in the event of the cancellation of the contract is given effect in head 93(9) and the amendment to Article 14(4)(b)(ii) is given effect in head 95(1)(a);
- the amendment of Article 16(a) of the Directive on the exception to the right of cancellation for specified service contracts is given effect in head 86(2)(b) and the amendment of Article 16(m) on the exception to the right of cancellation for specified contracts for the supply of digital content is given effect in head 86(2)(d);
- the amendment of Annex I of the Directive is given effect in Schedule 3.

5.10 In addition to the above amendments of specific provisions of the Consumer Rights Directive, the Better Enforcement Directive also makes important changes to the enforcement provisions of the Consumer Rights, Unfair Contract Terms, Unfair Commercial Practices, and Price Indications Directives. The new enforcement provisions set out, first, a range of indicative and non-exhaustive criteria to be taken into account by courts and administrative authorities in imposing penalties for infringements of the national measures which give effect to all four Directives. Head 115(2) of Part 8 gives effect to these criteria in respect of penalties imposed for infringements of Parts 5, 6 and 7 of the Scheme. Head 130 of Part 9 provides for the required amendment of section 79 (Fines and penalties) of the Consumer Protection Act 2007 in respect of infringements of the Unfair Commercial Practices Directive, the provisions of which are given effect in Parts 3 and 4 of the 2007 Act.

5.11 The Better Enforcement Directive also includes provisions for the amendment of the Consumer Rights, Unfair Contract Terms and Unfair Commercial Practices Directives to provide for the imposition of enhanced penalties for infringements of these Directives imposed in accordance with Article 21 of Regulation (EU) 2017/2394 on co-operation between national authorities responsible for the enforcement of consumer protection laws.³⁹

³⁹ The Regulation can be accessed at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R2394&from=EN> . The measures necessary for the implementation of the Regulation are contained in the European Union (Cooperation Between

Article 21 deals, among other things, with enforcement measures and penalties against traders responsible for a 'widespread infringement' or a 'widespread infringement with a Union dimension' of EU consumer protection laws. A 'widespread infringement' is an act or omission contrary to EU consumer protection laws that harms the collective interests of consumers in at least 2 Member States other than the Member State in which the act or omission originated or took place, or in which the trader responsible for the act or omission is established. A 'widespread infringement with a Union dimension' is a widespread infringement that harms the collective interests of consumers in at least two-thirds of EU Member States that together account for at least two-thirds of the population of the EU. The amendments to the enforcement provisions of the Consumer Rights, Unfair Contract Terms and Unfair Commercial Practices Directives require Member States to ensure that the penalties imposed for both types of infringement shall 'include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4% of the trader's annual turnover in the Member State or Member States concerned'. In cases where information on the trader's annual turnover is not available, Member States must 'introduce the possibility to impose fines, the maximum amount of which shall be at least EUR 2 million'.

5.12 Head 115(4) of Part 8 provides that a person who commits an offence under Parts 5, 6 or 7 of the Scheme which constitutes a widespread infringement or a widespread infringement with a Union dimension of a provision of these Parts shall be liable to the penalties provided for in Regulation 8 of the European Union (Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws) 2020. Head 130 provides for a similar amendment to section 79 of the Consumer Protection Act 2007. Head 139 provides for the amendment of Regulation 8 of the European Union (Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws) 2020 to provide for the fine of up to 4% of annual turnover for widespread infringements and widespread infringements with a Union dimension required by the amendments of the Consumer Rights, Unfair Contract Terms and Unfair Commercial Practices made by the Better Enforcement Directive.

4. Optional provisions in Consumer Rights Directive implemented in Part 5

Extension of information requirements and cancellation right to contracts for social services

5.13 Article 3(3)(a) of the Consumer Rights Directive provides that the Directive shall not apply to contracts for social services, including 'social housing, childcare and support of families and persons permanently or temporarily in need, including long-term care'. Recital

National Authorities Responsible for the Enforcement of Consumer Protection Laws) Regulations 2020 (S.I. No. 14 of 2020). The Regulations can be accessed at <http://www.irishstatutebook.ie/eli/2020/si/14/made/en/print> .

(29) of the Directive stated that social services were excluded from the scope of the Directive because the Directive's provisions were not appropriate to services of this kind. Their exclusion arose in large part from the fact that these services are wholly or mainly provided on a non-market basis by public authorities in many Member States. The exclusion of social services from the scope of the Directive was given effect in Regulation 3(2)(a) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 which transposed the Directive. As noted above, the Directive's transposition by Regulations made under the European Communities Act 1972 precluded any application of its provisions to contracts excluded from the scope of the Directive.

5.14 As the Consumer Rights Directive is now to be given effect in primary legislation, Part 5 proposes to extend the Directive's pre-contractual information requirements for on-premises, off-premises and distance contracts in Chapters 2 and 3 of the Part to contracts for social services. The provisions on the application of Part 5 at head 75(5) do not provide accordingly for the exclusion of these contracts from the scope of the Part. A number of important social services such as childcare and nursing home care are provided to a greater or lesser extent in this country on a market basis and the contracts for their supply are consumer contracts. In 2019, the Competition and Consumer Protection Commission (CCPC) issued a consumer information booklet on nursing home contracts of care.⁴⁰ It stated, among other things, that given the importance and high cost of decisions about nursing home care, it was 'essential that residents are given all of the necessary information they need to make an informed decision before they commit to a contract'. The CCPC further noted that the decision to enter a nursing home 'is one that is often made with urgency and in stressful circumstances.' If a nursing home contract concluded in such circumstances is an off-premises contract within the scope of Part 5, it would be beneficial for the consumer party to such a contract to have the right to cancel the contract within fourteen days of the date on which the contract was concluded. As nursing home care and other social services are not excluded from the provisions on the application of Part 5 at head 75(5), the right to cancel the contract in Chapter 4 of the Part will apply to off-premises contracts for these services in accordance with the conditions that apply to the exercise of the right.

Extension of information requirements for on-premises contracts to healthcare contracts

5.15 Article 3(3)(b) of the Consumer Rights Directive provides that the Directive shall not apply to contracts for healthcare 'as defined in point (a) of Directive 2011/24/EU, whether or not they are provided via healthcare facilities'. That definition states that 'healthcare means health services provided via health professionals to patients to assess, maintain or restore

⁴⁰ The booklet can be accessed at <https://www.ccpc.ie/consumers/wp-content/uploads/sites/2/2019/05/Consumer-booklet-Nursing-home-contracts-of-care.pdf> .

their state of health, including the prescription, dispensation and provision of medicinal products and medical devices.’ As with contracts for social services, recital (29) of the Directive stated that social services were excluded from the scope of the Directive because the Directive’s provisions were not appropriate to services of this nature. Their exclusion was similarly prompted by the fact that these services are wholly or mainly provided on a non-market basis by public authorities in many Member States. The exclusion of healthcare contracts was given effect in Regulation 3(2)(b) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 which transposed the Directive.

