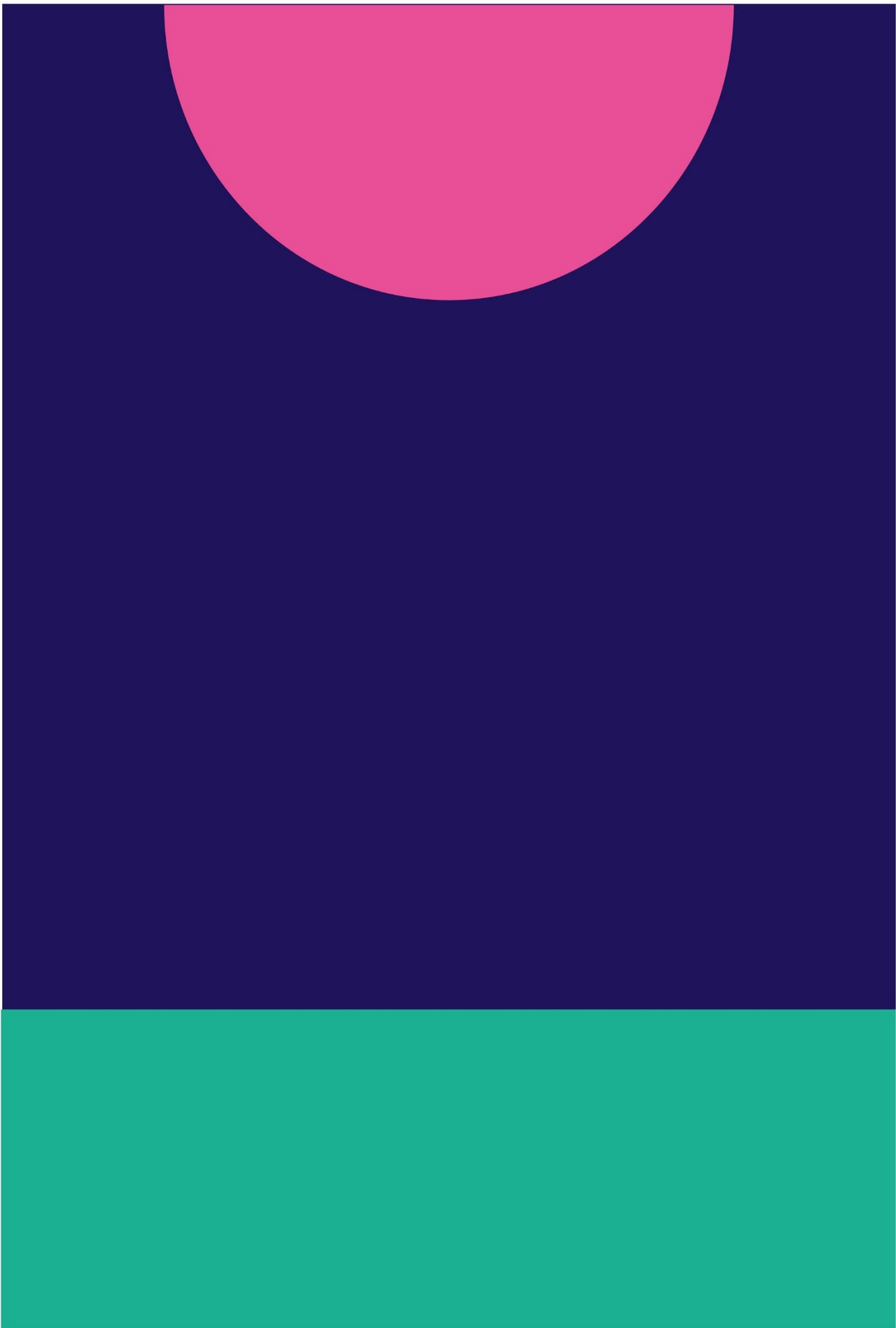




# Consumer Rights Bill 2021

Response to the Public  
Consultation on the General  
Scheme

June 2021



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# 1. Views on the Consultation on the General Scheme of the Consumer Rights Bill 2021

The proposed Consumer Rights Bill 2021 has significant implications for businesses right across the economy, operating domestically and on a cross-border basis. It is important that Ireland consolidates and modernises its consumer protection legislation. Getting it right will benefit both consumers and businesses alike.

