

**CONSUMER PROTECTION  
(NATIONAL CONSUMER AGENCY) BILL 2006**

**DRAFT GENERAL SCHEME**

**CONSUMER PROTECTION  
(NATIONAL CONSUMER AGENCY) BILL 2006**

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**PART 1**  
**PRELIMINARY AND GENERAL**

**Head 1 Short Title**

Provide for Short Title of Bill:

This Bill may be cited as the Consumer Protection (National Consumer Agency) Bill 2006.

**Explanatory Note**

Drafted as the standard citation clause. The Bill is necessary to give effect (i) to the Government decision of 3 May 2005 (S180/20/10/0740) to accept the recommendation of the Consumer Strategy Group that a new National Consumer Agency be established, and (ii) to Directive 2005/29 of the European Parliament and Council concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [Unfair Commercial Practices Directive - UCPD].

## **Head 2 Commencement**

Provide that:

This Bill will 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 or different provisions.

## **Explanatory Note**

Drafted as the standard commencement clause.

### **Head 3 Interpretation**

Provide that:

(1) In this Bill:

“advertisement” means a representation in any form in connection with a trade, business, craft or profession in order to promote a product;

“Agency” means the National Consumer Agency as established under head 4 of this Bill;

“authorised officer” means a person appointed under head 24 to exercise for the purpose of this Act the powers conferred under head 24;

“Board” means the Board of the National Consumer Agency as referred to in head 8;

“Chief Executive Officer” means the holder of the office of Chief Executive appointed under head 11;

“code of conduct” means an agreement or set of rules not imposed by law, regulation or administrative provision which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;

“commercial practice” means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

"consumer" means any natural person who is acting for purposes which are outside his trade, business, craft or profession;

“consumer group” means any group, organisation or collective representing the interests of consumers;

“Directive”, unless otherwise apparent from the context of the provision, means Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, the text of which in the English language is set out in Schedule 8 of this Act;

“establishment day” means the day appointed by the Minister under Head 4 to be the establishment day of the National Consumer Agency;

“functions” includes powers and duties, and reference to the performance of functions includes, as respects powers and duties, references to the exercise of the powers and performance of the duties;

“invitation to purchase” means a commercial communication that indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase.

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

“product” means any goods or service including immovable property, rights and obligations and, for the avoidance of doubt, includes any pyramid promotional scheme, prize promotion scheme, or other arrangement which does not involve the sale or consumption of a product but where consumers give consideration for the opportunity to receive compensation derived from the introduction of other consumers into a scheme, or do a particular act for the opportunity to win a prize or other equivalent benefit;

“public authority” means a Minister, a local authority, a harbour authority, a health board, a body established by statute, a company in which all the shares are held by a Minister, the Commissioners of Public Works in Ireland;

“statutory body” means a person specified in Schedule 5, or a person so specified by order of the Minister under head 16;

“supply” includes offer to supply and a person exposing a product for supply or having a product in his possession for supply shall be deemed to offer to supply it.

“third party” means a person who is not a party to the matters concerned;

“transactional decision” means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;

“trader” means any natural or legal person who, in commercial practices covered by this Bill, is acting for purposes relating to his trade, business, craft or profession, and anyone acting in the name or on behalf of a trader;

(2) In this Bill —

(a) a reference to a section or Part is a reference to a section or Part of this Bill unless it is indicated that reference to some other enactment is intended,

(b) a reference to a Chapter is a reference to the Chapter of the Part in which the reference occurs, unless it is indicated that reference to some other provision is intended,

(c) a reference to a subsection, paragraph or subparagraph is a reference to the subsection, paragraph or subparagraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended, and

(d) a reference to any other enactment is a reference to that enactment as amended or extended by or under any subsequent enactment.

### **Explanatory Note**

This head provides definitions of key words/terms used in the Bill. The definitions of ‘consumer’, ‘trader’, ‘product’, ‘business-to-consumer commercial practices’, ‘code of conduct’, and ‘transactional decision’ are based on those at article 2 of Directive 2005/29/EC of the European Parliament and Council of 11 May 2005 on Unfair Commercial Practices [UCPD]. The references to pyramid and prize promotion schemes in the definition of product have been inserted to remove doubts as to whether these constitute goods or services. The definition of ‘advertisement’ is based on that at article 2 (1) of Directive 84/450/EEC of the European Council on Misleading Advertising. The definition of ‘supply’ is derived from section 1 of the Consumer Information Act 1978.

## **PART 2**

### **NATIONAL CONSUMER AGENCY**

#### **Chapter 1**

##### ***The Agency***

#### **Head 4 Establishment of the National Consumer Agency**

Provide that:

(1) The Minister shall, by order, appoint a day to be the establishment day for the purposes of this Bill.

(2) There shall stand established, on the establishment day, a body which shall be known as the National Consumer Agency to perform the functions conferred on it by this Bill.

(3) The Agency shall be a body corporate with perpetual succession and an official seal and shall have power to sue, and may be sued, in its corporate name, and shall, with the consent of the Minister and the Minister for Finance, have power to acquire, hold and dispose of land or an interest in land, and to acquire, hold and dispose of any other property.

(4) The Agency shall, subject to the provisions of this Bill, be independent in the performance of its functions.

(5) The seal of the Agency shall be authenticated by—  
(a) the signatures of 2 members of the Board, or  
(b) the signatures of both—  
(i) a member of the Board, and  
(ii) such member of the staff of the Agency as is authorised by the Board to act in that behalf.

(6) Judicial notice shall be taken of the seal of the Agency and any document purporting to be an instrument made by, and to be sealed with the seal of, the Agency shall be received in evidence and be deemed to be such instrument without further proof, unless the contrary is shown.

#### **Explanatory Note**

This head provides for the establishment of the National Consumer Agency as a statutory body. The Agency shall be independent in the performance of its functions. The head also provides for the Agency to have a seal to be recognised judicially. It is based on Sections 52 & 53 of the Personal Injuries Assessment Board Act 2003.

