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Department of Jobs, Enterprise and Innovation

CONSULTATION ON THE REGULATION OF SMALL PRINT IN CONSUMER CONTRACTS

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CONTENTS

	PAGE
EXECUTIVE SUMMARY	3
I INTRODUCTION	9
II SMALL PRINT IN CONTRACTS	9
III THE CURRENT REGULATION OF SMALL PRINT	15
IV OPTIONS FOR THE FUTURE REGULATION OF SMALL PRINT	26
V QUESTIONS ON THE OPTIONS FOR THE FUTURE REGULATION OF SMALL PRINT	31

EXECUTIVE SUMMARY

I INTRODUCTION

1. In a statement made on the launch of the report of the Sales Law Review Group, the Minister for Jobs, Enterprise and Innovation, Richard Bruton T.D., indicated his intention to introduce curbs on small print in consumer contracts 'possibly by requiring a minimum font size and mandatory font colour, such as black'. The Review Group's report contained the following recommendation on the issue:

Regulations regulating print size and related presentational issues in consumer contracts should be introduced. The content of such Regulations should be determined after consultations with business and consumer interests.

II SMALL PRINT IN CONSUMER CONTRACTS

Legibility

2. The term 'small print' is commonly used both in a narrow sense to connote the legibility of contract documents and in a broader sense to connote their intelligibility. It is useful accordingly to distinguish between those features of consumer contracts that affect their legibility – such as font size, layout, and the contrast between print and background – and those have a bearing on their intelligibility, such as unclear or highly legalistic language, excessively long sentences and paragraphs, and lack of differentiation between core and peripheral contract terms. Both aspects are clearly important if consumers are to be in a position properly to understand contract terms.

3. Small print in a consumer contract presents a problem most obviously where the font size used impairs legibility – that is, the ease with which a document or text can be read. Analyses of legibility suggest that type within a size range of 10 to 12 facilitates legibility, though this may depend on the target group at which the printed material is aimed. Studies of the issue consistently underline, however, that type size is only one of a number of factors that affect legibility. Other relevant factors include the type of lettering used (upper or lower case, bold type, italics etc.), spacing and lay-out, and the degree of contrast between type and background.

4. Consumers increasingly access contract terms and conditions on the Internet through a variety of devices such as desktop computers, laptops, tablets, and smartphones. The screens on these devices render typefaces at lower resolution than in printed material, and there are wide variations in screen size and resolution between, and to some extent within, different types of device. Where screens display text at different resolutions, a type size legible at some resolutions might be illegible at others. Unlike conventional print texts, however, the type size on web pages or electronic files can be reset by the user either by adjusting the default size setting fixed by the browser or by using the zoom feature.

Intelligibility

5. If a contract document is to be intelligible, it must be capable of being readily understood by the group of consumers at which it is aimed. 'Intelligibility' in this context is usually understood to entail avoiding or minimising legal or technical jargon – or where such terms are unavoidable, explaining them clearly – along with the avoidance of other features that hinder comprehensibility such as long sentences, dense paragraphs, and inadequate use of headings and signposting. Intelligibility is a more complex and diffuse concept than legibility and raises the question of the benchmark consumer by reference to whom the intelligibility of contract terms is to be assessed. In case law relating to the free movement of goods and to commercial practices, the European Court of Justice has developed the concept of the 'average consumer' who is 'reasonably well informed, reasonably observant and reasonably circumspect'. Though this concept has been expressly incorporated in the Unfair Commercial Practices Directive and in the Consumer Protection Act which gives effect to the Directive in Ireland, it is uncertain whether, or to what extent, it also applies in the context of the control of unfair contract terms.

III The Regulation of Small Print

6. There are no legislative provisions of general application in Ireland that expressly regulate the size of print in, or the legibility of, consumer or other contracts. Section

53(1) of the Sale of Goods and Supply of Services Act 1980 provides that the Minister for Jobs, Enterprise and Innovation may:

by order prohibit, in relation to goods or services generally or in relation to any specified class of goods or services, any seller of such goods or supplier of such services in the course of business from making use of any printed contract, guarantee or other specified class of document unless it is printed in type of at least such size as the order prescribes.

The section applies to both business-to-consumer and business-to-business contracts. Contraventions of an order made under the section are a criminal offence, but the section contains no provision for a civil remedy for parties affected by such a contravention. Though Section 53 has been on the statute book for over three decades, no order regulating the size of print has been made since its enactment.

7. Regulation 5(1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 which gives effect to the similarly worded provision at Article 5 of Directive 93/13/EEC on Unfair Contract Terms states that:

In the case of contracts where all or certain terms offered to the consumer are in writing, the seller or supplier shall ensure that terms are drafted in plain, intelligible language.

Article 5 contains no direct reference to legibility, but some interpretations of it maintain that a legibility requirement follows from the stipulation that written terms in consumer contracts must be 'intelligible'. While a case can be made that a document cannot be intelligible if it is illegible, neither the courts in Ireland nor the European Court of Justice have ruled on this aspect of the Article. Though courts in common law jurisdictions have sometimes criticised the use of excessively small print in contract documents, it is likely that, at least in cases not involving statutory provisions on unfair contract terms, they would be slow to absolve a contracting party from liability solely on the ground that the size of type rendered the contract terms difficult to read.

8. Though there are no provisions of general application on the legibility of consumer contracts, rules regulating legibility apply to certain types of contract under EU legislation and in some sectors under domestic rules. Directive 2011/83/EU which Member States are required to adopt by December 2013 and to apply from June

2014 includes an express legibility requirement in respect of the pre-contractual information to be provided under distance and off-premises contracts. The Central Bank Consumer Protection Code which applies to regulated financial services entities includes a number of provisions relating to the presentation and legibility of material provided to consumers. The Code of Practice for Premium Rate Services issued by the Commission for Communications Regulation also contains provisions dealing with the presentation and legibility of commercial promotions for such services.

9. No European Union or common law jurisdiction of which we are aware has a statutory provision of general application requiring the use of a minimum font size for written contract terms. A number of US states have legislation requiring a specified font size for certain contracts, principally contracts for consumer credit, insurance, and residential tenancies. Outside the United States, legislative provisions regulating the presentation of contract terms are, as in the European Union and the United Kingdom, more commonly found in legislation on unfair terms in consumer contracts.

IV OPTIONS FOR THE FUTURE REGULATION OF SMALL PRINT

10. There are two main options for the future legislative regulation of small print in consumer contracts:

- 1) the enactment of an order setting a minimum font size for contracts under section 53 of the Sale of Goods and Supply of Services Act 1980; or
- 2) the enactment of provisions on the legibility and intelligibility of consumer contracts in a future, comprehensive Consumer Rights Bill, preparatory work for which is underway.

The case for and against each of these options can be summarised as follows.

11. Option 1: Order under Section 53 Sale of Goods and Supply of Services Act 1980

Pro

- The enactment of an Order under section 53 would be relatively straightforward and could be done quickly.

