



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

CONSULTATION PAPER ON REFORM OF THE LAW ON CONSUMER CONTRACT RIGHTS

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EXECUTIVE SUMMARY

I INTRODUCTION

1. This consultation paper outlines, and seeks view on, the main elements of proposed legislation to consolidate and update the statutory provisions that regulate consumer contracts. While our consumer legislation gives consumers effective protections in many areas, it is deficient and disjointed in a number of important respects, among them:

- The rights and remedies of consumers in respect of the quality and other aspects of goods that they purchase are regulated by two separate and not always consistent sets of statutory provisions – the Sale of Goods Acts 1893 and 1980 and the European Union (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 – while the rights of consumers in respect of the quality and other aspects of goods supplied under hire purchase and hire agreements are regulated by separate rules in the Consumer Credit Act 1995.
- The statutory rules on the supply of services are silent on key issues such as the remedies for services supplied in breach of these rules.
- While digital content supplied in tangible form is subject to the rights and remedies in the Sale of Goods Acts, digital content supplied – as is now mainly the case – in intangible form through downloads, streaming or other means is not subject to similar statutory regulation.

2. The deficiencies of the current legislative regime for consumer contract rights were analysed in detail in the final report of the Sales Law Review Group. The Group recommended the enactment of a comprehensive Consumer Rights Act that would bring together in an accessible way the main statutory provisions applicable to consumer contract rights. The Minister for Jobs, Enterprise and Innovation, Richard Bruton T.D., endorsed this recommendation, observing that an Act along these lines would create a structure that would be simpler to understand, create clearer rules for businesses, and bring about substantial improvements for consumers.

3. The main features of the proposed legislation, and the specific issues on which views are sought, are set out in subsequent Parts of this Consultation Paper as follows:

- Part II deals with the objectives and scope of the proposed legislation;
- Part III deals with consumer rights and remedies in contracts for the sale of goods;
- Part IV deals with consumer rights and remedies in non-sale contracts for the supply of goods;
- Part V deals with consumer rights and remedies in contracts for the supply of digital content;
- Part VI deals with consumer rights and remedies in contracts for the supply of services;

- Part VII deals with unfair terms and exclusion clauses in consumer contracts, whether sales, digital content or service contracts;
- The Annex to the Paper lists all of the questions on which views are sought.

4. Though the Department is committed to introducing a Consumer Rights Bill along the lines outlined in this Paper, the specific aspects of the legislative proposals on which views are sought are subject to review in the light of the responses to the consultation. Responses to the consultation should be sent by Monday 20 October by e-mail to conspol@djei.ie or by post to Competition and Consumer Policy Section, Department of Jobs, Enterprise and Innovation, Earlsfort Centre, Lower Hatch Street, Dublin 2.

II OBJECTIVES AND SCOPE OF PROPOSED CONSUMER RIGHTS BILL

5. The proposed Consumer Rights Bill will deal with transactions between consumers and traders, and will not regulate either transactions between consumers or those between traders. The main focus of the Bill will, first, be on the rights of consumers, and the corresponding obligations of traders, in respect of the quality and other attributes of goods, services and digital content. It will deal, secondly, with the remedies available to consumers when these rights are contravened. The legislation will, thirdly, incorporate the statutory provisions regulating the fairness or otherwise of the terms of consumer contracts. The current legislative provisions in these areas are spread across a number of different Acts and statutory instruments, and their consolidation in a single enactment in the interests of regulatory simplification is a core objective of the proposed legislation. The second main aim of the proposed legislation is to address the clear gaps in the protections afforded consumers by existing legislation. The Department will seek to ensure that the provisions of the proposed legislation will, as far as possible, be clear, coherent, proportionate, and effective.

Incorporation of Consumer Rights Regulations in Proposed Legislation

6. Directive 2011/83/EU on Consumer Rights was given effect by the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2014 (S.I. No. 484 of 2013) - the Consumer Rights Regulations - which were enacted on 11 December 2013 and came into operation on 14 June 2014. Subject to specified exclusions, the Regulations

- set out the substance and form of the information that traders must provide to consumers before consumers are bound by on-premises, off-premises or distance contracts;
- give consumers the right to cancel off-premises and distance contracts within fourteen days of the delivery of the goods in the case of sales contracts and fourteen days of the conclusion of the contract in the case of service contracts;

- regulate the fees charged by traders in respect of the use of a given means of payment, the cost of calls by consumers to customer helplines, and payments by consumers additional to the remuneration agreed for the trader's main obligation under the contract;
- amend the provisions of the Sale of Goods Act 1893 on the passing of risk, and certain of the Act's rules on delivery, in contracts of sale where the buyer deals as consumer.

7. While consideration was given to transposing the Directive in the Consumer Rights Bill outlined in this paper, this would not have been possible within the December 2013 time limit set by the Directive for the enactment of implementing legislation in Member States. The proposed Bill, however, will provide an opportunity to include the Consumer Rights Regulations alongside the Bill's other provisions. Inasmuch as the Regulations deal with consumer contracts – and in particular the distance contracts that are likely to account for an ever-increasing proportion of consumer transactions in the future - there is some logic in incorporating them in the proposed Bill. The main argument against including the Consumer Rights Regulations in the proposed Bill is that it would make the legislation longer and more complex.

Inclusion of Parts 3 and 4 of Consumer Protection Act 2007 in Proposed Bill

8. Directive 2005/29/EC on Unfair Commercial Practices deals with unfair, misleading and aggressive commercial practices by traders which are directly connected with the promotion, sale or supply of products to consumers. The Directive was given effect in Ireland by Parts 3 and 4 of the Consumer Protection Act 2007. As the Directive is not a contract law measure, it is not a necessary or direct complement to the provisions regulating consumer contracts that will form the main focus of the proposed legislation. It can be argued on the other hand that consumers and traders do not distinguish between different branches of consumer law and that there would be advantages to both in bringing together the main provisions relating to consumer contracts and business-to-consumer commercial practices in a single enactment.

Designation of Parties to Consumer Transactions

9. The parties to the transactions for the sale or supply of goods and the supply of services regulated by existing consumer legislation are referred to, and defined, in different ways: 'buyer' and 'seller'; 'hirer' and 'owner'; 'consumer', 'seller' and 'supplier'; and 'consumer' and 'trader'. It is not desirable to have different terms and definitions applying to the parties to consumer transactions in the statutory provisions that regulate these transactions. As 'consumer' and 'trader' are now the accepted terms in European Union legislation, it is proposed these should serve as the standard terms for the parties to all of the transactions to be covered by the proposed legislation. It is further proposed to define these terms broadly in line with the definitions in the Consumer Rights Directive.

III CONSUMER RIGHTS AND REMEDIES IN CONTRACTS FOR THE SALE OF GOODS

10. Though goods are transferred from traders to consumers under a range of different transactions, contracts of sale are the most important and the most extensively regulated of these transactions. The Sale of Goods Act defines a contract for the sale of goods as ‘a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price’. The Act defines ‘goods’ as all chattels personal other than things in action and money... The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.’ The language of the definition is archaic and obscure, and it is proposed to define ‘goods’ in the legislation in line with the following definition from the Consumer Rights Directive:

‘Goods’ means any tangible movable items with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or set quantity.

Though similar in substance to the definition in the Sale of Goods Act, this definition is expressed in clearer, less dated terminology.

Consumer Rights in Contracts for the Sale of Goods

11. When consumers acquire goods from traders under contracts of sale, they have certain expectations about those goods, such as that the trader has the right to sell the goods, that the goods should be as described by the seller, and that they should be of an acceptable quality. The rules on the quality and other aspects of goods are currently set out in two separate enactments – the domestic rules in the Sale of Goods Acts 1893 and 1980 and the rules of European Union origin in the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 – the Consumer Sales Regulations.

12. The Sales Law Review Group was critical of the existence of two separate sets of statutory rules regulating sales contracts, stating that it had ‘aggravated the complexity and lack of coherence of Irish sales law and led to ‘a confusing and, in some respects, contradictory legislative framework’. The Department agrees that the twin provisions now in place should be replaced by a single, coherent set of rules on the quality and other aspects of goods sold under consumer sales contracts. The principal issue for decision at this point concerns the basis of these rules – namely, should the rules be based, with appropriate modifications, on the concepts and terminology of the Sales of Goods Acts or on those of the EU Directive on Consumer Sales? The choice is largely one of form rather than substance, and the arguments for and against each of the options are set out in Box 2 of the consultation paper.

13. The main modifications envisaged to the quality provisions of the Sale of Goods Act are those recommended by the Sales Law Review Group, namely -

- the replacement of ‘merchantable quality’ standard by a standard of ‘satisfactory quality, defined as ‘the standard that a reasonable person would regard as satisfactory taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances’, and
- the addition of an indicative list of specific aspects of quality – fitness for the purposes for which goods of the kind in question are commonly supplied, appearance and finish, freedom from minor defects, durability and safety - that would apply in appropriate cases alongside the general definition of satisfactory quality.

The main modifications envisaged to the provisions of the Consumer Sales Directive would involve the replacement of the ‘presumption of conformity’ basis of the provisions by a basis less susceptible to challenge and the inclusion of an express reference to durability, safety, appearance and finish and freedom from minor defects as aspects of the quality and performance of goods.

Remedies for Breach of Quality and Other Standards in Consumer Contracts of Sale

14. The right of consumers to receive goods that meet the required quality and other standards is of limited value if consumers do not have adequate remedies where goods are in breach of those standards. While the quality and other standards applying to goods under the Sale of Goods Acts and the Consumer Sales Directive are relatively similar, the same cannot be said of the remedies. In the view of the Sales Law Review Group, it flew ‘in the face of all the tenets of good regulation to have two separate remedial schemes that serve the same purpose but are inconsistent, or in conflict in important respects’. The Department agrees with the Review Group’s recommendation on the need to integrate the remedial schemes under the Sale of Goods Acts and the Consumer Sales Directive.

15. The principal difference between the remedial schemes under the EU Consumer Sales Directive and the Sale of Goods Acts is that the remedy of rescission of the contract under the Directive can be invoked only where the consumer is not entitled to have the goods repaired or replaced, or where the seller cannot perform these remedies within a reasonable time or without significance inconvenience to the consumer. Under the Sale of Goods Acts by contrast, the consumer can reject the goods and terminate the contract without a requirement for prior recourse to repair or replacement.

16. In the Department’s view, the provisions on remedies for faulty goods in the proposed Consumer Rights Bill should meet three fundamental requirements. First, there must be a single coherent scheme of remedies instead of the twin schemes that now exist. Secondly, the scheme of remedies must include the remedies – repair, replacement, rescission and price reduction and the right to proceed to rescission or price reduction if repair and replacement are not available or are not

undertaken within a reasonable time or without significant inconvenience to the consumer – required by the Consumer Sales Directive, though it can diverge from the conditions attached to these remedies as the Directive is a minimum harmonisation enactment. Thirdly, the right to reject faulty goods for a limited time period must be a remedy of first resort and not, as under the Consumer Sales Directive, a second-tier remedy to which consumers can have recourse only when they are not entitled to the first-tier remedies of repair or replacement, or when these remedies are not completed within a reasonable time or without significant inconvenience to the consumer. The right to reject has been a cornerstone of our law for decades and its relegation to a second-tier remedy would entail a significant diminution in consumer rights.

17. Though the right to reject is a powerful remedy, it ceases to apply when the buyer is deemed to have accepted the goods. The rules on acceptance at section 35 of the Sale of Goods of Act 1893 originally provided that the buyer was deemed to have accepted the goods, and to have lost the right to reject, ‘when after the lapse of a reasonable time’ he retained them without intimating rejection. This was amended in 1980 to provide that the buyer was deemed to have accepted the goods when ‘without good and sufficient reason, he retains the goods without intimating to the seller that he has rejected them’. While the lack of any reported case law on the revised provision makes authoritative interpretation difficult, the effect of the revision was arguably to replace what had always been seen as a relatively short-term remedy with a longer-term one.

18. In the Department’s view, the current provision on acceptance ‘without good and sufficient reason’ for intimating rejection is unsatisfactory for a number of reasons. First, it offers little or no clarity or certainty to buyers and sellers as to when acceptance occurs and the right of rejection is lost. Secondly, insofar as the existing provision can be interpreted as providing a long-term right to reject, it gives rise to potentially significant issues and difficulties in practice. It is proposed instead to provide for a standard thirty day period within which faulty goods can be rejected together with a shorter time period for goods, such as perishable items, to which a thirty day period is inappropriate and a longer time period for cases where it is reasonably foreseeable to both parties that a period longer than thirty days will be needed to examine and try out the goods. While this will entail a significantly shorter period for rejection than under existing Irish law, this will be offset by the greater clarity and certainty offered by the provision. Consumers will find it easier to enforce a thirty-day rejection period than the indeterminate provision that currently applies.

Termination for ‘Minor’ Defects

19. The EU Consumer Sales Directive provides that ‘the consumer is not entitled to have the contract rescinded if the lack of conformity is minor’. This restriction on the right of rescission was included in the Regulations which give effect to the Directive in Ireland. There is no corresponding prohibition

on rejection for minor defects under the Sale of Goods Acts, though there is some uncertainty as to whether, or to what extent, the implied condition as to merchantable quality under the Acts covers such defects. The Sales Law Review Group recommended that 'freedom from minor defects' and 'appearance and finish' should be made express aspects of the quality of goods in future Irish legislation. The Group also recommended against precluding rejection for minor defects. It contended that, as the appearance and finish of consumer goods were often integral to their overall quality, a provision that limited the remedies available to consumers for defects affecting the appearance of goods would be unjustifiably detrimental to consumer interests. It would also create uncertainty and lead to disputes as to what was or was not a 'minor' defect. The Group pointed out that, as 'appearance and finish' and 'freedom from minor defects' would, under its recommendation, be aspects of the overall standard of quality in appropriate cases, courts would be free to distinguish between defects that were trivial and negligible and those that impaired the level of quality that a reasonable person would regard as satisfactory. The Department's agrees with the Review Group's recommendation that the right to reject faulty goods should not exclude termination for 'minor' defects.

Relation between Repair and Replacement and Termination or Price Reduction

20. The EU Directive on Consumer Sales differentiates between the first-tier remedies of repair and replacement and the second-tier remedies of termination and price reduction. The Directive provides that the consumer may require the rescission of the contract or an appropriate reduction of the price if –

- the consumer is entitled to neither repair nor replacement, or
- the seller has not completed the repair or replacement within a reasonable time, or
- the seller has not completed the repair or replacement without significant inconvenience to the consumer.

21. These provisions have been criticised for failing to give sufficient certainty or adequate safeguards to consumers in respect of the number of repairs and replacements that a trader may provide before the consumer is entitled to have recourse to the remedies of termination or price reduction. The Sales Law Review Group recommended accordingly that, in addition to being entitled to proceed to the remedies of termination or price reduction where repair or replacement were not undertaken within a reasonable time or without significant inconvenience, the consumer should be entitled to have recourse to termination or price reduction where the lack of conformity of the goods was not remedied by a first repair or a first replacement.

Compensation for Use of Goods Prior To Termination of Contract

22. As the right to reject was originally seen as a short-term remedy, a consumer or other buyer who exercised the right was not liable to compensate the seller for the use of the goods in the period prior to rejection. Compensation for use is not an issue in the case of the standard thirty day period for rejection proposed in this paper. It is an issue that requires consideration, however, where the consumer opts to terminate a contract and obtain a refund after repair or replacement have been resorted to and found unsatisfactory.

23. Subject to review in the light of the responses to this consultation, the Department does not propose to include a provision permitting compensation for use where the right to reject faulty goods is exercised as a remedy of second resort. Though Irish law has included such a remedy in the Sale of Goods Acts since 1980 and in the Consumer Sales Regulations since 2003, neither enactment makes provision for such compensation. The proposed standard thirty day period for rejection will represent a significant reduction in the duration of the rejection period compared with the position under existing Irish law, and it is reasonable to balance this diminution in consumer rights by affording consumers a secondary right of rejection without a compensation for use provision. On a practical level, devising a fair and workable formula for deduction for use is also likely to prove difficult.

IV CONSUMER RIGHTS AND REMEDIES IN NON-SALE CONTRACTS FOR THE SUPPLY OF GOODS

Scope of Non-Sale Transactions

24. Though contracts of sale are the most important form of goods transaction, goods are transferred from traders to consumers under a variety of other transactions as follows:

- contracts that include both the provision of a service and the supply of related goods (often referred to as work and materials contracts);
- hire agreements - defined as agreements of more than three months duration for the bailment (transfer of possession) of goods to a hirer under which the property in the goods remains with the owner;
- hire-purchase agreements – defined as agreements for the bailment of goods under which the hirer may buy the goods or under which the property in the goods will, if the terms of the agreement are complied with, pass to the hirer in return for periodical payments;
- exchange or barter – transactions in which goods are exchanged in return for other goods or, less commonly, for services.

25. As stated, a first key objective of the proposed reform of consumer law is to rationalise the statutory provisions governing different types of transaction, while the second is to tackle the gaps

that currently exist in the statutory protections for certain transactions. The proposed Bill will address both objectives by applying a single set of rights and remedies to all transactions in which traders supply goods to consumers (sales, hire-purchase, hire, exchange transactions in which consideration is given by the consumer in a form other than money, and goods supplied 'free' with other goods or services for which the consumer pays a price). Subject only to such modifications as are necessitated by the *sui generis* features of particular transactions, the rights and remedies of consumers in respect of the quality and other aspects of goods under the Bill will be the same regardless of the nature of the transaction under which the goods are supplied.

Consumer Rights in Non-Sale Contracts for the Supply of Goods

26. The rights germane to non-sale contracts for the supply of goods are broadly the same as those applying to sales contracts – the right of the trader to supply the goods; the freedom of the goods from undisclosed charges and the right of the consumer to quiet possession of the goods other than in accordance with such charges; the correspondence of the goods with their description, sample or model; the compliance of the goods with reasonable expectations about their quality; and the fitness of the goods for any particular purpose made known by the buyer. The main modification required to the rules that are to govern non-sale contracts relates to the non-applicability of the provisions regarding ownership and title to hire contracts. The rights relevant to such transactions are the right of the trader to supply the goods and of the consumer to enjoy quiet possession and use of the goods for the period of the hire other than in accordance with any charge or encumbrance disclosed before the conclusion of the contract.

Consumer Remedies in Non-Sale Contracts for the Supply of Goods

27. The remedies for faulty goods under hire and hire-purchase agreements, works and materials contracts and exchange transactions differ in important respects from the remedies for sales contracts. First, with the exception of contracts for work and materials, these remedies are not governed by statutory provisions. Secondly, the right to reject the goods and terminate the contract is not subject to rules on the acceptance of the goods. In the absence of statutory rules, the rules on the termination of hire and hire purchase contracts are governed by the common law rules on affirmation. These rules essentially provide that a party who becomes aware that goods do not conform to the contract does not lose the right to terminate unless he affirms the continued existence of the contract in the knowledge of that breach. Unlike rejection under the Sale of Goods Acts which was traditionally understood to be a short-term remedy, the right to terminate hire-purchase and consumer hire agreements where goods are faulty can apply where the fault emerges long after the delivery of the goods. Though the longer-term right to reject the goods and terminate

the contract in hire-purchase and hire agreements is advantageous to consumers, it does not necessarily give the consumer the right to recover all of the money paid under the contract.

28. Unlike in other common law jurisdictions whose sales law is based on the Sale of Goods Act 1893, the amendment made in Ireland in 1980 to the Act's provisions on acceptance brought about something of a convergence between the rules applying to rejection and termination in sales contracts and those applying in hire-purchase and hire agreements. As a result, the application of the scheme of remedies proposed for sales contracts to non-sale contracts for the supply of goods arguably gives rise to fewer issues. The proposed remedial scheme would permit the consumer party to hire-purchase, hire and other goods transactions to choose in the first instance between repair, replacement or rejection, provided that the last of these remedies was normally exercised within 30 days of delivery. If the consumer opted for repair or replacement, and the chosen remedy was impossible, disproportionate, could not be performed within a reasonable time or without significant inconvenience or had been undertaken unsuccessfully, the consumer would then have a secondary right to reject the goods.

29. It is necessary to take account, however, of the specific features of hire-purchase and hire agreements in the rules governing the refund of the price. Unlike standard sales contracts where consumers pay the full price of the goods on or before delivery, hire purchase agreements involve a schedule of payments over the duration of the hire period combined with an option to purchase the goods at the end of the period. It would seem reasonable accordingly to limit the refund of the price payable to the consumer to the money paid up to the point of termination. Hire contracts differs from the other contracts under consideration here in that they do not involve any transfer of the ownership of the goods. The consumer is paying only for the use of the goods and, if he or she terminates the contract because the goods are faulty, will have had the use of the goods up to the point at which the fault emerged. It can be argued accordingly that a consumer who terminates a hire contract for this reason should not be entitled to a refund of the payments made prior to termination.

V RIGHTS AND REMEDIES IN CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT

30. Article 2(11) of the Consumer Rights Directive defines 'digital content' as 'data which are produced and supplied in digital form'. Recital 19 of the Directive states that this includes data such as 'computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.' While digital content was once mainly supplied in tangible form such as cds or dvds, a range of developments – the greater availability of high-speed broadband, the rapid rise in Internet access,

the increased variety of Internet-enabled devices, and the ability to access and store digital content products on cloud computing platforms - have seen its distribution increasingly shift from the physical to the online domain.

31. Though digital technology has undergone rapid development, the law has been slower to respond. To date, few jurisdictions have introduced statutory provisions that expressly regulate consumer rights and remedies for digital content. As a result, issues have been left to the courts to resolve by reference to legislative provisions drafted in and for a pre-digital world. Though the case law remains somewhat unclear and uncertain, there is evidence of an emerging policy consensus that consumers purchasing digital products should have the same rights and remedies as purchasers of physical goods, with changes as appropriate to accommodate the distinctive characteristics of digital content. The Department sees merit both in regarding contracts for the supply of digital content as a separate category of contract and in applying, with appropriate adaptations, the rights and remedies for contracts for the supply of goods to these contracts. This is the approach currently being taken in the UK and is set to be the approach followed in any future EU legislation.

Right to Supply Digital Content

32. The Sale of Goods Acts define a contract of sale as one in which the seller transfers, or agrees to transfer, the ownership of the goods to the buyer in return for the payment of the price. Contracts for the supply of digital content differ from sales contracts in that the content is typically supplied subject to licence as set out in End User Licence Agreements (EULA). These agreements make it clear that the copyright holder does not transfer ownership of the digital content to the end user, but rather a licence to use that content in accordance with the rights and obligations set out in the agreement. The provisions on digital content in the proposed Bill will clearly have to take account of the copyright and other restrictions characteristic of contracts for the supply of such content. One option would be to utilise a variant of the Sale of Goods Act provisions that permit the transfer of only such title as the supplier or a third party may have and give the consumer the right to have quiet possession of the goods subject to any charges or encumbrances disclosed to him or her. Alternatively, it could simply be required that the supplier of the digital content must have the right to supply it.

Quality of Digital Content

33. While the details of the provision have yet to be fully determined, the quality standard for goods to be included in the proposed Bill is likely, first, to require goods to meet the standard that a reasonable person would regard as satisfactory taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances. It will set out, secondly, an indicative list

of aspects of quality to apply alongside the general standard in appropriate cases: fitness for the purposes for which goods of the kind in question are commonly supplied; appearance and finish; freedom from minor defects; safety; and durability. The Department considers that a quality standard along these lines is appropriate for application to digital content. It is aware that some digital content providers have expressed concern about a quality standard of this kind, and in particular the reference to 'freedom from minor defects'. This concern centres on the fact that, in a sector characterised by continuous product innovation, 'bugs' must be expected in new versions of complex products such as software and games. Applying a quality standard that includes freedom from minor defects is, it is contended, unrealistic and unreasonable in such cases. While this concern is understandable, it takes insufficient account of the flexibility inherent in the proposed quality standard. This standard is based on what a reasonable person would regard as satisfactory having regard to certain specified factors. In the case of complex products, such as new versions of software, a reasonable person may expect to encounter some 'bugs', while consumers can reasonably expect simpler digital products, such as a music file or e-book, to be free of flaws.

Correspondence of Digital Content with Description, Sample or Model

34. Legislation on the sale of goods requires goods to comply with their description, sample or model. While the general principle that digital content should comply with any description or sample provided by the trader is not open to challenge, concerns have been expressed about the possible implications of its application to digital products. Software providers in particular are concerned that the requirement that digital content comply with its original description does not take adequate account of the dynamic nature of software products. These products are subject to regular updates that may replace obsolete or vulnerable functionalities with the result that the software might no longer comply with its original description. The Common European Sales Law seeks to address this concern by providing that digital content 'is not considered as not conforming to the contract for the sole reason that updated digital content has become available after the conclusion of the contract.' Other views as to how the issue might be addressed will be considered.

Remedies for Digital Content

35. The remedies proposed for breaches of the quality and other requirements in contracts for the sale or supply of goods will permit the consumer, in the first instance, to reject the goods within a thirty-day time period and obtain a full refund of the price or to seek the repair or replacement of the goods. If repair or replacement are unavailable, cannot be undertaken within a reasonable time or without significant inconvenience, or if either has been undertaken once, the consumer will then have a further right to reject the goods or to seek a reduction in the price.

