



SCHEME OF CONSUMER RIGHTS BILL 2021

MAY 2021

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CONSUMER RIGHTS ACT 2021

AN ACT TO AMEND AND CONSOLIDATE THE LAW ON RIGHTS AND REMEDIES IN CONSUMER CONTRACTS; TO GIVE EFFECT TO DIRECTIVE (EU) 2019/770 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 MAY 2019 ON CERTAIN ASPECTS CONCERNING CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT AND DIGITAL SERVICES, DIRECTIVE (EU) 2019/771 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 MAY 2019 ON CERTAIN ASPECTS CONCERNING CONTRACTS FOR THE SALE OF GOODS, AND ARTICLES 1, 3 AND 4 OF DIRECTIVE (EU) 2019/2161 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 27 NOVEMBER 2019 AS REGARDS THE BETTER ENFORCEMENT AND MODERNISATION OF UNION CONSUMER PROTECTION RULES; TO AMEND THE LAW RELATING TO CONSUMER CONTRACTS FOR THE SUPPLY OF SERVICES; TO AMEND THE LAW RELATING TO UNFAIR TERMS IN CONSUMER CONTRACTS; AND TO PROVIDE FOR RELATED MATTERS.

PART 1¹

PRELIMINARY MATTERS

Head 1 Short title and commencement

(1) This Act may be cited as the Consumer Rights Act 2021.

(2) The Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes and provisions.

¹ In the footnotes to the Scheme, Directive (EU) 771/2019 on contracts for the sale of goods which is given effect in Part 2 is referred to as the SGD; Directive (EU) 770/2019 on contracts for the supply of digital content and digital services which is given effect in Part 3 is referred to as the DCD; Directive 2011/83/EU on Consumer Rights which is given effect in Parts 5 and 6 is referred to as the CRD; Directive 93/13/EEC on unfair terms in contracts which is given effect in Part 7 is referred to as the UCTD; Directive 2005/29/EC on unfair commercial practices whose provisions as given effect in the Consumer Protection Act 2007 are subject to a number of amendments in Part 9 is referred to as the UCPD; Directive (EU) 2019/2161 on the better enforcement and modernisation of European Union consumer protection rules which amends the CRD, UCTD and UCPD is referred to as the BEMD; the Sale of Goods Act 1893 whose provisions applying to consumer sales contracts are largely replaced by Part 2 is referred to as SOGA 1893; the Sale of Goods and Supply of Services Act 1980 whose provisions applying to consumer sales and services contracts are replaced by Parts 2 and 4 is referred to as SOG&SOSA 1980. The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013) which give effect to the CRD, and which are to be replaced by Parts 5 and 6, are referred to as S.I. 484/2013. The Consumer Protection Act 2007 which gives effect to the UCPD is referred to as CPA 2007.

Head 2 Interpretation generally²

(1) In this Act -

“Act of 2007” means the Consumer Protection Act 2007 (No. 19 of 2007);

“compatibility” means the ability of digital content, digital services or goods to function with hardware or software with which digital content, digital services or goods of the same type are normally used without the need to convert the digital content, digital service, goods, hardware or software;³

“commercial guarantee” means any undertaking by a trader or producer to the consumer (in addition to the trader’s legal obligation to supply goods in conformity with the contract) to reimburse the price paid or to repair, replace or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at or before the conclusion of the contract;⁴

² The definitions in head 2(1) are of terms found in more than one Part of the Scheme or of terms found in Part 1 only.

³ ‘Compatibility’ features in Parts 2, 3 and 4 of the Scheme. Article 2(8) of the SGD defines it as ‘the ability of the goods to function with hardware or software of the same type with which goods of the same type are normally used, without the need to convert the goods, hardware or software’. Article 2(10) of the DCD defines it as ‘the ability of the digital content or digital service to function with hardware or software with which digital content or digital services of the same kind without the need to convert the digital content or digital service’. Article 2(19) of the CRD (as inserted by Article 4(1)(e) of the BEMD) states that “‘compatibility’ means compatibility as defined in point (10) of Article 2 of Directive (EU) 2019/770”.

⁴ Article 2(14) of the CRD defines ‘commercial guarantee as any undertaking by the trader or a producer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract’. Other than its reference to ‘the seller’ rather than to ‘the trader’, Article 2(12) of the SGD contains an identical definition of the term. The definition in subhead (1) follows the definition at Regulation 2(1) of S.I. 484/2013 which gives effect to the definition in the CRD. As stated in the footnote to the definition of ‘trader’ below, that term is used for the non-consumer party to consumer contracts in all of the Parts of the Scheme.

“consumer” means a natural person who is acting for purposes which are wholly or mainly outside the person’s trade, business, craft or profession;⁵

“contract for the supply of digital content” means a contract under which the trader supplies or undertakes to supply digital content to the consumer and the consumer -

- (a) pays or undertakes to pay the price of the digital content,
- (b) provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of –
 - (i) supplying the digital content in accordance with this Act, or
 - (ii) allowing the trader to comply with legal requirements to which the trader is subject;⁶and the trader does not process those data for any other purpose.⁶

“contract for the supply of a digital service” means a contract under which the trader supplies or undertakes to supply a digital service to the consumer and the consumer -

⁵ Article 2(1) of the CRD, Article 2(2) of the SGD and Article 2(6) of the DCD define ‘consumer’ in similar terms as any natural person who, in contracts (CRD)/in relation to contracts (SGD and DCD) covered by the Directive, is acting for purposes which are outside his (CRD)/that person’s (SGD and DCD) trade, business, craft or profession. The definition in head 2(1) is, with one addition, similar to that at Regulation 2(1) of S.I. No. 484/2013 which gives effect to the CRD. That addition is the stipulation that ‘consumer’ includes a person acting ‘wholly or mainly’ for purposes outside his or her trade, business, craft, or profession. Because of the constraints that apply to secondary legislation made under the European Communities Act 1972, it was not possible to include this addition in S.I. No. 484/2013. Recital (17) of the CRD states that ‘in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade, and where 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’. Recital (22) of the SGD and Recital (17) of the DCD state that Member States should be free in these cases to determine whether, and in which cases and under which conditions, such a person should also be considered as a consumer. A similar definition can be found at Article 2(3) of the UK Consumer Rights Act 2015.

⁶ Though the DCD applies, and refers, to contracts for the supply of digital content and contracts for the supply of a digital service, it does not define these contracts in the definitions in Article 2 of the Directive. The contracts are defined instead in the application provision at Article 3(1) of the Directive. The definition of ‘contract for the supply of digital content’ and ‘contract for the supply of a digital service’ in this head are based on those definitions.

- (a) pays or undertakes to pay the price of the digital service,
 - (b) provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of –
 - (i) supplying the digital service in accordance with this Act, or
 - (ii) allowing the trader to comply with legal requirements to which the trader is subject,
- and the trader does not process those data for any other purpose.

“delivery” means the voluntary transfer of the physical possession or control of goods;⁷

“digital content” means data which are produced and supplied in digital form, including computer programs, applications, video files, audio files, music files, digital games, e-books and other e-publications;⁸

“digital service” means a service that allows⁹ –

- (a) the consumer to create, process, store or access data in digital form, or
- (b) the sharing of, or any other interaction with, data in digital form uploaded or created by the consumer or other users of the service,

and includes video and audio sharing and other file hosting, social media, and word processing or games offered in the cloud computing environment;

⁷ Recital (38) of the SGD states that ‘this Directive should not regulate the meaning of delivery, which should be left to national law’. The definition of “delivery” is based on the definition at section 62(1) of the Sale of Goods Act 1893 as amended to take account of the provisions on delivery and the passing of risk at Articles 18 and 20 of the CRD which are given effect in heads 31 and 32 of Part 2. S.59(1) of the UK Consumer Rights Act 2015 defines delivery in similar terms as ‘the voluntary transfer of possession from one person to another’.

⁸ Article 2(1) of the DCD, Digital Content Directive, Article 2(6) of the SGD and Article 2(11) of the CRD all define ‘digital content’ as ‘data which are produced and supplied in digital form’. The list of examples in the definition comes from recital (19) of the DCD. The examples have been included as, given the relative novelty of the term in consumer legislation, consumers and traders may not always be clear about what is, and is not, meant by digital content and how it differs from a digital service. While the recital refers to computer ‘programmes’, ‘programs’ is the more common form of the word generally and in the ISB.

⁹ This definition follows that at Article 2(2) of the DCD. The list of examples does not form part of the Directive definition and is taken from recital (19) of the Directive. The examples have been included as, given the relative novelty of the term in consumer legislation, consumers and traders may not always be clear about what is, and is not, meant by a digital service and how it differs from digital content. There is a similar definition of ‘digital service’ at Article 2(7) of the SGD. Article 2(16) of the CRD (as inserted by Article 4(1)(e) of the BEMD) provides that ‘digital service’ means a digital service as defined in Article 2(2) of the DCD.

“district heating” means the supply of heat (in the form of steam, hot water or otherwise) to multiple buildings from a central source of production through a transmission and distribution system for the purposes of heating;¹⁰

“durable medium” means any instrument which enables the consumer or the trader to store information addressed personally to that person in a way that is accessible for future reference for a period of time adequate for the purposes of the information, and which allows the unchanged reproduction of the information stored;¹¹

“electronic communications service” means a service normally provided for remuneration via electronic communications networks with the exception of a service providing, or exercising editorial control over, content transmitted using electronic communications networks and services, and encompasses the following types of service –

- (a) a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used;
- (b) an interpersonal communications service, and
- (c) a service consisting wholly or mainly in the conveyance of signals such as a transmission service used for the provision of a machine-to-machine service and for broadcasting;¹²

¹⁰ This definition re-enacts the definition of ‘district heating’ at Regulation 2(1) of S.I. 484/2013. Though ‘district heating’ is not included in the definitions in Article 2 of the CRD, it is defined in recital (25) of the Directive. The definition was included in Regulation 2(1) of S.I. 484/2013 as the term is an unfamiliar one in Ireland. Recital (19) states that contracts for the supply of district heating should, like contracts for the supply of water, gas or electricity not put up for sale in a limited volume or set quantity and contracts for digital content not supplied on a tangible medium, ‘be classified for the purposes of this Directive, neither as sales contracts nor as service contracts.’ Like the application provisions at Regulations 3(1), 5(1), 6(1) 13(1) and 24(1) of S.I. 484/2013, therefore, the application provisions at heads 75(1), 76(1), 78(1) and 86(1) of Part 5 and at head 98(1) of Part 6 refer separately to contracts for the supply of district heating.

¹¹ ‘Durable medium’ is defined in identical terms at Article 2(11) of the SGD and Article 2(13) of the DCD and in almost identical terms at Article 2(10) of the CRD. This definition follows the SGD and DCD definitions.

¹² The definition of ‘electronic communications service’ is based on the definition at Article 2(4) of Directive (EU) 2018/1972 establishing the European Electronic Communications Code. These services are referred to Part 3 and in the definition of ‘service’ in this head which applies for the purposes of Parts 4 to 7.

“financial service” means any service of a kind normally provided in the ordinary course of carrying on a banking business, an insurance business or a business of providing credit, personal pensions, an investment service or a payment service;¹³

“functionality” means the ability of goods, digital content or digital services to perform their functions having regard to their purpose;¹⁴

“goods” means any tangible movable items and includes –

- (a) goods with digital elements, and
- (b) water, gas and electricity supplied in a limited volume or set quantity,

but excludes coins and bank notes for use as currency and items sold by way of execution or otherwise by authority of law;¹⁵

¹³ ‘Financial service’ features in Parts 3 and 5 of the Scheme and in the definition of ‘service’ in this subhead. ‘Financial services’ are referred to also in paragraph 2 of Annex I of the UCTD which is incorporated in Part 2 of Schedule 4 of the Scheme. Article 2(12) of the CRD states that ‘financial service’ means ‘any service of a banking, credit, insurance, personal pension, investment or payment nature’, a definition taken from that at Article 2(b) of Directive 2002/65/EC on the distance marketing of consumer financial services. Article 3(5)(e) of the DCD provides that the Directive will not apply to contracts regarding ‘financial services as defined in point (b) of Article 2 of Directive 2002/65/EC’. The definition in this head follows that at Regulation 2(1) of S.I. 484/2013 which is identical to that at Regulation 3(1) of the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004 (S.I. No. 853/2004) which give effect to Directive 2002/65/EC.

¹⁴ ‘Functionality’ features in Parts 2, 3 and 5 of the Scheme. Article 2(11) of the DCD defines it as ‘the ability of the digital content or digital service to perform its functions having regard to its purpose’. Article 2(9) of the SGD defines it as ‘the ability of the goods to perform their functions having regard to their purpose’. Article 2(20) of the CRD (as inserted by Article 4(1)(e) of the BEMD states that ‘functionality’ means ‘functionality as defined in point (11) of Article 2 of Directive (EU) 2019/770’.

¹⁵ ‘Goods’ feature in Parts 2, 3, 5 and 7 of the Scheme. The definition in Article 2(5) of the SGD states that ‘goods means:

- (a) any tangible movable items: water, gas and electricity are considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or set quantity;
- (b) any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions (‘goods with digital elements’).

‘Goods with digital elements’ are defined separately in this subhead as is done in Article 2(3) of the DCD. Though the exclusion for items sold by way of execution or authority of law does not form part of the definition of goods in the SGD, Article 3(4)(a) of the Directive provides that it shall not apply to goods sold in this way. The exclusion of coins and banknotes for use as currency is in line with the exclusion of ‘money’ from the definition of ‘goods’ in section 62(1) SOGA 1893. Article 2(3) of the CRD defines ‘goods’ as ‘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.’ This definition was incorporated with minor drafting changes in Regulation 2(1) of S.I. No. 484/2013. Article 4(1)(a) of the BEMD provides for the replacement of the definition of goods at Article 2(3) of the CRD by the following:

‘goods’ means goods as defined in point (5) of Article 2 of Directive (EU) 2019/771 of the European Parliament and of the Council’.

“goods made to the consumer’s specifications” means non–prefabricated goods made on the basis of an individual choice of, or decision by, the consumer;¹⁶

“goods with digital elements” means any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions;¹⁷

“interoperability” means the ability of goods, digital content or digital services to function with hardware or software different from those with which goods, digital content or digital service of the same type are normally used;¹⁸

“Minister” means the Minister for Enterprise, Trade and Employment;

“ownership” means the general property in goods and not merely a special or limited property;¹⁹

The differing scope of ‘goods’ in Parts 2 and 3 in respect of digital content supplied on a tangible medium is outlined in the footnote to head 3(4).

¹⁶ This definition follows that at Article 3(4) of the CRD. The definition was not included in the interpretation provisions in Regulation 2(1) of S.I. No. 484/2013 but was incorporated instead in the provision on the exception to the right of withdrawal at Article 16(c) of the Directive to which it relates. Recital (17) of the SGD states that the ‘scope of this Directive should also cover contracts for goods that are yet to be produced or manufactured, including under the consumer’s specifications.’ As the term features in both Part 2 and Part 5, the definition has been included in the interpretation provisions in Part 1.

¹⁷ This definition follows the second part of the definition of ‘goods’ at Article 2(5)(b) of the Sales Directive and the definition of ‘goods with digital elements’ at Article 2(3) of the DCD.

¹⁸ Article 2(10) of the SGD defines ‘interoperability’ as ‘the ability of the goods to function with hardware or software different from those with which goods of the same type are normally used’. Article 2(12) of the DCD defines the term similarly as ‘the ability of the digital content or digital service to function with hardware or software different from those with which digital content or digital services of the same type are normally used’. Article 2(21) of the CRD (as inserted by Article 4(1)(e) of the BEMD) states that ‘interoperability’ means interoperability as defined in point (12) of Article 2 of Directive (EU) 2019/770’.

¹⁹ The definition of ‘ownership’ is based on the definition of ‘property’ at section 62(1) of SOGA 1893 and is relevant for the definition of ‘sales contract’ in this subhead and for the application of Parts 2 and 5 to these contracts.

²⁰ The term ‘personal data’ features in Parts 2, 3, 4 and 5 of the Scheme. Article 2(8) of the DCD and Article 2(4)(a) of the CRD (as inserted by Article 4(1)(b) of the BEMD) state that ‘personal data’ means ‘personal data as defined in point (1) of Article 4 of Regulation (EU) 2016/679’. The definition here is taken from that at section 69(1) of the Data Protection Act 2018 which gives effect to the definition at Article 4(1) of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data (the General Data Protection Regulation).

“personal data” means information relating to:

- (a) an identified living individual, or
- (b) a living individual who can be identified from the data, directly or indirectly, in particular by reference to -
 - (i) an identifier such as a name, an identification number, location data or an online identifier, or
 - (ii) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual;²⁰

“producer” means a manufacturer of goods, an importer of goods into the Union or any person purporting to be a producer by placing his or her name, trade mark or other distinctive sign on the goods, and includes any person acting in the name, or on behalf, of the trader;²¹

“product” means²² –

- (a) goods,
- (b) services,
- (c) digital content not supplied on a tangible medium,
- (d) water, gas or electricity not supplied in a limited volume or set quantity,
- (e) district heating;

“public auction” means a method of sale under which –

²¹ This definition follows that at Article 2(4) of the SGD. ‘Producer’ features in Parts 2 and 3 and also features in the definitions of ‘commercial guarantee’ at Article 2(12) of the SGD and Article 2(14) of the CRD which are incorporated in the definition of ‘commercial guarantee’ in this subhead.

²² ‘Product’ features in Parts 5 and 6 which give effect to the CRD. Though the term is not found in the CRD as originally adopted, it features in the optional provisions regarding certain off-premises contracts inserted at Articles 9(1)(a) and 16 of the Directive by Articles 4(8) and 4(12)(b) of the BEMD. It is also found in the definition of ‘ranking’ that applies for the purpose of the new Article 6a on additional information requirements concluded on online marketplaces inserted in the CRD by Article 4(5) of the BEMD. Where the information requirements at Articles 5 and 6 of the CRD which are given effect in Schedules 1 and 2 refer to ‘goods’ or ‘services’, ‘product’ has been substituted as these requirements also apply to contracts for digital content not supplied on a tangible medium; water, gas and electricity not supplied in a limited volume or set quantity; and district heating. As outlined in the footnote to head 3(6), these contracts are not regarded as sales or service contracts in the CRD.

- (a) goods or services are offered by the trader through a transparent, competitive bidding procedure run by an auctioneer to consumers who attend, or are given the possibility to attend, the auction, in person, and
- (b) the successful bidder is bound to purchase the goods or services;²³

“sales contract” means a contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer –

- (a) pays, or undertakes to pay, the price of the goods, or

²³ The term ‘public auction’ features in Parts 2 and 5 of the Scheme. Article 2(13) of the CRD defines ‘public auction’ as ‘a method of sale where goods or services are offered by the trader to consumers who attend or are given the possibility to attend the auction in person, through a transparent competitive bidding procedure run by an auctioneer and where the successful bidder is bound to purchase the goods or services’. There is an identical definition of the term at Article 2(15) of the SGD. The definition here is taken from that at Regulation 2(1) of S.I. 484/2013. Article 3(5)(a) of the SGD provides that Member States may exclude from the scope of the Directive contracts for the sale of second-hand goods sold at public auction. Article 2(3) of Directive 1999/44/EC on Consumer Sales and Associated Guarantees similarly permits Member States “to provide that the expression “consumer goods” does not cover second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person’. We did not exercise this option in transposing the 1999 Directive in the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11 of 2003). No such restriction is provided for in Part 2 of the Scheme with the result that second-hand goods sold at public auction come within its scope

²⁴ The chapeau and paragraph (a) of the definition of sales contract follow that at Article 2(1) of the SGD. Paragraph (b) has been included in order to clarify that contracts in which the consumer provides full or part consideration by transferring the ownership of goods to the trader in full or part exchange for goods purchased in a sales contract come within the scope of these contracts. This type of exchange transaction is common in contracts for the purchase of motor vehicles. The differences in the scope of ‘sales contract’ in Parts 2 and 5 in respect of digital content supplied on a tangible medium are outlined in the footnote to head 3(4). Article 2(5) of the CRD defines ‘sales contract as ‘any contract under which the trader 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’. Article 4(1)(c) of the BEMD provides for the replacement of the definition of ‘sales contract’ in the CRD by the following definition: ‘sales contract’ means any contract under which the trader transfers or undertakes to transfer ownership of goods to the consumer, including any contract having as its object both goods and services’. As can be seen, the new definition does not include the requirement for the consumer to pay, or to undertake to pay, the price that was included in the previous definition. The requirement for the payment of a price in sales contracts is now provided for in a replacement Article 3(1) inserted in the CRD by Article 4(2)(a) of the BEMD. This states that the ‘Directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer where the consumer pays or undertakes to pay the price’. As, unlike contracts for digital content not supplied on a tangible medium and contracts for digital services, all sales contracts under the CRD require the payment of a price, the payment stipulation is included in the definition of sales contract here. As can be seen, the CRD definition of sales contract differs from that in the SGD in that it includes contracts having as their object both goods and having both goods and services as their objects. The differences in the scope of ‘sales contract’ in Parts 2 and 5 in respect of such contracts are outlined in the footnote to head 3(5).

(b) transfers, or undertakes to transfer, the ownership of goods to the trader in full or part payment of the price;²⁴

“service” means any service or facility, including without limitation²⁵ -

(a) a service or facility for –

- (i) financial services or advice,
- (ii) other professional services or advice,
- (iii) amusement, cultural activities, entertainment, instruction, recreation or refreshment,
- (iv) accommodation,
- (v) communication, including electronic communication,
- (vi) transport, travel, parking, or storage,
- (vii) the care and maintenance of persons, animals or things, or
- (viii) the construction, maintenance or repair of buildings,

(b) the supply of water, gas or electricity not supplied in a limited volume or set quantity and of district heating;

(c) any rights, benefits, privileges, obligations or facilities that are, or are to be provided, granted, or conferred in the course of a service,

but does not include a service provided under a contract of employment or apprenticeship;

²⁵ The definition of ‘service’ in section 2(1) of the Sale of Goods and Supply of Services Act 1980 states only that ‘it does not include meteorological or aviation services provided by the Minister for Transport or anything done under a contract of service’. Paragraphs (a) and (c) of the definition in subhead (1) are based with some modifications on the definition of ‘services’ at section 2(1) of the Consumer Protection Act 2007. Paragraph (b) on gas, water and electricity has been included in order to clarify that, notwithstanding the fact that contracts for the supply of these services are not considered to be service contracts for the purpose of the provisions of the CRD given effect in Part 5, these products are services for the purposes of the other Parts of the Scheme. Differences in the scope of ‘service’ and ‘service contract’ in Parts 4 and 5 are outlined in the footnote to head 3(6).

²⁶ This definition follows with minor changes Article 2(5) of the CRD which defines ‘service contract’ as ‘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’. Article 4(1)(c) of the BEMD provides

“service contract” means a contract other than a sales contract under which the trader supplies or undertakes to supply a service, including a digital service, to the consumer, and the consumer pays or undertakes to pay the price of the service;²⁶

“technical standard” means a technical specification adopted for repeated or continuous application by a recognised national, European or international standardisation body, compliance with which is not compulsory;²⁷

“trader” means -

- (a) a natural person, or
- (b) a legal person, whether –
 - (i) privately owned,
 - (ii) publicly owned, or
 - (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.²⁸

for the replacement of the definition of ‘service contract’ at Article 2(6) of the CRD with the following definition:

‘service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service, including a digital service to the consumer’.

The new definition omits the requirement for the consumer to pay, or to undertake to pay, the price that was contained in the previous definition. The requirement for the payment of a price in contracts between a trader and a consumer now forms part of a new Article 3(1) inserted in the CRD by Article 4(2)(a) of the BEMD. The exception to that requirement for contracts for digital services forms part of a new Article 3(1a) inserted in the CRD by Article 4(2)(b) of the BEMD. As the general rule remains that service contracts require the payment of a price by the consumer with contracts for digital services the exception to that rule, the definition of ‘service contract’ in this subhead includes the payment requirement. Differences in the scope of ‘service contract’ in Parts 3, 4 and 5 in respect of contracts for digital services are outlined in the footnote to head 3(6).

²⁷ The term ‘technical standard’ is found in Article 8(1)(a) of the DCD and in Article 7(1)(a). Though this term is not defined in either Directive, the definition here has been included here in order to clarify the application of the term in Parts 2 and 3. It is based on the definition at Article 2(1) of Regulation (EU) No 1025/2012 of the European Parliament and of the Council on European standardisation.

²⁸ ‘Trader’ is defined in identical terms at Article 2(2) of the CRD and Article 2(5) of the DCD. Though the SGD refers to the non-consumer party as the ‘seller’, the definition of the term is otherwise the same as the definition of ‘trader’ in the DCD and CRD. The term “trader” is used throughout the Scheme to refer to the non-consumer party to contracts and transactions. The definition of the term is taken from that at Regulation 2(1) of S.I. No. 484/2013. Its use and that of ‘consumer’ throughout the Scheme is intended to standardise the terms used as follows in current legislation to denote the parties to consumer contracts and transactions:

- in SOGA 1893, the parties to sales contracts are referred to as “buyer” and “seller”, though certain provisions of the Act and of SOG&SOSA 1980 apply only where the buyer “deals as consumer” as defined in section 3(1) of the 1980 Act;

Head 3 Application

(1) This Act shall apply to contracts between a trader and a consumer concluded after the commencement of the provision or provisions relating to the contracts concerned.

(2) Subject to subheads (2) to (9) and heads 12, 41, 42, 62, 75, 76, 78, 86, 98 and 105,²⁹ this Act applies as follows to contracts between a trader and a consumer:

- (a) Part 2 applies to contracts for the sale of goods (sales contracts);
- (b) Part 3 applies to contracts for the supply of digital content and contracts for the supply of a digital service;
- (c) Part 4 applies to contracts for the supply of a service (service contracts);
- (d) Part 5 applies to on-premises, off-premises and distance contracts for -
 - (i) the sale of goods,
 - (ii) the supply of a service,
 - (iii) the supply of digital content not supplied on a tangible medium,
 - (iv) the supply of water, gas or electricity not supplied in a limited volume or set quantity, and

-
- in SOG&SOSA 1980, the trader party to consumer contracts for the supply of a service is referred to as the “supplier”, while the consumer is referred to as a party who “deals as consumer”;
 - in the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 which give effect to the UCTD, the parties to consumer contracts are referred to as “consumer”, “seller” and “supplier”;
 - in the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 which give effect to Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, the parties to sales contracts are referred to as “consumer” and “seller”;
 - under the Consumer Protection Act 2007 which gives effect to the UCPD, the parties to business-to-consumer commercial transactions are referred to as “consumer” and “trader”;
 - under the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 which give effect to the CRD, the parties to sales, service and digital content contracts are referred to as “consumer” and “trader”.

The European Commission have stated that Member States are free to substitute ‘trader’ for ‘seller’ in the draft transposition of of the SGD and a number of other Member State also plan to do so in their transpositions of the Directive.

²⁹ The application of different Parts to the various kinds of contract covered by the Scheme is not straightforward due to differences in the scope of the EU Directives given effect in Parts 2, 3, 5, 6 and 7. Rather than having different definitions of the contracts in question in different Parts of the Scheme, subheads (4), (5) and (6) provide for exceptions to the application of different Parts and Chapters to certain contracts.

- (v) the supply of district heating;³⁰
- (e) Part 6 applies to on-premises, off-premises and distance contracts for –
 - (i) the sale of goods,
 - (ii) the supply of a service,
 - (iii) the supply of digital content not supplied on a tangible medium, service,
 - (iv) the supply of water, gas or electricity not supplied in a limited volume or set quantity
 - (v) the supply of district heating;³¹
- (f) Part 7 applies to contracts between a consumer and a trader.

(3) Parts 2, 3 and 4 may apply to a contract that also comes within the scope of another Part.³²

(4) Notwithstanding the definitions of ‘goods’ and ‘sales contract’ in head 2(1), digital content supplied on a tangible medium which serves exclusively as a carrier for digital content does not come within the scope of Chapters 2 and 3 of Part 2.³³

³⁰ As outlined in greater detail in the footnote 349 to head 75 in Part 4, the CRD provides that the contracts for (i) the supply of digital content not supplied on a tangible medium (i.e. online digital content), (ii) gas, water and electricity not supplied in a limited volume or set quantity and (iii) district heating should, for the purposes of the Directive, be classified as neither sales nor service contracts. The application provisions at Regulations 3, 4, 6, 13 and 24 of S.I 484/2013 which gives effect to the Directive treat these contracts accordingly as separate categories of consumer contract as do the application provisions at heads 75, 76, 78 and 86 of Part 5 and at head 98 of Part 6.

³¹ As Part 6 gives effect to Chapter IV of the CRD, its general scope is similar to that of Part 5.

³² With limited and specific exceptions, Parts 2 to 4 apply only to contracts within the specified scope of the Part concerned. Mixed or bundled contracts may accordingly be covered by one or more Parts of the Scheme. Article 3(6) of the DCD provides that where a single contract between the same trader and the same consumer includes in a bundle elements of supply of digital content or a digital service and elements of the provision of other services or goods, the Directive will apply only to the elements of the contract concerning the digital content or digital service. A provision similar to subhead (3) can be found at Article 1(5) of the UK Consumer Rights Act 2015.

³³ Digital content supplied on a tangible medium such as a CD or DVD is a tangible movable item and thus clearly comes within the scope of goods and that of sales contract as these terms are defined in head 2(1). As outlined in more detail in Part 2, however, Article 3(4) of the SGD provides that the Directive does not apply to any tangible medium which serves exclusively as a carrier for digital content. Article 3(3) of the DCD provides accordingly that, with the exception of Article 5 of the Directive on the supply of digital content and Article 13 on the remedy for the failure of supply, the Directive also applies to any tangible medium which serves exclusively as a carrier of digital content. In the CRD, however, digital content supplied on a tangible medium is considered to be goods for the purposes of the Directive. Chapter 4 of Part 2 gives effect to the provisions of Articles 18 and 20 of the CRD on the delivery of, and the passing of risk in, goods along with a number of other provisions relating to the delivery of goods, and its provisions apply consequently to digital content supplied on a tangible medium.

(5) Notwithstanding the definition of ‘sales contract’ in head 2(1) –

(a) in Part 2, ‘sales contract’ includes a contract that has as its object both goods and services where the main purpose of the contract is the transfer of the ownership of the goods, and

(b) in Part 5, ‘sales contract’ includes a contract that has as its object both goods and services.³⁴

(6) Notwithstanding the definitions of ‘service’ and ‘service contract’ in head 2(1) –

(a) contracts for the supply of digital services do not come within the scope of Part 4,

(b) contracts for the supply of –

(i) water, gas or electricity not supplied in a limited volume or set quantity, and

(ii) district heating

are not service contracts for the purposes of Parts 5 and 6.³⁵

(7) The references in the definitions of ‘sales contract’, ‘contract for the supply of digital content’, ‘contract for the supply of a digital service’ and ‘service contract’ in subhead (1) to

³⁴ As outlined in the footnote to the definition of ‘sales contract’ in head 2(1), the definition of the term at Article 2(5) of the CRD, unlike that at Article 2(1) of the SGD, includes a contract having as its object both goods and services. Recital (17) of the SGD states however that where a contract includes elements of both sales of goods and provision of services, it should be left to national law to determine whether the whole contract can be classified as a sales contract within the meaning of the Directive. One type of such mixed contract – where installation of the goods form parts of the sales contract and is to be carried out by the trader or under his responsibility – comes expressly within the scope of the Directive and the provision on incorrect installation at Article 8 of the Directive is implemented at head 18 of Part 2. In the case of other mixed contracts, the principal criterion applied by the courts in order to determine whether a contract is a sales or service contract has been to assess whether the transfer of the ownership of the goods forms the main purpose of the contract. Subhead (5)(a) incorporates this test in order to provide guidance in the matter to consumers and traders. Subhead (5)(b) incorporates the stipulation from the definition of ‘sales contract’ in the CRD. It was thought preferable to clarify these differences in the application provisions rather than by having different definitions of ‘sales contract’ in Parts 2 and 5.

³⁵ Part 3 of the Scheme which gives effect to the DCD applies to digital services as well as digital content and sets out the obligations of traders to supply digital services in conformity with the contract and the remedies to which consumers are entitled if a digital service is not supplied or is not in conformity. Part 4 similarly sets out the rights and remedies for consumers in contracts for non-digital services. The definition of ‘service contract’ at Article 3(6) of the CRD however states that these contracts include contracts for the supply of a digital service. Recital (19) of the CRD states that contracts for the supply of water, gas or electricity not put up for sale in a limited volume or set quantity and contracts for the supply of district heating should ‘be classified for the purposes of this Directive, neither as sales contracts nor as service contracts.’ These contracts are services contracts however for the purpose of Parts 4 and 7 of the Directive. Given the divergent scope of different Parts of the Scheme in respect of service contracts, the simplest solution seemed to be not to exclude the contracts in question from the definitions of ‘service’ and ‘service contract’, but to provide in subhead (6) for specified exceptions to the application of these definitions.

to the consumer paying a price include a reference to the consumer using by way of payment any facility for which payment has been made.³⁶

(8) Where goods, digital content, a digital service or a service are supplied free of charge with goods, digital content, a digital service or a service for which the consumer pays a price

—

- (a) the provisions of Part 2 and Parts 5 to 7 apply to any goods,
- (b) the provisions of Part 3 and Parts 5 to 7 apply to any digital content or digital service,
- and
- (c) the provisions of Parts 4 to 7 apply to any service

so supplied.³⁷

³⁶ Subhead (7) is intended to cover cases where consumers make purchases using gift vouchers, or tokens or virtual currency originally purchased with money such as those used in some computer games. Recital (23) of the DCD notes that ‘digital representations of value such as electronic vouchers or e-coupons are used by consumers to pay for different goods or services in the digital single market. Such digital representations of value are becoming important in relation to the supply of digital content or digital services and should therefore be considered as a method of payment within the meaning of this Directive’. There is a similar provision at section 33(3) of the UK Consumer Rights Act 2015.

³⁷ Subhead (8) is intended to cover, among other things, goods, services or digital content supplied ‘free of charge’ to consumers under promotional schemes or in return for a separate purchase for which a price is paid. It is intended to clarify the application of the Scheme to goods or other products acquired, for example, under ‘buy one/get one free’ offers or products acquired gratis in return for purchases above a specified amount.

³⁸ Article 3(3)(g) of the CRD originally provided that the Directive did not apply to contracts ‘which fall within the scope of Council Directive 90/314/EEC on package travel, package holidays and package tours’. Regulation 3(2)(h) of S.I. 484/2013 provided accordingly for the exclusion of these contracts from the scope of the Regulations. A new Directive (EU) 2015/2302 on package travel and linked travel arrangements was adopted in 2015 and this repealed the previous package travel Directive with effect from 1 July 2018. Article 27(2) of Directive (EU) 2015/2302 provides for the replacement of Article 3(3)(g) of the CRD by the following provision: ‘(g) on packages as defined in point 2 of Article 3 of Directive (EU) 2015/2302 of the European Parliament and of the Council.

Article 6(7), Articles 8(2) and 8(6) and Articles 19, 21 and 22 of this Directive shall apply mutatis mutandis to packages as defined in point 2 of Article 3 of Directive (EU) 2015/2302 in relation to travellers as defined in point 6 of Article 3 of that Directive.’

The consequential amendments to S.I. 484/2013 were given effect in the European Union (Package Travel and Linked Travel Arrangements) Regulations 2019 (S.I. No. 80/2019) by means of a new section 25C inserted in the Package Holidays and Travel Trade Act 1995. Article 8(2) of the CRD is given effect in head 84 of Part 5. Articles 6(7) and 8(6) of the Directive are optional provisions which were not implemented in our transposition in S.I. No 484/2013 and are not given effect either in the Scheme. Articles 19, 21 and 22 of Directive 2011/83/EU are given effect in Part 6 of the Scheme. Section 25C of the Package Holidays and Travel Trade Act is now incorporated in head 78 of Part 5 and head 98 of Part 6, and its repeal in the 1995 Act is provided for in Part 1 of Schedule 5. As the terms applicable to package travel contracts included in subhead (9) apply only to a small number of provisions of the Scheme, a cross-reference to the definitions in the 1995 Act would seem adequate, but the definitions can be included in the interpretation provisions in Part 1 if this is considered necessary.

(9) For the purposes of head 78 of Part 5 and head 98 of Part 6, the following terms have the meaning given to them by section 2(1) of the Package Holidays and Travel Trade Act 1995:

- (a) linked travel arrangement;
- (b) organiser;
- (c) package;
- (d) package travel contract;
- (e) traveller.³⁸

(10) Where a provision of this Act refers to what the consumer can reasonably expect or to what can reasonably be expected, the standard of reasonableness should be objectively ascertained having regard to the nature and purpose of the contract, the circumstances of the case and the usages and practices of the parties to the contract.³⁹

(11) It is for a trader claiming that an individual was not acting for purposes wholly or mainly outside the individual's trade, business, craft or profession to show that the individual was not so acting.⁴⁰

³⁹ Recital (24) of the SGD states that in 'order to balance the need for legal certainty with an appropriate flexibility of the legal rules, any reference in this Directive to what can be expected from or by a person should be understood as a reference to what can reasonably be expected'. It further states that the 'standard of reasonableness should be objectively ascertained, having regard to the nature and purpose of the contract, the circumstances of the case and to the usages and practices of the parties.' There is a similar provision at recital (46) of the DCD which is given effect in Part 3. As this is an important clarification of a stipulation that applies to a number of the conformity provisions in Parts 2 and 3, it has been included in subhead (10).

⁴⁰ Subhead (11) is based on the provision at section 3(3) of SOG&SOSA 1980. A similar provision can be found at Article 2(4) of the UK Consumer Rights Act 2015.

Head 4 Regulations

(1) The Minister may by regulations provide for any matter referred to in this Act as prescribed or to be prescribed.

(2) The Minister may make different regulations under this Act for different classes or types of consumer, trader or contract.

(3) Regulations under this Act may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations.

(4) Every regulation made under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly but without prejudice to the validity of anything previously done under it.

Head 5 Repeals and revocations

(1) The Acts specified in *Part 1* of *Schedule 5* are repealed to the extent specified in *column (3)* of that Part.

(2) The statutory instruments specified in *Part 2* of *Schedule 5* are revoked to the extent specified in *column (3)* of that Part.

Head 6 Amendments

The Acts specified in *Schedule 6* are amended to the extent specified in *column (3)* of that Part.

Head 7 Making of contract

(1) A contract between a trader and a consumer -

- (a) for the sale of goods that is subject to the provisions of Part 2,
- (b) for the supply of digital content or a digital service that is subject to the provisions of Part 3,
- (c) for the supply of a service that is subject to the provisions of Part 4,
- (d) of an on-premises, off-premises or distance kind that is subject to the provisions of Parts 5 and 6,
- (e) that is subject to the provisions of Part 7,

may be made in writing, by word of mouth, partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.⁴¹

(2) Subhead (1) is subject to the provisions of Chapter 3 of Part 5 on consumer information for distance and off-premises contracts.⁴²

⁴¹ Subhead (1) provides, in line with the position at common law, that no formal requirements will apply to the formation of the contracts to be covered by the proposed Bill. A similar rule applies to sales contracts under section 3 of SOGA 1893. Part 1 of Schedule 5 provides for the repeal of section 4 of the 1893 Act which provides that sales contracts with a value of £10 or more are not enforceable unless they are evidenced in writing or satisfy other conditions. Many sales and services contracts are concluded orally between traders and consumers and imposing formal requirements in such cases would serve no purpose.

⁴² The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 which are given effect in Parts 5 and 6 of the Scheme, however, require specified pre-contractual information to be provided in writing or on another durable medium prior to the conclusion of an off-premises contract and, in the case of distance contracts, to be provided in a manner appropriate to the means of distance communication used to conclude the contract. In both cases, the trader must also provide the consumer with a copy or confirmation of the concluded contract on a durable medium.

*Head 8 Representations purporting to restrict rights of consumer*⁴³

(1) Subheads (2) and (3) apply to any representation likely to be taken as indicating that a right or remedy conferred by, or an obligation or liability arising from, this Act is restricted or excluded otherwise than in accordance with the Act.

(2) A trader shall not do any of the following things in relation to a representation to which subhead (1) applies:

- (a) publish or cause to be published a representation which contains any such restriction or exclusion;
- (b) supply goods or digital content bearing any form of such a representation;
- (c) display on any part of any premises a notice that includes such a representation; or
- (d) otherwise furnish or cause to be furnished a document including any such representation.

(3) For the purposes of this head, the following shall be treated as representations to which subhead (1) applies:

- (a) a representation that refunds will not be made for goods, digital content, digital services or services not in conformity with the contract or that refunds will be made only in the form of credit notes or gift vouchers; or
- (b) a representation that goods, digital content, digital services or services not in conformity with the contract will not be replaced, repaired, remedied or otherwise brought into conformity with the contract.

(4) "Representation" includes –

⁴³ Head 8 is an amended version of the provisions of section 11 (Statements purporting to restrict rights of buyer) and section 41 (Statements purporting to restrict rights of recipient of service) of the Sale of Goods and Supply of Services Act 1980. The main issue with the existing provision is that it permits traders to publish a statement that restricts consumer rights as long as, in accordance with section 11(4), the statement 'is accompanied by a clear and conspicuous declaration that the contractual rights which the consumer enjoys ... are in no way prejudiced by the relevant statement'. This enables traders to publish statements such as "No Refunds. This does not prejudice your statutory rights". Head 8 does not re-enact these exceptions.

- (a) any oral, written, visual, descriptive or other representation by a trader, including any commercial communication, marketing or advertising, and
- (b) any term or form of a notice or other document used or relied on by a trader in connection with a consumer transaction.⁴⁴

(5) A trader who contravenes subhead (2) commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in head 115 of Part 8.

⁴⁴ Subhead (4) is based on the definition of 'representation' at section 2(1) of the Consumer Protection Act 2007.

Head 9 Contract terms exceeding provisions of Act

Nothing in this Act shall prevent traders from offering consumers contractual rights or remedies that exceed those provided for in the Act.⁴⁵

⁴⁵ Article 21(2) of the SGD provides that the Directive 'shall not prevent the seller from offering to the consumer contractual arrangements that go beyond the protection provided for in this Directive'. Similar provisions can be found at Article 22(2) of the DCD and Article 3(6) of the CRD.

Head 10 Jurisdiction of court to order remedies

For the purpose of the provisions of this Act that provide for the remedies of –

- (a) the repair or replacement of goods,
- (b) bringing digital content, digital services or services into conformity with the contract,
- (c) a reduction of the price of goods, digital content, digital services or services

there is, by virtue of this Act, vested in each court established by the Courts (Establishment and Constitution) Act 1961 jurisdiction to order these remedies.⁴⁶

⁴⁶ Head 10 is based on the provision at Regulation 11 of the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11/2003) which give effect to Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. The Regulation deals only with the remedy of repair or replacement. As the remedies in Parts 3 and 4 refer to bringing the digital content, digital service or service into conformity with the contract and not to repair or replacement, the provision at Regulation 11 has been supplemented accordingly. A reference to the remedy of price reduction which applies in Parts 2 to 4 has also been included.

PART 2⁴⁷

CONTRACTS FOR THE SALE OF GOODS

⁴⁷ Part 2 gives effect in Chapters 1-3 & 5 to Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods (SGD). Chapter 4 incorporates the provisions applying to consumer sales contracts at section 20 of SOGA 1893 (as substituted by Regulation 29 of S.I. 484/2013) and section 29 of SOGA 1893 (as amended by Regulation 30 of S.I. 484/2013) which give effect to the provisions of Articles 18 and 20 of the CRD on the delivery of, and passing of risk in goods, along with the provisions of section 31 SOGA 1893 on instalment deliveries as these provisions apply to consumer sales contracts.

PART 2
SALES CONTRACTS
CHAPTER 1
APPLICATION (Part 2)

Head 11 Interpretation (Part 2)

(1) In this Part –

“ancillary contract” means a contract under which –

- (a) the consumer acquires goods, digital content, digital services or services related to a contract for the sale of goods, and
- (b) the goods, digital content, digital services or services are supplied by the trader or by a third party on the basis of an arrangement between that third party and the trader;⁴⁸

“Directive” means Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods;

“free of charge” means free of the necessary costs incurred in order to bring the goods into conformity with the contract, particularly the cost of postage, carriage, labour or materials;⁴⁹

⁴⁸ This definition does not feature in the SGD and is based on the definition at Article 2(15) of the CRD as incorporated in Regulation 23(1) of S.I. No. 484/2013. It has been included in Part 2 for the purpose of the provision on the termination of ancillary contracts at head 23(12). Though provisions similar to head 23(12) are included in Parts 3, 4 and 5, the format of the definition does not lend itself to the inclusion of a composite definition in Part 1. The scope of the definition in Part 5 differs also from that in Parts 2, 3 and 4 in that it applies only to off-premises and distance contracts

⁴⁹ This definition follows that at Article 2(14) of the SGD. Though ‘free of charge’ features also in the remedies’ provisions of the DCD and a definition of the term is included in Part 3, the specification of cost items in the definition applying to goods in subhead (1) was not formulated with digital content and digital services in mind.

(2) A word or expression used in this Part that is also used in the Directive has, unless the context otherwise requires, the same meaning in this Part as it has in the Directive.

(3) A court shall construe this Part in a manner that gives effect to the Directive, and for this purpose the court shall have regards to the provisions of the Directive, including its preambles.

Head 12 Application (Part 2)

(1) Subject to *subheads (2) to (6)*, this Part applies as follows:

- (a) *Chapters 1, 2, 3 and 4* apply to sales contracts,
- (b) *Chapter 5* applies to sales contracts where there is a commercial guarantee in relation to the goods sold under the contract.

(2) *Subhead (1)* is subject to any provision of this Part that applies a head or part of a head only to some sales contracts.⁵⁰

(3) Subject to *head 13(1)(b)* and *head 23(10)*, where a sales contract is combined with a contract covered by another Part of this Act, this Part applies to the sale of goods element of the contract.⁵¹

(4) This Part does not apply to a contract –

- (a) intended to operate as a mortgage, pledge, charge or other security,⁵²
- (b) made by deed for which the sole consideration is the consideration imported by the deed.⁵³

⁵⁰ Examples of such provisions include heads 17(4) to (6) which apply only to goods with digital elements and head 18 which applies only to sales contracts which provide for the installation of goods.

⁵¹ Though there is no corresponding provision in the SGD, Article 3(6) of the DCD states that where a single contract between the same trader and the same consumer includes in a bundle elements of the supply of digital content or a digital service and elements of the provision of other services or goods, the Directive shall apply only to the elements of the contract concerning the digital content or digital service. It is helpful in our view to include a similar clarification in this Part of the Scheme. Head 13(1)(b) provides that a sales contract includes a contract that has as its object both goods and services where the main purpose of the contract is the transfer of the ownership of the goods. Head 23(10) provides that where goods are sold under a contract that has other elements, the consumer shall have the right in certain circumstances to terminate that contract if the consumer would be entitled to terminate the contract if it were a contract for the sale of goods only.

⁵² Though it does not form part of the SGD, this is a standard provision in sale of goods legislation. A similar provision can be found at section 61(4) of the Sale of Goods Act 1893.

⁵³ Agreements lacking consideration acquire contractual force if they are executed as a deed, a written document whose signature involves certain formalities. Subhead (4)(b) excludes from the scope of Part 2 contracts that are not supported by any consideration other than that provided by a deed. A similar provision can be found at section 3(3)(d) of the UK Consumer Rights Act 2015.

(5) With the exception of Chapter 4, this Part does not apply to a tangible medium that serves exclusively as a carrier for digital content.⁵⁴

(6) In the event of doubt as to whether the supply of digital content or a digital service which are incorporated in, or interconnected with, goods with digital elements forms part of the sales contract, this Part should apply to the contract regardless, where applicable, of the fact that the consumer has to consent to a licensing agreement with a third party in order to access the digital content or digital service.⁵⁵

(7) The remedies provided for in *Chapters 3 and 4* are without prejudice to the right of the consumer to pursue other remedies where a sales contract is not in compliance with the requirements of this Part provided that the consumer is not seeking to recover the same loss twice.⁵⁶

⁵⁴ Article 3(4) of the SGD states that the Directive shall not apply to any tangible medium which serves exclusively as a carrier for digital content. Examples of such a tangible medium are cds, dvds and boxed software. With the exception of the provisions relating to the supply of digital content or a digital service, digital content supplied on a tangible medium of this kind comes within the scope of the DCD which is given effect in Part 3. In Chapter 4 of this Part, however, digital content supplied on a tangible medium constitutes goods for the purposes of the provisions on delivery and the passing of risk as the corresponding provisions on the supply of digital content in the DCD are not applicable to digital content supplied in tangible form. Chapter 4 gives effect, among other things, to the provisions of Articles 18 and 20 of the CRD on the delivery of, and the passing of risk in, goods. Under that Directive, these provisions apply to digital content supplied on a tangible medium. The provisions were given effect in Part 6 of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 by means of amendments to sections 20 and 29 of the Sale of Goods Act 1893. As the provisions apply to consumer contracts for the sale of goods, their inclusion in this Part of the Scheme is appropriate. The differential application of Parts 2, 3 and 5 to contracts for the sale of digital content on a tangible medium is provided for also in head 3(4) of Part 1.

⁵⁵ Recital (15) of the SGD states, among other things, that ‘in order to avoid uncertainty for both sellers and consumers, in the event of doubt as to whether the supply of the digital content or the digital service forms part of the sales contract, the rules of this Directive should apply’. The recital further states that ‘ascertaining a bilateral contractual relationship between the seller and the consumer of which the supply of the incorporated or inter-connected digital content or digital service forms part should not be affected by the mere fact that the consumer has to consent to a licensing agreement with a third party in order to benefit from the digital content or the digital service’. As these are significant clarifications, it is proposed to incorporate them in this subhead.

⁵⁶ The remedies provided for in Chapter 3 are those set out in Article 13 of the SGD. The remedies in Chapter 4 are those required by Article 18 of the CRD. Recital (18) of the SGD states that the Directive should not affect national law to the extent that the matters concerned are not regulated by it, including in relation to damages. The additional remedies provided for in subhead (7) and specified in subhead (8) are, with the exception of that at subhead 8(b), general contract law remedies that are not expressly required by the Directive.

(8) The other remedies referred to in *subhead (7)* include any of the following remedies that are available to the consumer⁵⁷ –

- (a) claiming damages,⁵⁸
- (b) withholding payment of any outstanding part of the price or a part thereof until the trader has fulfilled the trader's obligations under this Part.⁵⁹
- (c) relying on the lack of conformity with the contract against a claim under the contract by the trader for payment of the price,⁶⁰
- (d) seeking to recover money paid to the trader for goods that do not comply with the requirements of this Part,
- (e) having a lack of conformity of the goods with the contract remedied elsewhere and recovering from the trader all reasonable costs incurred in having the lack of conformity so remedied.⁶¹

⁵⁷ A somewhat similar statement of other remedies can be found at section 19(11) of the UK Consumer Rights Act 2015. Parts 3 and 4 of the Scheme include provisions similar to subheads (7) and (8). As many traders will be regulated only by one of these Parts, it was thought preferable to leave the provisions on other remedies in each of the Parts rather than having a composite provision in Part 1. A similar approach was taken in Chapters 2-4 of the UK Consumer Rights Act 2015. While section 52 of the SOGA 1893 includes a provision on specific performance, this remedy is not included in subhead (8) as Chapter 4 provides a remedy where the trader fails or refuses to deliver the goods. Schedule 6 provides that section 52 will be amended to apply no longer to consumer contracts.

⁵⁸ Recital (61) of the SGD notes that 'the principle of the seller's liability for damages is an essential element of sales contracts' and that 'consumers should, therefore, be entitled to claim compensation for any detriment caused by an infringement by the seller of this Directive, including for damage suffered as a consequence of a lack of conformity'. Such 'compensation should put the consumer as much as possible into the position in which the consumer would have been had the goods been in conformity'. As 'the existence of such a right to damages is already ensured in all Member States, this Directive should be without prejudice to national rules on the compensation of consumers for harm resulting from infringement of those rules.' Sections 51 and 53 of SOGA 1893 include rules on damages.

⁵⁹ Subhead 8(b) gives effect to Article 13(6) of the SGD. This states that 'The consumer shall have the right to withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller's obligations under this Directive. Member States may determine the conditions and modalities for the exercise by the consumer of the right to withhold the payment'. Subhead (9) which is based on the criterion for price reduction at Article 15 of the Directive, and subhead (10) which is based on the provision on the exercise of the right to terminate the contract at Article 16(1) of the Directive, set down such conditions and modalities. Heads 41(9) and (11) to (12) of Part 3 and heads 62(9) and (11) to (12) provide for a similar right to withhold payment in contracts for the supply of digital content or a digital service and contracts for the supply of a service respectively.

⁶⁰ Section 53(1)(a) of the Sale of Goods Act 1893 provides that where there is a breach of warranty by the seller, the buyer may set up against the seller the breach in diminution or extinction of the price. As subhead (8)(b) provides that the consumer shall have the right to withhold payment of any outstanding part of the price until the seller has fulfilled his obligations under the Act, subhead (8)(c) provides only that the consumer can rely on the breach of contract against a claim by the trader for the price.

