

The Irish Consumer Rights Bill 2022: Paving a path to 21st century consumer protection

Catherine Walsh, Senior Associate, and Laura Lambe, Support Lawyer, at McCann FitzGerald LLP, introduce the Irish Consumer Rights Bill 2022 and highlight the main consequences of the new legislation for consumer protection in Ireland

On 22 April 2022, the Irish government published the long awaited Consumer Rights Bill 2022 (the “Bill”). For organisations that deal with consumers, the Bill, if enacted, will strengthen consumer rights particularly in the digital sphere and will require updates to consumer terms and conditions.

In Ireland, there is a large body of legislation aimed at consumer protection with much of it having been driven by developments at a European Union level with the adoption of various Directives on consumer rights and consumer contracts. With the transposition of these Directives into Irish law on a piecemeal basis, Irish consumer law is consequently made up of a raft of legislation with some of the key pieces of legislation being:

- Consumer Protection Act 2007 (which implemented the Unfair Commercial Practices Directive 2005/29/EC into Irish law) (the “CPA”);
- Sale of Goods and Supply of Services Act 1980;
- European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 (as amended in 2013 and 2014) (which implemented the Unfair Terms in Consumer Contracts Directive 93/13/EEC into Irish Law) (the “UTCC Regulations”);
- European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (as amended) (which implemented the Directive on Consumer Rights 2011/83/EU into Irish law) (the “Consumer Information Regulations”); and
- Consumer Credit Act 1995 and the European Communities (Consumer Credit Agreements) Regulations 2010 (which gave effect to the Directive on Credit Agreements for Consumers 2008/48/EC in Irish law).

The Explanatory Memorandum to the Bill states that the purpose of the Bill is to consolidate and update the legislative provisions that regulate

the main types of consumer contract. The Bill is also intended to transpose a number of EU Directives into Irish law, including:

- Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (the “Digital Content Directive”);
- Directive 2019/771 on certain aspects concerning contracts for the sale of goods (the “Revised Sale of Goods Directive”); and
- The main provisions of Directive 2019/2161 on the better enforcement and modernisation of Union consumer protection rules (the “Omnibus Directive”), which itself amends the Unfair Contracts Terms Directive 93/13/EEC; the Unfair Commercial Practices Directive 2005/29/EC; the Consumer Rights Directive 2011/83/EU, and the Price Indication Directive 98/6/EC.

Welcoming the publication of the Bill, the Minister of State with responsibility for Consumer Protection legislation, Robert Troy, said, “This Bill represents the biggest overhaul of consumer rights law in 40 years. The proposed legislation modernises and consolidates existing consumer protection law and significantly strengthens the enforcement powers of our agencies responsible for ensuring consumer rights such as the CCPC and ComReg.”

This article discusses some of the proposed reforms.

Cementing protections: enhancing remedies under the Revised Sale of Goods Directive

The Bill seeks to transpose the Revised Sale of Goods Directive, providing consumers with enhanced rights and remedies in contracts for the sale of goods, including those with digital elements. This is an important development as contracts for the supply of digital content and services can be difficult to reconcile with existing protections for traditional goods and services. The Bill

seeks to clarify the position by proposing that the rights and remedies applicable for sales contracts include those sales contracts for the supply of goods which also contain elements incorporating the supply of a digital content or digital service (Section 12 (b)). Notable provisions include:

Conformity requirements

For sales contracts, consumers are currently entitled to goods that, amongst other things, are 'fit for purpose', 'match the description given' and are of 'merchantable quality'. The Bill provides for a more extensive list of both objective and subjective conformity requirements to include the following:

- goods must be of the description, type, quantity and quality, and possess the functionality, compatibility, interoperability and other features, specified in the sales contract;
- goods must be supplied with all accessories and instructions, including on installation of the goods, specified in the sales contract;
- goods must be updated as specified in the sales contract;
- goods must be fit for all of the purposes for which goods of the same type would normally be used; and
- goods must be delivered along with any accessories, including packaging, installation instructions or other instructions that the consumer may reasonably expect to receive.

Delivery

The Bill retains the existing position in relation to goods to be supplied by delivery so that, unless the trader and consumer have agreed otherwise, the trader must deliver the goods within 30 days of concluding the contract. If the trader fails to deliver within this period, the consumer may terminate the contract but only after allowing the trader an additional period for delivery that is 'appropriate in the

circumstances' (Section 29(2B), the Sale of Goods Act 1893 (as amended by the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013)).