36. The application to digital content contracts of the remedies for goods that do not conform to the contract gives rise to a number of issues. The Department does not have a fixed view at this stage on a number of these issues – in particular, whether there should be a short-term right to reject digital content or a limit on the number of repairs or replacements before a consumer could rescind a contract and obtain a refund of the price – and will give them further consideration in the light of the responses to the consultation. Where, however, repair or replacement cannot be undertaken within a reasonable time or without significant inconvenience to the consumer or in accordance with any other conditions set out in the legislation, the consumer should be entitled to a full refund of the price. It is not proposed that the corresponding remedies for faulty goods will provide for compensation for use of the goods prior to rescission and refund of the price, and it would be unreasonable to envisage anything less than full reimbursement where digital content is faulty and the consumer has pursued other remedies in accordance with the legislation.

Digital Content Supplied Other Than for a Price

37. While much digital content is supplied in return for the payment of a price, it is not uncommon for this content to be supplied in return for some form of non-monetary consideration, such as access to personal data. The Department proposes to apply rights and remedies broadly similar to those applying to sales contracts to exchange transactions in which goods are supplied in return for non-monetary consideration. It would be consistent with this approach to provide that the rights and remedies for digital content to be included in the proposed Bill should apply to content supplied in return for consideration other than the payment of a price. Transactions of this kind appear to constitute an important part of the business model and revenue-generating capacity of some digital content providers. It can be argued on the other hand that, while the status of a transaction involving the exchange of goods will be clear to the parties concerned, it may not be similarly apparent whether, or to what extent, a trader is obtaining consideration from a consumer in return for the provision of digital content.

VI CONTRACTS FOR THE SUPPLY OF SERVICES

38. Services account for over two-thirds of output and employment in modern economies and for a substantial proportion of consumer expenditure. Ten of the eleven companies that prompted the greatest number of contacts to the National Consumer Agency in 2013 were engaged in the provision of financial, telecommunications or waste services. As with contracts for the supply of goods and digital content, the main focus of the provisions on services in the proposed Consumer Rights Bill will be on the rights of consumers in respect of the quality and other attributes of services, and the remedies available to consumers when these rights are breached.

Quality of Services

39. The Sale of Goods and Supply of Services Act 1980 provides that, in every contract for the supply of a service where the supplier is acting in the course of a business, the following terms are implied –

- (a) that the supplier has the necessary skill to render the service,
- (b) that he will supply the service with due skill, care and diligence,
- (c) that, where materials are used, they will be sound and reasonably fit for the purpose for which they are required, and
- (d) that, where goods are supplied under the contract, they will be of merchantable quality within the meaning of section 14(3) of the Sale of Goods Act 1893.

40. The requirement that the service be supplied with due skill, care and diligence is a negligence or fault-based standard. Though the service may fail to achieve the desired result or even be defective, the supplier is liable only if he has failed to exercise due skill, care and diligence. This fault-based standard is in contrast to the strict liability or result-based standard that applies in contracts for the sale of goods. The degree of skill and care shown by the seller of goods is immaterial. What matters is whether or not the goods comply with the implied terms.

41. The rationale for the distinction between the quality standards applicable to goods and services has traditionally been that the more complex and less standardised nature of services makes it both unrealistic and unreasonable to apply an outcome-based standard to these transactions. More recent legislative developments have raised the question as to whether a quality standard similar, or at least closer, to that applying to sales contracts might be appropriate to contracts for the supply of a service. Consumers have a reasonable expectation that services, like goods, should be fit for purpose, while a fault-based standard is difficult for consumers to rely on as, in many cases, the consumer will not possess the knowledge and expertise necessary to know if a service has been carried out with reasonable skill and care.

42. Applying a strict outcome based-standard to the generality of services, however, would be a far-reaching change. While there may be certain services to which a rule of this kind could potentially be applied, its application would be more problematical in the case of professional and personal services in which a range of variables and contingencies are liable to intervene between expectation and outcome. The Department agrees with the conclusion of the Sales Law Review Group that a single, all-purpose, outcome-based quality standard is unsuited to the diversity of services activities and the flexibility that this requires.

43. While the Review Group was not in favour of the introduction of an inflexible result-based standard for services contracts, it considered that there was scope for a measured reform of the

purely fault-based standard at section 39 of the 1980 Act. It saw considerable merit in this context in the provisions in New Zealand and Australian legislation. These provisions apply, first, only to an outcome that the consumer has made known to the supplier expressly or impliedly. Secondly, they do not stipulate that a particular result must be achieved, but provide instead that the services should be such that they might be reasonably be expected to achieve the intended result. If the services provided would normally achieve this result, therefore, the supplier might not be liable because of a failure to achieve it in the circumstances specific to a particular transaction. An additional element of flexibility arises, thirdly, from the fact that the supplier's obligations under the provision arise only where there has been reasonable reliance on his skill and judgement.

44. The Department recognises that arguments can be made for and against a shift to an outcome-based quality standard for services. It does not have a fixed view on the issue at this stage and will give it further consideration in the light of the responses to this consultation.

Correspondence of Services with Description

45. While the Sale of Goods Acts imply into every contract of sale by description a condition that the goods comply with their description, no equivalent requirement applies to services contracts. The UK Consumer Rights Bill contains a provision that, subject to specified conditions, contracts for the supply of services are to be treated as including a provision that anything said by or on behalf of a trader that is taken into account by a consumer in deciding to enter into a contract forms part of the contract. Consumers can do and suffer detriment when service providers make statements or give commitments that they do not subsequently honour. While such statements may well be incorporated in the contract in any event, a statutory provision along the above lines clarifies the point in a manner likely to be beneficial to consumers. Subject to review in the light of responses to the consultation, the Department proposes to include a provision along these lines in the proposed Bill.

Default Provisions on Time and Price of Service

46. It is also proposed to include in the proposed Bill default provisions on the time of supply and the price of services. Where, first, the time for a service to be carried out is not fixed by the contract, the supplier will be required to provide the service within a reasonable time. Secondly, where the price of a service is not fixed by the contract, the recipient of the service will pay a reasonable charge. What constitutes a reasonable time or charge will be a matter of fact.

Exclusion of Statutory Requirements as to Quality and Other Aspects of Services

47. The Sale of Goods and Supply of Services Act 1980 provides that the implied undertakings as to the quality of services may be excluded or varied by a term of a consumer contract where this is fair and reasonable and has been brought to the attention of the consumer. By contrast, contract terms that exempt the quality and other undertakings implied into consumer sales contracts by the Sale of Goods Acts are void. The implied terms governing the quality of services are currently fault-based and, even if proposals for a qualified move towards an outcome-based standard are adopted, will remain so to a significant extent, and certainly to a greater extent than those applying to goods. In a situation in which the statutory rules on the quality of services are, and will remain, less stringent than those on the quality of goods, it is difficult to justify the application to those rules of more permissive provisions on exemption clauses. Exemption clauses pertaining to the statutory rules on the quality and other aspects of services contracts will be put on the same footing as those in sales contracts in the proposed legislation.

Remedies in Consumer Contracts for the Supply of Services

48. The Sale of Goods and Supply of Services Act 1980 does not set out any remedies for breaches of the Act's undertakings on the quality of services. In the absence of statutory remedies, consumers can claim damages in respect of losses arising from any such breach. Depending on the severity of the breach, they may also be able to terminate the contract. Subject to review in the light of the responses to this consultation, the Department proposes that the proposed legislation would include a scheme of remedies for contracts for the supply of services along the following lines:

- Where the service supplied by the trader was in breach of the statutory rules on the quality or other aspects of services, the consumer would have a right to require the trader to remedy the defective performance or, where the breach was of a kind that deprived the consumer of substantially the whole benefit of the contract, to terminate the contract.
- If the trader was unable to remedy the defective performance, or failed to do so within a reasonable time or without significant inconvenience to the consumer, the consumer could require a reduction in the price of the service or terminate the contract. The reduction in price, or the refund payable to the consumer in the event of termination, would be determined by reference to the difference in value between the service the consumer paid for and the service provided by the trader. Where the consumer received no value from the service, the reduction in price or the refund could amount to the full price paid by the consumer.

In the Department's view, a scheme of statutory remedies of this kind would represent a considerable advance on the present situation under Irish consumer law and be of significant benefit to consumers.

VII UNFAIR TERMS IN CONSUMER CONTRACTS

49. It is proposed to incorporate in the proposed Consumer Right Bill provisions that give effect to Directive 93/13/EEC on unfair terms in consumer contracts. The Directive is currently given effect by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000, the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014. In view of the Directive's centrality to consumer contract rights, there is a convincing case for its inclusion in the proposed legislation.

Proposals for Change

50. The Department does not propose to make, or put forward for consideration, changes to either the general test of unfairness under the Directive or the exemption from assessment for fairness of the main subject matter of the contract and the adequacy of the price as against the goods or services supplied in return. Though the Directive's test of unfairness can be criticised on a number of levels, it has now been in place for over two decades with all of the associated advantages of familiarity and interpretation. Making the core terms of consumer contracts subject to assessment for unfairness would represent a far-reaching change with potentially major implications. Even in competitive markets, prices vary significantly and there is ample scope for disagreement as to whether the goods or services supplied in return for a given price represent a fair bargain. Involving enforcement bodies and courts in disputes about what constitutes a fair price in a particular transaction would involve a big change in their role and functions. Though the exemption of the core terms is not under review, the scope of the exemption requires consideration, particularly in respect of contingent and ancillary charges.

Exclusion of Negotiated Terms

51. The Unfair Terms Directive does not apply to contract terms that have been individually negotiated. A sizeable number of Member States did not implement this exemption in their national legislation, and the UK is now set to join their ranks. The arguments in favour of applying the provisions on unfair terms to terms that have been negotiated can be summarised as follows:

- negotiated terms in consumer contracts mainly involve the main subject matter of the contract and/or the price and, as such, are already exempt from assessment for fairness;

- applying the provisions on unfair terms to negotiated contract terms would simplify the legislation and do away with disputes and uncertainty as to whether terms had been negotiated or not;
- though the information and resource imbalance between traders and consumers means that even negotiated terms may be unfair in some cases to the consumer, contract terms that have been genuinely negotiated will generally be held to be fair.

The main argument against the application of the unfair terms provisions to contract terms that have been negotiated is that it would undermine the careful balance that the Directive seeks to strike between contractual freedom and consumer protection. It might also make businesses less willing to negotiate with consumers and more likely to rely on pre-formulated contract terms.

Scope of the Core Terms Exemption

52. The scope of the Directive's exemption of core terms from assessment for fairness was brought into sharp focus by the decision of the United Kingdom Supreme Court in *Office of Fair Trading v Abbey National*. The Office of Fair Trading brought a test case on the question of whether charges to personal account customers for unauthorised overdrafts were assessable for fairness under the Unfair Terms Regulations. Though the charges were paid by less than a quarter of current account holders, over a million customers had paid more than £500 in such charges. While the High Court and the Court of Appeal found in favour of the Office of Fair Trading, the Supreme Court over-turned these judgments and found for the banks. It held, among other things, that the charges for unauthorised overdrafts were not assessable for fairness as 'any monetary price or remuneration payable under the contract would naturally fall within the language' of the exemption in the Directive.

53. The judgment in the Abbey National Case gives rise to justifiable concern on several grounds. First, it interprets the core terms exemption in a manner that does not accord with the reasonable expectations of consumers. Secondly, it has left the law in this area in a state of some uncertainty. There are a number of possible ways in which the exemption could be redrawn in the proposed legislation so as to give greater certainty and more effective protection to consumers. The Department does not have a fixed view at this stage as to how the issues raised by the interpretation of the core terms exemption would best be addressed and will give the matter further consideration in the light of the responses to this consultation.

Indicative List of Contract Terms That May Be Regarded as Unfair

54. Many EU Member States made extensive use of the Directive's minimum harmonisation clause to give 'black list' status to the indicative 'grey list' of contract terms in the Annex to the Directive, or to add additional terms to the 'black' or 'grey' lists in national legislation. Ireland was one of a

small minority of Member States that reproduced the Annex without addition or alteration. The Department considers in general that a grey list is a more suitable vehicle for the regulation of unfair contract terms than a black list. The term at paragraph (a) of the Annex regarding the exclusion or limitation of the legal liability of a trader in the event of the death of, or personal injury to, a consumer resulting from an act or omission of the trader is an exception, however, and should be automatically unfair in all circumstances.

55. The Department considers also that the status of the indicative list should be clarified and strengthened. While the Directive characterises the Annex as ‘terms which may be regarded as unfair’, it is proposed that its contents should instead be categorised as contract terms that are presumed to be unfair. The Department has an open mind at this stage on other additions to the indicative list of unfair terms.

Exclusion Clauses

56. Clauses that exclude or restrict consumers’ statutory rights are regulated in different ways in the Sale of Goods Acts 1893, the Sale of Goods and Supply of Services Act 1980, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, and the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003. While the proposed legislation will bar exclusion clauses in all consumer contracts, it is desirable also to bring some coherence to the current confusing patchwork of rules. It is proposed, in line with the recommendation of the Sales Law Review Group, to provide that such clauses should be automatically unfair in all circumstances – that is, to have the status of black list terms in the unfair terms provisions of the proposed legislation.

I INTRODUCTION

Purpose of Consultation

1. This consultation paper outlines, and seeks view on, the main elements of proposed legislation to consolidate and update the statutory provisions that regulate consumer contracts. While our consumer legislation gives consumers effective protections in many areas, it is deficient and disjointed in a number of important respects, among them:

- The rights and remedies of consumers in respect of the quality and other aspects of goods that they purchase are regulated by two separate and not always consistent sets of statutory provisions – the Sale of Goods Acts 1893 and 1980¹ and the European Union (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003.
- The rights of consumers in respect of the quality and other aspects of goods supplied under hire purchase and hire agreements are regulated by separate rules in the Consumer Credit Act 1995, while consumer rights in respects of goods supplied to consumers under exchange transactions are not covered by statutory provisions.
- While services now account for a substantial part of consumer spending, the statutory provisions on the supply of services comprise just four sections of the Sale of Goods and Supply of Services Act 1980 (compared with the over sixty sections in the Acts regulating the sale of goods) and are silent on key issues such as the remedies for services supplied without due skill, care and diligence or in a manner not in conformity with other requirements of the contract.
- While digital content supplied in tangible form such as a cd or dvd is subject to the rights and remedies in the Sale of Goods Acts 1893 and 1980, digital content supplied – as is now mainly the case – in intangible form through downloads, streaming or other means is not subject to similar statutory regulation.

2. The deficiencies of the current legislative regime for consumer contract rights were analysed in detail in the final report of the Sales Law Review Group.² The Group concluded that there would be considerable benefit to both consumers and businesses in bringing

¹ The Sale of Goods Act 1893 and Part II of the Sale of Goods and Supply of Services Act 1980 have the collective citation of the Sale of Goods Acts 1893 and 1980.

² Sales Law Review Group. November 2011. *Report on the Legislation Governing the Sale of Goods and the Supply of Services*, <http://www.djei.ie/publications/commerce/2011/saleslawreviewgroupreport2011.pdf>

together in an accessible way the main statutory provisions applicable to consumer rights. It recommended accordingly the enactment of a Consumer Contract Rights Act that would incorporate the key statutory provisions applicable to consumer contracts, including the provisions of the then recently adopted Directive 2011/83/EU on Consumer Rights (the Consumer Rights Directive). The non-core legislative provisions applicable to consumer contracts of sale would continue to be regulated by the provisions of the Sale of Goods Acts common to both commercial and consumer contracts of sales, many of which are relevant mainly to commercial sales.³ The Minister for Jobs, Enterprise and Innovation, Richard Bruton T.D., endorsed this recommendation, observing that a comprehensive Consumer Rights Act would create a structure which would be appropriate for the 21st century market, be simpler to understand, create clearer rules for businesses, and bring about substantial improvements for consumers.

3. Work on a Consumer Rights Bill along the lines recommended by the Sales Law Review Group had to be deferred while Directive 2011/83/EU on Consumer Rights was transposed. The Directive was given effect by the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013) which were enacted on 11 December 2013 and came into operation on 14 June 2014.⁴ Details of the Directive and Regulations are given in Part II of this Paper; views are also sought as to whether the Regulations should be incorporated in the proposed Consumer Rights Bill.

4. The main features of the proposed legislation, and the specific issues on which views are sought, are set out in subsequent Parts of this Consultation Paper as follows:

- Part II deals with the objectives and scope of the proposed legislation;
- Part III deals with consumer rights and remedies in contracts for the sale of goods;
- Part IV deals with consumer rights and remedies in non-sale contracts for the supply of goods;
- Part V deals with consumer rights and remedies in contracts for the supply of digital content;

³ These provisions deal with matters such as the transfer of the property in, and the title to, goods; the rights of unpaid sellers; and actions for breach of contracts of sale.

⁴ The Regulations can be accessed at <http://www.irishstatutebook.ie/2013/en/si/0484.html> .

The Department of Jobs, Enterprise and Innovation Guidance Note on the Regulations can be accessed at <http://www.djei.ie/commerce/consumer/CRDGuidance.pdf>. A Regulatory Impact Analysis on the Transposition of the Directive can be accessed at <http://www.djei.ie/publications/commerce/2014/crdregulationsriaJune2014.pdf> .

- Part VI deals with consumer rights and remedies in contracts for the supply of services;
- Part VII deals with unfair terms in consumer contracts, whether sales, digital content or service contracts.

5. Though the Department is committed to introducing a Consumer Rights Bill along the lines outlined in this Paper, the specific aspects of the legislative proposals on which views are sought are subject to review in the light of the responses to the consultation. We would encourage consumers and consumer organisations, businesses and business bodies, and other interested parties to submit their views on the issues and questions set out in the Paper. Individuals or organisations with an exclusive or predominant interest in a specific aspect or aspects of the proposals are free to confine their responses to those aspects. Responses to the consultation should be sent by **Monday 20 October** by e-mail to conspol@djei.ie or by post to Competition and Consumer Policy Section, Department of Jobs, Enterprise and Innovation, Earlsfort Centre, Lower Hatch Street, Dublin 2.

6. When the responses to the consultation have been considered, the Department will prepare and publish the Scheme, or heads, of the proposed Consumer Rights Bill. This will give stakeholders an opportunity to submit views on more detailed aspects of the legislative proposals not dealt with in the present consultation, as well as to comment on a more final version of the main provisions of the legislation. It is hoped to finalise, and consult on, the Scheme of the Bill by late 2014 or early 2015.

7. Responses to this consultation paper will be made available on the Department of Jobs, Enterprise and Innovation website. Any material contained in submissions to the consultation which 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.

II OBJECTIVES AND SCOPE OF PROPOSED CONSUMER RIGHTS BILL

8. The proposed Consumer Rights Bill will deal with transactions between consumers and traders, and will not regulate either transactions between consumers or those between traders. The main focus of the Bill will, first, be on the rights of consumers, and the corresponding obligations of traders, in respect of the quality and other attributes of goods, services and digital content. It will deal, secondly, with the remedies available to consumers when these rights are contravened. The legislation will, thirdly, incorporate the statutory provisions regulating the fairness or otherwise of the terms of consumer contracts. The current legislative provisions in these areas are contained in the following enactments:

- The rules governing the quality and other aspects of goods (including digital content supplied in tangible form) sold under sales contracts, and the remedies for breaches of these rules, are set out in the Sale of Goods Acts 1893 and 1980 and the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003.
- The rules governing the quality and other aspects of goods supplied under consumer hire and hire-purchase agreements, though not remedies for breaches of these rules, are set out in Parts VI and VII of the Consumer Credit Act 1995.
- The rules governing the quality of services supplied under service contracts, though not remedies for breaches of these rules, are set out in Part IV of the Sale of Goods and Supply of Services Act 1980.
- The fairness of the terms of consumer contracts is regulated by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000, the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014. Clauses exempting the quality and other terms implied into consumer sales contracts by the Sale of Goods Acts are regulated by section 55 of the Sale of Goods Act 1893, while clauses exempting the implied undertakings as to quality in consumer contracts for the supply of services are regulated by section 40 of the Sale of Goods and Supply of Services Act 1890.

The consolidation of these provisions in a single enactment in the interests of regulatory simplification is a core objective of the proposed legislation.

9. The second main aim of the proposed legislation is to address the clear gaps in the protections afforded consumers by existing legislation, among them:

- the absence of statutory rules on the rights of consumers, and the obligations of traders, in respect of digital content not supplied on a tangible medium, and of a statutory scheme of remedies for breaches of such rules;
- the absence of a statutory scheme of remedies for breaches of the rules on the quality of services;
- the absence of statutory rules on the rights of consumers in respect of goods supplied under exchange transactions, and the absence of a statutory scheme of remedies for breaches of the rules on the quality and other aspects of goods supplied under consumer hire and hire-purchase agreements and exchange transactions.

10. The Department's objective in drawing up the proposed legislation will be to ensure that, as far as possible, its provisions will be –

- clear, that is comprehensible and accessible,
- coherent, that is consistent to the fullest extent possible for different types of transaction,
- proportionate, that is fair and balanced, and
- effective, that is workable and enforceable.

Incorporation of Consumer Rights Regulations in Proposed Legislation

11. As noted above, Directive 2011/83/EU on Consumer Rights was given effect by the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2014 (S.I. No. 484 of 2013) - the Consumer Rights Regulations - which were enacted on 11 December 2013 and came into operation on 14 June 2014. Subject to specified exclusions, the Regulations –

- set out the substance and form of the information that traders must provide to consumers before consumers are bound by on-premises, off-premises or distance contracts;⁵

⁵ On-premises contracts are those concluded on a face-to-face basis on a trader's premises. Off-premises contracts are those concluded on a face-to-face basis away from the trader's premises, for example at the

- give consumers the right to cancel off-premises and distance contracts within fourteen days of the delivery of the goods in the case of sales contracts and fourteen days of the conclusion of the contract in the case of service contracts;
- regulate the fees charged by traders in respect of the use of a given means of payment, the cost of calls by consumers to customer helplines, and payments by consumers additional to the remuneration agreed for the trader's main obligation under the contract;
- amend the provisions of the Sale of Goods Act 1893 on the passing of risk, and certain of the Act's rules on delivery, in contracts of sale where the buyer deals as consumer.

12. While consideration was given to transposing the Directive in the Consumer Rights Bill outlined in this paper, this would not have been possible within the December 2013 time limit set by the Directive for the enactment of implementing legislation in Member States. The proposed Bill, however, will provide an opportunity to include the Consumer Rights Regulations alongside the Bill's other provisions. Inasmuch as the Regulations deal with consumer contracts – and in particular the distance contracts that are likely to account for an ever-increasing proportion of consumer transactions in the future - there is some logic in incorporating them in the proposed Bill. The inclusion of the Regulations in the Bill would also provide an opportunity to extend the Directive's provisions on fees for the use of means of payment, additional payments and charges for communication with traders by telephone to sectors outside the scope of the Directive, and to apply the Directive's information provisions to certain excluded sectors such as healthcare and social services. While these extensions of the Directive's provisions attracted considerable support in the Department's public consultations on the implementation of the Directive,⁶ it was not possible to legislate for them in the transposing Regulations because of the constraints that apply to secondary legislation made under the European Communities Act 1972.⁷ Similar constraints do not apply, however, to Acts of the Oireachtas.

consumer's home or place of work. Distance contracts are those concluded by the exclusive use of means of distance communication, for example contracts concluded online, over the telephone or by post.

⁶ Department of Jobs, Enterprise and Innovation. 2012. *Consultation on Article 19 (Fees for the Use of Means of Payment) and Article 22 (Additional Payments) of Directive 2011/83/EU on Consumer Rights*. Department of Jobs, Enterprise and Innovation. 2013. *Consultation on the Implementation of Directive 2011/83/EU on Consumer Rights*. Both consultation papers, and the responses to them, are available at <http://www.djei.ie/commerce/consumer/crdconsultations/htm#cons1>.

⁷ The constitutional immunity for Regulations made under the 1972 Act applies only to measures necessitated by the obligations of European Union membership. As extensions of a Directive's provisions to transactions outside its scope cannot be held to be so necessitated, they are at risk of legal challenge.

13. The main argument against including the Consumer Rights Regulations in the proposed Bill is that it would make the legislation longer and more complex. It is relevant to note in this context that the Consumer Rights Bill currently before the UK Parliament which consolidates and updates the statutory provisions on goods, services and digital content does not incorporate the Regulations that give effect to the Consumer Rights Directive in the United Kingdom.⁸ The implementation of EU legislation by means of primary legislation also forfeits the flexibility permitted by secondary legislation should amendments subsequently prove to be necessary or desirable; this consideration applies equally, however, to the provisions on consumer sales and unfair contract terms that give effect to EU Directives and are set to form part of the proposed Bill.

QUESTION 1

Should the Regulations that implement the Consumer Rights Directive be incorporated in the proposed Consumer Rights Bill or should they remain as a separate statutory instrument?