⁶¹ Section 53(2) SOGA 1893 provides, among other things, that where a buyer deals as consumer and the seller refuses, or fails within a reasonable time, to remedy a breach of a condition implied into the sales contract by

(9) Damages for any loss or detriment caused by an infringement by the trader of the provisions of this Part should put the consumer as much as possible in the position in which the consumer would have been if the trader had complied with those provisions.⁶²

(10) In the case of a lack of conformity of the goods with the sales contract, the part of the price withheld by the consumer under *subhead (8)(b)* shall be proportionate to the decrease in the value of the non-conforming goods received by the consumer compared with the value the goods would have if they were in conformity with the contract.

(11) The consumer shall exercise the right to withhold payment under *subhead (8)(b)* by means of a statement to the trader expressing the consumer's decision to withhold payment until the trader has fulfilled the trader's obligations under this Part.

(12) A person using a motor vehicle with the consent of the buyer of the vehicle who suffers loss as a result of a lack of conformity of the vehicle with the contract that would render it a danger to the public, including persons travelling in the vehicle, may maintain an action for damages in respect of that lack of conformity against the trader who sold the vehicle as if he or she were the buyer.⁶³

(13) The Minister may by regulations prescribe that this Part shall apply to contracts for the sale of goods with digital elements where the consumer does not pay or undertake to pay the price of the goods but provides or undertakes to provide personal data to the trader

the Act, the buyer is entitled 'to have the defect constituting the breach remedied elsewhere and to maintain an action against the seller for the costs thereby incurred by him'.

⁶² Subhead (9) is based on the third sentence of recital (61) of the SGD outlined in the footnote to subhead (8). The measure of damages it sets out is in line with the measure under Irish law. There is a similar provision at head 41(10) of Part 3 and head 61(10) of Part 4.

⁶³ Subhead (12) re-enacts the exception to the privity rule at section 13(7) of SOG&SOSA 1980. The other provisions of section 13 are not retained as, among other considerations, their retention would contravene the maximum harmonisation nature of the SGD. This was not an issue with the minimum harmonisation precursor of the SGD, Directive 1999/44/EC on certain aspects of contracts for the sale of goods and associated guarantees. As the provision at subhead (12) is outside the scope of the SGD, its retention does not give rise to a similar issue.

other than where the personal data provided by the consumer are exclusively processed for the purpose –

- (a) of supplying the goods with digital elements in accordance with this Part, or
- (b) for allowing the trader to comply with legal requirements to which the trader is subject

and the trader does not process those data for any other purpose.⁶⁴

(14) The Minister may make regulations under *subhead (13)* only where the Minister is satisfied after consultations with such interested parties as the Minister considers appropriate that such contracts are being concluded on a significant scale and that their regulation would be in the interest of consumer protection and fair competition.

⁶⁴ The DCD which is given effect in Part 3 of the Scheme applies where the consumer provides personal data to the trader as well as where the consumer pays a price for the digital content or digital service. Goods with digital elements (or ‘smart goods’ as they are also known) are becoming increasingly common and are undergoing constant evolution. In the case of some such goods, a point may be reached where the digital element is the predominant feature of the goods. In this event, traders may be willing to supply goods for the personal data to be obtained from them and to forego a requirement for payment. Unlike Part 3 of the Scheme which applies to digital content and digital services contracts where the consumer provides personal data to the trader without paying a price, the SGD and Part 2 do not apply to contracts for the sale of such goods. The review clause at Article 25 of the SGD provides that the review of the Directive to be undertaken by the European Commission before June 2024 shall assess in particular whether the application of the SGD and DCD ‘ensures a consistent and coherent framework for the proper functioning of the internal market with regard to the supply of digital content, digital services and goods with digital elements.’ As the review may result in a proposal that the SGD should apply to contracts for goods with digital elements where the consumer pays a price, subhead (13) provides that if such contracts become common, the Minister for Enterprise, Trade and Employment should have the option to extend the rights and remedies for sales contracts to contracts of this kind in the interests of consumer protection and of fair competition. The proposed exemptions for personal data supplied for the purposes specified in subheads 6(a) and (b) mirror those at Article 3(1) of the DCD as given effect in Part 3. Provision similar to subheads (13) and (14) can be found at heads 62(6) and (7) of Part 4.

Head 13 Sales Contracts

(1) In this Part, a sales contract includes –

- (a) a contract concluded between one part-owner and another,⁶⁵
- (b) a contract that has as its object both goods and services where the main purpose of the contract is the transfer of the ownership of the goods,⁶⁶
- (c) a contract for the sale of goods to be produced or manufactured by the trader, including goods made to the consumer's specifications.⁶⁷

(2) A sales contract may be a transaction under which the ownership of the goods is transferred from the trader to the consumer (a sale), or a transaction under which the ownership of the goods is to be transferred from the trader to the consumer at a future time or subject to a condition to be fulfilled at a future time (an agreement to sell).⁶⁸

(3) An agreement to sell becomes a sale when the time elapses or the condition is met subject to which ownership of the goods is to be transferred.

⁶⁵ This is a standard provision in sale of goods legislation and is similar to the provision at section 1(1) of the Sale of Goods Act 1893.

⁶⁶ Recital (17) of the SGD states that where a contract includes elements of both the sale of goods and the provision of services, it should be left to national law to determine whether the whole contract can be classified as a sales contract within the meaning of the Directive. One type of such mixed contract – where installation of the goods form part of the sales contract and is to be carried out by the trader or under his responsibility – comes expressly within the scope of the Directive and the provision on incorrect installation at Article 8 of the Directive is implemented at head 18 below. In the case of other mixed contracts, the principal criterion applied by the courts in order to determine whether a contract is a sales or services contract has been to assess whether the transfer of the ownership of the goods forms the main purpose of the contract. Subhead (1)(b) incorporates this test in order to provide guidance in the matter to consumers and traders.

⁶⁷ Article 3(2) of the SGD states that 'contracts between a consumer and a seller for the supply of goods to be manufactured or produced shall also be deemed sales contracts for the purposes of this Directive'. Recital (17) of the Directive states that these contracts include goods to be produced or manufactured 'under the consumer's specifications.' A definition of 'goods made to the consumer's specifications' is included in head 2(1) of Part 1.

⁶⁸ Subheads (2) and (3) re-enact with some changes in wording sections 1(3) and (4) of the Sale of Goods Act 1893.

(4) A sales contract may be absolute or conditional and is conditional where the trader retains ownership of the goods until the conditions specified in the contract for the payment of instalments or otherwise are met.⁶⁹

⁶⁹ Section 1(2) of the Sale of Goods Act 1893 states that a contract of sale may be absolute or conditional. Subhead (4) re-enacts this provision and elaborates on when a sales contract is conditional. A broadly similar provision can be found at section 5(3) of the UK Consumer Rights Act 2015.

Head 14 Rights of recipient of goods given as gift⁷⁰

Where a consumer who is a party to a sales contract gives goods acquired under the contract to another consumer as a gift, that other consumer shall be entitled to exercise all rights and remedies under this Part on the same terms as the consumer party to the sales contract.

⁷⁰ Consumers commonly buy goods to give as gifts to family members and friends. Because of the doctrine of privity of contract, the recipients of such gifts do not have rights or remedies against the trader under the sales contract. Head 14 provides for a statutory exception to the privity rule on the model of that for gift voucher contracts at head 66B(10) of the Consumer Protection Act 2007 (as inserted by section 2 of the Consumer Protection (Gift Vouchers) Act 2019). A similar provision can be found at section 266 of Schedule 2 of the Australian Competition and Consumer Act 2010.

CHAPTER 2

CONSUMER RIGHTS IN CONTRACTS FOR THE SALE OF GOODS

Head 15 Conformity of goods with sales contract

(1) The trader shall deliver goods to the consumer that are in conformity with the contract at the time of delivery.⁷¹

(2) Goods are in conformity with the contract if the goods comply with the requirements of *heads 16 to 19* where applicable, without prejudice to *head 20*.⁷²

(3) Subject to *head 19(3)*, where the goods delivered by the trader are not in conformity with the contract, the consumer shall have the right to the remedies specified in *Chapter 3*.⁷³

⁷¹ Subheads (1) and (2) give effect to Article 5 of the SGD.

⁷² Article 5 of the SGD states that the 'seller shall deliver goods to the consumer that meet the requirements set out in Articles 6, 7 and 8, where applicable, without prejudice to Article 9.' Articles 6 to 8 of the SGD are given effect in heads 16 to 19 and Article 9 is given effect in head 20. Head 19 (Trader to have right to sell goods) does not implement a provision of the Directive but is based on section 12 of the Sale of Goods Act 1893. While the Directive does not directly regulate matters relating to the passing of property in goods, recital (35) states that 'conformity should cover material defects as well as legal defects.' In line with the provision at Article 5 of the SGD, head 20 (Third party rights) does not impose an express requirement on the trader to sell goods that do not violate the rights of a third party over the goods, but requires that the consumer should be entitled to pursue the Directive's remedies for a lack of conformity where such violations prevent or limit the use of the goods in accordance with the provisions on the conformity of the goods with the contract.

⁷³ Head 19(3) provides that where the trader does not have the right to sell the goods, the consumer shall be entitled to terminate the contract. The right to terminate in such cases does not form part of the remedies set out in Chapter 3.

*Head 16 Subjective requirements for conformity with sales contract*⁷⁴

(1) In order to conform with the sales contract, the goods shall in particular and as applicable –

- (a) be of the description, type, quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the sales contract,
- (b) be fit for any particular purpose for which the consumer requires them –
 - (i) that the consumer made known to the trader at the latest at the time of the conclusion of the sales contract, and
 - (ii) that the trader has accepted,⁷⁵
- (c) be delivered with all accessories and instructions, including on installation, as stipulated by the sales contract, and
- (d) be supplied with updates as stipulated by the sales contract.

(2) The information which the trader is required to provide to the consumer in a distance or off-premises contract under *heads 79, 80 and 82* of Part 5 forms part of the sales contract and the goods shall comply with any term of the contract deriving from this information that is additional to the requirements of *subhead (1)*.⁷⁶

⁷⁴ Subhead (1) implements Article 6 of the SGD. The subjective requirements for conformity are essentially those agreed between the trader and consumer in the contract.

⁷⁵ The wording of the last part of Article 6(b) of the Directive states ‘and in respect of which the seller has given acceptance. Subhead (1)(b)(ii) uses the words ‘and which the trader has accepted’ instead.

⁷⁶ Heads 79-80 and 82 of Part 5 which give effect to Article 6(5) of the CRD provide that the pre-contractual information requirements for distance and off-premises contracts at Schedules 1 and 2 form part of the contract. Recital (26) of the SGD states that ‘the requirements in the sales contract should include those resulting from pre-contractual information which, in accordance with the CRD, form an integral part of the sales contract’. Subhead (2) gives effect to this requirement.

(3) In order to conform with the sales contract, spare parts and an adequate after-sale service shall be made available by the trader –

- (a) in such circumstances as are stated in an offer, description or advertisement by the trader on behalf of the producer or on his own behalf, and
- (b) for such period as is so stated or, if no period is so stated, for a reasonable period.⁷⁷

⁷⁷ Subhead (3) re-enacts the provision at section 12(1) of SOG&SOSA 1980. Recital (33) of the SGD states that while the 'Directive should not impose an obligation on sellers to ensure the availability of spare parts throughout a period of time as an objective requirement of conformity, it should not affect other provisions of national law obliging the seller, the producer or other person constituting a link in the chain of transactions to ensure that spare parts are available or to inform consumers about such availability'.

*Head 17 Objective requirements for conformity with sales contract*⁷⁸

(1) In addition to complying with the subjective requirements for conformity under *head 16* the goods shall –

- (a) be fit for all of⁷⁹ for the purposes for which goods of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct,
- (b) where applicable, be of the quality and correspond to the description of a sample or model that the trader made available to the consumer before the conclusion of the contract,
- (c) where applicable, be delivered along with such accessories, including packaging, installation instructions or other instructions, that the consumer may reasonably expect to receive, and
- (d) be of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type that the consumer may reasonably expect given the nature of the goods and taking into account any public statement about the goods⁸⁰ made by, or on behalf of, the trader or other persons in previous links of the chain of transactions including the producer, particularly in advertising or on labelling.

(2) In *subhead (1)(d)*, the durability of the goods refers to the ability of the goods to maintain their functions and performance through normal use and to possess the durability which is normal for goods of the same type and which the consumer can reasonably expect given –

- (a) the specific nature of the goods,

⁷⁸ Head 17 gives effect to Article 7 of the SGD.

⁷⁹ While the words ‘all of’ before ‘the purposes’ in subhead 1(a) do not form part of the provision at Article 7 (1)(a) of the SGD to which the paragraph gives effect, their inclusion is consistent with the Directive provision.

⁸⁰ While the words ‘about the goods’ do not form part of the provision in the chapeau of Article 7(1)(d) of the SGD to which paragraph (d) gives effect, the public statement referred to in the Directive provision can only be about the goods.

- (b) the possible need for reasonable maintenance of the goods,
- (c) any public statement on the durability of the goods made by or on behalf any person constituting a link in the chain of transactions, and
- (d) all other relevant circumstances, including the price of the goods and the intensity or frequency of the use made of the goods by the consumer.⁸¹

(3) The trader shall not be bound by any public statement referred to in *subhead (1)(d)* or *subhead (2)(c)* if the trader shows that –

- (a) the trader was not, and could not reasonably have been, aware of the public statement in question,
- (b) by the time of conclusion of the contract, the public statement had been corrected in the same way as, or in a way comparable to how, it had been made, or
- (c) the decision of the consumer⁸² to buy the goods could not have been influenced by the public statement.

(4) In the case of goods with digital elements where the sales contract provides for a single act of supply of the digital content or digital service, the trader shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to maintain⁸³ the goods in conformity with the contract for the period of time that the consumer may reasonably expect given the type and purpose of the goods and the digital elements, and taking into account the circumstances and nature of the contract.⁸⁴

⁸¹ Subhead (2) incorporate the clarification and elaboration of the durability requirement in recital (32) of the SGD. As durability is one of the most important aspects of the conformity of goods, there is merit in incorporating the recital's clarifications in head 17.

⁸² While the words 'of the consumer' do not form part of the provision at Article 7(2)(c) of the SGD to which subhead 3(c) gives effect, the decision referred to in the Directive provision can only be a decision of the consumer.

⁸³ Article 7(3) of the SGD which is given effect in subhead (4) states the trader shall supply updates that are necessary to *keep* the digital content or digital service in conformity. 'Keep' and 'maintain' are both used in relation to 'conformity' in the Directive and recitals, but 'maintain' is used in all cases in this Part.

⁸⁴ While Article 7(3) of the SGD deals in a single provision with the supply of updates in sales contracts for goods with digital elements that involve a single act of supply of the digital content or digital service and sales contracts that provide for a continuous supply of the digital content or digital service, it was considered simpler and clearer to deal separately with the two types of contract as is done in subheads (4) to (6).

(5) Where a contract for the sale of goods with digital elements provides for a continuous supply of the digital content or digital service for a period exceeding two years, the trader shall ensure that the consumer is informed of and supplied with, updates, including security updates, that are necessary to maintain the goods in conformity for the period of time for which the digital content or digital service is to be supplied under the sales contract.⁸⁵

(6) Where a contract for the sale of goods with digital elements provides for a continuous supply of the digital content or digital service for a period not exceeding two years, the trader shall ensure that the consumer is informed of, and supplied with, updates, including security updates, that are necessary to maintain the goods in conformity for two years from the time the goods with digital elements were delivered.

(7) Where the consumer fails to install within a reasonable time updates supplied in accordance with *subhead (4)*, *subhead (5)* or *subhead (6)*, the trader shall not be liable for any lack of conformity resulting solely from the lack of the relevant update, provided that –

- (a) the trader informed the consumer about the availability of the update and the consequences of the failure of the consumer to install it, and
- (b) the failure of the consumer to install the update, or the incorrect installation by the consumer of the update, was not due to shortcomings in the installation instructions provided to the consumer.⁸⁶

⁸⁵ Article 7(3)(b) of the SGD states that where a contract for the sale of goods with digital elements provides for the continuous supply of the digital content or digital service over a period of time, the seller shall ensure that the consumer is informed of and supplied with the necessary updates for the period of time ‘indicated in Article 10(2) or (5) as applicable’. Article 10(2) provides that where such a contract provides for the continuous supply of the digital content or digital service for more than two years, the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract. Subhead (5) gives effect to Article 7(3)(b) in such cases. Article 10(2) further provides that where a contract for the sale of goods with digital elements provides for a continuous supply of digital content or a digital service over a period of time (i.e one less than two years), the seller shall be liable for any lack of conformity that occurs or becomes apparent within two years of the time when the goods with digital elements were delivered. Subhead (6) gives effect to Article 7(3)(b) in such cases.

⁸⁶ Subhead (7) gives effect to Article 7(4) of the SGD.

(8) There shall be no lack of conformity under *subheads (1) to (2) or (subheads) (4) to (6)* if, at the time of the conclusion of the sales contract,⁸⁷ the consumer was specifically informed that a particular characteristic of the goods was deviating from the objective requirements for conformity laid down in those subheads, including a lack of conformity caused by a restriction resulting from a violation of an intellectual property or other right of a third party⁸⁸, and the consumer expressly and separately accepted that deviation when concluding the sales contract.

(9) In case of dispute, it shall be for the trader to show that the consumer -

(a) was specifically informed that a particular characteristic of the goods was deviating from the objective requirements for conformity laid down in *subhead (1) or (2)*, and

(b) expressly and separately accepted that deviation when concluding the contract.⁸⁹

(10) Any digital content or digital service supplied under a sales contract shall comply with *heads 45 to 48 of Part 3* and any service supplied under a sales contract shall comply with *heads 64 to 66 of Part 4*.⁹⁰

⁸⁷ Subhead (8) gives effect to Article 7 (5) of the SGD.

⁸⁸ The words 'including a lack of conformity arising from an intellectual property or other right of a third party' do not form part of Article 7(5) of the SGD which is given effect in subhead (8). Recital (35) of the Directive states however that 'restrictions resulting from a violation of third-party rights, in particular intellectual property rights, could prevent or limit the use of the goods in accordance with the contract. Member States should ensure that in such cases the consumer is entitled to remedies for the lack of conformity as set out in this Directive.' The consumer's entitlement to these remedies would not apply however where the consumer was informed of, and accepted, such restrictions in accordance with subhead (8). As restrictions arising from third party rights do not form an express part of the objective conformity requirements in Article 7 of the Directive, there is merit in clarifying that subhead (8) applies to such restrictions.

⁸⁹ It is appropriate to provide that it should be for the trader to show that the consumer was specifically informed about a deviation of the goods from the objective conformity requirements and that the consumer expressly accepted this deviation when concluding the contract.

⁹⁰ Head 12(3) provides that Part 2 applies only to the sale of goods element of mixed contracts that provide also for the supply of digital content, a digital service or a service. Subhead (10) provides that the digital content, digital service or service elements of such contracts must comply, as applicable, with the conformity requirements of Parts 3 and 4.

Head 18 Incorrect installation of goods⁹¹

Any lack of conformity with the sales contract resulting from the incorrect installation of the goods shall be regarded as a lack of conformity of the goods if –

- (a) the installation forms part of the sales contract and was carried out by the trader or under the trader's responsibility, or
- (b) the installation, intended to be carried out by the consumer, was done by the consumer and the incorrect installation was due to shortcomings in the installation instructions provided to the consumer by the trader or, in the case of goods with digital elements, provided to the consumer by the trader or by the supplier of the digital content or digital service.

⁹¹ This head implements Article 8 of the SGD.

*Head 19 Trader to have right to sell goods*⁹²

(1) In order to conform with the sales contract, other than a contract to which *subhead (2)* applies –

- (a) the trader shall have the right to sell the goods at the time when the ownership of the goods is to be transferred,⁹³
- (b) the goods shall be free from any charge or encumbrance not disclosed to the consumer before the consumer enters into the contract,⁹⁴
- (c) the goods shall remain free from any such charge or encumbrance until the ownership of the goods is to be transferred, and
- (d) the consumer shall enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed.

(2) Where the sales contract shows, or the circumstances at the time the contract was concluded imply, that the trader and the consumer intend that the trader transfer only the limited title to the goods that he or a third person may have⁹⁵ —

⁹² This head is similar in substance to section 12 of SOGA 1893, but is worded differently as Part 2 of the Scheme does not follow the implied conditions and warranties approach taken in that Act. There is no provision directly corresponding to this head in the SGD, but recital (35) states that conformity should cover material defects as well as legal defects. Recital (18) states that the Directive should not affect national law to the extent that the matters concerned are not regulated by the Directive, in particular with regard to the legality of the goods, damages and general contract law aspects such as the formation, validity, nullity and effects of contracts. Part 10 and Schedule 6 of the Scheme provides for the amendment of this and other provisions of the 1893 Act so that these provisions will no longer apply to contracts of sale between a trader and a consumer.

⁹³ While Section 12(1)(a) of the 1893 Act distinguishes between sales and agreements to sell, the wording of paragraph (a) (at the time when the ownership of the goods is to be transferred) is intended to apply to both types of sale transaction.

⁹⁴ Section 12(1)(b) of the 1893 Act requires goods to be free only of any charge or encumbrance not disclosed to the buyer before the contract is made. The corresponding provisions at section 12(2)(a) of the UK Sale of Goods Act 1979 and section 17(2)(a) of the UK Consumer Rights Act 2015 provide that the goods shall be free of any charge or encumbrance not disclosed or *known* to the buyer. As consumers, unlike commercial buyers, cannot be expected to have knowledge of charges or encumbrances affecting the goods before entering into a sales contract, subhead 1(b) does not make a similar change to the 1893 Act provision. Subhead (2)(b) similarly provides that the consumer's quiet possession of the goods may be disturbed only by the owner or other person entitled to the benefit of any *disclosed* charge or encumbrance.

⁹⁵ The implied warranties as to the disclosure of charges and encumbrances and to the quiet possessions of the goods at section 12(2) of the 1893 Act apply where it appears from the contract, or is to be inferred from the

- (a) all charges or encumbrances known to the trader shall be disclosed to the consumer before the consumer enters into the contract, and
- (b) the consumer's quiet possession of the goods —
 - (i) shall not be disturbed by the trader or by the third person, and
 - (ii) shall not be disturbed by a person claiming through or under the trader or the third person unless that person is claiming under a charge or encumbrance that was disclosed to the consumer before the contract was concluded.

(3) Where the trader does not have the right to sell the goods in accordance with subhead (1)(a), the consumer shall have the right to terminate the contract.⁹⁶

- (4) Where the consumer has the right to terminate the contract under *subhead (3)* –
- (a) the consumer shall exercise the right in accordance with *head 27*, and
 - (b) the trader shall comply with the obligations in *head 28*.

(5) Where the goods are not in compliance with the requirements of *subheads (1)(b) to (d)*, the trader does not disclose all known charges or encumbrances in accordance with *subhead 2(a)*, or the consumer's possession of the goods does not comply with subhead *(2)(b)*, the consumer shall have the right to the remedies specified in head 23.⁹⁷

(6) In case of dispute, it shall be for the trader to show that –

circumstances of the contract, that the seller should transfer only such title as he or a third person may have. In line with the approach taken in section 17 of the UK Consumer Rights Act 2015, the corresponding requirements in subhead (2) apply where the contract shows, or the circumstances at the time it was concluded imply, that both the trader *and the consumer* intend the trader to transfer a limited title to the goods. This additional protection is appropriate in consumer sales contracts.

⁹⁶ Section 12(1)(a) of SOGA 1893 to which subhead (1)(a) corresponds provides that the seller's right to sell the goods at the time when the property is to pass is a condition implied into the sales contract. Under section 11 of the 1893 Act, breach of a condition of the sales contract gives rise to a right to treat the contract as repudiated. In keeping with these provisions, subhead (3) provides that where the trader does not have the right to sell the goods in accordance with subhead (1)(a), the consumer has the right to terminate the contract.

⁹⁷ Sections 12(1)(b) and (2) of SOGA 1893 to which subsections (1)(b) to (d) and (2) correspond provide that the terms implied into the sales contract by these subsections of the Act are warranties. Section 11(2) of the Act provides that a warranty does not give rise to a right to treat the contract as repudiated. In keeping with these provisions, subhead (5) provides that breaches of subheads (1)(b) to (d) and (2) will give the consumer a right to the remedies specified in head 23.

- (a) the trader had the right to sell the goods in accordance with *subhead (1)(a)*,
- (b) the goods complied with the requirements of subheads *(1)(b) to (d)*,
- (c) the trader disclosed all known charges or encumbrances in accordance with subhead *(2)(a)*,
- (d) the consumer's possession of the goods complied with *subhead (2)(b)*.⁹⁸

⁹⁸ As traders are clearly in a better position than consumers to know whether they had the right to sell the goods and to know about charges and encumbrances affecting the goods, it is appropriate to provide in subhead (6) that in case of dispute it will be for the trader to show compliance with subheads (1) and (2).

*Head 20 Third party rights*⁹⁹

Where a restriction resulting from a violation of any right of a third party, in particular an intellectual property right, prevents or limits the use of the goods in accordance with *Heads 16 and 17*, the consumer shall be entitled to pursue the remedies for lack of conformity with the contract in *Chapter 3*.

⁹⁹ This head gives effect to Article 9 of the SGD. The Article provides that Directive's remedies shall apply where violations of third-party rights prevent or limit the use of the goods unless national law provides for the nullity or rescission of the sales contract in such cases. It was not thought necessary to include this exception in head 20.

*Head 21 Liability of trader*¹⁰⁰

(1) The trader shall be liable to the consumer for any lack of conformity of the goods with the sales contract which exists at the time of delivery of the goods.¹⁰¹

(2) Where the sales contract provides for the delivery of the goods for a fixed or an indefinite period, the trader shall be liable to the consumer for any lack of conformity of the goods which exists at the time of delivery throughout the duration of the contract period.¹⁰²

(3) Where a contract for the sale of goods with digital elements provides for a continuous supply of the digital content or digital service over a period of time, the trader shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract.¹⁰³

¹⁰⁰ This head gives effect to Article 10 of the SGD.

¹⁰¹ While Article 10(1) of the SGD also provides that the seller is liable for any lack of conformity which becomes apparent within two years of delivery, Article 10(3) states that 'Member States may maintain or introduce longer time limits than those referred to' in Articles 10(1) and 10(2). Article 10(5) states that 'notwithstanding paragraphs 1 and 2, of this Article, Member States may maintain or introduce only a limitation period for the remedies provided for in Article 13 of the Directive'. The precursor of the SGD, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated provided similarly for a two-year guarantee or liability period for a lack of conformity of the goods. As that Directive was a minimum harmonisation measure, its transposition in the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11/2003) did not implement this provision. The right of consumers to a remedy for a lack of conformity was subject only to the six-year limitation period for contract claims in the Statute of Limitations 1957. A similar approach is taken in Part 3 of the Scheme to the liability provisions of the DCD.

¹⁰² Though this subhead is not part of the SGD, it applies the liability provision in Article 10(1) of the Directive to the circumstances of contracts which involve the delivery of goods over a fixed or indeterminate period in a manner that is consistent with the Directive and that is compatible with its maximum harmonisation status.

¹⁰³ Subhead (3) gives effect to Article 10(2) of the SGD. Where a contract for the supply of goods with digital elements provides for a continuous supply of the digital content or digital service for more than two years, Article 10(2) states that 'the seller shall be liable for any lack of conformity of the digital content or the digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract'. This provision is given effect in subhead (3). Article 10(2) further states that where a contract for the supply of goods with digital elements provides for the continuous supply of digital content or a digital service over a period of time (i.e. for two years or less), the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within two years of the time when the goods with digital elements were delivered. As in accordance with the option for Member States at Article 10(5) of the SGD, our transposition does not include a two-year liability period but provides only for the limitation period that applies to contract claims under the Statute of Limitations

(4) Where an update is supplied by the trader or by a third party supplying the digital content or digital service under a contract for the sale of goods with digital elements, the trader shall be liable for any lack of conformity –

- (a) caused by the update which exists at the time of supply or installation of the update, or
- (b) caused by the failure of the trader to supply an update in accordance with head 17 at the time when the update should have been supplied.¹⁰⁴

(5) In *subheads (1) and (2)*, the time of delivery of the goods other than goods with digital elements means the time at which –

- (a) the consumer or a third party indicated by the consumer for this purpose acquires the physical possession of the goods, or
- (b) the goods are delivered to a carrier who was commissioned by the consumer to deliver the goods and who was not proposed by the trader for that purpose.¹⁰⁵

(6) In the case of goods with digital elements, the goods shall be deemed to have been delivered to the consumer when –

- (a) the physical component of the goods has been delivered to the consumer, and
- (b) the single act of supply of the digital content or digital service has been performed, or the continuous supply of the digital content or digital service over a period of time has begun, in such a way that the digital content or digital service, or any means suitable

1957, it is not necessary to differentiate between contracts involving continuous supply of digital content or a digital service for periods of more or less than two years respectively.

¹⁰⁴ Subhead (4) does not form part of Article 11 of the SGD which is given effect in head 21, but is taken instead from the fourth sentence of recital (30) of the Directive. This states that ‘if an update provided by the seller, or by a third party supplying the digital content or digital service under the sales contract, causes a lack of conformity of the good with digital elements, the seller should be liable for bringing the good into conformity again.’ As this is an important clarification of the seller’s liability for a lack of conformity caused by an update supplied subsequent to the conclusion of the contract, it is appropriate for inclusion in head 21.

¹⁰⁵ Subhead (5) does not implement a provision of the SGD, but clarifies that the time of delivery of goods applies in accordance with the time of the passing of the risk in the goods provided for in head 31. Head 31 gives effect to the provision at Article 20 of the CRD and was implemented by the substitution of a new section 20 in SOGA 1893 by Regulation 29 of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. 484/2013).

for downloading or accessing it, has reached the sphere of the consumer and no further action by the trader is required in order to enable the consumer to use the digital content or digital service in accordance with the contract.¹⁰⁶

(8) The consumer's right to a remedy in respect of a lack of conformity for which the trader is liable under this head applies in accordance with *section 11(1)* of the Statute of Limitations 1957.¹⁰⁷

¹⁰⁶ Subhead (6) gives effect to the important clarifications at recital (39) of the SGD on when goods with digital elements should be deemed to have been delivered.

¹⁰⁷ Subhead (7) clarifies that the consumer's right of action for a lack of conformity for which the trader is liable under head 21 is subject to the six-year period for contract claims under section 11 of the Statute of Limitations 1957.

Head 22 Burden of proof

(1) Any lack of conformity with the contract which becomes apparent within one year of the time of delivery of the goods shall be presumed to have existed at the time when the goods were delivered unless proven otherwise, or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity.¹⁰⁸

(2) In the case of goods with digital elements where the sales contract provides for the continuous supply of the digital content or digital service over a period of time, the burden of proof with regard to whether the digital content or digital service was in conformity with the contract within the period of supply of the digital content or digital service shall be on the trader for a lack of conformity which becomes apparent within that period.¹⁰⁹

(3) Nothing in this head shall prevent or restrict a consumer from exercising a remedy after twelve months from the delivery of the goods.¹¹⁰

¹⁰⁸ Subhead (1) gives effect to Article 11(1) of the SGD. It is not proposed to utilise the option in Article 11(2) of the SGD for Member States to maintain or introduce a period of two years from the time of delivery for the presumption of a lack of conformity.

¹⁰⁹ Subhead (2) gives effect to Article 11(3) of the SGD.

¹¹⁰ Subhead (3) clarifies that the limitation of the reversal of the burden of proof to twelve months provided for in head 22 does not prevent a consumer from exercising a remedy after that time.

CHAPTER 3

CONSUMER REMEDIES IN CONTRACTS FOR THE SALE OF GOODS

*Head 23 Remedies for lack of conformity with contract*¹¹¹

(1) In the event of a lack of conformity of the goods with the sales contract, the consumer shall have the right in the first instance to exercise the short-term right to terminate the sales contract in accordance with *head 24* or to have the goods brought into conformity with the contract through repair or replacement in accordance with *head 25*.¹¹²

(2) In order to have the goods brought into conformity with the contract, the consumer may choose between repair and replacement unless the remedy chosen by the consumer would be impossible for the trader to carry out or, compared to the alternative remedy,¹¹³ would impose disproportionate costs on the trader, taking all the circumstances into account, including –

- (a) the value that the goods would have if there were no lack of conformity,
- (b) the significance of the lack of conformity, and
- (c) whether the alternative remedy could be provided without significant inconvenience to the consumer.¹¹⁴

¹¹¹ Head 23 gives effect to Article 13 of the SGD.

¹¹² Subhead (1) gives effect to Article 13(1) of the SGD. Article 3(7) of the Directive states that the Directive shall not affect the freedom of Member States to allow consumers to choose a specific remedy if the lack of conformity of the goods becomes apparent within a period after delivery not exceeding 30 days. As the right to reject non-conforming goods without having to agree to their repair or replacement is a long-established right under Irish consumer sales law, head 23(1) and head 24 give effect to this regulatory option.

¹¹³ Subhead (2) gives effect to Article 13(2) of the SGD. While the chapeau of the provision at Article 13(2) of the Directive to which the subhead gives effect refers to ‘the other remedy’, ‘alternative remedy’ is used here as it is the term used in Article 13(2)(c) of the Directive.

¹¹⁴ Though it’s not entirely clear from Article 13(2) of the SGD that paragraphs (a) to and (c) of the provision apply only to the disproportionate cost condition, the circumstances which are to be taken into account would not be applicable in cases where bringing the digital content or digital service into conformity would be impossible. This point applies also to Article 13(3) of the Directive which is implemented in subhead (3).

(3) The trader may refuse to bring the goods into conformity with the sales contract if both repair and replacement are impossible for the trader to carry out or would impose disproportionate costs on the trader, taking all the circumstances into account including those specified in *subhead 2(a)* and *subhead 2(b)*.¹¹⁵

(4) The consumer shall have the right to either a proportionate reduction of the price in accordance with *head 26* or to exercise the final right to terminate the sales contract in accordance with *head 27* in any of the following cases:¹¹⁶

- (a) the trader has not completed the repair or the replacement of the goods or, where applicable, has not completed the repair or replacement in accordance with *head 25*;
- (b) the trader has refused to bring the goods into conformity with the sales contract in accordance with *subhead (3)*;
- (c) the same or a different¹¹⁷ lack of conformity of the goods becomes apparent¹¹⁸ despite the trader having attempted to bring the goods into conformity;
- (d) the lack of conformity of the goods is of such a serious nature as to justify an immediate price reduction or the termination of the sales contract; or
- (e) the trader has declared, or it is clear from the circumstances, that the trader will not bring the goods into conformity within a reasonable time or without significant inconvenience to the consumer.

(5) The consumer's final right to terminate the sales contract under subhead (4) shall not apply if the lack of conformity of the goods is only minor.¹¹⁹

¹¹⁵ Subhead (3) gives effect to Article 13(3) of the SGD.

¹¹⁶ Subhead (4) gives effect to Article 13(4) of the SGD.

¹¹⁷ The words 'a same or different' do not form part of Article 13(4)(b) of the SGD which is given effect in subhead 4(c). As Article 13(4)(b) refers to 'a lack of conformity' that appears, the addition of these words provides a desirable clarification and is consistent with the Directive provision.

¹¹⁸ Though the provision at Article 13 (4)(b) of the SGD which is given effect in subhead (4)(c) uses the word 'appears', 'becomes apparent' is used in the subhead as it is line with the wording of recital (50) and of Article 10 of the Directive on the liability of the seller.

¹¹⁹ Subhead (5) gives effect to the first part of Article 13(5) of the SGD. As the short-term right to terminate the contract is outside the Directive's scheme of remedies, there is no requirement in our view to apply this restriction to it.

(6) In case of dispute, it shall be for the trader to show that the lack of conformity of the goods is minor.¹²⁰

(7) Where a lack of conformity of the goods becomes apparent despite the trader having attempted to bring the goods into conformity, it shall be objectively determined under *subhead (4)(c)* whether the consumer shall be entitled to either a proportionate reduction of the price or to exercise the final right to terminate the contract or shall be required to accept a further attempt or attempts by the trader to bring the goods into conformity with the sales contract taking all the circumstances into account, including –

- (a) the type and value of the goods,
- (b) the nature and significance of the lack of conformity, and
- (c) whether the consumer can reasonably be expected to maintain confidence in the ability of the trader to bring the goods into conformity, in particular where the same lack of conformity appears twice.¹²¹

(8) It shall be objectively determined under *subhead (4)(d)* whether the lack of conformity of the goods is of such a serious nature as to justify an immediate price reduction or termination of the sales contract by the consumer having regard to the nature and severity of the lack of conformity, including whether that lack is such that –

- (a) the consumer cannot maintain confidence in the ability of the trader to bring the goods into conformity,
- (b) the ability of the consumer to make normal use of the goods is severely affected and

¹²⁰ Subhead (6) gives effect to the second part of Article 13(5) of the SGD.

¹²¹ This provision is not part of Article 13(4) of the SGD as given effect in subhead (4) but is taken instead from recital (52) of the Directive. This states, among other things, that ‘Where the seller has taken action to bring the goods into conformity but a lack of conformity becomes apparent subsequently, it should be objectively determined whether the consumer should accept further attempts by the seller to bring the goods into conformity, taking into account all the circumstances of the case, such as the type and value of the goods, and the nature and significance of the lack of conformity. In particular, for expensive or complex goods it could be justified to allow the seller another attempt to remedy the lack of conformity. It should also be taken into account whether the consumer can be expected to maintain confidence in the ability of the seller to bring the goods into conformity or not, for instance, due to the same problem appearing twice.’ As this part of the recital offers an important clarification of the conditions under which the consumer is entitled to proceed to the remedies of price reduction or termination, it is appropriate for inclusion in head 23.

the consumer cannot reasonably be expected to trust that this would be remedied by repair or replacement by the trader.¹²²

(9) Where a lack of conformity of the goods which entitles the consumer to exercise the final right to terminate the sales contract in accordance with *subhead (4)* relates only to some of the goods delivered under the sales contract, the consumer may terminate the contract only in relation to those goods and to any other goods that the consumer acquired with the non-conforming goods if the consumer cannot reasonably be expected to keep only the conforming goods.¹²³

(10) Where goods are sold to a consumer under a contract that provides also for the supply of digital content, a digital service or a service, the consumer shall have the right to terminate that contract if –

- (a) the consumer would be entitled to terminate the contract under this Part if it were a contract for the sale of goods only, and
- (b) the value of the digital content, digital service or service to the consumer would be materially reduced in the absence of the goods.¹²⁴

¹²² This provision is not part of Article 13(4) of the SGD as given effect in head 24(4) but is taken instead from the final sentence of recital (52) of the Directive. This states that ‘in certain situations, the lack of conformity could be of such a serious nature that the consumer cannot maintain confidence in the ability of the seller to bring the goods into conformity, such as where the lack of conformity severely affects the ability of the consumer to make normal use of the goods and the consumer cannot be expected to trust that repair or replacement by the seller would remedy the problem’. As this offers an important clarification of the criteria to be taken into account in considering whether a lack of conformity of the goods is of such a serious nature as to justify a right to immediate price reduction or termination of the contract, it is appropriate for inclusion in head 24.

¹²³ Subhead (9) gives effect to Article 16(2) of the SGD. As the short-term right to terminate the contract is outside the Directive’s scheme of remedies, there is no requirement in our view to apply this provision to it.

¹²⁴ This subhead does not form part of the SGD. Recital (60) of the Directive states that ‘This Directive should not affect the freedom of Member States to regulate the consequences of termination other than those provided for in this Directive.’ Article 3(6) of the DCD states among other things that ‘without prejudice to Article 107(2) of Directive (EU) 2018/1972, the effects that the termination of one element of a bundle contract may have on other elements of the bundle contract shall be governed by national law.’

(11) Subhead (10) shall not apply to a contract for terminal equipment and a bundle of services within the scope of Article 107 of Directive (EU) 2018/1972 establishing the European Electronic Communications Code.¹²⁵

(12) Where a consumer terminates a contract for the sale of goods in accordance with this head and head 27, any ancillary contracts shall be automatically terminated without any costs to the consumer.¹²⁶

(13) When a trader is informed by a consumer in accordance with *head 27* of the consumer's decision to terminate a contract for the sale of goods, the trader shall inform any other trader with whom the consumer has an ancillary contract that is terminated in accordance with *subhead (12)*.¹²⁷

(14) Where an ancillary contract is terminated in accordance with subhead (12) –
(a) the trader contract with whom the consumer has that contract shall comply with the obligations in *head 28*, and
(b) the consumer shall comply with the obligation in *head 27 (1)(b)*.

(15) Where any security has been provided under an ancillary contract that is terminated in accordance with *subhead (12)*, it is to be treated as never having had effect and any property lodged with the supplier or the third party solely for the purposes of that security shall be returned immediately by the supplier or third party.¹²⁸

¹²⁵ As separate rules apply to the termination of bundle contracts under the European Electronic Communications Code, subhead (11) exempts these contracts from the scope of subhead (10).

¹²⁶ Regulation 23(3) of S.I. 484/2013 provides in line with Article 15(1) of the CRD that where a consumer exercises the right to terminate a distance or off-premises contract any ancillary contract shall be automatically terminated without any costs for the consumer. A similar provision applies under Article 14(4) of Directive 2008/48/EU on consumer credit. Where a consumer has the right to terminate a sales contract under this Part, any ancillary contract should similarly be terminated. A definition of 'ancillary contract' is included in head 11(1). A similar provision can be found at head 53(11) of Part 3 and head 68(15) of Part 4.

¹²⁷ Subhead (13) is based on Regulation 23(3) of S.I. 484/2013. A similar provision can be found at head 53(14) of Part 3 and head 68(18) of Part 4.

¹²⁸ Subhead (5) re-enacts Regulation 23(4) of S.I. 484/2013.

(16) A refusal or failure by a trader to provide a remedy to which a consumer has a right under this head shall be a prohibited commercial practice under section 67 of the Consumer Protection Act 2007 for the purposes of sections 71, 73 and 75 of that Act.¹²⁹

¹²⁹ Article 21(1) of the SGD requires Member States to ensure that adequate and effective means exist to ensure compliance with the Directive. Subhead (16) provides accordingly that a refusal or failure by a trader to provide a remedy to which a consumer is entitled under head 23 may be the subject of enforcement action under the following provisions of the Consumer Protection Act 2007: section 71 (Civil relief by way of prohibition orders); section 73 (Undertakings with the Competition and Consumer Protection Commission); and section 75 (Compliance notices). Contraventions of head 23 are not considered appropriate for the provisions of the Consumer Protection Act relating to criminal offences as whether, or to what extent, a consumer has a right to a remedy under the head may not be clear-cut and will require consideration on a case-by-case basis. Sections 71 and 73 of the 2007 Act are civil remedies, while section 75 permits a person served with a compliance notice to appeal it to the District Court. Similar provisions have been included at head 53(15) of Part 3 and head 68(19) of Part 4.

*Head 24 Short-term right to terminate sales contract*¹³⁰

(1) This head applies where the consumer has the short-term right to terminate the sales contract under *head 23(1)*.

(2) Subject to *subhead (4)*, the short-term right to terminate the contract begins -

(a) when the goods have been delivered in accordance, as applicable, with *heads 21(6) or 21(6)*,

(b) where the contract requires the trader to install the goods after their delivery or to take other action to enable the consumer to use the goods, when the installation or other action has been completed,

and expires 30 days later.¹³¹

(3) *Subhead (2)* does not prevent a consumer who has a right to terminate the sales contract from terminating it before the time specified in paragraph (a) or (b) of that subhead.¹³²

(4) Where the goods are of a kind that can reasonably be expected to expire or deteriorate within a period shorter than 30 days, the time limit for exercising the short-term right to end the contract shall be the end of that shorter period.¹³³

¹³⁰ As indicated in the footnote to head 23(1), this head gives effect to the regulatory option for Member States at Article 3(7) of the SGD.

¹³¹ It is necessary in determining the period for which the short-term right to reject the goods will apply to take account of situations where the goods have to be installed or some other action has to be taken by the trader to enable the consumer to use the goods. Until such installation or action have been completed, the consumer will not be in a position to know whether the goods are in conformity with the contract. A similar provision applies under section 22(3)(c) of the UK Consumer Rights Act 2015.

¹³² A consumer may have the right to terminate the contract before the delivery of the goods or the completion of an installation, for example where the trader indicates that the goods will not be delivered. A similar provision applies under section 22(5) of the UK Consumer Rights Act 2015.

¹³³ A 30-day period for the short-term right to reject goods would be inappropriate for goods that can reasonably be expected to expire or deteriorate within a shorter period. A similar provision applies under section 22(4) of the UK Consumer Rights Act 2015. That provision uses the term 'perish' which applies to the provision on specific goods at section 6 of the UK Sale of Goods Act 1979 and section 6 of SOGA 1893. As 'perish' can be interpreted to refer only to the physical destruction of goods, the words 'deteriorate or expire' from Article 16(2) of the CRD are used here instead.

(5) In case of dispute, it shall be for the trader to show that a period shorter than 30 days applies to the consumer's right to terminate the contract under subhead (4).¹³⁴

(6) Where the consumer has the right to terminate the contract under this head –

(a) the consumer shall exercise the right in accordance with *head 27 and*

(b) the trader shall comply with the obligations in *head 28*.

¹³⁴ As traders can and should be expected to be better informed about the lifespan of the goods that they sell than the consumers who buy those goods, subhead (5) puts the onus on the trader to show that a period shorter than 30 days applies to the consumer's right to terminate under this head.

*Head 25 Repair or replacement of goods*¹³⁵

(1) This head applies where goods are to be brought into conformity with the sales contract by repair or replacement.

(2) The trader shall ensure that the repair or replacement of the goods is carried out –

- (a) free of charge,
- (b) within a reasonable period of time from the time the trader has been informed of the lack of conformity by the consumer,¹³⁶ and
- (c) without any significant inconvenience to the consumer, taking into account the nature of the goods and the purpose for which the consumer required the goods.

(3) The reasonable time for the completing repair or replacement of the goods under *subhead (2)(b)* and shall correspond to the shortest possible time necessary for completing the repair or replacement and shall be objectively determined having regard to the nature and complexity of the goods, the nature and severity of the lack of conformity and the effort needed to complete the repair or replacement.¹³⁷

(4) The consumer shall make the goods to be remedied by repair or replacement available to the trader.¹³⁸

(5) The trader shall take back the replaced goods and the goods to be repaired at the trader's expense.¹³⁹

¹³⁵ Head 25 gives effect to Article 14 of the SGD.

¹³⁶ Subhead (2) gives effect to Article 14(1) of the SGD. Article 14(1)(b) of the Directive which is implemented in subhead (2)(b) states that repairs or replacements shall be carried out with a reasonable period of time from the 'moment' the trader has been informed of the lack of conformity. As 'time' is more consistent with usage throughout the Directive, it is used in subhead (2)(b) in preference to 'moment'.

¹³⁷ Subhead (3) is not part of Article 13(4) of the SGD as given effect in subhead (2)(b) but is taken instead from recital (55) of the Directive. As it offers an important clarification of what constitutes a reasonable time for repair or replacement, it is appropriate for inclusion in head 25.

¹³⁸ Subhead (4) gives effect to the first sentence of Article 14(2) of the SGD.

¹³⁹ Subhead (5) gives effect to the second sentence of Article 14(2) of the SGD. While the Directive provision states only that 'the seller shall take back the replaced goods at the seller's expense', subhead (5) provides also that the trader shall take back goods to be repaired at the trader's expense. This is consistent with the

(6) Where a repair requires the removal of goods that had been installed in a manner consistent with their nature and purpose before the lack of conformity became apparent, or where such goods are to be replaced, the trader's obligation to repair or replace the goods shall include –

- (a) the removal of the non-conforming goods and, as applicable, the installation of replacement goods or repaired goods, or
- (b) bearing the costs of that removal and installation.¹⁴⁰

(7) The consumer shall not be liable to pay for the normal use of the replaced goods during the period prior to their replacement.¹⁴¹

(8) The Minister may by regulations prescribe in relation to a specific category of goods the period that can generally be considered reasonable for the repair or replacement of that category of goods for the purposes of *subheads (2)(b) and (3)*.¹⁴²

(9) The Minister may make regulations under *subhead (8)* only where the Minister is satisfied after consultations with such interested parties as the Minister considers appropriate that such regulations would be in the interest of consumer protection and fair competition.

requirement in Article 14(1)(a) of the Directive as given effect in subhead (2) that repair or replacement shall be carried out free of charge and is included in order to avoid possible confusion resulting from the absence of a reference to goods to be repaired in Article 14(2) of the Directive.

¹⁴⁰ Subhead (6) gives effect to Article 14(3) of the SGD.

¹⁴¹ Subhead (7) gives effect to Article 14(4) of the SGD.

¹⁴² Recital (55) of the SGD states that in 'implementing this Directive, Member States should be able to interpret the notion of reasonable time for completing repair or replacement by providing for fixed periods that could generally be considered reasonable for repair or replacement, in particular with regard to specific categories of products.' Subheads (8) and (9) give effect to this regulatory option.

*Head 26 Price reduction*¹⁴³

(1) This head applies where the consumer has the right to a price reduction under *head 23 (4)*.

(2) The right of the consumer under this head is, as applicable, the right to –

- (a) require the trader to reduce in accordance with *subhead (3)* the price the consumer is required to pay under the contract, or
- (b) receive from the trader a reimbursement of the price paid by the consumer in excess of the amount of the reduction applicable under *subhead (3)*.¹⁴⁴

(3) The reduction of the price shall be proportionate to the decrease in the value of the goods received by the consumer compared with the value that the goods would have if they were in conformity with the sales contract.¹⁴⁵

(4) Where the consumer has the right to reimbursement under *subhead (2)(b)*, the trader shall reimburse the consumer in accordance with *head 29*.

(5) In a sales contract where the consumer transfers the ownership of goods to the trader in full or part payment of the price, the right of the consumer to a price reduction shall not apply if –

- (a) no agreed monetary value was ascribed by the parties to the goods to be transferred by the consumer at the time the contract was concluded, or

¹⁴³ Head 26 gives effect to Article 15 of the SGD.

¹⁴⁴ Though Article 15 does not distinguish between the application of the price reduction provision in cases where the consumer has, or has not, already paid for the goods, it is appropriate to provide for both situations in subhead (2). A similar provision can be found at section 24(1) of the UK Consumer Rights Act 2015. Subhead (4) provides that where the consumer has paid for the goods prior to having the right to a price reduction, the trader shall reimburse the consumer in accordance with head 29.

¹⁴⁵ Section 53(5) of the SOGA 1893 (as substituted by section 21 of the SOG&SOSA 1980) provides similarly to Article 15 of the SGD that the loss resulting from a breach of a warranty in a sales contract is ‘prima facie the difference between the value of the goods at the time of delivery and the value they would have had if they had answered to the warranty’.

(b) the goods which the consumer has transferred, or is required to transfer, under the contract cannot be divided up so as to enable the trader to receive or retain only the reduced price.¹⁴⁶

¹⁴⁶ As the definition of 'sales contract' in head 11(1) provides that these contracts will include transactions in which the consumer transfers the ownership of goods to the trader in full or part payment of the price, it is necessary to provide for the application or otherwise of the price reduction provision in the particular circumstances of these contracts. Subhead (5) sets out two circumstances in which the right to a price reduction will not apply in the case of these contracts. Paragraph (b) is similar to the provision at section 24(a) of the UK Consumer Rights Act 2015.

*Head 27 Obligations of consumer in event of termination of sales contract*¹⁴⁷

(1) Where the consumer exercises the short-term right to terminate the sales contract under *head 23(1)*, the final right to terminate the sales contract under *head 23(4)* or the right to terminate the contract under *head 32* or *head 33*, the consumer shall -

- (a) do so by means of a statement to the trader expressing the decision to terminate the sales contract, and
- (b) return the goods delivered under the sales contract to the trader at the trader's expense.

(2) Breach by a consumer of the obligation to return the goods in accordance with this head shall be actionable by the trader as a breach of statutory duty.¹⁴⁸

¹⁴⁷ Head 27 gives effect to the provisions relating to the consumer's exercise of the right to terminate the contract at Articles 16(1) and (3) of the SGD. Though Article 16 deals also with the trader's obligations where the consumer terminates the contract, these are dealt with separately in head 28. The separation of the obligations of consumer and trader is in line with the approach taken in the provisions on termination of the contract in Articles 15 to 18 of the DCD and in the provisions on the exercise of the right of withdrawal at Articles 13 and 14 of the CRD.

¹⁴⁸ Subhead (2) is based on Regulation 20(8) of S.I. 484/2013.

*Head 28 Obligations of trader in event of termination of sales contract*¹⁴⁹

(1) Where the consumer exercises the short-term right to terminate the sales contract under *head 23 (1)*, the final right to terminate the sales contract under *head 23(4)* or the right to terminate the contract under *head 32* or *head 33*, the trader shall upon receipt of the goods or, if the trader so chooses,¹⁵⁰ of evidence provided by the consumer of having sent back the goods, reimburse the consumer in accordance with *head 29* for –

(a) the price paid for the goods, and

(b) where applicable, the costs incurred by the consumer in returning the goods to the trader.¹⁵¹

(2) The reimbursement of the price to which the consumer is entitled under subhead (1) 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.¹⁵²

¹⁴⁹ This head gives effect to Article 16(1) of the SGD and includes additional provisions on the trader's obligations in the event of the termination of a contract of exchange in which all or part of the consideration provided by the consumer consists of the transfer of goods to the trader.