- Setting a minimum font size for contracts would provide a clear, readily understandable and enforceable rule on a key aspect of legibility.

Con

- An Order under section 53 would address only one of the factors that affect the legibility of contract terms, and would do nothing to address the closely related, and equally important, issue of their intelligibility.
- The enforcement provisions under section 53 are inadequate, particularly in regard to the lack of civil redress for the counterparty to contracts in breach of the font size requirement.
- An Order under section 53 would have to apply to commercial as well as consumer contracts. This type of regulation of commercial contracts is undesirable in principle and would require scarce enforcement resources to be devoted to breaches affecting businesses only.
- Though the definition of ‘printing’ in section 53 appears sufficiently broad to allow an Order made under the section to encompass contract terms made available on web pages or by electronic mail, it is less clear if such an Order could take adequate account of the specific features of text accessed on computer or smartphone screens, in particular the ability to adjust font size.

12. Option 2: Inclusion of Provisions on the Legibility and Intelligibility of Contract Terms in Future Consumer Rights Bill

Pro

- Provisions of this kind would allow the twin issues of legibility and intelligibility to be addressed in a coherent and comprehensive manner.
- Rules based on general criteria relating to legibility and intelligibility are more flexible and adaptable to different circumstances and changing technologies. Such provisions could be supplemented, if considered desirable, by a stipulation as to minimum font size, whether in the primary legislation, Regulations made under it, or in guidance.
- The legal consequences where contract terms were in breach of legibility or font size requirements could be more fully addressed, including the question of whether such terms were to be void or not binding on the consumer.

- The scope of provisions regulating the legibility and intelligibility of contract terms provisions could be restricted to consumer contracts.

Con

- The introduction of provisions to regulate small print would be delayed for a significant period.
- The regulation of small print by way of general principles relating to legibility and intelligibility, even if supplemented by specific rules about minimum font size, would lack the clarity and certainty provided by statutory provisions that simply stipulated a minimum font size.

13. Part V of this Paper seeks the views of respondents at pages 31-32 on a number of issues relating to each of these options.

I INTRODUCTION

1. In a statement made on the launch of the report of the Sales Law Review Group, the Minister for Jobs, Enterprise and Innovation, Richard Bruton T.D., indicated his intention to introduce curbs on small print in consumer contracts 'possibly by requiring a minimum font size and mandatory font colour, such as black'.¹ The Review Group's report contained the following recommendation on the issue:²

Regulations regulating print size and related presentational issues in consumer contracts should be introduced. The content of such Regulations should be determined after consultations with business and consumer interests.

2. This consultation paper looks first in Part II (paragraphs 3-8) at what is meant by 'small print'. It outlines, secondly, in Part III (paragraphs 9-24) the current statutory, common law and sectoral rules on small print and related presentational matters in Ireland and elsewhere. Part IV (paragraphs 25-31) outlines options for the future statutory regulation of small print, and Part V seeks views on these options.

II SMALL PRINT IN CONSUMER CONTRACTS

3. The term 'small print' is commonly used both in a narrow sense to connote the legibility of contract documents and in a broader sense to connote their intelligibility. The two main issues identified by *Make Small Print Big Print* campaign initiated by the Dublin radio station Q102 in 2008 were thus 'the physical size of the font used and the opaque nature of the terms and language employed'.³ The guidance on plain English produced by the National Adult Literacy Agency includes tips on both document design and clear writing.⁴ In a recent consultation paper, the Law Commission of England and Wales and the Scottish Law Commission expressed the view that 'small print' was not just a matter of font size, but also included some or all of the following:⁵

¹ <http://www.djei.ie/press/20-11/20111018.htm>

² Sales Law Review Group. 2011. *Report on the Legislation Governing the Sale of Goods and Supply of Services*, paragraph 13.50.

³ Joint Committee on Enterprise, Trade and Employment. 28 May 2008. *Small Print Campaign: Discussion with Q102*.

⁴ www.simplyput.ie

⁵ Law Commission and Scottish Law Commission. 2012. *Unfair Terms in Consumer Contracts: A New Approach?*, http://lawcommission.justice.gov.uk/consultations/unfair_consumer_contracts.htm.

- 1) Poor layout;
- 1) Faint colours, such as grey text;
- 2) Generous sprinklings of legal jargon;
- 3) Long sentences;
- 4) Dense paragraphs;
- 5) Inadequate signposting or headings;
- 6) Little attempt to distinguish between important and unimportant contract terms;
- 7) Labelling material as 'terms' or 'terms and conditions' as these words are signals to consumers not to read the document.

4. It is useful accordingly to distinguish between those features of consumer contracts that affect their legibility – such as font size, layout, and the contrast between print and background – and those have a bearing on their intelligibility, such as unclear or highly legalistic language, excessively long sentences and paragraphs, and lack of differentiation between core and peripheral contract terms. Both aspects are clearly important if consumers are to be in a position properly to understand contract terms. Contracts written in clear, plain language will be of limited value to consumers if they are difficult to read because of small type or faint print. Similarly, contracts that are very legible in respect of their font size, print and layout, will be of limited value if they are written in dense language full of legal jargon. The next section looks at the factors affecting legibility.

LEGIBILITY

5. Small print in a consumer contract presents a problem most obviously where the font size used impairs legibility – that is, the ease with which a document or text can be read. An analysis of type sizes undertaken as far back as the 1920s concluded that size ten type was the optimum size for efficient reading.⁶ A more recent assessment suggests that, at a normal reading distance of 30-40mm (12-15 inches), the optimum type size for continuous text is between size 9 and size 11 type, depending on other

⁶ Paterson, D.G. and Tinker, M.A. 1929. 'Studies of Typographical Factors Influencing Speed of Reading: II. Size of Type'. *Journal of Applied Psychology*, Volume 13(2), pp. 120-30.

features of the typeface used.⁷ Another study found that three-quarters of those examined found type within a size range of 10/11 to 12/14 easy to read compared with a quarter who reported type size 8 easy to read.⁸ The National Adult Literacy Agency suggests that 12 point type is a good standard print size for most readers.⁹ The font size appropriate to a contract will also depend on the target group at which the contract in question is aimed. Contract documents aimed mainly at older age-groups may need to be presented in a larger font size in order to be readily legible.

6. Studies of the issue consistently underline that the size of type is only one of a number of factors that affect legibility.¹⁰ Other relevant factors include the following:

- **Lettering**

- 1) Blocks of text in upper case or capital lettering are less legible than text in lower case lettering as the resultant lack of variety in letter size and shape makes text more difficult to follow.
- 2) Though useful for emphasis, bold type is likely to reduce legibility where used on a continuous basis.
- 3) Italics are less legible for continuous text as letters are less easily distinguished from one another.
- 4) Typefaces with some or all of these features are less legible than others as can be seen from the following examples:¹¹

THE TYPEFACE USED IN A TEXT CAN AFFECT ITS LEGIBILITY.