5.16 Part 5 proposes to extend the Directive’s pre-contractual information requirements for on-premises contracts in Chapter 2 of the Part to contracts for healthcare. The provisions on the application of Part 5 at head 75(5) do not provide accordingly for the exclusion of these contracts from the scope of the Part. It is not proposed however to extend the information requirements for off-premises or distance contracts, or the right to cancel the contract, to healthcare contracts. The application provisions for Chapters 3 and 4 of Part 5 at heads 78 and 86 provide accordingly for the exclusion of these contracts from the scope of both Chapters. As healthcare services in Ireland are widely provided for payment and in some cases on a for-profit basis, a requirement to provide on-premises information on the price of these services before the conclusion of the contract would be of benefit to users of these services. A survey of 252 general practice doctors and dentists undertaken by the then National Consumer Agency in 2010 found that 68 per cent of dentists and 50 per cent of doctors did not display a schedule of prices on their premises.⁴¹ Although this survey is now dated and a similar survey has not subsequently been undertaken, its findings remain of interest. The National Consumer Agency commented that ‘any service provider to the public should display prices for routine services and there is no reason why doctors and dentists should not follow this practice’. It added that since the publication of the survey, it had been working with medical and dental regulatory and representative bodies with a view to implementing a code of practice for doctors and dentists to display a standard fee schedule in a prominent location at their premises. In 2011, the Dental Council published a Code of Practice Relating to the Display of Fees in Dental Practices.⁴² The Code requires dentists in general practice to display the fees for a range of specified treatments. There is no equivalent code for medical practitioners. The Medical Council’s Guide to Professional Conduct and Ethics for Registered Medical Practitioners states that ‘the fees you charge should be appropriate to

⁴¹ National Consumer Agency, *Annual Report 2010*, pp. 35-37. The Report can be accessed at <https://www.ccpc.ie/consumers/wp-content/uploads/sites/2/2017/03/NCA-2010-Annual-Report.pdf>.

⁴² The Code can be accessed at [http://www.dentalcouncil.ie/files/Display%20of%20Private%20Fees%20-%20Code%20of%20Practice%20\(Feb%202011\)%20-%2020110330.pdf](http://www.dentalcouncil.ie/files/Display%20of%20Private%20Fees%20-%20Code%20of%20Practice%20(Feb%202011)%20-%2020110330.pdf).

the service you provide. You should tell patients before the consultation and treatment what the costs are likely to be.⁴³

Additional pre-contractual information requirements for on-premises contracts

5.17. While most of the provisions of the Consumer Rights Directive are maximum harmonisation provisions, the information requirements for on-premises contracts at Article 5 of the Directive are minimum harmonisation measures. Article 5(4) states that Member States may adopt or maintain additional pre-contractual information requirements for contracts to which the Article applies. While no additional information requirements for these contracts are proposed in Chapter 2 of Part 5, head 76(5) provides that the Minister for Enterprise, Trade and Employment may by Regulations prescribe additional information requirements to apply to on-premises contracts generally or to different classes or types of on-premises contract.

Extension of cancellation period for certain off-premises contracts

5.18 Article 4(8) of the Better Enforcement Directive provides for the insertion of the following paragraph (1a) in Article 9 of the Consumer Rights Directive:

1a. Member States may adopt rules in accordance with this Directive with which the withdrawal period of 14 days referred to in paragraph 1 is extended to 30 days for contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers for the purpose of protecting legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices. Such rules shall be proportionate, non-discriminatory and justified on grounds of consumer protection.

5.19 Head 88(5) provides in line with the regulatory option for Member States for a cancellation period of 30 days for the off-premises contracts referred to in the new Article 9(1a) of the Consumer Rights Directive. As stated in the footnote to the head however, the inclusion of this option in the Scheme is provisional and a final decision has not been taken on its implementation.

Views are invited on the optional provisions included in Part 5 of the Scheme and can be submitted in the response forms in the Appendix to the consultation paper.

⁴³ Medical Council. *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* 8th Edition 2019, paragraph 44.5. The Guide can be accessed at <https://medicalcouncil.ie/news-and-publications/reports/guide-to-professional-conduct-and-ethics-for-registered-medical-practitioners-amended-.pdf> .

5. Optional provisions in Consumer Rights Directive not implemented in Part 5.

Derogation from exception to right of withdrawal for certain off-premises contracts

5.20 Article 4(12) of the Better Enforcement Directive provides for the addition of the following paragraph to Article 16 of the Consumer Rights Directive (Exceptions from the right of withdrawal):

Member States may derogate from the exceptions to the right of withdrawal set out in points (a), (b), (c) and (e) of the first paragraph for contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers for the purpose of protecting legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices. Such provisions shall be proportionate, non-discriminatory, and justified on grounds of consumer protection.

5.21 The exceptions to the right of withdrawal at Articles 16(a), (b), (c) and (e) of the Consumer Rights Directive are as follows:

(a) service contracts after the service have been fully performed but, if the contract places the consumer under an obligation to pay, only if the performance has begun with the consumer's prior express consent, and acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader;

(b) contracts for the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader and which may occur during the withdrawal period;

(c) contracts for the supply of goods made to the consumer's specifications or clearly personalised;

(e) the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery.

The effect of this optional addition to Article 16 would be to give consumers the right to cancel the contracts listed above if the contract was concluded in the context of an unsolicited visits by a trader to a consumer's home or an excursion organised by a trader with the aim or effect of promoting or selling products to consumers. Part 5 makes no provision for its implementation. The Department considers on balance that the existing provisions offer adequate and proportionate protection to consumers but will consider any views in favour of the implementation of this optional provision contained in responses to the consultation.

Conditions applying to exception to right of withdrawal for specified off-premises contracts

5.22 Article 4(12) of the Better Enforcement Directive further provides for the addition of the following paragraph to Article 16 of the Consumer Rights Directive:

In the case of service contracts which place the consumer under an obligation to pay where the consumer has specifically requested a visit from the trader for the purpose of carrying out repairs, Member States may provide that the consumer loses the right of withdrawal after the service has been fully performed provided that the performance has begun with the consumer's prior express consent.

Under Article 16(a) of the Directive, the non-application of the right to cancel a service contract that places the consumer under an obligation to pay and which has been fully performed is subject to two conditions. First, that the performance has begun with the consumer's prior express consent and, secondly, that it has begun with the consumer's acknowledgement that he or she will lose the right to cancel the contract once the contract has been fully performed. The proposed addition to Article 16 would do away with the second of these conditions in the case of service contracts for the purpose of carrying out repairs where the consumer has specifically requested a visit from the trader for this purpose. Part 5 makes no provision for its implementation. The Department considers that the condition relating to the acknowledgement of the loss of the right of withdrawal is an important protection for consumers but will consider any views in favour of the implementation of this optional provision contained in responses to the consultation.

Views are invited on the non-implementation of the above optional provisions in Part 5 of the Scheme and can be submitted in the response forms in the Appendix to the consultation paper.

VI Part 6 Other consumer rights

1. Basis of Part 6

6.1 Part 6 of the Scheme gives effect to Articles 19, 21 and 22 of Chapter IV (Other Consumer Rights) and Article 27 of Chapter V (General Provisions) of the Consumer Rights Directive. These provisions are currently implemented in Regulations 24 to 27 and 32 of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013.