¹⁵⁰ While the words 'if the trader so chooses' do not form part of the provision at Article 16(3)(b) of the SGD to which subhead (1) gives effect, the European Commission have clarified that the Directive provision is to be understood as meaning that the trader is not required to reimburse the consumer on receipt of evidence from the consumer of having sent back the goods. The words are included in order to avoid confusion on this point.

¹⁵¹ While subhead (1)(b) is not an express requirement under Article 16 of the SGD, it is in line with the provision at Article 16(3)(a) of the SGD that the consumer shall return the goods at the seller's expense.

¹⁵² The question of whether traders should be entitled to reduce the reimbursement due to consumers in the event of the termination of the contract to take account of the use had of the goods by the consumer prior to termination is one of the more contentious issues in consumer sales law. Recital (60) of the SGD states that the 'Directive should not affect the freedom of Member States to regulate the consequences of termination other than those provided for in the Directive, such as the consequences of the decrease of the value of the goods or of their destruction or loss'. Restitution provisions requiring consumers who terminate sale contracts to provide compensation for the use of the goods prior to termination apply in a number of civil law jurisdictions. The Sale of Goods Act 1893 does not regulate the matter, but a seller is free to make the case that the full price should not have to be reimbursed where the consumer has enjoyed the use of the goods for a significant period. Subhead (2) represents a qualified compensation for use provision. Though it does not give effect to a provision in the SGD, it is based on the provision at Article 12(3)(d) of the European Commission's proposal of 2015 for a Directive on contracts for the online and other distance sales of goods. The approach it takes is consistent with that of the provision at Article 14(4) of the SGD as given effect in head 25(7) that the consumer shall not be liable to pay for the normal use of replaced goods in the period prior to their replacement. Section 24(8) of the UK Consumer Rights Act 2015 provides that the refund of the price due to a consumer 'may be reduced by a deduction for use, to take account of the use the consumer has had of the goods in the period since they were delivered'. While this provision does not apply to goods generally if the contract is terminated in the first six months, it applies to motor vehicles from the time of delivery. This subhead is one of the provisions on which views will be sought in the public consultation to be held on the Scheme

(3) 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.¹⁵³

(4) In a sales contract where the consumer transfers the ownership of goods to the trader in full or part payment of the price, the trader shall –

- (a) return the transferred goods to the consumer and
- (b) where applicable, reimburse in accordance with head 29 any price paid by the consumer.

(5) Where the trader cannot return the transferred goods to the consumer, the trader shall reimburse the consumer –

- (a) to the agreed monetary value ascribed to the goods by the parties at the time the contract was concluded, or
- (b) where no such monetary value was agreed, to a reasonable market value for the goods at the time the contract was concluded.

¹⁵³ As 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.

*Head 29 Time limits and means of reimbursement by trader*¹⁵⁴

(1) Where reimbursement is owed to the consumer by the trader pursuant to a price reduction under *head 26*, the short-term right to terminate the sales contract under *head 23 (1)*, the final right to terminate the sales contract under *head 23(4)* or the right to terminate the contract under *head 32 or head 33*, the trader shall carry out the reimbursement –

(a) without undue delay and not later than 14 days of the date on which the trader received –

(i) the goods back or,

(ii) if the trader so chooses, evidence provided by the consumer of having sent back the goods,

(b) using the same means of payment as the consumer used to pay for the goods, unless the consumer expressly agrees otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.¹⁵⁵

(c) without the imposition of any fee on the consumer in respect of the reimbursement.

(2) A refusal or failure by a trader to make a reimbursement to which a consumer is entitled under this Part in accordance with subhead (1) shall be a prohibited act or practice under section 67 of the Consumer Protection Act 2007 for the purposes of sections 71, 73 and 75 of that Act.¹⁵⁶

¹⁵⁴ While Article 16(3)(b) of the SGD provides that, in the event of the termination of the contract, the trader shall reimburse the consumer for the price paid for the goods, it leaves it to Member States to determine the conditions and modalities for reimbursement. By contrast, Article 18 of the DCD which is given effect in head 57 sets out such conditions and modalities, and the provisions in this head are similar to those in head 57. Article 13(1) of the CRD includes similar provisions where consumers exercise the right to withdraw from distance or off-premises contracts. While similar reimbursement requirements apply under Parts 3, 4, and 5 of the Scheme, it was thought preferable to include these requirements with the remedies provisions to which they relate in each of these Parts.

¹⁵⁵ In Article 18(2) of the DCD on which paragraph (b) is based, there is a comma after ‘agrees otherwise’. This leaves it unclear whether the prohibition on fees for reimbursement applies both in the situation where the trader used the same means of payment to reimburse the consumer or the situation where, with the agreement of the consumer, a different means of payment was used for the reimbursement. The European Commission have since clarified that, in line with the provision in the second paragraph of Article 13(1) of the CRD on which the provision at Article 18(2) of the DCD is based, the comma after ‘agrees otherwise’ should be deleted.

¹⁵⁶ Subhead (2) is similar to the provision at head 23(16), the rationale for which is set out in the footnote to that subhead.

(3) Breach by a trader of the obligation to reimburse the consumer in accordance with this head shall be actionable by the consumer as a breach of statutory duty.¹⁵⁷

¹⁵⁷ Subhead (3) is based on the provision at Regulation 19(8) of S.I. 484/2013.

CHAPTER 4

OTHER RULES IN CONTRACTS FOR THE SALE OF GOODS

Head 30 Application (Chapter 4)

(1) In this Chapter, ‘goods’ include a tangible medium that serves exclusively as a carrier for digital content.¹⁵⁸

(2) Where the consumer has the right to terminate a sales contract under *head 32 or head 33* of this Chapter –

- (a) the consumer shall exercise the right in accordance with *head 27*,
- (b) the trader shall comply with the obligations in *head 28*.

¹⁵⁸ Head 12(5) of Chapter 1 states that, with the exception of Chapter 4, Part 2 shall not apply to any tangible medium which serves exclusively as a carrier for digital content. While the non-application of the SGD to this type of digital content is provided for in Article 3(4)(a) of the Directive, the provisions on risk and delivery in this Part apply to tangible digital content in accordance with the CRD and DCD. Article 3(3) of the DCD provides that, with the exception of Article 5 (supply of the digital content or digital service) and Article 13 (remedy for the failure to supply), the Directive shall apply to any tangible medium which serves exclusively as a carrier of digital content. The exceptions made for Articles 5 and 13 reflect the fact that provisions on the supply of intangible digital content or digital services are not appropriate for digital content supplied on a tangible medium such as a cd or dvd. In view of its tangible form, the supply of digital content of this kind is regulated instead by the provisions on the passing of risk in, and the time of delivery of, goods at Articles 18 and 20 of the CRD. Recital (19) of that Directive states that ‘if digital content is supplied on a tangible medium, such as a CD or DVD, it should be considered as goods within the meaning of this Directive.’ Digital content supplied on a tangible medium comes accordingly within the scope of head 31 (passing of risk in sales contracts) and head 32 (delivery of goods) of this Chapter. For similar reasons, it comes also within the scope of head 33 on instalment deliveries.

*Head 31 Passing of risk*¹⁵⁹

(1) In a sales contract, goods remain at the trader's risk until the consumer, or a person indicated by the consumer for this purpose, acquires the physical possession of the goods.

(2) *Subhead (1)* does not apply where the goods are delivered to a carrier who —

- (a) was commissioned by the consumer for the purpose of carrying the goods, and
- (b) was not proposed by the trader for that purpose.

(3) Where *subhead (2)* applies, the goods are at the consumer's risk upon delivery to the carrier.

(4) *Subhead (3)* is without prejudice to the rights of the consumer against the carrier.

¹⁵⁹ This head implements Article 20 of the CRD. That provision was given effect in section 20 of SOGA 1893 as substituted by Regulation 29 of S.I. 484/2013. While, in keeping with its primary focus on distance and off-premises contracts, Article 20 of the CRD applies only to consumer sales contracts where the trader dispatches the goods to the consumer, head 31 applies to all consumer sales contracts. Recital (13) of the Directive states that 'Member States should remain competent in accordance with Union law to apply the provisions of this Directive to areas not falling within its scope'. As with the other provisions of SOGA 1893 which are to be replaced for consumer sales contracts by the provisions of this Act, section 20 of the 1893 Act will apply in future only to commercial sales contracts. Part 10 and Schedule 6 of the Scheme provide for the required amendments to this and other provisions of the 1893 Act.

Head 32 Delivery of goods¹⁶⁰

(1) The trader shall deliver the goods to the consumer.¹⁶¹

(2) Where the contract provides for the delivery of the goods for a fixed or indefinite period, the trader shall deliver the goods throughout the duration of the contract period.

(3) Unless the trader and the consumer have agreed otherwise, the trader shall deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay and not later than 30 days from the conclusion of the contract.

(4) If the trader does not deliver the goods –

(a) at the time, or within the time period, agreed with the consumer, or

(b) where no such time or time period has been agreed between the trader and the consumer, within the time period specified in *subhead (3)*,¹⁶²

the consumer shall call upon¹⁶³ the trader to make the delivery within an additional period of time appropriate to the circumstances.

¹⁶⁰ Head 32 gives effect to Article 18 of the CRD. That provision was given effect in sections 29(2B) to (2F) of SOGA 1893 (as inserted by Regulation 30 of S.I. 484/2013). As with the other provisions of the Sale of Goods which are to be replaced for consumer sales by the provisions of this Act, section 29 of the 1893 Act will apply in future only to commercial sales contracts. The required amendment to the 1893 Act is provided for in Part 10 and Schedule 6.

¹⁶¹ While Article 18 of the CRD deals with the time of delivery of goods, it does not directly state the trader's obligations to deliver the goods. As this is the trader's primary obligation under the sales contract, subhead (1) provides for it in line with the provision at section 27 of SOGA 1893. Article 5 of the DCD which is given effect in head 43 of Part 3 provides, in addition to provisions on the mode and time of supply of digital content and digital services, that the 'trader shall supply the digital content or digital services to the consumer'.

¹⁶² While Article 18(2) of the CRD applies where the trader has failed to fulfil his obligation to deliver the goods at the time agreed upon with the consumer or within the time limit of not later than 30 days set out in Article 18(1), section 29(2C) of the 1893 Act incorporates only the first of these stipulations as to the time of delivery. Subhead (2)(b) includes both of the stipulations as to the time of delivery from Article 18(2).

¹⁶³ Article 18(2) of the CRD states that where the trader fails to deliver the goods at the agreed time or within the default time limit, the consumer 'shall call' upon the trader to deliver the goods within an additional period of time appropriate to the circumstances. The transposition of this provision at section 29(2)(c) of the Sale of Goods Act 1893 states that 'the buyer may require the consumer to make the delivery within an additional period of time appropriate to the circumstances.' As it is open to question whether the word 'may require' gives adequate effect to the Directive provision, subhead (4) states instead that the consumer 'shall call upon' the trader to make the delivery within an appropriate additional period of time.

(5) *Subhead (4)* does not apply if—

- (a) the trader has refused to deliver the goods,
- (b) delivery of the goods within the time period agreed with the consumer is essential, taking into account all the relevant circumstances at the time of the conclusion of the contract, or
- (c) the consumer has informed the trader prior to the conclusion of the contract that delivery on or by a specified date is essential.

(6) Where the trader —

- (a) has refused to deliver the goods,¹⁶⁴
- (b) fails to deliver the goods within any additional period of time for delivery applicable under *subhead (4)*, or
- (c) fails to deliver the goods —
 - (i) within the time agreed with the consumer under *subhead (5)(b)*, or
 - (ii) on or by the date the date specified by the consumer under *subhead (5)(c)*,

the consumer shall have the right to terminate the contract.¹⁶⁵

¹⁶⁴ Paragraph (a) does not form part of section 29(2E) of the 1893 Act. The second subparagraph of Article 18(2) of the CRD provides that the first subparagraph of the paragraph is not applicable where the trader has refused to deliver the goods, where delivery within the agreed delivery period is essential, or where the consumer has stated that delivery on or by a specified date is essential. It further states that ‘In those cases, if the trader fails to deliver the goods at the time agreed upon with the consumer or within the time limit set out in paragraph 1, the consumer shall be entitled to terminate the contract immediately’. The words ‘in those cases’ suggest that the consumer should be able to terminate the contract where the trader has refused, as well as where the trader has failed, to deliver the goods within the required time. As delivery of the goods is the fundamental obligation of the trader under a contract of sale, it goes without saying that the consumer has the right to terminate the contract if the trader has refused to deliver the goods.

¹⁶⁵ As head 32 does not come within the scope of the SGD, the remedies for breach of its provisions are not subject to the remedies provided for in the Directive as given effect in Chapter 3. It is not necessary consequently to indicate in subhead (6) whether the right to terminate the contract is the short-term or final right of termination. The second paragraph of Article 18(2) of the CRD provides that where the trader fails to deliver the goods in accordance, as applicable, with Articles 18(1) or (2), ‘the consumer shall be entitled to terminate the contract immediately’. Section 29(E) of the SOGA 1893 provides that where the seller fails to deliver the goods in accordance with the section, ‘the buyer may treat the failure as a breach of a condition of the contract which entitles the buyer to repudiate the contract’.

*Head 33 Instalment deliveries*¹⁶⁶

(1) Unless otherwise agreed between the consumer and the trader, the consumer is not bound to accept delivery of the goods under a sales contract by instalments.

(2) Subject to *subhead (3)*, if the trader makes a delivery that does not conform to the sales contract in respect of one or more instalments, the consumer may, as applicable, exercise the short-term right to terminate the contract under *head 23(1)* or the final right to terminate the contract under *head 23(4)*.

3) The consumer may exercise the right to terminate the contract under *subhead (2)* only in relation to the goods delivered in the non-conforming instalment or instalments unless taking all the circumstances into account the consumer cannot reasonably be expected to accept the goods delivered in the conforming instalment or instalments.

¹⁶⁶ Head 33 is based on section 31 of SOGA 1893 as amended to take account in subhead (3) of the provision at Article 16(2) of the Directive which is given effect in head 23(9) on the right of termination where a lack of conformity relates only to some of the goods delivered under the sales contract.

*Head 34 Right of redress*¹⁶⁷

Where the trader is liable to the consumer because of a lack of conformity resulting from an act or omission (including omitting to provide updates to goods with digital elements in accordance with *heads 17(4) to 17(6)*) by a person in previous links of the chain of transactions relating to the sales contract, the trader shall be entitled to pursue remedies against the person or persons in the chain of transactions liable for the lack of conformity.

¹⁶⁷ This head gives effect to Article 18 of the SGD. While the regulations at S.I. No. 11/2003 that give effect to the precursor of the present Directive, Directive 1999/44/EC on certain aspects of contracts for the sale of goods and associated guarantees, did not implement the corresponding provision at Article 4 of that Directive, the European Commission have indicated that Member States are required to transpose Article 18.

*Head 35 Exclusion or limitation of liability of trader*¹⁶⁸

(1) A term of a contract for the sale of goods or of any other contract between the consumer and the trader shall not exclude or restrict the trader's liability under any of the following provisions:

- (a) *head 14 (Rights of recipient of goods given as gift);*
- (b) *head 15 (Conformity of goods with sales contract);*
- (c) *head 16 (Subjective requirements for conformity with sales contract);*
- (d) *head 17 (Objective requirements for conformity with sales contract);*
- (e) *head 18 (Incorrect installation of goods);*
- (f) *head 19 (Trader to have right to sell goods);*
- (g) *head 20 (Third party rights);*
- (h) *head 21 (Liability of trader);*
- (i) *head 22 (Burden of proof);*
- (j) *head 31 (Passing of risk);*
- (k) *head 32 (Delivery of goods);*
- (l) *head 33 (Instalment deliveries).*

(2) The reference in *subhead (1)* to excluding or restricting the trader's liability includes -

- (a) excluding or limiting a right or remedy in respect of a liability under a provision listed in *subhead (1)*,
- (b) making such a right or remedy or its enforcement subject to a restrictive or onerous condition,

¹⁶⁸ Article 21 of the SGD states that 'unless otherwise provided for in this Directive, any contractual agreement which, to the detriment of the consumer, excludes the application of national measures transposing this Directive, derogates from them, or varies their effect, before the lack of conformity is brought to the seller's attention by the consumer shall not be binding on the consumer'. Section 55 of the Sale of Goods Act 1893 provides, among other things, that any term of a sales contract or any other contract excluding or restricting any or all of the Act's provisions on title and conformity shall be void where the buyer deals as consumer. Subhead (2) elaborates on what is meant by the exclusion or restriction of the trader's liability and subhead (3) provides that an agreement to submit differences to ADR is not to be regarded as such an exclusion. A similar provision can be found at section 31 of the UK Consumer Rights Act 2015.

- (c) allowing a trader to put a person at a disadvantage as a result of pursuing such a right or remedy,
- (d) excluding or restricting rules of evidence or procedure, or
- (e) preventing an obligation arising or limiting its extent.

(3) An agreement in writing to submit present or future differences to an alternative dispute resolution procedure is not to be regarded as excluding or restricting any liability for the purposes of this head.

(4) A trader who contravenes *subhead (1)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.¹⁶⁹

¹⁶⁹ The new Article 8b of the UCTD inserted in that Directive by Article 1 of the BEMD requires Member States to apply penalties to infringements of national provisions giving effect to the UCTD in cases where the contract terms are expressly defined as unfair in all circumstances in national law or where a trader continues to use contract terms that have been found unfair in a final decision by a court. As the provisions of subheads (1) and (2) relate to contract terms that are unfair in all circumstances, it is appropriate to provide for penalties for their infringements in this head and in the corresponding provisions in head 60 of Part 3 and head 73 of Part 4.

CHAPTER 5

COMMERCIAL GUARANTEES¹⁷⁰

Head 36 Application (Chapter 5)

(1) This Chapter applies where there is a commercial guarantee in relation to the goods sold under a sales contract.

(2) In this Chapter, “guarantor” means a producer, trader or any other person who provides a commercial guarantee in relation to goods sold under a sales contract.¹⁷¹

¹⁷⁰ Chapter 5 gives effect to the provisions of Article 17 of the SGD on commercial guarantees.

¹⁷¹ Though ‘guarantor’ is not defined in the SGD, the inclusion of a definition is appropriate. ‘Producer’ is defined in head 2(1) of Part 1 as the term also features in Part 6 of the Scheme.

*Head 37 Liability for commercial guarantee*¹⁷²

(1) A commercial guarantee shall be binding on the guarantor under the conditions laid down in the commercial guarantee statement and in associated advertising available at the time, or before the conclusion, of the contract.

(2) Where a producer offers the consumer a commercial guarantee of durability for certain goods for a certain period of time, the producer shall be liable directly to the consumer during the entire period of the commercial guarantee of durability for the repair or the replacement of the goods in accordance with *head 25*.

(3) The producer may offer more favourable conditions to the consumer in the commercial guarantee statement on the durability of the goods.

(4) If the conditions laid out in the commercial guarantee statement are less advantageous to the consumer than those laid down in the associated advertising, the commercial guarantee shall be binding under the conditions laid down in the advertising relating to the commercial guarantee, unless, before the conclusion of the contract, the associated advertising was corrected in the same, or a comparable, way to that in which it was made.

¹⁷² Head 37 gives effect to Article 17(1) of the SGD.

*Head 38 Provision of commercial guarantee*¹⁷³

(1) The commercial guarantee statement shall be provided to the consumer on a durable medium at the latest at the time of the delivery of the goods.

(2) The commercial guarantee statement shall be expressed in plain, intelligible language and shall include the following:

(a) a clear statement that the consumer is entitled by law to remedies from the trader free of charge in the event of a lack of conformity of the goods and that those remedies are not affected by the commercial guarantee;

(b) the name and address of the guarantor;

(c) the procedure to be followed by the consumer to obtain the implementation of the commercial guarantee;

(d) the designation of the goods to which the commercial guarantee applies; and

(e) the terms of the commercial guarantee.

(3) Non-compliance with *subheads (1) or (2)* shall not affect the binding nature of the commercial guarantee for the guarantor.

¹⁷³ Head 38 gives effect to Articles 17(2) and (3) of the SGD.

*Head 39 Exclusion or limitation of rights of consumer under commercial guarantee*¹⁷⁴

(1) A commercial guarantee shall not –

- (a) in any way exclude or limit the rights of the consumer at common law or under statute,
- (b) impose obligations on the consumer that are additional to his obligations under the sales contract, or
- (c) purport to make the guarantor or any person acting on his behalf the sole authority to decide whether goods conform to the sales contract or whether the consumer is otherwise entitled to make a claim under the commercial guarantee.

(2) Any provision of a commercial guarantee that is contrary to *subhead (1)* shall be void.

¹⁷⁴ Head 39 re-enacts with some modifications the provisions of section 18 of the Sale of Goods and Supply of Services Act 1980.

PART 3¹⁷⁵

CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT AND DIGITAL SERVICES

¹⁷⁵ Part 3 gives effect to Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (DCD). As digital content and digital services are relatively new, consumer contracts for their supply have not previously been the subject of specific statutory regulation.

PART 3

CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT AND DIGITAL SERVICES

Head 40 Interpretation (Part 3)

(1) In this Part –

“ancillary contract” means a contract under which –

- (a) the consumer acquires digital content, digital services, goods or services related to a contract for the supply of digital content or a digital service, and
- (b) the digital content, digital services, goods or services are supplied by the trader or by a third party on the basis of an arrangement between that third party and the trader;¹⁷⁶

“digital environment” means hardware, software and any network connection used by the consumer to access or make use of digital content or a digital service;¹⁷⁷

“Directive” means Directive (EU 770/2019 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services;

“gambling service” mean a service that involve wagering a stake with pecuniary value in games of chance (including those with an element of skill, such as lotteries, casino games,

¹⁷⁶ This definition does not feature in the DCD and is based on the definition at Article 2(15) of the CRD as given effect in Regulation 29(1) of S.I. 484/2013. It has been included for the purpose of the provision on the termination of ancillary contracts at head 53(11). Though provisions similar to head 53(11) are included in Parts 2, 4 and 5, the format of the definition does not lend itself to the inclusion of a composite definition in Part 1. The scope of the definition in Part 5 differs also from that in Parts 2, 3 and 4 in that it applies only to off-premises and distance contracts.

¹⁷⁷ This definition implements the definition at Article 2(9) of the DCD.

poker games and betting transactions) by electronic means or any other technology for facilitating communication at the individual request of a recipient of such a service;¹⁷⁸

“healthcare” means health services provided by health professionals to patients in order to assess, maintain or restore their state of health whether or not these services are provided via healthcare facilities and includes the prescription, dispensing and provision of medicinal products and medical devices;¹⁷⁹

“integration” means the linking and incorporation of digital content or a digital service with the components of the consumer's digital environment in order for the digital content or digital service to be used in accordance with the requirements for conformity with the contract in this Part;¹⁸⁰

“internet access service” means a publicly available electronic communications service that provides access to the internet and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used;¹⁸¹

“number-based interpersonal communications service” means an interpersonal communications service which connects with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which

¹⁷⁸ This definition incorporates the definition of ‘gambling services’ at Article 3(5)(d) of the DCD. ‘Gambling’ is also defined at Article 3(3)(c) of the CRD, the provisions of which are given effect in Part 5. Though the two definitions are similar in substance, their scope differs. Separate definitions of the term have been retained accordingly in this Part and in Part 5.

¹⁷⁹ Article 3(5)(c) of the DCD provides that the Directive shall not apply to contracts for healthcare ‘as defined in point (a) of Article 3 of Directive 2011/24/EU’. The definition here incorporates that definition. While Article 3(3)(b) of the CRD also provides that that Directive shall not apply to contracts for healthcare ‘as defined in point (a) of Article 3 of Directive 2011/24/EU’, it includes the additional stipulation ‘whether or not they are provided via healthcare facilities.’ As the DCD definition does not include this additional element, separate definitions of the term have been retained in this head and in head 74 of Part 5.

¹⁸⁰ This definition implements the definition of ‘integration’ at Article 2(4) of the DCD.

¹⁸¹ The second paragraph of Article 3(6) of the DCD provides that Article 19 of the Directive shall not apply where a bundle within the meaning of Directive (EU) 2018/1972 establishing the European Electronic Communications Code includes ‘elements of an internet access service as defined in point (2) of Article 2 of Regulation (EU) 2015/2120 of the European Parliament and of the Council’. The definition of ‘internet access service’ in subhead (1) is based on the definition at Article 2(2) of Regulation (EU) 2015/2120 on measures concerning open internet access and retail charges for regulated intra-EU communications. The definition of ‘electronic communication service’ in Directive (EU) 2018/1972 is included in head 2(1) of Part 1 and defines ‘internet access service’ by reference to the definition in Regulation (EU) 2015/2120.

enables communication with a number or numbers in national or international numbering plans;¹⁸²

“number-independent interpersonal communications service” means an interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans.¹⁸³

“price” means money or a digital representation of value that is due in exchange for the supply of digital content or a digital service;¹⁸⁴

(2) A word or expression used in this Part that is also used in the Directive has, unless the context otherwise requires, the same meaning in this Part as it has in the Directive.

(3) A court shall construe this Part in a manner that gives effect to the Directive, and for this purpose the court shall have regards to the provisions of the Directive, including its preambles.

¹⁸² Article 3(6) of the DCD states that Article 19 of the Directive shall not apply ‘where a bundle within the meaning of Directive (EU) 2018/1972 includes elements of an internet access service as defined in point (2) of Article 2 of Regulation (EU) 2015/2120 of the European Parliament and of the Council or a number-based interpersonal communications service as defined in point (6) of Article 2 of Directive (EU) 2018/1972’. The definition of number-based interpersonal communications service in this head is based on that at Article 2(6) of Directive (EU) 2018/1972.

¹⁸³ Article 3(5)(b) of the DCD states that it shall not apply to electronic communications services ‘as defined in point (4) of Article 2 of Directive (EU) 2018/1972 with the exception of number-independent interpersonal communications services as defined in point 7 of Article 2 of that Directive’. The definition of ‘number-independent interpersonal communications service’ in subhead (1) here incorporates the definition at Article 2(7) of Directive (EU) 2018/1972.

¹⁸⁴ This definition implements the definition at Article 2(7) of the DCD. Recital (12) of the Directive states that ‘digital representations of value should also be understood to include virtual currencies, to the extent that they are recognised by national law’. It is not considered necessary to incorporate this clarification in the definition of ‘price’ as, to our knowledge, these currencies are not recognised under Irish law. ‘Price’ is not defined in the SGD or CRD.

Head 41 Application (Part 3)

(1) Subject to *subheads (2) to (7)* and *head 42*, this Part applies to –

- (a) contracts for the supply of digital content, and
- (b) contracts for the supply of a digital service.¹⁸⁵

(2) This Part applies also to any contract where the digital content or digital service which the trader supplies or undertakes to supply is developed in accordance with the consumer's specifications.¹⁸⁶

(3) *Subheads (1) and (2)* are subject to any provision of this Part that applies a head or part of a head only to some contracts for the supply of digital content or a digital service.¹⁸⁷

(4) With the exception of *heads 43 and 52*, this Part applies to any tangible medium which serves exclusively as a carrier of digital content.¹⁸⁸

(5) This Part shall not apply to digital content or a digital service which are –

- (a) incorporated in or inter-connected with goods with digital elements, and
- (b) provided with the goods under a sales contract concerning those goods,

irrespective of whether the digital content or digital service is supplied by the trader or by a third party.¹⁸⁹

¹⁸⁵ 'Contract for the supply of digital content' and 'contract for the supply of a digital service' are defined in head 2(1) of Part 1.

¹⁸⁶ Subhead (2) gives effect to Article 3(2) of the DCD. Though head 2(1) of Part 1 includes a definition of 'goods made to the consumer's specifications' for the purposes of provisions in Part 2 and Part 5, the definition is not suitable or adaptable to digital content or digital services.

¹⁸⁷ Examples of such provisions include those at heads 50(2) to 50(4) which provide for different rules on the trader's liability in the case of contracts that provide respectively for a single act of supply of digital content or a digital service and for continuous supply of the digital content or digital service.

¹⁸⁸ Subhead (4) gives effect to Article 3(3) of the DCD. Recital (20) states that 'this Directive should also apply to digital content supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, as well as to the tangible medium itself, provided that the tangible medium serves exclusively as a carrier of the digital content'. The heads that do not apply to digital content supplied on a tangible medium are head 43 on the supply of digital content and digital services and head 52 on the remedy for the failure of such supply. As stated in head 12(5) of Part 2, digital content supplied in tangible form is subject instead to the provisions on the delivery of, and the passing of risk in, goods in Chapter 4 of that Part.

¹⁸⁹ Subhead (5) gives effect to the first sentence of Article 3(4) of the DCD.

(6) In the event of doubt as to whether the supply of incorporated or inter-connected digital content, or of an incorporated or inter-connected digital service, forms part of the sales contract, the digital content or digital service shall be presumed to be covered by the sales contract regardless, where applicable, of the fact that the consumer has to consent to a licensing agreement with a third party in order to access the digital content or digital service.¹⁹⁰

(7) Subject to *subhead (5) and head 53(9)*, where a single contract between the same trader and the same consumer includes elements of the supply of digital content or a digital service in a bundle with elements of the provision of other services or goods, this Part shall only apply to the elements of the contract concerning the digital content or digital service.¹⁹¹

(8) The remedies provided for in *Chapter 3* of this Part are without prejudice to the right of the consumer to pursue other remedies where a contract for the supply of digital content or a digital service is not in compliance with the requirements of this Part provided that the consumer is not seeking to recover the same loss twice.¹⁹²

¹⁹⁰ Subhead (6) gives effect to the second sentence of Article 3(4) of the DCD. The final part of the subhead is taken from recital (21) of the Directive. This states that ‘ascertaining a bilateral contractual relationship between the seller and the consumer of which the supply of the incorporated or inter-connected digital content or digital service forms part should not be affected by the mere fact that the consumer has to consent to a licensing agreement with a third party in order to benefit from the digital content or digital service’. As this part of the recital offers an important clarification, it is appropriate for inclusion in the subhead. Head 12(6) of Part 2 contains a similar clarification.

¹⁹¹ Subhead (7) gives effect to the first paragraph of Article 3(6) of the DCD. The third paragraph of Article 3(6) states, that without prejudice to Article 107(2) of Directive (EU) 2018/1972 establishing the European Electronic Communications Code, the effects that the termination of one element of a bundle contract may have on the other elements of the contract shall be governed by national law. Head 53(9) deals with the effect of the termination of a contract for the supply of digital content or a digital service on other elements of a mixed or bundle contract other than a contract within the scope of Directive (EU) 2018/1972.

¹⁹² Recital (12) of the DCD states that the Directive should not affect national law to the extent that the matters concerned are not regulated by it. This subhead is the counterpart of head 12(7) of Part 2 and head 62(8) of Part 4. As many traders will be regulated only by one of these Parts, it was thought preferable to leave the provisions in each of the Parts rather than having a composite provision on other remedies in Part 1. A similar approach was taken in Chapters 2-4 of the UK Consumer Rights Act 2015.

(9) The other remedies referred to in *subhead (8)* include any of the following remedies that are available to the consumer¹⁹³ –

- (a) claiming damages,¹⁹⁴
- (b) withholding payment of any outstanding part of the price or a part thereof until the trader has fulfilled the trader’s obligations under this Part.¹⁹⁵
- (c) relying on the lack of conformity with the contract against a claim under the contract by the trader for payment of the price,
- (d) seeking to recover money paid to the trader for digital content or a digital service that do not comply with the requirements of this Part,
- (e) having a lack of conformity of the digital content or digital service with the contract remedied elsewhere and recovering from the trader all reasonable costs incurred in having the lack of conformity so remedied.

(10) Damages for any loss or detriment caused by an infringement by the trader of the provisions of this Part should put the consumer as much as possible in the position in which the consumer would have been if the trader had complied with those provisions.¹⁹⁶

¹⁹³ The remedies specified in subhead (9) are similar to those in head 12(8) of Part 2 and head 62(9) of Part 4. As in the corresponding provision in Part 2, the remedy of specific performance is omitted from subhead (9). The European Commission advised against its inclusion on the ground that the DCD provides a remedy in cases where the trader fails to supply the digital content or digital service. The remedies at paragraphs (a), (c) and (d) of the subhead are similar to those at sections 42(7)(a), (b) and (e) of the UK Consumer Rights Act 2015.

¹⁹⁴ Recital (73) of the DCD states that ‘the principle of the liability of the trader for damages is an essential element of sales contracts’ and therefore ‘the consumer should be entitled to claim compensation for detriment caused by a lack of conformity or a failure to supply the digital content or digital service’. As ‘such a right to damages already exists in all Member States, this Directive should be without prejudice to national rules on the compensation of consumers for harm resulting from infringement of those rules’.

¹⁹⁵ Recital (15) of the DCD states that ‘Member States should also remain free to regulate the rights of parties to withhold the performance of their obligations or part thereof until the other party performs its obligations. For example, Member States should be free to regulate whether a consumer in cases of a lack of conformity is to be entitled to withhold payment of the price or part thereof until the trader has brought the digital content or digital service into conformity.’ Article 13(6) of the Sales Directive which is given effect in heads 12(8)(b) of Part 2 provides that the consumer shall have the right to withhold payment of any outstanding part of the price until the seller has fulfilled his obligations under the Directive. In order to ensure consistency in the remedies for goods and for digital content and digital services, paragraph (b) implements the regulatory option for Member States in recital (15) of the DCD. The provisions relating to its operation in subheads (11) and (12) are similar to those at heads 12(11) and (11) of Part 2 and heads 62(11) and (12) of Part 4.

¹⁹⁶ The third sentence of recital (73) of the DCD states that ‘compensation (for damages) should put the consumer as much as possible into the position in which the consumer would have been had the digital content or digital service been duly supplied and been in conformity’. Subhead (10) incorporates this rule. The measure of damages it sets out is in line with the measure under Irish law. There is a similar provision at head 12(9) of Part 2 and head 62(10) of Part 4.

(11) In the case of a lack of conformity of digital content or a digital service with the sales contract, the part of the price withheld by the consumer under *subhead (9)(b)* shall be proportionate to the decrease in the value of the non-conforming digital content or digital service received by the consumer compared with the value the digital content or digital service would have if they were in conformity with the contract.

(12) The consumer shall exercise the right to withhold payment under *subhead (9)(b)* by means of a statement to the trader expressing the consumer's decision to withhold payment until the trader has fulfilled the trader's obligations under this Part.

Head 42 Contracts to which this Part does not apply

(1) This Part does not apply to any of the following contracts between a trader and a consumer:¹⁹⁷

- (a) contracts for the provision of services other than digital services regardless of whether digital forms or means are used by the trader to produce the output of the service or to deliver or transmit it to the consumer;
- (b) contracts for electronic communications services, with the exception of number-independent interpersonal communications services;
- (c) contracts for healthcare;
- (d) contracts for gambling;
- (e) contracts for financial services;
- (f) contracts for software offered by the trader under a free and open-source licence, where the consumer does not pay a price and the personal data provided by the consumer are exclusively processed by the trader for the purpose of improving the security, compatibility or interoperability of that specific software;
- (g) contracts for the supply of digital content where the digital content is made available to the general public other than by signal transmission as a part of a performance or event, such as digital cinematographic projections;
- (h) contracts for digital content provided by a public sector body in accordance with Directive (EU) 2019/1024 of the European Parliament and of the Council on open data and the re-use of public sector information;¹⁹⁸
- (i) contracts for digital representations of value.¹⁹⁹

¹⁹⁷ Subhead (1) gives effect to Article 3(5) of the DCD. A number of the services excluded from the scope of the Directive are defined in Article 3(5) by means of cross-references to definitions in a number of other EU Directives. Definitions of the excluded digital content or digital services are included either in head 40 of this Part or in head 2(1) of Part 1.

¹⁹⁸ Article 3(5)(h) of the DCD to which subhead (1)(h) gives effect refers to Directive 2003/98/EC on the re-use of public sector information. This Directive has since been replaced however by Directive (EU) 2019/1024 which Member States are required to bring into force by 17 July 2021 in advance of the 1 January 2022 date for the application of the Digital Content Directive.

¹⁹⁹ Subhead (1)(i) does not form part of Article 3(5) of the DCD. Recital (23) of the Directive states however that while digital representations of value such as electronic vouchers or e-coupons should be considered as a method of payment within the meaning of the Directive, these products have no other purpose and should not be considered digital content or a digital service. Subhead 1(i) provides accordingly that Part 3 will not apply to

(2) *Head 53(9)* and *head 58* do not apply where a bundle within the application of Directive (EU) 2018/1972 of the European Parliament and of the Council establishing a European Electronic Communications Code includes elements of an internet access service or a number-based interpersonal communications service together with digital content or a digital service.²⁰⁰

contracts for digital representations of value. The definition of ‘goods’ in head 2(1) of Part 1 provides that goods do not include coins and banknotes for use as currency.

²⁰⁰ The second paragraph of Article 3(6) of the DCD provides that Article 19 of the Directive shall not apply where a bundle within the meaning of Directive (EU) 2018/1972 includes elements of an internet access service as defined in Article 2(2) of Directive (EU) 2015/2120 or a number-based interpersonal communications services as defined in Article 2(6) of Directive (EU) 2018/1972. Article 19 of the Directive is given effect in head 58. As stated in the footnote to subhead (7), head 53(9) deals with the effect of the termination of one element of a bundle contract on other elements of the contract. While Article 3(6) refers to a bundle ‘within the meaning of Directive (EU) 2018/1972’, the term is not defined in that Directive. Recital (283) of Directive (EU) 2018/1972 states that ‘Bundles comprising at least either an internet access service or a publicly available number-based interpersonal communications service, as well as other services, such as publicly available number-independent interpersonal communications services, linear broadcasting and machine-to-machine services, or terminal equipment have become increasingly widespread and are an important element of competition. For the purposes of this Directive, a bundle should be considered to exist in situations where the elements of the bundle are provided or sold by the same provider under the same or a closely related or linked contract.’ Subhead (2) adds the words ‘together with digital content or a digital service’ to the provision at Article 3(6) of the Directive as Article 19 could only apply to a bundle if it also included digital content or a digital service. Recital (19) of the DCD states that ‘this Directive should not apply to internet access services.’ Number-based interpersonal communications services come within the exclusion of electronic communications services at Article 3(6) of the DCD. ‘Internet access service’ and ‘number-based interpersonal communications service’ are defined in head 41(1).

CHAPTER 2

CONSUMER RIGHTS IN CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT AND DIGITAL SERVICES

*Head 43 Supply of digital content or digital service*²⁰¹

(1) The trader shall supply the digital content or digital service to the consumer.²⁰²

(2) Unless the parties have agreed otherwise, the trader shall supply the digital content or digital service to the consumer without undue delay after the conclusion of the contract.²⁰³

(3) Where the contract provides for a continuous supply of the digital content or digital service over a period of time, the trader shall supply the digital content or digital service to the consumer throughout the duration of the contract period.²⁰⁴

(4) For the purposes of this head and *head 52*, continuous supply of digital content or a digital service shall not require its long-term supply and shall include the following:

- (a) the streaming of a video file regardless of the duration of the file; and
- (b) cases of supply where elements of the digital content or digital service are made available periodically or on several instances over the duration of the contract.²⁰⁵

²⁰¹ Head 45 gives effect to Article 5 of the DCD.

²⁰² Subhead (1) implements the first sentence of Article 5(1) of the DCD.

²⁰³ Subhead (2) implements the second sentence of Article 5(1).

²⁰⁴ Recital (57) of the DCD states that 'digital content or digital services could also be supplied to consumers in a continuous manner over a period of time. Continuous supply can include cases where the trader makes a digital service available to consumers for a fixed or indefinite period of time, such as a two-year cloud storage contract or an indefinite social media platform membership. The distinctive element of this category is the fact that the digital content or digital service is available or accessible to consumers only for the fixed duration of the contract or for as long as the indefinite contract is in force.' It is desirable to clarify that the trader's obligation to supply the digital content or digital service in such cases applies for the duration of the contract given that Article 8(4) of the Directive requires digital content supplied in contracts providing for continuous supply over a period of time to be in conformity with the contract throughout the duration of the contract period.

²⁰⁵ Subhead (4) incorporates the clarifications regarding 'continuous supply' at recital (57) of the DCD. Head 52 deals with remedies for the failure to supply digital content or a digital service in accordance with head 43.

(5) The trader shall have complied with the obligation to supply the digital content or digital service in accordance with this head when –

- (a) the digital content or any means suitable for accessing or downloading the digital content is made available or accessible to the consumer, or to a physical or virtual facility chosen by the consumer for that purpose, or
- (b) the digital service is made accessible to the consumer or to a physical or virtual facility chosen by the consumer for that purpose.²⁰⁶

(6) A consumer shall not be considered to have chosen a physical or virtual facility under *subhead (5)* if –

- (a) the facility is under the trader's control or is contractually linked to the trader, or
- (b) the facility chosen by the consumer was the only facility offered by the trader for the purpose of making the digital content or digital service available or accessible to the consumer.²⁰⁷

(7) Where the trader does not supply the digital content or digital service to the consumer in accordance with this head, the consumer shall have the right to the remedies specified in *head 52*.

²⁰⁶ Subhead (5) implements Article 5(2) of the DCD.

²⁰⁷ Subhead (6) incorporates the important clarification at recital (41) of the DCD regarding the circumstances in which a consumer should not be considered to have chosen a physical or virtual facility for the purpose of accessing digital content or a digital service.

*Head 44 Trader to have right to supply digital content or digital service*²⁰⁸

(1) The trader shall have the right to supply the digital content or digital service to the consumer at the time at which it is to be supplied.

(2) Where the trader does not have the right to supply the digital content or digital service the consumer shall have the right to terminate the contract.

(3) Where the consumer has the right to terminate the contract under *subhead (2)* –

(a) the consumer shall exercise the right in accordance with *head 55*, and

(b) the trader shall comply with the obligations in *head 56*.

(4) In case of dispute, it shall be for the trader to show that the trader had the right to supply the digital content or digital service.

²⁰⁸ While Article 10 of the DCD which is given effect in head (49) provides that consumers shall have the right to the Directive's remedies for lack of conformity with the contract in cases where a restriction resulting from the violation of the right of a third party, in particular an intellectual property right, prevents or limits the use of the digital content or digital service in accordance with the Directive's requirements, the Directive does not otherwise regulate the right of the trader to supply the digital content or digital service. Recital (12) of the DCD states that it should not affect national law to the extent that the matters concerned are not regulated by the Directive such as national rules on the formation, validity, nullity or effects of contracts or the legality of the digital content or digital service. Head 44 provides accordingly that the trader shall have the right to supply the digital content at the time at which it is to be supplied and that the consumer shall be entitled to terminate the contract where the trader does not have this right. The head is the counterpart of head 19(1) of Part 2. A similar provision can be found at section 41 of the UK Consumer Rights Act 2015.

*Head 45 Conformity of digital content or digital service with contract*²⁰⁹

- (1) The trader shall supply the digital content or digital service to the consumer in conformity with the contract.
- (2) Digital content and digital services are in conformity with the contract if the digital content or digital service comply with the requirements of *heads 46 to 48* where applicable, without prejudice to *head 49*.
- (3) Where the digital content or digital service supplied to the consumer is not in conformity with the contract, the consumer shall have the right to the remedies specified in *head 53*.
- (4) Where non-compliance with the requirements of the Data Protection Act 2018 constitutes a lack of conformity of the digital content or digital service under *head 46* or *head 47*, the consumer shall have the right to the remedies specified in *head 53*.²¹⁰

²⁰⁹ Head 45 gives effect to Article 6 of the DCD. The head is the counterpart of head 15 of Part 2.

²¹⁰ As the DCD applies to contracts where the consumer provides personal data to the trader and as such contracts are common in the digital economy, its application gives rise to issues within the sphere of Regulation (EU) 2016/679, the GDPR, which has been given effect here by the Data Protection Act 2018. Article 3(8) of the Directive states that Union law on the protection of personal data shall apply to any personal data processed in connection with contracts for the supply of digital content or digital services. It further provides that in particular the Directive shall be without prejudice to Regulation (EU) 2016/679 and Directive 2002/58/EC on privacy and electronic communications and that in the event of conflict between the Directive and Union law on the protection of personal data, the latter will prevail. Recital (48) of the Directive states however that ‘facts leading to a lack of compliance with requirements provided for by Regulation (EU) 2016/679, including core principles such as the requirements for data minimisation, data protection by design and data protection by default, may, depending on the circumstances, also be considered to constitute a lack of conformity of the digital content or digital service with subjective or objective requirements for conformity provided for in this Directive’. The recital gives a number of examples of such cases and states that where non-compliance with the GDPR also constitutes a lack of conformity under the Directive ‘the consumer should be entitled to the remedies for lack of conformity provided for by this Directive, unless the contract is already void or voidable under national law’. As this aspect of the inter-relation between the Directive and the GDPR may not be clear to consumers and traders, subhead (4) incorporates the clarification contained in recital (48) of the Directive.

*Head 46 Subjective requirements for conformity of digital content or digital service with contract*²¹¹

(1) In order to conform with the contract, the digital content or digital service shall, in particular and as applicable –

- (a) be of the description, quantity and quality, and possess the functionality, compatibility, interoperability, accessibility, continuity, security and other features, as required by the contract,²¹²
- (b) be fit for any particular purpose for which the consumer requires it and which the consumer made known to the trader at the latest at the time of the conclusion of the contract, and in respect of which the trader has given acceptance,
- (c) be supplied with all accessories, instructions, including on the installation or integration of the digital content or digital service,²¹³ and customer assistance as required by the contract, and
- (d) be updated as stipulated by the contract.

(2) The information which the trader is required to provide to the consumer in a distance or off-premises contract under *heads 79, 80 and 82 of Part 5* forms part of the contract for the supply of digital content or digital service and the digital content or digital service shall comply with any term of the contract deriving from this information that is additional to the requirements of *subhead (1)*.²¹⁴

²¹¹ Head 46 gives effect to Article 7 of the DCD. The head is the counterpart of head 16 of Part 2.

²¹² In line 2 of subhead (1)(a), ‘accessibility, continuity, security’ have been added to align the subjective conformity requirement at Article 8(1)(a) of the DCD which is given in effect in the paragraph with the corresponding objective conformity requirement at Article 8(1)(b) which is given effect in head 47(1)(b).

²¹³ While Article 7(3)(c) of the DCD which is given effect in subhead (1)(c) refers to instructions on ‘installation’, Article 9(b) refers to shortcomings in the ‘integration’ instructions provided by the trader. Article 9 is titled ‘Incorrection integration of the digital content or digital service’ and ‘integration’ is defined in Article 2(4) of the Directive and in head 40(1) of this Part. In order to avoid possible confusion over the two terms, subhead (3)(c) refers to both the installation and integration of the digital content or digital service.

²¹⁴ Heads 79-80 and 82 of Part 5 which give effect to Article 6(5) of the CRD provide that the pre-contractual information requirements for distance and off-premises contracts at Schedules 1 and 2 of the Scheme form part of the contract. Recital (42) of the Digital Content Directive states that ‘the requirements of the contract should include those resulting from pre-contractual information which, in accordance with Directive 2011/83/EU, form an integral part of the sales contract’. Head 16(2) of Part 2 contains a similar provision.

(3) Where the contract provides for a continuous supply of digital content or a digital service over a period of time, the digital content or digital service shall comply with the requirements of subheads (1) and (2) throughout the duration of the contract period.²¹⁵

²¹⁵ Subhead (3) does not form part of Article 7 of the DCD and has been added to align the subjective conformity requirements in Article 7 which are given effect in head 46 with the objective conformity provision at Article 8(4) which is given effect in head 47(3).

*Head 47 Objective requirements for conformity of digital content or digital service with contract*²¹⁶

(1) In addition to complying with the subjective requirements for conformity with the contract under *head 46*, the digital content or digital service shall²¹⁷ -

- (a) be fit for all of²¹⁸ the purposes for which digital content or digital services of the same type would normally be used taking into account, where applicable, any existing Union and national law, technical standards, or in the absence of such technical standards, applicable sector-specific codes of conduct,
- (b) be of the quantity and possess the qualities and performance features, including in relation to functionality, compatibility, accessibility, continuity and security, normal for digital content or digital services of the same type and which the consumer may reasonably expect, given the nature of the digital content or digital service and taking into account any public statement about the digital content or digital service²¹⁹ made by or on behalf of the trader, or other persons in previous links of the chain of transactions, particularly in advertising or on labelling unless the trader shows that –
 - (i) the trader was not, and could not reasonably have been, aware of the public statement in question,
 - (ii) by the time of conclusion of the contract, the public statement had been corrected in the same way as, or in a way comparable to how, it had been made, or
 - (iii) the decision of the consumer²²⁰ to acquire the digital content or digital service could not have been influenced by the public statement,

²¹⁶ Head 47 gives effect to Article 8 of the DCD. The head is the counterpart of head 17 of Part 2.

²¹⁷ Subhead (1) implements Article 8(1) of the DCD.

²¹⁸ While the words ‘all of’ before ‘the purposes’ in subhead 1(a) do not form part of the provision at Article 8(1)(a) of the DCD to which the paragraph gives effect, their inclusion is consistent with the Directive provision. A similar addition has been made in head 17(1)(a) of Part 2.

²¹⁹ While the words ‘about the digital content or digital service’ do not form part of the provision in the chapeau of Article 8(1)(b) of the DCD to which paragraph (b) gives effect, the ‘public statement’ referred to in the Directive provision can only be about the digital content or digital service.

²²⁰ While the words ‘of the consumer’ do not form part of the provision at Article 8(1)(b)(iii) of the DCD to which subparagraph (iii) gives effect, the ‘decision’ referred to in the Directive provision can only be a decision of the consumer.

- (c) where applicable, be supplied along with any accessories and instructions, including on the installation or integration of the digital content or digital service²²¹, which the consumer may reasonably expect to receive, and
- (d) comply with any trial version or preview of the digital content or digital service, made available by the trader before the conclusion of the contract.

(2) The trader shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to maintain²²² the digital content or digital service in conformity with the contract for the period of time –

- (a) during which the digital content or digital service is to be supplied under a contract, that provides for a continuous supply of the digital content or digital service over a period of time, or
- (b) that the consumer may reasonably expect under a contract that provides for a single act of supply, or a series of individual acts of supply, of the digital content or digital service, given the type and purpose of the digital content or digital service and taking into account the circumstances and nature of the contract.

(3) Where the consumer fails to install, within a reasonable time, updates supplied by the trader in accordance with *subhead (2)*, the trader shall not be liable for any lack of conformity resulting solely from the lack of the relevant update, provided that –

- (a) the trader informed the consumer about the availability of the update and the consequences of the failure of the consumer to install it, and
- (b) the failure of the consumer to install the update, or its incorrect installation by the consumer, was not due to shortcomings in the installation instructions provided by the trader.²²³

²²¹ The words ‘including on the installation or integration of the digital content or digital service’ in line 2 of subhead (1)(c) do not form part of the provision at Article 8(1)(c) of the DCD to which the paragraph gives effect. They have been included to align the objective conformity provision relating to instructions with the subjective conformity provision at head 46(1)(c). The reasons for the inclusion of a reference to both integration and installation instructions are outlined in the footnote to head 46(1)(c).

²²² Subhead (2) implements Article 8(2) of the DCD. Article 8(2) states the trader shall supply updates that are necessary to *keep* the digital content or digital service in conformity. ‘Keep’ and ‘maintain’ are both used in relation to ‘conformity’ in the Directive and recitals, but ‘maintain’ is used in all cases in this Part.

²²³ Subhead (3) implements Article 8(3) of the Digital Content Directive.

(4) Where the contract provides for a continuous supply of digital content or digital service over a period of time, the digital content or digital service shall be in conformity with the contract throughout the duration of that period.²²⁴

(5) There shall be no lack of conformity with the contract within the meaning of *subhead (1)* or *(2)* if, at the time of the conclusion of the contract, the consumer²²⁵ –

- (a) was specifically informed that a particular characteristic of the digital content or digital service was deviating from the objective requirements for conformity laid down in *subhead (1)* or *(2)*, including a lack of conformity caused by a restriction resulting from a violation of an intellectual property or other right of a third party²²⁶, and
- (b) expressly and separately accepted that deviation when concluding the contract.

(6) In case of dispute, it shall be for the trader to show that the consumer²²⁷ -

- (a) was specifically informed that a particular characteristic of the digital content or digital service was deviating from the objective requirements for conformity laid down in *subhead (1)* or *(2)*, and

²²⁴ Subhead (4) implements Article 8(4) of the Digital Content Directive.

²²⁵ Subhead (5) gives effect to Article 8(5) of the Digital Content Directive.