The typeface used in a text can affect its legibility.

The typeface used in a text can affect its legibility.

⁷ Reynolds, L. *The Legibility of Type*, <http://designweb.cc.uic.edu/zhan/class/research/Legibility/html> .

⁸ Wheildon, C. 2005. *Type and Layout* (Victoria: Worsley Press), pp. 109-111.

⁹ www.simplyput.ie/document-design-tips

¹⁰ Ibid. See also Lupton, E. *The Science of Typography*, http://www.typotheque.com/articles/the_science_of_typography. Lupton, E. 2010 (2nd ed.). *Thinking with Type: A Critical Guide for Designers, Writers, Editors and Students* (New York: Princeton Architectural Press), pp. 38-42, 84-88 et passim. Baines, P. & Haslam, A. 2005 (2nd ed.). *Type & Typography* (London: Laurence King), pp. 124-135 et passim.

¹¹ As these examples also show, the height of text with similar font sizes can also vary with the typeface used. This is referred to in typography as the x-height, the distance between the baseline and the mean line in a typeface as typically measured by the letter 'x', hence the term.

- **Spacing and Lay-Out**

- 1) The spacing between letters should be sufficient to enable them to be clearly separated and differentiated.
- 2) The spacing between words must obviously be greater than that between letters in order to ensure adequate legibility. Where it is too great, however, the horizontal balance of the line can be adversely affected.
- 3) The spacing between lines must be sufficient to ensure that the bottom of some letters (such as j or p) does not overlap with the top of others (such as h or f).
- 4) Where lines are long and page margins small, the text will look more forbidding and be less readily legible. Where lines are too short, the normal pattern of eye movement is disrupted. The optimum line length for continuous text is put at 60-65 characters and spaces by some commentators.

- **Contrast**

The respective colours of, and the contrast between, the type and the background can have a marked effect on legibility.¹² Traditionally, the maximum contrast between black type and a white or near-white background has been seen as best for legibility. Dark coloured text can give good contrast against some other colours but some combinations – for example, grey text on a black background – are very difficult to read.

7. The above account largely reflects issues raised by contract documents in conventional print format where layout and type are fixed. Increasingly, however, consumers access contract terms and conditions on the Internet through a variety of

¹² Farley, J. *Focus on Typography, Part 1: Contrast*, <http://www.sitepoint.com/focus-on-typography-part-1-contrast>

devices such as desktop computers, laptops, tablets, and smartphones.¹³ The font size of documents accessed in these ways can be enlarged or reduced as electrical impulses, and not fixed type, are being modified. Though access to contract terms via the Internet is most common in the case of digital content and other contracts concluded online, consumers also commonly go to websites to access terms and conditions for goods and services provided offline. Contract terms may also be made available via e-mail, whether as an attachment or otherwise. Though consumers may have the option of making hard copies of contract terms accessed on the Internet or by e-mail, it is likely that, if read at all,¹⁴ these terms are read on the computer or smartphone screen in most cases.

8. Consideration of the issue of small print in consumer contracts must have regard, therefore, to the fact that these contracts are increasingly viewed on computer and smartphone screens. Improvements in the functionality and connectivity of smaller devices such as tablets and smartphones in particular have led to rapid growth in their popularity and use. Computer and smartphone screens render typefaces at lower resolution than books or other printed material, and there are wide variations

¹³ Directive 2000/31/EC on E-Commerce requires member states, among other things, to ensure that their laws allow contracts to be concluded by electronic means. Section 19 of the Electronic Commerce Act 2000 provides that an electronic contract shall not be denied legal effect solely because it is in electronic form or has been concluded by electronic means.

¹⁴ On 1 April 2010, the UK games' retailer, Gamestation, changed the terms and conditions on its website as an April Fools' joke to state that the company legally owned the soul of every customer who made a purchase from them. Over 7,000 customers, 88 per cent of those who made a purchase from the website on the day, agreed to the terms and conditions. The 12 per cent of customers who refused to agree to the terms received a £5 voucher. A more scholarly survey undertaken by the Law Faculty in University College Cork asked consumers if they read the terms and conditions before deciding to buy online. 28 per cent of respondents replied that they never did so; 43 per cent said they 'sometimes' did so; and 29 per cent said that they always did so. Donnelly, M. et al. 2005. *Consumers in the Electronic Marketplace: an Examination of Information-Based Consumer Protection in the Context of Distance Selling over the Internet*, pp. 30-31. Survey findings cited by the UK Office of Fair Trading found that only 23 per cent of those surveyed read contracts in full prior to purchase with other respondents claiming that they picked out key points to read (35 per cent), gave the contract a 'quick skim read' (30 per cent), or did not read it at all (10 per cent). Office of Fair Trading. 2011. *Consumer Contracts* (OFT 1312), p. 27. A US study which tracked the visits of 45,000 households to the websites of 66 software companies, however, found much lower levels of consumer scrutiny of contract terms. In all, only 0.2 per cent of online shoppers were found to access End User Licence Agreements for more than one second. Bakos, Y. et al. 2009. *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*. New York University Centre for Law, Economics and Organization: Law and Economics Research Paper Series, Working Paper No. 09-40.

in screen size and resolution between, and to some extent within, different types of device.¹⁵ Where screens display text at different resolutions, a type size legible at some resolutions might be illegible at others. Unlike conventional print texts, however, the type size on web pages or electronic files can be reset by the user either by adjusting the default size setting fixed by the browser or by using the zoom feature. The extent to which, and ease with which, this can be done will obviously vary, however, with the size of the screen. The evidence suggests, moreover, that most users do not adjust the default type settings on their browsers.¹⁶ Subject to these qualifications, the ability to adjust print size on web pages and electronic files differentiates contract terms accessed online from those accessed in hard copy.

INTELLIGIBILITY

9. If a contract document is to be intelligible, it must be capable of being readily understood by the group of consumers at which it is aimed. ‘Intelligibility’ in this context is usually understood to entail avoiding or minimising legal or technical jargon – or where such terms are unavoidable, explaining them clearly – along with the avoidance of other features that hinder comprehensibility such as long sentences, dense paragraphs, and inadequate use of headings and signposting. Intelligibility is a more complex and diffuse concept than legibility and, as discussed in paragraph 16, raises the question of the benchmark consumer by reference to whom the intelligibility of contract terms is to be assessed.

10. In Ireland, the National Adult Literacy Agency produces guidance on plain English, including guides to plain English in legal, financial and other documents along with lists of legal and other terms and phrases that should be avoided.¹⁷ The Agency also provides a plain English quality mark to print and web documents that meet internationally accepted plain English standards. The importance of communicating

¹⁵ Lynch, P. et al. *Web Style Guide*, <http://webstyleguide.com/wsg2/type/legible.html>. Lynch, P. et al. 2009 (2nd ed.). *Web Style Guide: Basic Design Principles for Creating Web Sites* (New Haven: Yale University Press), pp. 205-230 et passim.

