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Consumer rights

The scheme of a new Consumer Rights Bill has been published. A public consultation process is being conducted on the proposals in the Bill. The closing date for making submissions is 28 August 2015. It is hoped to have the new legislation in place in mid-2016. Here we look at current general consumer rights and how they may change if this proposed legislation is enacted.

The Sales Law Review Group examined consumer law in considerable detail. It published its *Report on the Legislation Governing the Sale of Goods and the Supply of Services* in October 2011:

djei.ie/publications/commerce/2011/saleslawreviewgroupreport2011.pdf

This report recommended that the statutory provisions on consumer rights should be brought together in one comprehensive Consumer Rights Act.

Among other things, it identified the main gaps in consumer protection legislation as being the lack of statutory rules on:

- The rights of consumers, and the obligations of traders, in respect of digital services which are delivered in intangible form, for example, by downloading or streaming, and remedies for breaches of such rights and obligations
- Remedies for breaches of the rules on the quality of services
- The rights of consumers in respect of goods supplied under exchange transactions
- Remedies for breaches of the rules on the quality and other aspects of goods supplied under consumer hire and hire-purchase agreements and exchange transactions

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The Department of Jobs, Enterprise and Innovation published a *Consultation Paper on Reform of the Law on Consumer Contract Rights* in August 2014.

djei.ie/publications/commerce/2014/crbconsultationpaperaug2014.pdf

The Scheme for the proposed Consumer Rights Bill is at:

djei.ie/publications/commerce/2015/crbschememay2015.pdf

The Consumer Rights Bill aims to consolidate and update the various statutory provisions dealing with consumer rights and to address the gaps in existing legislation. It deals with transactions between consumers and traders; it does not deal with transactions between traders or transactions between consumers. It proposes to:

- Outline the rights of consumers and the obligations of traders in respect of goods (sales contracts, hire purchase contracts, hire contracts, and barter or exchange contracts), services and digital content (including computer programs, applications, games, music, videos or texts accessed through downloads, streaming or other electronic means)
- Set out the remedies available to consumers where their rights are infringed

- Have provisions dealing with the fairness or otherwise of the terms of consumer contracts

The main new rights which are proposed in the Bill include:

- A ban on expiry dates on gift cards and vouchers
- Statutory rights and remedies for consumers who download or stream games, music, videos, apps and other digital content
- Clearer rights for consumers buying services, including a right to have a substandard service remedied or refunded
- A standard 30-day period in which consumers could return faulty goods and get a full refund
- Consumers who get goods as gifts will have the same rights as the buyers of the goods
- Extended rules on unfair contract terms
- Information rights for consumers in healthcare, social services and gambling transactions, including price information for GP and other medical consultations

Different terms are used in the various pieces of existing legislation to describe the people involved in a consumer transaction. The Bill proposes to use the term “consumer” to describe the person who is buying goods, hiring goods or receiving services. The term “trader” is used to describe the seller, the hirer or the supplier of goods or services.

Current legislation

The following are the main general consumer protection laws:

The Sale of Goods Act 1893, the Sale of Goods and Supply of Services Act 1980, the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003 (SI 11/2003) (generally known as the EU Consumer Sales Regulations). These set out the rules governing the quality and other aspects of goods sold under contracts for sale and the remedies for breaches of these rules.

The Consumer Credit Act 1995 sets out the rules governing the quality and other aspects of goods supplied under consumer hire and hire-purchase agreements but it does not set out the remedies for breaches of these rules.

The Sale of Goods and Supply of Services Act 1980 sets out the rules governing the quality of services supplied under service contracts but it does not set out the remedies for breaches of these rules.

The EU Unfair Commercial Practices Directive 2005/29/EC deals with unfair, misleading and aggressive commercial practices by traders which are directly connected with the

promotion, sale or supply of products to consumers. The Directive was implemented in Ireland by the Consumer Protection Act 2007.

The European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI 27/1995), the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000 (SI 307/2000), the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 (SI 160/2013) and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014 (SI 336/2014) deal with unfair terms in consumer contracts. They implement the EU Directive on Unfair Terms in Consumer Contracts (Directive 93/13/EEC).

European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (SI 484/2013), which came into effect on 14 June 2014, implemented Directive 2011/83/EU on Consumer Rights (generally known as the Consumer Rights Directive). These Regulations set out the substance and form of the information that traders must provide to consumers before consumers are bound by on-premises, off-premises or distance contracts.

There is a range of other consumer legislation relating to specific sectors, for example, food quality, food labelling, package holidays and toy safety.