²²⁶ The words ‘including a lack of conformity arising from an intellectual property or other right of a third party’ do not form part of Article 8(5) of the Digital Content Directive which is given effect in subhead (5). Recital (53) of the Directive states however that ‘restrictions of the consumer’s use of the digital content or digital service in accordance with this Directive could result from limitations imposed by the holder of intellectual property rights in accordance with intellectual property law... Such a restriction could render the digital content or digital service in breach of the objective requirements for conformity laid down in this Directive... In such cases, the consumer should be able to claim the remedies provided for in this Directive for the lack of conformity against the trader who supplied the digital content or digital service. The trader should only be able to avoid such liability by fulfilling the conditions for derogating from the objective requirements for conformity as laid down in this Directive, namely only if the trader specifically informs the consumer before the conclusion of the contract that a particular characteristic of the digital content or digital service deviates from the objective requirements for conformity and the consumer has expressly and separately accepted that deviation’. Article 10 of the Directive which is given effect in Head 49 provides that where a restriction resulting from a violation of a third party right, in particular an intellectual property right, prevents or limits the use of the digital content or digital service in accordance with Articles 7 and 8, Member States shall ensure that the consumer is entitled to the Directive’s remedies for a lack of conformity. As restrictions arising from third party rights do not form an express part of the objective conformity requirements in Article 8 of the Directive, there is merit in clarifying that subhead (5) applies to such restrictions.

²²⁷ It is appropriate that it should be for the trader to show that the consumer was specifically informed about a deviation of the digital content or digital services from the objective conformity requirements in head 47 and that the consumer expressly accepted this deviation when concluding the contract. There is a similar provision at head 17(9) of Part 2.

(b) expressly and separately accepted that deviation when concluding the contract.

(7) Unless the parties have agreed otherwise, digital content or a digital service shall be supplied in the most recent version available at the time of the conclusion of the contract.²²⁸

(8) Any goods supplied under a contract for the supply of digital content or a digital service shall comply with *heads 15 to 20 of Part 2* and any service supplied under a contract for the supply of a digital content or digital service shall comply with *heads 64 to 66 of Part 4*.²²⁹

²²⁸ Subhead (7) implements Article 8(6) of the DCD.

²²⁹ Subhead (8) corresponds to the provisions at head 17(10) of Part 2 and head 66(6) of Part 4.

Head 48 Incorrect integration of digital content or digital service²³⁰

Any lack of conformity resulting from the incorrect integration of the digital content or digital service into the consumer's digital environment shall be regarded as lack of conformity of the digital content or digital service if –

- (a) the digital content or digital service was integrated by the trader or under the trader's responsibility, or
- (b) the digital content or digital service was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions provided by the trader.

²³⁰ Head 48 implements Article 9 of the Digital Content Directive. The head is the counterpart of head 18 of Part 2.

*Head 49 Third party rights*²³¹

Where a restriction resulting from a violation of any right of a third party, in particular an intellectual property right, prevents or limits the use of the digital content or digital service in accordance with *head 46* and *47*, the consumer shall be entitled to pursue the remedies for lack of conformity provided for in *head 53*.

²³¹ Head 49 gives effect to Article 10 of the DCD. The head is the counterpart of head 20 of Part 2.

*Head 50 Liability of trader*²³²

(1) The trader shall be liable for any failure to supply the digital content or digital service in accordance with *head 43*.

(2) Where a contract provides for a single act of supply, or a series of individual acts of supply, of digital content or a digital service, the trader shall be liable for any lack of conformity under *heads 46, 47 and 48*, including any lack of conformity resulting from a violation of an intellectual property or other right of a third party²³³, which exists at the time of supply of the digital content or digital service.²³⁴

(3) Where an update is supplied by the trader or by a third party under a contract providing for a single act of supply, or a series of individual acts of supply, of digital content or a digital service, the trader shall be liable for any lack of conformity -

(a) caused by the update which exists at the time of supply or installation of the update,
or

(b) caused by the failure of the trader to supply an update in accordance with *head 47(2)* at the time the update should have been supplied.²³⁵

²³² Head 50 gives effect to Article 11 of the DCD. The head is the counterpart of head 21 of Part 2.

²³³ The words 'including any lack of conformity resulting from a violation of an intellectual property or other right of a third party' do not form part of Article 11(2) of the Digital Content Directive which is given effect in subhead (2). As indicated in Article 6 of the Directive, third party rights are not included among the express conformity requirements in Articles 7 to 9. Under Article 10 however, restrictions resulting from the violation of a third-party right which prevent or limit the use of the digital content or digital service in accordance with Articles 7 and 8 entitle the consumer to the remedies for a lack of conformity. The inclusion of the words referred to is intended to clarify the trader's liability for a lack of conformity resulting from the violation of the right of a third party.

²³⁴ Article 11(2) of the Digital Content Directive provides that, if under national law, the trader is only liable for a lack of conformity that becomes apparent within a period of time after supply, that period shall be not less than two years from the time of supply. It further states that if the consumer's rights to the remedies for lack of conformity under Article 14 of the Directive are also subject or only subject to a limitation period, Member States shall ensure that such a period allows the consumer to exercise the remedies under Article 14 for any lack of conformity that exists at the time of supply and that becomes apparent within not less than two years from that time. In line with the approach taken to the corresponding provision in head 21(2) of Part 2, it is not proposed to subject consumers' right to remedies for digital content or digital services to a two-year or other liability or guarantee period. This right will be subject instead only to the six-year limitation period for contract claims in the Statute of Limitations 1957.

²³⁵ Article 11(2) of the Digital Content Directive provides that the trader's liability for a lack of conformity at the time of supply of the digital content or digital service is 'without prejudice to point (b) of Article 8(2)'. Article 8(2)(b) which is given effect in head 47(2) provides that the trader shall ensure that the consumer is informed

(4) Where the contract provides for a continuous supply of the digital content or digital service over a period of time, the trader shall be liable for a lack of conformity under *heads 46, 47 and 48*, that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the contract.²³⁶

(5) The consumer's right to a remedy in respect of a lack of conformity for which the trader is liable under this head applies in accordance with section 11(1) of the Statute of Limitations 1957.²³⁷

of and supplied with updates that are necessary to keep the digital content in conformity for the period of time that the consumer can reasonably expect. As a lack of conformity caused by an update cannot exist at the time of the initial supply of the digital content or digital service, subhead (3)(a) clarifies that the trader's liability in such a case is for any lack of conformity which exists at the time of supply of the update. Where a lack of conformity results from the trader's failure to supply a required update, subhead (3)(b) clarifies that the trader's liability applies at the time the update should have been supplied.

²³⁶ Subhead (4) gives effect to Article 11(3) of the Digital Content Directive. The second paragraph of this provision states that if under national law, the rights of consumers to remedies under Article 14 of the Directive are also or only subject to a limitation period, Member States shall ensure that such a period allows the consumer to exercise those remedies for any lack of conformity that occurs or becomes apparent during the period of time within which the digital content or digital service is to be supplied under the contract. In line with the approach taken in subhead (2) and in the corresponding provision in head 21, it is proposed that the consumer's right to a remedy in such cases should be subject only to the general six-year limitation period for contract claims under the Statute of Limitations 1957.

²³⁷ Subhead (5) provides that the consumer's right of action for a lack of conformity for which the trader is liable under head 50 is subject to the six-year period for contract claims under section 11 of the Statute of Limitations 1957.

*Head 51 Burden of proof*²³⁸

(1) Subject to subheads (2) to (4), the burden of proof with regard to whether the digital content or digital service was supplied in accordance with *head 43* shall be on the trader.²³⁹

(2) Where the contract provides for a single act of supply, or a series of individual acts of supply, of digital content or a digital service, the burden of proof with regard to whether the digital content or digital service supplied by the trader was in conformity with the contract at the time of supply shall be on the trader for a lack of conformity which becomes apparent within a period of one year from the time when the digital content or digital service was supplied.²⁴⁰

(3) Where the contract provides for continuous supply of the digital content or digital service over a period of time the burden of proof with regard to whether the digital content or digital service was in conformity with the contract during the period of time for which the digital content or digital service is to be supplied shall be on the trader for a lack of conformity which becomes apparent within that period.²⁴¹

(4) *Subheads (2) and (3)* shall not apply where the trader –

- (a) demonstrates that the digital environment of the consumer is not compatible with the technical requirements of the digital content or digital service, and

²³⁸ Head 51 implements Article 12 of the DCD. The head is the counterpart of head 22 of Part 2.

²³⁹ Subhead (1) gives effect to Article 12(1) of the DCD.

²⁴⁰ Subhead (2) gives effect to Article 12(2) of the DCD. The Directive provision deals with its application to contracts which provide for a single act of supply or a series of acts of supply of digital content or a digital service by means of a cross-reference to the provisions of Article 11(2) on these contracts, but the subhead specifies the type of contracts to which it applies in the interests of clarity for consumers and traders. While the corresponding provision in the Sales Directive gives Member States the option of a one-year or two-year period for the reversal of the burden of proof, Article 12(2) of the DCD provides for a fully harmonised one-year period.

²⁴¹ Subhead (3) gives effect to Article 12(2) of the DCD. The Directive provision deals with its application to contracts which provide for a continuous supply of digital content or a digital service by means of a cross-reference to the provision of Article 11(3) on these contracts, but subhead (3), like subhead (2), specifies the type of contracts to which it applies in the interests of clarity for consumers and traders.

(b) informed the consumer of such requirements in a clear and comprehensible manner before the conclusion of the contract.²⁴²

(5) The consumer shall cooperate with the trader, to the extent reasonably possible and necessary, to ascertain whether the cause of the lack of conformity of the digital content or digital service at the time specified, as applicable, in *heads 50(2) to head 50(4)* lay in the consumer's digital environment.²⁴³

(6) The obligation on the consumer to cooperate under subhead (5) shall be limited to the technically available means which are least intrusive for the consumer. Where the consumer fails to cooperate, and where the trader informed the consumer of the technical requirements of the digital content or digital service in a clear and comprehensible manner before the conclusion of the contract, the burden of proof with regard to whether the lack of conformity existed at the time specified, as applicable, in *heads 50(2) to head 50(4)* shall be on the consumer.²⁴⁴

(7) Nothing in this head shall prevent or restrict a consumer from exercising a remedy after twelve months from the date of supply of the digital content or digital service.

²⁴² Subhead (4) gives effect to Article 12(4) of the Digital Content Directive.

²⁴³ Subhead (5) gives effect to the first sentence of Article 12(5) of the Digital Content Directive.

²⁴⁴ Subhead (6) gives effect to the second and third sentences of Article 12(5) of the Digital Content Directive. The Directive provision states among other things that the burden of proof regarding a lack of conformity shall be on the consumer 'where the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract'. Though the reference to 'such requirement' is somewhat unclear, recital (59) makes it clear that this refers to the technical requirements of the digital content or digital service referred to in Article 12(4) of the Directive and transposed in subhead (4). Subhead (6) refers accordingly to the technical requirements of the digital content or digital service.

CHAPTER 3

CONSUMER REMEDIES IN CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT AND DIGITAL SERVICES

*Head 52 Remedy for failure to supply digital content or digital service*²⁴⁵

(1) Where the trader has failed to supply the digital content or digital service in accordance with *head 43*, the consumer shall call upon the trader to supply the digital content or digital service.²⁴⁶ If the trader then fails to supply the digital content or digital service without undue delay or within an additional period of time expressly agreed by the parties, the consumer shall have the right to terminate the contract.

(2) *Subhead (1)* shall not apply, and the consumer shall have the right to terminate the contract immediately, where –

- (a) the trader has declared, or it is equally clear from the circumstances, that the trader will not supply the digital content or digital service, or
- (b) the consumer and the trader have agreed, or it is clear from the circumstances attending the conclusion of the contract, that a specific time for the supply of the digital content or digital service is essential for the consumer and the trader fails to supply the digital content or digital service at or by that time.²⁴⁷

(3) Where the consumer has the right to terminate the contract under *subheads (1) or (2)* –

- (a) the consumer shall exercise the right in accordance with *head 55*, and
- (b) the trader shall comply with the obligations in *head 56*.²⁴⁸

²⁴⁵ Head 52 gives effect to Article 13 of the DCD.

²⁴⁶ Subhead (1) gives effect to Article 13(1) of the DCD.

²⁴⁷ Subhead (2) gives effect to Article 13(1) of the DCD.

²⁴⁸ Subhead (3) gives effect to Article 14(3) of the DCD.

*Head 53 Remedies for lack of conformity of digital content or digital service with contract*²⁴⁹

(1) In the event of a lack of conformity of the digital content or digital service with the contract, the consumer shall have the right to –

- (a) have the digital content or digital service brought into conformity,
- (b) receive a proportionate reduction of the price, or
- (c) terminate the contract,

under the conditions set out in this head.²⁵⁰

(2) The right of the consumer to have the digital content or digital service brought into conformity with the contract shall not apply where this would be impossible, or would impose disproportionate costs on the trader taking into account all the circumstances of the case including –

- (a) the value the digital content or digital service would have if there were no lack of conformity, and
- (b) the significance of the lack of conformity.²⁵¹

(3) The trader shall bring the digital content or digital service into conformity pursuant to *subhead (1)* –

- (a) free of charge,
- (b) within a reasonable time from the time the trader has been informed by the consumer about the lack of conformity, and
- (c) without any significant inconvenience to the consumer, taking account of the nature of the digital content or digital service and the purpose for which the consumer required the digital content or digital service.²⁵²

²⁴⁹ Head 55 gives effect to Article 14 of the DCD. The head is the counterpart of head 23 of Part 2.

²⁵⁰ Subhead (1) gives effect to Article 14(1) of the DCD.

²⁵¹ Subhead (2) gives effect to Article 14(2) of the DCD. Though it's not entirely clear from Article 14(2) that paragraphs (a) and (b) of the provision apply only to the disproportionate cost condition, the circumstances which are to be taken into account would not be applicable in cases where bringing the digital content or digital service into conformity would be impossible.

²⁵² Subhead (3) implements Article 14(3) of the DCD.

(4) The reasonable time for bringing the digital content or digital service into conformity with the contract under *subhead (3)(b)* shall correspond to the shortest possible time necessary for bringing the digital content or digital service into conformity and shall be objectively determined having regard to the nature and complexity of the digital content or digital service, the nature and severity of the lack of conformity and the effort needed to bring the digital content or digital service into conformity.²⁵³

(5) The consumer shall have the right to either a proportionate reduction of the price in accordance with *head 54* where the digital content or digital service is supplied in exchange for a payment of a price, or to exercise the right to terminate the contract in accordance with *head 55*, in any of the following cases:²⁵⁴

- (a) bringing the digital content or digital service into conformity is impossible or would impose disproportionate costs on the trader in accordance with *subhead (2)*;
- (b) the trader has not brought the digital content or digital service into conformity in accordance with *subhead (3)*;
- (c) the same or a different lack of conformity appears despite the trader's attempt to bring the digital content or digital service into conformity;²⁵⁵
- (d) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the contract; or
- (e) the trader has declared, or it is clear from the circumstances, that the trader will not bring the digital content or digital service into conformity within a reasonable time, or without significant inconvenience for the consumer.

(6) It shall be objectively determined whether the lack of conformity of the digital content or digital service under *subhead (5)(d)* is of such a serious nature as to justify an immediate

²⁵³ Subhead (4) is not part of Article 14 of the DCD but is taken instead from the related provision at recital (55) of the SGD. As this offers an important clarification of what constitutes a reasonable time for repair or replacement, its inclusion in this head is appropriate given that, as stated in recital (11) of the SGD and recital (20) of the DCD, the two Directives should complement each other.

²⁵⁴ Subhead (5) implements Article 14(4) of the DCD.

²⁵⁵ The words 'a same or different' do not form part of Article 14(4)(c) of the DCD which is given effect in subhead 5(c). As the Directive provision clearly refers to *any* lack of conformity that appears, the addition of these words provides a desirable clarification and is consistent with Article 14(4)(c).

price reduction or termination of the contract, having regard to the nature and severity of the lack of conformity, including whether that lack is such that –

- (a) the consumer cannot maintain confidence in the ability of the trader to bring the digital content or digital goods into conformity,
- (b) the ability of the consumer to make normal use of the digital content or digital service is severely affected and the consumer cannot reasonably be expected to trust that this would be remedied by the trader’s attempt to bring the digital content or digital service into conformity.²⁵⁶

(7) Where the digital content or digital service is supplied in exchange for the payment of a price, the consumer shall be entitled to terminate the contract only if the lack of conformity is not minor.²⁵⁷

(8) In case of dispute, it shall be for the trader to show that the lack of conformity of the digital content or digital service is minor.²⁵⁸

(9) Where digital content or a digital service are supplied to a consumer under a contract that provides also for the sale of goods or the supply of a service, the consumer shall have the right to terminate that contract if –

- (a) the consumer would be entitled to terminate the contract under this Part if it were a contract for the supply of digital content or a digital service only, and

²⁵⁶ This subhead is not part of Article 14 of the DCD but is taken instead from recital (52) of the SGD. This states that ‘in certain situations, the lack of conformity could be of such a serious nature that the consumer cannot maintain confidence in the ability of the seller to bring the goods into conformity, such as where the lack of conformity severely affects the ability of the consumer to make normal use of the goods and the consumer cannot be expected to trust that repair or replacement by the seller would remedy the problem.’ As this provides an important clarification of the criteria to be taken into account in considering whether a lack of conformity is of such a serious nature as to justify a right to immediate price reduction or termination of the contract, it is appropriate for inclusion in this head given the need for the complementarity of the two Directives referred to in referred to in recital (20) of the DCD.

²⁵⁷ Subhead (7) gives effect to the first part of Article 13(6) of the DCD. It applies only to contracts where the digital content or digital service is supplied for payment of a price as the alternative remedy of a price reduction is not available where the consumer provides personal data rather than paying a price.

²⁵⁸ Subhead (8) gives effect to the second part of Article 13(6) of the DCD.

(b) the value of the goods or service to the consumer would be materially reduced in the absence of the digital content or digital service.²⁵⁹

(10) Subhead (9) shall not apply to a bundle within the scope of Directive (EU) 2018/1972 of the European Parliament and of the Council establishing a European Electronic Communications Code which includes elements of an internet access service or a number-based interpersonal communications service together with digital content or a digital service.²⁶⁰

(11) Where a consumer terminates a contract for the supply of digital content or a digital service in accordance with this head and head 55, any ancillary contracts shall be automatically terminated without any costs to the consumer.²⁶¹

(12) When a trader is informed by a consumer in accordance with *head 55* of the consumer's decision to terminate a contract for the supply of digital content or a digital service, the trader shall inform any other trader with whom the consumer has an ancillary contract that is terminated in accordance with *subhead (11)*.²⁶²

(13) Where an ancillary contract is terminated in accordance with subhead (11) –
(a) the trader with whom the consumer has that contract shall comply with the obligations in head 56, and

²⁵⁹ Article 3(6) of the Digital Content Directive states among other things that 'without prejudice to Article 107(2) of Directive (EU) 2018/1972, the effects that the termination of one element of a bundle contract may have on other elements of the bundle contract shall be governed by national law.' A similar provision applies to sales contracts under head 23(10) of Part 2.

²⁶⁰ Head 42(2) provides that subhead (9) does not apply to bundle contracts within the scope of Directive (EU) 2018/1972 as the termination of these contracts is regulated by Article 107(2) of that Directive. Subhead (11) similarly exempts these contracts from the scope of subhead (10).

²⁶¹ Article 15(1) of the CRD provides that where a consumer exercises the right to terminate a distance or off-premises contract any ancillary contract shall be automatically terminated without any costs for the consumer. A similar provision applies under Article 14(4) of Directive 2008/48/EU on consumer credit. Where a consumer has the right to terminate a contract for the supply of digital content or a digital service under this Part, any ancillary contract should similarly be terminated. 'Ancillary contract' is defined for the purposes of this Part in head 40(1). Head 23(12) of Part 2 and head 68(15) of Part 4 contains a similar provision.

²⁶² Subhead (12) is based on Regulation 23(3) of S.I. 484/2013. Similar provisions can be found at head 23(13) of Part 2 and head 68(16) of Part 4.

(b) the consumer shall comply with the obligations in heads 55(2) and (3).

(14) Where any security has been provided under an ancillary contract that is terminated in accordance with *subhead (11)*, it is to be treated as never having had effect and any property lodged with the supplier or the third party solely for the purposes of that security shall be returned immediately by the supplier or third party.²⁶³

(15) A refusal or failure by a trader to provide a remedy to which a consumer has a right under this head shall be a prohibited commercial practice under section 67 of the Consumer Protection Act 2007 for the purposes of sections 71, 73, 75 and 85 of that Act.²⁶⁴

²⁶³ Subhead (14) is based on Regulation 23(4) of S.I. 484/2013. Similar provisions can be found at head 23(15) of Part 2 and head 68(18) of Part 4.

²⁶⁴ Article 21(1) of the SGD requires Member States to ensure that adequate and effective means exist to ensure compliance with the Directive. Subhead (15) provides accordingly that a refusal or failure by a trader to provide a remedy to which a consumer is entitled under head 53 may be the subject of enforcement action under the following provisions of the Consumer Protection Act 2007: section 71 (Civil relief by way of prohibition orders); section 73 (Undertakings with the Competition and Consumer Protection Commission); Contraventions of head 53 are not considered appropriate for the provisions of the Consumer Protection Act relating to criminal offences as whether or to what extent a consumer has a right to a remedy under the head may not be clear-cut and will require consideration on a case-by-case basis. Sections 71 and 73 of the 2007 Act are civil remedies, while section 75 permits a person served with a compliance notice to appeal it to the District Court. Similar provisions have been included in head 23(16) of Part 2 and head 68(19) of Part 4.

*Head 54 Price reduction*²⁶⁵

(1) This head applies where the consumer has the right to a price reduction under *head 53(5)*.

(2) The right of the consumer under this head is, as applicable, the right to –

- (a) require the trader to reduce in accordance with *subhead (3)* the price the consumer is required to pay under the contract, or
- (b) receive from the trader a reimbursement of the price paid by the consumer in excess of the amount of the reduction applicable under *subhead (3)*.²⁶⁶

(3) The reduction of the price shall be proportionate to the decrease in the value of the goods received by the consumer compared with the value that the goods would have if they were in conformity with the sales contract.²⁶⁷

(4) Where the contract provides that the digital content or digital service shall be supplied over a period of time in exchange for the payment of a price, the reduction in price shall apply to the period of time during which the digital content or digital service was not in conformity with the contract.²⁶⁸

(5) Where the consumer has the right to reimbursement under *subhead (2)(b)*, the trader shall reimburse the consumer in accordance with *head 57*.

²⁶⁵ Head 54 gives effect to Article 14(5) of the DCD.

²⁶⁶ Though Article 15 does not distinguish between the application of the price reduction provision in cases where the consumer has, or has not, already paid for the digital content or digital service, it is appropriate to provide for both situations in subhead (2). Similar provisions have been included in head 26(2) of Part 2 and head 69(2) of Part. A similar provision can also be found at section 24(1) of the UK Consumer Rights Act 2015. Subhead (5) provides that where the consumer has paid for the goods prior to having the right to a price reduction, the trader shall reimburse the consumer in accordance with head 29.

²⁶⁷ Subhead (3) gives effect to the first paragraph of Article 14(5) of the DCD.

²⁶⁸ Subhead (4) gives effect to the second part of Article 14(5) of the DCD.

*Head 55 Obligations of consumer in event of termination of contract*²⁶⁹

(1) Where the consumer has the right to terminate a contract for the supply of digital content or a digital service under *head 44, head 52 or head 53*, the consumer shall exercise that right by means of a statement to the trader expressing the decision to terminate the contract.

(2) After the termination of the contract, the consumer shall refrain from using the digital content or digital service or from making it available to third parties.

(3) Where the digital content was supplied on a tangible medium, the consumer shall on receipt of a request from the trader in accordance with *head 56* return the tangible medium to the trader without undue delay.²⁷⁰

(4) The consumer shall not be liable to pay for any use made of the digital content or digital service in the period prior to the termination of the contract during which the digital content or the digital service was not in conformity with the contract.

(5) Breach by a consumer of the obligation to return digital content supplied on a tangible medium in accordance with this head shall be actionable by the trader as a breach of statutory duty.²⁷¹

²⁶⁹ Head 56 gives effect to Articles 15 and 17 of the DCD. Subhead (1) implements Article 15 of Directive. Subheads (2) to (4) implement Article 17 of the Directive. The head is the counterpart of head 27 of Part 2.

²⁷⁰ Subhead (3) gives effect only to the first sentence in Article 17(2) of the DCD as the provision in the second sentence is more appropriately included in head 56 on the obligations of the trader in the event of the termination of the contract. The stipulation in the first sentence in Article 17(2) that the return of the tangible medium shall be at the expense of the trader is also included in head 56.

²⁷¹ Subhead (5) is based on Regulation 20(8) of S.I. 484/2013.

*Head 56 Obligations of trader in event of termination of contract*²⁷²

(1) Subject to *subhead (2)* and *subhead (4)*, where the consumer exercises the right under *head 44*, *head 52* or *head 53* to terminate a contract for the supply of digital content or a digital service, the trader shall reimburse the consumer in accordance with *head 57* for all payments made under the contract.²⁷³

(2) In cases where the contract provides for the supply of the digital content or digital service over a period of time in exchange for the payment of a price and the digital content or digital service had been in conformity with the contract for a period of time prior to the termination of the contract, the trader shall reimburse the consumer only for –

- (a) the proportionate part of the price paid corresponding to the period of time during which the digital content or digital service was not in conformity with the contract, and
- (b) any part of the price paid by the consumer in advance for any period of the contract that would have remained had the contract not been terminated.²⁷⁴

(3) Where the consumer terminates a contract under which digital content was supplied on a tangible medium, the trader may request the consumer to return the tangible medium to the trader without undue delay.²⁷⁵

(4) Where the trader requests the consumer to return a tangible medium in accordance with *subhead (3)* –

- (a) that request shall be made within 14 days of the day on which the trader was informed of the consumer's decision to terminate the contract, and

²⁷² Head 57 gives effect to Articles 16 and 18 of the DCD and also, as stated in the footnote to head 55(3), to the second part of Article 17(2). The head is the counterpart of head 28 of Part 2.

²⁷³ Subhead (1) gives effect to the first paragraph of Article 16 of the DCD.

²⁷⁴ Subhead (2) gives effect to the second paragraph of Article 16(1) of the DCD.

²⁷⁵ Subheads (4) and (5) give effect to those parts of Article 17(2) of the DCD that relate to the obligations of the trader in the event of the termination by the consumer of a contract for the supply of digital content or digital services.

- (b) the trader shall be liable for the cost of returning the tangible medium,
- (c) the trader may withhold the reimbursement of the payment made by the consumer for the digital content until the trader has received –
 - (i) the tangible medium back or,
 - (ii) if the trader so chooses, evidence provided by the consumer of having sent back the tangible medium.²⁷⁶

(5) In respect of personal data of the consumer, the trader shall comply with the obligations applicable under the Data Protection Act 2018.²⁷⁷

(6) The trader shall refrain from using any content other than personal data that was provided or created by the consumer when using the digital content or digital service supplied by the trader, except where such content –

- (a) has no utility outside the context of the digital content or digital service supplied by the trader,
- (b) relates only to the consumer's activity when using the digital content or digital service supplied by the trader,
- (c) has been aggregated with other data by the trader and cannot be disaggregated or can be disaggregated only with disproportionate effort
- (d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content.²⁷⁸

(7) Except in the situations referred to in *subheads 6(a), (b) or (c)*, the trader shall, at the request of the consumer, make available to the consumer any content other than personal

²⁷⁶ Recital (15) of the DCD states among other things that Member States should be free to regulate whether the trader is to be entitled to retain any reimbursement due to the consumer upon termination of the contract until the consumer complies with the obligation under the Directive to return the tangible medium to the trader. Article 16(b) of the Sales Directive which is given effect in head 28(1) of Part 2 entitles the trader to withhold reimbursement in the event of termination of the contract until the trader has received the goods back or, at the traders' choice, evidence that the goods have been sent back. In the interests of the complementarity of the provisions on goods and on digital content and digital services, subhead 4(c) incorporates a similar option for the trader.

²⁷⁷ Subhead (5) gives effect to Article 16(2) of the DCD.

²⁷⁸ Subhead (6) gives effect to Article 16(3) of the DCD.

data that was provided or created by the consumer when using the digital content or digital service supplied by the trader.²⁷⁹

(8) The consumer shall be entitled to retrieve the digital content referred to in *subhead (6)* –

- (a) free of charge,
- (b) without hindrance from the trader,
- (c) within a reasonable time, and
- (d) in a commonly used and machine-readable format.²⁸⁰

(9) Without prejudice to *subheads (7)* and *(8)*, the trader may prevent any further use of the digital content or digital service by the consumer, in particular by making the digital content or digital service inaccessible to the consumer or disabling the user account of the consumer.²⁸¹

²⁷⁹ Subhead (7) gives effect to the first part of Article 16(4) of the DCD.

²⁸⁰ Subhead (8) gives effect to the second part of Article 16(4) of the DCD.

²⁸¹ Subhead (9) gives effect to Article 16(5) of the DCD.

*Head 57 Time limits and means of reimbursement by trader*²⁸²

(1) Where reimbursement is owed to the consumer by the trader pursuant to a price reduction under *head 54* or the termination of the contract under *head 44, head 52 or head 53*, the trader shall carry out the reimbursement –

- (a) without undue delay and not later than 14 days of the date on which the trader was informed of the consumer’s decision to invoke the right to a price reduction or to terminate the contract,²⁸³
- (b) using the same means of payment as the consumer used to pay for the digital content or digital service, unless the consumer expressly agrees otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.²⁸⁴
- (c) without the imposition of any fee on the consumer in respect of the reimbursement.²⁸⁵

(2) A refusal or failure by a trader to make a reimbursement to which a consumer is entitled under this Part in accordance with subhead (1) shall be a prohibited act or practice under section 67 of the Consumer Protection Act 2007 for the purposes of sections 71, 73 and 75 of that Act.²⁸⁶

²⁸² Head 58 gives effect to Article 18 of the DCD. While similar reimbursement requirements apply under Parts 3, 4, and 5 of the Scheme, it was thought preferable to include these requirements with the remedies provisions to which they relate in each of these Parts.

²⁸³ Paragraph (a) gives effect to Article 18(1) of the DCD.

²⁸⁴ Paragraph (b) gives effect to Article 18(2) of the DCD. It is not entirely clear whether the stipulation in the final part of the Directive provision that ‘the consumer does not incur any fees as a result of such reimbursement’ applies to reimbursement made with the same means of payment as the consumer used to pay for the digital content or digital service, or to reimbursement made with a different means of payment expressly agreed by the consumer, or both. The inclusion in particular of a comma after ‘agrees otherwise’ in the Directive provision leaves the point unclear. The European Commission have since clarified that, in line with the provision in the second paragraph of Article 13(1) of the CRD on which the provision at Article 18(2) of the DCD is based, the comma after ‘agrees otherwise’ should be deleted.

²⁸⁵ Paragraph (c) gives effect to Article 18(3) of the DCD.

²⁸⁶ Subhead (2) is similar to the provision at head 29(2). The rationale for the provision is similar to that for head 53(15) outlined at the footnote to that subhead.

(3) Breach by a trader of the obligation to reimburse the consumer in accordance with this head shall be actionable by the consumer as a breach of statutory duty.²⁸⁷

²⁸⁷ Subhead (3) is based on the provision at Regulation 19(8) of S.I. 484/2013.

*Head 58 Modification of digital content or digital service*²⁸⁸

(1) Where the contract provides that the digital content or digital service is to be supplied or made accessible to the consumer over a period of time, the trader may modify the digital content or digital service beyond what is necessary to maintain the digital content or digital service in conformity with the contract in accordance with *heads 46 and 47* if the following conditions are met –

- (a) the contract allows, and provides a valid reason for, such a modification,
- (b) such a modification is made without additional cost to the consumer,
- (c) the consumer is informed in a clear and comprehensible manner of the modification, and
- (d) in the cases referred to in *subhead (2)*, the consumer is informed reasonably in advance on a durable medium of the features and time of the modification of –
 - (i) the right to terminate the contract in accordance with *subhead (2)*, or
 - (ii) the possibility to maintain the digital content or digital service without such a modification in accordance with *subhead (3)(b)*.²⁸⁹

(2) Subject to *subhead (3)*, the consumer shall be entitled to terminate the contract free of charge if the modification of the digital content or digital service negatively affects the consumer's access to, or use of, the digital content or digital service.²⁹⁰

(3) The right of the consumer to terminate the contract under *subhead (2)* shall not apply if

–

- (a) the negative effect of the modification on the consumer's access to, or use of, the digital content or digital service is only minor, or

²⁸⁸ Head 59 gives effect to Article 19 of the DCD.

²⁸⁹ Subhead (1) gives effect to Article 19(1) of the DCD.

²⁹⁰ Subhead (2) give effects to the first part of Article 19(2) to (4) of the DCD. The stipulation in Article 19(2) that the right of the consumer to terminate the contract applies unless the lack of conformity is only minor is included in *subhead (3)*.

(b) the trader has enabled the consumer to maintain the unmodified digital content or digital service without additional cost, and the unmodified digital content or digital service remains in conformity with the contract in accordance with *heads 46 and 47*.²⁹¹

(4) The effect of the modification of the digital content or digital service on the consumer's access to, or use of, the digital content or digital service shall be objectively ascertained having regard to the nature and purpose of the digital content or digital service and the quality, functionality, compatibility and other main features normal in digital content or a digital service of the same type.²⁹²

(5) Where the consumer has the right to terminate the contract under subhead (2), the consumer shall exercise the right –

(a) within 30 days of the receipt of the information of the modification or of the time when the digital content or digital service has been modified by the trader, whichever is later, and

(b) in accordance with *head 55*.²⁹³

(6) Where the consumer terminates the contract in accordance with *subhead (2)*, the trader shall comply with the obligations under *head 56* and shall make any reimbursement due to the consumer in accordance with *head 57*.²⁹⁴

(7) Where the trader has enabled the consumer to maintain the unmodified digital content or digital service and the digital content or digital service is not in conformity with the

²⁹¹ Subhead (3) gives effect to Article 19(4) of the DCD together with the stipulation in Article 19(2) about the non-application of the right to terminate where the negative effect of a modification of the digital content or digital service is only minor.

²⁹² Subhead (4) does not form part of Article 19 of the DCD but is taken from recital (75) of the Directive. This states among other things that the 'extent to which modifications negatively affect the use of or access to the digital content or digital service should be objectively ascertained having regard to the nature and purpose of the digital content or digital service and to the quality, functionality, compatibility and other main features which are normal in digital content or digital services of the same type'.

²⁹³ Subhead (5) gives effect to the second part of Article 19(2) of the DCD and also to Article 19(3) insofar as this applies to the obligations of the consumer in the event of the termination of the contract.

²⁹⁴ Subhead (6) gives effect to Article 19(3) of the Digital Content Directive insofar as this applies to the obligations of the trader in the event of the termination of the contract.

subjective requirements for conformity with the contract under head 46 or the objective requirements for conformity with the contract under head 47, the consumer shall be entitled to the remedies for lack of conformity in head 53.²⁹⁵

²⁹⁵ Subhead (7) does not form part of Article 19 but is taken from recital (77). This states among other things that 'if the digital content or digital service that the trader enabled the consumer to maintain is no longer in conformity with the objective or subjective requirements for conformity, the consumer should be able to rely on the remedies for a lack of conformity as provided for under this Directive'.

*Head 59 Right of redress*²⁹⁶

Where the trader is liable to the consumer because of

(a) any failure to supply the digital content or digital service, or

(b) a lack of conformity of the digital content or digital service

resulting from an act or omission by a person in previous links of the chain of transactions, the trader shall be entitled to pursue remedies against the person or persons liable in the chain of commercial transactions.

²⁹⁶ Head 59 gives effect to Article 20 of the Digital Content Directive. The head is the counterpart of head 34 of Part 2.

*Head 60 Exclusion or limitation of liability of trader*²⁹⁷

(1) A term of a contract for the supply of digital content or a digital service or of any other contract between the consumer and the trader shall not exclude or restrict the trader's liability under any of the following provisions:

- (a) *head 43 (Supply of digital content or digital service);*
- (b) *head 44 (Trader to have right to supply digital content or digital service);*
- (c) *head 45 (Conformity of digital content or digital service with contract);*
- (d) *head 46 (Subjective requirements for conformity of digital content or digital service with contract);*
- (e) *head 47 (Objective requirements for conformity of digital content or digital service with contract);*
- (f) *head 48 (Incorrect integration of digital content or digital service);*
- (g) *head 49 (Third party rights);*
- (h) *head 50 (Liability of trader);*
- (i) *head 51 (Burden of proof).*

(2) The reference in *subhead (1)* to excluding or restricting the trader's liability includes -

- (a) excluding or limiting a right or remedy in respect of a liability under a provision listed in *subhead (1)*,
- (b) making such a right or remedy or its enforcement subject to a restrictive or onerous condition,
- (c) allowing a trader to put a person at a disadvantage as a result of pursuing such a right or remedy,
- (d) excluding or restricting rules of evidence or procedure, or

²⁹⁷ Article 22 of the DCD states that 'unless otherwise provided for in this Directive, any contractual term which, to the detriment of the consumer, excludes the application of the national measures transposing this Directive, derogates from them, or varies their effect, before the failure to supply or the lack of conformity is brought to the trader's attention by the consumer, or before the modification of the digital content or digital service in accordance with Article 19, shall not be binding on the consumer'. Subhead (2) elaborates on what is meant by the exclusion or restriction of the trader's liability and subhead (3) provides that an agreement to submit differences to ADR is not to be regarded as such an exclusion. The head is the counterpart of head 35 of Part 2 and head 60 of Part 4. A broadly similar provision can be found at section 31 of the UK Consumer Rights Act 2015.

(e) preventing an obligation arising or limiting its extent.

(3) An agreement in writing to submit present or future differences to an alternative dispute resolution procedure is not to be regarded as excluding or restricting any liability for the purposes of this head.

(4) A trader who contravenes *subhead (1)* or *subhead (2)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in head 115 of Part 8.²⁹⁸

²⁹⁸ The rationale for subhead (4) is set out in the footnote to the corresponding provision at head 35(4) of Part 2.

PART 4²⁹⁹

CONTRACTS FOR THE SUPPLY OF A SERVICE

²⁹⁹ Part 4 will replace Part IV of the Sale of Goods and Supply of Services Act 1980 (SGO&SOSA 1980) for services contracts between a consumer and a trader. Part IV of the 1980 Act will continue to apply to services contracts between businesses. Schedule 6 provides for the amendment of Part IV to limit its application to B2B contracts.

CHAPTER 1 (Application Part 4)

Head 61 Interpretation (Part 4)

In this Part –

“ancillary contract” means a contract under which –

- (a) the consumer acquires services, goods, digital content or digital services related to a contract for the supply of a service, and
- (b) the services, goods, digital content or digital services are supplied by the trader or by a third party on the basis of an arrangement between that third party and the trader;³⁰⁰

“code of practice” means any code, agreement or set of rules or standards not imposed by or under an enactment which governs or defines the behaviour, practices and, where applicable, ethical standards, of traders (whether generally or in respect of one or more trade, business or professional sectors or commercial practices) who undertake to be bound by the code;³⁰¹

“supply” in relation to a service includes the rendering or provision of a service or facility;³⁰²

³⁰⁰ This definition is based on the definition at Article 2(15) of the CRD as given effect in Regulation 29(1) of S.I. 484/2013. It has been included for the purpose of the provision on the termination of ancillary contracts at head 68(15). Though provisions similar to head 68(15) are included in Parts 2 and 3, the format of the definition does not lend itself to the inclusion of a composite definition in Part 1.

³⁰¹ This definition is based on that at section 2(1) of the Consumer Protection Act 2007 which implements the definition at Article 2(f) of Directive 2005/29/EC on unfair commercial practices.

³⁰² This definition derives from section 2(2) of SOG&SOSA 1980, but omits the reference in that subsection to ‘an offer to supply’.

Head 62 Application (Part 4)

(1) This Part applies to service contracts other than contracts for the supply of a digital service.³⁰³

³⁰³ ‘Service contract’ is defined in head 2(1) of Part 1. As Part 3 of the Scheme which gives effect to the DCD provides for rights and remedies for contracts for digital services, this Part does not apply to these contracts. While the definition of ‘service contract’ does not exclude contracts for digital services as these contracts are considered to be service contracts in the CRD which is given effect in Part 5, head 3(6) of Part 1 states that Part 4 does not apply to digital services contracts notwithstanding the definition of ‘service contract’ in head 2(1). Subject to this exception, Part 4 applies to all contracts for the supply of a service. The application of the provisions on the supply of services in Part IV of SOG&SOSA 1980 is currently excluded or restricted in the case of the following sectors or activities:

- The definition of “service” in section 2 of the 1980 Act excludes meteorological or aviation services provided by the Minister for Transport, Tourism and Sport.
- Section 40(5) of the 1980 Act provides that nothing in section 40 shall invalidate a term of an agreement for the international carriage of passengers or goods by land, sea or air, including an agreement between parties whose places of business or residence are situated in the State.
- Section 40(6) of the 1980 Act provides that section 39 (Implied undertakings as to quality of service) shall not apply to a contract for the carriage of passengers or goods by land, sea, air or inland waterway from one place to another within the State until such date, as the Minister for Jobs, Enterprise and Innovation, after consultation with the Minister for Climate Action, Communication Networks and Transport, by order provides whether in relation to such contracts generally or in relation to contracts of a class defined in the order in such manner and by reference to such matters as the Minister, after such consultation, thinks proper. No such order has been made to date.
- Section 3(3) of the International Carriage of Goods by Road Act 1990 provides, among other things, that the Sale of Goods and Supply of Services Act 1980 shall not apply in relation to contracts for the carriage of goods if the carriage is carriage in relation to which the Convention on the Contract for the International Carriage of Goods by Road applies. The Convention would seem to be mainly applicable to contracts of carriage between businesses, particularly as it excludes furniture removal contracts.
- Section 26(3) of the Communications Regulation (Postal Services) Act 2011 provides that section 39 of the 1980 Act shall not apply in relation to the provision of a universal postal service by a universal postal service provider until such date as the Minister for Jobs, Enterprise and Innovation, following consultation with the Commission for Communications Regulation and the Minister for Climate Action, Communication Networks and Transport, by order so provides. No such order has been made to date. Prior to a legislative amendment enacted in 1999, section 39 did not apply to telecommunications services provided by Bord Telecom.

The amendments to Part IV of the 1980 Act provided for in head 6 of Part 1 and set out in Schedule 6 will mean that the provisions of Part IV would no longer apply to consumer contracts covered by Part 4 of this Scheme. These amendments in tandem with the definition of ‘service’ proposed in head 2(1) of Part 1 mean that the above exclusions and restrictions would no longer apply to consumer contracts for the supply of a service. The Sales Law Review Group concluded that exclusions from, or restrictions on, the statutory rules applying to contracts for the supply of a service had no place in a competitive economy or modern regulatory system and recommended their repeal. Head 62(4) provides however that the provisions of Part 4 are subject to any other enactment that defines or limits rights, obligations or liabilities in relation to a service and to the provisions of international conventions to which Ireland or the European Union are party. Head 62(5) provides that regulations made by the Minister for Enterprise, Trade and Employment may provide that Part 4 or a provision of the Part will not apply to a service prescribed in the regulations or will apply only in the circumstances specified in the regulations.

(2) Subject to *heads 13(1)(b), 23(10), 53(9), 65(1), 66(1) and 68(13)*, where a contract for the supply of a service is combined with a contract covered by another Part of this Act, this Part applies to the services element of the contract.³⁰⁴

(3) Nothing in this Part affects any enactment or rule of law that imposes additional or stricter obligations on the trader in relation to the supply of a service.³⁰⁵

(4) The provisions of this Part are subject to –

- (a) any other enactment that defines or limits rights, obligations or liabilities in relation to a service,
- (b) the provisions of international conventions to which Ireland or the European Union are party.³⁰⁶

(5) Regulations made by the Minister under this Act may provide that this Part or a provision of this Part shall not apply to a prescribed service or shall apply only in the circumstances specified in the regulations.³⁰⁷

³⁰⁴ Head 13(1)(b) provides that a sales contract includes a contract that has as its object both goods and services where the main purpose of the contract is the transfer of the ownership of the goods. Head 23(10) provides that where goods are sold under a contract that has other elements the consumer shall have the right in certain circumstances to terminate that contract if the consumer would be entitled to terminate the contract if it were a contract for the sale of goods only. Head 53(9) of Part 3 and head 68(13) of this Part contain similar provisions for contracts for the supply of digital content and digital services and contracts for the supply of a service respectively. Head 65(1) provides that any goods, digital content or digital services resulting from a service contract shall comply with the subjective conformity requirements set out in the head. Head 66(1) provides that any goods, digital content or digital service supplied under a service contract shall comply with the relevant conformity provisions of Parts 2 and 3 respectively.

³⁰⁵ In some sectors such as financial services, communications, utilities and travel, sector-specific legislation applies to traders who provide these services and to contracts for the services that they provide. Subhead (3) provides that this legislation and any applicable common law rules will apply in addition to the provisions of this Part. A similar provision can be found at section 53(1) of the UK Consumer Rights Act 2015.

³⁰⁶ Paragraph (a) of subhead (4) covers statutory provisions such as section 26A of the Solicitors (Amendment) Act 1994 which provides for a cap on the civil liability of solicitors and section 26 of the Communications Regulation (Postal Services) Act 2011 which limits the liability of a universal postal service provider. Paragraph (b) covers international conventions such as the Warsaw Convention which regulates liability for the international carriage by air of persons, luggage and goods. Where statutory provisions or international conventions of the kind specified in subhead (4) apply, they will take precedence over the provisions of Part 4.

³⁰⁷ While Part 4 will apply to all consumer contracts for the supply of a service other than digital services contracts, it is prudent to provide for its non-application or partial application to certain contracts if this should be required in future.

(6) The Minister may by regulations provide that this Part shall apply to contracts for the supply of a service where the consumer does not pay or undertake to pay the price of the service but provides or undertakes to provide personal data to the trader other than where the personal data provided by the consumer are exclusively processed for the purpose –

(a) of supplying the service in accordance with this Part, or

(b) for allowing the trader to comply with legal requirements to which the trader is subject

and the trader does not process those data for any other purpose.³⁰⁸

(7) The Minister may make regulations under *subhead (6)* only where the Minister is satisfied after consultations with such interested parties as the Minister considers appropriate that such contracts are being concluded on a significant scale and that their regulation would be in the interest of consumer protection and fair competition.

(8) The remedies provided for in *Chapter 2* and *Chapter 3* are without prejudice to the right of the consumer to pursue other remedies where a contract for the supply of a service is not in compliance with the requirements of this Part provided that the consumer is not seeking to recover the same loss twice.

(9) The other remedies referred to in *subhead (8)* include any of the following remedies that are available to the consumer³⁰⁹ –

³⁰⁸ The definition of ‘service contract’ in head 2(1) of Part 1 states that it means ‘a contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pay or undertakes to pay the price of the service’. Directive (EU) 770/2019 on contracts for the supply of digital content and digital services which is given effect in Part 3 of the Scheme applies where the consumer provides personal data to the trader as well as where the consumer pays a price for the digital content or digital service. The providers of non-digital services increasingly process personal data that have commercial value. Though the extension of Part 4 to contracts where personal data alone are provided by the consumer is not currently envisaged, it is desirable to provide for the possibility. A similar provision applying to sales contracts has been included at heads 12(13) and (14) of Part 2.

³⁰⁹ Provisions similar to subheads (8) and (9) have been included at heads 12(7) and (8) of Part 2 and at heads 41(8) and (9) of Part 3. As many traders will be regulated only by one of these Parts, it was thought preferable to include the provisions in each of these Parts rather than having a composite provision on other remedies in Part 1. The remedies at paragraphs (a), (c) and (d) are similar to those at sections 54(7)(a), (b) and (e) of the UK Consumer Rights Act 2015. As pre-payment in full is less common in services contracts than in sales contracts or digital content and digital services contracts, it is desirable that consumers are given a right in paragraph (b)

- (a) claiming damages,
- (b) withholding payment of any outstanding part of the price or a part thereof until the trader has fulfilled the trader's obligations under this Part,
- (c) relying on the lack of conformity with the contract against a claim by the trader under the contract for payment of the price,
- (d) seeking to recover money paid to the trader for a service that does not comply with the requirements of this Part,
- (e) having a lack of conformity of the service with the contract remedied elsewhere and recovering from the trader all reasonable costs incurred in having the lack of conformity so remedied.

(10) Damages for any loss or injury caused by an infringement by the trader of the provisions of this Part should put the consumer as much as possible in the position in which the consumer would have been if the trader had complied with those provisions.³¹⁰

(11) In the case of a lack of conformity of the service with the service contract, the part of the price withheld by the consumer under *subhead (9)(b)* shall be proportionate to the decrease in the value of the non-conforming goods received by the consumer compared with the value the service would have if it were in conformity with the contract.³¹¹

(12) The consumer shall exercise the right to withhold payment under *subhead (9)(b)* by means of a statement to the trader expressing the consumer's decision to withhold payment until the trader has fulfilled the trader's obligations under this Part.

to withhold payment where the trader has not fulfilled his obligations under this Part. The remedy at paragraph (e) is based on the provision at section 53(2) of the Sale of Goods Act 1893 (as substituted by section 21 of the Sale of Goods and Supply of Services Act 1980) and has also been included at head 12(8)(e) of Part 2 and head 41(9)(e) of Part 3.

³¹⁰ Subhead (3) is based on the third sentence of recital (61) of the SGD which is given effect in head 12(9) of Part 2. A similar statement at recital (73) of the DCD is included at head 41(10) of Part 3. The measure of damages set out in the recitals of the two Directives is in line with the measure under Irish law.

³¹¹ Similar conditions to those in subheads (11) and (12) apply to the right to withhold payment at heads 12(10) and (11) of Part 2 and at heads 41(11) and (12) of Part 3.

CHAPTER 2

CONSUMER RIGHTS IN CONTRACTS FOR THE SUPPLY OF A SERVICE

*Head 63 Supply of service*³¹²

- (1) The trader shall supply the service to the consumer.

- (2) Where the contract provides for the supply of the service for a fixed or indefinite period, the trader shall supply the service throughout the duration of the contract period.

- (3) The trader shall supply the service –
 - (a) at the time, or within the time period –
 - (i) agreed with the consumer or,
 - (ii) where applicable, specified in the information provided to the consumer in a distance or off-premises contract in accordance with *heads 79, 80 and 82 of Part 5*.

³¹² Head 63 first sets out in subhead (1) the requirement on the trader to supply the service to the consumer, the primary obligation under the contract. The subhead is the counterpart of head 32(1) of Part 2 and head 43(1) of Part 3. Subhead (2) requires the trader to supply the service for the duration of the contract period in contracts of a fixed or indefinite duration. Subheads (3) to (6) deal with the time at which the service is to be supplied. While this is not regulated by Part IV of SOG&SOSA 1980, consumers are subject to inconvenience and loss where traders do not provide a service at, or within, the agreed or specified time. The provisions at subheads (3) to (6) are based on those that apply to goods at head 32 of Part 2 and to digital content and digital services at head 43 of Part 3. They provide first that the trader shall supply the service at the time, or within the time period, agreed with the consumer, or the time or time period specified in the information provided to the consumer in accordance with the information requirements for distance and off-premises contracts at heads 79, 80 and 82 of Part 5. Where no such time or time period have been agreed or specified, the service is to be supplied within a reasonable time. Provisions similar to the reasonable time provision at subhead (3)(b) can be found at section 52(1) and (2) of the UK Consumer Rights Act 2015, section 30 of the New Zealand Consumer Guarantees Act 1993 and section 62 of Schedule 2 of the Australian Competition and Consumer Act 2010. Subhead (8) states that what is a reasonable time is a question of fact. Where the trader does not supply the service at or within the required time, subhead (4) provides that, subject to the exceptions set out in subhead (5), the consumer shall call upon the trader to supply the service within an appropriate additional period of time. If the trader does not supply the service within this additional time, or within a time agreed with, or stated by, the consumer to be essential for its supply, the consumer shall have the right to terminate the contract.

(b) where no such time or time period has been agreed or specified, within a reasonable time of the conclusion of the contract.

(4) If the trader does not supply the service at the time, or within the time period, specified in *subhead (3)*, the consumer shall call upon the trader to supply the service within an additional period of time appropriate to the circumstances.

(5) *Subhead (4)* does not apply if—

- (a) the trader has declared, or it is clear from the circumstances, that the trader will not supply the service, or
- (b) the supply of the service within the time period agreed with the consumer is essential, taking into account all the relevant circumstances at the time of the conclusion of the contract, or
- (c) the consumer has informed the trader prior to the conclusion of the contract that the supply of the service on or by a specified date is essential.

(6) Where the trader —

- (a) has refused to supply the service,
- (b) fails to supply the service within any additional period of time for its supply applicable under *subhead (4)*, or
- (c) fails to supply the service —
 - (iii) within the time agreed with the consumer under *subhead (5)(b)*, or
 - (iv) on or by the date the date specified by the consumer under *subhead (5)(c)*,

the consumer shall have the right to terminate the contract.