The Bill departs from existing legislation on the question of deliveries by instalment. At present, if a trader makes defective deliveries in respect of one or more instalments, it is a question in each case, depending on the contract's terms and the circumstances, whether the breach of contract is a repudiation of the contract or a severable breach. In the case of repudiation, the consumer has a right to treat the contract as repudiated (i.e. cancelled) whereas a severable breach gives rise to a claim for compensation (Section 31, Sale of Goods Act 1893). Under the Bill, the consumer will be entitled to seek to terminate the contract if any instalments made are not in conformity with the contract. The consumer may only exercise this right in respect of the instalment or instalments that are non-conforming (Section 37).

Recipients of gifts

Irish law does not currently provide protection to individuals that receive goods as a gift. In practice, most traders deal with recipients of gifts as though they were the consumer as a gesture of goodwill. The Bill proposes instead that the gift recipient will be entitled to exercise all rights and remedies under Part 2 of the Bill as if they were a party to the sales contract (Section 46).

Bridging the gap: protecting consumers of digital content and services

Traditionally, consumer law in Ireland has focused on safeguarding consumers of goods and services. The Bill casts its net wider, extending protection to contracts for the supply of digital content and digital services as well as contracts for the sale of goods with digital elements. Notably, the safeguards contained in the Bill will cover situations in which the consumer does not make a monetary payment, but instead provides personal data which is used for purposes

beyond what is strictly required to provide the content or service.

'Digital content' is defined as data which is produced and supplied in digital form, such as games, e-books, music downloads and Apps. 'Digital services' comprise services that allow consumers to create, process, store, access, share or interact with data in digital form, such as social media. The safeguards afforded to these contracts include:

Supply rights

Where digital content or a digital service is to be supplied under contract, the trader must ensure that it has the right to supply the digital content or service to the consumer at the time of supply. If not, the consumer will have the right to terminate the contract. The Bill also places an obligation on traders to supply the digital content or service to the consumer in accordance with the terms of the contract and without undue delay.

Where a digital content or digital service contract provides for continuous supply over a particular period, the trader must ensure supply is maintained throughout that period. Similarly, where a contract provides for supply of the digital content or service on a number of occasions, the trader must ensure supply on each of those occasions.

Conformity requirements

The Bill places enhanced conformity obligations on traders, who must ensure that the goods, content and services they provide to consumers conform to the contract as regards matters such as quantity, quality, functionality, interoperability and fitness for purpose. The Bill provides for both objective conformity requirements, such as fitness for the purposes for which goods, content or services of the same type would normally be used, as well as subjective conformity requirements, such as fitness for the particular purpose for which the consumer requires the goods, content or services.

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In the context of digital content/service contracts, the trader must ensure that the digital content or service possesses the qualities and performance features (such as functionality, compatibility, accessibility, continuity and security) specified in the contract, as well as those that are normal for digital content or digital services of the same type and that the consumer may reasonably expect. Where the digital content/service contract provides for 'continuous supply' for a period, conformity must be ensured throughout that period. Any short term interruption to supply that is 'more than negligible' will constitute a lack of conformity.

The digital content or service must be supplied along with any accessories and instructions, including on installation or integration, that are specified in the contract as well as those instructions that the consumer may reasonably expect to receive. The trader must also ensure that the consumer is supplied with any updates, including security updates, that are necessary to keep the digital content or service in conformity with the contract for the relevant period. Unless otherwise agreed, the digital content or service must be supplied in the most recent version available.

Consumer remedies

The Bill provides consumers with various remedies, including:

- the right to terminate where the trader fails to supply the digital content or digital service (Section 60(1)).
- the right to have the digital content or digital service brought into conformity with the contract free of charge and within a reasonable time after being informed of the lack of conformity and such shall be done without a significant inconvenience to the consumer (Section 61). Where bringing the digital content or digital service into conformity with the contract would not be possible, or would impose disproportionate costs on the trader taking into account

all the circumstances, the consumer can seek a proportionate reduction in the price or termination of the contract (Section 62(2)). The consumer can only seek to terminate the contract where the lack of conformity is "not minor" (Section 62(3)).