Contracts for the sale of goods

At present, there are two sets of statutory rules on the sale of goods – the Sale of Goods Acts 1893 and 1980 and the EU Consumer Sales Regulations. The Sales Law Review Group was critical of the existence of the two sets of rules as it considered that this led to lack of coherence and was confusing. The rules in respect of quality of goods are broadly similar in both sets but expressed in somewhat different language. The remedies are different.

The Sale of Goods Acts provide that there are certain implied terms in every contract for the sale of goods. These implied terms may not be excluded or varied. They are:

- The seller has the right to sell the goods
- The goods must be free from any charge or encumbrance not disclosed to you, the buyer, and you must enjoy quiet possession other than in accordance with any such charge or encumbrance
- Where the contract is for the sale of goods by description, the goods must correspond with that description
- The goods must be of merchantable quality, that is, they must be as fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances. The quality of goods includes their state and condition. The “merchantable quality” requirement does not apply as regards defects specifically drawn to your attention before the contract is made or, if you have examined the goods before the contract is made, as regards defects which that examination ought to have revealed.
- Where you make known any particular purpose for which the goods are being bought, the goods must be reasonably fit for that purpose
- Where the contract is for the sale of goods by sample, the goods must correspond with the sample

The EU Consumer Sales Regulations provide that the goods must be in conformity with the contract. They are presumed to be in conformity if they meet the specified conditions about quality. The requirements about quality are substantially the same as in the Sale of Goods Acts although expressed in different legal language. The EU Regulations do not deal with ownership and title.

Remedies under the Sale of Goods Acts

If one of the implied terms of the contract in relation to quality is breached, you may reject the goods and treat the contract as repudiated and get a full refund of the price and/or claim damages. There are no specific time limits on the use of any particular remedy.

You may not reject the goods if you have been deemed to have accepted them. This can happen in a number of ways:

- You intimate to the trader that you have accepted the goods
- You have done anything in relation to goods that is inconsistent with the trader retaining ownership
- You retain the goods without intimating that you are rejecting them and you don't have a good and sufficient reason for doing this

Repair and replacement

If you do not have the right to reject the goods, you may seek to have them repaired or replaced. If this is not done within a reasonable time, you may either reject the goods or have them repaired elsewhere and claim the cost of the repair from the trader.

Remedies under EU Consumer Sales Directive

If the goods do not conform to the contract, you may first of all require the trader to repair or replace them. Where this is impossible or disproportionate or where the remedy is not completed within a reasonable period or without significant inconvenience to you, you may require an appropriate price reduction or, if the lack of conformity is not minor, you may have the contract rescinded.

Unless proved otherwise, any lack of conformity which becomes apparent within six months of delivery is presumed to have existed at the time of delivery.

Proposals for change

The Consumer Rights Bill proposes to give you a choice of remedies if the goods you buy are faulty. These are:

- Rejection of the goods, termination of the contract and full refund of the price
- Repair
- Replacement

It is proposed that there would be a standard 30-day period for making decisions in relation to faulty goods. During that

time, you would have the right to choose to have the goods repaired or replaced or to end the contract and get your money back. At present, the law does not specify the period for rejecting the goods.

After 30 days, you would still have the right to have faulty goods repaired or replaced. In certain circumstances you would have the right to keep the goods and get a price reduction or return the goods and get a full refund. This would apply if:

- Repair or replacement was not possible or could not be done within a reasonable time or without significant inconvenience to you or
- The goods were still faulty after one repair or one replacement

(Some traders allow you a period in which to reject goods even if they are not faulty. This is not a legal right, it is a choice exercised by the trader.)

The Bill would replace the "merchantable quality" standard with "satisfactory quality". This would be defined as the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

There would be an indicative list of specific aspects of quality:

- Fitness for the purposes for which goods of the kind in question are commonly supplied
- Appearance and finish
- Freedom from minor defects
- Durability and safety in the case of certain goods

As with the existing law, the quality requirements would not apply to defects which are drawn to your attention before the contract was concluded or, if you examined the goods before concluding the contract, to defects which you should have noticed in that examination.

Digital content contracts

When you buy tangible digital content, for example, a DVD or CD, you have the same rights as when you buy any other goods. Services which enable you to buy intangible digital content, for example, broadband, internet service providers and cloud storage come under the normal rules for the supply of services. However, if you buy intangible digital content, for example, if you download or stream ebooks, films or other such content, you are not currently protected by consumer legislation in respect of quality. (Various aspects of consumer information legislation do apply, for example, the provisions of the Consumer Rights Directive.)