¹⁶ Lynch, P. et al, *Web Style Guide: Basic Design Principles for Creating Web Sites*, op. cit., p. 222.

¹⁷ www.simplyput.ie/writing_tips;
www.simply.put.ie/downloads/plain_english_guide_to_legal_terms.pdf;
www.simplyput.ie/downloads/plain_english_guide_to_financial_terms.pdf

in plain language is increasingly recognised by governments and official bodies. In the United States, for example, a Plain Writing Act was enacted in 2010 to ‘enhance access to Government information and services by establishing that Government documents issued to the public must be written clearly’.¹⁸ In Ireland, the Government White Paper of 2005 on *Regulating Better* emphasised the need for Regulations to be clear and accessible, stating that these should be drafted in ‘language that achieves its intended purpose, resolving the tensions between clarity, simplicity and accuracy’.¹⁹

III THE REGULATION OF SMALL PRINT

LEGISLATIVE PROVISIONS ON LEGIBILITY AND INTELLIGIBILITY

The Sale of Goods and Supply of Services Act 1980

11. There are no legislative provisions of general application in Ireland that expressly regulate the size of print in, or the legibility of, consumer or other contracts. Section 53(1) of the Sale of Goods and Supply of Services Act 1980 provides that the Minister for Jobs, Enterprise and Innovation may:

by order prohibit, in relation to goods or services generally or in relation to any specified class of goods or services, any seller of such goods or supplier of such services in the course of business from making use of any printed contract, guarantee or other specified class of document unless it is printed in type of at least such size as the order prescribes.

Section 53(2) states that, in subsection (1), references to printing include ‘type-writing, lithography, photography, and other modes of representing or reproducing words in visible form.’ Section 53(3) provides that a person who contravenes an order made under section 53(1) shall be guilty of an offence. No civil remedy is provided under the section for parties affected by a breach of its provisions. Though section 53 has been on the statute book for over three decades, no order regulating the size of print has been made since its enactment.

¹⁸ Public Law 111-274- Oct. 13 2010. An Executive Order requiring plain language in Federal Regulations was adopted in 2011. *Improving Regulation and Regulatory Review*, Executive Order 13563 of January 18 2011.

¹⁹ Department of the Taoiseach. 2005. *Regulating Better: A Government White Paper setting out six principles of Better Regulation*, p. 28.

12. Section 53 of the 1980 Act applies to both business-to-consumer and business-to-business contracts. Though the Minister for Jobs, Enterprise and Innovation is empowered under the Section to make an order that applies to a 'specified class of goods or services', this would not appear to permit restricting the scope of such an order to consumer contracts. It would not appear permissible either to make an order restricted to contracts aimed at a specified class of consumer – for example, visually impaired or older consumers. Part IV of this paper discusses whether section 53 offers a suitable basis for future legislative regulation of small print.

13. Both the legibility and intelligibility of product guarantees are subject to statutory regulation. Section 16 of the Sale of Goods and Supply of Services Act 1980 requires that product guarantees be 'clearly legible'.²⁰ Regulation 9(2)(b) of the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 states that product guarantees 'shall set out in plain intelligible language the contents of the guarantee and the essential particulars for making claims under the guarantee, including the duration and territorial scope of the guarantee as well as the name and address of the guarantor.'²¹

The European Communities Unfair Terms in Consumer Contracts Regulations

14. Regulation 5(1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 states as follows:²²

In the case of contracts where all or certain terms offered to the consumer are in writing, the seller or supplier shall ensure that terms are drafted in plain, intelligible language.

This Regulation gives effect to the similarly worded provision at Article 5 of Directive 93/13/EEC on Unfair Contract Terms.²³ Though Article 5 contains no direct reference

²⁰ Section 15 of the Act defines 'guarantee' as 'any document, notice or other written statement, howsoever described, supplied by a manufacturer or other supplier, other than a retailer, in connection with the supply of any goods and indicating that the manufacturer or other supplier will service, repair or otherwise deal with the goods following purchase.'

²¹ S.I. No. 11/2003. Regulation 2(1) of the Regulations defines 'guarantee' as 'any undertaking by a seller or supplier to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising.'

²² S.I. No. 27/1995

to legibility, some interpretations of the Article hold that a legibility requirement follows from the stipulation that written terms in consumer contracts must be 'intelligible'. A study of the EU Consumer Protection Directives undertaken for the European Commission observed that:²⁴

The general view is that the requirements of "plain and intelligible drafting" encompass both formal as well as substantive criteria. In terms of formal requirements the user has to ensure the drafting style of the terms is such that the consumer can comprehend the essential rights and duties. This is unlikely to be the case when the outward appearance of the document makes it difficult to get an overview of the terms or recognise the structure (e.g. frequent cross-referencing), is printed in a type face that is difficult to read or is disproportionately long in relation to the significance of the transaction.

The Office of Fair Trading Guidance on the UK Regulations that implement the Unfair Terms Directive, for example, takes a broadly similar view, stating that:²⁵

Intelligibility also depends on how contracts are presented and used. Obviously, print must be legible. This depends not only on the size of the print used but also its colour, that of the background and the quality of the paper used.

15. While a case can certainly be made that a document cannot be intelligible if it is illegible, it is not self-evident, on the ordinary and natural meaning of the words used in Article 5 of the Directive, that a legibility requirement is entailed by the stipulation that written contract terms be drafted in plain intelligible language.²⁶ This

²³ This states as follows: '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.' The proposal for a Directive on Consumer Rights published by the European Commission in October 2008 contained a revised provision at Article 31(1) stating that 'contract terms shall be expressed in plain, intelligible language and be legible.' Subject to this legibility requirement, recital 47 provided that traders 'should be free to choose the font type or size in which the contract terms are drafted.' In the event, this and other provisions for the revision of the Unfair Contract Terms Directive were not adopted, and that Directive remains in force.

²⁴ Schulte-Nolke, H. et al. (eds.) 2008. *EC Consumer Law Compendium: A Comparative Analysis*, p. 412.

²⁵ Office of Fair Trading. 2008. *Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations*, paragraph 19.8. The Law Commission of England and Wales and the Scottish Law Commission have also expressed the view that the 'plain intelligible language' requirement of the Unfair Terms Directive 'is probably not satisfied if the term is in print that is difficult to read, the layout of the contractual document is difficult to follow or if the terms are not readily accessible'. Law Commission and Scottish Law Commission. 2005. *Unfair Terms in Contracts* (Law Com No. 292; Scot Law Com No. 199), Appendix A, Explanatory Notes, paragraph 13.