## **Head 5 Functions of the Agency**

Provide that:

(1) The Agency shall have, in addition to the functions assigned to it by any other provision of this Bill, the functions specified at subheads (2) to (11) of this head.

(2) The Agency shall be empowered to advise the Government, Ministers of the Government and Ministers of State concerning the implications of existing legislation or of proposals for legislation (including any statutory instruments to be made under any enactment) for consumer policy and consumer issues generally and for consumer protection and welfare. In exercising this function, the Agency shall advocate for the consumer and shall act as a strong voice for the consumer in public debate on consumer welfare issues.

(3) The Agency shall have the right to promote Customer Service Charters and alternative dispute resolution procedures and mechanisms.

(4) The Agency shall develop relationships with consumer groups and with consumer authorities and shall have the right to consult with such bodies in respect of matters of consumer protection and welfare.

(5) The Agency shall have the role of promoting consumer-related education and shall advise and co-operate with appropriate bodies in the exercise of this function.

(6) The Agency shall have the right to undertake a study or analysis of any matter relating to consumer protection or welfare or to engage in the conduct of research or to commission research projects on issues of concern to consumers and to determine an appropriate response.

(7) The Agency may publish notices containing practical guidance as to how the provisions of this Bill or other legislation that protects consumers' interests may be complied with.

(8) The Agency shall carry on such activities as it considers appropriate so as to inform the public about issues concerning consumer protection and welfare and to promote consumer awareness among the public.

(9) The Agency shall have the responsibility to perform the functions assigned to the Director of Consumer Affairs under the enactments listed in Schedule 1 of this Bill.

(10) Notwithstanding the provisions of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws (the Regulation on Consumer Protection Cooperation), the Agency may, through special agreement, cooperate formally with such a person or body with a consumer remit, and which operates outside of the State, for the purpose of enhancing consumer protection and welfare.

(11) The Agency may delegate the performance of any of the functions assigned to it by this Bill or any other enactment to any member of the Agency or to any member of its staff.

### **Explanatory Note**

This head sets out the main functions of the National Consumer Agency. The Consumer Strategy Group recommended that the National Consumer Agency should have specific functions in the areas of advocacy, research, information, enforcement, and education and awareness.

In relation to advocacy it stated “a strong and consistent voice for Irish consumers is needed at many levels in public debate in the State system and by way of influencing legislation. Intervention at policy level, or as necessary in the media, is particularly important to support the needs of disadvantaged consumers. Support is also needed for organisations that provide advice and information to consumers.”

With regard to research the CSG stated: “The NCA’s research function should encompass all significant consumer issues, including EU and national legislation, comparative pricing, consumer vulnerability, etc.”

On the matter of information provision, the CSG concluded that “The NCA should become an important source of information for consumers, both on markets and on products. It should establish a national referral hotline and a web-based information portal for consumers.”

The CSG concluded that the NCA should have considerable powers of enforcement. “It should be able to impose on-the-spot fines for breaches of consumer law and to bring repeat offenders to court. It should work with businesses to raise awareness of legal requirements and help them to meet these requirements. It should also work with Department of Enterprise, Trade and Investment (DETI), Northern Ireland and DETE to foster cross-border cooperation on consumer issues.”

On education and awareness, the CSG stated that “The NCA should assess the adequacy and quality of consumer-related education and identify any necessary changes. It should work with the third-level education sector to introduce courses or modules on consumer protection and consumer law enforcement. It should work with business organisations and State bodies to improve staff training, in particular in the tourism, trades and retail sectors. It should promote and assist awareness initiatives which provide comparative price and quality information to consumers and give special attention to the needs of vulnerable consumers.”

After the publication of the Consumer Strategy Group report, the Government agreed to the establishment of a High Level Interdepartmental Committee to examine the recommendations of the CSG report and to report back to Government on the implementation of those recommendations. The Interdepartmental Committee examined in detail the recommendations of the CSG and essentially endorsed the conclusions of the CSG report in regard to the functions of the Agency.

## **Head 6 Additional Functions of the Agency**

Provide that:

(1) The Minister may after consultation with the Agency and any other Minister of the Government that he considers appropriate, by order—

(a) confer on the Agency any additional functions connected with the functions for the time being of the Agency that the Minister considers appropriate, subject to the conditions (if any) that may be specified in the order, and

(b) make such provision as he considers necessary or expedient in relation to matters ancillary to or arising out of the conferral of those additional functions.

(2) (a) The Minister may by order amend or revoke an order under this head (including an order under this subhead).

(b) An order under this subhead shall be made in the like manner, and subject to the same consent and consultations (if any) as the order that it is amending or revoking.

### **Explanatory Note**

This head allows the Minister to assign by order further functions to the National Consumer Agency in addition to those functions which the Agency must carry out under this Bill. This head also allows the Minister to revoke or amend an order made under the head. It is similar to Section 35 of the Safety, Health and Welfare at Work Act 2005.

## **Head 7 Review of Legislation**

Provide that:

(1) The Minister may consult the Agency in regard to proposals for statutory provisions in relation to consumer protection and welfare.

(2) The Agency shall—

(a) keep under review the statutory provisions of this Bill and of the enactments listed in Schedule 1,

(b) submit, from time to time, to the Minister any proposals that it considers appropriate relating to this Bill or the enactments in Schedule 1 or for making or revoking any instruments under this Act or the enactments in Schedule 1,

(c) undertake such reviews of relevant statutory provisions as the Minister may direct, and

(d) assist in the preparation of draft legislation as the Minister may direct.

(3) Before submitting proposals to the Minister, the Agency shall consult any other person or body that appears to the Agency to be appropriate having regard to the proposals to be submitted or as directed by the Minister.

## **Explanatory Note**

This head provides that the Minister shall consult the Agency in regard to proposals for consumer related legislation. The head also provides that the National Consumer Agency shall keep under review current consumer legislation and where appropriate submit to the Minister proposals for making or revoking instruments under the relevant statutes. The head further imposes an obligation on the National Consumer Agency to consult other appropriate persons or bodies prior to submitting proposals to the Minister. It is similar to section 57 of the Safety, Health and Welfare at Work Act 2005.