6.2 Head 99 (Fees for the use of means of payment) implements Article 19 of the Directive and prohibits traders from charging consumers in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.⁴⁴

Head 100 (Additional Payments) implements Article 22 of the Directive and provides that before the consumer is bound by a contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to the reimbursement of the payment.⁴⁵

Head 101 (Charges for communication by telephone) implements Article 21 of the Directive and provides that where a trader operates a telephone line for the purpose of contacting the trader by telephone in relation to a contract concluded with the trader, the consumer is not bound to pay more than the basic rate when contacting the trader.

Head 102 (Inertia selling) implements Article 27 of the Directive and provides that where an unsolicited product is supplied by a trader to a consumer, the consumer is exempted from any requirement to provide consideration for the product.

⁴⁴ The effective scope of Article 19 has been substantially reduced by the prohibition in the Payment Services Directive 2015 given effect in Regulation 86 of the European Union (Payment Services) Regulations 2018 of payment fees for what are known as four-party payment card transactions, i.e. those in which the payment transaction involves the bank that issued the payment card to the payer and the acquirer bank that manages card transactions on behalf of the payee. These are the most common form of payment card transaction and include the Visa and MasterCard Schemes. As a result of the enactment of the 2018 Regulations, Article 19 of the Directive and Regulation 25 of the 2013 Regulations now effectively apply only to what are known as three-party payment card transactions, i.e. those involving card schemes such as American Express and Diners' Club in which the scheme owner also acts as the card issuer and acquirer.

⁴⁵ The most common form of such default options are pre-ticked boxes on websites.

2. Scope of Part 6

6.2 Like Chapters IV and V of the Consumer Rights Directive whose provisions it implements, Part 6 of the Scheme applies to the following contracts between a trader and a consumer:

- (f) sales contracts;
- (g) service contracts;
- (h) contracts for the supply of digital content not supplied on a tangible medium;
- (i) contracts for the supply of water, gas or electricity not supplied in a limited volume or set quantity;
- (j) contracts for the supply of district heating.

More detailed information about the contracts covered by Part 6 can be found in the application provision at head 98 of the Part and in the footnotes to the head.

3. Application of Part 6 of Scheme to contracts excluded from scope of Consumer Rights Directive

6.3 As outlined in paragraph 5.5 above, Article 3(3) of the Consumer Rights Directive lists a large number of contracts to which the Directive's provisions do not apply, including contracts for social services; healthcare; gambling; financial services; immovable property; the construction of new buildings; the substantial conversion of existing buildings; and time share.⁴⁶ These exclusions apply accordingly to Articles 19, 21 and 22 of the Directive, though not to Article 27. While the Directive provides that Member States may apply the Directive's provisions to contracts outside its scope, no extension of the provisions of these Articles to excluded contracts was possible in Regulations made under the European Communities Act 1972.

6.4 As Articles 19, 21, 22 of the Directive are now being implemented in primary legislation, Part 6 proposes to extend their provisions to all of the contracts excluded from the scope of the Directive other than contracts for financial services. The sectoral exclusions in Article 3(3) of the Directive were framed with the Directive's provisions on pre-contractual information and the cancellation of distance and off-premises contracts in mind and there is no policy or practical reason why the

⁴⁶ Articles 19 and 22 already apply to passenger travel contracts and an amendment in the Better Enforcement Directive provides for the application of Article 21 to these contracts also. Since 2018, Articles 19, 21 and 22 have applied to package travel contracts.

provisions of Articles 19, 21 and 22 should not, with the exception of financial services, apply to consumer contracts generally. As financial services contracts and transactions are subject to detailed sectoral regulation, an exception for these contracts is justified.

Views are invited on the extension of the scope of Part 6 of the Scheme and can be submitted in the response forms in the Appendix to the consultation paper.

VII Part 7 Unfair terms in consumer contracts

1. Basis of Part 7

7.1. Part 7 of the Scheme gives effect to Directive 93/13/EEC on unfair terms in consumer contracts, a measure generally acknowledged to be one of the most important elements of the European Union consumer acquis. Recital (9) of the Directive states that it seeks to protect consumers who acquire goods and services ‘against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.’

7.2 Unlike the Sales, Digital Content and Consumer Rights Directives implemented in Parts 2, 3, 5 and 6 of the Scheme, the Unfair Contract Terms Directive is a minimum harmonisation measure. Article 3(7) of the Directive states that Member States ‘may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.’ Chapter V of the European Commission 2008 proposal for a Directive on Consumer Rights sought to put the provisions regulating unfair contract terms on a maximum harmonisation footing.⁴⁷ The attempt failed to secure the required support from Member States and the provisions on unfair contract terms were omitted from the Directive adopted in 2011. Though almost EU consumer protection legislation is now of a maximum harmonisation character, the European Commission have indicated that there are no plans to alter the minimum harmonisation status of the Unfair Contract Terms Directive.

7.3 The amendments made to the Unfair Contract Terms Directive by Article 1 of the Better Enforcement Directive deal only with the enforcement of the Directive and leave its substantive provisions untouched. As outlined in paragraphs 5.11 and 5.12 above, head 115 of Part 8 set outs the criteria to be taken into account in the imposition of penalties for infringements of the Unfair Contract Terms, Unfair Commercial Practices and Consumer Rights Directives. It provides also that that a person who commits an offence under Parts 5, 6 or 7 of the Scheme which constitutes a widespread infringement, or a widespread infringement with a Union dimension, of a provision of these Parts will be liable to the enhanced penalties applying to infringements of these provisions under the European Union (Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws) Regulations 2020.

7.4 The Unfair Contract Terms Directive is principally given effect by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of

⁴⁷ The proposal can be accessed at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008PC0614&from=EN> .

1995).⁴⁸ These Regulations have been amended three times. The European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000 (S.I. No 307 of 2000) implemented the requirement on Member States in Article 7(2) of the Directive to ensure that organisations having a legitimate interest in protecting consumers could take an action before the courts for a decision as to whether contract terms were unfair.⁴⁹ The European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 (S.I. No. 160 of 2013) provided that an authorised body could apply to the Circuit Court as well as to the High Court for a declaration that a contract term drawn up for general use was unfair and for an injunction, including an interim injunction, against a trader using an unfair term.⁵⁰ The European Communities (Unfair Contract Terms) (Amendment) Regulations 2014 (S.I. No. 336 of 2014) gave the Commission for Communications Regulations an enforcement role in respect of unfair terms in contracts between consumers and providers of electronic communications networks and services and premium rate services.⁵¹ Section 94 of the Consumer Protection Act 2007 had earlier given the Central Bank an enforcement function under the Unfair Contract Terms Regulations in respect of consumer contracts with regulated financial service providers.

7.5 While most other Member States have availed of the Directive's minimum harmonisation status to supplement its provisions in national legislation, the Regulations that give effect to the Directive in this country have not made any substantive additions to, or extensions of, the Directive's provisions. The sole such addition made to date is the provision at section 21(6) of the Arbitration Act 2010 which provides that a term in an arbitration agreement to which one of the parties is a consumer and which provides that each party must bear his or her own costs is deemed to be an unfair term for the purposes of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.