(7) Where the consumer has the right to terminate the contract under *subhead (6)* —

- (a) the consumer shall exercise the right in accordance with *head 70*, and
- (b) the trader shall comply with the obligations in *head 71*.

(8) What is a reasonable time for the supply of a service is a question of fact, the decision of a court on which shall be final.³¹³

³¹³ Section 56 of the Sale of Goods Act 1893 states that where any reference is made in the Act to a reasonable time, the question of what is a reasonable time is a question of fact. A finding of fact by a court is not usually subject to appeal to a higher court. A provision similar to subhead (8) can be found at section 52(3) of the UK Consumer Rights Act 2015.

*Head 64 Conformity of service with contract*³¹⁴

(1) The trader shall supply the service to the consumer in conformity with the contract.

(2) A service is in conformity with the contract if it complies with *heads 65 and 66*.

(3) Where the service supplied by the trader is not in conformity with the contract, the consumer shall have the right to the remedies specified in *Chapter 3*.

³¹⁴ This head sets out the obligation on the trader to supply a service in conformity with the contract in accordance with heads 65-66 and the consumer's right to the remedies specified in Chapter 3 if a service does not conform to the contract. The head is the counterpart of head 15 of Part 2 and head 45 of Part 3. Heads 65 and 66 follow the approach taken in the Sales and Digital Content Directives as given effect in heads 16-17 of Part 2 and heads 46-47 of Part 3 in distinguishing between the subjective and objective requirements of conformity with the contract.

Head 65 Subjective requirements for conformity of service with contract³¹⁵

- (1) In order to conform with the contract, the service, and where applicable any goods or digital content produced by or resulting from the service, shall –
- (a) comply with the terms of the contract agreed between the trader and the consumer,
 - (b) comply with any oral or written statement to the consumer by or on behalf of the trader about the service or the trader on which the consumer relied when –
 - (i) deciding to enter into the contract, or
 - (ii) making any decision about the service after entering into the contract,³¹⁶
 - (c) be reasonably fit for any purpose -

³¹⁵ Compared with the statutory regulation of consumer sales contracts, services contracts have been subject to less extensive or detailed regulation. While this may have been understandable at a time when the bulk of consumer expenditure went on goods, it is not an appropriate approach to the regulation of services' contracts in the present-day consumer environment. Head 65 aims to bring the statutory rules governing services contracts closer to those applying to sales contracts, while taking due account of the differences between the two types of transaction.

³¹⁶ Subhead (1)(b) is new. It seeks to provide protection for consumers in cases where a trader says or writes something to a consumer about the service or the trader which the consumer relies on but with which the trader does not subsequently comply – for example a claim by a broadband provider that broadband would be supplied at a specified speed expressed in megabits per second. Any such statement by a trader supplying a service would be subject under subhead (2), however, to anything said or written by the trader that qualified the information given to the consumer or any subsequent changes to the statement agreed between the parties. In line with the common law, 'mere puffs' - statements that are so vague that they have no legal effect – would not come within the scope of the provision. These provisions can be seen as a form of counterpart to the requirement on goods, digital content and digital services to comply with their description under heads 16(1)(a) of Part 2 and 46(1)(a) of Part 3 respectively and the requirement under heads 17(1)(d) of Part 2 and 47(1)(b) of Part 3 that assessments of whether goods, digital content or digital services comply with conformity requirements should take account of any public statements by the seller or producer about the qualities or features of the goods, digital content or digital services. A similar provision is to be found at section 55 of the UK Consumer Rights Act 2015. Subhead (1)(b) applies however where the consumer has relied on the statement made by the trader while the UK provision applies more broadly to any statement by the trader that is taken into account by the consumer.

³¹⁷ Under Part IV of the Sale of Goods and Supply of Services Act 1980, the supplier of a service is not liable if the service fails to achieve a purpose or result indicated by the consumer provided that the supplier has exercised due skill, care and diligence. The fitness for particular purpose provision at subhead (1)(c) can be seen as corresponding broadly to the fitness for purpose provisions applying to goods at head 16(1)(b) of Part 2 and to digital content and digital services at head 46(1)(b) of Part 3. It is in line with a recommendation of the Sales Law Review Group and is similar to a provision at section 29 of the New Zealand Consumer Guarantees Act 1993 and section 61(1) of Schedule 2 of the Australian Competition and Consumer Act 2010. Those enactments state that the provisions do not apply where the circumstances show that the consumer did not rely on the skill or judgement of the trader or that it was unreasonable for the consumer to so rely. Subhead 1(c), like the fitness for purposes rules for goods and digital content and digital services in Parts 2 and 3, is subject to a stronger requirement that the trader *accepts* the purpose made known by the consumer. If the supplier of a service considers that he or she is not in a position to provide a service reasonably fit for the purpose made known by the consumer, he or she can decline to accept the proposed purpose.

- (i) which the consumer made known to the trader at the latest at the time of the conclusion of the contract, and
 - (ii) which the trader accepted,³¹⁷
- (d) be of a nature and quality that -
- (i) can reasonably be expected to achieve any result that the consumer made known to the trader at the latest at the time of the conclusion of the contract as the result the consumer wishes the service to achieve, and
 - (ii) which the trader accepted.³¹⁸

(2) Any oral or written statement of the kind referred to in *subhead (1)(b)* is subject to –

- (a) any oral or written statement made to the consumer by the trader on the same occasion which qualified that statement, and
- (b) any subsequent change to that statement agreed between the consumer and the trader.

(3) The information that the trader is required to provide to the consumer in distance and off-premises contracts under *heads 79, 80 and 82 of Part 5* forms part of the contract for the supply of the service and the service shall comply with any term of the contract resulting from this information that is additional to the requirements of *subhead (1)*.³¹⁹

³¹⁸ Subhead (1)(d) is similar to provisions at section 29 of the New Zealand Consumer Guarantees Act 1993 and section 61(2) of Schedule 2 of the Australian Competition and Consumer Act 2010. As with subhead (1)(c), it is subject to a requirement that the result to be achieved by the service be accepted by the trader. It is important to note that the provision does not require the service to achieve a particular result, but rather that it should be such that it can reasonably be expected to achieve the required result. If the supplier of a service considers that he is not in a position to provide a service reasonably fit for the purpose required or one that can reasonably be expected to achieve the result made known by the consumer, he or she can decline to accept the result proposed by the consumer. The reasonableness of the consumer's expectation or desired purpose is to be objectively ascertained in accordance with head 3(10) of Part 1.

³¹⁹ Article 6(5) of the CRD which is given effect in heads 79(6) and 82(5) provides that the pre-contractual information requirements applying to distance and off-premises contracts under the Directive form part of the contract. These requirements are given effect in heads 79-80 and 82 of Part 5. Subhead (3) provides accordingly that the service shall comply with any terms of the contract resulting from these provisions that are additional to the other subjective conformity requirements of subhead (1). Head 16(2) of Part 2 contains a similar provision for sales contracts and head 46(2) contains a similar provision for digital content and digital services contracts.

(4) Where the contract provides for the supply of the service for a fixed or indefinite period of time, the service shall comply with the requirements of *subheads (1) to (3)* throughout the duration of the contract period.³²⁰

(5) In case of dispute, it shall be for the trader to show that –

- (a) the consumer did not rely on a statement of the kind referred to in *subhead (1)(b)*,
- (b) the trader did not accept a purpose relating to the service of the kind referred to in *subhead (1)(c)*,
- (c) the trader did not accept a result relating to the service of the kind referred to in *subhead (1)(d)*.³²¹

³²⁰As services provided under a service contract may be supplied over a period of time, subhead (4) provides that a service shall be supplied in accordance with the subjective conformity requirements of the head for the duration for the contract period. The subhead is the counterpart of head 32(2) of Part 2 and head 46(3) of Part 3.

³²¹ Subhead (5) places the onus on the trader to show that the consumer did not rely on a statement about the service made by the trader and that the trader did not accept a particular purpose or result made known by the consumer as the purpose or result that the consumer wished the service to achieve.

Head 66 Objective requirements for conformity with the contract

(1) In addition to complying with the subjective requirements for conformity under *head 65*, a contract for the supply of a service shall comply with the following requirements:³²²

- (a) the trader shall have the necessary skill to provide the service;
- (b) the trader shall provide the service with reasonable care and skill;
- (c) the trader shall provide the service in accordance with any applicable statutory or other binding legal rules;
- (d) any materials used in the supply of the service shall be sound and reasonably fit for the purpose for which they are required;
- (e) any goods supplied under the contract shall comply with *heads 16 to 19 of Part 2*;
and
- (f) any digital content or digital service supplied under the contract shall comply with *heads 44 and 46 to 48 of Part 3*.

(2) A trader who purports to provide a service to a higher standard of care and skill than that specified in *subhead (1)(b)* shall exercise that standard of care and skill in providing the service.³²³

³²² Section 39 of the Sale of Goods and Supply of Services Act 1980 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 into the contract:

- (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.

Subhead (1) essentially re-enacts this provision with some additions. First, paragraph (c) states that the service should be provided in accordance with any applicable statutory or other binding legal rules. While these rules would apply in any event, the paragraph brings them within the scope of the provisions on conformity with the contract. Secondly, paragraph (f) updates the provisions to provide that any digital content or services shall comply with the relevant provisions of Part 3.

³²³ Subheads (2) to (4) supplement the skill and care requirement in subhead (1) by requiring traders to comply with any higher standards that they purport to exercise, or which are set for, or by, a professional body of which the trader is a member, or which derive from a code of practice by which the trader is bound. 'Code of practice' is defined in head 61(1).

(3) A trader who is, or purports to be, a member of a professional body of service providers for which standards of care and skill have been set by that body or by a public authority shall exercise those standards of care and skill in providing the service.

(4) A trader who is, or purports, to be bound by a code of practice relating to the supply of a service shall abide by that code in providing the service.

(5) Where the contract provides for a continuous supply of the service for a fixed or indefinite period of time, the service shall be in conformity with the contract throughout the duration of that period.³²⁴

³²⁴ As service contracts can be provided over a period of time, subhead (5) provides that a service shall be supplied in accordance with the objective conformity requirements of the head for the duration of the contract period. The subhead is the counterpart of head 47(4) of Part 3.

Head 67 Reasonable price to be paid for service

(1) Where in a contract for the supply of a service -

- (a) the consumer has not paid a price or other consideration for the service,
- (b) the contract for the supply of a service does not fix the price to be paid for the service or provide for it to be fixed in a manner set out in the contract, or
- (c) a price or other consideration is not fixed by –
 - (i) an oral or written statement by or on behalf the trader of the kind referred to in *head 65(1)(b)*, or
 - (ii) the information that the trader is required to provide to the consumer in accordance with *heads 77, 79, 80 and 82 of Part 5*.

the price payable for the service shall be a reasonable price.³²⁵

(2) What is a reasonable price for a service is a question of fact, the decision of a court on which shall be final

³²⁵ A consumer contract will generally set out the price to be paid for the service. In the case of on-premises, distance and off-premises contracts within the scope of the CRD that are subject to Part 5, the trader is required to provide information on the total price of the goods or services (or where the nature of the goods, digital content or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated) before the consumer is bound by the contract. Where the price of a service has not been agreed and paid, or has not been fixed directly or indirectly at the time of the conclusion of the contract, subhead (1) provides that the consumer shall pay a reasonable price. While head 65(3) refers only to heads 79, 80 and 82 of Part 5 as it applies only to distance and off-premises contracts, subhead (1)(c)(ii) refers also to head 77 as it applies to the price information requirements for on-premises contract under the CRD which are given effect in that head. Similar provisions can be found at section 51 of the UK Consumer Rights Act 2015 and at section 31 of the New Zealand Consumer Guarantees Act 1993. Subhead (2) states that what is a reasonable price is a question of fact.

CHAPTER 3

CONSUMER REMEDIES FOR LACK OF CONFORMITY OF SERVICE WITH CONTRACT

*Head 68 Remedies for lack of conformity of service with contract*³²⁶

(1) In the event of a lack of conformity of the service with the contract, the consumer shall have the right to –

- (a) have the service brought into conformity with the contract,
- (b) receive a proportionate reduction of the price of the service in accordance with *head 69*, or
- (c) terminate the contract in accordance with *head 70*,

under the conditions set out in this head.³²⁷

(2) The consumer's right to have the service brought into conformity with the contract shall not apply where this would be impossible, or would impose disproportionate costs on the trader taking into account all the circumstances of the case including –

- (a) the value the service would have if there were no lack of conformity, and
- (b) the significance of the lack of conformity.³²⁸

³²⁶ There are well established statutory remedies for breaches of the provisions on consumer sales contracts in the Sale of Goods Acts 1893 and 1980 and in the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 which give effect to Directive 1999/44/EC on contracts for the sale of goods. Part IV of the Sale of Goods and Supply of Services Act 1980 by contrast is silent on the remedies for breach of the terms on the quality of services implied into services contracts by the Act and leaves them to be determined by reference to general contract law rules. Legislation on consumer contracts for the supply of services in other common law jurisdictions such as Australia, New Zealand and the UK includes provisions setting out the remedies available to consumers if services do not comply with the provisions of the legislation. The DCD which is given effect in Part 3 contains detailed remedies where contracts for digital services do not comply with the Directive's provisions on the supply of digital services and on their conformity with the contract. It is not desirable or defensible to have statutory remedies for sales and digital content and digital services but not for the many types of services contracts concluded by consumers. The remedies set out in Part 3 are based with appropriate modifications on those which apply to sales contracts in Part 2 and to digital content and digital services contracts in Part 3. Head 68 sets out the remedies for lack of conformity in service contracts and the conditions that apply to them. The head is the counterpart of head 23 of Part 2 and head 53 of Part 3.

³²⁷ Subhead (2) sets out the circumstances in which the right to have the service brought into conformity will not apply. Subhead (13) provides that the right to terminate the contract will not apply where the lack of conformity with the contract is minor.

³²⁸ Subhead (2) is the counterpart of head 53(2) of Part 3.

- (3) The trader shall ensure that the service is brought into conformity with the contract -
- (a) within a reasonable time,
 - (b) without significant inconvenience to the consumer, and
 - (c) free of charge to the consumer.³²⁹

(4) The reasonable time for bringing the service into conformity under *subhead (3)(a)* shall correspond to the shortest possible time necessary for remedying the lack of conformity of the service and shall be objectively determined having regard to the nature and complexity of the service, the nature and severity of the lack of conformity and the effort needed to bring the service into conformity.³³⁰

(5) Any question as to what is a significant inconvenience to the consumer for the purposes of *subhead (3)(b)* shall be determined by reference to –

- (a) the nature of the service,
- (b) the purpose for which it is required by the consumer, and
- (c) other relevant circumstances.

(6) For the purposes of *subhead (3)(c)*, “free of charge” means free of any costs necessarily incurred in remedying the lack of conformity of the service with the contract, including the cost of labour and materials.³³¹

(7) Where bringing the service into conformity with the contract requires the removal of goods that had been installed in a manner consistent with their nature and purpose before the lack of conformity became apparent, or where such goods have to be replaced, the trader’s obligation to bring the service into conformity shall include –

- (a) the removal of the non-conforming goods and the installation, as applicable, of replacement goods or repaired goods, or

³²⁹ Subhead (3) is similar to head 25(2) of Part 2 and head 53(3) of Part 3.

³³⁰ Subhead (4) is similar to head 25(3) of Part 2 and head 53(4) of Part 3.

³³¹ This definition is similar to the definition of ‘free of charge’ at head 11(1) of Part 2 which implements the definition at Article 2(14) of the SGD, but omits the references to the costs of carriage and postage as these are of limited relevance in service contracts.

(b) bearing the costs of that removal and installation.³³²

(8) The consumer shall have the right to either a proportionate reduction of the price in accordance with *head 69* or to terminate the contract in accordance with *head 70* where ³³³

- (a) the trader does not have the necessary skill to provide the service,
- (b) bringing the service into conformity with the contract is impossible or would impose disproportionate costs on the trader in accordance with *subhead (2)*,
- (c) the trader has declared, or it is clear from the circumstances, that the trader will not bring the service into conformity with the contract within a reasonable time or without significant inconvenience to the consumer,
- (d) the trader fails to remedy the lack of conformity within a reasonable time or without significant inconvenience to the consumer in accordance with *subhead (3)*,
- (e) the same or a different lack of conformity becomes apparent despite the trader having attempted to bring the service into conformity;³³⁴
- (f) the lack of conformity is of such a serious nature as to justify an immediate price reduction or the termination of the contract;
- (g) the service, or any goods produced by or resulting from the service, are unsafe.

(9) Where a lack of conformity of the service becomes apparent despite the trader having attempted to bring the service into conformity, it shall be objectively determined under *subhead (3)(e)* whether the consumer shall be entitled to either a reduction of the price or to exercise the right to terminate the contract or shall be required to accept a further

³³² This provision is similar to head 25(6) of Part 2 which gives effect to Article 14(3) of the Sales Directive. As remedying the lack of conformity of some services contracts may require the removal of non-conforming goods and the installation of replacement or repaired goods, the provision is appropriate for inclusion in this head.

³³³ Subhead (8) is the counterpart of head 23(4) of Part 2 and head 53(5) of Part 3.

³³⁴ While head 53(5) of Part 3 gives consumers the right to a price reduction or to terminate a contract for digital content or digital services after a single failed attempt by the trader to remedy a lack of conformity of the digital content or digital service, heads 23(4) and (7) of Part 2 provide that in the case of sales contracts the right to these remedies may apply only after more than one attempt to remedy the lack of conformity of the goods. Subheads (8)(e) and (9) follow the approach of the provisions on sales contracts as there may be circumstances in which the right to a price reduction or to terminate the contract after one failed attempt to remedy the lack of conformity of a service contract would be disproportionate. As a lack of conformity can generally be remedied more readily in contracts for digital content or digital service, it is appropriate in the case of these contracts to provide for a right to price reduction or termination after one unsuccessful attempt to remedy a lack of conformity.

attempt or attempts by the trader to bring the service into conformity with the contract taking all the circumstances into account, including –

- (a) the type and value of the service,
- (b) the nature and significance of the lack of conformity, and
- (c) whether the consumer can reasonably be expected to maintain confidence in the ability of the trader to bring the service into conformity, in particular where the same lack of conformity appears twice.

(10) It shall be objectively determined under *subhead (3)(f)* whether the lack of conformity of the service is of such a serious nature as to justify an immediate price reduction or termination of the contract having regard to the nature and severity of the lack of conformity, including whether that lack is such that –

- (a) the consumer cannot maintain confidence in the ability of the trader to bring the service into conformity,
- (b) the ability of the consumer to make normal use of the service, or of any goods or digital content produced by or resulting from the service, is severely affected, and the consumer cannot reasonably be expected to trust that this would be remedied by the trader.³³⁵

(11) The right of the consumer to terminate the contract shall not apply where the lack of conformity of the service with the contract is minor.³³⁶

(12) In case of dispute, it shall be for the trader to show that the lack of conformity of the service is minor.

³³⁵ Subhead (10) is the counterpart of head 23(9) of Part 2 and of head 53(8) of Part 3.

³³⁶ There is no right under head 25 of Part 2 to terminate sales contracts for a minor lack of conformity. There is no right similarly under head 55 of Part 3 to terminate digital content or digital services contracts for a minor lack of conformity. It would be inappropriate accordingly to permit termination of a service contract for a minor lack of conformity. As with sales and digital content and digital services contracts, it would be up to the trader to show that a lack of conformity was minor.

(13) Where a service is supplied to the consumer under a contract that provides also for the supply of goods, digital content or a digital service, the consumer shall have the right to terminate that contract if –

- (a) the consumer would be entitled to terminate the contract under this Part if it were a contract for the supply of a service only, and
- (b) the value of the goods, digital content or digital service to the consumer would be materially affected in the absence of the service.³³⁷

(14) *Subhead (13)* shall not apply where a bundle of electronic communications services or a bundle of such services and terminal equipment within the application of Article 107 of Directive (EU) 2018/1972 of the European Parliament and of the Council establishing a European Electronic Communications Code includes elements of an internet access service or a number-based interpersonal communications service.³³⁸

(15) Where a consumer terminates a contract for the supply of a service in accordance with this head and head 70, any ancillary contracts shall be automatically terminated without any costs to the consumer.³³⁹

(16) When a trader is informed by a consumer in accordance with *head 70* of the consumer's decision to terminate a service contract, the trader shall inform any other trader

³³⁷ Subhead (11) is the counterpart of head 23(10) of Part 2 and of head 53(9) of Part 3.

³³⁸ As Article 107 of Directive (EU) 2018/1972 establishing a European Communications Code regulates the termination of the bundled contracts for electronic communications services, these contracts should not come within the scope of subhead (11). Head 23(11) of Part 2 and head 53(10) of Part 3 contain similar provisions. If Directive (EU) 2018/1972 is transposed before the enactment of this Bill, the reference to the Directive will be replaced in subhead (12) by a reference to the transposing enactment.

³³⁹ Article 15(1) of the CRD provides that where a consumer exercises the right to terminate a distance or off-premises contract any ancillary contract shall be automatically terminated without any costs for the consumer. A similar provision applies under Article 14(4) of Directive 2008/48/EU on consumer credit. Where a consumer has the right to terminate a contract for the supply of a service under this Part, any ancillary contract should similarly be terminated. 'Ancillary contract' is defined for the purposes of this Part in head 40(1). Head 23(12) of Part 2 and head 53(11) of Part 3 contain similar provisions.

³⁴⁰ Subhead (16) is based on Regulation 23(3) of S.I 484/2013. Similar provisions can be found at head 23(13) of Part 2 and head 53(12) of Part 3.

with whom the consumer has an ancillary contract that is terminated in accordance with *subhead (15)*.³⁴⁰

(17) Where an ancillary contract is terminated in accordance with subhead (15) –

(a) the trader with whom the consumer has that contract shall comply with the obligations in head 71, and

(b) the consumer shall comply with the obligation in head 70(3).

(18) Where any security has been provided under an ancillary contract that is terminated in accordance with *subhead (15)*, it is to be treated as never having had effect and any property lodged with the supplier or the third party solely for the purposes of that security shall be returned immediately by the supplier or third party.³⁴¹

(19) A refusal or failure by a trader to provide a remedy to which a consumer has a right under this head shall be a prohibited commercial practice under section 67 of the Consumer Protection Act 2007 for the purposes of sections 71, 73 and 75 of that Act.³⁴²

³⁴¹ Subhead (18) is based on Regulation 23(4) of S.I. 484/2013. Similar provisions can be found at head 23(15) of Part 2 and head 53(14) of Part 3.

³⁴² Like the corresponding provisions at head 23(16) of Part 2 and head 53(15) of Part 3, subhead (19) provides that a refusal or failure by a trader to provide a remedy to which a consumer is entitled under head 68 may be the subject of enforcement action under the following provisions of the Consumer Protection Act 2007: section 71 (Civil relief by way of prohibition orders); section 73 (Undertakings with the Competition and Consumer Protection Commission); and section 75 (Compliance notices). Contraventions of head 68 are not considered appropriate for the provisions of the Consumer Protection Act relating to criminal offences as whether or to what extent a consumer has a right to a remedy under the head may not be clear-cut and will require consideration on a case-by-case basis. Sections 71 and 73 of the 2007 Act are civil remedies, while section 75 permits a person served with a compliance notice to appeal it to the District Court..

*Head 69 Price reduction*³⁴³

(1) This head applies where a consumer has the right to a price reduction under *head 68(8)*.

(2) The right of the consumer under this head is the right to –

- (a) require the trader to reduce by an appropriate amount the price the consumer is required to pay under the contract, or
- (b) receive from the trader a reimbursement of the price paid by the consumer in excess of the amount of the reduction applicable under subhead (3).³⁴⁴

(3) The reduction of the price shall be proportionate to the decrease in the value of the service supplied to the consumer compared to the value that the service would have if it were in conformity with the contract.

(4) Where the contract provides that the service shall be supplied over a period of time, the reduction in the price shall apply to the period of time during which the service was not in conformity with the contract.

(5) Where the consumer has the right to reimbursement under subhead (2)(b), the trader shall reimburse the consumer in accordance with *head 72*.

³⁴³ Head 69 is the counterpart of head 26 of Part 2 and head 54 of Part 3.

³⁴⁴ A provision similar to subhead (2) can be found at section 24(1) of the UK Consumer Rights Act 2015.

*Head 70 Obligations of consumer in event of termination of service contract*³⁴⁵

(1) This head applies where a consumer has the right to terminate the contract under *head 68(8)*.

(2) The consumer shall exercise that right by means of a statement to the trader expressing the decision to terminate the contract.

(3) A consumer who exercises the right to terminate the contract shall –

- (a) make any goods or materials supplied under the contract available for collection by the trader, or where there is an agreement for the consumer to return the goods or materials, return them as agreed,
- (b) refrain from using any digital content or digital service supplied under the contract or from making it available to third parties.

(4) Breach by a consumer of the obligation to return goods or materials in accordance with this head shall be actionable by the trader as a breach of statutory duty.³⁴⁶

³⁴⁵ Head 70 is the counterpart of head 27 of Part 2 and head 55 of Part 3.

³⁴⁶ Subhead (4) is based on Regulation 20(8) of S.I. 484/2013.

*Head 71 Obligations of trader in event of termination of service contract*³⁴⁷

(1) Where the the consumer exercises the right to terminate the contract, the trader shall reimburse the consumer for all payments made under the contract in accordance with *head 72*.

(2) In a case where the contract provides for the supply of the service over a period of time, the trader shall reimburse the consumer only for –

- (a) the proportionate part of the price paid corresponding to the period of time during which the service was not in conformity with the contract, and
- (b) any part of the price paid by the consumer in advance for any period of the contract that would have remained had the contract not been terminated.³⁴⁸

³⁴⁷ Head 71 is the counterpart of head 28 of Part 2 and head 56 of Part 3.

³⁴⁸ Subhead (2) is similar to the provision at head 56(2) of Part 3.

*Head 72 Time limits and means of reimbursement by trader*³⁴⁹

(1) Where reimbursement is owed to the consumer by the trader pursuant to a price reduction under *head 69* or the termination of the contract under *heads 63* or *68*, the trader shall make the reimbursement –

- (a) without undue delay and not later than 14 days of the date on which the trader was informed of the consumer’s decision to invoke the right to a price reduction or to terminate the contract,
- (b) using the same means of payment as the consumer used to pay for the service, unless the consumer expressly agrees otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.
- (c) without the imposition of any fee on the consumer in respect of the reimbursement.

(2) A refusal or failure by a trader to make a reimbursement to which a consumer is entitled under this Part in accordance with subhead (1) shall be a prohibited act or practice under section 67 of the Consumer Protection Act 2007 for the purposes of sections 71, 73 and 75 of that Act.³⁵⁰

(3) Breach by a trader of the obligation to reimburse the consumer in accordance with this head shall be actionable by the consumer as a breach of statutory duty.³⁵¹

³⁴⁹ Head 72 is the counterpart of head 29 of Part 2 and head 57 of Part 3.

³⁵⁰ Subhead (2) is similar to the provision at head 68(19), the rationale for which is set out in the footnote to that subhead. Similar provisions can be found at head 29(2) of Part 2 and head 57(2) of Part 3.

³⁵¹ Subhead (3) is based on the provision at Regulation 19(8) of S.I. 484/2013.

*Head 73 Exclusion or limitation of liability of trader*³⁵²

(1) A term of a contract for the supply of a service or of any other contract between the consumer and the trader shall not exclude or restrict the trader's liability under any of the following provisions:

- (a) *head 63* (Supply of service),
- (b) *head 64* (Conformity of service with contract),
- (c) *head 65* (Subjective requirements for conformity of service with contract)
- (d) *head 66* (Objective requirements for conformity of service with contract)
- (e) *head 67* (Reasonable price to be paid for service).

(2) The reference in *subhead (1)* to excluding or restricting the trader's liability includes -

- (a) excluding or limiting a right or remedy in respect of a liability under a provision listed in *subhead (1)*,
- (b) making such a right or remedy or its enforcement subject to a restrictive or onerous condition,
- (c) allowing a trader to put a person at a disadvantage as a result of pursuing such a right or remedy,
- (d) excluding or restricting rules of evidence or procedure, or
- (e) preventing an obligation or duty arising or limiting its extent.

³⁵² This head makes an important change to the existing law in line with the recommendation of the Sales Law Review Group. Section 40 of the Sale of Goods and Supply of Services 1980 provides that the implied undertaking as to the quality of services in section 39 of the Act can be negated or varied by an express term of the contract where (1) the recipient of the service deals as consumer and (2) the express term is fair and reasonable and has been specifically brought to the consumer's attention. Head 73 provides that the trader cannot exclude or restrict liability under the provisions of Part 4. The head would bring the statutory rules governing exclusion clauses in services contracts into line with those that currently apply to sales contracts under section 55 of the Sale of Goods Act 1893 and with those that apply to sales contracts under head 35 of Part 2 and to digital content and digital services contracts under head 60 of Part 3. Like the other provisions of Part 4, this head is also subject to the exception at head 62(4) relating to other enactments that define or limits rights, obligations or liabilities in relation to a service and to provisions of international conventions to which Ireland or the European Union are party.

(3) An agreement in writing to submit present or future differences to an alternative dispute resolution procedure is not to be regarded as excluding or restricting any liability for the purposes of this head.

(4) A trader who contravenes *subhead (1)* or *subhead (2)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.³⁵³

³⁵³ This head is similar to the provisions at head 35(4) of Part 2 and head 60(4) of Part 3. The rationale for the provision is set out in the footnote to head 35(4).

PART 5³⁵⁴

CONSUMER INFORMATION AND CANCELLATION RIGHTS

³⁵⁴ This Part re-enacts with substantial amendments Chapters I to III of Directive 2011/83/EU as given effect in Parts 1-4 of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484/2013). The provisions of Article 18 (Delivery) and Article 20 (Passing of risk) of Chapter IV of the Directive are incorporated in Chapter 4 of Part 2 of the Scheme. The other provisions of Chapter IV of the CRD are included in Part 6 of the Scheme along with Article 27 of Chapter V of the Directive.

CHAPTER 1

APPLICATION (PART 5)

Head 74 Interpretation (Part 5)

(1) In this Part and in Schedules 1 and 2 -

“business premises” means –

- (a) any immovable retail premises where a trader carries out his or her activity on a permanent basis; or
- (b) any movable retail premises where a trader carries out his or her activity on a usual basis;³⁵⁵

“Directive” means Directive 20011/83/EC of the European Parliament and of the Council of 25 October 2011 on Consumer Rights (as amended by Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules);

“distance contract” means a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, and with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;³⁵⁶

³⁵⁵ This definition re-enacts the definition of ‘business premises’ at Regulation 2(1) of S.I. 484/2013 which gives effect to the definition at Article 2(9) of the CRD.

³⁵⁶ This definition re-enacts the definition of ‘distance contract’ at Regulation 2(1) of S.I. 484/2013 which gives effect to the definition at Article 2(7) of the CRD.

“gambling” means wagering a stake with pecuniary value in games of chance, including lotteries, casino games and betting transactions;³⁵⁷

“healthcare” means health services provided by health professionals to patients in order to assess, maintain or restore their state of health whether or not these services are provided via healthcare facilities and includes the prescription, dispensing and provision of medicinal products and medical devices;³⁵⁸

“off-premises contract” means any of the following contracts between a trader and a consumer:

- (a) a contract concluded in the simultaneous physical presence of the trader and the consumer in a place which is not the business premises of the trader;
- (b) a contract for which an offer was made by the consumer in the simultaneous physical presence of the trader and the consumer in a place which is not the business premises of the trader;
- (c) a contract concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer;

³⁵⁷ Article 3(3)(c) of the CRD states that the Directive will not apply to contracts for gambling ‘which involves wagering a stake with pecuniary value in games of chance, including lotteries, casino games and betting transactions. This definition was incorporated in the interpretation provisions at Regulation 2(1) of S.I. 484/2013. Article 3(5)(d) of the DCD provides that the Directive will not apply to gambling services ‘namely services that involve wagering a stake with pecuniary value in games of chance, including those with an element of skill, such as lotteries, casino games, poker and betting transactions, by electronic means or any other technology for facilitating communication and at the individual request of a recipient of such services.’ Though the two definitions are similar enough in substance, their scope differs. Separate definitions of the term have been retained accordingly in Part 3 and in this Part.

³⁵⁸ Article 3(b) of the CRD provides that the Directive shall not apply to contracts for healthcare ‘as defined in point (a) of Directive 2011/24/EU, whether or not they are provided via healthcare facilities.’ Regulation 2(1) of S.I. 484/2013 included the definition from Directive 2011/24/EU with the additional stipulation from the final part of the CRD definition as follows:

‘healthcare’ means health services provided by health professionals to patients in order to assess, maintain or restore their state of health, whether or not these services are provided via healthcare facilities, and includes the prescription, dispensing and provision of medicinal products and medical devices.

Article 3(5)(c) of the DCD states that the Directive shall not apply to contracts regarding ‘healthcare as defined in point (b) of Article 3 of Directive 2002/65/EC’. As this definition does not include the additional stipulation in the CRD definition, separate definitions of ‘healthcare’ are retained in Part 3 and in this Part.

(d) a contact concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer;³⁵⁹

“online marketplace” means a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows a consumer to conclude distance contracts with other traders or consumers;³⁶⁰

“on-premises contract” means a contract between a trader and a consumer which is not a distance or off-premises contract;³⁶¹

“passenger transport services” means services for the conveyance of passengers by air, rail, road, rail, sea or waterway, but excludes car rental services;³⁶²

“provider of an online marketplace” means any trader which provides an online marketplace to consumers;³⁶³

³⁵⁹ This definition re-enacts the definition of ‘off-premises contract’ at Regulation 2(1) of S.I. 484/2013 which gives effect to the definition at Article 2(8) of the CRD.

³⁶⁰ This definition gives effect to the definition of ‘online marketplace’ inserted at Article 2(17) of the CRD by Article 4(1)(e) of the BEMD.

³⁶¹ This definition re-enacts the definition of ‘on-premises contract’ at Regulation 2(1) of S.I. 484/2013. The CRD refers instead to ‘contracts other than distance or off-premises’, but the view was taken in the transposition that ‘on-premises contracts’ is a simpler way of referring to these contracts. The European Commission had no issue with the use of the term in our transposition of the Directive. It is used also in the UK Regulations that gave effect to the Directive.

³⁶² This definition re-enacts the definition of ‘passenger transport services’ at Regulation 2(1) of S.I. 484/2013. Article 3(3)(k) of the CRD as adopted provides that only Articles 8(2), 19 and 22 of the Directive would apply to contracts for passenger transport. Article 4(2)(c) of the BEMD provides for the replacement of Article 3(3)(k) of Directive 2011/83/EU in order to provide that Article 21 of the Directive will also apply to contracts for passenger transport. Recital (27) of Directive 2011/83/EU provides that consumer contracts for the transport of goods and for car rental come within the scope of the Directive with the exception of the provisions of Article 9 to 15 on the right of withdrawal. Article 8(2) of the CRD is given effect in head 84 and its application to contracts for passenger transport services is provided for in head 78(2)(b). Articles 19, 21 and 22 of the CRD are given effect in Part 6 of the Scheme.

³⁶³ This definition implements the definition of ‘provider of an online marketplace’ inserted at Article 2(18) of the CRD by Article 4(1)(e) of Directive (EU) 2019/2161.

“social services” includes services related to social housing, childcare and the support of families and persons permanently or temporarily in need, including long-term care.³⁶⁴

(2) A word or expression used in this Part that is also used in the Directive has, unless the context otherwise requires, the same meaning in this Part as it has in the Directive.

(3) A court shall construe this Part in a manner that gives effect to the Directive, and for this purpose the court shall have regard to the provisions of the Directive, including its preambles.

³⁶⁴ This definition re-enacts the definition of ‘social services’ at Regulation 2(1) of S.I. 484/2013 which gives effect to the definition included at Article 3(3)(a) of Directive 2011/83/EU. The term does not feature in any of the other parts of the Scheme.

Head 75 Application (Part 5)

(1) Subject to *subheads (2) to (9)* and *heads 76, 78 and 86*, this Part applies to each of the following contracts concluded between a trader and a consumer:

- (a) sales contracts;
- (b) service contracts;
- (c) contracts for the supply of digital content not supplied on a tangible medium;
- (d) contracts for the supply of water, gas or electricity not supplied in a limited volume or set quantity;
- (e) contracts for the supply of district heating.³⁶⁵

(2) Notwithstanding the definition of “sales contract” in *head 2(1)*, in this Part “sales contract” includes a contract that has as its object both goods and services.³⁶⁶

³⁶⁵ Subhead (1) re-enacts the application provision at Regulation 3(1) of S.I. 484/2013. As the definition of ‘goods’ in head 2(1) now includes digital content supplied on a tangible medium and water, gas or electricity supplied in a limited volume or set quantity, the subhead does not need to provide, as Regulation 3 (1) did, that sales contracts include these contracts. The separate application of Part 5 to the contracts specified in paragraphs (c) to (e) is in line with the stipulation in recital (19) of the CRD that these contracts are to be considered as neither sales nor service contracts.

³⁶⁶ Head 2(1) defines “sales contract” means as ‘a contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer –

(a) pays, or undertakes to pay, the price of the goods, or

(b) transfers, or agrees to transfer ownership of goods, to the trader in full or part payment of the price.’

As outlined in the footnote to the definition of ‘sales contract’ in head 2(1), the definition of the term at Article 2(5) of the CRD, unlike that at Article 2(1) of the SGD, includes a contract having as its object both goods and services. Head 3(5)(b) of Part 1 provides accordingly that notwithstanding the definition of sales contract in head 2(1), ‘sales contract’ in Part 5 includes a contract that has as its object both goods and services’. It was thought preferable to clarify these differences in the application provisions rather than by having different definitions of ‘sales contract’ in Parts 2 and 5. Though it may be sufficient to deal with the matter in Part 1 only, subhead (2) restates the application provision in head 3(5)(b).

³⁶⁷ Recital (19) of the CRD states that contracts for the supply of water, gas or electricity not put up for sale in a limited volume or set quantity and contracts for the supply of district heating should ‘be classified for the purposes of this Directive, neither as sales contracts nor as service contracts.’ These contracts are services contracts however for the purpose of Parts 4 and 7 of the Directive. Given the divergent scope of different Parts of the Scheme in respect of service contracts, the simplest solution seemed to be not to exclude the contracts in question from the definitions of ‘service’ and ‘service contract’, but to provide for specified exceptions to the application of these definitions. Head 3(6)(b) of Part 1 provides accordingly that notwithstanding the definition of ‘service’ and ‘service contract’ in head 2(1), contracts for the supply of water, gas and electricity not put up for sale in a limited volume or set quantity and contracts for the supply of district heating are not service contracts for the purposes of Part 5. It was thought preferable to clarify these differences in the application provisions rather than by having different definitions of ‘service contract’ in Parts 4 and 5. Though it may be sufficient to deal with the matter in Part 1 only, subhead (3) restates the application provision in head 3(6)(b).

(3) Notwithstanding the definition of “service contract” in *head 2(1)*, in this Part “service contract” does not include a contract for the supply of gas, water or electricity not supplied in a limited volume or set quantity or contracts for the supply of district heating.³⁶⁷

(4) Notwithstanding the definition of “service contract” in *head 2(1)*, this Part applies to a contract for the supply of a digital service under which the consumer does not pay a price but provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for -

- (a) the purpose of supplying the digital content or digital service or,
- (b) for allowing the trader to comply with legal requirements to which the trader is subject,

and the trader does not process those data for any other purpose.³⁶⁸

(5) This Part does not apply to any of the following contracts between a trader and a consumer:³⁶⁹

³⁶⁸ Subhead (4) gives effect to the provision at Article 3(1)(a) of the CRD as inserted by Article 4(2)(b) of the BEMD. As explained in the footnote to head 3(6), contracts for digital services are classified as service contracts in the CRD. As the definition of ‘service contract’ includes a requirement on the consumer to pay the price of the service, it is necessary to make an exception for digital service contracts in order to give effect to Article 3(1)(a) of the Directive. A similar provision is unnecessary for digital content contracts as the definition of ‘contract for the supply of digital content’ in head 2(1) includes contracts where the consumer provides personal data as well as contracts where the consumer pay a price.

³⁶⁹ Subhead (5) provides for some changes to the application provision at Regulation 3(2) of S.I. 484/2013. It does not give effect to the blanket exclusion from the scope of Part 5 of contracts for social services and healthcare at Articles 3(3)(a) and 3(3)(b) of the CRD. The information provisions for on-premises contracts in Chapter 2 will apply to both of these contracts. The information provisions for off-premises and distance contracts in Chapter 3 will apply to social services contracts as will the right of cancellation in Chapter 4. Recital (19) of the Directive states as follows:

Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive.

It was not possible to provide for such extensions of the application of the Directive’s provisions in the original transposition due to the constraints applying to Regulations made under the European Communities Act 1972. The exclusions at paragraphs (a) to (k) of subhead (5) are similar to those at paragraphs (c) to (g) and (i) to (n) of Regulation 3(2) of S.I. 484/2013. The exclusion at paragraph (l) gives effect to the exclusion of this type of contract inserted at Article 3(3)(n) of the CRD by Article 4(2)(c)(ii) of the BEMD. Article 3(3)(g) of the CRD previously provided that the Directive did not apply to contracts ‘which fall within the scope of Council Directive 90/314/EEC on package travel, package holidays and package tours’. Regulation 3(2)(h) of S.I. 484/2013 provided accordingly for the exclusion of such contracts from the scope of the Regulations. A new Directive (EU) 2015/2302 on package travel and linked travel arrangements was adopted in 2015 and this

- (a) contracts for gambling;
- (b) contracts for financial services;
- (c) contracts for the creation, acquisition or transfer of immovable property or of rights in immovable property;
- (d) contracts for the construction of new buildings or the substantial conversion of existing buildings;
- (e) contracts for rental of accommodation for residential purposes;
- (f) contracts within the scope of Directive 2008/122/EC of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts;
- (g) contracts established, in accordance with the law of a Member State, by a public office-holder who has a statutory duty to be independent and impartial and who shall ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope;
- (h) contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household which are physically supplied by the trader on frequent and regular rounds to the consumer's home, residence or workplace;
- (i) contracts concluded by means of automatic vending machines or automated commercial premises;
- (j) contracts concluded with a telecommunications operator through a public pay telephone for the use of the telephone;

repealed the previous package travel Directive with effect from 1 July 2018. Article 27(2) of Directive (EU) 2015/2302 provides for the replacement of Article 3(3)(g) of the CRD by the following provision:

'(g) on packages as defined in point 2 of Article 3 of Directive (EU) 2015/2302 of the European Parliament and of the Council.

Article 6(7), Articles 8(2) and 8(6) and Articles 19,21 and 22 of this Directive shall apply mutatis mutandis to packages as defined in point 2 of Article 3 of Directive (EU) 2015/2302 in relation to travellers as defined in point 6 of Article 3 of that Directive.'

The consequential amendments to S.I. 484/2013 were given effect in the European Union (Package Travel and Linked Travel Arrangements) Regulations 2019 (S.I. No. 80/2019) by means of a new section 25C inserted in the Package Holidays and Travel Trade Act 1995. The application provisions relating to package travel in this Part relate only to head 84 which gives effect to Article 8(2) of the CRD. Articles 6(7) and 8(6) of the Directive are optional provisions which were not implemented in our transposition in S.I. No 484/2013 and which are not given effect either in this Part. Articles 19, 21 and 22 of Directive 2011/83/EU are given effect in Part 6 and not in this Part.

- (k) contracts concluded for the use of one single connection by telephone, Internet or fax established by a consumer;
- (l) contracts for any goods sold by way of execution or otherwise by authority of law.

(6) Subhead (5)(b) is subject to head 96(6) (ancillary contracts).³⁷⁰

(7) For the purposes of subhead (5)(g), “Member State” means a state that is a member of the European Union (within the meaning of the European Communities Act 1972) (No. 27 of 1972) or a state that is a party to the agreement on the European Economic Area signed at Oporto on 2 May 1992, as adjusted by the protocol done at Brussels on 17 March 1993.

(8) This Part does not apply to off-premises contracts for which the payment to be made by the consumer does not exceed €50.³⁷¹

(9) Where two or more off-premises contracts with related subjects are concluded between a trader and a consumer at the same time, the total cost of the contracts shall be taken into account in applying the monetary threshold specified in subhead (6).³⁷²

³⁷⁰ Subhead (6) re-enacts the provision at Regulation 3(3) of S.I. 484/2013 but omits the reference to Regulation 24(3) as this provision is now included in Part 6 of the Scheme. Article 15 of the CRD which is given effect in head 109 of S.I. 484/2013 provides that if a consumer cancels a distance or off-premises contract in accordance with the Directive any ancillary contracts are automatically terminated. As such ancillary contracts could be financial services contracts, head 109(6) provides that notwithstanding the exclusion of these contracts from the scope of the Directive and the Regulations, financial services contracts may be ancillary contracts for the purpose of head 109. The European Commission had no issue with the inclusion of this provision in the 2013 Regulations.

³⁷¹ Subhead (8) re-enacts the provision at Regulation 3(5) of S.I. 484/2013 that gives effect to Article 3(4) of the CRD under which Member States can provide for such an exclusion in order to avoid putting an administrative burden on traders for relatively low-value off-premises transactions.

³⁷² Subhead (9) re-enacts the provision at Regulation 3(6) of S.I. 484/2013 and is in accordance with the clarification of the application of Article 3(4) of the CRD in the last sentence of recital (28) of the Directive.

CHAPTER 2

CONSUMER INFORMATION FOR ON-PREMISES CONTRACTS

Head 76 Application (Chapter 2)

Subject to *head 75*, this Part applies to each of the following contracts concluded between a trader and a consumer:

- (a) sales contracts;
- (b) service contracts other than contracts for package travel and passenger transport services;
- (c) contracts for the supply of digital content not supplied on a tangible medium;
- (d) contracts for the supply of water, gas or electricity not supplied in a limited volume or set quantity;
- (e) contracts for the supply of district heating.³⁷³

³⁷³ Head 76 re-enacts the application provision for the information requirements for on-premises contracts at Regulation 4 of S.I. 484/2013. The only change is the addition to paragraph (b) of contracts for package travel. As stated in the footnote to head 3(9), package travel contracts are no longer excluded from all of the provisions of the CRD. As the only provision in Part 5 which applies to these contracts is in Chapter 3, it is necessary to state that Chapter 2 and Chapter 4 of this Part do not apply to them. As also stated in that footnote, the information requirements of this Chapter will also apply to on-premises healthcare and social services contracts as these are no longer entirely excluded from the application of the CRD provisions given effect in Part 5.

Head 77 Information requirements for on-premises contracts

(1) Before the consumer is bound by an on-premises contract, the trader shall provide the consumer with the information specified in *Schedule 1* in a clear and comprehensible manner, if that information is not already apparent from the context.³⁷⁴

(2) *Subhead (1)* does not apply to contracts which involve day-to-day transactions and are performed immediately at the time of the conclusion of the contract.³⁷⁵

(3) In case of dispute, it is for the trader to show compliance with the information requirements laid down in this Part.³⁷⁶

(4) A trader who contravenes *subhead (1)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.

(5) The Minister may by Regulations prescribe additional information requirements that shall apply to on-premises contracts generally or to different classes or types of on-premises contract.³⁷⁷

³⁷⁴ Head 77(1) re-enacts Regulation 5 of S.I. 484/2013 which gives effect to the chapeau to Article 5(1) of the CRD. While Article 4(3) of the BEMD has made a number of amendments to Article 5 of the CRD, the provisions which are the subject of these amendments were included in Schedule 1 of the 2013 Regulations rather than in Regulation 5. The amendments to Article 5(1) of the Directive have been made accordingly in Schedule 1 of the Scheme.

³⁷⁵ Article 5(3) of the CRD provides that Member States shall not be required to apply the information provisions in Article 5(1) to 'contracts which involve day-to-day transactions and which are performed immediately at the time of their conclusion'. This optional provision was implemented in Regulation 5(2) of S.I. 484/2013 and is re-enacted in subhead (2).

³⁷⁶ Regulation 6(3) of S.I. 484/2013 provides that, in case of dispute, it is for the trader to show compliance with the information requirements for distance and off-premises contracts that are given effect in Part 3 of the Regulations. This provision gives effect to Article 6(9) of the CRD which provides that the burden of proof regarding compliance with the information requirements for distance and off-premises contracts in Chapter III of the Directive shall be on the trader. In the interests of consistency and consumer protection, it is desirable to have a similar rule for the information requirements applying to on-premises contracts in Chapter 2. It was not possible to include such a provision in S.I. 484/2013 because of the constraints applying to Regulations made under the European Communities Act 1972.

³⁷⁷ Article 3(4) of the CRD provides that Member States may adopt or maintain additional pre-contractual information for the on-premises contracts to which Article 5 of the Directive applies. Subhead (5) provides that

CHAPTER 3

CONSUMER INFORMATION FOR DISTANCE AND OFF-PREMISES CONTRACTS

Head 78 Application (Chapter 3)

(1) Subject to *subheads (2) and (3)* and *head 75*, this Part applies to each of the following contracts concluded between a trader and a consumer:

- (a) sales contracts;
- (b) service contracts other than contracts for healthcare;
- (c) contracts for the supply of digital content not supplied on a tangible medium;
- (d) contracts for the supply of water, gas or electricity not supplied in a limited volume or set quantity;
- (e) contracts for the supply of district heating.³⁷⁸

(2) Except for *head 84*, this Chapter does not apply to contracts for –

- (a) package travel,
- (b) passenger transport services.³⁷⁹

(3) *Head 84* shall apply to packages and linked travel arrangements subject to the following modifications and any other necessary modifications:

- (a) a reference to a trader shall be construed as a reference to an organiser or a trader facilitating linked travel arrangements;

the Minister for Enterprise, Trade and Innovation may prescribe additional information requirements of this kind in Regulations.

³⁷⁸ Head 78 re-enacts with some changes the application provision for consumer information for off-premises and distance contracts at Regulation 6 of S.I. 484/2013. The only change in subhead (1) is the addition of the exception for healthcare contracts at paragraph (b) which is necessitated by the fact that these contracts are no longer entirely excluded from the application of the provisions of the CRD given effect in Part 5, but are not subject to the provisions of Chapter 3.

³⁷⁹ Subhead (2) re-enacts Regulation 6(2) of the 2013 Regulations. While the Regulation refers to passenger travel services, the reference to package travel contracts is new. As explained in the footnote to head 75(3), the Package Travel Directive of 2015 amended the CRD to apply certain provisions of that Directive to package travel contracts. The only provision of this Part affected by this amendment is the provision at head 84 which gives effect to Article 8(2) of the CRD.

- (b) a reference to a consumer shall be construed as a reference to a traveller;
- (c) a reference to a package travel contract shall be construed as a reference to a package travel contract or a linked travel arrangement.³⁸⁰

(4) In case of dispute, it is for the trader to show compliance with the information requirements laid down in this Part.³⁸¹

³⁸⁰ Subhead (3) follows the approach taken by the European Union (Package Travel and Linked Travel Arrangements) Regulations 2019 (S.I. No 80 of 2019) to the amendment of Article 3(3)(g) of the CRD to provide for the application of certain of the CRD's provisions to package travel contracts. Article 27(2) of Directive (EU) 2015/2302 on package travel and linked travel arrangements provides that the relevant provisions of the CRD 'shall apply mutatis mutandis to packages as defined in point 2 of Article 3 of Directive (EU) 2015/2302 in relation to travellers as defined in point 6 of Article 3 of that Directive'. The modifications are mainly necessary because the Package Travel Directive applies under specified conditions to business travellers as well as to consumers. While S.I. No. 80 of 2019 provided for the amendments to S.I. 484/2013 in a new section 25C inserted in the Package Holidays and Travel Trade Act 1995, subhead (3) provides for their amendment in this Part. The revocation of section 25C of the 1995 Act is provided for accordingly in Part 1 of Schedule 5 (Repeal of Acts) of the Scheme. Head 3(9) of Part 1 provides that the terms referred to in subhead (4) have the meaning given them by section 2(1) of the Package Holidays and Travel Trade Act 1995.

³⁸¹ Subhead (4) re-enacts the provision at Regulation 6(3) of S.I. 484/2013 which gives effect to Article 6(9) of the CRD.

*Head 79 Information requirements for off-premises contracts*³⁸²

(1) Subject to *head 80*, before the consumer is bound by an off-premises contract or any corresponding offer, the trader –

- (a) shall provide the consumer with the information specified in Schedule 2 in a clear and comprehensible manner, and
- (b) where a right to cancel the contract exists, shall provide the consumer with the model cancellation form set out in *Part B* of Schedule 3.

(2) The information referred to in paragraphs (m) to (o) of Schedule 2 may be provided by means of the instructions on the right to cancel set out in *Part A* of Schedule 3, and a trader who correctly supplies those instructions fulfils the obligations of subhead (1) in respect of those paragraphs.³⁸³

(3) In the case of a public auction, the information specified in paragraphs (b) to (e) of Schedule 2 may be replaced by the equivalent details for the auctioneer.

(4) The information referred to in subhead (1)(a) –

- (a) shall be given on paper or, if the consumer agrees, on another durable medium, and
- (b) shall be legible and in plain intelligible language.