²⁶ The fundamental rule of statutory interpretation applied by the Irish courts is that the intention of the legislation must primarily be ascertained by reference to the meaning of the words used in the legislation. As Kelly J stated in *O'Dwyer v Keegan* [1997] 2 ILRM 401, 'the intention, and therefore the meaning, of an Act is primarily to be sought in the words used. They must, if they are plain and

aspect of the provision has not been ruled on by the courts in Ireland or by the European Court of Justice. In *Office of Fair Trading v Abbey National plc & 7 Others*, Smith J. stated as follows:²⁷

There was some discussion whether the expression “plain intelligible language” was to be interpreted widely to include the clarity of the presentation of the terms. For my part, I would consider it proper when assessing whether terms are in plain intelligible language to take into account clear and accessible presentation with, for example, useful headings and appropriate use of bold print which can contribute to the intelligibility to the typical consumer of the language. However, none of the conclusions that I reach about the OFT’s complaints depend upon this.

16. The Unfair Terms Directive does not set out any specific guidelines as to how the intelligibility of contract terms is to be assessed. In case law relating to the free movement of goods and to commercial practices, the European Court of Justice has developed the benchmark of the ‘average consumer’ who is ‘reasonably well informed, reasonably observant and reasonably circumspect’.²⁸ The average consumer concept has been expressly incorporated as a benchmark criterion in Directive 2005/29/EC on Unfair Commercial Practices and in the Consumer Protection Act which gives effect to the Directive in Ireland.²⁹ There is some uncertainty as to whether, or to what extent, this criterion also applies in the context of the control of unfair contract terms.³⁰ The National Consumer Agency guidance on unfair terms in consumer contracts states:³¹

The Irish courts have not yet considered the test for what constitutes ‘plain intelligible language’. The question will most likely be decided from the perspective of the typical or average consumer.

unambiguous, be applied as they stand... If there is nothing to modify, alter or qualify the language which is contained in the Act, then the words and sentences must be construed in their ordinary and natural meaning.’

²⁷[2008] EWHC 875 at paragraph 104.

²⁸ See, for example, ECJ Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung* [1998] ECR I – 4657.

²⁹ Directive 2005/29/EC, recital 18, Articles 5(2)(b) & (3) et passim. Consumer Protection Act 2007, section 2(2).

³⁰ Schulte-Nolke, et al, op. cit., p. 414.

³¹ National Consumer Agency. *An NCA guide to avoiding the use of unfair terms in consumer contracts*, p. 6. <http://corporate.nca.ie/searchGoogle.aspx?unfair%20contracts%20terms>.

In *Office of Fair Trading v Abbey National*, the English High Court accepted the appropriateness of the average consumer concept to the consideration of such terms, with Smith J. stating:³²

There is no real dispute between the parties that the question whether terms are in plain, intelligible language is to be considered from the point of view of the typical consumer or the average consumer. The concept of an “average consumer ... who is reasonably well informed and reasonably observant and circumspect” is a familiar concept used by the European Court of Justice in applying and interpreting European consumer law ... and it provides an appropriate yardstick guide to whether a term is in plain, intelligible language.

17. It is possible in addition to argue that there is an implicit legibility requirement in the unfairness clause at Article 3 of the Unfair Terms Directive. This Article provides that a contract term that has not been individually negotiated 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. In *Director General of Fair Trading v First National Bank plc*,³³ Lord Bingham expressed the view that the good faith requirement in Article 5 encompassed procedural fairness and demanded fair and open dealing:

Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the consumer.

Neither the courts in Ireland nor the European Court of Justice, however, have ruled on the question of whether legibility or transparency rules are to be inferred from the good faith provision at Article 3 of the Directive.

18. The UK Unfair Contract Terms Act 1977 includes provisions that prevent or limit parties to both business-to-consumer and business-to-business contracts from using contract terms to limit or exclude liability for negligence or breach of a contractual duty. Though consumer contracts in Ireland are subject to review for fairness under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995

³² [2008] EWHC 875 at paragraph 89. The Law Commission of England and Wales and the Scottish Law Commission have recently suggested that the ‘average consumer’ test should also be applied for the purpose of assessing the transparency of contract terms. Law Commission and Scottish Law Commission. 2012. *Unfair Terms in Consumer Contracts: A New Approach?*, paragraphs 8.29-8.33.

³³ [2001] UKHL 52, paragraph 17.

and 2000, there is no equivalent statutory regulation of contracts between businesses.³⁴ In *Stag Line Ltd v Tyne Shiprepair Group Ltd (The 'Zinnia')*,³⁵ one of the matters at issue was whether the Unfair Contract Terms Act 1977 rendered of no effect an exclusion clause in the contract that sought to limit the liability of the ship repair company for work on the shipping company's vessel. In his judgment, Staughton, J. stated that:³⁶

I would have been tempted to hold that all the conditions are unfair and unreasonable for two reasons: first they are in such small print that one can barely read them; secondly the draughtsmanship is so convoluted and prolix that one almost needs an LLB to understand them. However neither of those arguments was advanced before me, so I say no more about them.

In *The Office of Fair Trading and Foxtons Ltd.*,³⁷ Mann. J. noted the very small type used for some of the contract terms between the defendants, a letting agent, and the landlords who used their services. It is not clear from the judgment, however, what weight was given to the size of the print in the Court's finding that certain of the contract terms were in breach of the UK Unfair Terms in Consumer Contracts Regulations 1999. The question of whether small print or other factors affecting the legibility and/or intelligibility of terms in consumer render such terms unfair under the corresponding Regulations in Ireland has not been considered by the courts here.³⁸

COMMON LAW RULES

19. Though courts in common law jurisdictions have sometimes criticised the use of excessively small print in contract documents,³⁹ it is likely that, at least in cases not involving statutory provisions on unfair contract terms, they would be slow to

³⁴ Under the Sale of Goods Act 1893 and 1980, the terms implied into business-to-business contracts for the sale of goods can be excluded or varied only where this can be shown to be 'fair and reasonable'.

³⁵ [1984] 2 Lloyds Rep 211.

³⁶ *Ibid.*, at 222.

³⁷ [2009] EWHC 1681 (Ch.).

³⁸ There have been only two Irish cases to date involving the Unfair Terms Regulations: *Re an Application pursuant to Regulation (8)(1) of the Unfair Terms in Consumer Contracts Regulations 1995*, unreported High Court 5 December 2001; and *Marshall v Capitol Holdings Ltd* [2006] IEHC 271. White, F. *Commercial Law* (2nd ed.) 2012. (Dublin: Round Hall), p. 47, fn. 153.