The consultation is primarily focused on areas of national discretion in terms of the EU Directives being transposed. Specific observations on these areas have been included at the end of this submission. Ibec has opted to provide key overarching comments upfront. It is felt that these must be addressed with urgency, ahead of finalising the General Scheme of the Consumer Rights Bill 2021.

## Key principles:

- **Strike a balance between consumers and business:** The commentary on the options for consideration presented in the consultation document are heavily weighted towards the benefits for the consumer. There is little analysis of the impact specific measures could have on traders in terms of regulatory burden or competitiveness. It should be recognised that ensuring that markets work well for consumers is as important as a once-off business-to-consumer transaction.
- **Support evidence-based decision-making:** Regulatory impact assessments (RIAs) should be conducted on specific sections of the draft legislation. Government should have a clear understanding of how specific regulations under the legislation may impact on the ground, avoiding or limiting unintended consequences.
- **Apply Ireland's SME Test to the draft legislation:** The Department of Enterprise, Trade and Employment is leading on the roll out and implementation of the SME Test across Government. The "think small first" principle should be utilised in assessing the options to be adopted under the new legislation. Other principles such as avoiding gold-plating in the transposition of EU Directives must shape Government's approach.
- **Ensure consistency and coherence with EU and national law:** Each Member State has been given a large degree of autonomy over setting specific national procedural requirements and rules. These have been set out in the Directive through a series of options and areas for adopting national derogations. The legislation must not duplicate or result in inconsistencies with GDPR, the e-Privacy Directive or the European Electronic Communications Code, for example. This is important to continuing to grow and scale as a global hub for digital services.
- **Achieve a level playing field in the development of the new consolidated consumer protection legislation:** Government must recognise that regulatory policy making can be captured. Complexity can be driven by special interests, whereas simplicity encourages wider participation. The consultation process must ensure that all stakeholders have had an opportunity to participate effectively in the regulatory development process. For example, consumer advocacy groups would be likely familiar with development of this legislation, whereas individual small traders may not be aware of the consultation process. Also, regulatory literacy of organisations should be taken into consideration. Specific outreach initiatives should be undertaken to allow all stakeholders to input to the process in a meaningful and accessible way.

- Undertake outreach to specific sectors: The scope of this legislation is wide-ranging. It is important that all sectors have been informed in a meaningful way of the specific considerations as it related to their individual sector. For example, Part 5 of the General Scheme proposes to extend the information requirements and cancellation right to contracts across a wide range of previously excluded sectors. These were optional considerations, yet Government has proposed to avail of these options. Engagement with businesses and representative bodies within these sectors should be undertaken prior to the finalisation of the proposals. A general or one-size-fits-all consultation may not be sufficient.

The urgency of meeting the transposition deadline should not take precedence over getting the legislation right. It must be fair, transparent, and proportionate. It must also be workable. The consultation process should have been allocated more time. It should also be noted that wider stakeholder engagement could have occurred earlier, due to the impending transposition deadline. This could have occurred ahead of the consultation on the legislation transposing EU 2020/1828. It is important that informed judgements are made on the areas open to national discretion. This approach would be in line with the better regulation agenda.