(5) The cancellation form referred to in subhead (1)(b) shall be given on paper, or if the consumer agrees, on another durable medium, and be legible.

³⁸² Head 79 re-enacts Regulation 7 of S.I. 484/2013 which gives effect to Article 6 of the CRD as it applies to off-premises contracts and to Articles 7(1) and (2) on the formal requirements applying to these contracts. While Article 4(4) of the BEMD has made a number of amendments to Article 6, the provisions subject to these amendments were incorporated in Schedule 2 of the 2013 Regulations rather than in Regulation 7 and the required amendments have been made in Schedule 2 of the Scheme.

³⁸³ Regulation 7(2) of S.I. 484/2013 refers to paragraphs (l) to (n) of Schedule 2. As a new paragraph (i) has been inserted in the Schedule following an amendment made by the BEMD, these paragraphs are now paragraphs (m) to (o). While Article 4(4)(b) of the BEMD provides for the replacement of Article 6(4) of the CRD which is given effect in subhead (2), the amendment of the CRD provision affects only the instructions on the right to cancel the contract in Part A of Schedule 3 of the Scheme and the necessary changes have been made there.

(6) The information referred to in *subhead (1)* forms part of the contract and shall not be altered without the express agreement of the trader and the consumer.

(7) If the trader has not complied with *subhead (1)* in respect of *paragraphs (g) and (n)* of *Schedule 2*, the consumer is not liable for the charges or costs specified in those paragraphs.³⁸⁴

(8) A trader who contravenes *subhead (1)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115* of *Part 8*.

³⁸⁴ Regulation 7(7) of S.I. 484/2013 refers to paragraphs (g) and (m) of Schedule 2. Following the insertion of a new paragraph (i) as a result of an amendment made by the BEMD, paragraph (m) is now paragraph (n).

*Head 80 Information requirements for off-premises contracts for repairs or maintenance*³⁸⁵

(1) Subject to *subheads (2) and (3)*, *head 79* does not apply to an off-premises contract where -

- (a) the consumer has explicitly requested the services of the trader for the purpose of carrying out repairs or maintenance,
- (b) the trader and the consumer immediately perform their obligations under the contract, and
- (c) the payment to be made by the consumer does not exceed €200.

(2) In the case of an off-premises contract referred to in *subhead (1)*, the trader shall provide the consumer with –

- (a) the information specified in *paragraphs (a) to (d), (f), (m) and (p)* of *Schedule 2*, and
- (b) where a right to cancel the contract exists, the model cancellation form set out in *Part B of Schedule 3*, and
- (c) all of the information required by *head 79(1)* in the confirmation of the contract to be provided by the trader in accordance with *head 81*.³⁸⁶

(3) The trader shall provide the information specified in *paragraphs (b) to (d) and (f)* of *Schedule 2* on paper or, if the consumer agrees, on another durable medium.

(4) If the consumer expressly agrees, the information referred to in *paragraphs (a), (m) and (p)* of *Schedule 2* does not have to be provided by the trader on paper or another durable medium.

³⁸⁵ Head 80 re-enacts Regulation 8 of S.I. 484/2013 which gives effect to Article 7(4) of the CRD. The exemption for the off-premises contracts specified in subhead (1) was an optional provision that was implemented in our transposition.

³⁸⁶ Regulation 7(7) of S.I. 484/2013 refers to paragraphs (l) and (o) of Schedule 2. Following the insertion of a new paragraph (i) in the Schedule following an amendment made by the BEMD, paragraph (l) is now paragraph (m) and paragraph (o) is now paragraph (p). A similar change has been made in subhead (4).

(5) A trader who contravenes *subhead 2* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in head 115 of Part 8.

*Head 81 Provision of copy or confirmation of off-premises contracts*³⁸⁷

(1) A trader who concludes an off-premises contract with a consumer shall provide the consumer with a copy of the signed contract or the confirmation of the contract.

(2) The copy or confirmation of the contract shall be provided on paper or, if the consumer agrees, on another durable medium.

(3) Where applicable, the copy or the confirmation of the contract provided by the trader shall include the confirmation of the consumer's acknowledgement in accordance with *head 86(2)(d)* of the loss of the right to cancel the contract in the case of digital content not supplied on a tangible medium where the performance has begun with the consumer's prior express consent.³⁸⁸

(4) A trader who contravenes any of the provisions of this head commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.

³⁸⁷ Head 81 re-enacts Regulation 9 of S.I. 484/2013 which gives effect to Articles 7(1) and (2) of the CRD. Article 7(3) of the CRD is given effect by Regulations 21(1) and (2) of S.I. 484/2013 which are re-enacted in head 94 along with the amendments to Article 7(3) made by the BEMD.

³⁸⁸ Subhead (3) re-enacts Regulation 9(3) of S.I. 484/2013 which gives effect to Article 7(4) of the CRD. Article 7(4) refers to the consumer's prior express consent and acknowledgement in accordance with Article 16(m) of the Directive. Regulation 9(3) refers to Regulation 13(2)(b) as that is the provision which gave effect to Article 16(m). Subhead (3) refers to head 86 (2)(d) as that is the provision which now corresponds to Regulation 13(2)(d).

*Head 82 Information requirements for distance contracts*³⁸⁹

- (1) Before the consumer is bound by a distance contract, the trader –
- (a) shall give or make available to the consumer the information specified in *Schedule 2* in plain and intelligible language and in a way appropriate to the means of distance communication used,
 - (b) where a right to cancel the contract exists, shall give or make available to the consumer the cancellation form set out in *Part B* of *Schedule 3*.
- (2) The information referred to in *paragraphs (m) to (o)* of *Schedule 2* may be provided by means of the instructions on cancellation set out in *Part A* of *Schedule 3*, and a trader who correctly supplies those instructions fulfils the obligations of paragraph (1) in respect of those paragraphs.³⁹⁰
- (3) In the case of a public auction, the information specified in *paragraphs (b) to (e)* of *Schedule 2* may be replaced by the equivalent details for the auctioneer.
- (4) Where the information required by *subhead 1(a)*, or the cancellation form referred to in *subhead 1(b)*, is provided on a durable medium, it shall be legible.
- (5) The information referred to in *subhead (1)* forms part of the contract and shall not be altered without the express agreement of the trader and the consumer.

³⁸⁹ Head 82 re-enacts Regulation 10 of S.I. 484/2013 which gives effect to Article 6 of the CRD as it applies to distance contracts and to the further information requirements applying to these contracts under Articles 8(1), 8(3), 8(4) and 8(5) of the Directive. While Article 4(4) of the BEMD has made a number of amendments to Article 6, the provisions subject to these amendments were incorporated in Schedule 2 of the 2013 Regulations rather than in Regulation 10 and the required amendments have been made to Schedule 2 of the Scheme.

³⁹⁰ Regulation 10(2) of S.I. 484/2013 refers to paragraphs (l) to (n) of Schedule 2. Following the insertion of a new paragraph (i) in the Schedule as a result of an amendment made to Article 6(1) of the CRD by the BEMD, these paragraphs are now paragraphs (m) to (o).

(6) If the trader has not complied with *subhead (1)* in respect of *paragraphs (g) and (n)* of *Schedule 2*, the consumer is not liable for the charges or costs specified in those paragraphs.³⁹¹

(7) Where a distance contract is concluded through means of distance communication which allows limited space or time to display the information, the trader –

(a) shall provide the information specified in *paragraphs (a), (b), (f) to (h),³⁹² (m) and (t)* of *Schedule 2³⁹³* on or through³⁹⁴ that means of communication in accordance with *subheads (1) and (2)*, and

(b) shall provide

(i) the other information specified in *Schedule 2*, and

(ii) the cancellation form set out in *Part B of Schedule 3³⁹⁵*

in an appropriate way in accordance with *subheads (1) to (4)*.

³⁹¹ Regulation 10 (7) of S.I. 484/2013 refers to paragraphs (g) and (m) of Schedule 2. Following the insertion of a new paragraph (i) as a result of an amendment made to Article 6(1) of the CRD by the BEMD, paragraph (m) is now paragraph (n).

³⁹² The transposition of the first part of Article 8(4) of the CRD in Regulation 10(7)(a) of S.I. 484/2013 omitted the required references to paragraphs (g) and (h) of Schedule 2. This omission was addressed in the European Union (Consumer Information, Cancellation and Other Rights) (Amendment) Regulations 2016 (S.I. 336/2016) which substituted “f to h” for “f” in paragraph (a) of Regulation 10(7).

³⁹³ Regulation 10 (7) of S.I. 484/2013 refers to paragraphs (l) and (s) of Schedule 2. Following the insertion of a new paragraph (i) as a result of an amendment made to Article 6(1) of the CRD by the BEMD, paragraph (l) is now paragraph (m) and paragraph (s) is now paragraph (t).

³⁹⁴ Article 4(7) of the BEMD provides for the replacement of Article 8(4) of the CRD by an amended paragraph that incorporates two changes to the original provision. The first substitutes ‘on or through that particular means (of distance communication)’ for ‘on that particular means of distance communication’ and is implemented in paragraph (a).

³⁹⁵ The second change to Article 8(4) of the CRD by Article 4(7) of the BEMD removes the requirement on the trader to provide the model cancellation form on a means of distance communication that allows limited space or time and provides that the form shall be provided in an appropriate way in accordance with Article 8(1) CRD. In our transposition of Article 6(1)(h), we, along with a number of other Member States, did not include the model cancellation form referred to in the second part of the paragraph among the information requirements set out in Schedules 1 and 2 of the 2013 Regulations, but stated it as a separate obligation on the trader in Regulations 7(1) and 10(1). We took the view, first, that the requirement to provide a form differed from the requirement to provide information and, secondly, that a form could not realistically be provided under Article 8(4) on a means of distance communication that offered limited space or time. As our transposition of Article 6(1)(h) in the 2013 Regulations did not include the requirement to provide the model cancellation form, we do not need to make the second amendment to Article 8(4) of the CRD made by Article 8(7) of the BEMD. It is necessary however to amend subhead 7(b) to refer expressly to the cancellation form in order to give effect to this amendment.

(8) Without prejudice to *subhead (7)*, a trader who makes a telephone call to the consumer with a view to concluding a distance contract shall, at the beginning of that call, disclose –

- (a) the trader's identity;
- (b) where applicable, the identity of the trader on whose behalf the trader makes the call, and
- (c) the commercial purpose of the call.

(9) Where distance contracts are concluded through a trading website, the trader shall ensure that the website indicates clearly and legibly, and at the latest at the beginning of the ordering process, whether any delivery restrictions apply and which means of payment are accepted.

(10) A trader who contravenes *subhead (1)*, *subhead (7)*, *subhead (8)* or *subhead (9)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.

*Head 83 Additional information requirements for contracts concluded on online marketplaces*³⁹⁶

(1) Before the consumer is bound by a distance contract, or any corresponding offer, on an online marketplace, the provider of the online marketplace shall, without prejudice to the provisions of Parts 3 and 4 of the Consumer Protection Act 2007, give or make available the following information to the consumer in plain and intelligible language and in a way appropriate to the means of distance communication used:

- (a) general information on the main parameters determining the ranking of offers presented to a consumer as a result of a search query and the relative importance of those parameters as opposed to other parameters,
- (b) whether the third party is a trader or not, when offering the goods, services or digital content, on the basis of the information made available by the third party to the provider of the online marketplace;
- (c) where the third party is not a trader, when offering the goods, services or digital content, that the consumer rights provided for in national legislation that gives effect to European Union consumer protection law do not apply to the contract;
- (d) information, where applicable, on how the obligations related to the contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace.

(2) The information to be provided by the trader under *subhead (1)(a)* shall be –

- (a) be made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented, and
- (b) without prejudice to any responsibility that the provider of the online marketplace or the third party trader has in relation to the contract under European Union and national law other than consumer protection law.

³⁹⁶ Head 83 gives effect to the new Article 6a inserted in the CRD by Article 4(5) of the BEMD.

(3) In *subhead (1)(a)*, “ranking” means the relative prominence given to products as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication.³⁹⁷

(4) A trader who contravenes *subhead (1)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.

³⁹⁷ The definition of ‘ranking’ in *subhead (2)* comes from the definition inserted in in Article 2(1)(m) of Directive 2005/29/EC on unfair commercial practices (UCPD) by Article 3(1)(b) of the BEMD. While Article 2(1)(c) of the UCPD as replaced by Article 3(1)(a) of the BEMD defines ‘product’ as ‘any good or service including immovable property, digital services and digital content, as well as rights and obligations’, the definition of ‘product’ in *head 74(1)* follows the application provision for Part 5 at *head 75* in referring to goods; services; digital content not supplied on a tangible medium; water, gas or electricity not supplied in a set volume or limited quantity; and district heating. Contracts for immovable property are outside the scope of the CRD and service contracts under the Directive include contracts for digital services.

*Head 84 Additional information requirements for distance contracts concluded by electronic means*³⁹⁸

(1) Subject to *head 75*, this head applies to distance contracts concluded by electronic means.

(2) If the contract places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information specified in *paragraphs (a), (f) to (h), (t) and (u) of Schedule 2*.³⁹⁹

(3) The trader shall ensure that the consumer, when placing an order, explicitly acknowledges that the order implies an obligation to pay.

(4) If placing an order under *subhead (3)* entails activating a button or a similar function, the trader shall ensure that the button or similar function is labelled in an easily legible manner only with the words 'order with obligation to pay' or a corresponding unambiguous formulation indicating that the order entails an obligation to pay the trader.

(5) If the trader has not complied with *subhead (3)* and, where applicable, *subhead (4)*, the consumer is not bound by the contract or order.

(6) A trader who contravenes *subhead (2)*, *subhead (3)* or *subhead (4)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.

³⁹⁸ Head 84 re-enacts Regulation 11 of S.I. 484/2013 which gives effect to Article 8(2) of the CRD.

³⁹⁹ Regulation 11(2) of S.I. 484/2013 refers to paragraphs (s) and (t) of Schedule 2. Following the insertion of a new paragraph (i) as a result of an amendment made to Article 6(1) of the CRD by the BEMD, paragraph (s) is now paragraph (t) and paragraph (t) is now paragraph (u).

*Head 85 Provision of confirmation of distance contracts*⁴⁰⁰

(1) A trader who concludes a distance contract with a consumer shall provide the consumer with confirmation of the concluded contract on a durable medium.

(2) The confirmation shall include all of the information specified in *Schedule 2* unless the trader has already provided that information to the consumer on a durable medium prior to the conclusion of the contract.

(3) Where applicable, the confirmation shall include the confirmation of the consumer's acknowledgement in accordance with *head 86(2)(d)* of the loss of the right to cancel the contract in the case of digital content not supplied on a tangible medium where the performance has begun with the consumer's prior express consent.⁴⁰¹

(4) The confirmation required by *subhead (1)* shall be provided within a reasonable time after the conclusion of the contract and at the latest -

- (a) at the time of the delivery of the goods, or
- (b) before performance begins of –
 - (i) a service,
 - (ii) a supply of digital content not supplied on a tangible medium,
 - (iii) a supply of water, gas or electricity not supplied in a limited volume or set quantity, or
 - (iv) a supply of district heating.

(5) A trader who contravenes any of the provisions of this head commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.

⁴⁰⁰ Head 85 re-enacts Regulation 12 of S.I. 484/2013 which gives effect to Article 8(7) of the CRD.

⁴⁰¹ Regulation 12(3) of S.I. 484/2013 gives effect to Article 8(7)(b) of the CRD. Article 8(7)(b) refers to the consumer's prior express consent and acknowledgement in accordance with Article 16(m) of the Directive. Regulation 12(3) refers to Regulation 13(2)(b) as that is the provision which gave effect to Article 16(m). Subhead (3) refers to head 86(2)(d) as that is the provision which now corresponds to Regulation 13(2)(d).

CHAPTER 4

RIGHT TO CANCEL DISTANCE AND OFF-PREMISES CONTRACTS

*Head 86 Application (Chapter 4)*⁴⁰²

(1) Subject to *subheads (2) and (3)* and *head 75*, this Chapter applies to each of the following contracts concluded between a trader and a consumer:

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

(2) This Chapter does not apply to any of the following distance and off-premises contracts concluded between a trader and a consumer:

- (a) service contracts after the service has been fully performed where the contract does not place the consumer under an obligation to pay;⁴⁰³
- (b) service contracts after the service has been fully performed if –

⁴⁰² Head 86 re-enacts Regulation 13 of S.I. 484/2013 which gives effect to Article 16 of the CRD, including the amendments to Article 16 made by Article 4(12) of the BEMD.

⁴⁰³ Article 16a of the CRD exempts the following distance and off-premises contracts from the right to cancel the contract:

- (a) service contracts after the service has been fully performed if the performance has begun with the consumer's prior express consent and with the acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader.

Article 4(12) of the BEMD provides for the replacement of Article 16(a) by the following:

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

As the exception to the right of withdrawal in Article 16(a) now applies under different conditions in cases where the contract puts the consumer under an obligation to pay and in cases where the contract does not put the consumer under such an obligation, paragraphs (a) and (b) now deal separately with each of these cases.

- (i) the contract places the consumer under an obligation to pay, and
 - (ii) the performance of the contract has begun with the consumer's prior express consent, and acknowledgement that he or she will lose the right to cancel once the contract has been fully performed by the trader;
- (c) contracts for the supply of digital content not supplied on a tangible medium where the performance has begun and the contract does not place the consumer under an obligation to pay;⁴⁰⁴
- (d) contracts for the supply of digital content not supplied on a tangible medium where the performance has begun if -
- (i) the contract places the consumer under an obligation to pay,
 - (ii) the consumer has provided prior express consent to performance beginning during the cancellation period and an acknowledgement that he or she will thereby the right to cancel, and
 - (iii) the trader has provided confirmation of the contract in accordance as, applicable, with *head 81 or head 85*;

⁴⁰⁴ Article 16(m) of the CRD exempts the following contracts from the right to cancel the contract:
 (m) (contracts for) the supply of digital content which is not supplied on a tangible medium if the performance has begun with the consumer's prior express consent and his acknowledgement that he thereby loses his right of withdrawal:

Article 4(12)(b) of the BEMD provides for the replacement of Article 16(m) by the following:

- (m) contracts for the supply of digital content which is not supplied on a tangible medium if the performance has begun and, if the contract places the consumer under an obligation to pay, where:
- (i) the consumer has provided prior express consent to begin the performance during the right of withdrawal period;
 - (ii) the consumer has provided acknowledgement that he thereby loses his right of withdrawal; and
 - (iii) the trader has provided confirmation in accordance with Article 7(2) or Article 8(7).

Recital (38) of the BEMD gives the following rationale for this amendment:

Point (m) of the first paragraph of Article 16 of Directive 2011/83/EU provides for an exception to the right of withdrawal in respect of digital content which is not supplied on a tangible medium if the consumer has given prior express consent to begin the performance before the expiry of the right of withdrawal period and acknowledged that he thereby loses his right of withdrawal. Point (b) of Article 14(4) of that Directive provides for a contractual sanction when this requirement is not fulfilled by the trader, namely, the consumer does not have to pay for the digital content consumed. The requirement to obtain the consumer's prior express consent and acknowledgement is accordingly only relevant for digital content which is provided against payment of the price. It is therefore necessary to amend point (m) of the first paragraph of Article 16 to the effect that the requirement for traders to obtain the consumer's prior express consent and acknowledgement only applies to contracts that put the consumer under an obligation to pay. As the exception to the right to withdrawal for these contracts now applies under different conditions in cases where the contract puts the consumer under an obligation to pay and in cases where it does not put the consumer under such an obligation, paragraphs (c) and (d) now deal separately with each of these cases.

- (e) contracts for the supply of goods or services whose price is dependent on fluctuations in the financial market that may occur during the cancellation period and that cannot be controlled by the trader;
- (f) contracts for the supply of non-prefabricated goods made on the basis of an individual choice of, or decision by, the consumer;⁴⁰⁵
- (g) contracts for the supply of goods that are clearly personalised;
- (h) contracts for the supply of goods that are liable to deteriorate or expire rapidly;
- (i) contracts for the supply of sealed goods that –
 - (i) are not suitable for return for health protection and hygiene reasons, and
 - (ii) were unsealed after delivery;
- (j) contracts for the supply of goods that are, according to their nature, inseparably mixed with other items after their delivery;
- (k) contracts for the supply of alcoholic beverages where –
 - (i) the price has been agreed at the time of the conclusion of the sales contract,
 - (ii) the delivery of the beverages can only take place after 30 days from the conclusion of the sales contract, and
 - (iii) the value of the beverages is dependent on fluctuations in the market that cannot be controlled by the trader;
- (l) contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance;
- (m) contracts for the supply of sealed audio or sealed video recordings or sealed computer software that were unsealed after delivery;
- (n) contracts for the supply of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;
- (o) contracts concluded at a public auction;
- (p) contracts for healthcare;⁴⁰⁶

⁴⁰⁵ Paragraph (f) gives effect to the first part of Article 16(c) which exempts from the right of withdrawal contracts for ‘the supply of goods made to the consumer’s specifications’. Article 3(4) of the CRD defines ‘goods made to the consumer’s specifications’ as ‘non-prefabricated goods made on the basis of an individual choice of or decision by the consumer’.

⁴⁰⁶ As contracts for healthcare and package travel are no longer entirely outside the scope of the provisions of the CRD provision which are given effect in Part 5 but are not appropriate for the right of cancellation, it is necessary to provide in paragraphs (p) and (q) for the non-application to these contracts of the right to cancel.

- (q) contracts for package travel;
- (r) contracts for passenger transport services;
- (s) contracts for -
 - (i) the provision of accommodation other than for residential purposes,
 - (ii) the transport of goods,
 - (iii) car rental services,
 - (iv) catering, or
 - (v) services related to leisure activities.

where the contract provides for a specific date or period of performance;

(3) Notwithstanding *subhead 2(l)*, this Chapter applies to contracts for –

- (a) services in addition to the urgent repairs or maintenance requested by the consumer, and
- (b) goods other than replacement parts necessarily used in carrying out the maintenance or making the repairs

provided by the trader on the occasion of a visit made for the purpose referred to in subhead (2)(l).⁴⁰⁷

⁴⁰⁷ Subhead (3) gives effect to the qualification in the second part of Article 16(h) of the CRD of the exception to the right of withdrawal for contracts where the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance.

*Head 87 Right to cancel*⁴⁰⁸

(1) Subject to *head 86* and *head 90*, the consumer may, at any time prior to the expiry of the cancellation period applicable under *head 88* or *head 89*, cancel a distance or off-premises contract without giving any reason for the cancellation.

(2) A consumer who cancels a distance or off-premises contract does not incur any costs or liability other than those for which he or she is liable under the following provisions:

- (a) *head 92(2)* (non-standard delivery);
- (b) *head 93(5)* (direct cost of returning goods);
- (c) *head 93(6)(b)* (diminished value of goods);
- (d) *head 94(3)* (services provided, or gas, water, electricity, or district heating supplied, during cancellation period).

⁴⁰⁸ Head 87 re-enacts Regulation 14 of S.I. 484/2013 which gives effect to Articles 9(1) and 14(5) of the CRD.

*Head 88 Expiry of cancellation period*⁴⁰⁹

(1) Subject to *head 89*, the cancellation period expires in accordance with *subheads (2) to (8)*.

(2) Subject to *subhead (3)*, the cancellation period for -

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

expires after 14 days from the day on which the contract is concluded.

(3) In the case of off-premises contracts within the scope of *subhead (2)* that are concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, the cancellation period expires after 30 days from the day on which the contract is concluded.

(4) In the case of sales contracts other than those specified in *subheads (5) to (8)*, the cancellation period expires after 14 days from the day on which the consumer acquires physical possession of the goods.

(5) In the case of sales contracts for multiple goods that are ordered by the consumer in one order and delivered separately, the cancellation period expires after 14 days from the day on which the consumer acquires physical possession of the last of the goods.

⁴⁰⁹ Subheads (1), (2), (4) and (6) to (9) of Head 88 re-enact Regulation 15 of S.I. 484 of 2013 which gives effect to Article 9(2) of the CRD as originally adopted. Subheads (3) and (8) give effect to the optional provision for a 30-day cancellation period for certain off-premises contracts inserted at Articles 9(1a) and (2) of the CRD by Article 4(8) of the BEMD. While this option has been provisionally included in the Scheme, we have not taken a final decision on whether or not to implement it and plan to consult with stakeholders about its adoption.

(6) In the case of sales contracts for goods consisting of multiple lots or pieces, the cancellation period expires after 14 days from the day on which the consumer acquires physical possession of the last lot or piece.

(7) In the case of sales contracts for regular delivery of goods during a defined period of time, the cancellation period expires after 14 days from the day on which the consumer acquires physical possession of the first of the goods.

(8) In the case of off-premises sales contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, the cancellation period expires after 30 days from the day on which the consumer acquires the physical possession of the goods or, as applicable, the physical possession of -

- (a) the last of the goods in accordance with *subhead (5)*,
- (b) the last lot or piece of the goods in accordance with *subhead (6)*,
- (c) the first of the goods in accordance with *subhead (7)*.

(9) In *subheads (4) to (8)*, "consumer" includes a person, other than the carrier, indicated by the consumer for the purpose of acquiring physical possession of the goods.

*Head 89 Omission of information on right to cancel*⁴¹⁰

(1) If the trader does not provide the consumer with the information on the right to cancel the contract required by *paragraph (m) of Schedule 2*, the cancellation period expires 12 months from the day on which it would have expired under *head 88*.⁴¹¹

(2) Subject to *subhead (3)*, if the trader provides the consumer with the information on the right to cancel required by *paragraph (m) of Schedule 2* within 12 months of the day on which the cancellation period would have expired under *head 88*, the cancellation period expires 14 days after the day on which the consumer receives the information specified in *subhead (1)*.

(3) In the case of off-premises contracts concluded in the context of unsolicited visits by a trader to a consumer's home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers, the cancellation period expires 30 days after the day on which the consumer receives the information specified in *subhead (1)*.

(4) The information on the right to cancel referred to in *subheads (1) to (3)* shall be provided in accordance with –

- (a) *head 79* in the case of off-premises contracts,
- (b) *head 80* in the case of off-premises contracts for repairs or maintenance within the scope of that head,
- (c) *head 82* in the case of distance contracts.

⁴¹⁰ Head 89 re-enacts Regulation 16 of S.I. 484/2013 which gives effect to Article 10 of the CRD. Subhead (3) arises from the optional provision for a 30-day cancellation period for certain off-premises contracts outlined in the footnote to head 88 and gives effect to Article 10(2) of the CRD as replaced by Article 4(9) of the BEMD.

⁴¹¹ Regulations 16(1) and (2) of S.I. 484 of 2013 refer to paragraph (l) of Schedule 2. As a result of the addition of a new paragraph (i) to the Schedule resulting from an amendment made to Article 6(1) of the CRD by the BEMD, paragraph (l) is now paragraph (m).

*Head 90 Exercise of right to cancel*⁴¹²

(1) To exercise the right to cancel under *head 87*, the consumer shall, before the expiry of the cancellation period, inform the trader of his or her decision to cancel the contract.

(2) To inform the trader under *subhead (1)* the consumer may –

- (a) use the model cancellation form in *Part B of Schedule 3*, or
- (b) make any other unequivocal statement setting out his or her decision to cancel the contract.

(3) Where the trader gives the consumer the option to do so, the consumer may fill in and submit the cancellation form or the statement referred to in *subhead (2)* on the trader's website.

(4) Where the consumer exercises the option in *subhead (3)*, the trader shall communicate to the consumer without delay an acknowledgement on a durable medium of receipt of the consumer's cancellation of the contract.

(5) The consumer exercises the right to cancel within the cancellation period required by *head 88* if he or she sends the communication concerning the exercise of the right to the trader before that period has expired.

(6) In case of dispute, it is for the consumer to show that the right to cancel was exercised in accordance with this head.

⁴¹² Head 90 re-enacts Regulation 17 of S.I. 484/2013 which gives effect to Article 11 of the CRD.

*Head 91 Effects of cancellation*⁴¹³

Subject to *heads 92 to 96*, the exercise of the right to cancel by the consumer terminates the obligations of the consumer and the trader –

- (a) to perform the contract, or
- (b) in cases where an offer was made by the consumer, to conclude the contract.

⁴¹³ Head 91 re-enacts Regulation 18 of S.I. 484/2013 which gives effect to Article 12 of the CRD.

*Head 92 Obligations of trader in event of cancellation*⁴¹⁴

(1) Subject to *subhead (2)*, the trader shall reimburse all payments, including any payment for delivery, received from a consumer who exercises the right to cancel a contract.

(2) If the consumer has expressly opted for a type of delivery costing more than the least expensive type of standard delivery offered by the trader, the trader is required only to reimburse the consumer's delivery payment to an amount equivalent to the cost of the least expensive type of standard delivery offered by the trader.

(3) Subject to *subhead (4)*, the trader shall reimburse the consumer's payment without undue delay and not later than 14 days after the day on which the trader is informed of the consumer's decision to cancel the contract in accordance with *head 90*.

(4) In the case of sales contracts, the trader may, unless he or she has offered to collect the goods, withhold the reimbursement until –

(a) the trader has received the goods back, or

(b) the consumer supplies evidence to the trader that he or she has sent the goods back,

whichever first occurs.

(5) Unless the consumer has expressly agreed otherwise, the trader shall reimburse the consumer using the same means of payment as the consumer used for the initial transaction.

(6) Where the consumer agrees that the reimbursement may be made by a different means of payment to that used for the initial transaction, the trader shall ensure that the consumer does not incur any fees as a result of the use of that different means of payment.

⁴¹⁴ Head 92 re-enacts, with additions at subheads (7) to (11), Regulation 19 of S.I. 484 of 2013 which gives effect to Article 13 of the CRD. The additions at subheads (7) to (11) implement the paragraphs added to Article 13 by Article 4(10) of the BEMD.

(7) In respect of the personal data of the consumer, the trader shall comply with the obligations applicable under the Data Protection Act 2018.

(8) The trader shall refrain from using any content, other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader, except where such content:

(a) has no utility outside the context of the digital content or digital service supplied by the trader;

(b) only relates to the consumer's activity when using the digital content or digital service supplied by the trader;

(c) has been aggregated with other data by the trader and cannot be disaggregated or can be disaggregated only with disproportionate effort; or

(d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content.

(9) Subject to the exceptions specified in *subheads (8)(a), (b) or (c)*, the trader shall, at the request of the consumer, make available to the consumer any content, other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader.

(10) The consumer shall be entitled to retrieve the digital content referred to in *subhead (9)* free of charge, without hindrance from the trader, within a reasonable time and in a commonly used and machine-readable format.

(11) Where the consumer cancels the contract, the trader may prevent any further use of the digital content or digital service by the consumer, in particular by making the digital content or digital service inaccessible to the consumer or disabling the user account of the consumer, without prejudice to *subhead (9)*.

(12) A trader who contravenes any of the provisions of *subheads (1) to (6) and subheads (8) to (9)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.⁴¹⁵

(13) Breach by a trader of the obligation to reimburse the consumer in accordance with this head shall be actionable by the consumer as a breach of statutory duty.⁴¹⁶

⁴¹⁵ Contraventions of subhead (7) are a matter for data protection, and not consumer, law.

⁴¹⁶ Subhead (13) re-enacts the provision at Regulation 19(8) of S.I. 484/2013.

*Head 93 Return of goods and obligations of consumer in event of cancellation*⁴¹⁷

(1) Where a consumer cancels a sales contract under *head 87*, the trader shall collect the goods if –

- (a) the trader has offered to collect them, or
- (b) in the case of an off-premises contract, the goods were delivered to the consumer's home at the time of the conclusion of the contract and the nature of the goods is such that they cannot normally be returned by post.

(2) Where the trader is required to collect the goods under *subhead (1)*, the trader shall do so at his or her own expense.

(3) Where the trader is not required to collect the goods under *subhead (1)*, the consumer shall –

- (a) send them back, or
- (b) hand them over to the trader or to a person authorised by the trader to receive them.

(4) The consumer shall send back or hand over the goods without undue delay and not later than 14 days from the day on which he informed the trader of his decision to cancel the contract in accordance with *head 90*.

(5) The consumer shall bear the direct costs of returning the goods under paragraph (3) unless –

- (a) the trader has agreed to bear those costs, or

⁴¹⁷ Head 93 re-enacts, with the addition of subhead (9), Regulation 20 of S.I. 484/2013 which gives effect to Articles 14(1) and (2) of the CRD. Subhead (9) gives effect to the new paragraph 2a inserted in Article 14 of the CRD by Article 4(11) of the BEMD. While Article 14 of the CRD is titled 'Obligations of the consumer in the event of withdrawal', Regulation 20 is titled 'Return of goods in event of cancellation of sales contract'. It is proposed to change this to 'Return of goods and obligations of consumer in event of cancellation of contract'. The head contains obligations on consumers as well as provisions on the return of goods. The addition of subhead (9) means also that it no longer applies only to sales contracts.

(b) the trader has failed to inform the consumer, in accordance with *paragraph (n)* of *Schedule 2*, that the consumer shall bear those costs.⁴¹⁸

(6) A consumer who is required to return goods to a trader following the exercise of the right to cancel –

- (a) shall take reasonable care of the goods prior to returning them, and
- (b) is liable for any diminished value of the goods resulting from the handling of the goods beyond that necessary to establish their nature, characteristics and functioning.

(7) There is no liability on the consumer under *subhead (6)* if the trader has failed to provide the consumer with the information on the right to cancel required by *paragraph (m)* of *Schedule 2* in accordance with –

- (a) *head 79* in the case of off-premises contracts,
- (b) *head 80* in the case of off-premises contacts for repairs or maintenance within the scope of that Regulation,
- (c) *head 82* in the case of distance contracts.⁴¹⁹

(8) Breach by a consumer of the obligation to return the goods in accordance with this head shall be actionable by the trader as a breach of statutory duty.⁴²⁰

(9) Where a consumer cancels a contract for the supply of –

- (a) digital content not supplied on a tangible medium, or
- (b) a digital service,

he or she shall refrain from using the digital content or digital service and from making it available to third parties.

⁴¹⁸ Regulation 20 (5)(b) of S.I. 484/2013 refers to paragraph (m) of Schedule 2. As a result of the addition of a new paragraph (i) to the Schedule however, paragraph (m) is now paragraph (n).

⁴¹⁹ Regulation 20(7) of S.I. 484/2013 refers to paragraph (l) of Schedule 2. As a result of the addition of a new paragraph (i) to the Schedule resulting from an amendment made to Article 6(1) of the CRD by the BEMD, paragraph (l) is now paragraph (m).

⁴²⁰ Subhead (8) re-enacts Regulation 20(8) of S.I. 484/2013.

*Head 94 Performance of service and supply of water, gas or electricity and of district heating during cancellation period*⁴²¹

(1) Subject to *head 75* and *head 86*, this head applies to any of the following contracts concluded between a trader and a consumer that place the consumer under an obligation to pay:⁴²²

- (a) service contracts;
- (b) contracts for the supply of water, gas or electricity not supplied in a limited volume or set quantity;
- (c) contracts for the supply of district heating;

(2) Where the consumer wants the performance of a contract referred to in *subhead (1)* to begin during the cancellation period, the trader shall –

- (a) require the consumer to make an express request to this effect on a durable medium, and
- (b) request the consumer to acknowledge that, once the contract has been fully performed by the trader, the consumer will no longer have the right to cancel the contract.⁴²³

⁴²¹ Head 94 re-enacts with amendments Regulation 21 of S.I. 484 of 2013. Regulation 21(2) gives effect to Articles 7(3) and 8(8) of the CRD. Regulations 21(3) and (4) give effect to Article 14(3) of the Directive and Regulation 21(5) gives effect to Article 14(4)(a).

⁴²² The application of Regulation 21 of S.I. 484/2013 and of the provisions of the CRD as adopted to which the Regulation gives effect are not expressly restricted to contracts that place the consumer under an obligation to pay the price. Article 4(6) of the BEMD replaces Article 7(3) of the CRD with a paragraph that restricts its application to such contracts and Article 4(7)(b) of the BEMD makes a similar change to Article 8(8) of the BEMD. Recital (37) of the BEMD gives the following rationale for these changes:

Article 7(3) and Article 8(8) of Directive 2011/83/EU require traders for off-premises and distance contracts to respectively, to obtain the consumer's prior express consent to begin performance before the expiry of the right of withdrawal period. Point (a) of Article 14(4)(a) provides for a contractual sanction when this requirement is not fulfilled by the trader, namely, the consumer does not have to pay for the services provided. The requirement to obtain the consumer's prior express consent and acknowledgement is accordingly only relevant for services, including digital services, which are provided against the payment of the price. It is therefore necessary to amend Article 7(3) and Article 8(8) to the effect that the requirement that the requirement for traders to obtain the consumer's prior express consent only applies to service contracts that place the consumer under an obligation to pay.

While Articles 4(6) and 4(7)(b) of the BEMD do not similarly amend Articles 14(3) and 14(4)(a) of the CRD which are given effect in subheads (3) to (5), these subheads, as is apparent, apply only to contracts involving the payment of a price.

⁴²³ Paragraph (b) of subhead (2) gives effect to the further amendment of Articles 7(3) and 8(8) of the CRD made by Articles 4(6) and 4(7)(b) of the BEMD.

(3) Subject to *subhead (5)*, where the consumer cancels a contract during the cancellation period before the service has been fully performed or the water, gas, electricity or district heating fully supplied, the consumer shall pay to the trader an amount which is in proportion to what has been provided until the time the consumer informed the trader of the exercise of the right to cancel.

(4) The amount referred to in *subhead (3)* is to be calculated –

- (a) on the basis of the total price agreed in the contract, or
- (b) if that price is excessive, on the basis of the market value of the service that has been provided.

(5) The consumer bears no cost for the performance of the contract during the cancellation period if –

- (a) the trader has failed to provide the consumer with the information on –
 - (i) the right to cancel required by *paragraph (m)* of *Schedule 2*, or
 - (ii) the consumer's liability to pay the trader reasonable costs for the performance of the contract during the cancellation period required by *paragraph (o)* of *Schedule 2*, or
- (b) the consumer has not expressly requested performance to begin during the cancellation period in accordance with *subhead (2)*.⁴²⁴

(6) The information on the right to cancel and on the consumer's liability to pay the trader reasonable costs referred to in *subhead 5(a)* shall be provided in accordance with –

- (a) *head 79* in the case of off-premises contracts,
- (b) *head 80* in the case of off-premises contracts for repairs or maintenance within the scope of that head,
- (c) *head 82* in the case of distance contracts.

⁴²⁴ Regulation 21(5)(a)(i) of S.I. 484/2013 refers to paragraph (l) of Schedule 2. As a result of the addition of a new paragraph (i) to the Schedule resulting from an amendment made to Article 6(1) of the CRD by the BEMD, paragraph (m) is now paragraph (n). Regulation 21(5)(a)(ii) refers to paragraph (n) of Schedule 2. As a result of the addition of a new paragraph (i) to the Schedule however, paragraph (n) is now paragraph (o).

*Head 95 Provision of digital content during cancellation period*⁴²⁵

(1) A consumer who exercises the right to cancel a contract for the supply of digital content not supplied on a tangible medium during the cancellation period is not liable for the cost of that supply, whether in full or in part, during the cancellation period where –

- (a) the consumer has not given his or her prior express consent to the beginning of the performance of the digital content before the expiry of the cancellation period applicable under *head 88* or *head 89*;
- (b) the consumer has not acknowledged in giving his or her consent to the beginning of the performance of the digital content before the expiry of the cancellation period that the right to cancel would be lost; or
- (c) the trader has failed to provide confirmation of –
 - (i) the consumer’s prior express consent to the beginning of the performance of the digital content before the expiry of the cancellation period, and
 - (ii) the consumer’s acknowledgement of the loss of the right to cancel the contract where the performance of the digital content has begun with the consumer’s prior express consent before the expiry of the cancellation period.

(2) The confirmation of the consumer’s prior express consent to the beginning of the performance of the digital content and of the consumer’s acknowledgement of the loss of the right to cancel the contract referred to in *subhead (1)(c)* shall be provided in accordance with *head 81* in the case of off-premises contracts and in accordance with *head 85* in the case of distance contracts.

⁴²⁵ Head 95 re-enacts Regulation 22 of S.I. 484 of 2013 which gives effect to Article 14(4)(b) of the CRD. Article 14(4)(b)(i) provides that the consumer will bear no cost for the supply, in full or in part, of digital content not supplied on a tangible medium where ‘the consumer has not given his prior express consent to the beginning of the performance before the end of the 14-day period referred to in Article 9’. Article 4(11)(b) of the BEMD amends this provision to refer ‘to the beginning of the performance before the end of the 14-day or 30-day period referred to in Article 9’. It is not considered necessary to incorporate this amendment in subhead (1)(a). The reference in the subhead to the expiry of the cancellation period applicable under head 88 or head 89 encompasses both the 14-day and 30-day cancellation periods.

*Head 96 Effects of cancellation on ancillary contracts*⁴²⁶

- (1) For the purposes of this head, an “ancillary contract” means a contract under which -
- (a) the consumer acquires goods or services related to a distance or off-premises contract, and
 - (b) the goods are supplied, or services provided, by the trader or by a third party on the basis of an arrangement between the third party and the trader.⁴²⁷
- (2) Where a consumer cancels a distance or off-premises contract in accordance with this Chapter, any ancillary contracts are automatically terminated without any costs for the consumers other than costs under the following provisions:
- (a) *head 92(2)* (non-standard delivery);
 - (b) *head 93(5)* (direct cost of returning goods);
 - (c) *head 93(6)(b)* (diminished value of goods);
 - (d) *head 94(3)* (services provided, or gas, water, electricity, or district heating supplied, during cancellation period).
- (3) When a trader is informed by a consumer in accordance with *head 90* of the consumer’s decision to cancel a contract, the trader shall inform any other trader with whom the consumer has an ancillary contract that is terminated in accordance with *subhead (2)*.⁴²⁸
- (4) Where an ancillary contract is terminated in accordance with this head –
- (a) the trader with whom the consumer has that contract shall reimburse all payments received from the consumer,
 - (b) the consumer shall

⁴²⁶ Head 96 re-enacts Regulation 23 of S.I. 484/2013 which gives effect to Article 15 of the CRD. Article 15(2) of the Directive states that Member States ‘shall lay down detailed rules on the termination of such contracts.’ Subheads (3) to (5) set out these rules.

⁴²⁷ The definition of ‘ancillary contract’ at subhead (1) is taken from the definition of the term at Article 2(15) of the CRD. As the CRD definition refers only to goods or services and not to digital content and as it was not amended by the BEMD, subhead (1), like Article 2(15) and Regulation 23(1), refers only to goods or services. The scope of the definition differs from that of the corresponding definitions in head 11(1) of Part 2, head 40(1) of Part 3 and head 61(1) of Part 4 in that it does not refer to digital content and applies to distance and off-premises contracts only.

⁴²⁸ Subhead (3) re-enacts Regulation 23(3) of S.I. 484/2013.

- (i) return any goods delivered under the ancillary contract to the trader at the trader's expense, and
- (ii) refrain from using any digital content or digital service supplied under the ancillary contract or from making it available to a third party.⁴²⁹

(5) Where any security has been provided under an ancillary contract that is terminated in accordance with *subhead (2)*, it is to be treated as never having had effect and any property lodged with the supplier or the third party solely for the purposes of that security shall be returned immediately by the supplier or third party.⁴³⁰

(6) *Subhead (2)* is without prejudice to Regulation 18 of the European Communities (Consumer Credit Agreements) Regulations 2010 (S.I. No. 281/2010).⁴³¹

(7) Notwithstanding *head 76(5)(b)* (exclusion of financial services contracts), contracts for financial services may be ancillary contracts for the purposes of this Regulation.

⁴²⁹ Subhead (4) is an addition to the provisions at Regulation 23 of S.I. 484/2013.

⁴³⁰ Subhead (5) re-enacts Regulation 23(4) of S.I. 484/2013.

⁴³¹ Regulation 18 of S.I. No. 281/2010 provides, among other things, a consumer who exercises a right to cancel a credit agreement ceases to be bound by any linked credit agreement.

*Head 97 Rights of consumer cannot be waived*⁴³²

(1) Any purported waiver by a consumer of a right conferred by this Part is of no effect.

(2) Any term of a contract which directly or indirectly waives or restricts the rights conferred by this Part is not binding on the consumer.

⁴³² Head 97 re-enacts Regulation 39 of S.I. 484/2013 which gives effect to Article 25 of the CRD.

PART 6⁴³³

OTHER CONSUMER RIGHTS

⁴³³ Part 6 implements the following provisions of the CRD as given effect in Chapter IV (Other Consumer Rights) of S.I. 484/2013: Article 19 (Fees for the use of means of payment), Article 21 (Communication by telephone), Article 22 (Additional payments) and Article 27 (Inertia selling). Article 18 (Delivery) of the CRD and Article 20 (Passing of risk) which are also given effect in Chapter IV of the 2013 Regulations relate to sales contracts and now form part of Chapter 4 of Part 2 of the Scheme.

PART 6

OTHER CONSUMER RIGHTS

Head 98 Application (Part 6)

(1) In this Part, “Directive” means Directive 20011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights (as amended by Directive (EU) 2019/2161 of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules).

(2) Subject to *subheads (3) to (5)*, this Part applies to –

- (a) sales contracts,
- (b) service contracts,
- (c) contracts for the supply of digital content not supplied on a tangible medium,
- (d) contracts for the water, gas or electricity not supplied in a limited volume or set quantity, supply of digital services,
- (e) contracts for the supply of district heating.⁴³⁴

(3) This Part does not apply to contracts for financial services, but applies to payments for such services in other contracts between a trader and a consumer to which this Part.⁴³⁵

⁴³⁴ The provisions of Articles 19, 21, 22 of the CRD that are given effect in Part 6 are subject in Article 3(3) of the Directive and in Regulation 3(2) of S.I. 484/2013 to exclusions for a number of specified contracts broadly similar to those in head 75(5) of Part 5. No similar exclusions apply however to Article 27 of the Directive which is also given effect in this Part. With the exception of contracts for financial services, these exclusions do not apply to the provisions of Part 6. The sectoral exclusions in Article 3(3) of the CRD were framed with the Directive’s provisions on pre-contractual information and the cancellation of distance and off-premises contracts in mind and there is no policy or practical reason why the provisions of Articles 19, 21 and 22 should not, with the exception of financial services, apply to consumer contracts generally. As financial services contracts and transactions are subject to detailed separate sectoral regulation, an exception for these contracts is justified.

⁴³⁵ Subhead (2) re-enacts Regulation 24(3) of S.I. 484/2013. As payments for financial services may occur in the contracts to which Part 6 applies, it was thought necessary to include a clarification of this kind in the transposition of Articles 19 and 22 of the CRD. The European Commission had no issue with the inclusion of Regulation 24(3) in the transposition of the CRD.

(4) *Head 100* does not apply to contracts for the supply of digital content or digital services under which the consumer does not pay a price for the digital content or digital service.⁴³⁶

(5) The application of this Part to packages and linked travel arrangements is subject to the following modifications and any other necessary modifications:

- (a) a reference to a trader shall be construed as a reference to an organiser or a trader facilitating linked travel arrangements;
- (b) a reference to a consumer shall be construed as a reference to a traveller.⁴³⁷

(6) A word or expression used in this Part that is also used in the Directive has, unless the context otherwise requires, the same meaning in this Part as it has in the Directive.

(7) A court shall construe this Part in a manner that gives effect to the Directive, and for this purpose the court shall have regard to the provisions of the Directive, including its preambles.

⁴³⁶ As head 100 deals with payments additional to the payment for the main obligation under the contract, it has no application to contracts for digital content or digital services in which the consumer does not pay a price. Head 99 (Fees for the use of means of payment) may be applicable to such contracts in some cases, for example where digital content such as that in some computer games is available free of charge, but a price is payable for additional content by means such as in-app purchases.

⁴³⁷ As with subhead 78(3) of Part 5, subhead (5) follows the approach taken by the European Union (Package Travel and Linked Travel Arrangements) 2019 (S.I. No 80 of 2019) to the amendment of Article 3(3)(g) of the CRD to provide for the application of certain of the CRD's provisions, including Articles 19, 21 and 22, to package travel contracts. Article 27(2) of Directive (EU) 2015/2302 on package travel and linked travel arrangements provides that the relevant provisions of the CRD 'shall apply mutatis mutandis to packages as defined in point 2 of Article 3 of Directive (EU) 2015/2302 in relation to travellers as defined in point 6 of Article 3 of that Directive'. The modifications are mainly necessary because the Package Travel Directive applies under specified conditions to business travellers as well as to consumers. Unlike the corresponding provision at head 78(3), subhead (5) does not refer to 'package travel contract' as this term does not feature in any of the provisions of Part 6. While S.I. No. 80 of 2019 provided for the amendments to S.I. 484/2013 in a new section 25C inserted in the Package Holidays and Travel Trade Act 1995, subhead (5) provides for their amendment in this Part. The revocation of section 25C of the 1995 Act is provided for accordingly in Part 1 of Schedule 5 (Repeal of Acts) of the Scheme. Head 3(9) of Part 1 provides that the terms referred to in subhead (4) have the meaning given them by section 2(1) of the Package Holidays and Travel Trade Act 1995.

*Head 99 Fees for the use of means of payment*⁴³⁸

(1) A trader shall not charge consumers in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of that means of payment.

(2) Where a trader charges a consumer a fee in excess of that provided for in *subhead (1)*, the trader shall reimburse the consumer to the extent of the excess charged.

(3) Any provision of a contract which requires the consumer to pay a fee in excess of that provided for in *subhead (1)* is unenforceable to the extent of the excess charged.

(4) A trader who contravenes *subhead (1)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.

(5) Breach by a trader of the obligation to reimburse the consumer in accordance with this head shall be actionable by the consumer as a breach of statutory duty.

(6) In case of dispute, it is for the trader to show that a fee charged in respect of the use of a given means of payment does not exceed the cost borne by the trader for the use of that means of payment.

(7) Nothing in this head shall affect the operation of Regulation 86 of the European Union (Payment Services) Regulations 2018 (S.I. No 6 of 2018).⁴³⁹

⁴³⁸ Head 99 re-enacts Regulation 25 of S.I. 484/2013 which gives effect to Article 19 of the CRD.

⁴³⁹ Regulation 5 of the European Union (Payment Services) (Amendment) Regulations 2019 (S.I. No. 255 of 2019) amended Regulation 25 of S.I. 484/2013 by inserting the following paragraph (6):

(6) Nothing in this Regulation shall affect the operation of Regulation 86 of the European Union (Payment Services) Regulations 2018 (S.I. No. 6 of 2018).

Regulation 86 of the 2018 Regulations, among other things, prohibits payment fees for what are known as four-party payment card transactions, i.e. those in which the payment transaction involves the bank that issued the payment card to the payer and the acquirer bank which that manages card transactions on behalf of the payee. These are the most common form of payment card transaction and include the Visa and MasterCard Schemes. As a result of the enactment of Regulation 86 of the 2018 Regulations, Regulation 25 of S.I. 484/2013 which is re-enacted in head 99 now effectively applies only to what are known as three-party

*Head 100 Additional Payments*⁴⁴⁰

(1) Before a consumer is bound by a contract or an offer, the trader shall seek the consumer's express consent to any payment additional to the payment agreed for the trader's main obligation under the contract.

(2) There is no express consent by the consumer under *subhead (1)* if that consent is inferred from the use of a default option which the consumer is required to reject in order to avoid the additional payment.

(3) Where a trader receives a payment from a consumer that contravenes *subhead (1)*, the trader shall reimburse the payment to the consumer.

(4) Any provision of a contract which requires the consumer to make a payment that contravenes *subhead (1)* is unenforceable.

(5) A trader who contravenes *subhead (1)* or *subhead (3)* commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.⁴⁴¹

(6) Breach by a trader of the obligation to reimburse the consumer in accordance with this head shall be actionable by the consumer as a breach of statutory duty.

(7) In case of dispute, it is for the trader to show that –

- (a) the trader sought the consumer's express consent to any payment additional to that agreed for the trader's main obligation under the contract, and

payment card transactions, i.e. those involving card schemes such as American Express and Diners' Club in which the scheme owner also acts as the card issuer and acquirer.

Subhead (7) re-enacts the provision inserted in Regulation 25 of S.I. 484/2013 by the 2018 Regulations.

⁴⁴⁰ Head 100 re-enacts Regulation 26 of S.I. 484/2013 which gives effect to Article 26 of the CRD.

⁴⁴¹ Though regulation 26(5) of S.I. 484/13 does not make non-reimbursement of an additional payment an offence, it should be an offence in the Department's view in order to give proper effect to the Directive provision and subhead (5) provides accordingly.

(b) the consumer's consent was not inferred from the use of a default option which the consumer was required to reject in order to avoid the additional payment.

*Head 101 Charges for communication by telephone*⁴⁴²

(1) Where a trader operates a telephone line for the purpose of permitting consumers to contact the trader about a contract concluded with the trader, calls by consumers to that line for that purpose shall not be charged at more than the basic rate.

(2) Where a trader operates a telephone line that contravenes subhead (1), the trader shall reimburse the consent to the extent of the excess charged.

(3) Any provision of a contract which requires the consumer to make a payment that contravenes subhead (1) is unenforceable.