## **Head 8 Membership of the Board of the Agency**

Provide that:

- (1) The Board shall consist of no more than 13 members.
- (2) The Board shall include the Chief Executive Officer who shall be an ex officio member of the Board.
- (3) The members of the Board (other than the Chief Executive Officer) shall, as soon as may be after the establishment day, be appointed by the Minister.
- (4) The Minister shall appoint one member of the Board as Chairperson.
- (5) The Board shall appoint one member of the Board as Deputy Chairperson with the function of acting as Chairperson in the absence of the Chairperson.
- (6) There shall be paid to the members of the Board such remuneration (if any) and such allowances for expenses incurred by them as the Minister, with the consent of the Minister for Finance, may from time to time determine.
- (7) Each member of the Board shall hold office on such terms (other than the payment of remuneration and allowances for expenses) as the Minister determines at the time of his appointment.
- (8) On the anniversary of the establishment day and thereafter on each anniversary of the establishment day, two of the members of the Board (other than the chairperson and the chief executive officer) shall retire from office.
- (9) The members to retire under subsection (8) in any year shall be those who have been longest in office since their last appointment, and where there are members whose appointment was made on the same day and who are obliged to retire under subsection (8), the members to retire shall, unless such members otherwise agree, be determined by lot.
- (10) A member of the board shall not serve for more than 10 consecutive years.
- (11) A member of the Board shall be disqualified from being such a member where he -
  - (a) is adjudged bankrupt,
  - (b) makes a composition or arrangement with creditors,
  - (c) is convicted of an indictable offence in relation to a company,
  - (d) is convicted of an offence involving fraud or dishonesty, or
  - (e) is disqualified or restricted from being a director of any company (within the meaning of the Companies Acts 1963 to 2001)

(12) A member of the Board may, at any time, resign his membership by letter addressed to the Minister and the resignation shall take effect from the date specified therein or upon receipt of the letter by the Minister, whichever is the later.

(13) A member of the Board may at any time for stated reasons be removed from membership of the Board by the Minister if, in the Minister's opinion, the member has become incapable through ill-health of performing his functions, or has committed stated misbehaviour, or his removal appears to the Minister to be necessary for the effective performance by the Agency of the functions of the Agency.

(14) If a member of the Board dies, resigns, retires, becomes disqualified or is removed from office, the Minister may appoint a person to be a member of the Board to fill the casual vacancy so occasioned and the person so appointed shall be appointed in the same manner as the member of the Board who occasioned the casual vacancy.

(15) A member of the Board whose period of membership expires by the effluxion of time shall be eligible for re-appointment as a member of the Board.

(16) The Minister shall, in so far as is practicable and having regard to relevant experience, ensure an equitable balance between men and women in the composition of the Board.

(17) Where a member of a Board is—

(a) nominated as a member of Seanad Éireann, or

(b) elected as a member of either House of the Oireachtas or to the European Parliament, or

(c) regarded, pursuant to section 15 (inserted by the European Parliament Elections Act, 1993) of the European Assembly Elections Act, 1977, as having been elected to the European Parliament to fill a vacancy,

(d) becomes a member of a local authority,

he shall thereupon be disqualified as a member of the Board.

(18) A person who is for the time being entitled under the Standing Orders of either House of the Oireachtas to sit therein or who is a member of the European Parliament shall, while he is so entitled or is such a member, be disqualified for becoming a member of the Board or for employment in any capacity by the Board.

### **Explanatory Note**

This head provides for membership of the Board, its numbers, how they are to be appointed, paid, replaced, removed etc. This head also provides for the period of appointment of Board members and for the rotation of its members. It is primarily based on sections 35–37 of the Competition Act 2002 and section 9 of the Industrial development (Science Foundation Ireland) Act 2003. Subheads 8–10 and subhead 15 are based on provisions in section 9 of the Industrial Development (Enterprise Ireland) Act 1998. In subhead 14, casual vacancy may be interpreted as a vacancy arising out of the death, retirement, resignation, disqualification or removal of a person from the Board (Section 12 Local Government (Dublin) (Amendment) Act 1931).

## **Head 9 Chairperson of the Board of the Agency**

Provide that:

- (1) The term of office of the Chairperson of the Board shall be 5 years.
- (2) Where the Chairperson of the Board ceases to be a member of the Board he shall also thereupon cease to be Chairperson of the Board.
- (3) The Chairperson of the Board may at any time resign his office as Chairperson by letter sent to the Minister and the resignation shall, unless previously withdrawn in writing, take effect at the commencement of the meeting of the Board held next after the Board has been informed by the Minister of the resignation.
- (4) The Chairperson of the Board shall, unless he sooner dies or otherwise ceases to be Chairperson by virtue of subhead (2) or (3), hold office until the expiration of his period of membership of the Board and, if he is re-appointed as a member of the Board, he shall be eligible for re-appointment as Chairperson of the Board.

### **Explanatory Note**

This head provides for the appointment of the Chairperson of the Board of the National Consumer Agency for a term of office of 5 years. It is similar to Section 10 of the Industrial Development (Science Foundation Ireland) Act 2003.

## **Head 10 Meetings of the Board**

Provide that:

(1) The Board shall hold such and as many meetings as may be necessary for the performance of its functions.

(2) The Board may act without its full membership in attendance.

(3) The quorum for a meeting of the Board shall be 50 per cent of its membership plus one.

(4) At a meeting of the Board -

(a) the Chairperson of the Board shall, if present, be the Chairperson of the meeting, and

(b) if and so long as the Chairperson of the Board is not present or if the office of the Chairperson is vacant, the Deputy Chairperson shall be the Chairperson of the meeting and

if the Chairperson is not present and the Deputy Chairperson is not present, the members of the Board who are present shall choose one of their members to be Chairperson of the meeting.