## 2. General Observations

### Part 2 Contracts for the Sale of Goods

#### Optional provisions in Sales Directive implemented in Part 2 of Scheme

- **Short-term right of consumers to terminate the contract:** Consumers should have the right in the first instance to terminate the sales contract within 30 days of the delivery of the goods, in the event of a lack of conformity of the goods. It is reasonable that a shorter time limit is to apply in the case of goods that can reasonably be expected to expire or deteriorate within a period of less than 30 days.
- **Duration of the liability of the trader, and of the entitlement of consumer to remedies, for a lack of conformity of the goods:** The legal guarantee period should last no more than two years. The European Commission's Impact Assessment states that EU consumers overwhelmingly take "action immediately or within one week after the problem occurs". In fact, the Impact Assessment stated 96% of defects are discovered within 24 months of purchase. Only four EU Member States have a legal guarantee period greater than two years. It is three years in Sweden, whereas it is linked to the product's average lifespan in Finland and the Netherlands. Ireland is the outlier in Europe, with the six-year period. Maintaining the six-year limitation period for contract actions set out in the Statute of Limitations 1957 is no longer consistent with a modern economy, conducting transactions across the EU Single Market. Ireland should follow other EU Member States in adopting a harmonised two-year legal guarantee. A harmonised approach would provide legal certainty and clarity for both consumers and businesses alike in cross-border transactions. This would ensure the modernisation of consumer protection legislation strikes a balance with the digitalisation of the Irish and European economies. Extended warranty service contracts are widely available for consumers that seek additional protection.
- **Remedies available to the consumer in addition to the Directive's primary remedies of repair, replacement, price reduction and termination of the contract:** It should be recognised that depending on the good(s) in question, it could be expected that traders may reasonably require different timeframes to bring the good(s) into conformity. Having a lack of conformity of the goods with the contract remedied elsewhere and recovering from the trader all reasonable costs incurred in having the lack of conformity so remedied should only be available in circumstances where the trader has refused to remedy the situation or fails to remedy the situation within a reasonable period of time in the circumstances (section 53(2) SOGA 1893 supports this view).
- **Conditions and modalities for the reimbursement of the price in the event of the termination of the contract:** Refunds should be made via the same payment method used to make the payment to avoid additional costs. This will benefit both the trader and seller. Alternative methods for refunds should be the exception. This provision must be consistent with provisions transposing the Digital Content Directive and the Consumer Rights Directive.

- **Deduction permitted in the reimbursement of the price to the consumer in respect of the use of the goods prior to termination of the contract:** Government should regulate this specific area in Head 28(2). It is reasonable to expect the refund the consumer is entitled on termination of the sales contract for the “may be reduced in proportion to any depreciation in the value of the goods in excess of the depreciation that could reasonably be expected to result from their normal use”. This is balanced in part by Head 28(3), which states that “in case of dispute, it shall be for the trader to show that the depreciation in the value of the goods exceeded that which could reasonably be expected to result from their normal use provides that, in case of dispute, it shall be for the trader to show that the depreciation in the value of the goods exceeded that which could reasonably be expected to result from their normal use”. It is noted that “traders are in a better position than consumers to assess the deterioration in, and depreciation of, goods as a result of use, it is appropriate that the burden of proof that depreciation exceeded the depreciation that could reasonably be expected from the normal use of the goods should rest with the trader”. It should be noted that in Parts 2 and 3 of the Scheme, the burden of proof rests with the trader. The consumer will be given stronger rights under the proposed legislation, including powerful termination rights. Provisions such as the potential for a trader to reduce the reimbursement amount must be workable. Specific guidance may be required to ensure that objective criteria established by a trader carries more weight than the subjective criteria of a consumer. This will ensure the provision is both proportionate and reasonable.

### Optional provisions in Sales Directive not implemented in Part 2 of Scheme

- **Sale of second-hand goods sold at public auction:** No opinion.
- **Sale of living animals:** No opinion.
- **Duration of the period for the reversal of the burden of proof for a lack of conformity of the goods:** The period must last no more than one year. This period of reverse burden proof is reasonable. It would provide legal certainty and clarity for both consumers and businesses alike. It should also be noted that the UK reverse burden of proof is 6 months from the date of purchase.
- **Obligation on the consumer to notify a lack of conformity within two months of detecting it:** Most of the non-conformity claims by consumers occur within the first two months of purchase. This has been put forward as a reason rendering a set-period unnecessary. The consultation document suggests that it is “unfair or unreasonable” to deny consumer protections due to a failure to notify within a set timeframe. Of course, some faults may manifest themselves weeks or months from the date of purchase/delivery. There is currently no statutory timeframe for the notification of a lack of conformity. Now is the opportunity to scrutinise the need for introducing one now. Several EU Member States have called for this. Government should consult them on this specific provision, with a view to understanding their rationale for favouring the introduction of such a clause. An open-ended or protracted notification period is clearly not in the interest of the consumer. This was acknowledged as much in the consultation paper, which stated that delayed notifications may make it “more difficult to obtain redress”. Importantly, the consultation paper does not take into consideration the potential liabilities on traders, particularly the impact on SMEs. It is important that the new legislation strikes the right balance between the interests of both consumers and traders. Consumers should be obligated to notify a lack of conformity within a reasonable timeframe. The more protracted the notification, the more expensive it can be for traders in remedying the problem. According to the European Commission, it could also “impair the ability of the trader to adequately repair or replace a defective