(4) A trader who contravenes subhead (1) commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in head 115 of Part 8.

(5) Breach by a trader of the obligation to reimburse the consumer in accordance with this head shall be actionable by the consumer as a breach of statutory duty.

(6) In case of dispute, it is for the trader to show that calls to a telephone line operated by the trader for the purpose of permitting consumers to contact the trader about a contract concluded with the trader were not charged at more than the basic rate.

(7) For the purposes of this head –

“basic rate” means the rate charged for a call to –

- (a) an Irish geographic number,
- (b) an Irish mobile number, or
- (c) any of the following non-geographic numbers as defined in the National Numbering Conventions:

⁴⁴² Head 101 re-enacts Regulation 27 of S.I. 484/2013 which gives effect to Article 21 of the CRD.

- (i) Freephone,
- (ii) Shared Cost (Fixed),
- (iii) Shared Cost (Timed),
- (iv) Universal Access

but, for the avoidance of doubt, excludes the rate charged for a call to a Premium Rate Number as defined in the National Numbering Conventions;⁴⁴³

“National Numbering Conventions” means the National Numbering Conventions as published by the Commission from time to time, and most recently on 9 March 2011.

⁴⁴³ The non-geographic numbers (NGNs) referred to in subhead (7)(c) are more commonly known as 1800 numbers (Freephone), 1850 numbers (Shared Cost Fixed), 1890 numbers (Shared Cost Timed) and 0818 numbers (Universal Access). Subsequent to the transposition of Article 21 of the CRD, ComReg made changes to the rules on charges for calls to these four NGNs as well to the rules on charges for calls to 076 numbers that are used for calls to some public service bodies and which are outside the scope of Article 21. From December 2019, calls to these numbers must be included in call bundles that include calls to landlines. Out of bundle, calls to these numbers can cost no more than a call to a landline. These changes required no amendment to Regulation 27 of the 2013 Regulations as they are fully in accordance with the aim of Article 21 to ensure that consumers are not charged premium rates for calls to customer helplines. From 1 January 2022, the five current NGN numbers will be reduced to two (1800 and 0818).

*Head 102 Inertia Selling*⁴⁴⁴

(1) Where an unsolicited product is supplied by a trader to a consumer, the consumer is exempted from any requirement to provide consideration for the product so supplied.⁴⁴⁵

(2) The absence of a response from the consumer following the supply of an unsolicited product does not constitute consent to –

- (a) the provision of consideration for the product, or
- (b) the return or safekeeping of goods.

(3) In the case of an unsolicited supply of goods, the consumer may treat the goods or digital content as if they were an unconditional gift.

(4) For the purposes of this head “unsolicited”, in relation to a product means that it is supplied without any request by or on behalf of the consumer.

⁴⁴⁴ This head incorporates the provisions inserted in sections 47(6) to (10) of SOG&SOSA 1980 by Regulation 32 of S.I. 484/2013 in order to give effect Article 27 of the CRD. The repeal of these subsections of the 1980 Act is provided for in head 5 and Schedule 5, Part 1. Sections 47(1) to (5) of the 1980 Act will continue to apply to unsolicited goods supplied to a person other than a consumer. Schedule 6 provides for the required amendments to the Act.

⁴⁴⁵ While sections 47(6) to (10) of SOG&SOSA 1980 refers only to goods or services, this head refers to ‘products’ which is defined in head 2(1) to include digital content not supplied on a tangible medium; water, gas and electricity not supplied in a limited volume or set quantity; and district heating. Subheads (2)(b) and (3) refer only to goods (including digital content supplied on a tangible medium) as as their provisions are applicable only to tangible items.

*Head 103 Rights of consumer cannot be waived*⁴⁴⁶

(1) Any waiver by a consumer of a right conferred by this Part is of no effect.

(2) Any term of a contract which directly or indirectly waives or restricts the rights conferred by this Part is not binding on the consumer.

⁴⁴⁶ Head 103 re-enacts Regulation 32 of S.I. 484/2013 in respect of Articles 19, 21, 22 and 27 of the CRD and is the counterpart of head 97 of Part 5.

PART 7

UNFAIR TERMS IN CONSUMER CONTRACTS⁴⁴⁷

⁴⁴⁷ Directive 93/13/EEC on Unfair Terms in Consumer Contracts (UCTD) which is given effect principally by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995) is generally acknowledged to be one of the most important pieces of consumer protection legislation. 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.' The Directive applies to all contracts between a trader and a consumer, including the goods, digital content, digital services, and services contracts covered by Parts 2 to 4 as well as other contracts outside the scope of those Parts, principally contracts for immovable property. Certain terms are excluded from the scope of the Directive, however, in particular terms that have been individually negotiated between the trader and consumer as well as what are sometimes referred to as the core terms of the contract. The UCTD 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'. Though almost all EU consumer protection legislation is now of a full harmonisation character, the European Commission have indicated that there are no plans for a similar change to the UCTD. While most other Member States have availed of the option to go beyond the UCTD's provisions in national legislation, the Regulations that implemented the Directive in Ireland did not make any additions to the Directive's provisions. An addition to the Directive's provisions was subsequently made, however, with the enactment of the provision at section 21(6) of the Arbitration Act 2010 which is included among the list of 'contract terms that are always unfair' in head 110. Part 7 makes a number of important changes to the UCTD provisions given effect in the 1995 Regulations, including -

- extending the scope of the unfair terms provisions to include contract terms that have been negotiated between the consumer and trader,
- strengthening the transparency requirements that apply to contract terms,
- narrowing somewhat the exemption from assessment for unfairness of core contract terms, and
- establishing a 'black list' of contract terms that are always unfair and expanding the 'grey list' of contract terms presumed.

Head 104 Interpretation (Part 7)

In this Part -

“authorised body” means –

- (a) the Competition and Consumer Protection Commission,
- (b) the Central Bank of Ireland,
- (c) the Commission for Communications Regulation,
- (d) a consumer organisation,
- (e) a body prescribed for the purposes of this Part;⁴⁴⁸

“consumer organisation” means⁴⁴⁹ -

- (a) a company, the memorandum of association of which states the company’s main object or objects to be the protection of consumer interests, or
- (b) a body corporate (other than a company) or an unincorporated body of persons in relation to which there exists a constitution or a deed of trust which states the body’s main object or objects to be the protection of consumer interests.

⁴⁴⁸ Paragraphs (a) to (d) of this definition re-enact the definition of ‘authorised body’ at Regulation 2 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995) (as substituted by Regulation 2 of the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014 (S.I. No. 336 of 2014)). The definition applies for the purpose of the bodies entitled to apply for a court declaration or order under the 1995 Regulations and under head 113 of this Part. Paragraph (e) provides that a body prescribed by the Minister in Regulations made under head 4 of Part 1 may also be an authorised body for the purposes of this Part.

⁴⁴⁹ This definition re-enacts the definition of ‘consumer organisation’ at Regulation 2 of the 1995 Regulations (as inserted by Regulation 3 of the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000 (S.I. No. 307 of 2000)). Article 7(2) of the UCTD requires Member States to ensure that the means used to prevent the continued use of unfair terms include provisions under which persons or organisations having a legitimate interest under national law in protecting consumers may take action before the courts for a decision as to whether contractual terms drawn up for general use are fair.

Head 105 Application (Part 7)

(1) Subject to *subheads (2) to (5)*, this Part applies to any contract⁴⁵⁰ between a trader⁴⁵¹ and a consumer (a consumer contract).

(2) A consumer contract is not excluded from the application of this Part by reason only of the fact that –

- (a) the contract or a term of the contract has been individually negotiated between the trader and the consumer,⁴⁵² or
- (b) the consumer does not pay a price under the contract.⁴⁵³

⁴⁵⁰ Article 1(1) of the UCTD states that its purpose is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms ‘in contracts concluded between a seller or supplier and a consumer’. Recital (10) of the Directive states that its rules ‘should apply to all contracts concluded between sellers or suppliers and consumers’. The CJEU has confirmed that the UCTD is intended to apply to all sectors of economic activity (Case C-537/13, *Air Berlin*, paragraph 44).

⁴⁵¹ As explained in the footnote to the definition of ‘trader’ in head 2(1), ‘trader’ is used throughout the Scheme for the non-consumer party to consumer contracts, including for the ‘seller’ and ‘supplier’ referred to in the UCTD.

⁴⁵² Article 2(a) of the UCTD in conjunction with Article 3(1) provides that only contract terms that have not been negotiated individually are subject to the Directive. The Directive applies essentially therefore to the terms of what Article 3(2) refers to as ‘preformulated standard contract(s)’. Subhead (2) provides that Part 7 will apply both to negotiated and non-negotiated contract terms. While this is a significant change in principle, its practical effect is likely to be less marked. Contract terms agreed between a trader and a consumer may be thought to be more likely to be fair than ‘take it or leave it’ terms in a standard form contract, but there is no guarantee that they will be so given the asymmetry of information and bargaining power characteristic of consumer contracts. Applying Part 7 to both negotiated and non-negotiated terms will simplify the application of its provisions to contracts that are partly negotiated and partly non-negotiated and prevent disputes about whether or not terms have been negotiated. Member States are free in accordance with the minimum harmonisation clause at Article 8 of the UCTD to apply the Directive’s provisions to negotiated contract terms and a number have done so. The freedom of Member States to do so is in fact expressly mentioned in the first indent to Article 8a(1) of the Directive (as inserted by Article 32 of the CRD).

⁴⁵³ The UCTD does not define ‘contract’ and does not expressly provide that only contracts where the consumer provides monetary consideration come within its scope. The CJEU has ruled however that a guarantee contract under which a private person provided a guarantee for a loan taken out by others came within the scope of the Directive even though the guarantee contract did not include any requirement for monetary consideration on the part of the guarantor (Case C-74/15 *Dumitru Tarcau* and Case C-534/15 *Dumitras*). In its guidance on the Directive, the European Commission states that ‘contracts between consumers and providers of social media services must be considered to be covered by the UCTD regardless of whether consumers have to pay certain amounts of money or whether the consideration for the services consists in consumer generated content and profiling’ (European Commission, 2019, *Guidance on the interpretation and application of Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts*, pp. 9-10). It is desirable nevertheless to clarify in subhead (2)(b) that Part 7 applies to contracts where the consumer does not provide monetary consideration.

- (3) This Part does not apply to a contract term that reflects –
- (a) mandatory statutory or regulatory provisions, including provisions that, according to law, apply between the parties on the basis that no other rules or arrangements have been established, or
 - (b) the provisions or principles of international conventions to which Ireland or the European Union are party.⁴⁵⁴

(4) In subsection (3)(a), “mandatory statutory or regulatory provisions” include rules which, according to law, apply between contracting parties where no other arrangements have been established.⁴⁵⁵

- (5) This Part does not apply to:
- (a) a contract of employment,
 - (b) a contract relating to succession rights,
 - (c) a contract relating to rights under family law, or
 - (d) a contract relating to the incorporation and organisation of companies or partnerships.⁴⁵⁶

(6) If the law of a non-EEA State is chosen by the parties to be applicable to a consumer contract and that contract has a close connection with the territory of the EEA States, this Part shall apply to the contract despite that choice.⁴⁵⁷

⁴⁵⁴ Subhead (3) gives effect to Article 1(2) of the UCTD. This states that the ‘contractual terms which reflect mandatory statutory or regulatory provisions and the provisions of international conventions to which the Member States or the Community are bound, particularly in the transport area, shall not be subject to the provisions of this Directive’. Recital (13) of the Directive states that ‘the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms.’ The CJEU has held that the exclusion of these provisions from the scope of the UCTD is justified by the fact that ‘in principle, it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts’ (Case C-51/17, *OTP Bank v Ilyés and Kiss*, paragraph 53).

⁴⁵⁵ Subhead (4) gives effect to the clarification of ‘mandatory statutory or regulatory provisions’ in the last part of recital (13) of the UCTD, namely that the term includes provisions that operate as default rules.

⁴⁵⁶ Subhead (5) gives effect to the exclusions from the scope of the UCTD set out in recital (10) of the Directive.

⁴⁵⁷ Article 6(2) of the UCTD requires Member States to ‘take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a connection with the territory of the

(7) For the purposes of subhead (6) –

“EEA State” means a state which is a contracting party to the EEA Agreement;

“EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2 May 1992, as adjusted by all subsequent amendments to that Agreement.

- (a) the applicable law has not been chosen by the parties to the contract, or
- (b) the law of an EEA State is chosen.

Member States.’ As EU consumer law applies to EEA States by virtue of the EEA Agreement of 1992, subhead (6) refers to the law of a non-EEA State rather than to that of a non-Member State. Subhead (7) defines ‘EEA State’ and ‘EEA Agreement’.

Head 106 Contract terms to be transparent

(1) The trader shall ensure that the terms of consumer contracts are transparent.⁴⁵⁸

(2) A term of a consumer contract is transparent if -

- (a) the term is expressed in plain and intelligible language,
- (b) the term, if written, is legible and presented clearly,
- (c) the term is made available to the consumer in a manner which gives the consumer a real opportunity of becoming acquainted with it before the conclusion of the contract,⁴⁵⁹
- (d) the term, if novel or onerous, is given due prominence;⁴⁶⁰
- (e) the economic costs and consequences deriving from the term would be comprehensible to the average consumer.⁴⁶¹

⁴⁵⁸ Article 5 of the UCTD states that in 'the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain intelligible language'. Head 106 substitutes more expansive transparency requirements for the relatively narrow provision at Article 5 of the Directive that written contract terms should be drafted in plain and intelligible language. This approach is in line with a number of judgments of the European Court of Justice which have held that the requirement of transparency 'cannot be reduced' to a requirement that contract terms be 'formally and grammatically intelligible' but 'must be understood in a broader sense' (Case C-26/13 *Kasler*, paragraphs 70-71; Case C-96/14 *Van Hove*, paragraphs 40 and 50; Case C-186/16 *Andricuic*, paragraphs 44-45).

⁴⁵⁹ Paragraph (c) is based, among other things, on the transparency requirement at Article 31(2) of the European Commission's 2008 proposal for a Directive on Consumer Rights. Though the provisions dealing with unfair contract terms were not adopted in the event, the Commission proposal on transparency is in accordance with provisions of the UCTD that expand on the transparency provision at Article 5. Recital 20 of the Directive states as follows: 'Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms.' The Directive's Annex of 'terms which may be regarded as unfair' includes at point (i) a term with the object or effect of 'irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'.

⁴⁶⁰ Paragraph (d) derives from the well-established principle in contract law that a party seeking to enforce an onerous or unusual contract term must show that it has been brought fairly and reasonably to the attention of the other party.

⁴⁶¹ Paragraph (d) takes account of the broad concept of transparency developed in a number of CJEU judgments. In *Kasler* (paragraph 50), for example, the Court held that 'the requirement that a contractual term must be drafted in plain, intelligible language is to be understood as requiring also that the contract should set out transparently the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms, so that the consumer is in a position to evaluate on the basis of clear, intelligible criteria the economic consequences for him which derive from it.' See also Case 143/13 *Matei and Matei*, paragraph 74; Case C-186/16 *Andricuic*, paragraph 47; and Case C-384/14 *Bucura*, paragraph 66. The CJEU developed the concept of the 'average consumer' and has used it as a benchmark in a number of cases concerning the transparency provisions of the UCTD. In *Van Hove* (Case C-96/14, paragraph 47), for example, the Court stated that it 'is for the referring court to determine whether having regard to all the relevant information, including the promotional material and information

- (3) The assessment of the transparency of a contract term shall take account without limitation of –
- (a) the nature of the subject matter of the contract,
 - (b) the means by which the contract is communicated and presented,
 - (c) the other terms of the contract or of any other contract on which it is dependent,
 - (d) the term’s compliance with any applicable pre-contractual information requirements,
 - (e) all the circumstances attending the conclusion of the contract.⁴⁶²

(4) Where there is doubt about the meaning of a contract term, the interpretation most favourable to the consumer shall prevail.⁴⁶³

(5) Subhead (4) shall not apply to the interpretation of a term in proceedings on an application to a court for a declaration or injunction under *head 113*.

(6) In this head, “average consumer” has the meaning given to it by Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices.⁴⁶⁴

provided and, more generally, of the contractual framework, an average consumer, who is reasonably well informed and reasonably observant and circumspect [would be able to understand the term].’

⁴⁶² The criteria at paragraphs (a), (c) and (f) are based on those specified in Article 4 of the UCTD for the purpose of assessments of the unfairness of a contract term. Paragraph (e) reflects the fact that the CJEU has taken account in a number of judgments of the information requirements applying under various EU consumer protection enactments. The Commission guidance on the UCTD (p. 31) states that the ‘fact of whether a seller or supplier has complied with sector-specific requirements is an important element when assessing compliance with the transparency requirements under the UCTD’.

⁴⁶³ Subhead (4) gives effect to the *contra preferentem* rule at Article 5 of the UCTD. As Article 5 further provides that this rule of interpretation shall not apply in the context of the procedures laid down in Article 7(2) relating to court actions about the unfairness of contract terms, subhead (5) provides that subhead (4) will not apply in proceedings for a declaration or injunction under head 113.

⁴⁶⁴ Though ‘average consumer’ is not included among the definitions in Article 2 of the UCPD, recital 18 of the Directive interprets it in line with CJEU case law as follows:

‘this Directive takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice... Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group... The average consumer is not a statistical test. National courts and authorities will have to assess their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case’. The definition in this head is similar to that in section 2(2) of the CPA 2007 and section 1 of the Consumer Insurance Contracts Act 2019. Section 64(5)

(7) A contravention by a trader of subhead (1) shall be a prohibited commercial practice under section 67 of the Consumer Protection Act 2007 for the purposes of sections 71, 73 and 75 of that Act.⁴⁶⁵

(8) The Minister may make regulations prescribing specific requirements for the transparency of contract terms in consumer contracts generally or in contracts for a specified class or classes of goods, digital content, digital service or service.⁴⁶⁶

of the UK Consumer Rights Act 2015 defines ‘average consumer’ as ‘a consumer who is reasonably well-informed, observant and circumspect’ for the purpose of the provision at 64(4) of the Act requiring contract terms to be prominent in order to be excluded from assessment for unfairness.

⁴⁶⁵ Article 7 of the UCTD requires Member States to ensure ‘that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’ The new Article 8b inserted in the UCTD by Article 1 of the BEMD provides at paragraph 1 that ‘Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented.’ While infringements of the transparency provisions of head 106 are not appropriate for a criminal offence, it is desirable to provide enforcement mechanisms to address such infringements. Subhead (7) provides accordingly that a contravention of the requirement on traders under subhead (1) to ensure that the terms of consumer contracts are transparent shall be a prohibited act or practice under section 67 of the CPA 2007 for the purposes of enforcement action under the following provisions of the Act: section 71 (Civil relief by way of prohibition orders); section 73 (Undertakings with the Competition and Consumer Protection Commission); and section 75 (Compliance notices). Sections 71 and 73 of the 2007 Act are civil remedies, while section 75 permits a person served with a compliance notice to appeal it to the District Court and section 85 permits a person served with a fixed payment notice not to pay the notice and to have the matter dealt with by way of prosecution

⁴⁶⁶ Subhead (8) replaces section 53 (Size of type in printed contracts and other documents) and section 54 (Contracts required to be in writing) of the SOG&SOSA 1980. Part 1 of Schedule 5 provides for the repeal of both these sections.

Head 107 Meaning of unfair

(1) A contract term is unfair for the purposes of this Part if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.⁴⁶⁷

(2) The assessment of whether a term is unfair shall take account of –

- (a) the nature of the subject matter of the contract,
- (b) the compliance of the term with the requirement of transparency under head 106,
- (c) all the circumstances attending the conclusion of the contract, and
- (d) all of the other terms of the contract or of another contract on which it is dependent.⁴⁶⁸

(3) The assessment of whether a term complies with the requirement of good faith shall have particular regard to -

- (a) the strength of the bargaining positions of the parties,
- (b) whether the consumer had an inducement to agree to the term,
- (c) whether the goods, digital content, digital services, services or other subject matter of the contract were sold or supplied to the special order of the consumer, and
- (d) the extent to which the trader has –
 - (i) dealt fairly and equitably with the consumer, and
 - (ii) taken the consumer's legitimate interests into account.⁴⁶⁹

(4) Nothing in this head affects the operation of the following provisions:

- (a) *head 35* (Exclusion or limitation of liability of trader in sales contracts);

⁴⁶⁷ Subhead (1) re-enacts the first part of Regulation 3(2) of S.I. No. 27 of 1995 which gives effect to the test of unfairness at Article 3(1) of the Directive.

⁴⁶⁸ Subhead (2) re-enacts the second part of Regulation 3(2) of S.I. No. 1995 which gives account to Article 4(1) of the UCTD. Paragraph 2 of the subhead is an addition and reflects the case law of the CJEU that failure to meet the Directive's transparency requirements can be an element in the assessment of the unfairness of a contract term (Case C-472/10 *Invitel*, paragraphs 30-31; Case C-226/12 *Constructora Principado*, paragraph 27).

⁴⁶⁹ Subhead (3) incorporates the 'Guidelines for Application of the Test of Good Faith' at Schedule 2 of S.I. No. 27 of 1995 which implements recital (13) of the UCTD. These provisions are more appropriately placed along with the provision on the test of unfairness to which they relate rather than in a schedule.

- (b) *head 60* (Exclusion or limitation of liability of trader in contracts for supply of digital content or digital services);
- (c) *head 73* (Exclusion or limitation of liability of trader in service contracts); and
- (d) *head 110* (Contract terms which are always unfair).⁴⁷⁰

⁴⁷⁰ The provisions on the exclusion or limitation of the liability of traders in Parts 2-4 effectively make any such contract terms unfair in all circumstances. It is desirable accordingly to clarify that these provisions, along with head 110 on contract terms that are always unfair, are exempt from a case-by-case assessment of their unfairness under head 107. A similar provision can be found at section 62(8) of the UK Consumer Rights Act 2015.

Head 108 Exclusion from assessment for unfairness

(1) Subject to *subheads (2) to (4)*, a contract term shall not be assessed for unfairness under head 107 to the extent that it –

- (a) specifies the main subject matter of the contract, or
- (b) relates to the adequacy of the price or remuneration payable under the contract as against the goods, digital content, digital services, services or other subject matter of the contract supplied in exchange.⁴⁷¹

(2) A contract term is excluded from assessment for unfairness under *head 107* only if it complies with the requirements of head 106 on the transparency of contract terms.⁴⁷²

(3) The reference in *subhead (1)(b)* to the price or remuneration payable under the contract does not include any payment that is -

- (a) incidental or ancillary to the price payable under the contract for the goods, digital content, digital services, services or other subject matter of the contract supplied in exchange, or
- (b) contingent on the occurrence or non-occurrence of a particular event.⁴⁷³

⁴⁷¹ Subhead (1) re-enacts Regulation 4 of S.I No. 27 of 1995 which implements the provision at Article 4(2) of the UCTF which exempts from assessment for unfairness contract terms that relate ‘neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other’. This is commonly referred to as the core terms exclusion. The CJEU has held that ‘the main subject of the contract’ are the terms that ‘lay down the essential obligations of the contract and, as such, characterise it’ (Case C-96/14, *Van Hove*, paragraph 33; Case C-26/13 *Kasler*, paragraph 49). Consideration was given to using this wording in subhead (1)(a) but it was thought preferable to use wording in line with that in Article 4(2) of the Directive. Subheads (2) and (3) include provisions that seek to ensure that the exemption in subhead (1) is not interpreted or applied too broadly.

⁴⁷² Article 4(2) of the UCTD provides that the exclusion of core terms from assessment for unfairness applies only ‘in so far as these terms are in plain intelligible language’. Subhead (2) makes this exception subject to the transparency requirements in head 106.

⁴⁷³ Subhead (3)(a) provides that the reference to the price in the exemption from assessment for unfairness in subhead (1)(b) does not include incidental or ancillary payments. This does not mean that contract terms which provide for such payments would necessarily be impermissible or unfair, but simply that they would be assessable for unfairness. Subhead (3)(b) provides that the price exemption does not include payments contingent on the occurrence or non-occurrence of a particular event. These provisions seek, among other things, to address the interpretation of the price-value exemption taken by the English Supreme Court in *Office of Fair Trading v Abbey National* ([2009] UK SC 6). In 2007, the Office of Fair Trading (OFT) commenced an investigation under the UK Regulations that implement the UCTD into the fairness of the contract terms relating to charges for unauthorised overdrafts in personal current accounts. Though these charges were paid by fewer than a quarter of current account customers, over 1 million customers had paid more than £500 in

(4) Subhead (1) does not apply to a contract term specified in Part 1 of Schedule 1.⁴⁷⁴

charges. With the agreement of seven banks and one building society, the OFT brought a test case on the question of whether the charges for unauthorised overdrafts were assessable for fairness under the Regulations. The High Court and the Court of Appeal found in favour of the OFT. The Supreme Court overturned these judgments and found for the banks. It held that the charges for unauthorised overdrafts were not assessable for fairness on the ground that ‘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. The judgment is widely viewed as an excessively narrow interpretation of the core terms exemption and one that does not accord with the judgments of the CJEU. In its judgments, the CJEU has consistently stressed that exceptions to provisions aimed at protecting consumers must be interpreted narrowly (Case C-34/13 *Kusionova*, paragraph 77; Case C-51/17 *Ilyes and Kiss*, paragraph 54; Case C-186/16 *Andriciuc*, paragraph 31). In a case concerning a loan contract, the CJEU has characterised the price-value exemption as follows: ‘Terms relating to the consideration due by the consumer to the lender or having an impact on the actual price to be paid to the latter by the consumer thus do not, in principle, fall within the second category of terms, except as regards the question whether the amount of consideration or the price as stipulated in the contract is adequate as compared with the service provided in exchange by the lender’ (Case C-143/13 *Matei*, paragraph 56). All other aspects of the price terms of a contract fall outside the scope of the exemption and are subject to assessment for unfairness. The Court has ruled accordingly that the exclusion ‘cannot apply to a term relating to a mechanism for amending the price of the services provided to the consumer’ (Case 472/10 *Invitel*, paragraph 23). As stated in the footnote to subhead (1), the CJEU has further ruled that that contractual terms falling within the ‘main subject-matter’ of the contract ‘must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it.’ (Case C-143/13, *Matei* paragraph 54 et passim; Case C-26/13, *Kásler v OTP Jelzálogbank Zrt*; Case C-96-14, *Van Hove v CNP Assurances SA*). By contrast, ‘terms ancillary to those that define the very essence of the contractual relationship cannot fall within the notion of the main subject-matter of the contract’. The Court held accordingly that the exemption at Article 4(2) did not ‘in principle’ cover the type of terms in consumer credit agreements that allowed the lender under certain conditions unilaterally to alter the interest rate or which provided for a ‘risk charge’ applied by the lender.

⁴⁷⁴ A number of the terms in the UCTD Annex of ‘terms which may be regarded as unfair’ which is given effect in Schedule 4 deal in one way or another with the price paid for goods or services. The CJEU has held that a price escalation clause can 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’ (Case 472/10 *Invitel*, paragraph 24). It is accepted accordingly that the exemption for the main subject matter and the price-value ratio of the contract is not intended to apply to the terms set out in the grey list. Subhead (5) provides in keeping with this view that the exclusion from the assessment for unfairness of contract terms does not apply to a contract term in the list of terms presumed unfair at Schedule 1. A similar provision can be found at Article 64(6) of the UK Consumer Rights Act 2015.

*Head 109 Effect of unfairness*⁴⁷⁵

(1) An unfair term is not binding on the consumer.

(2) *Subhead (1)* does not prevent the consumer from relying on the unfair term if the consumer chooses to do so.

(3) If a contract is capable of continuing in existence without the unfair term, it shall continue to bind the parties.

⁴⁷⁵ Subheads (1) and (3) re-enact Regulation 6 of S.I. No. 27 of 1995 which gives effect to Article 6(1) of the UCTD. Subhead (2) is based on section 62(3) of the UK Consumer Rights Act 2015.

Head 110 Contract terms which are always unfair

(1) Subject to *subheads (2) and (3)*, a contract term shall always be unfair if its object or effect is to –

- (a) exclude or limit the liability of the trader for death or personal injury arising from an act or omission of the trader,
- (b) require the consumer to pay for goods not delivered or digital content, digital services or services not supplied,
- (c) provide that the consumer is bound by the contract when the trader is not,
- (d) impose on the consumer a burden of proof that, according to the applicable law, should lie with the trader,
- (e) exclude or hinder the consumer's right to take legal action or exercise a legal remedy, including by requiring the consumer to take disputes to arbitration that is not covered by legal provisions,
- (f) require the consumer party to an arbitration to bear his or her own costs,
- (g) give the trader the exclusive right to determine whether goods, services, digital content or digital services are in conformity with the contract or the exclusive right to interpret any term of the contract,
- (h) grant the trader a shorter notice period to terminate the contract than the notice period required of the consumer,
- (i) confer exclusive jurisdiction for disputes arising under the contract on a court in the place where the trader is domiciled unless that court is also the court for the place where the consumer is domiciled.⁴⁷⁶

⁴⁷⁶ Subhead (1) provides that the contract terms specified in paragraphs (a) to (i) of the subhead will be terms that are always unfair and that do not consequently have to be assessed for unfairness under head 107. Contract terms of this kind are commonly referred to as 'black list' terms. The terms at paragraphs (a), (d), (e) and (g) are among the 'grey list' of terms which may be regarded as unfair in the Annex to the UCTD. The term at paragraph (f) incorporates the provision at section 21(6) of the Arbitration Act 2010 which provides that a term requiring the consumer party to an arbitration to bear his or her own costs was deemed to be an unfair term for the purposes of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995. The repeal of section 21(6) is provided for accordingly in Part 1 of Schedule 5. The contract terms at paragraphs (b), (c), (h) and (i) are based on the terms at paragraphs (j), (g), (h) and (i) of Article 84 of the European Commission proposal for a Regulation on a Common European Sales Law. The CJEU has ruled that a contract term conferring exclusive jurisdiction on a court in the territorial jurisdiction of the seller or supplier is unfair (Joined Cases C-240/98 to 244/98 *Oceano Grupo*, paragraphs 22-24). In the Department's view, the terms included in subhead (1) are both sufficiently serious and clear to be accorded black list status.

(2) *Subhead (1)(a)* shall not –

- (a) apply to any contract in so far as it is a contract of insurance, including a contract to pay an annuity on human life,
- (b) apply to any contract so far as it relates to the creation or transfer of an interest in land.
- (c) apply to the liability of an occupier of premises to a person who obtains access to the premises for recreational purposes if –
 - (i) the person suffers loss or damage because of the dangerous state of the premises, and
 - (ii) allowing the person access for those purposes is not within the purposes of the occupier’s trade, business craft or profession.
- (d) affect the validity of any discharge or indemnity given by a person in consideration of the receipt by that person of compensation in settlement of any claim that the person has.⁴⁷⁷

(3) For the purposes of *subhead (1)(a)* - ,

- (a) a consumer shall not be taken to have voluntarily accepted any risk merely because he or she agreed to or knew about a contract term that purported to exclude the trader’s liability for death or personal injury,
- (b) “personal injury” has the meaning given to it by section 2(1) of the Civil Liability Act 1961.⁴⁷⁸

(4) A trader who –

- (a) concludes a consumer contract containing a term that is contrary to *subhead (1)*, or
- (b) continues to use a term that has been found unfair in a final decision taken by a court in proceedings brought under *head 113*

⁴⁷⁷ The restrictions on the scope of *subhead (1)(a)* are based on the provisions of section 66 of the UK Consumer Rights Act 2015.

⁴⁷⁸ *Subhead (3)(a)* is based on section 65(2) of the UK Consumer Rights Act 2015.

commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in *head 115 of Part 8*.⁴⁷⁹

⁴⁷⁹ The new Article 8b of the UCTD inserted in that Directive by Article 1 of the BEMD requires Member States to apply penalties to infringements of national provisions giving effect to the UCTD in cases where the contract terms are expressly defined as unfair in all circumstances in national law or where a trader continues to use contract terms that have been found unfair in a final decision by a court. It is necessary consequently to provide in subhead (4) for the imposition of penalties in such cases.

Head 111 Contract terms presumed to be unfair

(1) *Part 1 of Schedule 4* contains an indicative and non-exhaustive list of contract terms that shall be presumed to be unfair for the purposes of this Part.⁴⁸⁰

(2) *Part 1 of Schedule 4* is subject to the provisions of *Part 2* of the Schedule.⁴⁸¹

(3) Subject to *head 108*, a contract term referred to in *Part 2* of *Schedule 4* may be assessed for unfairness under *head 106*.

(4) The continued use in a consumer contract of a contract term presumed unfair in accordance with *Part 1* of *Schedule 4* shall be a prohibited commercial practice under

⁴⁸⁰ Article 3(3) of the UCTD 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 Schedule 3 of the 1995 Regulations which give effect to the Directive in Ireland. A term in the Annex is not necessarily to be considered unfair, while a term that does not appear on the list may be found to be unfair. The European Court has held that the Annex 'is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term' (Case C-472/10, *Nemzeti*, paragraph 26). In keeping with the Directive's minimum harmonisation status, Recital 17 states that the scope of the Annex terms 'may be the subjective of amplification or more restrictive editing by the Member States in their national laws.' Subhead (1) clarifies and somewhat strengthens the status of the indicative list of unfair terms. While the Directive characterises the Annex as contract terms 'that may be regarded as unfair', the subhead proposes that the contract terms in the corresponding list in Schedule 1 should be 'presumed to be unfair'. The presumption of unfairness would be rebuttable. The European Commission's 2008 proposal for a revision of the UCTD also provided that the indicative list of unfair terms would comprise terms which 'are presumed to be unfair'. The list of terms presumed unfair at Part 1 of Schedule 1 includes a number of additions at paragraphs 4, 8, 12, 14, 20, 21, 22 and 23 to the list of terms in the Annex to the Directive. As indicated in the footnote to head 110(1), a number of terms in the grey list in the UCTD Annex and in Schedule 3 of the 1995 Regulations are now included in the blacklist of terms considered always unfair in head 110(1)(a).

⁴⁸¹ The indicative list of contract terms in the Annex to the Directive also contains a number of qualifications to the scope of a number of the specified terms. These qualifications are set out in Part 2 of Schedule 1. The changes to this Part of the Schedule involve the addition to paragraphs (2) to (5) of references to the new provision at paragraph 14 of Part 1 of the Schedule and the addition in paragraph 4 to the terms relating to the sale of financial securities and foreign currency of a requirement that the consumer's attention is brought to possible fluctuations affecting the contract before the consumer is bound by it. While this requirement is largely covered by the requirements of other financial services legislation, it is included here to ensure that consumers are adequately informed about the nature of the contract into which they are entering. Subhead (3) clarifies that a contract term referred to in Part 2 of Schedule 4 may be assessed for unfairness under head 106 if it does not come within the scope of the exclusions from assessment for unfairness in head 108.

section 67 of the Consumer Protection Act 2007 for the purposes of sections 71, 73 and 75 of that Act.⁴⁸²

(5) The Minister may prescribe in regulations for the amendment of Schedule 4 so as to add, modify or remove an entry in Part 1 or Part 2 of the Schedule.

⁴⁸²Article 7 of the UCTD requires Member States to ensure ‘that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’ The new Article 8b inserted in the UCTD by Article 1 of the BEMD provides at paragraph 1 that ‘Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented.’ While the continued use of a contract term included in the grey list of terms presumed unfair in Schedule 4 is not appropriate for a criminal offence, there is a need to provide enforcement mechanisms to address the continued use of such terms. Subhead (4) provides accordingly that their continued use shall be a prohibited act or practice under section 67 of the CPA 2007 for the purposes of enforcement action under the following provisions of the Act: section 71 (Civil relief by way of prohibition orders); section 73 (Undertakings with the Competition and Consumer Protection Commission); and section 75 (Compliance notices). Sections 71 and 73 of the 2007 Act are civil remedies, while section 75 permits a person served with a compliance notice to appeal it to the District Court.

*Head 112 Duty of court to consider unfairness of term*⁴⁸³

(1) In proceedings before a court relating to a term of a consumer contract, the court shall be required to assess whether the term is unfair regardless of whether a party to the proceedings has raised that question or indicated that it intends to raise it.⁴⁸⁴

(2) The requirement in subhead (1) shall not apply unless the court considers that it has before it sufficient legal and factual material to enable it to assess whether the term is unfair.

⁴⁸³ Subhead (1) gives statutory effect to the obligation on national courts in EU Member States to assess *ex officio* whether a clause in a consumer contract is unfair. This obligation has been laid down by the European Court of Justice in a number of judgments (Case C-168/05 *Mostazo Claro*; Case C-40/08 *Asturcom Telecomunicaciones SL v Maria Cristina Rodríguez Nogueira*; Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatosag v Invitel Tavkozlesi Zrt*; and Case C-488/11 *Asbeek Brusse and de Man Garabito v Jahani BV*). In a submission made to the European Commission in November 2017 in response to an enquiry from the Commission about the enforcement of the *ex officio* obligation in proceedings relating to mortgage enforcement, the Department undertook to include a provision along the lines of head 112 in the Consumer Rights Bill to be introduced following the adoption of the Directives on the sale of goods and the supply of digital content. The *ex officio* obligation on courts in Ireland was first recognised by the High Court in *Allied Irish Banks v Coughlan* ([2016] IEHC 752) and affirmed by the Supreme Court in *Pepper Finance (Ireland) DAC v Cannon* ([2020] IESC 2). Subhead (2) qualifies the obligation on courts in line with CJEU case law by providing that it does not apply unless the court considers that it has a sufficient legal and factual basis for the assessment of the unfairness of contract terms. A provision similar to head 112 can be found at section 71 of the UK Consumer Rights Act 2015.

⁴⁸⁴ The Department has sought the view of the Office of the Attorney General as to whether the obligation in subhead (1) should apply also to officers of the court who exercise limited functions of a judicial nature, such as county registrars. In *Pepper Finance (Ireland) DAC v Cannon*, the Supreme Court noted that it could raise 'difficult constitutional issues' if a county registrar were to make a determination on the enforceability of a contract term. The appropriate course was for the county registrar to consider the contract 'by reference to the relevant EU jurisprudence' to see if there was a potential defence on this basis. If there was such a defence, the case should be sent forward to the Circuit Court for determination ([2020] IESC 2, paragraph 141).

*Head 113 Application to court for declaration or injunction*⁴⁸⁵

(1) An authorised body may apply to the Circuit Court or High Court for a declaration that any term drawn up for general use in contracts concluded by traders is unfair and may, at the discretion of the Court, be granted an order prohibiting the use or continued use of such a term or similar terms of like effect.

(2) An authorised body shall cause to be published notice of intention to apply to the Circuit Court or High Court for a declaration under subhead (1) in *Iris Oifigiúil* and at least two national newspapers and in such further or other manner as the Court may direct.

(3) Every person claiming to have an interest in an application under subhead (1) shall be entitled to appear before and be heard by the Court on the hearing of the application.

(4) Further and ancillary to the power provided for under subhead (1) of this head, an authorised body may apply for an injunction (including an interim injunction) against any trader using, or recommending use of, a term which the authorised body considers to be an unfair term drawn up for general use in contracts concluded with consumers and the Court may grant an injunction on such terms as it deems appropriate.

(5) An application under subhead (1) or (4) by an authorised body, other than the Competition and Consumer Protection Commission, shall be on notice to the Commission.

(6) An injunction granted pursuant to subhead (4) may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any trader.

⁴⁸⁵ Head 113 re-enacts with minor changes in wording regulation 8 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995) (as substituted by Regulation 5 of the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 (S.I. No. 160 of 2013)).

(7) On any application under subhead (1) or (4) it shall not be necessary for an authorised body to prove—

- (a) actual loss or damage, or
- (b) recklessness or negligence on the part of the trader.

(8) In the exercise of its jurisdiction under subheads (1) and (4) the court shall take account of all the interests involved and in particular the public interest.

(9) Subheads (1) and (4) are without prejudice to the right of a consumer to rely upon the provisions of this Part in any case before a court of competent jurisdiction.

(10) An application under this head to the Circuit Court shall be made to the judge of the Circuit Court in which the trader is ordinarily resident or carries on any profession, trade or business.

(11) If, in relation to an application under this head to the Circuit Court, that Court becomes of the opinion, during the hearing of the application, that it is not appropriate for the Circuit Court to deal with the application, it may, if it so thinks fit, transfer the application to the High Court.

(12) Subhead (11) is without prejudice to the jurisdiction of the Circuit Court to determine an application under this head which, at the time of the making of the application, it was satisfied it had jurisdiction to deal with.

(13) Where an application is transferred to the High Court under subhead (11), the High Court shall be deemed to have made any order of a procedural nature that was made by the Court from which it is so transferred in the proceedings in relation to the application.

PART 8

PROCEEDINGS AND PENALTIES

Head 114 Summary proceedings for offences

(1) Summary proceedings under this Act may be brought –

- (a) by the Competition and Consumer Protection Commission for an offence under *Parts 2 to 7*,
- (b) by the Commission for Communications Regulation for an offence under *Parts 5 to 7*;
- (c) by the Central Bank for an offence under *Part 7*.⁴⁸⁶

(2) Notwithstanding section 10(4) of the Petty Sessions Act 1851, summary proceedings for an offence under this Act may be instituted at any time within 3 years of the date of the alleged commission of the offence.⁴⁸⁷

⁴⁸⁶ The CCPC currently has enforcement responsibility for (i) consumer sales and services contracts, (ii) the CRD provisions relating to on-premises, off-premises and distance contracts in S.I. 484/2013, and (iii) the Regulations on unfair terms in consumer contracts. It will have responsibility for the corresponding provisions under Parts 2, 4, 5, 6 and 7 of the Act along with the new provisions on digital content and digital services in Part 3. The Central Bank has an enforcement function in respect of unfair contract terms in contracts for regulated financial services and will exercise a similar function in respect of the provisions of Part 7. The Commission for Communications Regulation has an enforcement function in respect of unfair contract terms and the CRD provisions in consumer contracts for electronic communications and premium rate services and will exercise a similar function in respect of the provisions of Parts 5 to 7. Heads 137 and 138 provide for the required amendments to the Central Bank Act 1942 and the Communications Regulation Act 2002.

⁴⁸⁷ Section 76 of the CPA 2007 as enacted provided as follows:

Notwithstanding any provision in any enactment specifying the period within which proceedings may be commenced, a prosecution for an offence under this Act may be brought at any time within 2 years after the date of the alleged commission of the offence.

The section was repealed however by the Central Bank (Supervision and Enforcement) Act 2013 (section 4(1) and Schedule 1, Part 1, item 16). Though DETE were not responsible for the amendment that repealed section 76, we understand that the reason for the amendment may have been that time limits do not apply to electable or hybrid offences by virtue of section 177 of the Criminal Justice Act 2006. The CCPC are of the view that the absence of a time limit for the commencement of summary proceedings is a cause of uncertainty and that a three-year time limit is appropriate given the complexity of some of the cases that may arise under the provisions of the Act. Head 129 provides for the amendment of section 76 of the Consumer Protection Act 2007 by the insertion of a three-year period for the bringing of summary proceedings under the Act. A three-year period applies also to summary proceedings under section 147(1) of the Data Protection Act 2018.

Head 115 Offences and penalties

(1) Subject to *subhead (2)*, a person who commits an offence under this Act shall be liable –

- (a) on summary conviction to a class A fine or to imprisonment for a term not exceeding 12 months or to both, or
- (b) on conviction on indictment to a fine not exceeding €60,000 or to imprisonment for a term not exceeding 18 months or to both.⁴⁸⁸

(2) In imposing a penalty on a person who commits an offence under *Parts 5, 6 and 7* of this Act, a court shall take account, as applicable, of the following indicative and non-exhaustive criteria:

- (a) the nature, gravity, scale and duration of the infringement;
- (b) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- (c) any previous infringements of the provisions of these Parts by the trader;
- (d) the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
- (e) penalties imposed on the trader for the same infringement in other Member States in cross-border cases;
- (f) any other aggravating or mitigating factors applicable in the circumstances of the case.⁴⁸⁹

(3) *Sections 76 to 78 and sections 80, 81, 83 and 84* of the Act of 2007 shall apply to an offence under this Act as they apply to an offence under the Act of 2007 and, accordingly, references in those sections to an offence under that Act shall be construed as including references to an offence under this Act.⁴⁹⁰

⁴⁸⁸ Subhead (1) re-enacts Regulation 38(1) of S.I. 484/2013. The offence provisions in the Scheme apply under Parts 5, 6 and 7.

⁴⁸⁹ Articles 1(4), 2(6) and 4(3) of the BEMD further require Member States to ensure that the criteria specified in subhead (3) 'are taken into account for the imposition of penalties where appropriate' for infringements of the national measures which give effect to the UCTD, UCPD and CRD, i.e. Parts 5, 6 and 7 of this Scheme and Parts 3 and 4 of the CPA 2007.

⁴⁹⁰ Subhead (3) is based on Regulation 38(2) of S.I. 484/2013.

(4) A person who commits an offence under *Parts 5, 6 and 7* of this Act which constitutes an intra-union infringement, a widespread infringement or a widespread infringement with a Union dimension within the meaning of Article 3 of Regulation (EU) 2017/2394 of the European Parliament and of the Council shall be liable to the penalties provided for in Regulation 8 of the European Union (Cooperation Between National Authorities Responsible For The Enforcement Of Consumer Protection Laws (S.I. No. 14/2020)).⁴⁹¹

⁴⁹¹ Articles 1(4), 3(6) and 4(3) of the BEMD require Member States to ensure that when penalties are imposed in accordance with Article 21 of Regulation (EU) 2017/2394 for intra-union infringements, widespread infringements or widespread infringements with a Union dimension of the UCTD, UCPD and CRD, they include the possibility to initiate legal proceedings for the imposition of fines to a maximum of at least 4 per cent of the trader's annual turnover in the Member State or Member States concerned. Head 139 gives effect to the amendments of the European Union (Cooperation Between National Authorities Responsible for The Enforcement of Consumer Protection Laws) Regulations 2020 (S.I. No. 14/2020) that are necessary to provide for the level of fines to apply in such cases. The requirement for maximum fines of at least 4% of turnover does not apply to infringements of the SGD and DCD.

PART 9 AMENDMENT OF CONSUMER PROTECTION ACT 2007⁴⁹²

⁴⁹² Article 3 of the BEMD provides for a significant number of important amendments to the UCPD which is given effect in Ireland by the CPA 2007. As Part 5 of the 2007 Act provides the basis for enforcement powers under other consumer protection legislation, including the provisions contained in Parts 2-6 of the Scheme, a number of amendments to its provisions are also required. Part 9 contains the various amendments proposed to the 2007 Act.

*Head 116 Amendment of section 2 of Act of 2007*⁴⁹³

The Act of 2007 is amended in section 2(1) –

(a) by inserting the following definition:

“ ‘online marketplace’ means a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers”;

(b) by substituting the following definition for the definition of “product”:

“ ‘product’ means any goods or service, including immovable property, digital service and digital content, as well as rights and obligations”;

(c) by inserting the following definition:

“ ‘ranking’ means the relative prominence given to products as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication”;

(d) by inserting the following paragraph after paragraph (n) (inserted by Regulation 3 of the European Union (Payment Services) (Amendment) Regulations 2019 (S.I. No. 255/2019) of the definition of “relevant statutory provisions”:

“(o) the Consumer Rights Act 2021”;⁴⁹⁴

⁴⁹³ Paragraphs (a) to (c) of the amendments to section 2(1) of the CPA in this head 114 give effect to the amendments of section 2 of the CPA 2007 required to implement the amendments to the definitions in Article 2 of the UCPD made by Article 3(1) of the BEMD. The definitions of ‘online marketplace’ and ‘ranking’ are new; the definition of ‘product’ has been amended to include references to digital content and digital services.

⁴⁹⁴ Article 10 of the Competition and Consumer Protection Act 2014 lists among the main functions of the CCPC the carrying out of investigations into, and the enforcement of, the relevant statutory provisions specified in the CPA 2007 and other enactments. Section 35 of the 2014 Act provides that authorised officers of the CCPC are appointed for the purposes of the relevant statutory provisions and section 36 provides that the powers of authorised officers apply for the purposes of enforcing these provisions. In order that the CCPC and its authorised officers can enforce the Consumer Rights Act, it is necessary therefore to provide in paragraph (d) for the addition of the Act to the relevant statutory provisions specified in section 2(1) of the CPA 2007.

Head 117 Amendment of section 41 of Act of 2007

The Act of 2007 is amended in section 41 by inserting the following subsection after subsection (4):⁴⁹⁵

“ (4) A trader who continues to engage in a commercial practice that has been found to be unfair by a court under this this section commits an offence and is liable on conviction on indictment or on summary conviction, as the case may be, to the fines and penalties provided for in Chapter 4 of Part 5.”.

⁴⁹⁵ Section 41 of the CPA gives effect to the general prohibition of unfair commercial practices in Article 5 of the UCPD. Mainly because of concerns that the provisions of Article 5 did not meet the criteria for a criminal offence under Irish law, section 41 contains no offence provision. Unfair commercial practices within the scope of the section can be the subject however of other enforcement action under the 2007 Act such as prohibition orders under section 71, undertakings under section 72 and compliance notices under section 75. The European Commission did not raise the non-application of criminal offences to the provisions of Article 5 in its detailed review of our transposition of the Directive. As much of the focus of the BEMD is on the more effective enforcement of EU consumer protection legislation, Article 3(6) of that Directive provides for the replacement of Article 13 of the UCPD (Penalties) with a new Article, paragraph 3 of which provides as follows: Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394 (on cooperation between national authorities responsible for the enforcement of consumer protection laws), they include the possibility to either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4% of the trader’s annual turnover in the Member State or Member States concerned. Without prejudice to that Regulation, Member States may, for national constitutional reasons, restrict the imposition of fines to: (a) infringements of Articles 6,7,8,9 and of Annex I to this Directive; and (b) a trader’s continued use of a commercial practice that has been found to be unfair by the competent national authority or court when that commercial practice is not an infringement referred to in paragraph (a).

The penalties to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394 relate to intra-union infringements, widespread infringements or widespread infringements with a Union dimension which affect consumers in a number of Member States. As noted in Parts 7 and 9, similar requirements for the imposition of enhanced fines for such infringements apply also to the UCTD and CRD. In order to ensure that Article 13(3) of the UCPD as amended is given effect, it is necessary to provide that infringements of Article 5 of the Directive can be the subject of criminal offences in the circumstances provided for in paragraph 3(b) of Article 13(3). The required amendment to section 79 of the CPA 2007 (Fines and penalties) are provided for in head 130. Head 139 provides for the amendments to the European Union (Cooperation Between National Authorities Responsible for The Enforcement of Consumer Protection Laws) Regulations 2020 (S.I. No. 14/2020) that are necessary to provide for the level of fines to apply in such cases.

Head 118 Insertion of new section 45A into Act of 2007⁴⁹⁶

The Act of 2007 is amended by the insertion of the following section after section 45:

“Misleading: marketing of goods in Member State as identical to goods with different composition or characteristics marketed in other Member States

45A. (1) A commercial practice is misleading if –

- (a) unless justified by legitimate and objective factors, it involves any marketing of goods in a Member State as identical to goods marketed in other Member States where the goods have significantly different composition or characteristics, and
- (b) the marketing referred to in paragraph (a) would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

(2) In determining whether a commercial practice is misleading under *subsection (1)*, the commercial practice shall be considered in its factual context, taking account of all of its features and the circumstances.”.

⁴⁹⁶ Head 115 gives effect to the addition of the new point (c) of Article 6(2) of the UCPD inserted by Article 3(3) of the BEMD. Article 6(2)(a) of the Directive is implemented by section 44 of the CPA 2007 and Article 6(2)(b) by Article 45. The transposition of Article 6(2)(c) by a new section 45A of the CPA follows the format of sections 44 and 45 of the Act.

*Head 119 Amendment of section 46 of Act of 2007*⁴⁹⁷

The Act of 2007 is amended in section 46 –

(a) in subsection (3) –

(i) by substituting the following paragraph for paragraph (e):

“ (e) the arrangements for payment, delivery and performance if such arrangements do not meet or accord with –

(i) the standard of skill and care that the trader may reasonably be expected to exercise in respect of consumers, or

(ii) the general principle of good faith in the trader’s field of activity”⁴⁹⁸

(ii) by inserting the following paragraph after paragraph (f):

“ (g) For products offered on online marketplaces, whether the third party offering the products is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace.”⁴⁹⁹

⁴⁹⁷ Head 116 gives effect to the amendments made to Article 7 of the UCPD by Article 3(4) of the BEMD. Article 7 of the UCPD is implemented by section 46 of the CPA 2007.