³⁹ *Goldsbrough v Ford Credit (Aust) Ltd* [1989] ASC 55-946 at 58-584. *George T. Collings (Aust) Pty Ltd v H.F. Stevenson* [1991] ASC 56-051. In a South African case, *Fourie v Hansen* [2000] JOL 5993 (W), the court held that the small font size in a contract document was one of the factors that rendered an exemption clause unenforceable.

absolve a contracting party from liability solely on the ground that the size of type rendered the contract terms difficult to read. In *D & J Koskas v Standard Marine Insurance Co. Ltd*,⁴⁰ Sankey J. expressed the view that a clause presented in very small print should be ignored. The Court of Appeal disagreed, however, with the judge's assessment of the legibility of the document.⁴¹ Scrutton LJ. commented more broadly as follows on the relation between the legibility and validity of contract terms:⁴²

I am rather afraid of the doctrine that you can get out of clauses by saying they are difficult to read. There may be extreme cases. I have in mind the bill of a well-known shipping company printed on red paper which was calculated to produce blindness in anyone reading it. I am not saying that in no case can you get out of it on the point of illegibility, but this case does not appear to me to be a case in which that doctrine should be applied.

20. More generally, the law relating to contractual disclaimers or restrictions on liability in contract or tort has long recognised that, as a matter of principle, a party to a contract who seeks to rely on a limiting or exclusionary contractual term must do everything reasonable to bring that term to the attention of the other party. Case law starting dating back to the nineteenth century has laid down requirements both about the process being transparent and the contract term being clear and explicit.⁴³ A related body of case-law addresses the question of judicial control of unusual or onerous contract terms. The most important decision in this area is that of English Court of Appeal in *Interfoto Picture Library v. Stilleto Visual Programmes Ltd*,⁴⁴ a case involving a commercial supply contract that required a person who acquired access to photographs with a view to their use in marketing to pay very high charges if they were retained for an undue period of time. The Court of Appeal held, among other things, that the circumstances in which the clause was brought to the attention of the user fell short of the required notice standard and the clause was thus not incorporated into the contract. Dillon LJ underlined that unusual or

⁴⁰ (1926) 25 Lloyd's Rep. 363 at 368.

⁴¹ (1927) 27 Lloyd's Rep 59.

⁴² Ibid. at 62.

⁴³ See, for example, *McNally v. Lancs and York Railway* (1880) 8 LR(lr) 81.

⁴⁴ [1989] QB 433. In a more recent English High Court case, *Kaye v. Nu Skin Ltd (Rev 1)*, Kitchen J. repudiated an argument that *Interfoto* was confined to consumer type contracts. [2011] 1 Lloyd's Rep 40.

onerous terms must be fairly brought to the attention of the other party.⁴⁵ The thrust of this rule of law, therefore, is to prevent such terms from being hidden among the small print of a contract. The *Interfoto* judgment has been endorsed in a number of Irish cases.⁴⁶

Sector-Specific Rules on Legibility and Intelligibility

21. Regulation 4(1) of the European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) Regulations 2001 stipulates that the information which traders are required to provide under the Regulations must be provided 'in a clear and comprehensible manner in a way which is appropriate to the means of distance communication used, with due regard to any enactment or rule of law requiring good faith in commercial transactions.'⁴⁷ The Regulations give effect to Directive 97/7/EC on the Protection of Consumers in Respect of Distance Contracts. This Directive will be repealed as of 13 June 2014, the date by which Member States are required to apply the provisions of Directive 2011/83/EU on Consumer Rights Directive. The Consumer Rights Directive contains information requirements for distance contracts, off-premises contracts, and on-premises contracts. In all cases, the trader is required to provide the information required by the Directive 'in a clear and comprehensible manner'. In the case of off-premises contracts,⁴⁸ the trader must give the required information to the consumer 'on paper' or, with the agreement of the consumer, on another durable medium.⁴⁹

⁴⁵ If, however, the clause in question is of a kind that is not onerous or unusual – for example, if it is a standard provision in the industry or commercial sector in which the parties are engaged – then there is little scope for this kind of analysis in commercial contracts once it is established that, in all the circumstances, reasonable notice was given. See, for example, *Lynch Roofing Systems (Ballaghaderreen) v. Christopher Bennett and Son (Construction) Ltd* [1999] 2 IR 450, and *Photolibary Group Ltd v. Burda Senator Verlag GmbH* [2008] EWHC 1343 QB.

⁴⁶ *Carroll v An Post National Lottery Co* [1996] 1IR 443; *Finnegan v JE Davy* [2007] IEHC 18; In *McCabe Builders (Dublin) Ltd v. Sagamu Developments Ltd* [2007] IEHC 391; and *Ryanair Ltd v. Billigfluege.de GmbH* [2010] IEHC 47.

⁴⁷ S.I. No. 207/2001.

⁴⁸ In the case of off-premises contracts for repairs or maintenance undertaken at the express request of the consumer and costing less than €200, Member States have the discretion to provide that the trader will be required to provide a more limited range of information on paper or another durable medium.

⁴⁹ The Directive defines 'durable medium' as 'any instrument which enables the consumer or trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored'.

The information must 'be legible and in plain, intelligible language'. In the case of distance contracts, the trader must give, or make available, the required information to the consumer 'in a way appropriate to the means of distance communication used in plain and intelligible language'. The Directive further provides that, insofar as the required information is provided on a durable medium, it must be legible. The legislation that will give effect to the Directive in Ireland will therefore include an express legibility requirement in respect of the pre-contractual information to be provided under distance and off-premises contracts. Though Articles 7(5) and 8(10) state that Member States 'shall not impose any further formal pre-contractual information requirements for the fulfilment of the information obligations laid down in this Directive', this would not appear to preclude minimum font size requirements for distance and off-premises contract terms in national legislation, though it would clearly do so in the case of information to be provided prior to the conclusion of such contracts.

22. The Central Bank Consumer Protection Code which applies to regulated financial services entities includes a number of provisions relating to the presentation and legibility of material provided to consumers. Regulated entities must ensure, for example, that the font size used in all printed information is clearly legible and is appropriate to the type of document and the information contained therein.⁵⁰ They must also ensure that warnings required by the Code are prominent - that is, they must be in a box, in bold type and of a font size that is at least equal to the predominant font size used throughout the document or advertisement.⁵¹ In the case of advertisements for products or services, regulated entities must ensure that key information is prominent and is not obscured or disguised in any way by the content, design or format of the advertisement.⁵² They must further ensure that small print or footnotes are used only to supplement or elaborate on the key information in the main body of the advertisement and must be of sufficient size and prominence to be clearly legible.

⁵⁰ Central Bank, *Consumer Protection Code 2012*, paragraph 4.4.

⁵¹ *Ibid.*, paragraph 3.9

⁵² *Ibid.*, paragraph. 9.6.