product". In short, a fixed time frame within which to notify faults would help to clarify the situation for both retailers and consumers alike.

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

### Optional provisions in Digital Content Directive implemented in Part 3 of Scheme

- **Duration of the liability of the trader, and of the entitlement of the consumer to remedies, for a lack of conformity with a contract:** Consumers should be required to notify the lack of conformity within a reasonable period after a consumer became aware of it. It is in the interest of both trader and consumer to ensure that the lack of conformity is solved as quickly and effectively as possible. The duty to notify the lack of conformity is therefore a necessity to fulfil this objective. This period should be no longer than two years. The proposal to retain the six-year period set out in the Statute of Limitations 1957 in the new legislation is not satisfactory. Irish consumer law should be in keeping with consumer law across the EU Single Market, with most Member States favouring a harmonised two-year time frame. Extended warranties and optional extended guarantees are increasingly available. Companies operating from Ireland across the Digital Single Market would face additional costs servicing domestic consumers, and it could be the case that the Irish marketplace becomes less attractive to new entrants due to more onerous local restrictions. Consumers would potentially miss out on new products and services. Simply maintaining the status quo would appear to be the only justification put forward for retaining the 74 year-old notification precedent. The evidence base underpinning this position taken should be published. It is important that Ireland's regulatory regime has the capacity to adapt to the digital environment. Specific regulatory impact analysis on the notification period should be urgently conducted.
- **Right of consumer to withhold payment and other remedies:** Must be consistent with national law. Having a lack of conformity of the digital content or digital service remedied elsewhere and recovering from the trader all reasonable costs incurred in having the lack of conformity so remedied should only be available in circumstances where the trader has refused to remedy the situation or fails to remedy the situation within a reasonable period of time in the circumstances.
- **Termination of bundle and ancillary contracts:** The transposition process must carefully consider how provisions established under this section will be consistent with established rules under national and European law, such as the European Electronic Communications Code. It should not be solely judged to be an issue of termination rights. How Article 3(6) of the Digital Content Directive is transposed into national law could cause inconsistencies in several important areas. These include achieving a clear understanding of the differences between digital services and digital content, and between data and content. Crucially, the new provisions must be consistent on the area of modifications, set out in other legislation.



## Optional provisions in Digital Content Directive not implemented in Part 3 of Scheme

- **Consequences for contract of withdrawal of consent to processing of personal data:** Creating a parallel legal basis to the GDPR regime must be avoided. The potential option available for Member States in terms of withdrawal of consent is likely to result in inconsistencies with GDPR. It could undermine the harmonisation of data protection across the EU. It goes beyond the provisions set out under the GDPR, which were developed under detailed regulatory and legislative scrutiny. It is in the interest of both consumers and traders that a predictable, coherent, and stable legal regime exists. Government is right not to exercise this option.
- **Application of Directive to metadata collected by trader and cases where access to digital content or digital services involves exposure to advertisements:** While this option is open to Member States, implementing this provision is beyond the scope of core objectives of the Digital Content Directive. It should specifically apply only to accessing digital content or digital services in exchange for money. It is right that Part 3 of the Scheme does not provide for its application. The existing regulatory framework strikes a better balance between strong consumer protection on the one hand and innovation and fair competition on the other. Issues such as consent are dealt in other areas of law. It is important that the new legislation is consistent with existing national and European requirements, such as the ePrivacy Directive.