⁴⁹⁸ Article 7(4)(d) of the UCPD refers to ‘the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence’. ‘Professional diligence’ is defined by Article 2(h) of the UCPD as ‘the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity’. Article 3(4)(a)(i) of the BEMD provides for the replacement of Article 7(4) by the following: ‘the arrangements for payment, delivery and performance, if they depart from the requirements of professional diligence’. As is apparent, the change to the paragraph consists of the deletion of the reference to the trader’s ‘complaint handling policy’. Recital (40) of the BEMD states that the Commission’s Fitness Check of consumer and marketing law found that information about traders’ complaint handling policy is most relevant to the pre-contractual stage which is regulated by the CRD and that the requirement to provide this information in invitations to purchase under the UCPD should therefore be deleted. Paragraph (a)(i) of the head makes the necessary changes to section 46(3)(e) of the CPA 2007 which implements Article 7(4)(d) of the UCPD. Consideration was given to making the required amendment by deleting the words ‘the handling of consumer complaints in relation to the product’ in subsection (3)(e). As ‘handling’ recurs in line 3 of the paragraph, however, it was thought simpler to substitute an amended paragraph.

⁴⁹⁹ Paragraph (a)(ii) of the head provides for the insertion of a new paragraph (g) in section 7(3) of the CPA 2007 in order to give effect to the addition of a new point (f) to Article 7(4) of the UCPD by Article 3(4)(a)(ii) of the BEMD.

(b) by inserting the following subsections after subsection (3):

“ 3A. (a) – When consumers are provided with the possibility to search for products, offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions are ultimately concluded, general information relating to the main parameters determining the ranking of products presented to a consumer as a result of the search query and the importance of those parameters relative to other parameters that is made available in a specific section of the online interface directly and easily accessible from the page where the query results are presented, shall be considered material information;⁵⁰⁰

(b) Paragraph (a) does not apply to any natural or legal person who provides or offers to provide an online search engine to consumers.”

3B. Where a trader provides access to consumer reviews of products, information about whether and how the trader ensures that the published reviews originate from consumers who have actually used or purchased the products shall be considered material.”.

⁵⁰⁰ Paragraph (b) of the head provides for the addition of new subsections 3A and 3B to section 46 of the CPA 2007 in order to give effect to the new paragraph 4a inserted in Article 7 of the UCPD by Article 3(4)(b) of the BEMD and the new paragraph 6 inserted in Article 7 of the UCPD by Article 3(4)(c) of the BEMD.

Head 120 Amendment of section 47 of Act of 2007

The Act of 2007 is amended in section 47 by substituting “in section 43(1), 43(2) 44(1), (45)(1), 45A, 46(1) or 46(2)” for “in section 43(1) and (2)”.⁵⁰¹

⁵⁰¹ Sections 42 to 46 of the CPA give effect to the provisions of Article 6 of the UCPD on misleading actions and of Article 7 on misleading omissions. Mainly because of concerns that misleading actions under Article 6(2) of the Directive and misleading omissions under Article 7 did not meet the criteria for criminal offences under Irish law, section 47 of the Act provides that only misleading commercial practices under sections 43(1) and (2) constitute offences. Misleading practices under section 44(1), 45(1), 46(1) and 46(2) can be the subject however of other enforcement action, in particular compliance notices under section 75 of the Act. The European Commission did not raise the non-application of criminal offences to the provisions of Articles 6(2) and 7 in its detailed review of our transposition of the Directive. As set out in the footnote to head 115(4), Article 3(6) of the BEMD provides for the replacement of Article 13 of the UCPD (Penalties) with a new Article, paragraph (3) of which requires Member States to ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394 for intra-union infringements, widespread infringements or widespread infringements with a Union dimension of the UCPD, Member States shall ensure that this includes ‘the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4% of the trader’s annual turnover in the Member State or Member States concerned’. In order to ensure that Article 13(3) of the UCPD is given effect, it is necessary to provide that infringements of all of the relevant provisions of Articles 6 and 7 of the Directive can be the subject of criminal offences. There is no requirement for similar changes to sections 52 to 54 of the CPA 2007 which gives effect to Article 9 of the UCPD or to sections 55 to 56 which gives effect to Annex I of the Directive as these include offence provisions.

Head 121 Amendment of section 55 of the Act of 2007⁵⁰²

The Act of 2007 is amended in section 55(1) –

- (a) by inserting the following paragraph after paragraph (q):
- (b) “(qa) providing search results in response to a consumer’s online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results.”.

- (c) by inserting the following paragraphs after paragraph (y):
- (d) “(ya) Reselling event tickets to consumers if the trader acquired them by using automated means to circumvent any limit on the number of tickets that a person can buy or any other rules applicable to the purchase of tickets;
- (e) (yb) Stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that the reviews originate from such consumers;
- (f) (yc) Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products;”.

⁵⁰² Article 5(5) of the UCPD states that Annex I of the Directive ‘contains the list of those commercial practices which shall in all circumstances be regarded as unfair’. The commercial practices specified in Annex I are commonly referred to as the blacklist and are given effect in section 55 of the CPA 2007. Article 3(7) of the BEMD makes a number of additions to Annex I of the UCPD and head 121 provides for the required amendments to section 55 of the CPA 2007.

Head 122 Amendment of section 65 of Act of 2007

The Act of 2007 is amended in section 65 by deleting subsection (1)(b).⁵⁰³

⁵⁰³ Section 65(1)(b) of the CPA 2007 provides that a person shall not knowingly participate in a pyramid promotional scheme. Section 65(2) provides that a person who contravenes subsection (1) commits an offence. Sections 64 to 66 of the Act give effect to the following provision at point 14 of Annex I of the UCPD on commercial practices regarded as unfair in all circumstances:

Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the consumption of products.

As can be seen, the UCPD provision does not prohibit participation in a pyramid scheme. As it is permissible under EU law to apply the provisions of Union legislation to parties or matters outside the scope of the legislation, the European Commission did not object to the extension of the provision to participants in pyramid schemes. While subsection (b) may help to deter participation in pyramid schemes, this is outweighed by its effect in deterring participants from providing evidence about the organisers and promoters of these schemes lest they incriminate themselves. The CCPC support the deletion of subsection (1)(b) and point out that to date no prosecution has been brought under section 65 of the Act.

Head 123 Amendment of section 67 of Act of 2007

The Act of 2007 is amended by the insertion of the following paragraphs after paragraph (n) (inserted by Regulation 6 of the European Union (Promoting Fairness and Transparency for Business Users of Online Intermediation Services) Regulations 2020 (S. I. No. 256/2020):⁵⁰⁴

“(o) any contravention of Parts 2 to 7 of the Consumer Rights Act 2021 (No. – of 2021),”

⁵⁰⁴ Section 67 of the Consumer Protection Act 2007 defines “prohibited act or practice” for the purposes of the application of the following enforcement provisions of the 2007 Act to contraventions of the Act and of other consumer protection enactments specified in the section:

- section 71 (Civil relief by way of prohibition orders);
- section 72 (Prohibition orders against code owners);
- section 73 (Undertakings with the Commission);
- section 74 (Consumer’s right of action for damages); and
- section 75 (Compliance notices).

The section is subject to the exclusion of any enactment covered by it which is provided for in sections 71 and 73 to 75 of the Act. The addition of the proposed Consumer Rights Act to the enactments covered by the definition of “prohibited act or practice” in section 67 is necessary to allow the CCPC to apply the enforcement provisions in the specified sections of the 2007 Act to contraventions of the new Act.

Head 124 Amendment of section 71 of Act of 2007

The Act of 2007 is amended in section 71 –

(a) by inserting the following paragraph after paragraph (b) in subsection (1):

“ (c) a contravention of Part 7 of the Consumer Rights Act 2021.”⁵⁰⁵

(20) by inserting the following subsection after subsection (2):

“(2A) An application under subsection (2) may be for –

(a) an interim order,

(b) an interlocutory order,

(c) an order of definite or indefinite duration.”⁵⁰⁶

(20) by inserting the following subsection after subsection (5):

“(5A) An order granted pursuant to subsection (2) may relate not only to a particular commercial practice or contract term but to any similar practice or term, or practice or term having like effect, engaged in or used by any trader.”⁵⁰⁷

⁵⁰⁵ Part 7 of the Scheme deals with unfair terms in consumer contracts. Regulation 8 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27/1995) (as substituted by Regulation 5 of the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 (S.I. No. 160/2013)) contain detailed provisions on applications for court declarations and orders relating to unfair contract terms. These provisions are re-enacted in head 113 of Part 7 and it is necessary consequently to provide for the non-application of section 71 of the 2007 Act to contraventions of the unfair terms provisions of Part 7.

⁵⁰⁶ Section 71 does not permit an application to be made for interim or interlocutory relief. In its judgment in *Aldi vi Dunnes Stores Ltd* ([2019] IESC 41), the Supreme Court commented as follows on the European Communities (Misleading and Comparative Advertising) Regulations 2007 (S.I. No. 774 of 2007) which give effect to Directive 2006/114/EC on misleading and comparative advertising:

The primary remedy under the 2007 Regulations is an order that any advertising in breach of the 2007 Regulations should be prohibited. If traders are being subjected to comparative advertising which is unfair and impermissible under both the 2006 Directive and the 2007 Regulations, then they should be entitled to immediate protection. If consumers are being deceived and misled, then it is important that such conduct be brought to an end (paragraph 75).

Directive 2006/114/EC is closely related to the UCPD and incorporates some of its provisions. The Department and the CCPC consider that section 71 should be amended to provide for applications for interim and interlocutory relief.

⁵⁰⁷ The new subsection (5A) provided for in paragraph (c) of the head is based on Regulation 8(6) of the European Communities (Unfair Terms in Consumer Contracts Regulations) 1995 (S.I. No. 27/1995). The reference to ‘contract term’ in subsection (5A) relates to the terms of the sales, services and digital content and digital services contracts regulated in Parts 2-5 of the Scheme.

Head 125 Amendment of section 73 of Act of 2007

Section 73 of the Act of 2007 is amended by substituting the following subsection for subsection (7):⁵⁰⁸

“ (7) Despite subsection (6), the Agency may –

- (a) apply for an order against a trader under section 71, or
- (b) serve a compliance notice on a trader under section 75,

if the trader fails to comply with the terms and conditions of an undertaking under this section.”.

⁵⁰⁸ Though an undertaking under section 73 of the CPA can be an effective enforcement mechanism for the CCPC, its main drawback is that the only option available to the Commission if a trader fails to comply with an undertaking is to apply for a prohibition order under section 71 of the Act. While this might be an appropriate option in some cases, it is likely to prove costly and time consuming in others. The CCPC have proposed accordingly that section 73 be amended to provide that a compliance notice could be served on a trader who fails to comply with an undertaking. Head 125 provides for such an amendment.

Head 126 Amendment of section 74 of Act of 2007

The Act of 2007 is amended in section 74 by deleting subsection (1).⁵⁰⁹

⁵⁰⁹ Section 74(1) of the CPA 2007 provides that the consumer's right of action for damages under the section does not apply to a misleading commercial practice described in section 45 of the Act (Misleading: non-compliance with commitment under code of practice by which trader is bound or to a contravention of section 65(1) of the Act (respecting pyramid promotional schemes). Section 45 gives effect to Article 6(2) of the UCPD and section 65(1) to the provision on pyramid promotional schemes at point 14 of Annex I of the Directive. A new Article 11a (Redress) inserted in the UCPD by Article 3(5) of the BEMD provides, among other things, that consumers 'harmed by unfair commercial practices shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer.' As the right of action of consumers for damages under Article 11a applies to all unfair commercial practices within the scope of the Directive, it is not permissible to retain the exceptions to that right contained in section 74(1) of the CPA 2007.

Head 127 Insertion of new section 74A into Act of 2007

“Consumer’s right to other remedies

- (1) A consumer who is aggrieved by a prohibited act or practice shall have a right to the remedies of price reduction or termination of the contract.

- (2) The conditions under which the consumer shall have the right to these remedies and the obligations of the trader and the consumer in respect of the remedies shall be prescribed by the Minister for the purposes of this section.”⁵¹⁰

⁵¹⁰ The new Article 11a of the UCPD further provides that the remedies to which consumers harmed by unfair commercial practices are to have access shall include ‘where relevant, a price reduction or the termination of the contract’. It states that ‘Member States may determine the conditions for the application and effects of those remedies’ and ‘may take into account, where appropriate, the gravity and nature of the unfair commercial practices, the damage suffered by the consumer and other relevant circumstances.’ Article 11a concludes by saying that the ‘remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law.’ The conditions for the application and operation of the remedies for unfair commercial practices require further consideration and will likely require a level of detail more appropriate to Regulations than to a new section or sections in Part 5 of the CPA 2007. An indication of the level of detail that may be required can be had from the Consumer Protection (Amendment) Regulations 2014 enacted in the UK to provide consumers with rights of redress for misleading and aggressive commercial practices: <https://www.legislation.gov.uk/uksi/2014/870/made> .

Head 128 Amendment of section 75 of Act of 2007

The Act of 2007 is amended in section 75(3) by inserting the following paragraph after paragraph (b):

“(ba) a direction in a compliance notice to remedy the contravention of the matters occasioning that notice may include a requirement for the refund by the trader of payments made by consumers in transactions relating to that contravention;”⁵¹¹

⁵¹¹ Under section 75(3)(b) of the CPA 2007, a direction in a compliance notice to remedy a contravention of a provision within the scope of the section may include ‘any other requirement that the authorised officer considers appropriate in order to remedy the contravention or matters.’ While it is arguable that this could include a requirement to refund payments made by consumers in transactions relating to the contravention, the CCPC would like to remove any doubt that a requirement of this kind can be included in a compliance notice. It is relevant to note in this context that head 29(2) of Part 2, head 57(2) of Part 3 and head 72(2) of Part 4 provide that a refusal by a trader to make a reimbursement to which a consumer is entitled under these Parts can be the subject of a compliance notice.

Head 129 Amendment of section 76 of Act of 2007

The Act of 2007 is amended in section 76 by inserting the following:

“Notwithstanding section 10(4) of the Petty Sessions Act 1851, summary proceedings for an offence under this Act may be instituted at any time within 3 years of the date of the alleged commission of the offence.”⁵¹²

⁵¹² Section 76 of the CPA 2007 as enacted provided as follows:

Notwithstanding any provision in any enactment specifying the period within which proceedings may be commenced, a prosecution for an offence under this Act may be brought at any time within 2 years after the date of the alleged commission of the offence.

The section was repealed however by the Central Bank (Supervision and Enforcement) Act 2013 (section 4(1) and Schedule 1, Part 1, item 16). Though DETE were not responsible for the amendment that repealed section 76, we understand that the reason for the amendment may have been that time limits do not apply to electable or hybrid offences by virtue of section 177 of the Criminal Justice Act 2006. The CCPC are of the view that the absence of a time limit for the commencement of summary proceedings is a cause of uncertainty and that a three-year time limit is appropriate given the complexity of some of the cases that may arise under the CPA 2007 and the other enactments that come within the scope of Part 5 of the Act. Head 114(2) provides that summary proceedings under the Consumer Rights Act can be brought within three years of the alleged commission of the offence. A similar three-year period applies to summary proceedings under section 147(1) of the Data Protection Act 2018.

Head 130 Amendment of section 79 of Act of 2007

The Act of 2007 is amended in section 79 –

(a) in subsection (1)(a) by substituting “a Class A fine” for “a fine not exceeding €3,000”;⁵¹³

(b) by inserting the following subsections after subsection (4):

(4B) A person guilty of an offence under this Act which constitutes an intra-union infringement, a widespread infringement or a widespread infringement with a Union dimension within the meaning of Article 3 of Regulation (EU) 2017/2394 of the European Parliament and of the Council shall be liable to the penalties provided for in Regulation 8 of the European Union (Cooperation Between National Authorities Responsible For The Enforcement Of Consumer Protection Laws (S.I. No. 14/2020)).⁵¹⁴

(4C) In imposing a penalty on a person who commits an offence under this Act, a court shall take account, as applicable, of the following indicative and non-exhaustive criteria:

(a) the nature, gravity, scale and duration of the infringement;

⁵¹³ Section 79(1)(a) of the CPA 2007 currently provides for a maximum fine of €3,000 on a first summary conviction for an offence under the Act. The Department and the CCPC consider that this should be replaced by a Class A fine given the length of time that has elapsed since the Act’s enactment, the fact that a Class A fine applies to summary convictions for contraventions of the provisions of the CRD given effect in in S.I. 484/2013 and the increased emphasis placed by the European Commission on the effective enforcement of EU consumer laws.

⁵¹⁴ Articles 1(4), 2(6) and 4(3) of the BEMD require Member States to ensure that when penalties are imposed in accordance with Article 21 of Regulation (EU) 2017/2394 for intra-union infringements, widespread infringements or widespread infringements with a Union dimension of the UCTD, UCPD and CRD, Member States shall ensure that this includes ‘the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4% of the trader’s annual turnover in the Member State or Member States concerned’. The new subsection (4)(b) inserted in section 79 of the CPA gives effect to this requirement for contraventions of the Act within the scope of Regulation (EU) 2017/2394. Head 139 provides for the amendments to the European Union (Cooperation Between National Authorities Responsible for The Enforcement of Consumer Protection Laws) Regulations 2020 (S.I. No. 14/2020) that are necessary in order to provide for the level of fines to apply in such cases.

- (b) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- (c) any previous infringements of this Act by the trader;
- (d) the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
- (e) penalties imposed on the trader for the same infringement in other Member States in cross-border cases;
- (f) any other aggravating or mitigating factors applicable in the circumstances of the case.⁵¹⁵

⁵¹⁵ Articles 1(4), 2(6) and 4(3) of the BEMD further require Member States to ensure that the criteria specified in subhead (3) 'are taken into account for the imposition of penalties where appropriate' for infringements of the national measures which give effect to the UCTD, UCPD and CRD.

Head 131 Amendment of section 85 of Act of 2007

The Act of 2007 is amended in section 85 –

(a) in subsection (1) by inserting the following paragraphs after paragraph (e) (substituted by section 3(b) of the Consumer Protection (Gift Vouchers) 2019 (No. 38 of 2019):

“ (f) Regulations 7, 8, 13 and 14 of the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003);⁵¹⁶

(g) sections 43(1), 43(3)(c) and 47 of the Act of 2007.”⁵¹⁷

(b) in subsection (3)(c) by substituting “the amount specified in the notice” for “the amount of €300””,⁵¹⁸

(c) by inserting the following subsection after subsection (3):

“(3A) The Minister may prescribe the amount to accompany the payment of a fixed payment notice, being an amount of not more than €1,500, and may prescribe different amounts for the different relevant offences specified in subsection (1).”.

⁵¹⁶ The CCPC is responsible for the enforcement of the provisions of S.I. No. 68 of 2003 specified in paragraph (a) and have advised the Department that bringing these provisions within the scope of the fixed payment notice provision at section 85 of the CPA 2007 would facilitate the more effective enforcement of the provisions concerned.

⁵¹⁷ The CCPC have similarly advised the Department that bringing the provisions of the CPA 2007 specified in paragraph (a) within the scope of section 85 of the Act would facilitate enforcement, particularly in the case of misleading commercial practices relating to prices.

⁵¹⁸ Section 85(3)(c) of the CPA fixes the amount payable under a fixed payment notice at €300. The Department and the CCPC consider that this figure is too low given the length of time that has elapsed since the enactment of the section, the increased number and range of the enactments within the scope of the fixed payment notice provisions of the Act, and the substantially higher amounts that apply to such notices under other regulatory enactments. Section 36(1) of the Workplace Relations Act 2015 provides for example for a fixed payment notice of ‘an amount of not more than €2,000’ as do section 10A of the Waste Management Act 1996 and section 29(1)(c) of the Public Health (Alcohol) Act 2018. The proposed amendment to subsection (3) (c) and the proposed new subsection (3A) follow the approach taken in a number of other enactments (including section 10 of the Heritage Act 2018; section 20 of the Public Health (Sunbeds) Act 2018; section 80 of the Inland Fisheries Act 2010; and section 41 of the Road Traffic Act 2010) in providing that the amount of the fixed payment notice shall be prescribed in Regulations and that different amounts may apply to different fixed payment notice offences. The amounts prescribed would be subject however to a maximum of €1,500.

Head 132 Amendment of section 91 of Act of 2007

The Act of 2007 is amended in section 91 –

(a) by inserting “and section 74A” after “section 66(1)”;⁵¹⁹

(b) by substituting “any product” for “any goods or the provision of any services.”⁵²⁰

⁵¹⁹ Section 91 of the CPA states that, subject to section 66(1), a contract for the supply of any goods or the provision of any services shall not be void or enforceable by reason only of a contravention of any provision of this Act. Section 66(1) provides that agreements relating to pyramid promotional schemes are void. Section 91 was in accordance with Article 3(2) of the UCPD which provides that the Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract. Following the insertion of a new Article 11A on redress in the UCPD by the BEMD, it is no longer strictly the case that the Directive is without prejudice to contract law given that the new redress provisions provide that consumers harmed by unfair commercial practices shall have access to what are essentially contract law remedies in the form of price reduction and termination. Article 11a is given effect in head 127 by means of the insertion of a new section 74A in the CPA 2007. Though head 74A does not mean that contracts will be void or unenforceable by reason of unfair commercial practices, it qualifies section 91 nevertheless.

⁵²⁰ The scope of the UCPD and the CPA is broader than just goods and services. The revised definition of product inserted in Article 2(1) of the Directive by the BEMD which is given effect in head 116 includes digital content and digital services as well as goods, services, immovable property and rights and obligations.

Head 133 Amendment of Schedule 4 of Act of 2007

The Act of 2007 is amended in Schedule 4 –

(a) by deleting the following items:⁵²¹

In Column (1), the following:

“No. 16 of 1980;

S.I. No. 224 of 1989;

S.I. No. 227 of 1995;

S.I. No. 307 of 2000;

Si. No. 204 of 1997;

S.I. No. 144 of 2000;

S.I. No. 207 of 2001;

S.I. No. 11 of 2003;

S.I. No. 484 of 2003”;

In Column 2, the following :

“Sale of Goods and Supply of Services Act 1980;

European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations 1989;

European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000);

European Communities (Contracts for Time Sharing of Immovable Property – Protection of Purchasers) Regulations 1997;

European Communities (Contracts for Time Sharing of Immovable Property – Protection of Purchasers) (Amendment) Regulations 2000;

⁵²¹ The provisions of No. 16 of 1980 relevant to section 73 will be replaced by Parts 2 and 4 of this Act. S.I. No. 224 of 1989 and S.I. No. 207 of 2001 was revoked by S.I. No. 484 of 2013. S.I. No. 227 of 1995 and S.I. No. 307 of 2000 will be replaced by Part 7 of this Act. S.I. No. 204 of 1997 and S.I. No. 144 of 2000 were revoked by the European Union (Protection of Consumers in respect of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts) Regulations 2011. S.I. No. 11 of 2003 will be replaced by Part 2 of this Act. S.I. No. 484 of 2013 will be replaced by Parts 5 and 6 this Act.

European Communities (Sale of Goods and Associated Guarantees) Regulations 2003;
European Union (Consumer Information, Cancellation and Other Rights) Regulations
2013.”

(b) by inserting after the last item –

(a) in Column (1), the following “(No. – of 2015)”, and

(b) in Column (2), the following “the Consumer Rights Act 2021”.

Head 134 Amendment of Schedule 5 of Act of 2007

The Act of 2007 is amended in Schedule 4 –

(a) by deleting the following items:⁵²²

In Column (1), the following:

“No. 16 of 1980;

S.I. No. 224 of 1989;

Si. No. 204 of 1997;

S.I. No. 144 of 2000;

S.I. No. 207 of 2001;

S.I. No. 484 of 2003”;

In Column 2, the following:

“Sale of Goods and Supply of Services Act 1980;

European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations 1989;

European Communities (Contracts for Time Sharing of Immovable Property – Protection of Purchasers) Regulations 1997;

European Communities (Contracts for Time Sharing of Immovable Property – Protection of Purchasers) (Amendment) Regulations 2000;

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

European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013.”

(b) by inserting after the last item –

⁵²² The provisions of No. 16 of 1980 relevant to section 73 will be replaced by Parts 2 and 4 of this Act. S.I. No. 224 of 1989 and S.I. No. 207 of 2001 were revoked by S.I. No. 484 of 2013. S.I. No. 204 of 1997 and S.I. No. 144 of 2000 were revoked by the European Union (Protection of Consumers in respect of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts) Regulations 2011. S.I. No. 484 of 2013 will be replaced by Parts 5 and 6 of this Act.

(c) in Column (1), the following “(No. – of 2015)”, and

(d) in Column (2), the following “the Consumer Rights Act 2021”.

PART 10 MISCELLANEOUS

Head 135 Amendment of Sale of Goods Act 1893

The Sale of Goods 1893 is amended to the extent specified in Schedule 6.⁵²³

⁵²³ A large number of amendments are required to the Sale of Goods Act 1893 to provide that specified provisions of Act will no longer apply to sales contracts to which Part 2 of this Act applies. Given the number and similar nature of the amendments, it was more appropriate to include them in a schedule.

Head 136 Amendment of Sale of Goods and Supply of Services Act 1980

The Sale of Goods and Supply of Services Act is amended to the extent specified in Schedule 6.⁵²⁴

⁵²⁴ A large number of amendments are required to the Sale of Goods Act 1893 to provide that specified provisions of Act will no longer apply to sales contracts to which Part 2 of this Act applies. Given the number and similar nature of the amendments, it was more appropriate to include them in a schedule.

*Head 137 Amendment of Central Bank Act 1942*⁵²⁵

The Central Bank Act 1942 (No. 22 of 1942) is amended –

(a) in section 5A(5)(3B) by substituting the following subparagraph for subparagraph (a)(ii):

“(ii) Part 7 of the Consumer Rights Act 2021,”

(b) in Part 1 of Schedule 2 by inserting the following item after item 46:

47 No. – of 2021. The Consumer Rights Act 2021. Part 7.

(c) In Part 2 of Schedule 2, by deleting item 21 and item 29.

⁵²⁵ Head 137 amends the provisions of the Central Bank Act 1942 which give the Central Bank an enforcement function under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 in order to provide that the Central Bank will exercise a similar function under Part 7 of this Act which is to replace those Regulations. The amendments to the 1942 Act to give the Central Bank functions under the 1995 Regulations and some provisions of the CPA 2007 were provided for in section 94 of the CPA.

Head 138 Amendment of Communications Regulation Act 2002

The Communications Regulation Act 2002 (No. 20 of 2002) is amended in section 10 –⁵²⁶

- (a) by substituting the following paragraph for paragraph (ab) of subsection (1) (inserted by Regulation 34(1)(b) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013):

“(ab) to ensure compliance by undertakings and premium rate service providers with Part 5, Part 6 and Part 7 of the Consumer Rights Act 2021.”,

- (b) by deleting paragraph (ac) of subsection (1) (inserted by Regulation 3 of the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014 (S.I. No. 336/2014);

- (c) by substituting the following paragraph for paragraph (a) of subsection (1B) (inserted by Regulation 34(1)(b) of the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013):

“(a) section 67, section 71, section 73, sections 75 to 77, section 80, sections 83 to 87 and section 90 of the Consumer Protection Act 2007 in relation to Part 5 and Part 6 of the Consumer Rights Act 2021;”.

- (d) by substituting the following paragraph for paragraph and (b) of subsection (1B) (inserted by Regulation 3 of the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014 (S.I. No. 336/2014);

⁵²⁶ When the Commission for Communications Regulation (ComReg) was given an enforcement function under S.I. 484/2013 in 2013 and under the European Communities (Unfair Terms in Consumer Regulations) 1995 in 2014, it was necessary to amend section 10 of the Communications Regulations Act 2002 to include these functions among ComReg’s functions. As the Regulations under which the Commission exercises these functions will be replaced by Parts 5 to 7 of this Act, consequential amendments are required to the Act of 2002.

section 73, sections 75 to 77, section 80 and sections 83 to 87 in relation to Part 7 of the Consumer Rights Act 2021;”.

Head 139 Amendment of S.I. No. 14 of 2020⁵²⁷

The European Union (Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws) Regulations 2020 (S.I. No. 14 of 2020) is amended –

(a) In Regulation 7 –

(i) by substituting the following paragraph for paragraph (3):

“For the purposes of paragraph (2) and Regulation 8(2), a “national measure means the following:

(a) European Communities (Requirements to Indicate Product Prices) Regulations 2002 (S.I. No. 639 of 20 02);

(b) European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003);

(c) European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 (S.I. No. 774 of 2007);

(d) European Union (Provision of Services) Regulations 2010 (S.I. No. 533 of 2010);

(e) European Union (Protection of Consumers in Respect of Timeshare, Long-Term Holiday Product, Resale and Exchange Contracts) 2011 (S.I. No. 73 of 2011);

(f) European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015 (S.I. No 243 of 2015);

(g) European Union (Online Dispute Resolution for Consumer Disputes) Regulations 2015 (S.I. No. 500 of 2015);

(h) European Union (Casual Trading Act 1995) Regulations 2018 (S.I. No. 508 of 2018);

(i) European Union (Unjustified Geo-Blocking of Consumers) Regulations 2018 (S.I. No. 513 of 2018.”.

⁵²⁷ The amendments to S.I. No. 14 of 2020 are necessary, first, to take account of the replacement of the enactment referred to in Regulation 7(3)(b) of the Regulation by Part 7 of this Act and of the replacement of enactment referred to in Regulation 7(3)(i) of the Regulations by Parts 5 and 6 of the Act. Similar amendments are necessary to Schedule 4 of the Regulations. Secondly, the amendments to Regulation 8 of the Regulations are necessary to give effect to the requirements inserted in the UCTD, UCPD and CRD by Articles 1(4), 3(6) and 4(13) of the MEMD to provide for greatly increased fines for intra-Union infringements, widespread infringements and widespread infringements with a Union dimension of these Directives.

(ii) by inserting the following paragraph after paragraph (3):

“For the purposes of paragraph (2) and of Regulation 8(3), a “national measure” means the following:

(a) sections 41(4), 43(1), 43(2), 44(1), 45(1), 45A, 46(1), 46(2), 54, 56 and 65(2) of the Act of 2007;

(b) sections 77(4), 79(8), 80(5), 81(4), 82(10), 83(4), 84(6), 85(5), 92(12), 99(1), 100(5), 101(4) and 110(4) of the Consumer Rights Act 2021.

(b) in Regulation 8

(i) by substituting the following paragraphs after paragraph (2):

(3) A trader who commits an offence under a national measure specified at paragraphs (3) of Regulation 7 that also constitutes an offence under Regulation 7(2), shall be liable for a fine not exceeding 4 per cent of the trader’s annual turnover in the Member State or Member States concerned.

(4) Where a fine is to be imposed in accordance with paragraph (2), but information on the trader’s annual turnover is not available, the trader shall be liable to a fine not exceeding €2 million.”.

(c) In Schedule Regulation 4 –

(i) In Column 3 of Reference Number 1 by substituting “Part 7 of Consumer Rights Act 2021” for “European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No 27 of 1995);

(ii) In Column 3 of Reference Number 20 by substituting “Parts 5 and 6 of Consumer Rights Act 2021” for “European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No. 484 of 2013”.

SCHEDULES

SCHEDULE 1

INFORMATION TO BE PROVIDED PRIOR TO CONCLUSION OF ON-PREMISES CONTRACT⁵²⁸

The information to be provided by the trader to the consumer in accordance with *head 77* is as follows:

- (a) the main characteristics of the product to the extent appropriate to the medium and to the product;⁵²⁹
- (b) the identity of the trader, including the trader's trading name and legal identity;
- (c) the geographical address at which the trader is established, and the trader's telephone number;
- (d) the total price of the product inclusive of taxes, or where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated;
- (e) where applicable, all freight, delivery or postal charges additional to the price referred to in paragraph (d) or, where those charges cannot reasonably be calculated in advance, the fact that such charges may be payable;
- (f) where applicable, the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver, provide or supply the product;⁵³⁰
- (g) where applicable, the trader's complaint handling policy;
- (h) the existence of a legal obligation on the trader to supply goods, digital content and digital services that are in conformity with the contract;⁵³¹

⁵²⁸ Schedule 1 re-enacts with some amendments and additions Schedule 1 of S.I. 484/2013 which gives effect to the information requirements in paragraphs (a) to (h) of Article 5(1) of the CRD.

⁵²⁹ Paragraph (a) of Schedule 1 of S.I. 484/2013 refers, as does Article 5(1)(a) of the CRD to which it gives effect, to 'goods or services.' Article 5(2) of the Directive states that Article 5(1) shall also apply to contracts for the supply of water, gas or electricity where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium. In order to avoid confusion about the application of Schedules 1 and 2 to these items, 'product' has been substituted for 'goods or services' in paragraphs (a), (d) and (f) of Schedule 1, and in paragraphs (a), (f) and (k) of Schedule 2.

⁵³⁰ Paragraph (d) of Article 5(1) of the CRD as adopted refers, like paragraph (f) of Schedule 1 of S.I. 484/2013, to the time by which the trader undertakes 'to deliver the goods or perform the service'. As 'perform' cannot be used in respect of a 'product', paragraph (f) in Schedule 1 and paragraph (k) in Schedule 2 refer instead to the time by which the trader undertakes 'to deliver, provide or supply the product'.

⁵³¹ Paragraph (e) of Article 5(1) of the CRD as adopted refers only 'to the existence of a legal guarantee of conformity for goods.' In response to the adoption of the DCD, Article 4(3)(a) of the BEMD provides for the

- (i) where applicable, the existence and the conditions of after-sales services and commercial guarantees;
- (j) the duration of the contract where applicable or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating it;
- (k) where applicable, the functionality, including applicable technical protection measures, of goods with digital elements, digital content and digital services;⁵³²
- (l) where applicable, any relevant compatibility and interoperability of goods with digital elements, digital content and digital services of which the trader is, or can reasonably be expected to have been, aware.⁵³³

replacement of paragraph (e) by a paragraph that refers also to the legal guarantee of conformity for digital content and digital services. Paragraph (h) has been amended accordingly.

⁵³² Article 5(1)(g) of the CRD as adopted refers only to the functionality of digital content. In response to the adoption of the DCD, Article 4(3)(b) of the BEMD provides for the replacement of Article 5(1)(g) by a paragraph that refers also to the functionality of goods with digital elements and of digital services. Paragraph (k) has been amended accordingly.

⁵³³ Article 5(1)(h) of the CRD as adopted refers only to the relevant interoperability of digital content. In response to the adoption of the DCD, Article 4(3)(b) of the BEMD provides for the replacement of Article 5(1)(h) by a paragraph that refers to the relevant compatibility and interoperability of goods with digital elements, digital content and digital services. Paragraph (l) has been amended accordingly.

SCHEDULE 2

INFORMATION TO BE PROVIDED PRIOR TO CONCLUSION OF OFF-PREMISES CONTRACTS AND DISTANCE CONTRACTS⁵³⁴

The information to be provided by the trader to the consumer in accordance with *head 79* in the case of off-premises contracts, *head 80* in the case of off-premises contracts for repairs or maintenance within the scope of that head and *head 82* in the case of distance contracts, is as follows:

- (a) the main characteristics of the product, to the extent appropriate to the medium and to the product;
- (b) the identity of the trader, including the trader's trading name;
- (c) if the trader is acting on behalf of another trader, the geographical address and identity of that trader;
- (d) the geographical address at which the trader is established, the trader's telephone number and email address, and details of other means of online communications provided by the trader which guarantee that the consumer can keep any written correspondence with the trader, including its date and time, on a durable medium, to enable the consumer to contact the trader quickly and communicate with the trader efficiently through all of the means of communication provided by the trader;⁵³⁵
- (e) the geographical address of –
 - (i) the place of business of the trader, if different from the address provided in accordance with paragraph (d), and

⁵³⁴ Schedule 1 re-enacts with some amendments and additions Schedule 2 of S.I. 484/2013 which gives effect to the information requirements in paragraphs (a) to (t) of Article 6(1) of the CRD.

⁵³⁵ Article 6(1)(c) of the CRD which is given effect in paragraphs (d) and (e) of Schedule 2 of S.I. 484/2013 has been amended by Article 4(4)(a)(i) of the BEMD. The amendments, first, delete the previous requirement on the trader to provide a fax number. The amendments, secondly, require the trader to provide details of other means of online communication provided by the trader which guarantee that the consumer can keep any written correspondence, including its date and time, on durable medium. Paragraph (d) has been amended accordingly.

- (ii) where the trader acts on behalf of another trader, the place of business of that other trader, if different from the address provided in accordance with paragraph (c),
to which the consumer can address complaints;
- (f) the total price of the product inclusive of taxes, or where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated;
- (g) where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such charges may be payable;
- (h) in the case of a contract of indeterminate duration or a contract containing a subscription –
 - (i) the total costs per billing period, or,
 - (ii) where such contracts are charged at a fixed rate, the total monthly costs, or
 - (iii) where the total costs cannot reasonably be calculated in advance, the manner in which the price is to be calculated;
- (i) where applicable, that the price of the goods, digital content, digital service or service was personalised on the basis of automated decision-making;⁵³⁶
- (j) the cost of using the means of distance communication used for the conclusion of the contract where that cost is calculated other than at the basic rate;
- (k) the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or perform the service;
- (l) where applicable, the trader's complaint handling policy;
- (m) where a right to cancel the contract exists, the conditions, time limit and procedures for exercising that right in accordance with *head 90*;
- (n) where applicable, that the consumer will have to bear the cost of returning the goods in case of cancellation of the contract and, in the case of distance contracts, if

⁵³⁶ Article 4(4)(a)(ii) inserts a new paragraph (ea) in Article 6(1) of the CRD as follows: 'where applicable, that the price was personalised on the basis of automated decision making'. Paragraph (i) gives effect to this addition to the information requirements in Schedule 2.

the goods by their nature cannot normally be returned by post, the cost of returning the goods;

- (o) where the consumer exercises the right to cancel after having made a request in accordance with *head 94*, that the consumer is liable to pay the trader reasonable costs in accordance with that head;
- (p) where a right to cancel the contract does not apply under *head 86*, the information that the consumer will not benefit from that right or, where applicable, the circumstances in which the consumer loses the right;
- (q) the existence of a legal obligation on the trader to supply goods, digital content, digital services and services that are in conformity with the contract;⁵³⁷
- (r) where applicable, the existence and conditions of after-sale customer assistance, after-sales services and commercial guarantees;
- (s) the existence of relevant codes of practice, as defined in *head 2(1) of Part 1* and, where applicable, how copies of such codes can be obtained;
- (t) the duration of the contract where applicable or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating it;
- (u) where applicable, the minimum duration of the consumer's obligations under the contract;
- (v) where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
- (w) where applicable, the functionality, including applicable technical protection measures, of goods with digital elements, digital content and digital services;⁵³⁸
- (x) where applicable, any relevant compatibility and interoperability of goods with digital elements, digital content and digital services of which the trader is, or can reasonably be expected to have been, aware;⁵³⁹

⁵³⁷ Paragraph (l) of Article 6 (1) of the CRD as adopted refers only 'to the existence of a legal guarantee of conformity for goods.' In response to the adoption of the DCD, Article 4(4)(a)(iii) of the BEMD provides for the replacement of paragraph (e) by a paragraph that refers also to the legal guarantee of conformity for digital content and digital services. Paragraph (q) has been amended accordingly.

⁵³⁸ Article 6(1)(r) of the CRD as adopted refers only to the functionality, including applicable technical protection measures, of digital content. In response to the adoption of the DCD, Article 4(4)(a)(iv) of the BEMD provides for the replacement of Article 6(1)(r) by a paragraph that refers also to the functionality of goods with digital elements and of digital services. Paragraph (w) has been amended accordingly.

⁵³⁹ Article 6(1)(s) of the CRD as adopted refers only to the relevant interoperability of digital content. In response to the adoption of the DCD, Article 4(4)(a)(iv) of the BEMD provides for the replacement of Article 6

(y) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism to which the trader is subject, and the methods for having access to it.

(1)(s) by a paragraph that refers to the relevant compatibility and interoperability of goods with digital elements, digital content and digital services. Paragraph (x) has been amended accordingly

SCHEDULE 3⁵⁴⁰

INFORMATION CONCERNING THE EXERCISE OF THE RIGHT TO CANCEL

20. MODEL INSTRUCTIONS FOR CANCELLATION

Right to cancel for contracts other than off-premises contracts concluded in the context of unsolicited visits to the consumer's home or excursions organised by the trader with the aim or effect of promoting or selling products to consumers⁵⁴¹

You have the right to cancel this contract within 14 days without giving any reason.

The cancellation period will expire after 14 days from the day [See Note 1].

Right to cancel for off-premises contracts concluded in the context of unsolicited visits to the consumer's home or excursions organised by the trader with the aim or effect of promoting or selling products to consumers

You have the right to cancel this contract within 30 days without giving any reason.

The cancellation period will expire after 30 days from the day [See Note 1].

To exercise the right to cancel, you must inform us [see Note 2] of your decision to cancel this contract by an unequivocal statement such as a letter sent by post or an e-mail. You may use the attached cancellation form but it is not obligatory. [See note 3]⁵⁴²

To meet the cancellation deadline, it is sufficient for you to send your communication concerning your exercise of the right to cancel before the cancellation period has expired.

Effects of cancellation

If you cancel this contract, we will reimburse to you all payments received from you, including the costs of delivery (with the exception of the supplementary costs resulting from

⁵⁴⁰ Schedule 3 re-enacts with some amendments Schedule 3 of S.I. 484/2013 which gives effect to Annex I of the CRD.

⁵⁴¹ The introductory part of the Schedule has been amended to take account of the fact that, if the regulatory option for Member States inserted at Article 9(1a) of the CRD by Article 4(8) of the BEMD is implemented, the withdrawal period for certain off-premises contracts will be 30 days rather than the 14-day period that will apply to distance and off-premises contracts generally.

⁵⁴² This paragraph incorporates the amendment to Annex I of the CRD made by Article 4(15)(a)(i) of the BEMD to remove the previous reference to a letter sent by fax.

your choice of a type of delivery other than the least expensive type of standard delivery offered by us) without undue delay and in any event not later than 14 days from the day on which we are informed about your decision to cancel this contract. We will carry out such reimbursement using the same means of payment as you used for the initial transaction, unless you have expressly agreed otherwise; in any event, you will not incur any fees as a result of such reimbursement. [See Note 4]

[See Note 5]

[See Note 6]

Notes on instructions for completion:

20. Insert one of the following texts between inverted commas:

- (a) in the case of a service contract or a contract for the supply of water, gas or electricity not supplied in a limited volume or set quantity, of district heating or of digital content not supplied on a tangible medium: “of the conclusion of the contract.”;
- (b) in the case of a sales contract: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the goods.”;
- (c) in the case of a contract relating to multiple goods ordered by the consumer in one order and delivered separately: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the last of the goods.”;
- (d) in the case of a contract relating to delivery of a good consisting of multiple lots or pieces: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the last lot or piece.”;
- (e) in the case of a contract for regular delivery of goods during a defined period: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the first of the goods.”.

2. Insert your name, geographical address, telephone number and email address.⁵⁴³
3. If you give the option to the consumer to electronically fill in and submit information about his cancellation of the contract on your website, insert the following: “You can also electronically fill in and submit the model cancellation form or any other unequivocal statement on our website [insert Internet address]. If you use this option, we will communicate to you an acknowledgement of receipt of such a cancellation on a durable medium (e.g. by e-mail) without delay.”.
4. In the case of sales contracts in which you have not offered to collect the goods in the event of cancellation insert the following: “We may withhold reimbursement until we have received the goods back or you have supplied evidence of having sent back the goods, whichever is the earliest.”.
5. If the consumer has received goods in connection with the contract:
 - (a) insert:
 - “We will collect the goods”; or
 - “You shall send back the goods or hand them over to us or ... [insert the name and geographical address, where applicable, of the person authorised by you to receive the goods], without undue delay and in any event not later than 14 days from the day on which you communicate your cancellation of the contract to us. The deadline is met if you send back the goods before the period of 14 days has expired.”;
 - (20) insert:
 - “We will bear the cost of returning the goods.”,
 - “You will bear the direct cost of returning the goods.”,
 - If, in a distance contract, you do not offer to bear the cost of returning the goods and the goods, by their nature, cannot normally be returned by post: “You will have to bear the direct cost of returning the goods ... EUR [insert the amount].”; or if the cost of returning the goods cannot reasonably be calculated in advance:

⁵⁴³ This paragraph incorporates the amendment to this provision of Annex I of the CRD made by Article 4(15)(a)(ii) of the BEMD to remove the previous reference to a fax number. The amendment has also deleted the words ‘where available’ that were previously before ‘telephone number, fax number and e-mail address’.

- “You will have to bear the direct cost of returning the goods. The cost is estimated at a maximum of approximately ... EUR [insert the amount].|”, or
- If, in an off-premises contract, the goods, by their nature, cannot normally be returned by post and have been delivered to the consumer’s home at the time of the conclusion of the contract: “We will collect the goods at our own expense.”, and

(20) insert: “You are only liable for any diminished value of the goods resulting from the handling of the goods beyond that necessary to establish their nature, characteristics and functioning”.

In the case of a contract for the provision of services or the supply of water, gas or electricity, where they are not supplied in a limited volume or set quantity, or of district heating, insert the following: “If you requested to begin the performance of services or the supply of water/gas/electricity/district heating [delete where inapplicable] during the cancellation period, you shall pay us an amount which is in proportion to what has been provided until you have communicated to us your cancellation of this contract in comparison with the full coverage of the contract.”.

B. Model cancellation form

[Complete and return this form only if you wish to cancel the contract.]

To [here the trader’s name, geographical address and e-mail address are to be inserted by the trader]:⁵⁴⁴

- I/We [*] hereby give notice that I/We [*] cancel my/our [*] contract of sale of the following goods[*]/for the provision of the following service [*],
- Ordered on[*]/received on [*],
- Name of consumer(s),
- Address of consumer(s),
- Signature of consumer(s) [only if this form is notified on paper],
- Date

⁵⁴⁴ This sentence incorporates the amendment to this provision of Annex I of the CRD made by Article 4(15)(b) of the BEMD to remove the previous reference to a fax number. The amendment has also deleted the words ‘where available’ that were previously before ‘fax number and e-mail address’.

SCHEDULE 4

PART 1

CONTRACT TERMS PRESUMED UNFAIR

1. A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.
2. A term which has the object or effect of making an agreement binding on the consumer whereas provision of services by the trader is subject to a condition whose realization depends on the trader's will alone.
3. A term which has the object or effect of permitting the trader 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 trader where the trader is the party cancelling the contract.
4. 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 or for services which have not been supplied.
5. A term which has the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation.
6. A term which has the object or effect of authorizing the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by him where it is the trader who dissolves the contract.
7. A term which has the object or effect of enabling the trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.
8. A term which has the object or effect of permitting a trader, where the consumer has cancelled the contract, to retain a payment which, had the contract been performed, would

have been paid to a third party in accordance with a contractual obligation or a mandatory statutory or regulatory provision.

9. A term which has the object or effect of 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.

10. A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer had no real opportunity of becoming acquainted before the conclusion of the contract.

11. A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.

12. A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.

13. A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or service to be provided.

14. A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by the contract, where no price or method of determining the price has been agreed with the consumer before the consumer becomes bound.

15. A term which has the object or effect of providing for the price of goods to be determined at the time of delivery or permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

17. A term which has the object or effect of limiting the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.

18. A term which has the object or effect of obliging the consumer to fulfil all his obligations where the trader does not perform the trader's obligations.

19. A term which has the object or effect of giving the trader the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the consumer's agreement.

20. A term which has the object or effect of requiring a consumer to pay a fee in order to exercise a statutory right.

21. A term which has the object or effect of preventing without a valid justification the consumer from obtaining repairs or spare parts from another trader.

22. A term which has the object or effect of imposing disproportionate formal or other requirements where the consumer wishes to terminate the contract and switch to another trader.

23. A term which has the object or effect of requiring from the consumer excessive advance payments or excessive guarantees of the performance of future obligations.

PART 2

RESTRICTIONS ON THE APPLICATION OF PART 1

1. Term 8 (cancellation without reasonable notice) does not include a term 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 financial services supplier is required to inform the consumer and another other contracting party or parties of the cancellation immediately.
2. Term 11 (alteration of contract without valid reason) and term 14 (determination of price after consumer bound by contract) do not include a term whereby a supplier of financial services reserves the right to alter the rate of interest payable by or due to the consumer, or the amount of other charges for financial service where there is a valid reason for doing so, provided that the supplier is required to inform the consumer and any other contracting party or parties of the alteration at the earliest opportunity and the consumer is free to dissolve the contract immediately.
3. Term 11 (alteration of contract without valid reason), term 12 (determination of characteristics of subject matter of contract after consumer bound by contract), and term 14 (determination of price after consumer bound by contract) do not include a term under which a trader reserves the right to alter unilaterally the conditions of a contract of indeterminate duration provided that the trader is required to inform the consumer of the alteration with reasonable notice and the consumer is free to dissolve the contract.
4. Term 8 (cancellation without reasonable notice), term 11 (alteration of contract without valid reason), Term 14 (determination of price after consumer bound by contract) and Term 15 (increase in price) do not apply to:
 - (a) transactions in transferrable securities, financial instruments and 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 trader does not control, or
 - (b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency

provided that the consumer is made away of the possibility of changes in the contract before the consumer is bound by the contract.

5. Term 14 (determination of price after consumer bound by contract) and Term 15 (increase in price) do not apply to a price-indexation clause, where otherwise lawful, provided that the method by which prices may vary is explicitly described.

SCHEDULE 5
REPEALS AND REVOCATIONS

PART 1

Acts Repealed

Section 5(1)

Number and Year	Short Title	Extent of Repeal
(1)	(2)	(3)
(1893, c. 71)	<u>Sale of Goods Act 1893</u>	Section 4
No. 16 of 1980	<u>Sale of Goods and Supply of Services Act 1980</u>	Sections 3, 14, 41, 47(6) to 47(10), 47, 53, 54 and 55.
No. 23 of 1980	<u>Trading Stamps Act 1980</u>	The whole Act
No. 17 of 1995	<u>Package Holidays and Travel Trade Act 1995</u>	Section 25C
No. 1 of 2010	<u>Arbitration Act 2010</u>	Section 21(6)

Part 2

Statutory Instruments Revoked

Section 5(2)

Number and Year	Title of Instrument	Extent of Revocation
(1)	(2)	(3)
<u>S.I. No 27 of 1995 and S.I. No 307 of 2000</u>	European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000	The whole Instrument
<u>S.I. No 11 of 2003</u>	European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003	The whole Instrument
<u>S.I. No 160 of 2013</u>	European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013	The whole Instrument
<u>S.I. No 484 of 2013</u>	European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013	The whole Instrument
<u>S.I. No 336 of 2014</u>	European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014	The whole Instrument

SCHEDULE 6

Amendments to Acts

Section 6(1)

Short Title, Number and Year	Provision Affected	Amendment
(1)	(2)	(3)
Sale of Goods Act 1893		The Sale of Goods Act 1893 is amended as follows:
	Section 1 (Sale and agreement to sell)	After subsection (4) insert- “(5) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 3 (Contract of sale, how made)	After subsection (4) insert- “(5) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 3 (Contract of sale, how made)	At the beginning of the section insert “(1)”. At the end of the section insert- “(2) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”

	Section 11 (When condition to be treated as warranty)	After subsection (4) insert- “(5) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 12 (Implied undertaking as to title, etc.)	After subsection (2) insert- “(3) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 13 (Sale by description)	After subsection (3) insert- “(4) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 14 (Implied undertakings as to quality or fitness)	After subsection (6) insert- “(7) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 15 (Sale by sample)	After subsection (2) insert- “(3) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 20 (Passing of risk)	Delete subsections (3) to (7). After subsection (2) insert- “(3) This section does not apply to a contract to which

		Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 29 (Rules as to delivery)	Delete subsections (2A) to (2F). After subsection (5) insert- “(6) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 30 (Delivery of wrong quantity)	After subsection (4) insert- “(5) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 31 (Instalment delivery)	After subsection (2) insert- “(3) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 32 (Delivery to carrier)	Delete subsection (4). After subsection (3) insert- “(4) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 35 (Acceptance)	At the beginning of the section insert “(1)”. At the end of the section insert-

		“(2) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 53 (Remedy for breach of warranty)	In subsection (1) delete “Subject to subsection (2),”. Delete subsections (2) and (3). After subsection (4) insert-“(5) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
	Section 55 (Exclusion of implied terms and conditions) Section 61 (Savings)	After subsection (8) insert-“(9) This section does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.” After subsection (6) insert –“(7) Subsection (6) does not apply to a contract to which Part 2 of the Consumer Rights Bill 2021 applies.”
Sale of Goods and Supply of Services Act 1980		
	Section 12 (Implied warranty for spare parts and servicing)	After subsection (3) insert-“(4) This section does not apply to a contract to which Part 4 of the Consumer Rights Bill 2021 applies.”

	Section 13 (Implied condition on sale of motor vehicles)	After subsection (9) insert- “(10) This section does not apply to a contract to which Part 4 of the Consumer Rights Bill 2021 applies.”
	Section 15 (Definition of guarantee)	After section 15 insert- “15A. Sections 15 to 19 do not apply to a contract to which Part 4 of the Consumer Rights Bill 2021 applies.”
	Section 39 (Implied undertakings as to quality of service)	After section 39 insert: “39A. This Part does not apply to a contract to which Part 4 of the Consumer Rights Bill 2021 applies.”
	Section 47 (Unsolicited goods)	After subsection (5) insert: “(6) This section does not apply to a contract to which head 115 of the Consumer Rights Bill 2021 applies.”