Inclusion of Parts 3 and 4 of Consumer Protection Act 2007 in Proposed Bill

14. Directive 2005/29/EC on Unfair Commercial Practices deals with unfair, misleading and aggressive commercial practices by traders which are directly connected with the promotion, sale or supply of products to consumers. The Directive was given effect in Ireland by the Consumer Protection Act 2007, in particular Parts 3 and 4 of the Act, and is regarded by the National Consumer Agency as a cornerstone of our consumer protection legislation.

15. The Unfair Commercial Practices Directive is not a contract law measure but instead regulates business-to-consumer commercial communications, marketing and other

⁸ The text of the Bill as introduced in the House of Commons in January 2014 is available at <http://www.publications.parliament.uk/bills/cbill2013-2014/0161/en/14161en.htm> . The Bill has completed Committee and Report stages in the House of Commons and had its Second Reading in the House of Lords, and is scheduled for Committee Stage in the House of Lords in October 2014.

practices engaged in by traders in order to promote or sell their products.⁹ As such, it is not a necessary or direct complement to the provisions regulating consumer contracts that form the main focus of the proposed legislation. The UK Consumer Rights Bill referred to above, for example, does not include the provisions that implement the Unfair Commercial Practices Directive in the UK. The inclusion of Parts 3 and 4 of the Consumer Protection Act in the proposed Bill would also add substantially to what will already be a lengthy enactment.

16. It can be argued on the other hand that consumers and traders do not distinguish between different branches of consumer law. From a consumer perspective, the protections provided by the law are what matters. For traders, the obligations required by the law are what concern them. For both consumers and traders, bringing together the main provisions relating to consumer contracts and business-to-consumer commercial practices in a single enactment would make the law more accessible. The Australian Consumer Law, for example, deals in a single, albeit lengthy, consolidated enactment with provisions relating to consumer contracts, commercial practices and a range of other issues.¹⁰

QUESTION 2

Should Parts 3 and 4 of the Consumer Protection Act 2007 which give effect to the Unfair Commercial Practices Directive be incorporated in the proposed Consumer Rights Bill?

Designation of Parties to Consumer Transactions

17. The parties to the transactions for the sale or supply of goods and the supply of services regulated by existing consumer legislation are referred to, and defined, in different ways as follows:

⁹ Article 3(2) of the Directive states that it is 'without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'.

¹⁰ Competition and Consumer Act 2010, Volume 3, Schedule 2, <http://www.comlaw.gov.au/Details/C2013C00620>

- Under the Sale of Goods Act 1893, the parties to sales contracts are referred to as “buyer” and “seller”.¹¹ Certain provisions of the 1893 Act and of the Sale of Goods and Supply of Services Act 1980, however, apply only where the buyer “deals as consumer”.¹²
- Under the Consumer Credit Act 1995, the parties to consumer hire and hire purchase agreements are referred to as “hirer” and “owner”.¹³
- Under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, the parties are referred to as “consumer”, “seller” and “supplier”.¹⁴
- Under the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003, the parties to sales contracts are referred to as “consumer” and “seller”.¹⁵
- Under the Consumer Protection Act 2007, the parties to business-to-consumer commercial practices are referred to as “consumer” and “trader”.¹⁶
- Under the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013, the parties to sales, service and digital content contracts are referred to as “consumer” and “trader”.¹⁷

¹¹ Section 62 of the Act defines “buyer” as ‘a person who buys or agrees to buy goods’, and “seller” as ‘a person who sells or agrees to sell goods’.

¹² Section 3(1) of the Sale of Goods and Supply of Services Act 1980 provides as follows:

- (1) In the Act of 1893 and this Act, a party to a contract is said to deal as consumer in relation to another party if –
- a) he neither makes the contract in the course of a business nor holds himself out as doing so,
 - b) the other party does make the contract in the course of a business, and
 - c) the goods or services supplied under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

¹³ Section 2(1) of the Act defines “hirer” as ‘a consumer who takes, intends to take or has taken goods from an owner under a hire-purchase agreement or a consumer hire-agreement in return for periodical payment’, and “owner” as ‘the person who lets or has let goods to a hirer under a hire-purchase agreement or a consumer-hire agreement’.

¹⁴ Regulation 2 of the Regulations defines “consumer” as ‘a natural person who is acting for purposes which are outside his business’, “seller” as ‘a person who, acting for purposes relating to his business, sells goods’, and “supplier” as ‘a person who, acting for purposes relating to his business, supplies services’.

¹⁵ Regulation 2(1) of the Regulations defines “consumer” as ‘a natural person who, as regards a sale or associated guarantee, is acting for purposes which are outside that person’s trade, business or profession’, and “seller” as ‘any natural or legal person who, under a contract, sells consumer goods in the course of his or her trade, business or profession’.

¹⁶ Section 2(1) of the Act defines “consumer” as ‘a natural person (whether in the State or not) who is acting for purposes unrelated to the person’s trade, business or profession’, and “trader” as –

- a) a person who is acting for purposes related to the person’s trade, business or profession, and
- b) a person acting on behalf of a person referred to in paragraph (a).

¹⁷ Regulation 2(1) of the Regulations defines “consumer” as ‘a natural person who is acting for purposes which are outside the person’s trade, business, craft or profession’, and “trader” as –

- a) a natural person, or

PROPOSAL 1

18. It is not desirable in the Department's view to have different terms and definitions applying to the parties to consumer transactions in the statutory provisions that regulate these transactions. It is proposed accordingly that "consumer" and "trader" should serve as the standard terms for the parties to all of the transactions to be covered by the proposed legislation. These are now the accepted terms in European Union consumer protection legislation.

QUESTION 3

Should the parties to all of the consumer contracts and transactions to be regulated by the proposed Consumer Rights Bill be referred to as "consumer" and "trader"? If not, what terms should be used, and why?

PROPOSAL 2

19. It is proposed to define the terms "consumer" and "trader" in line broadly with the definitions in the Consumer Rights Directive as follows:

- "consumer" means any natural person who is acting for purposes that are wholly or mainly outside the consumer's trade, business, craft or profession;¹⁸
- "trader" means any natural or legal person, irrespective of whether publicly or privately owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession.

-
- b) a legal person, whether –
(i) privately owned,
(ii) publicly owned,
(iii) partly privately owned and partly publicly owned,

who is acting for purposes related to the person's trade, business, craft or profession, and includes any person acting in the name, or on behalf of, the trader'.

¹⁸ Though the definition of "consumer" in the Consumer Rights Directive does not include the stipulation that the consumer be acting *wholly or mainly* for purposes outside his or her trade, business, craft or profession, recital 17 of the Directive provides that in 'the case of dual purpose contracts, where the contract is concluded partly for purposes within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered a consumer'. The 'wholly or mainly' stipulation is in line with this clarification. Because of the constraints that apply to secondary legislation made under the European Communities Act 1972 referred to in footnote 7 above, it was not considered advisable to include this clarification in the definition of "consumer" in the Regulations that give effect to the Directive.

20. The provisions of the Consumer Rights Directive are fully harmonised and are mandatory on EU Member States. They are also closely related to the provisions of the proposed Consumer Rights Bill and, as outlined in paragraphs 11-13 above, may possibly be included in the Bill. There is logic and merit accordingly in basing the definitions of “consumer and trader” on those in the Directive.

QUESTION 4

Do you agree with the definitions of “consumer” and “trader” proposed in paragraph 19? If not, how should these definitions be amended, and why?

III CONSUMER RIGHTS AND REMEDIES IN CONTRACTS FOR THE SALE OF GOODS

Definition of Sales Contract

21. Though, as outlined in Part IV of this paper, goods are transferred from traders to consumers under a range of different transactions, contracts of sale are the most important and the most extensively regulated of these transactions. Section 1(1) of the Sale of Goods Act 1893 defines a contract for the sale of goods as ‘a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price’. Section 62 of the Act provides that a contract of sale includes an agreement to sell as well as a sale. Where the property in the goods is transferred from the seller to the buyer the contract is termed a sale, but where the transfer of the goods is to take place at a future time, or subject to some condition to be fulfilled subsequently, the contract is termed an agreement to sell. An agreement to sell becomes a sale when the time fixed for the transfer of property elapses, or the condition governing the transfer of the property is fulfilled.

22. The definition of sales contract in the Sale of Goods Act 1893 is broadly similar in substance to the main part of the definition at Article 2(3) of the Consumer Rights Directive.¹⁹ This states that ‘sales contract’ means ‘any contract under which the trader

¹⁹ ‘Sales contract’ is not defined in Directive 1999/44/EC on Consumer Sales and Associated Guarantees.

transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services.’

Definition of ‘Goods’

23. Goods are defined in different ways in the Irish and European Union legislation that regulates contracts for the sale of goods. Section 62 of the Sale of Goods Act states that:²⁰

“Goods” include all chattels personal other than things in action and money... The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Article 2(3) of the Consumer Rights Directive states that:²¹

‘Goods’ means any tangible movable items with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or set quantity.²²

24. As the Sales Law Review Group observed, the language of the definition in the Sale of Goods Act will strike today’s readers of the Act as archaic and obscure. The substance of the definition in the Consumer Rights Directive and other EU legislation – the specification that goods are tangible and movable – is similar to that in the 1893 Act, but is expressed in clearer, less dated terminology. The Review Group recommended accordingly that the definition of ‘goods’ in EU legislation should serve as the basis of the definition of the term in future Irish legislation.

PROPOSAL 3

25. It is proposed to define “goods” in line with the following definition in the Regulations that give effect to the Consumer Rights Directive:

“goods” means any tangible movable items with the exception of items sold by way of execution or otherwise by authority of law, and includes gas, water and electricity put up for sale in a limited volume or set quantity.

²⁰ For an explanation of the terms in the definition, see Sales Law Review Group, *op. cit.*, paragraph 2.2.

²¹ This is similar to the definition of ‘goods’ in Directive 1999/44/EC on the Sale of Goods and Associated Guarantees as ‘any tangible movable item with the exception of :

- goods sold by way of execution or otherwise by authority of law,
- water and gas where they are not put up for sale in a limited volume or set quantity,
- electricity.

²² Examples of gas, water or electricity put up for sale in a limited volume or set quantity include a gas cylinder, a bottle of water and a battery.

QUESTION 5

Do you agree with the definition of “goods” proposed in paragraph 25? If not, how should the definition be amended, and why?

Consumer Rights in Contracts for the Sale of Goods

26. When consumers acquire goods from traders under contracts of sale, they have certain expectations about those goods, such as that the trader has the right to sell the goods, that the goods should be as described by the seller, and that they should be of an acceptable quality. The statutory rules on the seller’s obligations as to the quality of goods in particular are, as one commentator has noted, ‘at the very heart of the law of sale’ and are ‘in many respects the most important part’ of that law.²³ The rules on the quality and other aspects of goods are currently set out in two separate enactments – the domestic rules in the Sale of Goods Acts 1893 and 1980 and the rules of European Union origin in the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 – the Consumer Sales Regulations.

27. Box 1 sets out the rights of consumers in respect of the quality and other attributes of goods in the Sale of Goods Acts and the Consumer Sales Regulations respectively. While the form and wording of the two sets of rules differs and the EU rules do not deal with matters of ownership and title, the provisions overlap to a substantial extent.²⁴ Each requires goods to comply with their description and sample, to be fit for their normal purposes, to meet reasonable expectations about durability or performance, and to be fit for any particular purpose indicated by the buyer.

²³ Atiyah, P.S. et al. 2010. *The Sale of Goods* (twelfth ed.) (London: Pearson), p. 157.

²⁴ The quality and other requirements applicable to goods under the Sale of Goods Acts listed in Box 1 have the status of conditions (or in the case of the stipulation as to freedom from charges or encumbrances, that of a warranty) implied into the contract of sale. The requirements under the European Union (Consumer Sales and Associated Guarantees) are (rebuttable) presumptions of conformity. For a summary of other differences between the two sets of provisions, see Sales Law Review Group, op. cit., paragraph 1.22.

Box 1

Main Consumer Rights Under Domestic and EU Legislation on Contracts of Sale

Sale of Goods Acts 1893 and 1980²⁵

The seller must have the right to sell the goods [section 12(1) SOGA 1893].

The goods must be free from any charge or encumbrance not disclosed to the buyer, and the buyer must enjoy quiet possession other than in accordance with any such charge or encumbrance [section 12(2) SOGA 1893].

Where the contract is for the sale of goods by description,²⁶ the goods must correspond with that description [section 13(1) SOGA 1893].

The goods must be of merchantable quality, that is they must be as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances. The quality of goods includes their state and condition. The 'merchantable quality' requirement does not apply as regards defects specifically drawn to the buyer's attention before the contract is made or, if the buyer examines the goods before the contract is made, as regards defects which that examination ought to have revealed [sections 14(2), 14(3) and 62(1) SOGA 1893].

Where the buyer makes known any particular purpose for which the goods are being bought, the goods must be reasonably fit for that purpose [section 14(4) SOGA 1893].²⁷

Where the contract is for the sale of goods by sample, the goods must correspond with the sample [section 15 SOGA 1893].

European Communities (Sale of Goods and Associated Guarantees) Regulations 2003

Goods delivered to a consumer under a contract must be in conformity with the contract of sale [Regulation 5(1)].

Goods are presumed to be in conformity with the contract [Regulation 5(2)], if they –

- a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample of model;
- b) are fit for any particular purpose for which the consumer requires them and which he has made known to the seller at the time of the conclusion of the contract and which the seller has accepted;
- c) are fit for the purposes for which goods of the same type are normally used;
- d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative.

The requirement for goods to be in conformity with the contract does not apply if (i) at the time the contract was made, the consumer was aware or ought reasonably to have been aware of the lack of conformity, or (ii) the lack of conformity has its origins in materials supplied by the consumer.

²⁵ The Sale of Goods and Supply of Services Act 1980 also includes an implied warranty for spare parts and servicing and an implied condition on the sale of motor vehicles not listed in Box 1.

²⁶ A sale by description can include a sale of goods exposed for sale and selected on a self-service basis by the buyer.

²⁷ The fitness for particular purpose requirement does not apply where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment.

28. The Sales Law Review Group was critical of the existence of two separate sets of statutory rules regulating sales contracts, stating that it had ‘aggravated the complexity and lack of coherence of Irish sales law’ and led to ‘a confusing and, in some respects, contradictory legislative framework’.²⁸ The Department agrees that the twin provisions now in place should be replaced by a single, coherent set of rules on the quality and other requirements of goods sold under consumer sales contracts. The principal issue for decision at this point concerns the basis of these rules – namely, should the rules be based, with appropriate modifications, on the concepts and terminology of the Sales of Goods Acts or on those of the EU Directive on Consumer Sales? The main such modifications envisaged to the Sale of Goods Act provisions summarised in Box 1 are those recommended by the Sales Law Review Group,²⁹ namely -

- the replacement of ‘merchantable quality’ standard by a standard of ‘satisfactory quality, defined as ‘the standard that a reasonable person would regard as satisfactory taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances’, and
- the addition of an indicative list of specific aspects of quality – fitness for the purposes for which goods of the kind in question are commonly supplied, appearance and finish, freedom from minor defects, durability and safety - that would apply in appropriate cases alongside the general definition of satisfactory quality.

The main modifications envisaged to the provisions of the Consumer Sales Directive provisions would involve the replacement of the ‘presumption of conformity’ basis of the provisions by a basis less susceptible to challenge and the inclusion of an express reference to durability, safety, appearance and finish and freedom from minor defects as aspects of the quality and performance of goods. Amendments of the Directive’s provisions along these lines would be permissible by virtue of the Directive’s minimum harmonisation status.³⁰ As is the case under existing law, the quality requirements to be included in the

²⁸ Sales Law Review Group, op. cit., paragraphs 1.2 and 1.22.

²⁹ Ibid., paragraph 4.48.

³⁰ Article 8(2) of the Directive states that Member States ‘may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection’.

proposed Bill would not apply to defects drawn to the consumer's attention prior to the conclusion of the contract or, where the consumer examines the goods prior to concluding the contract, to defects which that examination should have revealed.

29. Though the choice between the rules on the quality and other aspects of goods in the Sale of Goods Acts and the Consumer Sales Directive is largely one of form rather than substance, it is nevertheless a choice that must be made if we are to have a single set of statutory standards in the future. The arguments for and against basing the relevant provisions in the proposed Bill on each of the respective options are summarised in Box 2.

QUESTION 6

Should the provisions of the proposed Consumer Rights Bill on the quality and other attributes of goods be based on the concepts and terminology of the Sales of Goods Acts or on those of the European Union Directive on Consumer Sales and Guarantees?

Exclusion Clauses

30. Section 55 of the Sale of Goods Act 1893 provides that contract terms which exempt the undertakings as to title, correspondence with description, quality, and correspondence with sample implied into consumer contracts of sale by the Act are void. The prohibition of exclusion clauses is essential in order to ensure that statutory rights are not undermined and will obviously be retained in the proposed legislation. The regulation of exemption clauses in contracts for the sale and supply of goods, the supply of digital content and the supply of services is discussed further in paragraphs 159-160.

Box 2

Arguments for Basing Future Statutory Provisions on the Sale of Goods Acts or the Consumer Sales Directive

Sale of Goods Acts

- The concepts and terminology of the Sale of Goods Acts have over a century of history and interpretation behind them, and it would be unwise to jettison the advantages of familiarity and of a substantial body of case law.
- Retaining rules based on the Sale of Goods Acts for consumer sales contracts would help to maintain a close relation between Irish consumer sales law and that in other common law jurisdictions – the United Kingdom whose reformed consumer law will remain based on the Sale of Goods Act, as is that of countries with progressive consumer law codes such as Australia and New Zealand.
- Retaining rules based on the Sale of Goods Acts for consumer sales would help to maintain coherence and consistency between the statutory provisions applicable to consumer sales contracts and those applicable to commercial sales contracts.

Consumer Sales Directive

- While it may not be strictly necessary to reproduce the wording of European legislation in transposing legislation,³¹ adhering more or less closely to such wording is the course most likely to ensure compliance with the obligation of effective implementation.
- Basing the rules on the quality and other aspects goods on the provisions of the Consumer Sales Directive would help maximise the applicability and utility of the European Court of Justice case law on the Directive. Irish sales of goods legislation has diverged in significant respects from UK legislation in recent decades and the relevance of UK case law has lessened as a result.³²
- As consumer and commercial sales law are aimed at different groups and based on different policy approaches, there is little advantage in seeking to maintain an artificial unity between them.

³¹ Under Article 288 of the European Union Treaty, Directives are 'binding, as to the result to be achieved' on Member States but leave 'to the national authorities the choice of form and methods.' As stated by the European Court of Justice in *Commission v Sweden (C-478/99, paragraph 15)*, the obligation on Member States is to 'adopt, within the framework of its national legal system, all the measures necessary to ensure that the Directive is fully effective, in accordance with the objective it pursues'. The transposition of the Consumer Sales Directive's provisions on the quality and other attributes of goods was effected in the United Kingdom, for example, by means of relatively minor additions to sections 13-15 of the UK Sale of Goods Act 1979.

³² The UK legislation refers to 'satisfactory' rather than 'merchantable' quality and defines that term differently from the provisions on merchantable quality in the Irish Sale of Goods Act. As outlined in paragraphs 40-41, the rules on the acceptance of goods and the loss of right to reject in Ireland and the UK also differ.

Remedies for Breach of Quality and Other Standards in Consumer Contracts of Sale

31. The right of consumers to receive goods that meet the required quality and other standards is of limited value if consumers do not have adequate remedies where goods are in breach of those standards. As is the case with the standards, there are separate remedies for breaches of these standards in the Sale of Goods Acts and the Regulations that implement the Consumer Sales Directive. While the quality and other standards applying to goods under the Acts and the Regulations are relatively similar, the same cannot be said of the remedies. As the Sales Law Review Group observed, the ‘starkest difference between the two regimes lies in the remedies available to consumers for goods not in conformity with conformity with the contract’.³³ In the Group’s view, it flew ‘in the face of all the tenets of good regulation to have two separate remedial schemes that serve the same purpose but are inconsistent, or in conflict in important respects.’³⁴

32. The Department agrees with the Review Group’s recommendation on the need to integrate the remedial schemes under the Sale of Goods Acts and the Consumer Sales Regulations. Before their integration can be considered, it is necessary first to outline the main features of each scheme. For convenience, goods in breach of the various obligations under the Sale of Goods Acts or the Regulations are referred to as faulty goods, regardless of the nature of the breach.

Remedies for Faulty Goods in Sale of Goods Acts

Right to Reject in Sale of Goods Acts

33. With two exceptions,³⁵ the undertakings as to the quality and other aspects of goods under the Sale of Goods Acts are implied into contracts of sale as conditions of the contract. Breach of a condition of the contract gives the buyer, in addition to the right to claim damages, the right to reject the goods and to treat the contract as repudiated and obtain a

³³ Sales Law Review Group, op. cit., paragraph 1.23.

³⁴ Ibid., paragraph 9.49.

³⁵ The implied terms with the status of warranties are (i) the undertakings as to the freedom of the goods from any charge or encumbrance not disclosed to the buyer and as to the buyer’s quiet possession of the goods under section 12 of the Sale of Goods Act 1893, and (ii) the implied warranty for spare parts and servicing under section 12 of the Sale of Goods and Supply of Services Act 1980. Breach of a warranty gives rise to a claim for damages but not to a right to reject the goods.

full refund of the price.³⁶ Though the right to reject is a powerful remedy, it ceases to apply when the buyer is deemed to have accepted the goods.³⁷ Section 35 of the Sale of Goods Act 1893 provides that acceptance is deemed to occur in the following ways:

- (1) When the buyer intimates to the seller that he has accepted the goods;
- (2) When the buyer does any act in relation to the goods that is inconsistent with the ownership of the seller;
- (3) When, without good and sufficient reason, the buyer retains the goods without intimating to the seller that he has rejected them.

34. The wording of the first two heads of acceptance has remained unchanged since the enactment of the 1893 Act. The third head of acceptance was amended by the Sale of Goods and Supply of Services Act 1980 by the substitution of 'without good and sufficient reason' for 'after the lapse of a reasonable time'. This amendment was made in response to concerns that the interpretation of the 'reasonable time' provision in recent UK cases was unduly restrictive in its application to consumer sales.³⁸ As discussed below, however, the 'retention without good and sufficient reason' provision that replaced 'the reasonable time' stipulation has yet to be interpreted by the courts and it is far from clear how it is, or should be, applied in practice.

Right to Request 'Cure' in Sale of Goods Acts

35. Section 53(2) of the Sale of Goods and Supply of Services Act 1980 gives the consumer the right to request 'cure' – that is, repair or replacement - of faulty goods where he or she has opted, or is obliged, to treat the fault in the goods as a breach of a warranty and, as a consequence, no longer has the right to reject. If the seller fails to repair or replace the goods within a reasonable time of the consumer requesting cure, the consumer can then

³⁶ Though rejection of the goods will commonly entail repudiation or termination of the contract, the right to reject the goods and the right to terminate the contract are best understood as separate rights. Sales Law Review Group, op. cit., paragraph 9.6.

³⁷ At the time the 1893 Act was enacted, the right to reject was very much seen as a short-term one, reflecting the fact that the case law on which the Act was based involved commercial sales contracts for commodities, raw materials and, on the whole, relatively unsophisticated manufacturing goods. As cases involving consumer sales and more complex products came before the courts, the time permitted for the rejection of goods tended to lengthen, though not universally so. Law Commission and the Scottish Law Commission. 2008. *Consumer Remedies for Faulty Goods: A Joint Consultation Paper*, paragraphs 3.21-3.24.

³⁸ Sales Law Review Group, op. cit., paragraphs 9.32-9.33.

either reject the goods or have them repaired elsewhere and claim the cost of the repair from the seller.

Remedies for Faulty Goods in EU Consumer Sales Directive

36. The scheme of remedies for faulty goods under the Consumer Sales Directive involves a two-tier hierarchy of remedies, the main features of which are as follows:

- Where the seller has delivered goods that do not conform with the contract, the consumer may, in the first instance, require the seller to repair or replace them.
- Where repair or replacement are impossible or disproportionate, or where either remedy has not been completed within a reasonable time or without significant inconvenience to the consumer, the consumer may require an appropriate reduction of price, or if the lack of conformity is not minor, have the contract rescinded.
- Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery is presumed to have existed at the time of delivery.

37. The principal difference between the remedial schemes under the EU Consumer Sales Directive and the Sale of Goods Acts is that the remedy of rescission of the contract under the Directive can be invoked only where the consumer is not entitled to have the goods repaired or replaced, or where the seller cannot perform these remedies within a reasonable time or without significance inconvenience to the consumer. Under the Sale of Goods Acts by contrast, the consumer can reject the goods and terminate the contract without any requirement for prior recourse to repair or replacement. While rejection of the goods and repudiation of the contract under the Sale of Goods Acts entitles the consumer to a full refund of the price, rescission of the contract under the Consumer Sales Directive does not preclude a deduction from the refunded price for the consumer's use of the goods prior to rescission. This issue is discussed further in paragraphs 55-59.