23. The Code of Practice for Premium Rate Services (other than broadcasting services) supplied through an electronic communications network recently issued by the Commission for Communications Regulation contains a number of provisions which deal with the presentation and legibility of commercial promotions for such services. In all visual invitations to purchase, pricing information must be displayed prominently in the body of the promotion and not solely contained in the terms and conditions.⁵³ This information must also be of a size that is at least 33 per cent of the primary mechanism used to enable end-users to request or subscribe to the service, or at a minimum text size of 9 point, whichever is larger. Non-price information in visual promotions must appear at a minimum text size of 9 point.⁵⁴ In all visual promotions, furthermore, the information required by the Code must appear in text which contrasts sufficiently in colour with its background to enable it to be clearly read.⁵⁵ The providers of premium rate services must also ensure that all visual promotions are in a format that does not result in required information being lost due to cropping, or rendered illegible due to resizing or reformatting.⁵⁶

24. A number of Orders and Regulations relating to the display of price information at the point of sale contain detailed provisions about the visibility and legibility of such information.⁵⁷ Some of these enactments contain general stipulations about legibility and visibility, while others include detailed provisions about the size of letters and figures on price display notices. As price display information is not the subject of this consultation, it not proposed to discuss these provisions further.

LEGISLATIVE PROVISIONS IN OTHER COUNTRIES

⁵³ Commission for Communications Regulation. 2012. *Code of Practice: Premium Rate Services*, paragraph. 4.10.

⁵⁴ Ibid., paragraph 4.14.

⁵⁵ Ibid, paragraph 4.12.

⁵⁶ Ibid., paragraph. 4.13.

⁵⁷ The Charges (Hairdressing) Display Order 1976 (S.I. No. 156 of 1976). The Retail Price (Food in Catering Establishments) Display Order 1984 (S.I. No. 213 of 1984). The Retail Price (Diesel and Petrol) Display Order 1997 (S.I. No. 178 of 1997). The Retail Price (Beverages in Licensed Premises) Display Order 1999 (S.I. No. 263 of 1999). The European Communities (Requirements to Indicate Product Prices) Regulations 2002 (S.I. No. 639 of 2002).

25. To our knowledge, no European Union or common law jurisdiction has a statutory provision of general application requiring the use of a minimum font size for written contract terms. A number of US states have legislation requiring a specified font size for certain contracts, principally contracts for consumer credit, insurance, and residential tenancies. In New York, for example, residency agreements must be in no less than twelve point type,⁵⁸ premium finance agreements must be in at least eight point type with a heading in at least ten point bold type,⁵⁹ and certain specified statements in consumer credit agreements must be in at least ten point type.⁶⁰ In Massachusetts, specified provisions of contracts for accident and sickness insurance must be in no less than 10 or 12 point type.⁶¹ In North Carolina, insurance contracts must be printed in a typeface of at least 10 point modern type, one point leaded or spaced, and be 'written in a logical and clear order and form'.⁶² A similar typeface size provision applies to insurance contracts in Ohio.⁶³

26. Outside the United States, legislative provisions regulating the presentation of contract terms are, as in the European Union and the United Kingdom, more commonly found in legislation on unfair terms in consumer contracts. In Australia, Part 2(3) of the 2010 Consumer Law deals with unfair terms in standard form consumer contracts.⁶⁴ The unfair terms provisions state that, in determining whether a term of a consumer contract are unfair, courts must take into account the extent to which the term is transparent. A contract term is transparent if it is:⁶⁵

- a) expressed in reasonably plain language;
- b) legible;
- c) presented clearly; and
- d) readily available to any party affected by the term.

⁵⁸ N.Y. PBH. Law: 4658: NY Code - Section 4568(1).

⁵⁹ NY BNK Law 567: NY Code – Section 567(1) & (2).

⁶⁰ N.Y. GBS Law 458-f: NY Code – Section 458-f(1).

⁶¹ 211 CMR 42.00. *The Form and Contents of Individual Accident and Sickness Insurance*. 42.09(1), (3), 4(a)(1) & 4(b)(1).

⁶² North Carolina Code, Chapter 58 Insurance. Article 38 *Readable Insurance Policies*, 58-66-20(a).

⁶³ Ohio Revised Code, Title XXXI. Chapter 3909 *Insurance Policies and Contracts*, 3092.04(A)(2).

⁶⁴ Competition and Consumer Act 2010. Volume 3, Schedule 3 Australian Consumer Law, Part 2-3 *Unfair Contract Terms*. The Act does not apply to consumer contracts for financial legislation as these regulated by separate legislation.

⁶⁵ *Ibid.*, section 24(3).

Legislation currently going through the final stages of the legislative process in New Zealand similarly includes a provision that courts must take the transparency of terms in standard form consumer contracts into account in determining whether terms are unfair, though, unlike in the Australian legislation, the criteria for transparency are not expressly specified.⁶⁶

IV OPTIONS FOR THE FUTURE REGULATION OF SMALL PRINT

27. There are two main options for the future legislative regulation of small print in Ireland:

- 1) the enactment of an order setting a minimum font size for contracts under section 53 of the Sale of Goods and Supply of Services Act 1980; or
- 2) the enactment of provisions on the legibility and intelligibility of consumer contracts in a future, comprehensive Consumer Rights Bill, preparatory work for which is underway.

The arguments for and against each of these options are summarised below.

Option 1: An Order under Section 53 Sale of Goods and Supply of Services Act 1980

28. Pro

- The enactment of an Order under section 53 would be relatively straightforward and could be done quickly.
- Setting a minimum font size for contracts would provide a clear, readily understandable and enforceable rule on a key aspect of legibility.

Con

- An Order under section 53 would address only one of the factors that affect the legibility of contract terms, and would do nothing to address the closely related, and equally important, issue of their intelligibility.
- The enforcement provisions under section 53 are inadequate, particularly in regard to the lack of civil redress for the counterparty to contracts in breach of the font size requirement.

⁶⁶ Consumer Law Reform Bill, section 46(3),
<http://www.leg.govt.nz/bill/government/2011/0287/latest/versions.aspx> .

- An Order under section 53 would have to apply to commercial as well as consumer contracts. This type of regulation of commercial contracts is undesirable in principle and would require scarce enforcement resources to be devoted to breaches affecting businesses only.
- Though the definition of ‘printing’ in section 53 appears sufficiently broad to allow an Order made under the section to encompass contract terms made available on web pages or by electronic mail, it is less clear if such an Order could take adequate account of the specific features of text accessed on computer or smartphone screens, in particular the ability to adjust font size.

Option 2: Inclusion of Provisions on the Legibility and Intelligibility of Contract

Terms in Future Consumer Rights Bill

29. Pro

- Provisions of this kind would allow the twin issues of legibility and intelligibility to be addressed in a coherent and comprehensive manner.
- Rules based on general criteria relating to legibility and intelligibility are more flexible and adaptable to different circumstances and changing technologies. Such provisions could be supplemented, if considered desirable, by a stipulation as to minimum font size, whether in the primary legislation, Regulations made under it, or in guidance.
- The legal consequences where contract terms were in breach of legibility or font size requirements could be more fully addressed, including the question of whether such terms were to be void or not binding on the consumer.
- The scope of provisions regulating the legibility and intelligibility of contract terms provisions could be restricted to consumer contracts.