- the right to terminate free of charge where the trader modifies the contract in a manner that negatively affects the consumer's access to, or use of, the digital content or digital service (Section 64(3)).

The Bill also extends a number of familiar redress options to consumers of digital content and digital services, including the right to a full refund, exchange or repair where the content or service is not as described or fit for the purpose intended. The consumer may decide to withhold any outstanding payment to the trader until the trader's legislative obligations are fulfilled. This right may be exercised by way of a written statement to the trader.

Levelling protections: improving the rights of service users

At present, contracts for the sale of services are afforded much less statutory protection than those for goods. The definition of services contained in the Bill largely aligns with that under existing legislation, which covers areas such as financial services, entertainment, accommodation, club memberships, the care of people, animals or things as well as "any rights, benefits, privileges, obligations or facilities that are, or are to be provided, granted or conferred in the course of services" (Section 2, Consumer Protection Act 2007). The definition in the Bill goes further, including communication services and services for the construction, maintenance or repair of buildings (Section 2).

Part 4 of the Bill supplements the existing framework, granting a number of new protections to consumers of services, which largely mirror those provided to goods under Part 2 and digital content and digital services

under Part 3, to include:

Conformity requirements

The Bill places objective and subjective conformity requirements on suppliers of services (Section 80). In particular, the service must:

- comply with any oral or written statement made to the consumer by or on behalf of the trader which the consumer relied on when deciding to enter into the contract, or in making any decision in relation to the service after entering into it (Section 80(1)(b));
- be reasonably fit for any purpose that the consumer made known to the trader at the time of, or before, the conclusion of the service contract and that the trader has accepted (Section 80(1)(c)); and
- be of a nature and quality that can reasonably be expected to achieve any result that the consumer made known to the trader at the time of, or before, the conclusion of the service contract, and that the trader has accepted (Section 80(1)(d)).

The Bill maintains a number of objective conformity requirements contained in the Sale of Goods and Supply of Services Act 1980 (specifically Section 39 of that Act, as amended), which require traders to supply the service with reasonable care and skill and to ensure that any materials used in the supply of services should be sound, reasonably fit for purpose and correspond to any description by the trader (Section 81).

The Bill goes further, placing an obligation on traders to supply the service in accordance with any applicable laws and to ensure that the service complies with any public statements in relation to the service made by, or on behalf of, the trader, particularly in advertising.

This obligation will not apply where the trader can show that:

- it was not, and could not reasonably have been, aware of the public statement in question;

- at the time of concluding the service contract, the public statement had been corrected in the same way as it had been made (or in a comparable way); or
- the decision of the consumer to purchase the service could not have been influenced by the public statement (Section 81(1)(e)).

Reasonable prices

The Bill introduces a limit on the price that can be set for services in circumstances where the parties have not agreed to a price either under contract or by way of oral or written statements. In such circumstances, the price payable for the service "shall be a reasonable price and no more" (Section 83(1)). What is a reasonable price for a service will be a question of fact.

Strengthening foundations: unfair terms in consumer contracts

If the Bill becomes law, it will revoke the existing legislation in force in Ireland on unfair terms in consumer contracts, the UTCC Regulations, but similar replacement provisions are proposed. Under the UTCC Regulations, a consumer is not bound by a standard term in a business to consumer contract if that term is 'unfair' (Regulation 6(1), European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995).

This principle is retained in the Bill, however, it is extended to all 'consumer contracts', as discussed below (Section 129). Under the Bill, a contractual term is regarded as 'unfair', and consequently unenforceable, if contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the consumer's detriment (Section 130).

Some of the more notable changes in this area include:

Application

Subject to limited exceptions, the

UTCC Regulations apply to standard terms which have not been individually negotiated with the consumer (Regulation 3(1), 3(2), 3(4) and 3(5)). If the Bill becomes law, it is proposed that Part 6, which deals with unfair terms, will apply to 'consumer contracts' which are defined as "any contract between a consumer and a trader" (Section 126(1)), and Part 6 specifically provides that a consumer contract will not be excluded by reason only that the contract or a term therein has been individually negotiated with the consumer (Section 127(2)(a)). As such, businesses should be cognisant of the fact that, if the Bill becomes law, any consumer contract (and not just standard terms which are not individually negotiated) will be captured.

In addition, if the governing law applicable to the consumer contract is that of a country or territory other than an EEA State, Part 6 will still apply if the contract has a close connection with the State (Section 127(5)).