## Part 4 Contracts for the supply of a service

### Provisions concerning contracts for the supply of a service in Part 4 of Scheme

#### Specific observations:

Government is currently in the process of transposing the European Electronic Communications Code (EECC) into Irish law. The EECC introduces very comprehensive consumer protection rules that will apply to providers of electronic communications services (ECS) and other services that are provided in a 'bundle' with ECS. The telecoms industry, through the TII group in Ibec, has been engaging with Government and the relevant regulator (ComReg) for some time on this very significant piece of legislation and a considerable amount of time and resources have been committed by industry to building new processes and procedures and developing contractual documentation to ensure compliance with the EECC. It should be recognised by Government that detailed sector specific legislation exists for the telecoms sector and that consumer protection rules for the sector are set out in the EECC.

It should not be the case that, following the investment of such a considerable amount of time and resources to come into compliance with the detailed provisions of the EECC, industry could then find itself not in compliance with these new rules, or having to revisit what has just been developed. It is also important from a legal certainty perspective that industry is clear on what rules apply to the provision of ECS and that consumers are clear on what rules apply when they consume ECS.

Government seems to recognise that sector specific legislation exists in other industries, for example financial services. The same recognition should be provided to the telecommunications industry. ECS should either be excluded, or at the very least it should be acknowledged that in circumstances where there is a potential conflict between these provisions and the EECC then the EECC shall prevail.

## Part 5 Consumer information and cancellation rights

### Optional provisions in the Consumer Rights Directive implemented in Part 5

- **Extension of information requirements and cancellation right to contracts for social services:** Dedicated engagement must be facilitated with providers or traders of social services and their respective representative bodies on the specific implications of the proposals on their activity. This is in line with the three consultation principles set out in Government's *Consultation Principles & Guidance document* (2016). First, it must set out to achieve "real engagement" by all parties concerned. Second, all stakeholders should be identified, and targeted interventions should be considered. The final principle is that "Government departments and agencies should make systematic efforts to ensure that interested and affected parties have the opportunity to take part". Awareness of this proposal is likely to be higher amongst consumer bodies due to the nature to substance of the Consumer Rights Bill falling clearly within their sphere of influence. However, awareness is likely to be substantially lower amongst service providers identified in Part 5. This is especially relevant in the case of social service providers being SMEs. Specific engagement should be urgently undertaken prior to finalisation of proposals set out in the draft Scheme.
- **Extension of information requirements for on-premises contracts to healthcare contracts:** Targeted engagement should occur to ensure all interested and affected parties have had the opportunity to take part. In this case, it is the providers of on-premises contracts to healthcare.
- **Additional pre-contractual information requirements for on-premises contracts:** No opinion
- **Extension of cancellation period for certain off-premises contracts:** No opinion

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

- **Derogation from exception to right of withdrawal for certain off-premises contracts:** No opinion
- **Conditions applying to exception to right of withdrawal for specified off-premises contracts:** No opinion

## Part 6 Other consumer rights

- **Application of Part 6 of Scheme to contracts excluded from scope of Consumer Rights Directive:** The Department of Enterprise, Trade and Employment must reach out directly to these organisations to ensure the consultation is conducted in a meaningful and balanced way. The ‘one size fits all’ approach to this consultation procedure makes it difficult to adequately assess whether traders and their representative bodies were sufficiently aware of the proposed changes affecting their specific sector or business activity. First, it is essential to understand how all stakeholders with clear interest in this issue were made aware of the consultation. While general information was made available on the broad consultation itself, the fact that major changes impacting specific business activities, previously excluded from the scope of the Consumer Rights Directive, were now being brought into scope requires a “targeted at and easily accessible to those with a clear interest in the policy in question”. Interested parties must be made aware of the proposals and how they could impact them, allowing them to provide meaningful and constructive feedback.