Proposed Single Scheme of Remedies for Consumer Sales Contracts

38. In the Department's view, the provisions on remedies for faulty goods in the proposed Consumer Rights Bill must meet three fundamental requirements. First, there must be a single coherent scheme of remedies instead of the twin schemes that now exist. Secondly, the scheme of remedies must include the remedies – repair, replacement, rescission and price reduction and the right to proceed to rescission or price reduction if repair and

replacement are not available or are not undertaken within a reasonable time or without significant inconvenience to the consumer – required by the Consumer Sales Directive, though it can diverge from the conditions attached to these remedies as the Directive is a minimum harmonisation enactment. Thirdly, the right to reject faulty goods for a limited time period must be a remedy of first resort and not, as under the Consumer Sales Directive, a second-tier remedy to which consumers can have recourse only when they are not entitled to the first-tier remedies of repair or replacement, or when these remedies are not completed within a reasonable time or without significant inconvenience to the consumer. The right to reject has been a cornerstone of our law for decades and its relegation to a second-tier remedy would entail a significant diminution in consumer rights. The availability of the right to reject gives consumers a strong bargaining tool in dealings with recalcitrant traders and, by giving consumers the option of demanding termination of the contract and a full refund, gives traders an incentive to ensure that the quality of goods sold to consumers is satisfactory and that repairs or replacements are undertaken speedily.

39. The scheme of remedies for faulty goods in the proposed Bill, therefore, will give the consumer the choice, in the first instance, between (i) rejection of the goods, termination of the contract and full refund of the price, (ii) repair and (iii) replacement. It will also set out the conditions under which, a consumer who opts for repair or replacement in the first instance can proceed to termination or price reduction if repair or replacement are unavailable or prove unsatisfactory. A number of specific aspects of the proposed remedial scheme require more detailed consideration, commencing with the time limit or other conditions governing the right to reject faulty goods.

Time Limit for Exercise of Right to Reject

40. As noted above, the rules on acceptance at section 35 of the Sale of Goods of Act 1893 originally provided, that the buyer was deemed to have accepted the goods, and to have lost the right to reject, 'when after the lapse of a reasonable time' he retained them without intimating rejection. While this provision was retained in the Sale of Goods and Supply of Services Bill as introduced in 1978, a Committee Stage amendment moved by the then Government provided instead that the buyer was deemed to have accepted the goods when 'without good and sufficient reason, he retains the goods without intimating to the seller that he has rejected them'. This amendment was prompted by concerns that recent

interpretations of the 'reasonable time' provision by the UK courts operated against the interests of consumers.³⁹

41. While the lack of any reported case law since 1980 on the amended wording of section 35 makes authoritative interpretation of the provision difficult, its effect was arguably to replace what had always been seen as a relatively short-term remedy with a longer-term one. The Sales Law Review Group commented as follows on the change:⁴⁰

Though the amendment effected by the 1980 Act was presented as a way of extending the time limit for the rejection of goods, its significance would seem to go further in providing that time *per se* is no longer the guiding criterion for the purposes of this head of acceptance. The question that the Irish courts must consider is not whether the period for which the buyer retained the goods before intimating rejection was reasonable, but rather whether the buyer had good and sufficient reason for retaining the goods without intimating rejection. It is arguable that the amended wording of section 35 marks a break with the traditional view of the right to reject as a short-term remedy and would permit buyers to reject goods for latent defects that take some time to emerge. It has been suggested in this context that the position under section 35 is analogous to the common law principle of affirmation under which an innocent party cannot, as a general rule, be held to have affirmed the contract unless he had knowledge of the breach.

42. In the Department's view, the current provision on acceptance 'without good and sufficient reason' for intimating rejection is unsatisfactory for a number of reasons. First, it offers little or no clarity or certainty to buyers and sellers as to when acceptance occurs and the right of rejection is lost. Secondly, insofar as the existing provision can be interpreted as providing a long-term right to reject, it gives rise to potentially significant issues and difficulties in practice. A long-term right to reject is open to abuse by buyers who may use goods for a specific purpose or period before rejecting them and obtaining a full refund of the price. If such a right were exercised on a significant scale, it would arguably be necessary to formulate rules dealing with the buyer's obligation to give credit or compensation for the use of the goods during the months, or possibly even years, prior to rejection. In addition to being difficult to devise and liable to cause disputes, rules on compensation for use would

³⁹ The case that gave rise to particular concern was *Lee v York Coach and Marine* ([1979] 2 Lloyd's Rep 28) in which the buyer of a defective motor car sought to reject it six months after delivery, during which time attempts had been made both to remedy the defects and to persuade the seller to acknowledge his obligation to do so. The Court of Appeal held, however, that the reasonable time allowed for rejection had elapsed and that the buyer was not entitled to reject the vehicle, but only to damages for breach of warranty. *Dáil Debates*, Vol.316, 14 November 1979 Sale of Goods and Supply of Services Bill 1978 Committee Stage (Resumed): col. 1646.

⁴⁰ The English and Scottish Law Commissions had a similar interpretation of the 'without good and sufficient reason' head of acceptance at section 35 of the 1893 Act. Law Commission and Scottish Law Commission. 2008. *Consumer Remedies for Faulty Goods: A Joint Consultation Paper*, paragraphs 6.28-6.29.

take away much of the benefit of an extended right to reject. Compensation for use is discussed further in paragraphs 55-59.

Option 1: Standard Thirty Day Time Period for Right to Reject

43. The Sales Law Review Group recommended that the normal time period within which consumers could exercise the right to reject faulty goods should be thirty days from the date of purchase or delivery of the goods. A shorter or longer period for rejection would apply in the following circumstances:

- Where the standard thirty-day period for rejection is incompatible with the nature of the goods – for example, where the goods are perishable - a rejection period shorter than thirty days would apply.
- Where it is reasonably foreseeable by both parties that a longer period will be needed to examine and try out the goods – for example, a lawnmower bought in November, a pram bought in the early stages of a pregnancy - a rejection period longer than thirty days would apply.

As with the right to reject under existing law, the right to reject for a thirty-day period would apply only where the goods were faulty – that is, in breach of the statutory requirements as to the quality or other attributes of the goods. The no-quibble return of goods permitted for 28 days or other periods by some retailers are a policy choice by the trader and not a right of the consumer.

44. The Review Group's recommendations were based on proposals drawn up by the English and Scottish Law Commissions after extensive consultation and research.⁴¹ In the Group's view, provisions along these lines would bring a substantial degree of clarity and a greater element of certainty to the operation of the remedies regime. The Group noted that the broadly, though not universally, positive response to the proposals from business and consumer interests in the UK suggested that the proposed rules struck a reasonable balance between the interests of consumers and businesses.⁴² Though the provisions governing the circumstances in which a shorter or longer rejection period would apply took away

⁴¹ Law Commission and the Scottish Law Commission. 2008. *Consumer Remedies for Faulty Goods: A Joint Consultation Paper*. Law Commission and the Scottish Law Commission. 2009. *Consumer Remedies for Faulty Goods*.

⁴² The Law Commission and the Scottish Law Commission. *Consumer Remedies for Faulty Goods: A Summary of Responses to the Consultation*, op. cit., paras. 2.32-2.55. The Law Commission and the Scottish Law Commission. *Consumer Remedies for Faulty Goods*, op. cit., paras. 3.47-3.88.

somewhat from the simplicity and certainty offered by the standard thirty day period, some element of flexibility along these lines was necessary in the Group's view.

45. The proposals of the English and Scottish Law Commissions have been largely incorporated in the provisions on the right to reject in the Consumer Rights Bill currently before the UK Parliament. The Bill does not make provision, however, for an extension of the thirty day period to take account of cases where the consumer is not in a position to inspect and test the goods within this period. In the view of the UK Government⁴³ – a view not shared by the English and Scottish Law Commissions, the House of Commons Business, Innovation and Skills Committee, the UK consumer organisation Which and others⁴⁴ – such a provision would 'detract from the intended clarity' of the 30 day time and 'introduce greater complexity' to the law.

Option 2: Revised 'Reasonable Time' Provision

46. The main argument against a fixed time period for rejection such as that proposed by the Sales Law Review Group is the difficulty of dealing with the huge diversity of goods supplied under sales contracts by means of a single time limit. A time limit appropriate to perishable products with a lifespan of days or weeks will not be appropriate to complex products with an expected life span of years or decades. Consumer sales law in Australia and New Zealand accordingly retains a 'reasonable time' limit for the right to reject, but sets out criteria that seek to clarify and elaborate on what constitutes such a time. Section 20(2) of the New Zealand Consumer Guarantees Act 1993⁴⁵ provides that the term 'reasonable time' means 'a period from the time of the supply of the goods in which it would be reasonable to expect the defect to become apparent having regard to –

- a) the type of goods;
- b) the use to which the consumer is likely to put them;
- c) the length of time for which it is reasonable for them to be used;
- d) the amount of use to which it is reasonable for them to be put before the defect becomes apparent.

⁴³ Department of Business, Innovation and Skills. June 2013. *Supply of Goods: Final Impact Assessment*, paragraph 36.

⁴⁴ House of Commons Business, Innovation and Skills Committee. 2013. *Draft Consumer Rights Bill: Volume I*, paragraphs 50-54.

⁴⁵ The rules governing 'reasonable time' at Schedule 2, Chapter 5, section 262(2) of the Australian Consumer Law are broadly similar.

47. The criteria applying to the determination of the 'reasonable time' for rejection in New Zealand and Australian legislation would appear to permit a relatively long time period for rejection in some cases, though this will largely depend on the nature of the goods and of their use.⁴⁶ Though these provisions allow for a significant degree of flexibility, this comes at the cost of clarity and certainty. In the Department's view, the provisions in New Zealand and Australian legislation have less to commend them than the proposal for a standard thirty day rejection period outlined above. In UK case law, the duration of the 'reasonable time' period has been interpreted as being as little as a few days and as long as nine months.⁴⁷ It is not clear that the insertion of additional general criteria elaborating on what constitutes a reasonable time period would materially alter this level of indeterminacy.

PROPOSAL 4

48. It is proposed to provide for a standard thirty day period within which faulty goods can be rejected together with a shorter time period for goods, such as perishable items, to which a thirty day period is inappropriate and a longer time period for cases where it is reasonably foreseeable to both parties that a period longer than thirty days will be needed to examine and try out the goods. While this will entail a significantly shorter period for rejection than under existing Irish law, this will be offset by the greater clarity and certainty offered by the provision. Consumers will find it easier to enforce a thirty-day rejection period than the indeterminate provision that currently applies.

QUESTION 7

Should thirty days should be standard time period within which a consumer can exercise the right to reject faulty goods? If not, what time period or other condition should apply to the exercise of this right?

⁴⁶ *Nesbit v Porter* (2000) 2 NZLR 465. This case involved the purchase of an eleven year-old four-wheel drive vehicle. The New Zealand High Court held that six months would be the maximum time period reasonable for the exercise of the rejection, while the Court of Appeal put it somewhat higher at around seven months.

⁴⁷ Law Commission and Scottish Law Commission. 2009. *Consumer Remedies for Faulty Goods*, paragraphs 2.11-2.20.

QUESTION 8

Should the standard thirty day period proposed for the rejection of faulty goods be extended where it is reasonably foreseeable from the circumstances of the contract that the consumer will need additional time in which to examine and try out the goods?

Termination for 'Minor' Defects

49. As outlined above, the EU Consumer Sales Directive provides at Article 3(6) that 'the consumer is not entitled to have the contract rescinded if the lack of conformity is minor'. This restriction on the right of rescission was included in the Regulations which give effect to the Directive in Ireland. There is no corresponding prohibition on rejection for minor defects under the Sale of Goods Acts, though there is some uncertainty as to whether, or to what extent, the implied condition as to merchantable quality under the Acts covers such defects. That condition requires goods to be 'as fit for the purpose or purposes for which goods of that kind are commonly bought ... as it is reasonable to expect', and defects such as a small dent in a car, or a scratch on a table, might be held not to be in breach of it in some cases.⁴⁸ The UK Sale of Goods Act was amended for this reason in 1994 to provide that 'freedom from minor defects' and 'appearance and finish are 'aspects of the quality of goods' in 'appropriate cases', and the UK Regulations that give effect to the Consumer Sales Directive did not implement the provision precluding rescission for a minor lack of conformity. The Consumer Rights Bill currently before the UK Parliament makes no change in either of these respects. Consumer law in New Zealand, however, limits the right to reject to cases where the failure to comply with the statutory guarantees applying to the quality and other aspects of goods is of 'a substantial character', while Australian consumer law does so in the case of 'major failure'⁴⁹

⁴⁸ See, for example, the different approaches taken by courts in *Millar's of Falkirk Ltd v Turpie* [1966] S.L.T. (Notes) 66, and *Rogers v Parish* [1987] 2 WLR 353. See also, Law Commission and Scottish Law Commission. 1987. *Sale and Supply of Goods*, paragraphs 2.11-2.13.

⁴⁹ Section 21 of the New Zealand Consumer Guarantees Act 1993 provides that a failure of goods to comply with a statutory guarantee is of a substantial character where –

- a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;
- b) the goods depart in 1 or more significant respects from the description by which they were supplied or, where they were supplied by reference to a sample or demonstration model, from the sample or demonstration model;

50. As noted above, the Sales Law Review Group recommended that ‘freedom from minor defects’ and ‘appearance and finish’ should be made express aspects of the quality of goods in future Irish legislation. The Group also recommended against precluding rejection for minor defects.⁵⁰ It contended that, as the appearance and finish of consumer goods were often integral to their overall quality, a provision that limited the remedies available to consumers for defects affecting the appearance of goods would be unjustifiably detrimental to consumer interests. It would also create uncertainty and lead to disputes as to what was or was not a ‘minor’ defect. The Group pointed out that, as ‘appearance and finish’ and ‘freedom from minor defects’ would, under its recommendation, be aspects of the overall standard of quality in appropriate cases, courts would be free to distinguish between defects that were trivial and negligible and those that impaired the level of quality that a reasonable person would regard as satisfactory. Whether or not any particular defect breached this standard of quality would depend on the facts of the case. Second-hand goods, for example, might be expected to have minor defects or blemishes, as would goods sold as ‘seconds’.

PROPOSAL 5

51. The Department’s agrees with the Review Group’s recommendation that the right to reject faulty goods should not exclude termination for ‘minor’ defects.

QUESTION 9

Should the consumer’s right to reject faulty goods permit rejection for ‘minor’ defects within the framework of the proposed general standard of satisfactory quality? If not, why not?

-
- c) the goods are substantially unfit for a purpose for which goods of the type in question are commonly supplied or ... are unfit for a particular purpose made known to the supplier or represented by the supplier to be a purpose for which the goods would be fit and the goods cannot easily and within a reasonable time be remedied to make them fit for such purpose;
 - d) the goods are not of acceptable quality ... because they are unsafe’.

The criteria governing ‘major failure’ to comply with the statutory guarantees applying to goods under the Australian Consumer Law (Schedule 2, Chapter 5, section 260) are broadly similar.

⁵⁰ Sales Law Review Group, op. cit., paragraph 9.51

The Relation between Repair and Replacement and Termination or Price Reduction

52. As outlined above, the EU Directive on Consumer Sales differentiates between the first-tier remedies of repair and replacement and the second-tier remedies of termination and price reduction. The Directive provides that the consumer may require the rescission of the contract or an appropriate reduction of the price if –

- the consumer is entitled to neither repair nor replacement, or
- the seller has not completed the repair or replacement within a reasonable time, or
- the seller has not completed the repair or replacement without significant inconvenience to the consumer.

53. These provisions have been criticised for failing to give sufficient certainty or adequate safeguards to consumers in respect of the number of repairs and replacements that a trader may provide before the consumer is entitled to have recourse to the remedies of termination or price reduction. If goods are repaired or replaced, and that fault recurs or another fault occurs, the trader may propose a further repair or replacement provided that the first repair or replacement was completed within a reasonable time and without significant inconvenience to the consumer. If a second repair or replacement was also unsuccessful, the trader could similarly propose a further repair or replacement. This risks locking consumers into a cycle of failed repair or replacements that may involve significant costs in respect of time spent and costs incurred in communicating with the trader, the possible need in some cases to take time off work, and, if the consumer is not given a temporary replacement, the loss of the use of the goods while a repair is undertaken or a replacement sourced. The evidence suggests that consumers fail to obtain satisfactory redress from traders in a sizeable proportion of cases. A survey of Irish consumers undertaken in 2012, for example, found that 30 per cent of respondents had encountered problems when buying or using goods or services in the previous twelve months.⁵¹ Among respondents who complained to the retailer or service provider about the problem, 41 per cent reported that they were dissatisfied with the retailer's response, compared with an EU average of 33 per cent.

54. The Sales Law Review Group recommended accordingly that, in addition to being entitled to proceed to the remedies of termination or price reduction where repair or

⁵¹ European Commission. 2013. *Flash Eurobarometer 358: Consumer Attitudes Towards Cross-Border Trade and Consumer Protection*, pp. 67-76.

replacement were not undertaken within a reasonable time or without significant inconvenience, the consumer should be entitled to have recourse to termination or price reduction where the lack of conformity of the goods was not remedied by a first repair or a first replacement. The current UK Consumer Rights Bill includes a similar provision.

QUESTION 10

Should consumers who have agreed to have faulty goods remedied by a repair or replacement be entitled to terminate the contract or require a price reduction if, after one repair or one replacement, the goods do not conform to the contract?

Compensation for Use of Goods Prior To Termination of Contract

55. As the right to reject was originally seen as a short-term remedy, a consumer or other buyer who exercised the right was not liable to compensate the seller for the use of the goods in the period prior to rejection. Though the secondary right to reject provided for in the 'cure' provision in the Sale of Goods and Supply of Services Act 1980 outlined at paragraph 35 could potentially involve rejection after a longer time period, it did not include a requirement for the consumer to compensate the trader for the use of the goods. As rescission of the contract under the Consumer Sales Directive could occur where repair or replacement had been unsuccessful, it could also be resorted to in circumstances where the consumer had had use of the goods for a considerable period. Recital 15 of the Directive accordingly permits Member States to provide that 'any reimbursement to the consumer may be reduced to take account of the use the consumer has had of the goods since they were delivered to him.' The Irish Regulations that give effect to the Directive did not implement this optional provision, though a number of other Member States, including the UK, did so.⁵²

⁵² Schulte-Nolke, H. et al (eds). 2008. *EU Consumer Law Compendium: Comparative Analysis*, p.686. The Consumer Sales Directive was partly given effect in the UK by means of a new Part 5A inserted in the Sale of Goods Act 1979. This provides for compensation for use only in the case of rescission of the contract after the consumer has first sought recourse to repair or replacement in accordance with the Directive's scheme of remedies, and not in the case of the separate right to reject under the Act.

56. Compensation for use is not an issue in the case of the standard thirty day period for rejection proposed in this paper. It is an issue that requires consideration, however, where the consumer opts to terminate a contract and obtain a refund after repair or replacement have been resorted to and found unsatisfactory.

57. The Consumer Rights Bill currently before the UK Parliament provides that, where a consumer exercises what is called the ‘final right to reject’ (ie the right to reject where repair or replacement are impossible or disproportionate, are not undertaken within a reasonable time or without significant inconvenience, or there has been one failed repair or replacement), ‘any refund to the consumer may be reduced for a deduction for use, to take account of the use the consumer has had of the goods in the period since they were delivered.’ This provision essentially restates existing UK law. The Bill goes beyond that law in setting out a basis for the calculation of the compensation to be made for use in such cases. It provides, that where the final right to reject is exercised within six months of purchase or delivery, deduction for use can be made only where the trader gives the consumer clear, independent evidence of an active second-hand market for goods of the same make and model. If the goods have a proven second-hand value, the deduction for use cannot reduce the refund to the consumer below that value. In the view of the UK Government, there will be no such deduction ‘in most cases’ where the final right to reject is exercised within six months.

58. The compensation for use provision is one of the more controversial elements of the UK Bill. It has been criticised by the English and Scottish Law Commissions, the Office of Fair Trading (now the Competition and Markets Authority), the House of Commons Business, Innovation and Skills Committee, and Which, the UK consumer body.⁵³ These criticisms have been directed at both the principle and the practicability of the provision. The Law Commissions cited research findings which indicated that most consumers would feel aggrieved if they were charged for the use of a faulty product that had been the subject of an unsuccessful repair or replacement with the resultant delay and inconvenience to the consumer. The Commissions further pointed out that the provision for deduction for use in force in the UK since 2002 was ‘uncertain and relatively rarely used’. It added

⁵³ House of Commons Business, Innovation and Skills Committee. 2013. *Draft Consumer Rights Bill: Volume I*, paragraphs 62-70. House of Commons Public Bill Committee. 2014. *Consumer Rights Bill: Written Evidence*, pp. 4, 6, 13, and 76.

‘complications to the law’ and led to disputes ‘as consumers retaliate with damages claims’. The formula proposed for the calculation for use has also been criticised on the grounds that the concept of ‘active second hand market’ is unclear and uncertain, and that the second-hand value of goods will be taken as the basis for compensation even where the consumer had had little or no use of the goods. Though the UK Government have stated that there would not a deduction for use ‘in most cases’ in the first six months, critics of the provision questioned this claim on the grounds that online websites mean that there is now both an active market and a readily calculable second hand value for a great many goods.

59. Subject to review in the light of the responses to this consultation, the Department does not propose to include a provision permitting compensation for use where the right to reject faulty goods is exercised as a remedy of second resort. Though Irish law has included such a remedy in the Sale of Goods Acts since 1980 and in the Consumer Sales Regulations since 2003, neither enactment made provision for such compensation. The proposed standard thirty day period for rejection will represent a significant reduction in the duration of the rejection period compared with the position under existing Irish law, and it is reasonable to balance this diminution in consumer rights by affording consumers a secondary right of rejection without a compensation for use provision. On a practical level, devising a fair and workable formula for deduction for use is also likely to prove difficult. It is relevant to note in this context that the revision of the EU Consumer Sales Directive included in the original text of the Consumer Rights Directive did not retain the provision permitting compensation for use.⁵⁴

PROPOSAL 6

60. It is not proposed to include a provision for compensation for use of the goods by the consumer prior to the termination of a sales contract after recourse to the repair or replacement of the goods was unavailable or unsuccessful.

⁵⁴ Recital 41 of the proposal stated that ‘the consumer shall not compensate the trader for the use of the defective goods’. European Commission. 2008. *Proposal for a Directive on Consumer Rights* {SEC (2008) 2544}. The revised provisions on consumer sales included in the proposal did not form part of the Directive as finally adopted due to disagreements among Member States about the appropriate level of harmonisation and other issues.

QUESTION 11

Do you agree that the consumer's right to reject faulty goods and to obtain a refund of the price if repair or replacement are unavailable, cannot be completed within a reasonable time or without significant inconvenience, or have been undertaken unsuccessfully, should not be subject to a deduction for the use of the goods prior to the exercise of the right to reject? If not, why not, and what should be the basis for determining the compensation payable for use?

IV CONSUMER RIGHTS AND REMEDIES IN NON-SALE CONTRACTS FOR THE SUPPLY OF GOODS

Scope of Non-Sale Transactions

61. Though contracts of sale are the most important form of goods transaction, goods are transferred from traders to consumers under a variety of other transactions as follows:

- contracts that include both the provision of a service and the supply of related goods (often referred to as work and materials contracts);⁵⁵
- hire agreements - defined in section 2(1) of the Consumer Credit Act 1995 as agreements of more than three months duration for the bailment (transfer of possession) of goods to a hirer under which the property in the goods remains with the owner;
- hire-purchase agreements – defined in section 2(1) of the Consumer Credit Act 1995 as agreements for the bailment of goods under which the hirer may buy the goods or under which the property in the goods will, if the terms of the agreement are complied with, pass to the hirer in return for periodical payments;

⁵⁵ For a discussion of the distinction between goods and work and materials transactions, see Sales Law Review Group, *op. cit.*, paragraphs 2.11-2.12. These contracts may be covered by the EU Consumer Sales Directive. Article 1(4) of the Directive states that contracts 'for the supply of consumer goods to be manufactured or produced shall also be deemed to be contracts of sale for the purpose of this Directive.' While this can be interpreted narrowly as covering contracts for the sale of goods not yet in existence – or what section 5 of the Sale of Goods Act calls 'future goods' - it has been plausibly argued that it is broader in scope and covers any contract in which a finished product is supplied to a consumer. Some such contracts – for example, where a carpenter makes a bookshelf for a consumer – would probably be regarded as works and materials (or service) contracts under Irish law. Bradgate, R. and Twigg-Flesner, C. 2003. *Blackstone's Guide to Consumer Sales and Associated Guarantees* (Oxford: Oxford University Press), pp. 23-25.