7.6 The Department considers that after almost three decades since the Directive's adoption, it is now time to strengthen the statutory provisions governing unfair terms in consumer contracts. Developments such as the sustained growth of online transactions require more extensive and effective protections for consumers from unfair and one-sided contract terms. The businesses that use standard form consumer contracts typically have the benefit of expert legal advice in developing and deploying these contracts. The consumers who sign up to these contracts normally have no such advantage and need supportive legislative provisions to ensure that their interests are protected. Part 7 of the Scheme provides accordingly for a number of significant changes to the provisions of the Unfair Contract Terms Directive as currently given effect in the 1995 Regulations. The main such changes are summarised next. As national legislation on unfair contract terms is

⁴⁸ The Regulations can be accessed at

<http://www.irishstatutebook.ie/eli/1995/si/27/made/en/print> .

⁴⁹ <http://www.irishstatutebook.ie/eli/2000/si/307/made/en/print> .

⁵⁰ <http://www.irishstatutebook.ie/eli/2013/si/160/made/en/print> .

⁵¹ <http://www.legislation.ie/eli/2014/si/336/made/en/pdf> .

required to give full effect to the provisions of the Directive, the focus of the summary is on the provisions that extend and strengthen the protections contained in the Directive. The background to, and rationale for, the provisions concerned are set out in more detail in the footnotes to the various heads.

2. Changes to current provisions on unfair terms in consumer contracts

1. Scope of provisions (head 105)

7.7 Recital (10) of the Unfair Contract Terms states that its rules ‘should apply to all contracts concluded between sellers or suppliers and consumers’. The European Court of Justice has confirmed that the Directive is intended to apply to all sectors of economic activity.⁵² Part 7 of the Scheme applies therefore to all contracts between a trader and a consumer, including the sales, digital content, digital services, and services contracts covered by Parts 2 to 4.

7.8 Article 2(a) of the Directive read in conjunction with Article 3(1) provides that only contract terms that have not been negotiated individually are subject to the Directive’s rules. The Directive applies essentially therefore to the terms of what Article 3(2) refers to as ‘preformulated standard contract(s).’ Head 105(2)(a) provides that Part 7 will apply to both negotiated and non-negotiated contract terms. Contract terms agreed between a trader and a consumer may be thought to be more likely to be fair than ‘take it or leave it’ terms in a standard form contract, but there is no guarantee that they will be so given the asymmetry of information and bargaining power characteristic of consumer contracts. Applying the provisions of Part 7 to both negotiated and non-negotiated terms will simplify the application of these provisions to contracts that are partly negotiated and partly non-negotiated and help prevent disputes about whether or not terms have been negotiated.

7.9 The Unfair Contract Terms Directive predates the emergence of the digital economy and of contracts in which the consumer provides personal data to the trader. The Directive does not define ‘contract’ and nowhere states that only contracts where the consumer pays a price come within its scope. The European Court of Justice has held that that a guarantee contract under which a private person provided a guarantee for a loan taken out by others came within the scope of the Directive even though the guarantee contract did not include any requirement for monetary consideration on the part of the guarantor.⁵³ The European Commission’s guidance on the Directive takes the view that ‘contracts between consumers and providers of social media services must be considered to be covered by the UCTD regardless of whether consumers have to pay certain amounts of money or whether the

⁵² Case C-537/13, *Air Berlin*, paragraph 44.

⁵³ Case C-74/15 *Dumitru Tarcau* and Case C-534/15 *Dumitras*

consideration for the services consists in consumer generated content and profiling'.⁵⁴ This case law and guidance notwithstanding, it is desirable to put the matter beyond doubt. Head 105(2)(b) provides accordingly that a contract is not excluded from the application of Part 7 by reason only of the fact that the consumer does not pay a price under the contract.

2. Transparency of contract terms (head 106)

7.10 Article 5 of the Unfair Contract Terms Directive states that in 'the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain intelligible language'. Recital 20 of the Directive expands on this relatively narrow stipulation and states that 'whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms.' In a number of judgments, the European Court of Justice has held that the requirement of transparency cannot be reduced to a requirement that contract terms be 'formally and grammatically intelligible' but 'must be understood in a broader sense'. The 'requirement that a contractual term must be drafted in plain, intelligible language is to be understood as requiring also that the contract should set out transparently the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms, so that the consumer is in a position to evaluate on the basis of clear, intelligible criteria the economic consequences for him which derive from it.'⁵⁵

7.11 In addition to the requirement of Article 5 of the Unfair Contract Terms Directive that contract terms be expressed in plain intelligible language, head 106 provides that a term of a consumer contract is transparent if -

- **it is made available to the consumer in a manner which gives the consumer a real opportunity of becoming acquainted with the term before the conclusion of the contract;**
- **it is given due prominence if novel or onerous;**
- **the economic costs and consequences deriving from the term would be comprehensible to the average consumer.**

A contravention by a trader of the requirement to ensure that the terms of consumer contracts are transparent will be a prohibited commercial practice under the

⁵⁴ European Commission, 2019, *Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts*, pp. 9-10).

⁵⁵ Case C-26/13 *Kasler*, paragraphs 50-51 and 70-71. See also Case C-96/14 *Van Hove*, paragraphs 40 and 50; Case 143/13 *Matei and Matei*, paragraph 74; Case C-384/14 *Bucura*, paragraph 66; and Case C-186/16 *Andricucic*, paragraphs 44-47;.

Consumer Protection Act 2007 for the purposes of section 71 (Civil relief by way of prohibition orders), section 73 (Undertakings) and section 75 (Compliance notices) of the Act.

3. Contract terms exempt from assessment for unfairness (head 108)

7.12 Article 4(2) of the Unfair Contract Terms Directive exempts from assessment for unfairness contract terms that relate 'neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language'. This is commonly referred to as the core terms exemption. The European Court of Justice has held that 'the main subject matter of the contract' are the terms that 'lay down the essential obligations of the contract and, as such, characterise it'.⁵⁶

7.13 Head 108(1) of Part 7 gives effect to the exemption from assessment from unfairness at Article 4(2) of the Directive. Head 108(3) seeks to ensure that this exemption applies in line with the case law of the European Court of Justice and is not interpreted too broadly. Head 108(3)(a) provides accordingly that the reference to the price in the exemption provision does not include incidental or ancillary payments. Head 108(3)(b) provides that the price exemption does not include payments contingent on the occurrence or non-occurrence of a particular event.

These provisions seek, among other things, to address the widely criticised interpretation of the price-value exemption by the English Supreme Court in *Office of Fair Trading v Abbey National*.⁵⁷

4. Contract terms which are always unfair (head 110)

7.14 In the majority of EU Member States, the legislation that gives effect to the Unfair Contract Terms Directive includes a list of contract terms that are automatically and always unfair. Contract terms of this kind are commonly referred to as blacklist terms. The terms included in such lists do not have to be assessed consequently for unfairness by reference to the criteria for unfairness in Article 3(1) of the Directive which is implemented in head 107 of the Scheme.⁵⁸ A study undertaken for the European Commission concluded that lists of terms that are automatically unfair provided greater legal certainty and made it easier to tackle unfair terms.⁵⁹

⁵⁶ Case C-96/14, *Van Hove*, paragraph 33; Case C-26/13 *Kasler*, paragraph 49.

⁵⁷ [2009] UK SC 6.

⁵⁸ Article 3(1) states that a contract term shall be regarded as unfair if 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

⁵⁹ European Commission. 2017. *Study for the Fitness Check of EU consumer and marketing law: final report*, pp. 77-80.