Proposals for change

The Consumer Rights Bill proposes that intangible digital content would be subject to the same consumer protection laws as other goods in respect of quality. This means that digital content must be of satisfactory quality, match its description or trial version and be fit for any particular purpose made known by you.

When you buy tangible goods, you own those goods. In the case of intangible digital content, you do not generally own the goods in the usual sense but rather you buy the use of the goods subject to a licence. The ownership rights which apply

to goods generally will not be applied to digital content.

The remedies for breach of the laws would be similar to the general remedies. You would be entitled to have the content repaired or replaced. However, you would not be entitled to end the contract and get a refund in the same way as for other goods. This is because the content can often be copied, establishing that you had deleted it from your hardware would be difficult and it cannot meaningfully be returned to the trader.

If the trader could not repair or replace the defective digital content, or did not do so within a reasonable time or without significant inconvenience to you, you would be entitled either to a reduction of the price or to end the contract and receive a refund of the price. However, unlike in the case of goods generally, it is not proposed to give you these rights after one unsuccessful repair or replacement. This is because repairs and patches are a common and necessary feature of many digital products.

If digital content damages your device or your other digital content, you will be entitled to have the damage repaired or to receive appropriate financial compensation.

Non-sale contracts

Non-sale contracts include hire agreements (these are defined as agreements to hire goods for at least three months), hire

purchase agreements, contracts that include both the supply of a service and the supply of related goods (sometimes

called work and materials contracts), exchange or barter. Your general rights in relation to hire agreements and hire purchase agreements are set out in the Consumer Credit Act 1995.

At present, your rights to standards of quality in these non-sale contracts are broadly the same as in agreements for sale.

The remedies for breaches of those rights are not the same. There are no statutory provisions on remedies (except in the case of work and materials contracts where the EU Sales Regulations may apply).

Gifts

At present, if you receive goods as a gift, you have no rights under consumer legislation; only the buyer has rights. In practice, many traders deal with the recipients of gifts as if they were the buyers but this is a gesture of goodwill and is not a legal requirement.

Proposals for change

The Consumer Rights Bill provides that if you get goods as a gift, you would have the same rights as the buyer.

Gift vouchers

At present, there is no statutory regulation of the terms and conditions of gift cards and vouchers.

Gift cards which constitute electronic money are already regulated by EU Directive 2009/110/EC. This is implemented in Ireland by the European Communities (Electronic Money) Regulations 2011 (SI 183/2011). The Central Bank is responsible

Proposals for change

The Consumer Rights Bill would provide that broadly the same remedies would be available to you, the consumer, in non-sale contracts as in sale contracts. This would take account of the specific features of hire agreements and hire purchase agreements if the issue of a refund arises.

The Consumer Credit Act 1995 would continue to apply to other aspects of hire agreements and hire purchase agreements.

for enforcing these Regulations. In general, these are cards which may be used in a number of different outlets. Before buying such cards, you must be informed of the conditions for redeeming the e-money, including any fees. The fees must be proportionate and commensurate with the costs actually incurred by the e-money issuer.

Proposals for change

The Consumer Rights Bill proposes to regulate gift voucher contracts. It proposes to prohibit the inclusion of an expiry date for gift vouchers. It also provides that the trader would have to inform you, before you bought the voucher, in a clear and comprehensible manner of any fees charged for the voucher, including fees charged for an inactive balance or for the repayment of a credit balance. These fees would also be assessable for unfairness under the provisions on unfair contract terms – see below. The trader would also be required to inform you of any restrictions on the use of the gift voucher.

Contracts for the supply of services

At present, contracts for the supply of services are subject to much less statutory regulation than contracts for the sale of goods.

"Services" covers a wide range of activities. The term is not defined in the Sale of Goods and Supply of Services Act 1980. The Consumer Protection Act 2007 defines services as: "any service or facility provided for gain or reward or otherwise than free of charge, including, without limitation —

- (a) services or facilities for —
 - (i) banking, insurance, grants, loans, credit or financing
 - (ii) amusement, cultural activities, entertainment, instruction, recreation or refreshment

- (iii) accommodation, transport, travel, parking or storage, or
- (iv) the care of persons, animals or things

- (b) membership in a club or organisation or any service or facility provided by the club or organisation, and
- (c) any rights, benefits, privileges, obligations or facilities that are, or are to be provided, granted or conferred in the course of services,

but does not include services provided under a contract of employment;"

When you make an agreement with a supplier of services, for example, a carpenter, a plumber, a provider of financial services, a dentist, the agreement may be written or oral or a bit of both. In general, the terms of the agreement are what you agree with the supplier or trader. You may specify that you want, for example, materials of a particular quality; if the trader agrees to provide that, it is a term of the contract.