- exchange or barter – in exchange transactions, goods are exchanged in return for other goods or, less commonly, for services. Such transactions are not regulated by statutory provisions, though if goods are exchanged in return for goods plus money, the transaction may be classified as a sales contract in some circumstances.⁵⁶
- gift – a gift is not a contract at common law because of the absence of any consideration. The legal status of goods supplied ‘free’ of direct charge by traders to consumers under promotional campaigns or loyalty schemes is uncertain and, with the exception of the now obsolete trading card schemes regulated by the Trading Stamps Act 1980, is not subject to statutory regulation.⁵⁷

62. As outlined above, a first key objective of the proposed reform of consumer contract law is to streamline the statutory provisions governing these contracts that are currently spread across a number of different enactments. As noted above, the quality and other requirements applying to goods supplied under hire-purchase and consumer hire agreements are contained in the Consumer Credit Act 1995, while those applying to goods sold under sales contracts are set out in the Sale of Goods Act 1893 and Part II of the Sale of Goods Act 1980 and in the Consumer Sales Regulations, and those applying to goods supplied under a contract for work and materials are set out in Part IV of the Sale of Goods and Supply of Services Act 1980. A second objective is to tackle the gaps that currently exist in the statutory protections for certain transactions, in particular the absence of a statutory scheme of remedies for hire and hire-purchase agreements, and the absence of either statutory rights or remedies for goods supplied by way of exchange.

63. The proposed Bill will address both objectives by applying a single set of rights and remedies to all transactions in which traders supply goods to consumers (sales, hire-purchase, hire, exchange transactions in which consideration is given by the consumer in a form other than money, and goods supplied ‘free’ with other goods or services for which the consumer pays a price). Subject only to such modifications as are necessitated by the *sui generis* features of particular transactions, the rights and remedies of consumers in respect of the quality and other aspects of goods under the Bill will be the same regardless of the nature of the transaction under which the goods are supplied. This will both simplify, and bring greater consistency to, the legislative provisions governing these transactions. A

⁵⁶ Sales Law Review Group, op. cit., paragraph 14.7.

⁵⁷ Ibid., paragraphs 14.6 and 14.8.

similar unified framework based on the concept of contracts for the supply of goods applies to goods transactions in consumer legislation in New Zealand and Australia and in the current UK Consumer Rights Bill.⁵⁸

64. The adoption of a unified set of provisions on the rights and remedies of consumers in all transactions in which traders supply goods to consumers would require the incorporation in the proposed legislation of amended versions of the provisions on goods supplied under hire-purchase agreements at sections 74-83 of the Consumer Credit Act 1995 and under consumer hire agreements at section 88 of the Act.⁵⁹ The other provisions of Parts VI and VII of the Consumer Credit Act on these agreements would remain part of the Act.

Consumer Rights in Non-Sale Contracts for the Supply of Goods

65. The rights germane to non-sale contracts for the supply of goods are broadly the same as those listed in Box 1 for sales contracts – the right of the trader to supply the goods; the freedom of the goods from undisclosed charges and the right of the consumer to quiet possession of the goods other than in accordance with such charges; the correspondence of the goods with their description, sample or model; the compliance of the goods with reasonable expectations about their quality; and the fitness of the goods for any particular purpose made known by the buyer. These rights will be set out in the proposed Consumer Rights Bill in line with the provisions outlined in Part III.

66. The main modification required to the rights applicable to non-sale contracts relates to the non-applicability of the provisions regarding ownership and title to hire contracts. Unlike sale, hire-purchase or exchange transactions, hire contracts do not involve a transfer, whether immediate or ultimate, of the ownership of the goods. The rules relevant to such transactions accordingly are the right of the trader to supply the goods and of the consumer to enjoy quiet possession and use of the goods for the period of the hire other than in

⁵⁸ The New Zealand Consumer Guarantees Act 1993 defines supply of goods 'as supply (or resupply) by way of gift, sale, exchange, lease, hire or hire-purchase.' The definition in the Australian Consumer Law is similar, but omits the reference to supply by way of 'gift'. The relevant Part of the UK Consumer Rights Bill covers 'contracts under which a trader supplies or agrees to supply goods to a consumer' and covers sales contracts, hire contracts, hire-purchase agreements and contracts for the non-money transfer of goods.

⁵⁹ Section 88 extends the quality and other requirements applicable to hire-purchase agreements under sections 75-83 of the Consumer Credit Act to consumer hire agreements.

accordance with any charge or encumbrance disclosed before the conclusion of the contract.

QUESTION 12

Should a common set of provisions on the quality and other aspects of goods apply to all transactions in which traders supply goods to consumers? If not, why not?

Consumer Remedies in Non-Sale Contracts for the Supply of Goods

67. The remedies for faulty goods under hire and hire-purchase agreements, works and materials contracts and exchange transactions differ in important respects from the remedies for sales contracts outlined at paragraphs 33-37. First, these remedies are not governed by statutory provisions. Secondly, the right to reject the goods and terminate the contract is not subject to rules on the acceptance of the goods.⁶⁰ Thirdly, the scheme of remedies in the EU Consumer Sales Directive does not apply to these transactions, with the exception of contracts for work and materials which, as noted earlier, appear to come within the scope of the Directive.

68. In the absence of statutory provisions, the rules on the termination of hire and hire purchase contracts are governed by the common law rules on affirmation. These rules essentially provide that a party who becomes aware that goods do not conform to the contract does not lose the right to terminate unless he affirms the continued existence of the contract in the knowledge of that breach.⁶¹ Unlike rejection under the Sale of Goods Acts which was traditionally understood to be a short-term remedy, the right to terminate hire-purchase and consumer hire agreements where goods are faulty can apply where the

⁶⁰ The discussion of hire and hire-purchase agreements in this section deals solely with the consumer's right to terminate where the goods supplied under the agreement are faulty. This is separate from the general right of the consumer to terminate these agreements, and the conditions under which this rights applies. The statutory rules on the termination of hire purchase agreements are set out at section 63 of the Consumer Credit Act 1995, while the rules on the termination of consumer hire agreements are contained at section 89 of the Act.

⁶¹ For a concise outline of the rules on affirmation, see Law Commission and Scottish Law Commission. 1987. *Sale and Supply of Goods*, paragraph 48.

fault emerges long after the delivery of the goods.⁶² The rules governing affirmation are not straightforward, however, and require account to be taken of many of the same factors that apply to the rules on acceptance, such as the nature of the goods and the conduct of the parties.⁶³

69. Though the longer-term right to reject the goods and terminate the contract in hire-purchase and hire agreements is advantageous to consumers, it does not necessarily give the consumer the right to recover all of the money paid under the contract. The UK case law on the issue is not entirely consistent, however, and suggests that the hirer's liability for compensation for use will depend on the circumstances of the case.⁶⁴

Proposed Scheme of Remedies for Non-Sale Contracts for the Supply of Goods

70. Unlike in the UK and other common law jurisdictions whose sales law is based on the Sale of Goods Act 1893, the amendment made in Ireland in 1980 to the Act's provisions on acceptance brought about something of a convergence between the rules applying to rejection and termination in sales contracts and those applying in hire-purchase and hire agreements. As a result, the application of the scheme of remedies proposed for sales contracts in Part III to non-sale contracts for the supply of goods arguably gives rise to fewer issues than in other jurisdictions. The proposed scheme would permit the consumer party to hire-purchase, hire and other goods transactions to choose in the first instance between repair, replacement or rejection, provided that the last of these remedies was normally exercised within 30 days of delivery. If the consumer opted for repair or replacement, and the chosen remedy was impossible, disproportionate, could not be performed within a reasonable time or without significant inconvenience or had been undertaken unsuccessfully, the consumer would then have a secondary right to reject the goods.

⁶² The consumer would have to prove of course that the latent defect existed when the goods were delivered, something that obviously becomes more difficult with the passage of time.

⁶³ Law Commission and Scottish Law Commission. 2009. *Consumer Remedies for Faulty Goods*, paragraph 5.19.

⁶⁴ In *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, the consumer party to a hire-purchase agreement for a second-hand car that proved to be defective was held to be entitled to terminate the contract and claim damages. As he had had the use of the car for around six months, the failure of consideration was not total and the consumer was not entitled to recover the deposit and instalments paid prior to termination. In *Charterhouse Credit v Tolly* [1963] 2 QB 683, a small deduction for use was made for the consumer's use of a car prior to the termination of a hire purchase agreement. In *Farnworth Finance Facilities v Attryde* [1970] 1 WLR 1053, no deduction for use was made in the case of a defective motor cycle supplied under a hire purchase agreement that had been driven for 4,000 miles because of the inconvenience caused to the hirer.

71. It is necessary to take account, however, of the specific features of hire-purchase and hire agreements in the rules governing the refund of the price. Unlike standard sales contracts where consumers pay the full price of the goods on or before delivery, hire purchase agreements involve a schedule of payments over the duration of the hire period combined with an option to purchase the goods at the end of the period. It would seem reasonable accordingly to limit the refund of the price payable to the consumer to the money paid up to the point of termination. If, for example, a laptop valued at €800 was found to be faulty after the consumer had paid €500 under a hire-purchase agreement, the maximum refund to the consumer would be €500. The current UK Consumer Rights Bill includes a similar limitation on the refund payable to a consumer who terminates a hire-purchase agreement where the goods are faulty.

72. Hire contracts differs from the other contracts under consideration here in that they do not involve any transfer of the ownership of the goods. The consumer is paying only for the use of the goods and, if he or she terminates the contract because the goods they are faulty, will have had the use of the goods up to the point at which the fault emerged. It can be argued accordingly that a consumer who terminates a hire contract for this reason should not be entitled to a refund of the payments made prior to termination. If the consumer had paid for a longer period of hire than he or she had received before terminating the contract, however, they should be refunded the payment made in respect of the hire period paid for but not received. Where, for example, a consumer pays in advance for the hire of goods for 3 months, and the goods are found to be faulty after 2 months, the consumer would be entitled to seek a refund for the final month of the hire period. A limitation of this kind applies in the current UK Consumer Rights Bill to the refund of the price payable to the consumer on the termination of a hire agreement

73. In the Department's view, a common scheme of remedies for all transactions involving the supply of goods would simplify and streamline our consumer law code and minimise the differences in the treatment of different types of transaction. While the replacement of the longer-term right of rejection by a standard thirty-day period for rejection in non-sale contracts for the supply of goods would involve a reduction in consumer rights, that reduction would be substantially offset by the greater certainty and clarity that the thirty-day period would offer consumers seeking to enforce their rights. As deduction for use is possible under the existing law applying to consumer hire agreements, limiting the refund of

the price payable to the hirer to the portion of the hire agreement paid for but not received would not appear to involve any significant reduction in consumer rights.

QUESTION 13

Should the proposed Bill include a common scheme of remedies for all transactions in which traders supply goods to consumers? If not, why not?

QUESTION 14

Should a consumer who terminates a hire agreement where goods are faulty be entitled only to a refund of the price for a period of hire that was paid for but not received, and not for a hire period in which the consumer had the use of the goods? If not, why not?

V CONSUMER RIGHTS AND REMEDIES IN CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT

74. Article 2(11) of the Consumer Rights Directive defines 'digital content' as 'data which are produced and supplied in digital form'. Recital 19 of the Directive states that this includes data such as 'computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.' The proposed legislation, like the Directive, will apply to consumer contracts for the supply of digital content. As such, it will not cover the provision of online digital content on the Internet in the absence of a contract. Browsing on a website, for example, will not of itself constitute a contract for the purposes of the legislation as the consumer will not normally offer any consideration in return for the digital content. The supply of digital content must also be distinguished from the supply of the various enabling services – broadband, Internet service provision, access to digital content stored in the cloud etc – required for the delivery and functioning of the content. Transactions for services that do not involve the consumer accessing or acquiring digital content – for example, contracts with a broadband provider or with a cloud provider for the storage of

the consumer's own digital content – should be regarded accordingly as contracts for the supply of a service.

75. While digital content was once mainly supplied in tangible form such as cds or DVDs, a range of developments – the greater availability of high-speed broadband, the rapid rise in Internet access, the increased variety of Internet-enabled devices, and the ability to access and store digital content products on cloud computing platforms - have seen its distribution increasingly shift from the physical to the online domain. Digital content is now offered via a range of different business models that allow consumers to choose between⁶⁵ –

“on-demand offerings”, “near on-demand” content, on-demand downloading, streaming, webcasting, IP-based TV, the subscription to purchase of e-books, e-journals and newspapers, social broadcasting, cloud computing, and many, many more. Similarly varied are the forms of payment. Content can be delivered as pay-per-download, pay-per-bundle, pay-per-use, pay-per source (e.g. a specific title), pay-per-day, flat access fee, subscription, price, advertisement, or free of charge.

76. Though digital technology has undergone rapid development, the law has been slower to respond. A review of EU consumer protection legislation undertaken by the European Commission in 2006-2007 identified the non-application of much of that legislation to contracts for intangible digital content as a ‘particularly important problem’, most obviously in respect of the absence of legislative rights and remedies for intangible content that did not conform to the contract.⁶⁶ The subsequent proposal for a Consumer Rights Directive, however, failed to include provisions to address this deficiency. To date, few jurisdictions have introduced statutory provisions that expressly regulate consumer rights and remedies for digital content. As a result, issues have been left to the courts to resolve by reference to legislative provisions drafted in and for a pre-digital world.

77. Though there have been no reported Irish cases on the classification of, or rights and remedies applicable, to digital content, case law in the UK has ‘not given satisfactory or

⁶⁵ Loos, M.B.M. et al. 2011. *Comparative Analysis, Law and Economics Analysis, Assessment and Development of Recommendations for Possible Future Rules on Digital Content Contracts*, p.13.

⁶⁶ European Commission. 2007. *Green Paper on the Review of the Consumer Acquis* [COM (2006) 744], p. 24.

convincing answers' to the questions that have arisen.⁶⁷ In *St. Alban's City and District Council v. International Computers Ltd*,⁶⁸ the UK Court of Appeal expressed the view *obiter* that, where software was supplied on a computer disk, the disk came within the definition of goods for the purpose of the sale of goods legislation, though the computer program itself 'being instructions or commands telling the computer hardware what to do' did not.⁶⁹ Where a defective software program was encoded and sold on a disk, the supplier of the disk would be in breach of the implied terms of the Sale of Goods Act as to quality and fitness for purpose. If the same software or other digital content was downloaded from the Internet or transferred to the end-user by e-mail, however, it would not enjoy the protections of the Act. As the Sales Law Review Group commented:⁷⁰

This leads to the clearly unsatisfactory situation that the law applicable to a certain transaction will depend on whether software has been delivered on a physical medium such as a disk or a CD (in which case it could be classified as a sale of goods) or whether it has been downloaded online (in which case it could be categorised as a supply of services, or as a contract *sui generis* to which the statutory rules do not apply).

78. Though the case law remains somewhat unclear and uncertain, there is evidence of an emerging policy consensus on the classification and regulation of consumer digital content. A report commissioned by the European Commission on possible future rules for digital content contracts concluded that, though these rules should seek to create a regime

⁶⁷ Bradgate, R. 2010. *Consumer Rights in Digital Products: A Research Report Prepared for the UK Department for Business, Innovation and Skills*, p. 10.

⁶⁸ [1996] All ER 481.

⁶⁹ In a Scottish case, *Beta Computers (Europe) Ltd. v. Adobe Systems (Europe) Ltd* [1996] FSR 367, Lord Penrose questioned *obiter* whether software should be considered to be goods, observing that: 'This reasoning appears to me to be unattractive, at least in the context with which this case is concerned. It appears to emphasise the role of the physical medium and to relate the transaction in the medium to sale or hire of goods. It would have the somewhat odd result that the dominant characteristic of the complex product, in terms of value or the significant interest of the parties, would be subordinated to the medium by which it was transmitted to the user in analysing the true nature and effect of the contract.' He went on to state that the supply of proprietary software for a price was a single contract *sui generis*, though it contained elements of contracts such as sales of goods and the grant of a licence. In *London Borough of Southwark v IBM (UK) Ltd* [2011] EWHC 549 (TCC), Akenhead J. stated *obiter* that, in principle, software could be goods. Unlike the *St Alban's* judgment which distinguished between the software program and the disc carrying the program, the judgment in this case did not appear to consider it necessary to distinguish between the two. Akenhead J's statement appears to be limited, however, to cases where software is contained on a physical medium such as a CD and to have no application to cases where software is supplied in intangible form.

⁷⁰ Sales Law Review Group, *op. cit.*, paragraph 2.7. See also, Bradgate, R., *op. cit.*, paragraph 20.

specifically tailored to such content, the substance of the rules should be based on the rights and remedies for goods under the Consumer Sales Directive.⁷¹ In the authors' view:

The provisions applicable to sales contracts lend themselves well for application to digital content contracts, with some obvious amendments as to gratuitous digital content. In particular, the provisions on conformity and the remedies for non-conformity may be applied with only minor changes.

79. In line with this analysis, the proposed Regulation for an optional Common European Sales Law [CESL] published subsequently by the Commission treats digital content contracts as a separate category to sales contracts.⁷² Apart, however, from certain exceptions in respect of digital content for which no payment is made, the provisions on the conformity of digital content with the contract and on the remedies for non-conforming digital content are identical to those for goods. These provisions are a likely pointer, moreover, to the rights and remedies for digital content in any future mandatory EU legislation in this area.⁷³

80. The increased acceptance of the need to regulate digital content transactions reflects both the rapid expansion of these transactions and the evidence that they are giving rise to significant consumer detriment. A study undertaken for the European Commission in 2010 estimated, on the basis of a survey of the experience of consumers in 12 Member States with eight digital content services, that the combined cost of financial losses and lost time

⁷¹ Loos, M.B.M. et al. 2011, op. cit, pp. 6-7 The report acknowledged, however, that the application of the conformity test for goods to digital content was not without problems. These problems resulted mainly from the fact that it 'is often uncertain what the consumer may reasonably expect from the digital content. An objective yardstick to determine whether these expectations have been met often does not yet exist because of the relatively new character of digital content, the many different types of digital content, the high level of product differentiation, licensing practices and the rapid market and technological developments.'

⁷² Article 5 of the proposed Regulation provides that the Common European Sales Law may be used for 'contracts for the supply of digital content, whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price.' Article 2(j) defines 'digital content' as 'data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software, but excluding:

- (i) financial services, including online banking services;
- (ii) legal or financial advice provided in electronic form;
- (iii) electronic healthcare services;
- (iv) electronic communication services and networks, and associated facilities and services;
- (v) gambling;
- (vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users'.

⁷³ Recital 19 of the Consumer Rights Directive states that the European Commission 'should examine the need for further harmonisation of provisions in respect of digital content and submit, if necessary, a legislative proposal for addressing the matter'.

across the EU as a whole from these services was approximately €64bn per annum.⁷⁴ Across the digital content services surveyed, 21 to 26 per cent of users reported experiencing at least one problem in the 12 months prior to the survey. The most common problems concerned difficulties with access to services followed by lack of, or unclear, information; poor service quality; security; unfair terms and conditions; and privacy. Issues to do with the quality of digital content services, a central focus of the legislative proposals outlined in this paper, accounted for 14 per cent of reported problems. Only two to six per cent of respondents who reported experiencing a problem had received compensation, however, from the trader whether in the form of a full or partial refund, a replacement product or some other remedy, while around four-fifths had not received such compensation.

81. The information deficiencies revealed by the survey have been addressed in part by the Consumer Rights Directive. For the time in EU consumer legislation, the Directive includes information provisions specifically applicable to digital content.⁷⁵ It further provides that contracts for digital content not supplied on a tangible medium should be classified neither as sales contracts nor as service contracts, but rather as a separate sui generis category of contract. Digital content supplied on a tangible medium, such as a CD or a DVD, however, continues to be considered as goods for the purposes of the Directive, and contracts for its supply as sales contracts.

82. A review of consumer rights in digital products undertaken for the UK Department of Business, Innovation and Skills in 2010 recommended that ‘consumers purchasing digital products [should] be treated, as far as possible, in the same way as purchasers of physical goods’ and ‘should have the same rights, and the same remedies, with changes as appropriate to accommodate the nature of the items purchased.’⁷⁶ The Consumer Rights Bill introduced by the UK Government in 2013 provides for ‘a new category of digital content in consumer law’. As outlined below, the rights and remedies for digital content in the Bill are

⁷⁴ Europe Economics. 2011. *Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers – Final Report*, paragraph 24 and paragraphs 5.28 to 5.37. The eight digital content services covered by the study were music; games; social networking sites; ringtones; e-mail; anti-virus software; positioning and navigation services; and e-learning.

⁷⁵ These provisions require information to be provided, where applicable, on (i) the functionality of digital content, including technical protection measures, and (ii) any relevant inter-operability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of. They have been given effect in Regulations 5, 7 and 10 and paragraphs (k) and (l) of Schedule 1 and paragraphs (v) and (w) of Schedule 2 of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013.

⁷⁶ Bradgate, R., *op. cit.*, p. 64.

based, albeit with significant modifications in the case of the remedies, on the rights and remedies applying to goods. Other jurisdictions, such as Australia and New Zealand, have gone further and amended the definition of goods to include computer software with the result that contracts for its supply are regarded as sales contracts.⁷⁷

83. The Department sees merit both in regarding contracts for the supply of digital content as a separate category of contract⁷⁸ and in applying, with appropriate adaptations, the rights and remedies for contracts for the supply of goods to these contracts. This is the approach currently being taken in the UK and is set to be the approach followed in any future EU legislation. As will become evident, the issues and difficulties associated with this approach stem less from the application in principle of the rights and remedies for goods to digital content, and more from the identification and formulation of the required adaptations to these rules. The Department is conscious that, unlike contracts for goods and services which have a relatively long history of case law and legislative regulation behind them, devising appropriate statutory rules for digital content is largely uncharted territory. Views are sought at this stage on a number of key issues relating to the regulation of such content. Other more detailed aspects of the provisions will be set out in the scheme of the Bill to be published later. As with other parts of the Bill, the Department will welcome engagement with stakeholders on the provisions relating to digital content.

QUESTION 15

Should contracts for the supply of digital content be classified as a separate category of contract in the proposed legislation? If not, how should they be classified?

⁷⁷ New Zealand Consumer Guarantees Act 1009, section 2(1). Australian Consumer Law, Schedule 2, Chapter 1, section 2.

⁷⁸ It is proposed that contracts for the supply of digital content in the Bill will, in principle, encompass both digital content supplied on a tangible medium and digital content supplied in intangible form. Digital content supplied on a tangible medium, however, constitutes a sales contract under both the Consumer Sales Directive and the Consumer Rights Directive. As Ireland is required to ensure that the provisions of the Directives apply in full to such contracts, it may be necessary, depending on the content of the digital content rules to be included in the Bill, to have some differences in the rules applying to tangible and intangible content.

QUESTION 16

Should consumer rights and remedies in contracts for the supply of digital content be based with appropriate adaptations on the rules applying to contracts for the supply of goods? If not, what should be the basis of these rights and remedies?

84. We look next at a number of specific issues raised by the regulation of digital content contracts, commencing with the provisions relating to the trader's right to supply the goods. Subsequent sections look at issues relating to the quality of digital content, its correspondence with description and sample, and the remedies for non-conformity of digital content with the contract. The application of the proposed rights and remedies to digital content supplied other than for payment of a price is considered in the final section.

Right to Supply Digital Content

85. The Sale of Goods Acts define a contract of sale as one in which the seller transfers, or agrees to transfer, the ownership of the goods to the buyer in return for the payment of the price. The Acts further provide that the seller must have the right to sell the goods; that the goods must be free from any charge or encumbrance not disclosed to the buyer; and that buyer must enjoy quiet possession of the goods other than in accordance with any such charge or encumbrance. The requirements as to freedom from undisclosed charges and quiet possession apply also to contracts of sale in which it is intended that the seller should transfer only such title as he or a third party may have.

86. Contracts for the supply of digital content differ from sales contracts in that the content is typically supplied subject to licence as set out in End User Licence Agreements (EULA). These agreements make it clear that the copyright holder does not transfer ownership of the digital content to the end user, but rather a licence to use that content in accordance with the rights and obligations set out in the agreement. In *London Borough of Southwark v IBM UK Ltd*,⁷⁹ Southwark Council brought a claim for damages of £2.5m. against IBM on the ground that third-party software supplied by the company was not fit for purpose or of satisfactory quality. The court dismissed the claim and held, among other things, that the

⁷⁹ [2011] EWHC 599 (TCC).

agreement between the parties was not a contract of sale within the meaning of the UK Sale of Goods Act 1979. In order for there to be a contract of sale under the Act there had to be a transfer of property in the goods and, as the parties had agreed that title to the software remained with the third party which had developed it, there was no such contract in this case.

87. The provisions on digital content in the proposed Bill will clearly have to take account of the copyright and other restrictions characteristic of contracts for the supply of such content. One option would be to utilise a variant of the Sale of Goods Act provisions that permit the transfer of only such title as the supplier or a third party may have and give the consumer the right to have quiet possession of the goods subject to any charges or encumbrances disclosed to him or her. Alternatively, it could simply be required, as is the case under the current UK Consumer Rights Bill, that the supplier of the digital content must have the right to supply it.

The Quality of Digital Content

88. While the details of the provision have yet to be fully determined, the quality standard for goods to be included in the proposed Bill is likely, first, to require goods to meet the standard that a reasonable person would regard as satisfactory taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances. It will set out, secondly, an indicative list of aspects of quality to apply alongside the general standard in appropriate cases: fitness for the purposes for which goods of the kind in question are commonly supplied; appearance and finish; freedom from minor defects; safety; and durability. The Department considers that a quality standard along these lines is appropriate for application to digital content. As noted above, the rules on conformity with the contract in the Common European Sales Law are identical for goods and for digital content for which the consumer pays a price. The quality standard for digital content in the current UK Consumer Rights Bill is similar to that outlined above. It omits, however, the reference to 'appearance and finish' on the ground that this is of little relevance to intangible digital content in particular, but retains the other criteria including that of 'freedom from minor defects'. 'Appearance and finish' is likely to be omitted similarly from the list of the aspects of quality of digital content to be included in the proposed legislation.