7.15 Head 110 lists nine contract terms that are always unfair. Four of these terms come from the list of contract terms ‘which may be regarded as unfair’ in the Annex to the Unfair Contract Terms Directive. Four are based on terms included in the European Commission’s proposal for a Regulation on a Common European Sales Law and one term incorporates the provision at Article 21(6) of the Arbitration Act outlined in paragraph 7.5 above. In the Department’s view, the terms specified in head 110 are both sufficiently serious and clear to be accorded blacklist status.

7.16 A new Article 8b inserted in the Unfair Contract Terms Directive by Article 1 of the Better Enforcement Directive requires Member States to apply penalties for infringements of the national provisions giving effect to the Unfair Contract Terms Directive in cases where the contract terms are expressly defined as unfair in all circumstances in national law or where a trader continues to use contract terms that have been found unfair in a final decision by a court. Head 110 provides accordingly that a trader who concludes a contract containing a term that is regarded as always unfair under the head or who continues to use a term that has been found unfair by a court commits an offence.

5. Contract terms presumed unfair (head 111 and Schedule 4)

7.17 Article 3(3) of the Unfair Contract Terms Directive states that the Annex to the Directive contains an ‘indicative and non-exhaustive list of the terms which may be regarded as unfair’. The list of terms in the Annex, or the ‘grey list’ as it is commonly known, is reproduced in Schedule 3 of the 1995 Regulations which give effect to the Directive. A contract term listed in the Annex is not necessarily to be considered unfair, while a term that does not appear on the list may be found to be unfair. The European Court has held that the Annex ‘is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term’.⁶⁰ In keeping with the Directive’s minimum harmonisation status, recital (17) states that the scope of the Annex terms ‘may be the subjective of amplification or more restrictive editing by the Member States in their national laws.’

7.18 While the Unfair Contract Terms Directive characterises the contract terms listed in the Annex to the Directive as terms ‘which may be regarded as unfair’, head 114 provides that the terms in the corresponding list in Schedule 4 of the Scheme ‘shall be presumed to be unfair’. The presumption of unfairness would be rebuttable. The European Commission’s 2008 proposal for a revision of the Directive also provided that the indicative list of unfair terms would comprise terms which ‘are presumed to be unfair’. **The list of terms presumed unfair at Part 1 of Schedule 4 includes at paragraphs 4, 8, 12,**

⁶⁰ Case C-472/10, *Nemzeti*, paragraph 26.

14, 20, 21, 22 and 23 a number of additions to the list of terms in the Annex to the Directive. The continued use in a consumer contract of a term presumed unfair in accordance with Schedule 4 will be a prohibited commercial practice under the Consumer Protection Act 2007 for the purposes of section 71 (Civil relief by way of prohibition orders), section 73 (Undertakings) and section 75 (Compliance notices) of the Act.

6. Duty of court to consider unfairness of term (head 112)

7.19 Head 112 provides that in proceedings before a court relating to a term of a consumer contract, the court shall be required to assess whether the term is unfair regardless of whether a party to the proceedings has raised that question or indicated that it intends to raise it. The head gives statutory effect to the obligation on national courts in EU Member States to assess *ex officio* whether a clause in a consumer contract is unfair. This obligation has been laid down by the European Court of Justice in a number of judgments.⁶¹ It was recognised by the High Court in *Allied Irish Banks v Coughlin*,⁶² and affirmed by the Supreme Court in *Pepper Finance (Ireland) DAC v Cannon*.⁶³ In line with the case law of the European Court of Justice, the head provides that the obligation on courts does not apply unless the court considers that it has a sufficient legal and factual basis for the assessment of the unfairness of contract terms.

Views are invited on the provisions of Part 7 of the Scheme that extend the provisions and strengthen the protections of the Unfair Contract Terms Directive and can be submitted in the response forms in the Appendix to the consultation paper.

⁶¹ Case C-168/05 *Mostazo Claro*; Case C-40/08 *Asturcom Telecomunicaciones SL v Maria Cristina Rodríguez Nogueira*; Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*; and Case C-488/11 *Asbeek Brusse and de Man Garabito v Jahani BV*.

⁶² [2016] IEHC 752.

⁶³ [2020] IESC 2.

VIII Part 9 Amendment of Consumer Protection Act 2007

1. Summary of amendments to Act

8.1 Article 3 of the Better Enforcement Directive provides for a sizeable number of amendments to Directive 2005/29/EC on unfair commercial practices (UCPD). The Directive is given effect in Parts 3 and 4 of the Consumer Protection Act 2007. Though the UCPD is not a contract law measure,⁶⁴ Part 9 of the Scheme provides for the required amendments to the 2007 Act.

8.2 The amendments to the substantive provisions of the Directive are implemented as follows in Part 9:

- head 116 gives effect to the amendments of Article 2 of the UCPD made by Article 3(1) of the Better Enforcement Directive by inserting new definitions of 'online marketplace' and 'ranking' and amends the definition of 'product' in section 2(1) of the 2007 Act;
- head 118 inserts a new section 45A in the 2007 Act to give effect to the addition to Article 6(2) of the Directive by Article 3(3) of the Better Enforcement Directive of a provision on the marketing of goods in a Member State as identical to goods with different composition or characteristics marketed in other Member States;
- head 119 gives effect to the amendment of Article 7(4)(d) of the UCPD by Article 3(4) of the Better Enforcement Directive and to the addition of a new paragraph 7(4)(f) stipulating that whether or not a third party offering products on an online marketplace is a trader shall be regarded as material information in the case of an invitation to purchase;
- head 119 gives effect also to the new paragraph 4(a) inserted in Article 7 of the UCPD by Article 3(4) of the Better Enforcement Directive that information relating to the main parameters determining the ranking of products presented to a consumer as a result of an online search query shall be regarded as material information in the case of an invitation to purchase;
- head 119 further gives effect to the new paragraph 6 inserted in Article 7 of the UCPD by Article 3(4) of the Better Enforcement Directive which stipulates that where a trader provides access to consumer reviews of products, information about whether and how the trader ensures that such reviews originate from consumers who have actually used or

⁶⁴ Article 3(3) of the Directive provides that it is 'without prejudice to contract law'.

purchased the products shall be regarded as material information in the case of an invitation to purchase.

- head 121 gives effect to the following additions made by Article 3(7) of the Better Enforcement Directive to the 'blacklist' of commercial practices considered unfair in all circumstances at Annex 1 of the UCPD:
 - (a) 11a. Providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results.
 - (b) 23a. Reselling event tickets to consumers if the trader acquired them by using automated means to circumvent any limit on the number of tickets that a person can buy or any other rules applicable to the purchase of tickets;⁶⁵
 - (c) 23b. Stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that the reviews originate from such consumers;
 - (d) 23c. Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products.

8.3. As its title suggests, the Better Enforcement Directive makes a number of amendments to the UCPD with a view to enhancing the effectiveness of its enforcement and the redress available to consumers. These amendments include the provisions for greatly enhanced fines for widespread infringements, and widespread infringements with a Union dimension, of a number of EU consumer protection laws outlined at paragraphs 5.11 and 5.12 above. Head 130 provides for the required amendment to section 79 (Fines and penalties) of the Consumer Protection Act 2007.