(5) At a meeting of the Board, each member of the Board present, including the Chairperson, shall have a vote and any question on which a vote is required in order to establish the Board's view on the matter shall be determined by a majority of votes of the members of the Board present and voting on the question and, in the case of an equal division of votes, the Chairperson of the meeting shall have a second and casting vote.

(6) The Board may act notwithstanding one or more vacancies among its members.

(7) Subject to this Bill, the Board shall regulate, by standing orders or otherwise, the procedure and business of the Board.

### **Explanatory Note**

This head provides for the procedure to be followed by the Board in regard to the frequency of meetings, the chairing of meetings and voting. The text is based on section 11 of the Industrial Development (Science Foundation Ireland) Act 2003.

## **Head 11 Appointment of the Chief Executive Officer**

Provide that:

(1) There shall be a chief officer of the Agency who shall be known as the Chief Executive Officer.

(2) Subject to subheads (7) and (9) of this head, the Chief Executive Officer shall be appointed by the Board. The appointment of a Chief Executive Officer under this head shall only be made after the holding of a public open competition for that position.

(3) The Chief Executive Officer shall hold office for such term being not more than a period of 5 years and upon and subject to such terms and conditions (including remuneration) as the Board, with the consent of the Minister and the Minister for Finance, may determine.

(4) The Chief Executive Officer may be re-appointed for a second term and such subsequent terms as the Board sees fit.

(5) The Chief Executive Officer shall not hold any other office or position or carry on any business without the consent of the Board.

(6) The Chief Executive Officer is subject to the control of the members of the Board and, except as regards voting at meetings of that Board, is required to comply with any lawful directions given by those members with respect to the carrying out of the Chief Executive's responsibilities.

(7) For the purposes of appointing the person to be the Chief Executive Officer appointed immediately after the establishment day, the Minister may, before the establishment day, designate a person to be appointed under this head immediately after the establishment day, following the holding of a public open competition for that position by the Public Appointments Service.

(8) If a person has been designated in accordance with subhead (7) the Board shall, for the purposes of appointing the first person to be the Chief Executive Officer immediately after the establishment day, appoint that person to be the Chief Executive Officer.

(9) A person is not eligible for appointment as Chief Executive if the person—

(a) is a member of either House of the Oireachtas or is, with the person's consent, nominated as a candidate for election as such a member or is nominated as a member of Seanad Eireann, or

(b) is a member of the European Parliament or is, with the person's consent, nominated as a candidate for election as such a member or to fill a vacancy in the membership of that Parliament, or

(c) is a member of a local authority or is, with the person's consent, nominated as a candidate for election as such a member.

(10) A person ceases to hold office as Chief Executive if the person—

(a) dies, or

(b) completes a term of office and is not re-appointed, or

(c) resigns the office by notice in writing addressed to the Chairperson, or

(d) is, with the person's consent, nominated as a candidate for election as a member of either House of the Oireachtas or is nominated as a member of Seanad Eireann, or

(e) is, with the person's consent, nominated as a candidate for election as a member of the European Parliament or to fill a vacancy in the membership of that Parliament, or

(f) is, with the person's consent, nominated as a candidate for election as a member of a local authority, or

(g) is adjudged bankrupt (either in the State or elsewhere) or enters into a composition with the person's creditors, or

(h) becomes physically or mentally incapable of performing the duties of Chief Executive, or

(i) is convicted of an offence (either in the State or elsewhere) and sentenced to serve a term of imprisonment for the offence, or

(j) is removed from office under subhead (11).

(11) The Board may remove or suspend the Chief Executive from office, but only for reasons notified in writing to the Chief Executive.

### **Explanatory Note**

This head provides that the Board shall appoint the Chief Executive Officer of the National Consumer Agency. The appointment is to be made subsequent to the holding of a public open competition for the position. The Chief Executive Officer shall be appointed on a fixed-term contract basis. Subhead 4 further provides for subsequent appointments for a fixed term (section 63 of the Personal Injuries Assessment Board Act 2003 allows for its CEO to have an open-ended appointment). The CEO will also be a member of the Board. Subhead 7 is similar to section 33(f)(8) of the Central Bank and Financial Services Authority of Ireland Act 2003. The head provides also for the removal of the CEO. The text is primarily based on section 13 of the Industrial Development (Science Foundation Ireland) Act 2003.

## **Head 12 Functions and Duties of the Chief Executive Officer**

Provide that:

(1) The Chief Executive Officer of the Agency shall manage and control generally the staff, administration and business of the Agency.

(2) The Chief Executive Officer of the Agency shall perform any other functions that may be determined by the Board of the Agency.

(3) The Chief Executive Officer of the Agency shall, whenever required by the Committee of Dáil Éireann established under the Standing Orders of Dáil Éireann to examine and report to Dáil Éireann on the appropriation accounts and reports of the Comptroller and Auditor General, give evidence to that committee on—

(a) the regularity and propriety of the transactions recorded or required to be recorded in any book or other record of account subject to audit by the Comptroller and Auditor General which the chairperson or the Agency is required by or under statute to prepare,

(b) the economy and efficiency of the Agency in the use of its resources,

(c) the systems, procedures and practices employed by the Agency for the purpose of evaluating the effectiveness of its operations, and

(d) any matter affecting the Agency referred to in a special report of the Comptroller and Auditor General under section 11(2) of the Comptroller and Auditor General (Amendment) Act, 1993, or in any other report of the Comptroller and Auditor General (in so far as it relates to a matter specified in paragraph (a), (b) or (c)) that is laid before Dáil Éireann.

(4) In the performance of duties under subhead (3), the chairperson of the Authority shall not question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such a policy.

(5) The Chief Executive Officer of the Agency shall, whenever required to do so by—

(a) a committee appointed by either House of the Oireachtas, the business of which committee includes examination of policy relating to consumer protection, or

(b) a committee appointed jointly by both Houses of the Oireachtas, the business of which committee includes examination of such policy,

attend before such committee to discuss the general activities of the Agency.