89. The Department is aware that some digital content providers in the UK have expressed concern about the proposed quality standard, and in particular the reference to ‘freedom from minor defects’.⁸⁰ This concern centres on the fact that, in a sector characterised by continuous product innovation, ‘bugs’ must be expected in new versions of complex products such as software and games. Applying a quality standard that includes freedom from minor defects is, it is contended, unrealistic and unreasonable in such cases. While this concern is understandable, it takes insufficient account in our view of the flexibility inherent in the proposed quality standard. This standard is based on what a reasonable person would regard as satisfactory having regard to certain specified factors (the description of the product and the price) and all other relevant circumstances. The indicative list of criteria of quality, including freedom from minor defects’, will be aspects of the overall standard of quality of goods in appropriate cases and, as such, will depend on the reasonable expectations of quality which underpin that standard. In the case of some complex products, such as new versions of software, a reasonable person may expect to encounter some ‘bugs’ and the existence of such defects would not necessarily breach the quality standard. In the case of simpler digital products, such as a music file or an e-book, however, the consumer can reasonably expect the digital content to be free of flaws. It is relevant to note also that, as is now and will remain the case in contracts for the sale of goods, the statutory requirement as to the quality of digital content will not apply in respect of defects specifically drawn to the buyer’s attention before the conclusion of the contract.

QUESTION 17

Is the general standard of satisfactory quality that is to apply to goods in the proposed Bill appropriate to digital content? If not, what standard should apply?

⁸⁰ House of Commons, Public Bill Committee. 2013. *Consumer Rights Bill: Written Evidence*. Evidence from Symantec, p. 60; evidence from Microsoft, pp. 66-67; evidence from techUK, p.68.

QUESTION 18

Should 'freedom from minor defects' be an aspect of the general standard of quality in the case of digital content? If not, why not?

Correspondence with Digital Content with Description, Sample or Model

90. As outlined in Box 1 above, Irish and EU legislation on the sale of goods requires goods to comply with their description, sample or model. In line with the general policy approach of aligning the rules for contracts for the sale of goods and the supply of digital content, the rules of both the proposed Common European Sales Law and the UK Consumer Rights Bill on the correspondence of digital content with its description, sample or model are similar to those applying to goods. Article 99 CESL provides that, in order to conform with the contract, digital content must be of the description required by the contract, while Article 100(c) requires that digital content must possess the qualities which the seller held out to the buyer as a sample or model. Section 36 of the UK Consumer Rights Bill states that:

- 1) Every contract to supply digital content is to be treated as including a term that the digital content will match any description of it given by the trader to the consumer.
- 2) Where the consumer examines a trial version before the contract is made, it is not sufficient that the digital content matches (or is better than) the trial version if the digital content does not also match any description of it given by the trader to the consumer.

91. The information provisions of the Consumer Rights Directive are also relevant to the description of digital content supplied to the consumer. In addition to general requirements concerning the main characteristics of products, these provisions, as outlined at paragraph 81, require traders supplying digital content to inform consumers about the functionality and inter-operability of that content. In the case of distance and off-premises transactions, the information that the trader is required to provide forms part of the contract between the parties and, as such, this information also forms part of the description of the content. Though it was not strictly necessary to do so as the requirement applies already under the Regulations which give effect to the Directive, the UK Consumer Rights Bill expressly states that the information which the trader must provide about the main characteristics, functionality and inter-operability of digital content forms is 'to be treated as included as a term of the contract'.

92. While the general principle that digital content should comply with any description or sample provided by the trader is not open to challenge, some concerns have been expressed about possible aspects or implications of its application to such content. Software providers in particular are concerned that the requirement that digital content comply with its original description does not take adequate account of the dynamic nature of software products. These products are subject to regular updates that may replace obsolete or vulnerable functionalities with the result that the software might no longer comply with its original description. The Common European Sales Law seeks to address this concern by providing at Article 103 that digital content 'is not considered as not conforming to the contract for the sole reason that updated digital content has become available after the conclusion of the contract.' Section 40 of the UK Consumer Rights Bill permits a trader to update digital content provided that the contract stated that such updates would be provided. Where such updates are provided, however, the content must still match the description originally given, though it can contain features that go beyond that description.

QUESTION 19

What problems, if any, might result from the requirement that digital content comply with any description, sample or model provided by the trader? How might any such problems be addressed in the proposed legislation?

Remedies for Digital Content

93. As set out in Parts III and IV, the remedies proposed for breaches of the quality and other requirements in contracts for the sale or supply of goods will permit the consumer, in the first instance, to reject the goods within a thirty-day time period and obtain a full refund of the price or to seek the repair or replacement of the goods. If repair or replacement are unavailable, cannot be undertaken within a reasonable time or without significant inconvenience, or if either has been undertaken once, the consumer will then have a further right to reject the goods or to seek a reduction in the price. Subject to an exception for digital content not supplied in return for the payment of a price outlined at paragraph 100 below, the proposed Common European Sales Law provides for a broadly similar scheme of

remedies where digital content fails to conform with the contract.⁸¹ This is consistent with the CESL's general approach of aligning the rights and remedies for goods and digital content.

94. Though the rules on the quality and other attributes of digital content in the UK Consumer Rights Bill are broadly the same as those for goods, the remedies for the two types of transaction differ significantly in the case of digital content not supplied on a tangible medium. First, the right to reject and to obtain a full refund of the price will apply only where the trader does not have the right to supply the content. It will not apply where digital content is in breach of the quality or other requirements of the legislation. In such cases, the consumer can require the trader in the first instance to repair or replace the digital content. If these remedies cannot be provided by the trader, or cannot be undertaken within a reasonable time or without significant inconvenience, the consumer may require the trader to reduce the price of the digital content 'by an appropriate amount'. Unlike in the case of the remedies provisions for goods, moreover, the consumer will not have the right to resort to these secondary remedies after one repair or replacement of the digital content.

95. While the Bill as initiated did not provide that the reduction in the price could constitute the full payment made by the consumer, it has since been amended to state that it may amount to this sum 'where appropriate'. Though not expressed a provision on compensation for the use of the digital content, the fact that the price reduction was not originally envisaged as amounting to the full price, and may still be less than this amount, means that it can be seen as the functional equivalent of such a provision. Digital content supplied on a tangible medium such as a cd or dvd, however, will enjoy the same remedies as goods, including both the short term right to reject and the longer-term right to rescind the contract. The inclusion of the latter, though not the former remedy, is necessitated by the requirement to comply with the remedies provisions of the Consumer Sales Directive as digital content supplied in tangible form constitutes goods within the meaning of the Directive.

96. The UK Government have indicated that the main reason for the omission of both a short-term right to reject and a longer-term right to rescind for intangible digital content is

⁸¹ The CESL, however, does not provide for a right to terminate the contract after one repair or replacement.

the fact that such content 'is very easily copied and can be very difficult to delete from a device altogether'.⁸² In addition, it 'cannot meaningfully be "returned" to the trader. In view of the ease with which digital content can be copied, the Government have maintained that the inclusion of a right to reject digital content might facilitate abuse by consumers who could reject digital content on the grounds that it was defective while retaining a copy that remained usable, if imperfect.⁸³ Giving consumers a right to reject digital content could also create difficulties between the digital content provider and the holder of intellectual property rights to the content. The latter commonly receives a payment for each copy of the digital content sold and, where that digital content was rejected by the consumer, the trader may find it difficult to establish that the content has been deleted by the consumer and, as a consequence, to recover the monies paid to the rights holder.

97. The remedies provisions for digital content in the UK Bill also omit the limit of one repair or replacement following which a consumer party to a contract for the sale or supply of goods can opt for rescission of the contract or a price reduction. In the view of the UK government, the context and circumstances in which repairs in particular occur in the digital content market is quite different to that for goods.⁸⁴ As patches, bug fixes, and updates are issued on an ongoing basis for some digital content products, it will not necessarily be clear when these constitute a repair within the meaning of the legislation, or whether they might even be said to involve a replacement. Applying a fixed limit to the number of repairs or replacements is not an appropriate measure accordingly in view of the dynamic character of digital content.

98. The omission from the UK Bill of either a short-term right to reject digital content or a longer time right to rescind digital content contracts has been criticised on the ground that it perpetuates the differential treatment of digital content supplied in tangible and intangible form.⁸⁵ It has been further pointed that the Bill effectively permits a right to

⁸² Department for Business, Innovation and Skills. 2013. *Consumer Rights Bill: Supply of Digital Content - Final Impact Assessment*, page 36.

⁸³ Department for Business, Innovation and Skills. 2012. *Enhancing Consumer Confidence by Clarifying Consumer Law*, paragraphs 7.142-7.145. Though the onus of establishing that digital content is faulty will otherwise lie with the consumer, the UK Bill extends to digital content the provision from the Consumer Sales Directive that any lack of conformity which becomes apparent within six months of delivery is presumed to have existed at the time of delivery.

⁸⁴ *Ibid.*, paragraphs 7.119-7.122.

⁸⁵ House of Commons Business Innovations and Skills Committee. *Draft Consumer Rights Bill: Volume I*, paragraphs 128-130.

reject where the trader does not have the right to supply the digital content, and is inconsistent in not applying the same right to breaches of the provisions on the quality and other attributes of the content. The amendment to the Bill which provides that the consumer may receive a full refund 'where appropriate' if repair or replacement are not available or not carried out within a reasonable time or without significant inconvenience to the consumer has, however, gone some way towards addressing these criticisms.

99. There is no doubt that the application to digital content contracts of the remedies for goods that do not conform to the contract gives rise to a number of issues. As evident from the divergent approaches taken by the Common European Sales Law and the UK Consumer Rights Bill, the questions raised by the appropriateness of these remedies to digital content products are not simple or straightforward. The Department does not have a fixed view at this stage on a number of these issues – in particular, whether there should be a short-term right to reject digital content or a limit on the number of repairs or replacements before a consumer could rescind a contract and obtain a refund of the price – and will give them further consideration in the light of the responses to this consultation. Where, however, repair or replacement cannot be undertaken within a reasonable time or without significant inconvenience to the consumer or in accordance with any other conditions set out in the legislation, we are of the view that the consumer should be entitled to a full refund of the price. We are not proposing that the corresponding remedies for faulty goods will provide for compensation for use of the goods prior to rescission and refund of the price, and it would be unreasonable in our view to envisage anything less than full reimbursement where digital content is faulty and the consumer has pursued other remedies in accordance with the legislation.

QUESTION 20

Should consumers have the same short-term right to reject digital content that does not meet the required quality and other standards as is proposed to apply in the case of goods? If not, why not?

QUESTION 21

Should consumers have the right to a full refund of the price of digital content where repair or replacement are unavailable or cannot be carried out within a reasonable time and without significant inconvenience to the consumer? If not, why not?

QUESTION 22

Should there be a limit to the number of repairs or replacements permitted before a consumer can claim a full refund of the price for faulty digital content? If so, what should this limit be?

Digital Content Supplied Other Than for a Price

100. While much digital content is supplied in return for the payment of a price, it is not uncommon for this content to be supplied in return for some form of non-monetary consideration, such as access to personal data. Recent legislative initiatives in the EU and the UK have taken somewhat different approaches to the regulation of digital content supplied other than for a price. As noted above, the Common European Sales Law applies to contracts for the supply of digital content ‘irrespective of whether the digital content is supplied in exchange for the payment of a price.’ This reflects a view that, as defects in digital content can affect the economic interests of consumers irrespective of the conditions under which it is provided, the applicability of the CESL should not depend on whether or not a price was paid for the content.⁸⁶ Though the CESL’s rules on the conformity of digital content with the contract apply irrespective of whether a price has been paid for the content, these rules stipulate that, in determining the quality and performance capabilities that a buyer may reasonably expect from digital content, regard is to be had as to whether or not the digital content was supplied in exchange for the payment of a price.⁸⁷ Subject to this qualification, the rights applicable to ‘paid for’ and ‘free’ digital content are similar.

⁸⁶ European Commission. 2011. *Proposal for a Regulation on a Common European Sales Law*, recital 19.

⁸⁷ *Ibid*, Article 100(g). The European Parliament has proposed an amendment of this provision to provide that regard should be had to whether the digital content was supplied ‘in exchange for the payment of a price or

101. The remedies set out in the CESL for digital content that does not conform to the contract differ substantially, however, depending on whether or not a price has been paid for the content. Where such content is not supplied in exchange for payment of a price, the buyer may only claim damages for loss or damage to his or her property (including hardware, software and data) caused by the lack of conformity of the digital content, except for any gain of which the buyer has been deprived by that damage. There is no entitlement to the other CESL remedies of repair, replacement, specific performance, or termination of the contract, while the remedy of price reduction is clearly inapplicable in cases where no price has been paid. The European Parliament have proposed an amendment to these provisions, however, to the effect that, where digital content is supplied in exchange for a counter-performance other than the payment of a price, the buyer should be entitled to all of the remedies other than price reduction.⁸⁸

102. The current UK Consumer Rights Bill takes a somewhat more restrictive approach to digital content supplied without the payment of a price. With just one exception, neither the rights nor remedies proposed for consumer contracts for digital content apply to content not supplied in return for payment.⁸⁹ That exception applies where digital content supplied by a trader under a contract causes damage to a device or other digital content belonging to the consumer. In such cases, the consumer is entitled to the remedies of repair or financial compensation regardless of whether or not the digital content was paid for. The Bill also gives the relevant UK Minister power to provide by order for the application of its provisions to digital content contracts supplied free of charge if the Minister is satisfied that these contracts are giving rise to significant consumer detriment.

103. As outlined in Part IV, the Department proposes to apply rights and remedies broadly similar to those applying to sales contracts to exchange transactions in which goods are supplied in return for non-monetary consideration. It would be consistent with this approach to provide that the rights and remedies for digital content to be included in the

any other counter-performance'. European Parliament. 2013. *Report on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Amendment 185*. The price paid for digital content would be taken into account under any general provision as to quality. Section 14 of the Sale of Goods Act 1893 states that regard should be had, among other things, to the 'price (if relevant)' of goods in determining whether the goods are of merchantable quality.

⁸⁸ *Ibid.*, Amendment 193.

⁸⁹ The Bill's provisions apply, however, to digital content supplied with goods, services or other digital content for which a price has been paid, as well as to digital content paid for with a token, virtual currency or other facility originally purchased with money.

proposed Bill should apply to content supplied in return for consideration other than the payment of a price. Transactions of this kind appear to constitute an important part of the business model and revenue-generating capacity of some digital content providers. It can be argued on the other hand that, while the status of a transaction involving the exchange of goods will be clear to the parties concerned, it may not be similarly apparent whether, or to what extent, a trader is obtaining consideration from a consumer in return for the provision of digital content.

QUESTION 23

Should the right and remedies for digital content in the proposed Consumer Rights Bill apply –

- 1) only where the digital content is supplied in return for the payment of a price?*
- 2) where, in addition, the digital content is supplied in return for consideration other than the payment of a price?*
- 3) regardless of whether a price is paid or consideration given for the digital content?*

QUESTION 24

If contracts for digital content supplied in return for consideration other than the payment of a price are to come within the scope of the proposed legislation, should they be subject to all of the rights on the quality and other aspects of digital content for which a price has been paid and all of the remedies except price reduction? If not, what rights and remedies should apply?

VI CONTRACTS FOR THE SUPPLY OF SERVICES

104. There is no doubting the importance of the services sector in modern economies. In Ireland and other EU Member States, services account for over two-thirds of output and employment. According to the most recent Household Budget Survey, thirty per cent of household income went on miscellaneous goods, services and other expenditure, while there was also a substantial services element in other expenditure categories such as transport and housing.⁹⁰ While the figures published by the National Consumer Agency on the number of complaints received from consumers do not differentiate between complaints about goods and services, ten of the eleven companies that prompted the greatest number of contacts to the Agency in 2013 were engaged in the provision of financial, telecommunications or waste services.⁹¹

105. Perhaps because of the size and heterogeneity of the sector, “services”, unlike goods or digital content, often goes undefined in legislation or is defined tautologically and/or by reference to transactions that are not services.⁹² The main part of the definition of ‘services’ at section 2(1) of the Consumer Protection Act 2007 is more expansive, and states that “services” means –

- (a) any service or facility provided for gain or reward or otherwise than free of charge, including, without limitation services or facilities for –
 - (i) banking, insurance, grants, loans, credit or financing,
 - (ii) amusement, cultural activities, entertainment, instruction, recreation or refreshment,
 - (iii) accommodation, transport, travel, parking or storage, or
 - (iv) the care of persons, animals or things;

106. As with contracts for the supply of goods and digital content, the main focus of the provisions on services in the proposed Consumer Rights Bill will be on the rights of consumers in respect of the quality and other attributes of services, and the remedies available to consumers when these rights are breached. We look first at the rights consumers enjoy under existing legislation and at the statutory regulation of contract terms that seek to exempt or restrict these rights, followed by a discussion of remedies.

⁹⁰ Central Statistics Office. 2012. *Household Budget Survey 2009-10: Final Results*, table A.

⁹¹ National Consumer Agency. 2014. *Annual Report 2013*, p. 28.

⁹² There is no definition of ‘services’, for example, in the Sale of Goods and Supply of Services Act 1980 or in Directive 2006/123/EC on Services in the Internal Market. Article 2(6) of the Consumer Rights Directive defines service contract as ‘any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof.’

The Quality of Services

107. As noted earlier, the regulation of services contracts in consumer protection legislation is relatively scant compared with that of sales contracts. The provisions on the supply of services in Part IV of the Sale of Goods and Supply of Services Act 1980 comprise just 4 sections: 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); and section 42 (conflict of laws). The core provision at section 39 states that, in every contract for the supply of a service where the supplier is acting in the course of a business, the following terms are implied –

- (a) that the supplier has the necessary skill to render the service,
- (b) that he will supply the service with due skill, care and diligence,
- (c) that, where materials are used, they will be sound and reasonably fit for the purpose for which they are required, and
- (d) that, where goods are supplied under the contract, they will be of merchantable quality within the meaning of section 14(3) of the Sale of Goods Act 1893.

108. The requirement under section 39 that the service be supplied with due skill, care and diligence is a negligence or fault-based standard. Though the service may fail to achieve the desired result or even be defective, the supplier is liable only if he has failed to exercise due skill, care and diligence. This will normally be judged by reference to the degree of skill and care exercisable by a reasonably competent person in the same trade, business or profession.⁹³ The courts may, of course, imply a term entailing a higher level of performance in the circumstances of a particular case, or take the view that the generally accepted level of skill and care in a particular trade or profession is not an acceptable benchmark.⁹⁴

109. The fault-based standard which applies in contracts for the supply of services is in contrast to the strict liability or result-based standard that applies in contracts for the sale of goods. As outlined in Part III, the Sale of Goods Acts imply conditions into every contract of sale that the goods will comply with description and sample, be of merchantable quality, and be reasonably fit for any particular purpose made known to the seller. The degree of

⁹³ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *Whitehouse v Jordan* [1981] 1 All ER 267; *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635; *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871.

⁹⁴ *Bolitho v City and Hackney Health Authority* [1998] AC 232. See also *Lloyds Bank Ltd v EB Savory and Co.* [1933] AC 201; *Cavanagh v Ulster Weaving Co. Ltd* [1960] AC 145;

skill and care shown by the seller is immaterial. What matters is whether or not the goods comply with the implied terms. The strict liability character of the implied terms is offset to some extent, however, by the element of flexibility built into these terms. The merchantable quality standard under the Acts is satisfied if the goods are as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.

110. The rationale for the distinction between the quality standards applicable to goods and services has traditionally been that the more complex and less standardised nature of services makes it both unrealistic and unreasonable to apply an outcome-based standard to these transactions. In *Singer and Friedlander Ltd v John D Wood and Co*, for example,⁹⁵ Watkins J. observed as follows of the advice given by property surveyors and valuers:

... the valuation of land by trained, competent and careful professional men is a task which rarely, if ever, admits of a precise conclusion. Often beyond certain well-founded facts so many imponderables confront the valuer that he is obliged to proceed on the basis of assumptions. Therefore he cannot be faulted for achieving a result which does not admit some degree of error.

The English courts have demonstrated a willingness, however, to differentiate between different types of service contract and to apply a higher standard of liability in certain circumstances, most notably cases involving contracts to design and supply a building or other structure in accordance with specifications furnished by the client.⁹⁶

⁹⁵ [1977] 243 EG 212 at 213.

⁹⁵ In *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 1 WLR 1095 at 1101-02, a case concerning faults that had emerged in a warehouse designed for a specified commercial purpose and use, Lord Denning observed that the 'law does not usually imply a warrant that he [the professional man] will achieve the desired result, but only that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case.' He went on to say, however, that 'when a dentist agrees to make a set of false teeth for a patient, there is an implied warranty that they will fit his gums', before posing the question if an architect or engineer employed to design a house or bridge was 'under an implied warranty that, if the work is carried out to his design, it will be reasonably fit for purpose Or is he only under a duty to use reasonable skill and care.' Though he chose not to answer the question as a matter of law, Lord Denning was satisfied that, in the case at issue, the common intention of both parties was that the engineer should design a warehouse which would be fit for the purpose for which it was required.

⁹⁶ *Ibid.* See also *Stewart v Reavell's Garage* [1952] 2 QB 545; *Independent Broadcasting Authority v EMI and BICC Construction* (1980) 14 Build. LR 1. For a discussion of these cases, see Sales Law Review Group, *op. cit.*, paragraph 14.34.

111. The provisions on the quality of services at section 39 of the Sale of Goods and Supply of Services Act 1980 Act were in line with the then prevailing approach to the regulation of service contracts in other jurisdictions. The Act preceded the enactment of the UK Supply of Goods and Services Act 1982, section 13 of which provides similarly that, in contracts for the supply of a service, there is an implied term that the supplier will carry out the service with reasonable skill and care.

112. More recent legislative developments have raised the question as to whether a quality standard similar, or at least closer, to that applying to sales contracts might be appropriate to contracts for the supply of a service. It has been contended in this context that consumers have a reasonable expectation that services, like goods, should be fit for purpose, and that a fault-based standard is difficult for consumers to rely on as, in many cases, the consumer will not possess the knowledge and expertise necessary to know if a service has been carried out with reasonable skill and care.⁹⁷

113. The Draft Common Frame of Reference - the principles, definitions and model rules of European private law prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law – takes a mainly result-based approach to the regulation of service contacts and, in addition to an obligation of skill and care, provides at Article IV. C. – 2: 106: (Obligation to achieve result) that:⁹⁸

- (1) The supplier of the service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:
 - a) the result envisaged was one which the client could reasonably be expected to have envisaged; and
 - b) the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service.

114. In addition to a statutory guarantee that services will be carried out with reasonable care and skill, sections 28 and 29 of the New Zealand Consumer Guarantees Act 1993 contain the following provision as to the fitness for purpose of services:

... where services are supplied to a consumer there is a guarantee that the service, and any product resulting from the service, will be -

⁹⁷ Howells, G. & Twigg-Flessner, C. (eds). 2010. *Consolidation and Simplification of UK Consumer Law: Report for the Department for Business, Innovation and Skills*, pp. 47-69.

⁹⁸ Von Bar, C. et al (eds). 2009. *Draft Common Frame of Reference: Outline Edition*, IV. C.-2: 106, http://ec.europa.eu/justice/policies/civil/docs/dcf_r_outline_edition_en.pdf.

- (a) reasonably fit for any particular purpose; and
- (b) of such a nature and quality that it can reasonably be expected to achieve any particular result, -
that the consumer makes known to the supplier before or at the time of the making of the contract for the supply of the service, as the particular purpose for which the service is required or the result that the consumer desires to achieve, as the case may be, except where the circumstances show that –
- (c) the consumer does not rely on the supplier’s skill or judgement; or
- (d) it is unreasonable for the consumer to rely on the supplier’s skill or judgment.

Similar provisions apply to contracts for the supply of services under the Australian Consumer Law.⁹⁹

115. Applying a strict outcome based-standard to the generality of services would be a far-reaching change. While there may be certain services to which a rule of this kind could potentially be applied – for example, some services for house or vehicle repair and maintenance - its application would be more problematical in the case of professional and personal services in which a range of variables and contingencies are liable to intervene between expectation and outcome. It is necessary to keep in mind in this context the great number and diversity of the activities that go to make up the services sector in modern economies. The Department agrees with the conclusion of the Sales Law Review Group that a single, all-purpose rule of the kind found in the Draft Common Frame of Reference is unsuited to this diversity of circumstances and the flexibility that it requires.¹⁰⁰

116. While the Review Group was not in favour of the introduction of an inflexible result-based standard for services contracts, it considered that there was scope for a measured reform of the purely fault-based standard at section 39 of the 1980 Act. It saw considerable merit in this context in the provisions in New Zealand and Australian legislation. In the Group’s view, these rules constituted a nuanced and flexible approach to the regulation of the quality of services contracts. The provisions in question apply, first, only to an outcome that the consumer has made known to the supplier expressly or impliedly. Secondly, they do not stipulate that a particular result must be achieved, but provide instead that the services should be such that they might be reasonably be expected to achieve the intended result. If the services provided would normally achieve this result, therefore, the supplier might not be liable because of a failure to achieve it in the

⁹⁹ Australian Consumer Law, Schedule 3, Chapter 3, sections 60 and 61.