Con

- The introduction of provisions to regulate small print would be delayed for a significant period.
- The regulation of small print by way of general principles relating to legibility and intelligibility, even if supplemented by specific rules about minimum font size, would lack the clarity and certainty provided by statutory provisions that simply stipulated a minimum font size.

A number of issues relating to the scope and enforcement of legislative provisions that are, to varying degrees, common to both options are discussed next.

Scope of Legislative Provisions to Regulate Small Print

30. As outlined at paragraph 7, an order under section 53 of the 1980 Act prescribing a minimum font size for contracts can apply to –

- 1) goods or services generally, that is all goods, all services, or all goods and services.
- 2) any specified class of goods or services.

Where legislative provisions regulating font size apply in other jurisdictions, they are commonly restricted to specific sectors, principally financial services (including insurance) and residential tenancies. Views are sought below as to whether an Order made under section 53 should be general in scope or should be restricted to specific sectors. As the Consumer Protection Code for regulated financial services entities contains detailed rules regarding the legibility and presentation of printed information (including information on contract terms), views are also sought as to whether the minimum font size prescribed in such an order should apply to financial services. Though the ComReg Code of Practice on Premium Rate Services contains detailed rules about font size and other presentational requirements, these appear to apply to promotions and invitations to purchase rather than to contract terms. The application of an order made under section 53 to contracts for premium rate services would not appear, therefore, to entail a risk of dual regulation.

31. The inclusion of provisions regarding legibility and intelligibility in the legislation on unfair terms in consumer contracts does not give rise to the same issues of double or overlapping regulation. Directive 93/13/EEC on unfair terms applies to all consumer contracts,⁶⁷ including financial services, and, as we have seen, already includes a requirement that written contract terms must be drafted in ‘plain, intelligible language’. As the Directive is a minimum harmonisation instrument,

⁶⁷ Per Recital Ten, the Directive ‘applies to all contracts concluded between sellers or suppliers and consumers’, but excludes ‘inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements’.

Member States are free to include additional requirements relating to legibility and/or intelligibility in national legislation.

Enforcement

32. As noted at paragraph 7, the sole enforcement provision in section 53 of the 1980 Act is that a person who contravenes an order made under the section commits an offence. There is no provision for the National Consumer Agency to seek a court order prohibiting contract terms in a font size smaller than that prescribed in such an order. The Act is silent also about the effect on the contract of a breach of such an order.

33. The Unfair Contract Terms Directive provides that unfair terms in a consumer contract shall not, as provided for under national law, be binding on the consumer. The Directive does not similarly specify the legal consequences that apply where the 'plain and intelligible language' requirement in Article 5 of the Directive is breached. The sole legal consequence of failure to fulfil the intelligibility requirement is the provision at Article 5(2) to the effect that, where the meaning of a contract term is in doubt, the interpretation most favourable to the consumer will prevail.⁶⁸ This is consistent with the long standing common law rule that an ambiguous contract term should be construed *contra proferens*, that is, against the person who drafted and relies upon the clause. The Law Commission of England and Wales and the Scottish Law Commission have recommended that unfair terms legislation in the UK should be amended to provide that the factors to be taken into account in assessing the fairness of consumer contracts should expressly include whether the contract is transparent, that is expressed in plain language, presented in a clear manner, and accessible to the consumer.⁶⁹ If a provision along these lines is enacted, it would be

⁶⁸ Article 4(2) of the Directive also provides that contract terms relating to the definition of the main subject matter of the contract or the adequacy of the price and remuneration as against the goods or services supplied in exchange that would otherwise be exempt from assessment for fairness are so assessable in so far as the terms in question are not in 'plain intelligible language.'

⁶⁹ Law Commission and Scottish Law Commission. 2005. *Unfair Terms in Contracts*, paragraphs. 3.101-102. See also Law Commission and Scottish Law Commission. 2002. *Unfair Terms in Contracts: A Joint Consultation Paper*, paragraphs 4.104-109.

possible accordingly for a contract term to be found to be unfair – and hence not binding on the consumer - principally or solely because it was not transparent.

Publication of Responses to Consultation Paper

34. It is proposed to make the responses to the consultation paper available on the Department of Jobs, Enterprise and Innovation website. Any material contained in submissions made in response to the consultation that respondents do not wish to be made public in this way should be clearly identified as confidential in the submission. Respondents should also be aware that submissions may be disclosed by the Department in response to requests under the Freedom of Information Acts 1997-2003. Any 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 Acts, the Department will consult with respondents about information identified as commercially sensitive before making a decision on a freedom of information request.

V QUESTIONS ON THE OPTIONS FOR THE FUTURE REGULATION OF SMALL PRINT

Question 1

Do you favour regulating the use of small print in consumer contracts -

- 1) by means of an Order made under section 53 of the Sale of Goods and Supply of Services Act 1980, or
- 2) by means of requirements on legibility and intelligibility in the provisions on unfair contract terms to be included in a future Consumer Rights Bill?

If you favour Option 1, please answer Questions 2-4. If you favour Option 2, please proceed to Question 5.

QUESTIONS RELATING TO OPTION 1: AN ORDER UNDER SECTION 53 OF THE SALE OF GOODS AND SUPPLY OF SERVICES ACT 1980

Question 2

What minimum font size should be prescribed by an order made under section 53?

Question 3

Should an Order made under section 53 apply to:

- 1) all contracts for goods;
- 2) all contracts for services;
- 3) all contracts for goods and services;
- 4) contracts for specified classes of goods and/or services
- 5) exclude contracts for regulated financial services.

Question 4

If your reply to Question 3 is that an Order made under section 53 should apply only to specified classes of goods and/or services, please indicate the classes of goods or services to which it should apply.

QUESTIONS RELATING TO OPTION 2: THE INCLUSION OF PROVISIONS ON THE LEGIBILITY AND INTELLIGIBILITY OF CONTRACT TERMS IN FUTURE LEGISLATION ON UNFAIR CONTRACT TERMS

Question 5

Should statutory provisions on the legibility of contract terms in unfair contract terms legislation provide for:

- 1) a general requirement of legibility;
- 2) a general requirement of legibility, supplemented by a specific statutory requirement for a minimum font size;
- 3) a general requirement of legibility, supplemented by guidance on minimum font size.

Question 6

If your reply to Question 5 is that legibility provisions in future unfair contract terms legislation should include a specific statutory requirement for a minimum font size, please indicate:

- (a) the minimum font size that should be prescribed; and
- (b) whether, In the case of contract terms presented on a web page or provided in an electronic mail, compliance with such a statutory font size requirement would be met if the webpage or electronic mail can be reformatted to the required font size without being rendered illegible.

Question 7

Should future consumer rights legislation provide that breaches of provisions on the intelligibility and legibility of contract terms should be taken into account in assessing the fairness of consumer contracts?

Question 8

Should the intelligibility requirements in future unfair contract terms legislation be made expressly subject to the average consumer test contained in the Unfair Commercial Practices Directive and the Consumer Protection Act 2007?