(6) The Chief Executive Officer shall provide the Board of the Agency with such information, including financial information, in relation to the performance of his functions as the Board may require.

(7) The Chief Executive Officer may do all such acts or things as are necessary or expedient for the purposes of the exercise of his functions under this Bill.

(8) The Chief Executive Officer may perform such of his functions as he may deem proper through or by any officer of the Agency duly authorised by the Chief Executive Officer in that behalf.

(9) (a) Whenever it appears to the Board that the Chief Executive Officer is temporarily unable to discharge his duties, the Board may appoint a person to act in place of the Chief Executive Officer during such inability or for such shorter period as the Board thinks proper.

(b) A person appointed under paragraph (a) of this subhead shall have all the powers, rights and duties conferred on the Chief Executive Officer by this Bill and each reference in this Bill to the Chief Executive Officer shall be deemed to include a reference to such a person.

### **Explanatory Note**

This head provides for the duties and functions to be carried out by the Chief Executive Officer. This head also provides that where the Chief Executive Officer is temporarily unable to discharge his duties, the Board may appoint a person to act in place of the Chief Executive Officer. Subheads (1), (3), (4) and (5) are based on the provisions of section 38 of the Competition Act 2002. Subhead (6) is based on section 14(5) of the Ordinance Survey of Ireland Act 2001. Subheads (7), (8) and (9) repeat the provisions of section 9 (8)(10)(11) of the Consumer Information Act 1978.

### **Head 13 Indemnity for Members of the Agency**

Provide that:

(1) Where the Board is satisfied that a person to whom this head applies has discharged the functions appropriate to that person in relation to the functions of the Board in good faith, it shall indemnify that person against all actions or claims however they arise in respect of the discharge by that person of those functions.

(2) This head applies to—

- (a) a member of the Board,
- (b) a member of a committee of the Board,
- (c) a member of staff of the Agency, and
- (d) a person whose services are provided to the Board under head 20.

(3) Any person referred to in subhead (2) of this head shall not be ordered to pay costs either their own or that of any other parties in any challenge, in respect of any thing done or omitted to be done in good faith or negligence by him in the performance or purported performance of a function under this Bill or the enactments listed in Schedule 1.

### **Explanatory Note**

This head provides that members of the Board, any person whose services are provided under head 20 and the staff of the National Consumer Agency are indemnified jointly, severally and personally for any action such as Constitutional challenge, judicial review, or allegations of negligence in respect of the performance of their functions under this Bill or the enactments listed in Schedule 1, provided they have acted in good faith. It is similar to section 69 of the Personal Injuries Assessment Board Act 2003.

## **Head 14 Funding of the Agency**

Provide that:

(1) In each financial year there may be paid by the Minister to the Agency out of monies provided by the Oireachtas grants of such amounts as the Minister, with the consent of the Minister for Finance, may sanction to enable the Agency—

(a) to carry out its functions under this Bill and the enactments listed in Schedule 1,

(b) to meet its administration and general expenses, and

(c) to discharge the obligations or liabilities incurred by the Agency under this Bill or any repealed enactment or otherwise.

## **Explanatory Note**

This head provides that the National Consumer Agency will be funded by a subhead of the Vote for the Department of Enterprise, Trade and Employment approved by the Minister and with the consent of the Minister for Finance. The High Level Inter-Departmental Committee agreed that the Agency should be funded in this manner. The head is based on section 43(1) of the Competition Act 2002.

## **Head 15 Strategic Plans and Work Programme of the National Consumer Agency**

Provide that:

(1) As soon as practicable and after the establishment day, and thereafter within 6 months before each 3rd anniversary of the establishment day, the Board shall prepare and submit to the Minister a plan (in this head referred to as a “strategic plan”) for the ensuing 3 year period.

(2) A strategic plan shall -

(a) comprise the key objectives, outputs and related strategies including use of resources, of the Board,

(b) be prepared in a form and manner in accordance with any directions issued from time to time by the Minister, and

(c) have regard to the need to ensure the most beneficial, effective and efficient use of resources of the Board.

(3) The Minister shall, as soon as practicable after a strategic plan has been submitted to him under subhead (1), cause a copy of it to be laid before each House of the Oireachtas.

(4) The Board shall prepare and submit to the Minister by the end of each year a programme (in this head referred to as a “work programme”) of the activities it proposes to carry out in the following year.

(5) Such a programme shall be prepared in such form and manner as may be directed by the Minister.

### **Explanatory Note**

This head provides that the Board shall draw up and submit to the Minister a strategic plan setting out the Board’s strategies and planned activities for a period of three years. It also provides that the Board shall submit an annual programme of activities. This provision is based on section 33 of the Competition Act 2002.

## **Head 16 Provision for Co-operation between the Agency and certain Statutory Bodies**

Provide that:

(1) There shall, as soon as practicable after the commencement of this head, be entered into between the Agency and every one of the statutory bodies specified in Schedule 5 one or more agreements for the purposes of—

(a) facilitating co-operation between the Agency and the statutory bodies in the performance of their respective functions in so far as they relate to issues of consumer protection and welfare,

(b) avoiding duplication of activities by the Agency and any of the statutory bodies, and

(c) enabling the Agency to be consulted in relation to any decisions by statutory bodies which affect consumers.

(d) where appropriate, conducting joint studies or analysis of matters relating to consumer protection or issues of concern to consumers.

(2) It shall not be necessary, for the purposes of subhead (1), that the same statutory bodies be party to each agreement entered into with the Agency in pursuance of that subhead.

(3) A co-operation agreement shall include—

(a) a provision enabling each party to furnish to another party information in its possession if the information is required by that other party for the purpose of the performance by it of any of its functions,

(b) a provision enabling each party to forbear to perform any of its functions in relation to a matter in circumstances where it is satisfied that another party is performing functions in relation to that matter, and

(c) a provision requiring each party to consult with any other party before performing any functions in circumstances where the respective exercise by each party of the functions concerned involves the determination of issues of consumer protection and welfare.