There are certain implied terms in contracts for the supply of services. The Sale of Goods and Supply of Services Act 1980 provides that, in every contract for the supply of a service where the trader is acting in the course of a business, the following terms are implied:

- The supplier has the necessary skill to provide the service
- The service will be supplied with due skill, care and diligence
- Where materials are used, they are sound and reasonably fit for the purpose for which they are required, and
- Where goods are supplied under the contract, they are of merchantable quality (in the same way as when goods are sold)

These implied terms may be excluded or varied by an express agreement between you, the consumer, and the trader. However, the express term in the agreement excluding or varying the implied term must be fair and reasonable and must have been specifically brought to your attention. (In the case of goods, it is not possible to exclude or vary implied terms.)

The law in relation to the supply of goods requires that goods must comply with their description. There is no similar provision for service contracts. However, the Consumer Information Act 1978 and the Consumer Rights Directive do require traders to give clear and comprehensive information about matters such as the main characteristics of the service, the price, and the arrangements for, and time of, performance. This information forms part of the contract in the case of distance and off-premises contracts. Where this information forms part of the contract and it subsequently is established to have been incorrect or incomplete, you may be able to claim a breach of contract.

Remedies for breaches of services contracts

If you are not happy with the service provided, you may sue the trader for negligence. In themselves, an unsatisfactory outcome or even a defective service are not enough to succeed. In order to succeed, you have to show that the trader did not deliver the service with due skill, care and diligence. In general, this means that you have to show that the trader did

not exercise the degree of skill and care that would normally be exercised by a reasonably competent person in the same trade, business or profession. (In certain circumstances the standard of care required may be higher.)

If the breach of contract is severe, you may also be able to end the contract.

Proposals for change

The Consumer Rights Bill proposes to strengthen the rights of consumers under services contracts. It provides that a service should be fit for any purpose made known by you, the consumer, or be of a nature and quality that could reasonably be expected to achieve any result made known by you. You would have the right to enforce any promise or commitment given by the trader that was taken into account by you. These rights would be subject to any qualification or disclaimer made by the trader.

You would have the right to have a service performed within a reasonable time where the contract did not fix a time for its performance.

These rights could not be excluded or restricted.

Remedies

The Bill provides for a statutory scheme of remedies in cases where the trader does not comply with the requirement to supply the service with due skill and care.

It provides that you would be entitled to require the trader to remedy a defective service. If this was not possible or the trader failed to remedy it within a reasonable time or without significant inconvenience to you, you would have a right to

- Have the service remedied elsewhere and/or
- A price reduction, or
- End the contract and receive a refund of the price

The price reduction or refund would be based on the difference in value between the service you paid for and the service provided by the trader and could amount to the full price.

Unfair terms in consumer contracts

The EU Directive on Unfair Terms in Consumer Contracts (Directive 93/13/EEC) is implemented in Ireland by a number of statutory instruments (see above). The Directive's substantive rules are set out in the 1995 Regulations. The 2000, 2013 and 2014 Regulations deal with the enforcement of the Directive and with the bodies authorised to undertake that enforcement.

The aim of the EU Directive on Unfair Terms in Consumer Contracts (Directive 93/13/EEC) is to protect consumers against the abuse of power by the seller or supplier (the trader), in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts.

The EU Directive on Unfair Terms in Consumer Contracts (Directive 93/13/EEC) does not apply to contract terms that have been individually negotiated. The onus is on the trader to establish that the contract was individually negotiated.

The core terms of the contract are excluded from the Directive. They are the terms that set out the main conditions of the contract and may include the price. These core terms can be taken into account when assessing the fairness of other terms of the contract.

In the case of contracts where all or certain terms offered are in writing, these terms "must always be drafted in plain, intelligible language". Where there is doubt about the meaning of a contract term, the interpretation most favourable to the consumer prevails.

The Directive has an indicative list of contract terms that may be regarded as unfair. It is open to member states to add to this list or to categorise some or all of the list as automatically unfair. The Irish legislation provides for the list as set out in the Directive.