¹⁰⁰ Sales Law Review Group, op. cit. paragraph 14.35.

circumstances specific to a particular transaction. An additional element of flexibility arises, thirdly, from the fact that the supplier's obligations under the provision arise only where there has been reasonable reliance on his skill and judgement. If the supplier is of the view that he cannot supply a service that is reasonably fit for a particular purpose or can reasonably be expected to achieve a particular result, he can make this clear to the consumer. This gives the supplier a reasonable degree of control over his responsibilities and liabilities. Though the Review Group believed that these aspects of the provisions would help to allay some concerns, it acknowledged that a reform of this kind would represent a substantial change in the approach taken to the regulation of services contracts. It suggested accordingly that the introduction of a provision along these lines, and the conditions governing its application, should be the subject of further consultation.

117. The Department recognises that arguments can be made for and against a shift to an outcome-based quality standard for services. It does not have a fixed view on the issue at this stage and will give it further consideration in the light of the responses to this consultation. It is relevant to note that, while the British Government considered and consulted on the introduction of an outcome-based standard for services, it did not include such a provision in the current Consumer Rights Bill. Though that Bill strengthens consumer rights in respect of services in a number of other ways, it restates the existing rule that services must be provided with reasonable skill and care. The Bill's failure to adopt, or move towards, a strict liability standard for services has been criticised, however, by the House of Commons Business, Innovation and Skills Committee, the Scottish Law Commission, the Office of Fair Trading (now the Competition and Markets Authority) and the UK consumer body, Which.¹⁰¹

¹⁰¹ House of Commons Business Innovations and Skills Committee. *Draft Consumer Rights Bill: Volume 1*, paragraphs 148-165. House of Commons Public Bill Committee. 2014. *Consumer Rights Bill: Written Evidence*, pp. 6, 14-16 and p.77.

QUESTION 25

Should the proposed legislation include, in addition to the requirement that the service be provided with skill and care, a provision that it should be reasonably fit for any particular purpose, and of such a nature and quality, that it can reasonably be expected to achieve any particular result that the consumer makes known to the supplier as the particular purpose for which the service is required, or result that the consumer desires to achieve? This obligation to apply only where the circumstances showed that the consumer had relied on the supplier's skill or judgement and that it was reasonable for him to do so. If not, why not?

Correspondence of Services with Description

118. As noted earlier, the Sale of Goods Acts imply into every contract of sale by description a condition that the goods comply with their description. Though no equivalent provision applies to services contracts under the Sale of Goods and Supply of Services Act 1980, the information provisions that apply to services contracts that come within the scope of the Consumer Rights Directive go some way towards addressing this gap. The Regulations that give effect to the Directive require the trader to provide clear and comprehensible information prior to the conclusion of the contract about matters such as the main characteristics of the service, the price, and the arrangements for, and time of, performance. In the case of distance and off-premises contracts, moreover, this information forms part of the contract. If the information provided by the trader prior to the conclusion of such a contract subsequently proves to be incorrect or incomplete, therefore, the consumer may have a claim for breach of contract.

119. The UK Consumer Rights Bill contains a potentially useful supplement to the Directive's information provisions. Section 50 of the Bill provides that every contract for the supply of a service is to be treated as including as a term of the contract –

anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service, if –

- a) it is taken into account by the consumer when deciding to enter into the contract, or
- b) it is taken into account by the consumer when making any decision about the service after entering into the contract.

The statements or representations taken into account by the consumer are subject, first, to anything that qualified these statements and was said or written to the consumer by the trader on the same occasion and, secondly, to any change to the statements expressly agreed between the consumer and trader. Consumers can do and suffer detriment when service providers make statements or give commitments that they do not subsequently honour. While such statements may well be incorporated in the contract in any event, a statutory provision along the above lines clarifies the point in a manner likely to be beneficial to consumers. Subject to review in the light of responses to the consultation, the Department proposes to include such a provision in the proposed Bill.

QUESTION 26

Should the proposed Bill provide that contracts for the supply of services are to be treated as including a provision that, subject to specified conditions, anything said by or on behalf of a trader that is taken into account by a consumer in deciding to enter into the contract, or in taking any decision about the service after entering into the contract, forms part of the contract.

Default Provisions on Time and Price of Service

120. While the stipulations on the quality of services in the Sale of Goods and Supply of Services Act 1980 were broadly in line with those in other common law jurisdictions at the time, the legislation in those jurisdictions included additional provisions not found in the 1980 Act. The UK Supply of Goods and Services Act 1982 contains, first, an implied term that, where the time for a service to be carried out is not fixed by the contract, or is left to be fixed in a manner agreed by the contract or to be determined by the course of dealing between the parties, the supplier will carry out the service within a reasonable time. It includes, secondly, an implied term that, where the consideration for a service is not fixed by the contract, or is left to be fixed in a manner agreed by the contract or to be determined by the course of dealing between the parties, the recipient of the service will pay a reasonable charge. What constitutes a reasonable time or charge is a question of fact. The current UK Consumer Rights Bill retains these provisions, while similar provisions can also be

found in the New Zealand Consumer Guarantees Act 1993 and, in the case of the statutory guarantee as to reasonable time for the supply of the service, in the Australian Consumer Law. It is proposed to include similar default rules in the proposed Bill.

QUESTION 27

Should the proposed Bill provide that, where the time of performance of a service is not fixed by the contract, it should be carried out within a reasonable time?

QUESTION 28

Should the proposed Bill provide that, where the price for a service is not fixed by the contract, the consumer is not liable to pay more than a reasonable price?

Exclusion of Statutory Requirements as to Quality and Other Aspects of Services

121. Section 40 of the Sale of Goods and Supply of Services Act 1980 states that the implied undertakings as to quality of service under section 39 of the Act may be negated or varied by an express term of the contract, by the course of dealing between the parties, or by usage that binds both parties to the contract. Where the recipient of the service deals as consumer, however, the implied undertakings may be negated or varied only where the express term in question is fair and reasonable and has been specifically brought to the attention of the consumer. By contrast, contract terms that exempt the conditions and warranties as to title, correspondence with description and sample, and quality implied into consumer sales contracts by the Sale of Goods Acts are void.

122. As the Sales Law Review Group observed, the differential treatment of exemption clauses in sales and services contracts is the legacy of a period when the regulation of services contracts was novel and, as a result, was undertaken in a tentative and qualified way. The implied terms governing the provision of services are currently fault-based and, even if the proposals in this paper for a qualified move towards an outcome-based standard are adopted, will remain so to a significant extent, and certainly to a greater extent than

those applying to goods. In a situation in which the statutory rules on the quality of services are, and will remain, less stringent than those on the quality of goods, it is difficult to justify the application to those rules of more permissive provisions on exemption clauses. Exemption clauses have been one of the main ways in which essential consumer rights have been undermined, and effective protection for consumers from these clauses is no less important in services than in sales contracts.

123. In the UK, liability for the implied term of 'reasonable skill and care' in contracts for the supply of a service can currently be excluded or restricted in consumer contracts where the exclusion clause satisfies the reasonableness requirement under the Unfair Contract Terms Act 1977. The Consumer Rights Bill now before the Westminster Parliament, however, provides that contract terms which exclude or restrict the rights of consumers under the Act in respect of the quality and other aspects of services, and the remedies for breaches of those rights, are not binding on the consumer. In Australia and New Zealand similarly, contracting out of the statutory guarantees implied into consumer contracts for the supply of services is prohibited.¹⁰² Though it can be argued that courts would be slow to find clauses exempting or restricting the statutory rules on the quality of services 'fair and reasonable', it would be clearer and more advantageous to consumers to preclude in legislation the possibility that these rules could be waived or restricted. In the Department's view, exemption clauses pertaining to the implied terms in services contracts should be put on the same footing as those in sales contracts in the proposed Consumer Rights Bill.

QUESTION 29

Should the proposed legislation prohibit contract terms that exclude or vary the statutory undertakings on the quality and other aspects of consumer services contracts in all circumstances and not, as is currently the case, permit terms that exclude or vary these undertakings if the terms are fair and reasonable? If not, why not?

¹⁰² New Zealand Consumer Guarantees Act 1993, s.43. Australian Consumer Law, Schedule 2, Chapter 3, s. 63.

Remedies in Consumer Contracts for the Supply of Services

124. As noted earlier, the provisions on the supply of services in the Sale of Goods and Supply of Services Act 1980 do not contain any remedies for breaches of the Act's undertakings on the quality of services. In the absence of statutory remedies, consumers can claim damages in respect of losses arising from any such breach. Depending on the severity of the breach, they may also be able to terminate the contract. While the implied undertakings as to the quality and other aspects of goods in the Sale of Goods Acts are mainly conditions of the contract, breach of which gives rise to a right to terminate the contract, the implied undertakings on the quality of services at section 39 of the 1980 Act are expressly said to be 'terms' of the contract. In *Irish Telephone Rentals v Irish Civil Service Building Society Ltd*,¹⁰³ the plaintiff contracted to install and maintain a telephone system in the defendant's offices. While the system functioned satisfactorily at first, it later proved unable to cope with increased levels of telephone traffic. The defendants terminated their contracts with the plaintiff and the latter sued for wrongful termination. Costello J. held that the defects in the telephone system amounted to a breach of the plaintiff's express obligations under the contract that had deprived the defendants of substantially the whole benefit envisaged under the contract, as well as a breach of the implied term under section 39 of the 1980 Act that goods supplied under a contract for the supply of a service should be of merchantable quality. He found accordingly against the plaintiff's claim for damages for breach of contract.

125. Consumer law in both New Zealand and Australia sets out a scheme of remedies where services supplied under a contract of service are in breach of the statutory guarantees on the quality or other aspects of services. The remedial scheme in the New Zealand Consumer Guarantees Act 1993 which served as the model for the subsequent Australian provisions provides as follows:¹⁰⁴

- Where a service supplied to a consumer fails to comply with any of the statutory guarantees, the consumer may, where the failure can be remedied, require the supplier to remedy it within a reasonable time. Where the supplier refuses or neglects to remedy the service, or

¹⁰³ [1991] ILRM 880.

¹⁰⁴ New Zealand Consumer Guarantees Act 1993, sections 32-38. The equivalent Australian provisions can be found at Schedule 2, Chapter 5, sections 267-270 of the Australian Consumer Law. In the event of termination of the contract by the consumer, the Australian legislation provides that the consumer is entitled to a refund of any money paid for the services 'to the extent that the consumer has not already consumed the services at the time the termination takes effect.'

fails to do so within a reasonable time, the consumer can have the failure remedied elsewhere and recover the costs from the supplier.

- Where the failure cannot be remedied or is of a substantial character,¹⁰⁵ the consumer can cancel the contract or obtain from the supplier damages for any reduction in the value of the product of the service below the charge paid or payable by the consumer for the service.
- Where a consumer cancels a contract under the Act, he or she is entitled to a refund of any money paid or consideration provided in respect of the service unless a court or tribunal orders that the supplier may retain the money or consideration in full or in part.
- In the case of the statutory guarantees as to the fitness of a service for a particular purpose or the achievement of a particular a result made known by the consumer to the supplier, or as to the time of completion of the service, there is no right of redress for consumers against suppliers in respect of a service that fails to comply with these guarantees because of an act or omission of a person other than the supplier or an agent of the supplier, or because of a cause independent of human control.

126. While existing UK law on the supply of services contains no scheme of remedies, the current Consumer Rights Bill makes good this omission. The Bill provides for a first-tier remedy of a right to require repeat performance and a second-tier remedy of a right to a reduction in the price of the service. If a service is not performed with reasonable care and skill, or is not performed in accordance with the information provided by the trader about the service, the consumer can require the trader to perform the service again to the extent necessary to complete it in conformity with the contract. If repeat performance is impossible or cannot be provided within a reasonable time or without significant inconvenience, the consumer has the right to require the trader to reduce the price by an appropriate amount. If the service is not performed in a reasonable time, or is not provided in accordance with the information provided about the trader (as opposed to the service), price reduction is the sole remedy. Where appropriate, the amount of the reduction may be the full amount of the price.¹⁰⁶ According to the explanatory notes to the Bill, a 'reduction in price of an appropriate amount' will normally mean that the price is reduced by the

¹⁰⁵ The criteria governing failure of a substantial character in the supply of a service broadly correspond to those governing similar failures in the supply of goods under the New Zealand Act outlined at paragraph 49 and footnote 49 above, namely that the failure is such that the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or that the product of the service is substantially unfit for the purpose for which services of the type in question are commonly supplied, or for a particular purpose or result made known to the seller, and cannot easily and within a reasonable time be remedied to make it fit for purpose; or the product of the service is unsafe.

¹⁰⁶ The draft Bill as originally presented to Parliament did not include this provision. It was added in response to criticisms of the remedies provisions.

difference in value between the service the consumer paid for and the service that was provided.¹⁰⁷ In practice, this will mean that the reduction in price from the full amount ‘takes into account the benefit which the consumer has derived from the service’, a provision that can be said to correspond to that permitting compensation for the use of the goods in sales contracts prior to termination. Where the consumer has derived no such benefit from the service, the reduction in price could be a full refund.

127. As can be seen, there are clear similarities, as well as some differences, between the scheme of remedies in the New Zealand and Australian legislation and those in the UK Bill. Both give the consumer the right to require the trader to make good a performance that breaches the statutory standard of quality. Though the secondary remedy in the New Zealand Act is cancellation of the contract, while it is a reduction in the price in the UK Bill, the practical effect would be similar where the reduction amounted to the full price under the UK provision, or where a court held that the trader was permitted to retain part of the price under the New Zealand legislation. It is not clear why the remedial scheme in the UK omits the second-tier remedy of termination that applies alongside that of price reduction in the corresponding scheme of remedies for sales contracts. The main difference between the two remedial schemes lies in the right of the consumer under the New Zealand Act to have direct recourse to cancellation of the contract where the trader’s failure to comply with the statutory guarantees is of a substantial character. Under the UK Bill, the consumer is entitled to the second-tier remedy of price reduction only where repeat performance is impossible, is not provided by the trader, or is not provided within a reasonable time or without significant inconvenience to the consumer. This aspect of the UK Bill has been criticised on the ground there are circumstances in which the consumer should not be required to give the trader a second chance, for example where the service was provided in a very poor or unsafe manner.¹⁰⁸ As many services are carried out in the consumer’s home or on their person, a consumer who has lost trust in a trader will understandably not want that trader to perform the service again and should be permitted to resort directly to the second-tier remedy of price reduction.

¹⁰⁷ Consumer Rights Bill (as brought from the House of Commons on 17th June 2014): *Explanatory Notes*, paragraph 262.

¹⁰⁸ House of Commons Public Bill Committee. 2014. *Consumer Rights Bill: Written Evidence*, written evidence from Which, pp. 15-16; written evidence from the Office of Fair Trading, p. 77

128. A scheme of statutory remedies for services contracts that would give consumers the right to require the trader to remedy a defective performance and/or to terminate the contract or obtain a price reduction would represent a considerable advance on the present situation under Irish consumer law and be of significant benefit to consumers. Subject to review in the light of the responses to this consultation, the Department proposes that the scheme of remedies for contracts for the supply of services in the proposed legislation would operate broadly as follows:

- Where the service supplied by the trader was in breach of the statutory rules on the quality or other aspects of services, the consumer would have a right to require the trader to remedy the defective performance or, where the breach was of a kind that deprived the consumer of substantially the whole benefit of the contract, to terminate the contract.
- If the trader was unable to remedy the defective performance, or failed to do so within a reasonable time or without significant inconvenience to the consumer, the consumer could require a reduction in the price of the service or terminate the contract. The reduction in price, or the refund payable to the consumer in the event of termination, would be determined by reference to the difference in value between the service the consumer paid for and the service provided by the trader. Where the consumer received no value from the service, the reduction in price or the refund could amount to the full price paid by the consumer.

QUESTION 30

Do you agree with the scheme of remedies for contracts for the supply of services proposed in paragraph 128? If not, why not and what statutory remedies should apply to such contracts?

VII UNFAIR TERMS IN CONSUMER CONTRACTS

129. As stated earlier, it is proposed to incorporate in the proposed Consumer Right Bill provisions that give effect to Directive 93/13/EEC on unfair terms in consumer contracts. The Directive is currently given effect by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000, the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014.¹⁰⁹ In view of the Directive's centrality to consumer contract rights, there is a convincing case for its inclusion in the proposed legislation.

130. The Unfair Terms Directive is one of the most important enactments in the EU 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'. Despite its significance, the Directive is short and succinct. The key provisions on the scope of the Directive, the criteria for the assessment of the unfairness of contract terms, the transparency of contract terms and the effects of unfairness are set out in five Articles spanning little more than a page. We will look next at these provisions, commencing with the scope of application of the Directive.

Scope of the Unfair Terms Directive

131. The first of the Directive's scope provisions states that it does not apply to contract terms that have been 'individually negotiated'.¹¹⁰ Article 3(2) clarifies that a term shall always be regarded as not individually negotiated 'where it has been drafted in advance and the consumer has not therefore been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract'. It goes on to say that the fact that certain aspects of a term or one specific term have been individually negotiated

¹⁰⁹ The Directive's substantive rules are transposed in the 1995 Regulations. The 2000, 2013 and 2014 Regulations deal with the enforcement of the Directive and with the bodies authorised to undertake that enforcement.

¹¹⁰ The original proposal for the Directive did not include this restriction. It was included at a relatively late stage of the negotiations on the proposal, largely in response to the following article by two German academics which argued that its application to negotiated terms would involve an excessive intrusion into freedom of contract. Brandner, H. and Ulmer, P. 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission', 28 *Common Market Law Review* 647.

will not exclude the application of the Directive to the rest of the contract if an overall assessment of the contract indicates that it is a standard pre-formulated contract. The burden of proof that a term was individually negotiated rests with the trader and not with the consumer.

132. Article 1(2) provides that the Directive does not apply, secondly, to contract terms that 'reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the European Union are party'. Recital 13 of the Directive states this exclusion also covers 'rules which, according to the law, shall apply to the contracting parties provided that no other arrangements have been established' – that is any contract term which reflects the default law that would apply in the absence of the term.

133. Thirdly, Article 4(2) provides that assessment of the unfair nature of contract terms does not apply to either 'the definition of the main subject matter of the contract' or 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'. The exemption of these so-called core terms reflected a view that, in a market economy, contracting parties should remain free to shape the principal obligations under the contract, while the relationship between the price and the goods or services provided in return should be determined by market mechanisms and not by statutory provisions.

134. The restriction of the core terms exemption to terms expressed in plain, intelligible language underlines the importance attached by the Directive to the transparency of contract terms. Article 5 of the Directive provides in addition 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'. Where there is doubt about the meaning of a contract term, the interpretation most favourable to the consumer prevails.

135. The main subject matter of the contract and the price/quality ratio can be taken into account, however, in assessing the fairness of other terms of the contract. The European Court of Justice has held, furthermore, that Article 4(2) does not determine the scope of the Directive in its entirety, but applies only to a particular type of assessment that is excluded

from review.¹¹¹ Terms defining the main subject matter of the contract or the adequacy of the price-value ratio come within the scope of the Directive, but ‘escape assessment only insofar as the national court having jurisdiction should form the view, following a case-by-case examination, that they were drafted by the seller or supplier in plain, intelligible language.’

The Test of Unfairness

136. Article 3(1) states the general test of unfairness under the Directive as follows:

A contractual term which 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.

Article 4(1) lists a number of additional factors to be taken into account:

The unfairness of a contract term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

Recital 16 of the Directive elaborates as follows on the factors to be taken into account in making an assessment of good faith under the test of unfairness:¹¹²

Particular regard shall be had to the strength of the bargaining position of the parties; whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account.

Indicative List of Contract Terms That May Be Regarded as Unfair

137. Article 3(3) states that the Annex to the Directive ‘shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair’. The Annex, or grey list of contract terms as it commonly known, is reproduced in Box 3. Though it is sometimes suggested that the terms in the Annex are presumed to be unfair, this is nowhere stated in

¹¹¹ European Court of Justice, Case C-484/08. *Caja de Ahorros y Monte de Piedad de Madrid v Asociacion de Usuarios de Servicios Bancarios (Ausbanc)*, paragraphs 31-35.

¹¹² These factors overlap to a considerable extent with the criteria set out in the Schedule of the Sale of Goods and Services Act 1980 for the purpose of determining whether the exclusion of the terms implied into commercial contracts of sale by the Sale of Goods Acts, and of the terms implied into consumer contracts of sale by the Sale of Goods and Supply of Services Act 1980, is ‘fair and reasonable’. The criteria in both the 1980 Act and the recital to the Unfair Terms Directive drew substantially on the ‘Guidelines for Application of Reasonableness Test’ at Schedule 2 of the UK Unfair Contract Terms 1977.

BOX 3 INDICATIVE LIST OF CONTRACT TERMS WHICH MAY BE REGARDED AS UNFAIR

- 1.(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;
- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
- (f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier who dissolves the contract;
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed upon when the contract was concluded;
- (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.
2. Scope of subparagraphs (g), (j) and (i)
- (a) Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
- (b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.
- Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.
- (c) Subparagraph (g), (j) and (l) do not apply to:
- transactions in transferable securities, financial instruments or other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;
 - contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in a foreign currency;
- (d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

the Directive or in the case law of the European Court of Justice. In *Commission v Sweden*,¹¹³ the Court stated that:

It is not disputed that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear on the list may none the less be regarded as unfair. Inasmuch as the list contained in the annex to the Directive is of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures.

In *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*,¹¹⁴ the Court appeared to place somewhat greater weight on the Annex:

If the content of the annex does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term.

138. As can be seen from Box 3, a number of the Annex terms – for example, paragraphs (d), (e), (f) and (l) - deal in one way or another with the price paid for goods or services. In *Nemzeti*,¹¹⁵ the European Court of Justice held that a price escalation clause could be assessed for fairness under the Directive, stating that the exclusion from assessment for fairness of the main subject matter and the price-quality ratio ‘cannot apply to a term relating to a mechanism for amending the prices of the services provided for the customer.’ It has been argued accordingly that the exemption for the main subject matter and the price terms of a contract is not intended to apply to the terms set out in the grey list.¹¹⁶ In accordance with this view, section 64(6) of the current UK Consumer Rights Bill provides that the exclusion from assessment for fairness of contract terms specifying the main subject matter, or the appropriateness of the price by comparison with the goods, digital content or services supplied in return, does not apply to a contract term in the list of consumer contract terms that may be regarded as unfair at Schedule 2 of the Bill.

Effect of Unfairness

139. Article 6 of the Directive requires Member States to ensure that unfair terms in a consumer contract shall not be binding on the consumer. If the contract is capable of continuing in existence without the unfair term, it should continue to bind the parties.

¹¹³ Case C-478-99, paragraphs 20-22.

¹¹⁴ Case C-472/10, paragraph 26.

¹¹⁵ *Ibid.*, paragraph 23.

¹¹⁶ Law Commission and Scottish Law Commission. 2012. *Unfair Terms in Consumer Contracts: A New Approach?*, paragraph 2.33.

Transposition of the Directive

140. The Unfair Terms Directive is a minimum harmonisation instrument. Article 8 of the Directive permits Member States to ‘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’. Recital 17 states that, because of the minimal character of the Directive, the scope of the terms in the Annex to the Directive ‘may be the subject of amplification or more restrictive editing by the Member States in their national laws.’ In *Caja de Ahorros*,¹¹⁷ the European Court of Justice confirmed that the Directive did not preclude national legislation which authorised judicial review of contract terms relating to the main subject matter of the contract or the price-quality ratio regardless of whether or not those terms were expressed in plain, intelligible language.

141. The majority of the Member States availed of the Directive’s minimum harmonisation status to maintain or introduce national measures that exceed the scope or substance of the Directive. The main additions or adaptations in national legislation are as follows:¹¹⁸

- legislation in eleven Member States regulates the unfairness of commercial as well as consumer contacts;
- thirteen Member States did not implement the exclusion of contract terms reflecting mandatory statutory or regulatory provisions;
- twelve Member States did not implement the exclusion of individually negotiated contract terms;
- nine Member States did not implement the exclusion of terms relating to the main subject matter of the contract and the adequacy of the price;
- eighteen Member States gave some or all of the terms on the Directive’s grey list the status of black list terms that are automatically unfair.

142. Ireland was one of a minority of Member States that made no additions or alterations to the Directive and that implemented its provisions virtually word-for-word. This reflected the relative novelty of unfair terms provisions in Irish law, as well as the constraints applying where EU legislation is given effect by regulations made under the European Communities Act 1972. It has been argued that the ‘minimalist’ approach taken to the transposition of the

¹¹⁷ Case C-484/08, paragraph 50.