(4) A co-operation agreement may be varied by the parties concerned.

(5) The Minister and the relevant Minister or Ministers shall each be furnished by one of the parties concerned with a copy of every cooperation agreement that has been entered into, within 3 months after the completion of each agreement.

(6) A co-operation agreement, or any variation made to it, shall be in writing and, as soon as practicable after the making of the agreement or variation, notice of its making shall be published by the parties in such manner as they think fit.

(7) Without prejudice to subhead (8), nothing in any enactment shall be construed as preventing the provisions of a co-operation agreement from having effect in accordance with their terms.

(8) If information is furnished by one party to another party pursuant to a provision of a co-operation agreement of the kind referred to in subhead (3)(a), the provisions of any enactment concerning the disclosure of that information by the first-mentioned party shall apply to the second-mentioned party with respect to that information.

(9) A failure by the Agency or a statutory body to comply with a provision of a co-operation agreement shall not invalidate the exercise by it of any power.

(10) The Minister, in consultation with the Minister responsible for the statutory body concerned, may by regulation amend by adding to or deleting any entry in the list of statutory bodies in Schedule 5 of this Bill. In making regulations under this head the Minister shall have regard to the functions, role, objectives and activities of the bodies to be prescribed under this head and in particular to their impact upon consumer protection and welfare.

## **Explanatory Note**

The Consumer Strategy Group in its report recommended that the NCA should establish relationships with relevant state bodies such as the Competition Authority, IFSRA, Food Safety Authority of Ireland, National Standards Authority of Ireland (Standards & Legal Metrology), Commission for Energy Regulation, ComReg, and the Commission for Aviation Regulation through specific Memoranda of Understanding. It concluded that parties would benefit from this relationship through the process of sharing information, joint programmes of work and co-operation on areas of mutual interest.

The High Level Interdepartmental Committee concluded that the regulatory process would benefit from a greater consumer input. The Committee agreed that this should be achieved through the NCA entering into formal Co-operation Agreements/Memoranda of Understanding, as appropriate, with the various sectoral regulators and that such Agreements should allow for a consumer input as part of a consultative process. Furthermore, the Interdepartmental Committee concluded provision should be made to allow for the adoption of bi and multi-lateral Memorandums of Understanding between the Agency and the various sectoral regulators which would allow for the input of a variety of views on a consultative basis before decisions which impact on consumers are made. Subject to necessary confidentiality requirements, such Memorandums of Understanding should include provisions for the sharing of information so as to allow the Agency to comment on proposals in an informed and meaningful way. Subject to the same confidentiality requirements, nothing in law should prevent the Agency engaging in public debate on the subject matter of such decisions in order to articulate a consumer view.

The head allows the Minister to add to or delete by order the list of statutory bodies in Schedule 5.

Subhead (1) defines a co-operation arrangement and sets out a non-exhaustive list of those matters which must be included in any such agreement and gives express power to the NCA and the bodies to enter into such agreements.

Subheads (2) and (3) enable the National Consumer Agency and other statutory bodies, including the sectoral regulators, to enter into “co-operation arrangements” and exchange information. Subhead (3) authorises the Authority and the bodies to exchange information.

Subhead (8) provides a safeguard whereby any information exchanged between the Authority and a body will be treated confidentially. Subhead (10) empowers the Minister, in consultation with the Minister who has responsibility for a statutory body, to amend Schedule 5 as necessary. It also provides that the Minister shall have regard to the functions, role, objectives and activities of the statutory bodies in making such a decision. This will facilitate keeping the legislation up to date where, for example, new regulators are created or where the responsibility for a particular regulator is transferred from one Minister to another.

This head is based mainly on section 34 of the Competition Act 2002.

## **Head 17 Annual Report**

Provide that:

- (1) The Agency shall submit to the Minister an annual report of its activities within six months of the end of each year.
- (2) Each report under subhead (1) shall contain information in such form and regarding such matters as the Minister may direct.
- (3) Prior to the publication of each report under subhead (1), the Agency shall—
  - (a) furnish to the Minister a copy of the report, and
  - (b) arrange for a copy of the report to be laid before each House of the Oireachtas.

## **Explanatory Note**

An Annual Report on the National Consumer Agency's activities must be prepared and submitted to the Minister within six months at the end of each financial year. This head is based on section 42 of the Competition Act 2002.

## **Head 18 Accounts and Audits**

Provide that:

- (1) The Agency shall—
  - (a) submit estimates of income and expenditure to the Minister in such form, in respect of such periods and at such times as may be required by the Minister, and
  - (b) furnish to the Minister any information which the Minister may require in relation to such estimates, including proposals and future plans relating to the performance by the Agency of its functions over a period of years.
- (2) The Agency shall cause to be kept all proper and usual books or other records of account of—
  - (a) all income and expenditure of the Agency,
  - (b) the sources of such income and the subject matter of such expenditure, and
  - (c) the property, assets and liabilities of the Agency, and shall keep such other special accounts as the Minister may from time to time direct to be kept.
- (3) The financial year of the Agency shall be the period of 12 months ending on the 31st day of December in any year.
- (4) The Agency shall, whenever so requested by the Minister, permit any person appointed by the Minister to examine the books or other records of account of the Agency in respect of any financial year or other period and shall facilitate any such examination, and the Agency shall pay such fee therefore as may be fixed by the Minister.
- (5) The accounts of the Agency for each financial year shall—
  - (a) be prepared in such form and manner as may be specified by the Minister, and
  - (b) be prepared by the Agency as soon as practicable, but not later than 3 months, after the end of the financial year to which they relate for submission to the Comptroller and Auditor General for audit, and a copy of the accounts and the auditor's report thereon shall be presented, as soon as practicable, to the Minister.
- (6) The Minister shall cause a copy of the accounts and auditor's report referred to in subhead (5) to be laid before each House of the Oireachtas.

**Explanatory Note**

This head provides that the National Consumer Agency must keep account of the monies received and expended by it. The accounts must be submitted annually to the Comptroller and Auditor General for audit. This provision is based upon section 41 of the Competition Act 2002.