⁶⁵ Though the regulation of the resale of event tickets is dealt with in the Sale of Tickets (Cultural, Entertainment, Recreational and Sporting Events) Bill 2021, the UCPD provision on the resale of tickets acquired by automated means is given effect in an amendment to section 55 of the Consumer Protection Act for two reasons. First, the scope of the UCPD and of the Consumer Protection Act is limited to transactions between traders and consumers while the Sale of Tickets Bill applies to all ticket sales regardless of the status of the seller. Secondly, EU consumer protection legislation gives rise to specific obligations in respect of co-operation between enforcement authorities in different Member States and other matters. This function is appropriate to the Competition and Consumer Protection Commission which is the principal competent authority for the purposes of the EU consumer protection cooperation regime, but would not be appropriate to the Garda Síochána which will have responsibility for enforcing the legislation on the sale of tickets.

8.4 A new Article 11a (Redress) inserted in the UCPD by Article 3(5) of the Better Enforcement Directive provides as follows:

Consumers harmed by unfair commercial practices shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.

Section 74 of the Consumer Protection Act already provides a right of action for damages for consumers aggrieved by an act or practice prohibited under the Act. Head 127 provides for the insertion of a new section 74A into the Act to give consumers a right also to a reduction of the price or to the termination of the contract. The conditions under which consumers will have a right to these remedies will be specified in regulations to be made by the Minister for Enterprise, Trade and Employment.

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

2. Optional provision in Unfair Commercial Practices Directive not implemented in Part 9

8.6 Article 3(2) of the Better Enforcement Directive provides for the addition of the following paragraph (5) to Article 3 of the UCPD:

5. This Directive does not prevent Member States from adopting provisions to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits to the consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers. Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection.

Part 9 of the Scheme does not include any provisions along these lines.

Views are invited on the non-implementation of the above optional provision in Part 9 of the Scheme and can be submitted in the response forms in the Appendix to the consultation paper.

IX Amendment of Directive 98/6/EC on the indication of product prices

9.1 Article 2 of the Better Enforcement Directive provides for the insertion of the following new Article 6a in Directive 98/6/EC on the indication of the price of products offered to consumers:

1. Any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction.
2. The prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction.
3. Member States may provide for different rules for goods which are liable to deteriorate or expire rapidly.
4. Where the product has been on the market for less than 30 days, Member States may also provide for a shorter period of time than the period specified in paragraph 2.
5. Member States may provide that, when the price reduction is progressively increased, the prior price is the price without the price reduction before the first application of the price reduction.

As the Price Indications Directive is not a contract law measure, the amendments to the Directive contained in the Better Enforcement Directive will be implemented by amendments to the Regulations which give effect to the Directive, the European Communities (Requirements to Indicate Produce Prices) Regulations 2002 (S.I. No. 639 of 2002).⁶⁶

9.2 The announcement of a temporary price reduction in the price of goods or services is a common and well-established commercial practice. Claims that the prices have been reduced by a specified percentage or amount can be a cause of detriment to consumers however if the basis of the claim, in particular the previous price by reference to which the price reduction is calculated, is unclear or misleading. The manner in which price reductions were indicated was previously regulated by the following provision at section 7(2)(a) of the Consumer Information Act 1978:

⁶⁶ The Directive can be accessed at https://eur-lex.europa.eu/resource.html?uri=cellar:b8fd669f-e013-4f8a-a9e1-2ff0dfee7de6.0008.02/DOC_1&format=PDF . The Regulations can be accessed at <http://www.irishstatutebook.ie/eli/2002/si/639/made/en/print> .

(a) an indication that goods, services or accommodation were or was previously offered at a different price or charge or at a particular price or charge shall be treated, unless the contrary is expressed, as an indication that they were so offered openly at the same place within the preceding 3 months for not less than 28 successive days.

As this provision was incompatible with the maximum harmonisation nature of the Unfair Commercial Practices Directive it was repealed by the Consumer Protection Act 2007 which transposed the Directive. Section 43(6)(a) of the Act provides as follows:

(a) if the commercial practice involves a representation or creates an impression (whether in advertising, marketing or otherwise) that a product was previously offered at a different price or at a particular price, consideration shall be given to whether the product was previously offered openly and in good faith at that price and at the same place for a reasonable period of time before the representation was made.

9.3 As can be seen, the new Article 6a inserted in the Price Indications Directive leaves it to Member States to regulate the following aspects of its implementation:

- whether or not different rules should apply to goods which are liable to deteriorate or expire rapidly and, if so, what those rules should be;
- in the case of a product that has been on the market for less than 30 days, whether or not the period for which the prior price of the product applied should be less than 30 days and, if so, how long should it be;
- where a price reduction is progressively increased, whether or not the prior price should be the price without the price reduction before the first application of the price reduction.

9.4 Article 2 of the Better Enforcement Directive further provides that the criteria for the imposition of penalties for infringements of EU consumer protection laws referred to at paragraph 5.10 above will apply also to infringements of the national measures that give effect to the Price Indications Directive. The Regulations that implement the Directive will be amended to provide for the inclusion of these criteria. Article 2 does not provide however for the application of the enhanced fines for widespread infringements and widespread infringements with a Union dimensions to infringements of the Price Indications Directive.

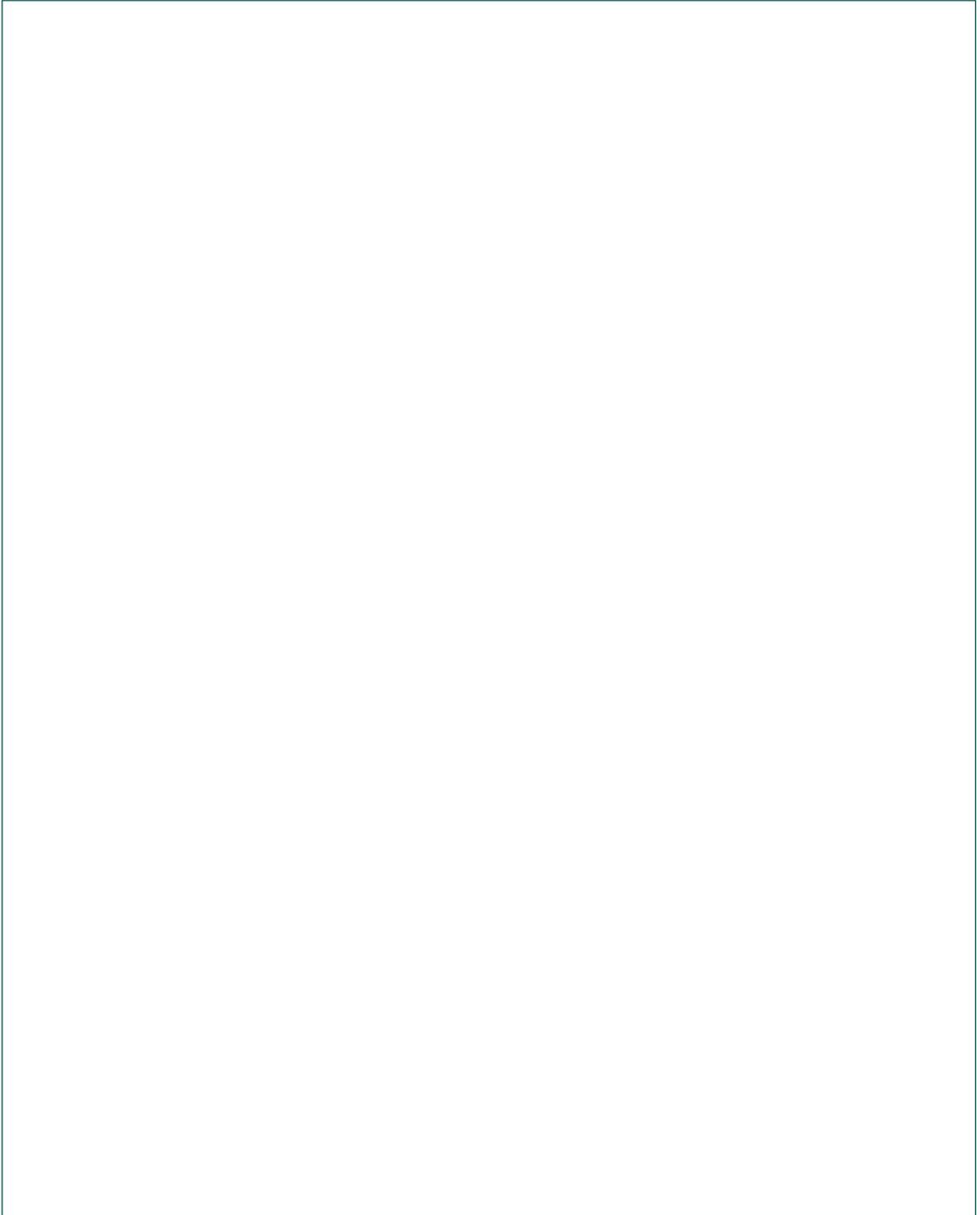
Views are invited on the implementation of the optional aspects of the amendment of the Price Indication Directive outlined above and can be submitted in the response forms in the Appendix to the consultation paper.