## Part 9 Amendment of Consumer Protection Act 2007

### Optional provision in Unfair Commercial Practices Directive not implemented in Part 9

- **The non-implementation of the optional provision in Part 9 of the Scheme:**  
No opinion

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

### Implementation of the optional aspects of the amendment of the Price Indication Directive

- **Do not gold-plate the legislation:** First, it must be recognised that no impact assessment was conducted by the European Commission on this important proposal (Article 6a). Ireland must avoid gold-plating in the transposition of the optional aspects of this part of the Better Enforcement Directive. We must be consistent with the preferred approach taken by the other Member States in implementing the minimum level of harmonisation of the law.
- **Avoid unintended consequences:** This sector has been severely impacted by Covid-19, and the rise of online retail. The impact on SMEs should be part of the final e national measures that give effect to the Price Indications Directive
- **Must not apply to general discounts:** These are not product-specific and are readily understood by consumers. There should be outside the scope of the new rules. Traders should not be obligated to provide new reference prices for each of their product; the initial selling price can remain on which the reduction will be applicable. Otherwise, the administrative restrictions resulting from in-store sales could be too burdensome and expensive to manage. Ultimately, the consumer could lose out.
- **Differentiate between prior price and other price reference points:** National measures transposing Article 6a must clearly differentiate between prior price and other price reference points, such as recommended retail price or launch price. It

should only apply to products already being sold by the trader, where there is a clear reference price for each item.

- **Avoid potential distortions to the EU Single Market and to cross-border trade on the island of Ireland:** Irish retailers engaged in trading locally or cross-border must not be at a competitive disadvantage or be exposed to an unlevel playing field. While it is preferable to adopt the common, harmonised prior price period of 28 days within the Single Market, it should be noted that the UK recently changed from a similar price reference guidelines to a 1:1 ratio approach, meaning the higher reference price must be charged for the same length of time as the lower “sale” price. Essentially, retailers should not be unduly disadvantaged competitively from the introduction of new provisions. This sector is exposed to Brexit and online cross-border competitors.
- **Apply different rules to goods which are liable to deteriorate or expire rapidly:** Ireland should provide for different or specific rules on goods which are liable to deteriorate or expire rapidly (i.e. less than 28 days). Providing for this in the national measures will be important in the fight against food waste. Flexibility to price reduce perishable items is a good thing.
- **Multiple price reduction actions:** Occasions where there may be more than one price reduction action within a 28-day period should not be discouraged. Special sales events such as Black Friday or Cyber Monday have become increasingly popular with consumers. So too have weekend events or flash sales. Events such as these often coincide with other sales periods, within the same 28-day period. Retailers need flexibility to provide the best possible value for the customer. National measures should specify that prior price refers to the lowest full price charged within the previous 28-days, excluding any reference to further price reduction actions taken as part of clearly advertised and transparent short-term promotional events. Guidance will be required on distinguishing between prior price and lowest price. A pragmatic approach is needed on this area, as Irish retailers could be competitively disadvantaged because third-country retailers, from the UK and elsewhere, would not be bound by the same limitations. In fact, aggressive promotions and discounts could more than offset other duties paid by consumers. Irish retailers must be able to respond to this pressure and keep up with consumer demand for special promotional events.
- **The progressive increase in price reduction actions:** Progressively increased price reduction is a commonly used and accepted promotional method. For example, this could include initial discount through to final discount during a sale period. In such instances, the prior price referred to must be the price without the price reduction before the first application of the price reduction. This would also support wider sustainability goals for the retail sector, including reducing waste. Retailers already provide clear information to customers where there are a series of price reductions (i.e. Was/Was/Now). Customers need to understand that a product or service has been offered at an intervening lower price to be able to make an informed purchasing decision, but any additional information is superfluous.



## About Ibec

Ibec is Ireland's largest lobby group and business representative. We campaign for real changes to the policies that matter most to business. Policy is shaped by our diverse membership, who are home grown, multinational, big and small and employ 70% of the private sector workforce in Ireland. With 36 trade associations covering a range of industry sectors, 6 offices around Ireland as well as an office in Brussels. With over 240 employees, Ibec communicates the Irish business voice to key stakeholders at home and abroad. Ibec also provides a wide range of professional services and management training to members on all aspects of human resource management, occupational health and safety, employee relations and employment law.

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