'Grey list' and 'black list' contractual terms

The UTCC Regulations contain an indicative and non-exhaustive list of terms, commonly referred to as a 'grey list', which may be regarded as 'unfair' (Regulation 3(7) and Schedule 3, European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995). These terms are not necessarily unfair but may be (e.g. terms which have the object or effect of enabling a supplier to automatically renew a contract of fixed duration).

The Bill retains the concept of a 'grey list' but provides that terms on that list shall be presumed 'unfair' (Section 133(1)) - the UTCC Regulations provided that they 'may' be regarded as unfair but it did not state that a presumption of unfairness arose. While the Bill proposes retaining much of the existing 'grey list' from the UTCC Regulations, it significantly adds to it and there is also the possibility of Ministerial Regulations being enacted, in the future, to specify further terms that shall be presumed 'unfair' (Section 133(4)).

Examples of some of the terms appearing on the Bill's 'grey list'

include those which have the object or effect of:

- requiring any consumer who fails to fulfil his or her obligations under the contract to pay a disproportionately high sum in compensation;
 - enabling the trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
 - irrevocably binding the consumer to terms with which the consumer had no real opportunity of becoming acquainted before the conclusion of the contract;
 - enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
 - enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content, digital service or service to be delivered or supplied;
 - 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;
 - requiring a consumer to pay a fee in order to exercise a statutory right;
 - preventing, without a valid reason, the consumer from obtaining repairs or spare parts from another trader; or
 - requiring a consumer to restrict his/her rights as a data subject under data protection law.
- Significantly, the Bill proposes, for the first time, the introduction of a 'black list' of contractual terms which shall always be regarded as unfair (Section 132) if its object or effect is to:
- exclude or limit the trader's liability for the death or personal injury of a

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consumer arising from the trader's act or omission;

- require a consumer to pay for goods that have not been delivered or digital consent, a digital service or a service that has not been supplied;
- impose on a consumer a burden of proof that, according to the applicable law, would otherwise rest with the trader;
- exclude or hinder a consumer's right to take legal action or exercise a legal remedy (including by requiring the consumer to resolve a dispute through an arbitration procedure that is not governed by law);
- require a consumer to bear its own costs in respect of arbitration;
- give a trader the exclusive right to determine whether goods are, or digital content, a digital service or a service is, in conformity with the contract;
- grant the trader a shorter notice period to terminate the contract than the notice period required of the consumer; or
- confer exclusive jurisdiction for disputes arising under the contract on a court in the place where a trader is domiciled unless the consumer is also domiciled in that place.

Businesses who contract with consumers should review their consumer contracts to ensure that they do not contain any contractual terms appearing on the 'grey list' or 'black list'.

Increasing transparency requirements

The UTCC Regulations require the supplier to ensure that written terms are drafted in plain, intelligible language (Regulation 5(1), European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995). The Bill, however, proposes strengthening this by requiring traders to ensure that the terms of a consumer

contract are 'transparent'.

The Bill proposes that a term must satisfy the following conditions to be regarded as 'transparent' (Section 134):

- it is in plain and intelligible language;
- any written terms must be legible and presented clearly;
- the term must be made available in a manner that gives the consumer a reasonable opportunity to become acquainted with it before conclusion of the contract;
- if a term is novel or onerous, it must be specifically brought to the consumer's attention;
- the costs of any other financial consequences of the term are understandable; and
- the term complies with such other requirements as may be prescribed.

In assessing transparency, the Bill proposes various other matters to be taken into account. Such matters include: (a) the nature and subject matter of the contract; (b) the means by which the contract is communicated to the consumer; (c) the other terms of the contract or any other contract on which it may be dependent; (d) compliance with any obligations imposed under an enactment relating to the provision of information before a consumer contract is concluded; and (e) all the circumstances relating to the conclusion of the contract.

The onus rests with the trader to show that a term is 'transparent' should a dispute arise (Section 134(4)). Practically, this requirement might necessitate a 'plain English' review of contracts with consumers.

Extending cancellation rights

If enacted, the Bill will extend the statutory 14-day cancellation right, commonly known as the 'cooling-off' right, provided under the Consumer Information Regulations.