Appendix – Reply Forms

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

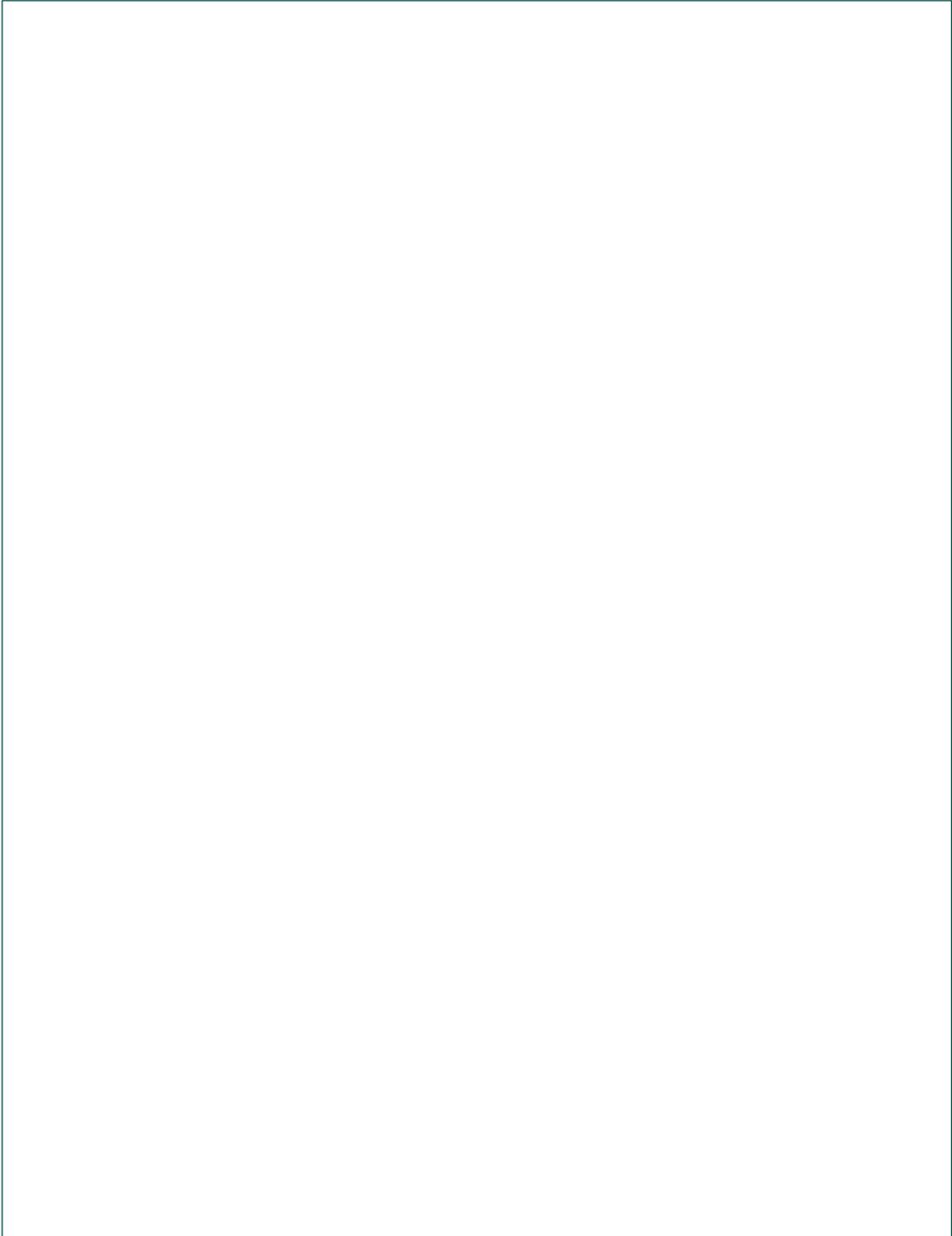
- 2 Views are invited on the non-implementation of the above optional provisions in Part 2 of the Scheme. Please limit your views to 500 words:**