## **Head 19 Disclosure of Interests by Chief Executive Officer, Board Members and Employees of the Agency**

Provide that:

(1) Where the Chief Executive Officer, a member of the Board, a member of the staff of the Agency, or a consultant, adviser or other person engaged by the Agency, has a pecuniary interest or other beneficial interest in, or material to, any matter which falls to be considered by the Board, he shall –

- (a) disclose to the Board the nature of his interest in advance of any consideration of the matter,
- (b) neither influence nor seek to influence a decision in relation to the matter,
- (c) take no part in any consideration of the matter,
- (d) if he is the Chief Executive Officer, a member of the Board, or a member of the staff of the Agency, withdraw from the meeting for so long as the matter is being discussed or considered and shall not vote or otherwise act as such Chief Executive Officer or member in relation to the matter.

(2) For the purposes of this head, but without prejudice to the generality of subhead (1), a person shall be regarded as having a beneficial interest if –

- (a) he or any connected relative or nominee of his or any connected relative is a member of a company or any other body which has a beneficial interest in, or
- (b) he or any connected relative is in partnership with or is in the employment of a person who has a beneficial interest in, or material to, such a matter,
- (c) he or any connected relative is a party to any arrangement or agreement (whether or not enforceable) concerning land to which such a matter relates, or
- (d) any connected relative has a beneficial interest in, or material to, such a matter.

(3) For the purposes of this head a person shall not be regarded as having a beneficial interest in, or material to, any matter by reason only of an interest of his or of any institution or company or of any other body or person mentioned in subhead (2) which is so remote or insignificant that it cannot reasonably be regarded as likely to influence a person in considering, discussing or in voting on, any question with respect to the matter, or in performing any function in relation to that matter.

(4) Where a question arises as to whether or not a course of conduct, if pursued by a person, would be a failure by him to comply with the requirements of subhead (1), the question shall be determined by the Board, as the case may be, and particulars of the determination shall be recorded in the minutes of the meeting concerned.

(5) Where a disclosure is made to the Board pursuant to subhead (1), particulars of the disclosure shall be recorded in the minutes of the meeting concerned, and for so long as the matter to which the disclosure relates is being dealt with by the meeting, the person by which the disclosure is made shall not be counted in the quorum for the meeting.

(6) Where a person referred to in this head fails to make a disclosure in accordance with this head, the Board in consultation with the Minister shall decide the appropriate action (including removal from office or termination of contract) to be taken.

(7) In this head “connected relative” means, in relation to a person to whom this head applies, the parent, spouse, partner, brother, sister or child of that person.

### **Explanatory Note**

This head provides for the disclosure of interests by members of the Board, the Chief Executive Officer, the staff etc. The text is based on section 16 of the Industrial Development (Science Foundation Ireland) Act 2003.

## **Head 20 Consultants and Advisers**

Provide that:

(1) The Agency may from time to time engage such consultants or advisers as it considers necessary for the performance of its functions and any fees payable by the Agency to a consultant or adviser engaged under this head shall be paid by the Agency out of monies at its disposal.

(2) Consultants or advisers engaged by the Agency shall not disclose any information which may come to their knowledge in the course of their engagement by the Agency except as authorised by the Agency itself.

(3) In exceptional circumstances the Board may appoint a consultant or adviser to be an “authorised officer” for the purposes of head 24. Any such appointment shall be for the purposes of a specific investigation and shall be for a specified time period.

### **Explanatory Note**

This head permits the National Consumer Agency to engage consultants or advisers to assist it in performing its functions. This head is based on section 22 of the Industrial Development (Science Foundation Ireland) Act 2003.

## **Chapter 2** ***Staff of the Agency***

### **Head 21 Staffing**

Provide that:

(1) The Agency may, from time to time, appoint such and so many persons to be members of the staff of the Agency with the consent of the Minister and the Minister for Finance.

(2) The numbers, grades and terms and conditions of the Agency's staff and the appropriate level for each grade shall be determined by the Board with the approval of the Minister given with the consent of the Minister for Finance.

(3) Where a member of the staff of the Agency -

(a) is nominated as a member of Seanad Éireann,

(b) is elected as a member of either House of the Oireachtas or a representative in the European Parliament, or is regarded, pursuant to section 19 of the European Parliament Elections Act 1997, as having been elected to the European Parliament to fill a vacancy,

he shall thereupon stand seconded from his employment with the Agency and shall not be paid by, or be entitled to receive from the Agency, remuneration or allowances in respect of the period commencing on such nomination or election, or when he is so regarded as having been elected (as the case may be), and ending when he ceases to be a member of that House or a representative in that Parliament.

(4) A person who is for the time being entitled under the Standing Orders of either House of the Oireachtas to sit therein or who is a representative in the European Parliament shall, while he is so entitled or is such a representative, be disqualified from becoming a member of the staff of the Agency.

### **Explanatory Note**

This head empowers the National Consumer Agency to determine its own staffing requirements and to recruit directly subject to the numbers, grades and remuneration of each grade being approved by the Minister and the Minister for Finance. The wording is similar to section 19 of the Industrial Development (Science Foundation Ireland) Act 2003.

## **Head 22 Transfer of Employment of Certain Persons to the Agency**

Provide that:

(1) On the request of the Chief Executive Officer of the Agency made within 24 months of the establishment day of the Agency, the Minister may, by direction in writing, transfer to the Agency the employment of a person who is employed in a Government department, or by a public authority or a State owned corporation, but only if the person has agreed to have that employment transferred to the Agency.

(2) The Chief Executive Officer of the Agency may make such a request only with the concurrence of the Board of the Agency.

(3) The conditions of employment of a person whose employment is transferred under this paragraph are to be no less favourable than those applicable to the person immediately before the transfer, except in so far as—

- (a) a collective agreement negotiated with a trade union or staff association of which the person is a member, or
- (b) an agreement between the person and the Agency,

expressly provides otherwise.