There are three main categories of unfair terms:

- Terms that give the trader the right to change the terms of the contract
- Terms that limit the liability of the trader: for example, a term purporting to establish that the trader has no liability for death or personal injury arising out of an act or an omission by the trader
- Terms that put an unfair burden on the consumer: for example a contract with a term stating that a deposit will be kept by the trader if you cancel the contract but which does not have a counterbalancing term providing that the trader will pay compensation if commitments are not fulfilled

This list is not exhaustive. Terms that fit into one of the above categories may be fair, and equally, a term may be deemed to be unfair which does not fit into one of the above.

A number of factors are taken into account when assessing the fairness of a contract term. These include:

- The nature of the goods or services for which the contract was concluded

- All the circumstances attending the conclusion of the contract
- All the other terms of the contract or of another contract on which it is dependent
- The strength of the bargaining position of the parties

The Competition and Consumer Protection Commission (CCPC) has supervisory powers to ensure compliance with the legislation. In certain circumstances, the CCPC may seek a court order preventing the use of contract terms that are considered to be unfair. The CCPC publishes a detailed *Guide to unfair terms and conditions in consumer contracts*.

Proposals for change

It is proposed to incorporate all of the unfair contract terms regulations in the new Consumer Rights Bill.

It is also proposed to:

- Extend the scope of the unfair terms provisions to include contract terms that have been negotiated between the consumer and trader; a contractual term which has not been individually negotiated will be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer
- The indicative list of contract terms which may currently be regarded as unfair should be presumed to be unfair
- Expand the list of contract terms presumed unfair
- Narrow somewhat the exemption from assessment for unfairness of core contract terms
- Make it automatically unfair to exclude or restrict consumers' statutory rights

Extension of consumer information, cancellation and other rights

The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (SI 484/2013) implement the EU Consumer Rights Directive in Ireland (Directive 2011/83/EU). The Regulations came into effect in June 2014. Among other things, the Directive provides for:

- Rights to detailed information on goods, digital content and services before the conclusion of a contract
- The right to cancel a contract within 14 days of its conclusion in the case of distance and off-premises contracts
- Provisions dealing with payment surcharges, additional payments and pre-ticked boxes, and charges for calls to consumer helplines

The Citizens Information Board provides independent information, advice and advocacy on public and social services through citizensinformation.ie, the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities.

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A number of contracts are excluded from the scope of the Directive including contracts for financial services, passenger transport, healthcare, social services and gambling.

The Directive does allow member states to maintain or introduce national legislation that would apply the provisions of the Directive to contracts outside its scope.

Proposals for change

The Consumer Rights Bill proposes to extend the scope of the Regulations to healthcare contracts, social service contracts and gambling contracts. This would mean, for example, that healthcare providers would be required to tell you the cost of a consultation in advance.

It also proposes to extend the provisions on payment surcharges and additional payments to all excluded contracts other than contracts for financial services. The provision on charges for calls to consumer helplines would be extended to all of the excluded contracts, including contracts for financial services.

Alternative dispute resolution

The EU Directive on Consumer Alternative Dispute Resolution (Directive 2013/11/EC) must be brought into national law by 9 July 2015. The EU Regulation on Consumer Online Dispute Resolution (Regulation 524/2013) will apply directly from 9 January 2016 – that means that it is not necessary to pass specific Irish legislation; the Regulation automatically becomes part of Irish law.

The Department of Jobs, Enterprise and Innovation has published a consultation paper on the implementation of the Directive and the Regulation. To date, no arrangements have been announced for the implementation of the Directive.

The Directive requires that consumers be able to access alternative dispute resolution (ADR) procedures for domestic and cross-border disputes. Qualified ADR entities must resolve disputes within 90 days and ADR procedures should be free of charge or of moderate costs for consumers. The Directive requires all traders to inform customers about ADR entities or schemes which cover the trader's sector and whether or not the trader subscribes to those ADR schemes.

The Regulation creates a European online platform which takes the form of an interactive website which will provide a single-point of entry for consumers and traders seeking to resolve cross-border disputes out of court concerning online sales or service contracts.

djei.ie/commerce/consumer/adrconsultation.htm

Enforcing consumer rights

The Competition and Consumer Protection Commission (CCPC) is the statutory body with responsibility for providing advice and information to consumers on their rights. It also has responsibility for the enforcement of a wide range of consumer protection laws. The CCPC does not intervene or become involved in individual issues or disputes between consumers and traders. It can, however, advise you if you have a particular consumer problem. Website: ccpc.ie

If you are unable to resolve a dispute with a trader, your only recourse may be the courts. The CCPC has the power to promote the development of alternative dispute resolution mechanisms for resolving disputes between consumers and traders.

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