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

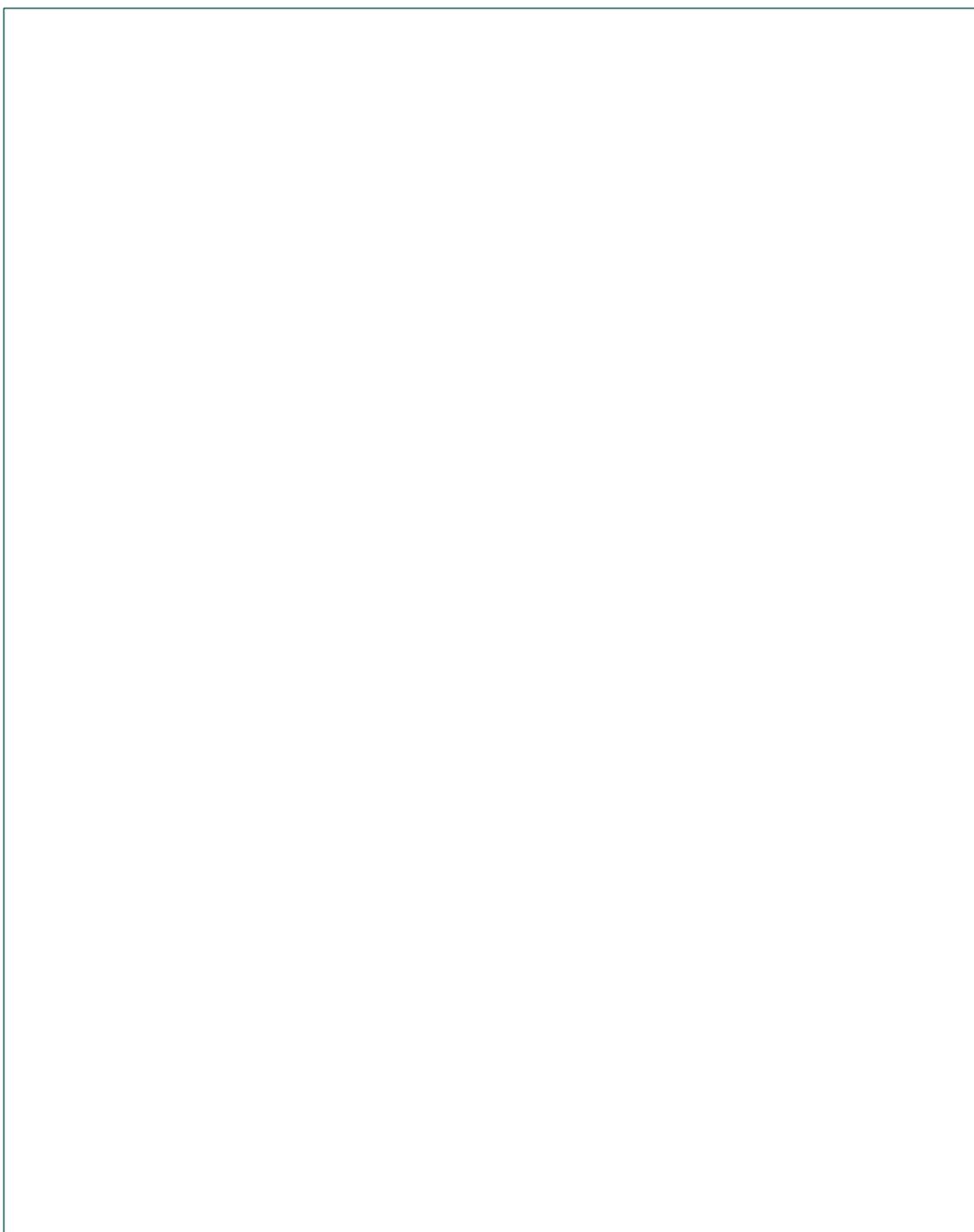
A large, empty rectangular box with a thin black border, intended for the respondent to provide their views on the optional provisions mentioned in the text above. The box is currently blank.

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

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

A large, empty rectangular box with a thin black border, intended for the respondent to provide their views on the provisions of Part 4 of the Scheme. The box is currently blank.

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

A large, empty rectangular box with a thin black border, intended for the respondent to provide their views on the optional provisions mentioned in the text above. The box is currently blank.

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

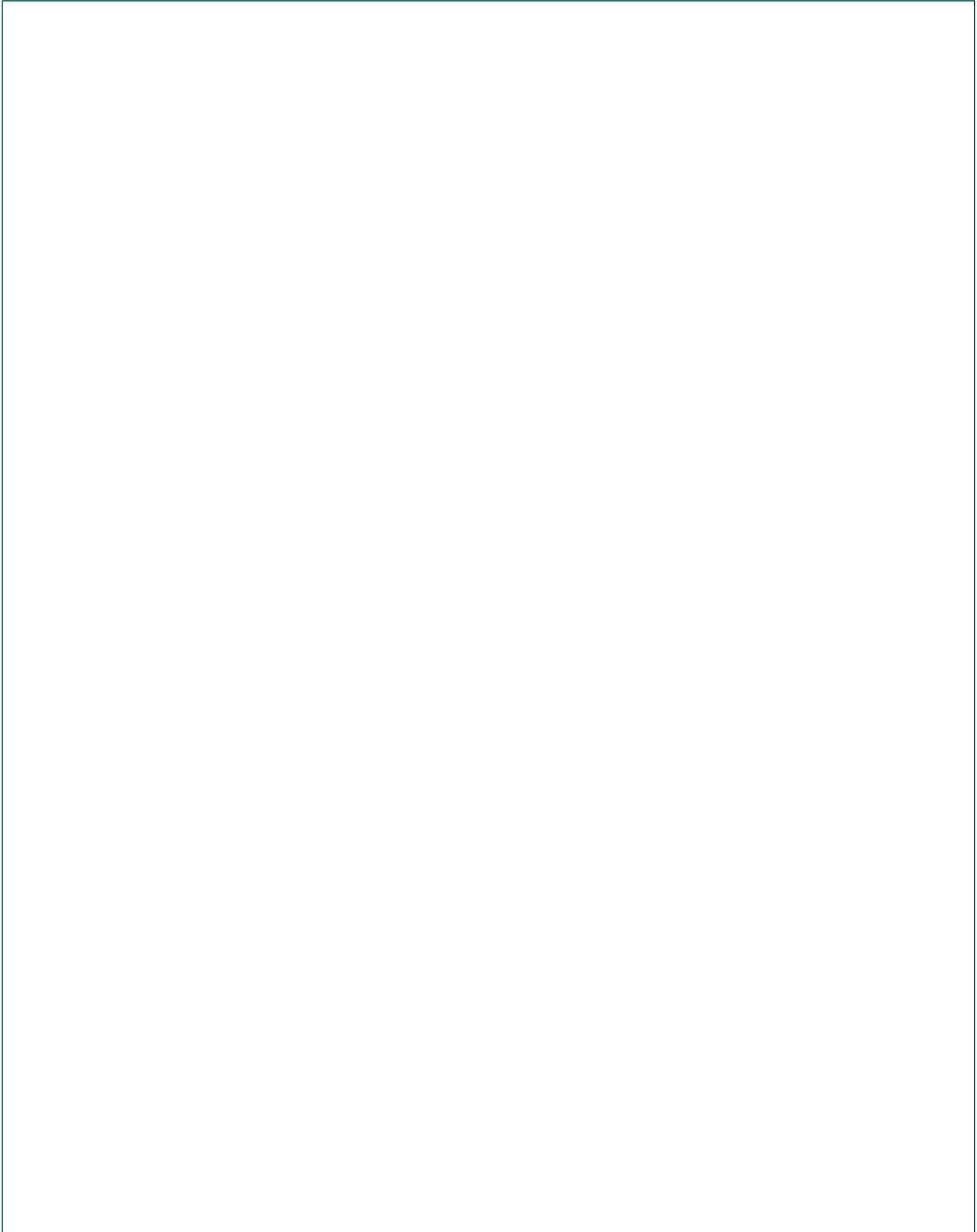
8 Views are invited on the extension of the scope of Part 6 of the Scheme. Please limit your views to 500 words:

A large, empty rectangular box with a thin black border, intended for the respondent to provide their views on the extension of the scope of Part 6 of the Scheme. The box is currently blank.

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

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

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

A large, empty rectangular box with a thin black border, intended for the respondent to provide their views on the implementation of the optional aspects of the amendment of the Price Indication Directive. The box is currently blank.