

Response of Bord Gáis Energy to the 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

Summary Position:

Bord Gáis Energy welcomes the opportunity to comment on the aforementioned consultation. We are in material agreement with the direction proposed but have some concerns around the suggested means of enforcement. We agree with the focus being placed on what charges are to be regarded as fees *‘in respect of the use of a given means of payment’*. This issue requires careful consideration in order to ensure that unintended consequences in drafting do not negate the intent behind the Directive, particularly in the area utility discounts for payment by Direct Debit. While the National Consumer Agency must be afforded adequate certainty in terms of enforcement, this should not come about by a diminution of long standing rights held by persons and bodies corporate in Ireland. We believe similar outcomes can be achieved by adopting existing approaches used by other enforcement authorities, which have the broad support of society.

Direct Debit Discounts in the Utility Sector:

It is common place for companies in the Irish Utility Sector to offer discounts for payment by Direct Debit. Discounts of this nature are offered as a reward to customers, who in the main, present a lower credit risk to their energy supplier as well as offering lower interaction costs e.g. follow-up for non payment of account etc. The means of payment in this instance is merely “a tag” to differentiate risk profile and ongoing interaction costs. We note the clarification provided by the European Commission that such rebates are not a fee *‘in respect of the use of a given means of payment’* within the meaning of Article 19. The consultation paper however, acknowledges that it can be argued that price rebates for payment by direct debit effectively represent a charge. In order to ensure that no unintended consequences materialise, we believe the Regulations should not stay silent on this issue. A specific carve out for Direct Debit discounts, consistent with the European Commission’s clarification is necessary within the Regulations.

Means of Enforcement:

We are concerned in general around the proposals on Enforcement of Articles 19 and 22 and in particular, on proposals to reverse the evidential burden of proof onto the trader where an allegation is made by the NCA in civil proceedings. The reasons given for this proposal are that:

- The issue is *“not a straightforward one”* consequently;

- “...the National Consumer Agency could face difficulties in taking court proceedings for a breach of Article 19“

It could be reasonably argued that this is the case for almost every prosecution being brought about by every enforcement Authority.

The Proposal seeks to justify the reasonableness of the approach by suggesting that “As the trader is in a position to supply the relevant details about the cost of payment, a burden shifting provision of this kind could not be said to be unfair or unreasonable.” Clearly this is not the case and many examples could be cited to disprove this view. If a company were to introduce an online payments system, this would involve a certain amount of fixed cost (website development, back-end systems and set-up costs with a third party payments provider etc.). The company would be unsure at the outset what level of take up would materialise within its customer base. A charge would be applied based on an assumption of take-up and spread over this customer number to achieve fixed cost recovery. Invariably, this will be incorrect once an ex-post analysis is undertaken. An under or over recovery is highly probable. In addition, trader A may seek recovery of fixed costs in 1 year while trader B may seek recovery over a 10 year period. Both approaches are valid but would result in very different unit charges to the consumer. It is clear that there are many factors involved in the setting of a payment other than the “*relevant details about the cost of payment*”.

In order provide certainty around “*the cost of payment*”, additional regulations would be needed to curtail or prohibit what are currently valid business plans. These regulations would need to vary by industry to account for the structure of that industry. They would also need to keep pace with the dynamics of that industry in a competitive national or international market place. Central planning of this nature may negatively impact business in Ireland and lead to a loss of competitiveness and jobs. Perhaps the best means of approaching these Regulations is to do so in the conventional manner, by placing the obligation to prove a case on the party making the allegation. This is possible today in terms of the investigative powers granted to other Authorities. Section 45 of the Competition Act 2002 grants extensive powers to Authorised Officers of the Competition Authority for the purpose of obtaining information necessary for the performance of its functions. The approach taken ensures that case material can be compiled while maintaining the evidential burden of proof on the party making the allegation. We see this approach as providing the best guidance for proceeding in this instance.

In addition, it is proposed that in criminal proceedings where the truth of a factual representation is an issue and the trader who made the representation does not establish its truth on the balance of probabilities, the representation shall be assumed untrue. Persons and Bodies Corporate in Ireland have always had the right to their good name and the presumption

of innocence. Where allegations are made, the convention is that the evidential onus of proof be placed on the party making the allegation. The consultation document does not seek to specifically justify this proposal. Given the severity and gravity of such a change, we believe that at the very least, it must be subject to additional scrutiny and debate. As alluded to earlier (by reference to the Competition Act 2002), established approaches to investigation and enforcement already exist. These measures have the broad support of society. Perhaps they provide the best guidance for proceeding in this instance. Bord Gáis Energy would urge the Department of Jobs, Enterprise and Innovation to reconsider its proposed approach in this area.