¹¹⁸ Schulte-Nolke, H. et al (eds). 2008. *EU Consumer Law Compendium: Comparative Analysis*, pp. 376-403.

Directive has left Irish consumers less well protected in respect of unfair terms than those in most other Member States.¹¹⁹

Proposals for Change

143. The Department does not propose to make, or put forward for consideration, changes to either the general test of unfairness under the Directive or the exemption for the main subject matter of the contract and the adequacy of the price as against the goods or services supplied in return. Though the test of unfairness can be criticised on a number of levels, it has now been in place for over two decades with all of the associated advantages of familiarity and interpretation. Both the European Commission's proposal for a revision of the Directive in 2008 and the current UK Consumer Rights Bill retained the test without amendment. It has also influenced the test of unfairness in jurisdictions such as Australia and New Zealand which have enacted legislation on unfair terms in consumer contracts in recent years.¹²⁰ Making the core terms of consumer contracts subject to assessment for unfairness would represent a far-reaching change with potentially major implications. Even in competitive markets, prices vary significantly and there is ample scope for disagreement as to whether the goods or services supplied in return for a given price represent a fair bargain. Involving enforcement bodies and courts in disputes about what constitutes a fair price in a particular transaction would involve a big change in their role and functions. Though the exemption of the core terms is not under review, the scope of the exemption requires consideration, particularly in respect of contingent and ancillary charges. The other aspects of the Directive on which views are sought are the exclusion of individually negotiated terms and the composition and status of the indicative list of unfair terms.

Exclusion of Negotiated Terms

144. As indicated above, the Unfair Terms Directive does not apply to contract terms that have been individually negotiated, though negotiated terms are defined relatively narrowly. A sizeable number of Member States did not implement this exemption in their national legislation. The UK is now set to join their ranks as the unfair terms provisions in the Consumer Rights Bill now before the Westminster Parliament apply to negotiated and non-

¹¹⁹ Donnelly, M. 'Unfair Terms in Consumer Contracts: Time for Legislative Recalibration?' *Commercial Law Practitioner* (2012) 114.

¹²⁰ Though the legislation in Australia and New Zealand includes the 'significant imbalance' element of the test, it omits the good faith element.

negotiated terms alike. Though this decision was influenced by the fact that the UK Unfair Contract Terms Act 1977 applies to all terms in consumer contracts, the arguments for the removal of the exemption for negotiated terms were considered stronger than those for its retention.

145. The arguments in favour of applying the provisions on unfair terms to terms that have been negotiated can be summarised as follows:

- negotiated terms in consumer contracts mainly involve the main subject matter of the contract and/or the price and, as such, are already exempt from assessment for fairness;
- applying the provisions on unfair terms to negotiated contract terms would simplify the legislation and do away with disputes and uncertainty as to whether terms had been negotiated or not, or as to whether the Directive's provisions apply where a consumer has sought unsuccessfully to negotiate the terms of a contract;
- though the information and resource imbalance between traders and consumers means that even negotiated terms may be unfair in some cases to the consumer, contract terms that have been genuinely negotiated will generally be held to be fair.

The main argument against the application of the unfair terms provisions to contract terms that have been negotiated is that it would undermine the careful balance that the Directive seeks to strike between contractual freedom and consumer protection. It might also make businesses less willing to negotiate with consumers and more likely to rely on pre-formulated contract terms.

QUESTION 31

Should the proposed Consumer Rights Bill provide that all terms in consumer contracts, whether negotiated or not, are subject to assessment for fairness? If not, why not?

Scope of the Core Terms Exemption

146. The scope of the Directive's exemption of core terms from assessment for fairness was brought into sharp focus by the decision of the United Kingdom Supreme Court in *Office of*

Fair Trading v Abbey National.¹²¹ In 2007, the Office of Fair Trading commenced an investigation under the UK Regulations that implement the Unfair Terms Directive into the fairness of contract terms relating to charges for unauthorised overdrafts in personal current accounts. Though the charges were paid by less than a quarter of current account customers, over a million customers had paid more than £500 in these charges. With the agreement of seven banks and one building society, the Office brought a test case on the question of whether charges for unauthorised overdrafts were assessable for fairness under the Unfair Terms Regulations. The High Court and the Court of Appeal found in favour of the Office of Fair Trading. The Supreme Court over-turned these judgments, however, and found for the banks. It held that the charges for unauthorised overdrafts were not assessable for fairness as ‘any monetary price or remuneration payable under the contract would naturally fall within the language’ of the exemption at Article 4(2) of the Directive.¹²² It rejected the contention accepted by the High Court and the Court of Appeal that an average consumer would not recognise the overdraft charge as part of the main subject matter or as a price term within the meaning of the exemption and would not take it into account in deciding whether or not to enter into the contract, finding instead that the ‘identification of the price or remuneration’ was ‘a matter of objective interpretation by the court.’ Despite an acknowledgement that the Supreme Court was faced with a difficult decision given the potential costs for banks and the implications for the cross-subsidy to the majority of current account customers who do not incur unauthorised overdrafts, most commentators have been highly critical of the judgment.¹²³

147. Though the Abbey National judgment led to demands that the core terms exemption be redrawn more narrowly to exclude incidental or ancillary charges, the current UK Consumer Rights Bill has taken a different approach to the issue. The Bill restates the exemption from assessment for fairness of terms specifying the main subject matter of the contract and of assessments of the appropriateness of the price vis-à-vis the goods or services supplied in return, but provides that such terms are excluded from assessment only ‘if transparent and prominent’. The English and Scottish Law Commissions on whose recommendations these provisions are based have argued that a test focusing on whether a

¹²¹ [2009] UK SC 6. For a summary of the case, see Law Commission and Scottish Law Commission. 2012. *Unfair Terms in Consumer Contracts: A New Approach?*, paragraphs 5.22 to 5.67.

¹²² Office of Fair Trading v Abbey National, *ibid.* at [41] and [78].

¹²³ Law Commission and Scottish Law Commission. 2012. *Unfair Terms in Consumer Contracts: A New Approach?*, paragraphs 6.1 to 6.20.

term is transparent (that is, in plain intelligible language, legible and readily available to the consumer) and prominent (that is presented in such a way that a reasonably well informed consumer would be aware of it) would produce much the same effect as a test which focuses on whether a term is ancillary or incidental.¹²⁴ Both approaches 'seek to distinguish between terms which consumers take into account in their decision to buy the product and those which become lost in small print'. The emphasis on prominence 'offers a practical way of distinguishing between a headline price and what are commonly thought of as incidental and ancillary terms'. It will also enable traders to ensure that price terms are exempt from review by making them prominent and transparent.

148. The judgment of the UK Supreme Court in the Abbey National Case gives rise to justifiable concern on several grounds. First, it interprets the core terms exemption in a manner that does not accord with the reasonable expectations of consumers. As one commentator has noted:¹²⁵

... the vast majority of customers do not consider insufficient funds charges to be an essential element of the contract they enter into with the bank. Sheltering such terms from a test of fairness does little to further the goal of consumer protection.

Secondly, it has left the law in this area in a state of some uncertainty. As the English and Scottish Law Commissions noted, there were several strands in the Supreme Court decision that 'are not always easy to reconcile' and that allow for 'differing interpretations of the decision'.¹²⁶

149. The Department does not have a fixed view at this stage as to how the issues raised by the interpretation of the core terms exemption would best be addressed and will give the matter further consideration in the light of the responses to this consultation. There are a number of possible ways in which the exemption could be redrawn in the proposed legislation so as to give greater certainty and more effective protection to consumers:

- 1) As in the UK Consumer Rights Bill, contract terms relating to the main subject matter of the contract and the adequacy of the price as against the goods or services supplied in return could be exempt from assessment if they are transparent and prominent.

¹²⁴ Law Commission and Scottish Law Commission. 2013. *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills*, paragraphs 3.14 to 3.17.

¹²⁵ Davies, P. 'Bank Charges in the Supreme Court', (2010) 69(1) *Cambridge Law Journal* 21, at 22.

¹²⁶ Law Commission and Scottish Law Commission. 2012. *Unfair Terms in Consumer Contracts: A New Approach?*, paragraphs 5.84 to 5.96.

- 2) In addition to transparency and prominence requirements, it could be specified that, for the purposes of the exemption from assessment for fairness, 'price' does not include payments that are incidental or ancillary to the main purpose of the contract.¹²⁷
- 3) As in the Australian Consumer Law,¹²⁸ the exemption from assessment for fairness could apply only to the extent that the term 'sets the upfront price payable for the contract', defined as the consideration that:
 - a) is provided, or is to be provided, for the supply, sale or grant under the contract; and
 - b) is disclosed at or before the time the contract is entered into;
 but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

QUESTION 32

Should the exemption from assessment for fairness of the core terms of consumer contracts be redrawn? If so, which, if any, of the options for its redefinition outlined in paragraph 149 would you favour, and why?

Indicative List of Contract Terms That May Be Regarded as Unfair

150. As noted above, many EU Member States made extensive use of the Directive's minimum harmonisation clause to give black list status to the grey list of contract terms in the Annex, or to add additional terms to the black or grey lists in national legislation.¹²⁹

Thirteen Member States gave black list status to all of the terms in the Annex, while five Member States gave black status to some of these terms.¹³⁰ Ireland, along with the UK, was one of a minority of six Member States that reproduced the Annex without addition or alteration in their implementing legislation.¹³¹

¹²⁷ A provision along these lines was included at section 4(5) of the draft Unfair Contract Terms Bill published by the English and Scottish Law Commissions in 2005. Law Commission and Scottish Law Commission. 2005. *Unfair Terms in Contracts*, p. 144.

¹²⁸ Australian Consumer Law, Schedule 2, Chapter 2, section 26.

¹²⁹ Recital 17 of the Directive states that 'because of the cause of the minimal character of the Directive, the scope of these terms may be the subject of amplification or more restrictive editing by the Member States in their national laws.' For a detailed of the transposition of the Annex in Member States, see Schulte-Nolke, H. et al (eds). 2008. *EU Consumer Law Compendium: Comparative Analysis*, pp. 395-402.

¹³⁰ Austria, Belgium, Bulgaria, Czech Republic, Estonia, Greece, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovenia and Spain.

¹³¹ The other Member States were Cyprus, France, Poland and Slovakia.

Proposals for Amendment of the Annex

151. The European Commission's 2008 proposals for a revision of the Unfair Terms Directive under the original proposal for the Consumer Rights Directive provided that the terms at paragraphs (a), (m), (n) and (q) of the Annex outlined at Box 3 should be considered unfair in all circumstances, i.e. have the status of black list terms. The Commission further proposed the following additions to the Directive's grey list:

- giving the trader the possibility of transferring his obligations under the contract, without the consumer's agreement;
- restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the trader;
- unilaterally amending contract terms communicated to the consumer in a durable medium through on-line contract terms which have not been agreed by the consumer.

152. The current UK Consumer Rights Bill provides at section 68 that a trader cannot by a term of a consumer contract or a consumer notice exclude or restrict liability for death or personal injury resulting from negligence. This re-enacts a provision of the UK Unfair Contract Terms Act 1977 and, though not formulated as such, is essentially a black list version of the grey list provision on the exclusion of liability for death or injury at paragraph (a) of the Annex to the Unfair Terms Directive. The provisions of the UK Bill prohibiting the exclusion of the rights and remedies for sales, services and digital content contracts are also equivalent to black list terms, but remain separate to the Bill's unfair terms provisions.

153. The UK Bill also includes the following additions to the indicative list of unfair terms in line with recommendations made the English and Scottish Law Commissions:¹³²

- A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation for services which have not been supplied.
- A term which has the object or effect or permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.
- A term which has the object or effect of permitting the trader to determine the price payable under the contract after the consumer has become bound by it.

¹³² Law Commission and Scottish Law Commission. 2013. *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills*, paragraphs 5.82, 5.101 and 5.116,

154. The House of Commons Business, Innovation and Skills Committee and the UK consumer body Which have further proposed the addition of the following term to the grey list to ensure that traders should only be able to change the price of fixed-term and long-term contracts for a valid reason, such as a change to a market index outside of the trader's control¹³³:

A term ... which has the object or effect of permitting a trader to increase the price of, or alter unilaterally any characteristics of goods, digital content or services during any minimum contract period or before the end of a contract of a specified duration without a valid reason or where the consumer is not free to dissolve the contract without being disadvantaged.

The proposed term was prompted in part by the action of Bank of Ireland in increasing the increment added to the base rate in UK tracker mortgages, resulting in a rise of up to 4 per cent in mortgage rates in some cases. While the Banks's customers had the option to terminate the mortgage under the contract, there were no equivalent deals on offer and termination would accordingly involve significant detriment to the affected consumers.¹³⁴

155. The legislation on unfair contract terms in Australia and New Zealand does not include a black list of unfair terms.¹³⁵ Each contains a list of 'examples of the kind of terms of a consumer contract that may be unfair' that is broadly similar to the indicative list of unfair terms in the EU Directive.

156. The Department considers that, in general, a grey list is a more suitable vehicle for the regulation of unfair contract terms than a black list. There is one term, however, in the current indicative list in the Annex to the Directive, however, which should clearly be a term that is unfair in all circumstances, and that is the term at paragraph (a) of the Annex regarding the exclusion or limitation of the legal liability of a trader in the event of the death of, or personal injury to, a consumer resulting from an act or omission of the trader. This

¹³³ House of Commons Business, Innovation and Skills Committee, *Draft Consumer Rights Bill: Volume I*, paragraphs 189-195.

¹³⁴ Though the case related to contracts for the supply of gas, and the price variation at issue is permitted for financial services contracts by virtue of paragraph 2(b) of the Annex to the Unfair Terms Directive, the European Court of Justice judgment in *RWE Vertrieb v Verbraucherherzentrale Nordrhein-Westfalen* (Case C-92/11) deals with similar issues. The Court observed apropos of the consumer's right to terminate the gas supply contract in the event of a unilateral variation of the price tariff by the supplier that 'it is of fundamental importance ... that the right of termination given to the consumer is not purely formal but can actually be exercised. That would not be the case if, for reasons, connected with the method of exercise of the right of termination or the conditions of the market concerned, the consumer has no real possibility of changing supplier' (paragraph 54).

¹³⁵ Australian Consumer Law, Schedule 2, Chapter 2, Article 25. New Zealand Fair Trading Amendment Act 2013, section 36. The unfair terms provisions in New Zealand will take effect in March 2015.

was proposed for black list status in the European Commission's proposals for a revision of the Directive, and has effectively had that status in the UK since 1977.¹³⁶

QUESTION 33

Should paragraph (a) of the Annex to the Unfair Terms Directive on a contract term that excludes or limits the trader's legal liability for death or personal injury to a consumer resulting from an act or omission of the trader be reclassified as a term that is unfair in all circumstances? If not, why not?

157. The Department considers also that the status of the indicative list should be clarified and strengthened. The Directive describes the Annex as 'terms which may be regarded as unfair'. The proposed Consumer Rights Bill should instead categorise the contents of the Annex as contract terms that are presumed to be unfair. The presumption of unfairness would of course be rebuttable. The European Commission's proposal for a revision of the Directive in 2008 also provided that the indicative list of unfair terms would comprise terms which 'are presumed to be unfair' rather than terms 'that may be regarded as unfair'.¹³⁷

158. The Department has an open mind at this stage on other additions to the indicative list of unfair terms. There is merit in our view in the provisions on the terms relating to early termination fees and price variation clauses recommended by the English and Scottish Law Commissions and included in the UK Consumer Rights Bill.

¹³⁶ Section 2(1) of the UK Unfair Contract Terms Act 1977 provides that: 'A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.' This provision is re-enacted at section 65 of the current UK Consumer Rights Bill.

¹³⁷ Or as recital 52 of the proposal put it, 'terms which should be deemed unfair unless the trader proves otherwise'.

QUESTION 34

Should the indicative list of contract terms that may be regarded as unfair in the Annex to the Unfair Terms Directive be re-classified as contract terms that are presumed to be unfair. If not, why not?

QUESTION 35

Are there other contract terms that, in your view, should be included in the black list of terms that are automatically unfair and/or in the grey list of terms presumed to be unfair that are to be incorporated the proposed Consumer Rights Bill? If so, what are these terms?

Exclusion Clauses

159. At present, clauses that exclude or restrict consumers' statutory rights are regulated in different ways as follows in the Sale of Goods Act 1893, the Sale of Goods and Supply of Services Act 1980, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, and the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003:

- Section 55(4) of the Sale of Goods Act 1893 provides that any term in a consumer contract of sale exempting from any or all of the provisions of sections 12 to 15 of the Act on the implied undertakings as to title, correspondence with description and sample, and quality is void.
- Section 40 of the Sale of Goods and Supply of Services Act 1980 provides that the implied undertakings as to quality of service in consumer contracts for the supply of services can be negated or varied where this can be shown to be fair and reasonable and has been brought to the attention of the consumer.
- Schedule 3 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 includes the following term among the 'indicative and non-exhaustive list of terms which may be regarded as unfair':
 - Terms which have the object or effect of:
 - inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the

option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him.

- Regulation 10 of the European Communities (Certain Aspects of the Sale of Consumer Goods and Guarantees) Regulations 2003 states as follows:
Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which purport directly to waive or restrict the rights resulting from these Regulations shall not be binding on the consumer.

As the Sales Law Review Group pointed out, clauses which exempt the implied quality and related terms in consumer contracts of sale are thus (i) void under the Sale of Goods Act 1893, (ii) may be regarded as unfair under the Unfair Terms in Consumer Contracts Regulations 1995, and (iii) are not binding on the consumer under the Consumer Sales and Guarantees Regulations 2003. Clauses which exempt the implied undertakings as to quality in consumer contracts of sale meanwhile are permissible if 'fair and reasonable'.

160. As outlined in paragraphs 30 and 121-123, the proposed Consumer Rights Bill will bar exclusion clauses in all consumer contracts, whether for goods, digital content or services. While this deals with the substance of the issue, it is desirable also to bring some coherence to the current confusing patchwork of rules. The Sales Law Review Group concluded that the provisions on unfair contract terms were the most appropriate vehicle for the regulation of exclusion clauses in consumer contracts. It recommended that such clauses should be made automatically unfair in all circumstances - that is, have the status of black list terms - in future legislation. Subject to review in the light of responses to this consultation, the Department proposes to regulate exclusion clauses in this way in the proposed Consumer Right Bill.

QUESTION 36

Should clauses that exclude or restrict consumers' statutory rights as to the quality and other aspects of goods, digital or services be treated as contract terms that are automatically unfair in all circumstances in the unfair terms provisions of the proposed legislation?

ANNEX I QUESTIONS INCLUDED IN CONSULTATION

1. Should the Regulations that implement the Consumer Rights Directive be incorporated in the proposed Consumer Rights Bill or should they remain as a separate statutory instrument?
2. Should Parts 3 and 4 of the Consumer Protection Act 2007 which give effect to the Unfair Commercial Practices Directive be incorporated in the proposed Consumer Rights Bill?
3. Should the parties to all of the consumer contracts and transactions to be regulated by the proposed Consumer Rights Bill be referred to as “consumer” and “trader”? If not, what terms should be used, and why?
4. Do you agree with the definitions of “consumer” and “trader” proposed in paragraph 19? If not, how should these definitions be amended, and why?
5. Do you agree with the definition of “goods” proposed in paragraph 25? If not, how should the definition be amended, and why?
6. Should the provisions of the proposed Consumer Rights Bill on the quality and other attributes of goods be based on the concepts and terminology of the Sales of Goods Acts or on those of the European Union Directive on Consumer Sales and Guarantees?
7. Should thirty days should be standard time period within which a consumer can exercise the right to reject faulty goods? If not, what time period or other condition should apply to the exercise of this right?
8. Should the standard thirty day period proposed for the rejection of faulty goods be extended where it is reasonably foreseeable from the circumstances of the contract that the consumer will need additional time in which to examine and try out the goods?
9. Should the consumer’s right to reject faulty goods permit rejection for ‘minor’ defects within the framework of the proposed general standard of satisfactory quality? If not, why not?
10. Should consumers who have agreed to have faulty goods remedied by repair or replacement be entitled to terminate the contract or require a price reduction if, after one repair or one replacement, the goods do not conform to the contract?
11. Do you agree that the consumer’s right to reject faulty goods and to obtain a refund of the price if repair or replacement are unavailable, cannot be completed within a reasonable time or without significant inconvenience, or have been undertaken unsuccessfully, should not be subject to a deduction for the use of the goods prior to the exercise of the right to reject? If not, why not, and what should be the basis for determining the compensation payable for use?
12. Should a common set of provisions on the quality and other aspects of goods apply to all transactions in which traders supply goods to consumers? If not, why not?
13. Should the proposed Bill include a common scheme of remedies for all transactions in which traders supply goods to consumers? If not, why not?
14. Should a consumer who terminates a hire agreement where the goods are faulty be entitled only to claim a refund of the price for a period of hire that was paid for but not received, and not for a hire period in which the consumer had the use of the goods? If not, why not?

15. Should contracts for the supply of digital content be classified as a separate category of contract in the proposed legislation? If not, how should they be classified?
16. Should consumer rights and remedies in contracts for the supply of digital content be based with appropriate adaptations on the rules applying to contracts for the supply of goods? If not, what should be the basis of these rights and remedies?
17. Is the proposed general standard of satisfactory quality that is to apply to goods in the proposed Bill appropriate to digital content? If not, what standard should apply?
18. Should 'freedom from minor defects' be an aspect of the proposed general standard of satisfactory quality in the case of digital content? If not, why not?
19. What problems, if any, might result from the requirement that digital content comply with any description, sample or model provided by the trader? How might any such problems be addressed in the proposed legislation?
20. Should consumers have the same short-term right to reject digital content that does not meet the required quality and other standards as is proposed to apply in the case of goods? If not, why not?
21. Should consumers have the right to a full refund of the price of digital content where repair or replacement are unavailable or cannot be carried out within a reasonable time and without significant inconvenience to the consumer? If not, why not?
22. Should there be a limit to the number of repairs or replacements permitted before consumers can claim a full refund of the price paid for faulty digital content? If so, what should this limit be?
23. Should the rights and remedies for digital content in the proposed Consumer Rights Bill apply –
 - 1) only where the digital content is supplied in return for the payment of a price?
 - 2) where, in addition, the digital content is supplied in return for consideration other than the payment of a price?
 - 3) regardless of whether a price is paid or consideration given for the digital content?
24. If contracts for digital content supplied in return for consideration other than the payment of a price are to come within the scope of the proposed legislation, should they be subject to all of the rights as to the quality and other aspects of digital content contracts for which a price has been paid and all of the remedies except price reduction? If not, what rights and remedies should apply?
25. Should the provisions on the supply of services in the proposed legislation include, in addition to the requirement that the service be provided with due skill and care, a provision that it should be reasonably fit for any particular purpose, and of such a nature and quality, that it can reasonably be expected to achieve any particular result that the consumer makes known to the supplier as the particular purpose for which the service is required, or the result that the consumer desires to achieve? This obligation to apply only where the circumstances showed that the consumer had relied on the supplier's skill or judgement and that it was reasonable for him to do so. If not, why not?

26. Should the proposed Bill provide that contracts for the supply of services are to be treated as including a provision that, subject to specified conditions, anything said by or on behalf of a trader that is taken into account by a consumer in deciding to enter into the contract, or in taking any decision about the service after entering into the contract, forms part of the contract.
27. Should the proposed Bill provide that, where the time of performance of a service is not fixed by the contract, it should be carried out within a reasonable time.
28. Should the proposed Bill provide that, where the price for a service is not fixed by the contract, the consumer is not liable to pay more than a reasonable price.
29. Should the proposed legislation prohibit contract terms that exclude or vary the statutory undertakings on the quality and other aspects of consumer services contracts in all circumstances and not, as is currently the case, permit terms that exclude or vary these undertakings if the terms are fair and reasonable? If not, why not?
30. Do you agree with the scheme of remedies for contracts for the supply of services proposed in paragraph 128? If not, why not, and what statutory remedies should apply to such contracts?
31. Should the proposed Consumer Rights Bill provide that all terms in consumer contracts, whether negotiated or not, are subject to assessment for fairness. If not, why not?
32. Should the exemption from assessment for fairness of the core terms of consumer contracts be redrawn? If so, which, if any, of the options for its redefinition outlined in paragraph 149 would you favour, and why?
33. Should paragraph (a) of the Annex to the Unfair Terms Directive on a contract term that excludes or limits the trader's legal liability for death or personal injury to a consumer resulting from an act or omission of the trader be reclassified as a term that is unfair in all circumstances? If not, why not?
34. Should the indicative list of contract terms that may be regarded as unfair in the Annex to the Unfair Terms Directive be re-classified as contract terms that are presumed to be unfair. If not, why not?
35. Are there other contract terms that should be included in the black list of terms that are automatically unfair, and/or in the grey list of terms presumed to be unfair, that are to be incorporated in the proposed Consumer Rights Bill? If so, what are these terms?
36. Should clauses that exclude or restrict consumers' statutory rights as to the quality and other aspects of goods, digital or services be treated as contract terms that are automatically unfair in all circumstances under the unfair terms provisions of the proposed legislation?