Subject to certain exceptions, consumers have 14 days from delivery of a good during which they can cancel the contract without penalty (Regulation 15(3), European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013). For service contracts and contracts for the supply of digital content (not on a tangible medium), the 14-day cancellation right begins to run from the day on which the contract is concluded (Regulation 15(2)).

If the Bill is enacted, the 14-day 'cooling-off' right will continue, however, if the contract is concluded in the context of an unsolicited visit to the consumer's home or an excursion organised by the trader with the aim or effect of promoting a service or supply of digital content, or water, gas or electricity (that is not supplied in a limited volume or set quantity) then the cancellation period will be extended to 30 days.

This is a significant development for those traders who engage in door-to-door sales or organise events to promote their services or products.

Scrapping fees for particular payment means

Section 48 of the Consumer Protection Act 2007 provides that where a trader makes a representation that it will accept payment by any one of two or more payment methods or where its practice is to accept a different payment methods, it is not permitted to impose a surcharge for using one method in preference over another and such constitutes a criminal offence. This provision, however, was never commenced so traders are currently permitted to charge consumers for using debit cards for transactions instead of cash for example.

If enacted, the Bill will prohibit traders from charging fees/surcharges for using a particular payment method and where a trader does so, it will be required to reimburse the consumer for the excess paid (Section 122). The Bill also makes this practice an offence. For the avoidance of doubt, traders are permitted to charge the consumer the cost borne by it for use of a particular payment means (e.g. processing fees).

Building up: prohibited practices and obligatory disclosures

Part 9 of the Bill provides for a number of amendments to the Consumer Protection Act 2007 (the "CPA"), which will place heightened transparency requirements on traders. The CPA applies to products, which it defines as "goods and services" (Section 2, CPA).

The Bill extends this definition to include "any goods or services including immovable property, a digital service and digital content, as well as rights and obligations" (Section 152(a)).

Prohibited practices

Section 55(1) of the CPA sets out a list of prohibited commercial practices, such as falsely representing that the trader or product has a particular approval, endorsement or authorisation, making a false representation that a product is available for a limited time in order to elicit an immediate decision from a consumer, failing to disclose that editorial content used to promote a product is a paid promotion, creating the impression that the trader is a consumer and running fake competitions.

Section 157 of the Bill bolsters these provisions by prohibiting the following actions:

- providing search results to a consumer's online search query without clearly disclosing any paid advertisement or payment made in order to achieve higher ranking of products within the search results;
- reselling event tickets where the trader acquired them by using automated means to circumvent any limit on the number of tickets that a person may buy or any other rules applicable to the purchase of tickets;
- stating that reviews 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 those consumers; and

- submitting or commissioning false reviews or endorsements, or misrepresenting reviews or social endorsements by consumers, in order to promote products.

Obligatory disclosures

Where a trader hosts an online marketplace, it must state clearly whether the third party offering the products is a commercial trader or not, on the basis of a declaration made by that third party to the trader (Section 155 (ii)(g)).

Where a trader's website enables consumers to search for products offered by different traders or consumers, general information relating to the main parameters determining the ranking of products in search results and the weighting of those parameters, must be made available in a directly and easily accessible section of the online interface (Section 155(b)). This obligation does not apply to online search engines, such as Google.

Consumers must be informed when the price of a product is personalised on the basis of automated decision making (Schedule 3).

The path ahead

The Bill proposes widespread, and necessary, reform to consumer law in Ireland. By clamping down on unfair and misleading practices in the online sphere and by extending protections to users of digital content and digital services, it paves a path to a legislative framework that better serves 21st century consumers.

The changes proposed by the Bill will complement a wide array of legislative reforms, at both an EU and national level such as the EU Digital Services Act and the Online Safety Bill.

At the time of writing, the Bill is at the Fourth Stage of Dáil Éireann with amendments arising from the Committee Stage being considered. Political appetite to move quickly through the remaining stages of the legislative process is expected, as the deadline for the

transposition of the Omnibus Directive was 28 May 2022, while the deadlines for implementing the Digital Contents Directive and Revised Sale of Goods Directive have also passed.

As a result, traders may face a brief window in which to bring their activities into compliance with the Bill once it is enacted and brought into force.

Given the potential penalties involved, consumer facing businesses would be wise to familiarise themselves with the Bill as soon as possible, with a view to identifying areas of potential non-compliance regarding their contracts and dealings with consumers.

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