(4) If any dispute arises between a person whose employment is transferred under this head and the Agency as to the conditions of employment applicable to the person immediately before the transfer, the Minister shall determine the dispute.

(5) If a person's employment is transferred under this paragraph, the person's previous service with a Government department, public authority or State owned corporation is to be counted as service for the purposes of the following Acts:

- (a) the Redundancy Payments Acts 1967 to 1991;
- (b) the Minimum Notice and Terms of Employment Act 1973;
- (c) the Unfair Dismissals Act 1977;
- (d) the Organisation of Working Time Act 1997;
- (e) the Parental Leave Act 1998; and
- (f) any other Act prescribed for the purposes of this head by a regulation made under head 26.
- (g) any Act that is to be read as one with any of those Acts.

(6) For the purposes of subhead (5) —

“public authority” means a body (other than a company) established or constituted by or under an Act for a public purpose;

“State owned corporation” means a body corporate owned, or of which all or a majority of the shares of the body are owned, by the Government or by a Minister on behalf of the State.

(7) This head shall come into operation on such day as the Minister may appoint by order.

### **Explanatory Note**

This head provides that staff of the Department of Enterprise, Trade and Employment and other appropriate public bodies may, by direction of the Minister and by agreement of the Chief Executive Officer of the Agency and of the staff member him/herself, be transferred to and become staff of the NCA. This head also provides that staff thus transferred would have no diminution of their terms and conditions except where changes are negotiated by collective agreement with recognised trade unions or staff associations. The head is based on section 36, item 10 of Schedule 3 of the Central Bank and Financial Services Authority of Ireland Act 2003.

## **Head 23 Superannuation**

Provide that:

(1) The Minister shall, with the consent of the Minister for Finance, make and carry out such a scheme or schemes for the granting of superannuation benefits to or in respect of the members of the Agency and the members of staff of the Agency as he may think fit.

(2) Every such scheme shall fix the time and conditions of retirement for all persons in respect of whom superannuation benefits are payable under the scheme, and different times and conditions may be fixed in respect of different classes of persons.

(3) The Minister may at any time, with the consent of the Minister for Finance, make and carry out a scheme or schemes amending or revoking a scheme under this head.

(4) No superannuation benefit shall be granted by the Minister nor shall any other arrangement be entered into by the Minister for the provision of such a benefit to or in respect of any member of the Agency or any member of the staff of the Agency otherwise than in accordance with a scheme under this head or, if the Minister, with the consent of the Minister for Finance, sanctions the granting of such a benefit, in accordance with that sanction.

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

(6) If any dispute arises as to the claim of any person to, or the amount of, any superannuation benefit payable in pursuance of a scheme or schemes under this section, such dispute shall be submitted to the Minister who shall refer it to the Minister for Finance, whose decision shall be final.

(7) The terms and conditions of the superannuation benefits of persons who transfer to the Agency as provided for in head 22 and who previously were members of schemes arising from their employment in a Government Department or public authority or in a State owned corporation shall be no less favourable than the terms and conditions they were entitled to prior to that transfer.

(8) In this head “superannuation benefit” means a pension, gratuity or other allowance payable on resignation, retirement or death.

### **Explanatory Note**

This head provides that the Board, with the consent of the Minister and the Minister for Finance, shall prepare a superannuation scheme for its staff in line with the most recent standard format. It also allows for those persons transferring to the Agency to have their existing superannuation rights maintained. The head is mainly based on section 44 of the Competition Act 2002.

## **Head 24 Authorised Officers of the Agency**

Provide that:

- (1) The Board may appoint in writing such and so many members of staff to be authorised officers for the purposes of all or any of the provisions of this Bill and the enactments listed in Schedule 1.
- (2) The Board may appoint in writing any person to be an authorised officer for a fixed period for the purposes of all or any of the provisions of this Bill and the enactments listed in Schedule 1.
- (3) Every authorised officer shall be furnished with a warrant of his appointment as an authorised officer which shall indicate the enactment or statutory instrument under which he is acting and, when exercising any power conferred on him by subhead (5) of this head shall inform any person affected of the title of the enactment to which the investigation relates and, if requested to do so, produce the warrant to him.
- (4) An appointment under this head as an authorised officer shall cease—
  - (a) where the Board revokes the appointment,
  - (b) where it is for a fixed period, upon the expiry of that period, or
  - (c) where the person appointed is an officer of the Board, upon his ceasing to be such an officer.
- (5) An authorised officer may, for the purpose of obtaining any information which may be required in relation to a matter under investigation under this Bill or the enactments listed in Schedule 1 –
  - (a) at all reasonable times enter any premises, at which there are reasonable grounds to believe that any trade or business or any activity in connection with a trade or business is, or has been, carried on, or that records in relation to such trade, business or activities are kept, and search and inspect the premises and any records on the premises,
  - (b) secure for later inspection any premises or any part of a premises in which such records are kept or there are reasonable grounds for believing that such records are kept,
  - (c) require any person who carries on such trade, business or activity or any person employed therewith to produce to him such records and in the case of such information in a non-legible form to reproduce it in a legible form or to give to him such information as the officer may reasonably require in relation to any entries in such records,
  - (d) inspect and take copies of or extracts from any such records (including in the case of information in a non-legible form a copy of or extract from such information in a permanent legible form),

(e) remove and retain the said records for such period as may be reasonable for further examination, subject to a warrant being issued for that purpose by a judge of the District Court who is satisfied that the said records may be necessary for the investigation of a matter under this Bill or under the enactments listed in Schedule 1.

(f) require any such person to give to the officer any information which the officer may reasonably require in regard to the trade, business or activity or in regard to the persons carrying on such trade, business or activity or employed in connection therewith,

(g) require any such person to give to the officer any other information which the officer may reasonably require in regard to such trade, business or activity,

(h) require any person by or on whose behalf data equipment is or has been used or any person having charge of, or otherwise concerned with the operation of, the data equipment or any associated apparatus or material, to afford the officer all reasonable assistance in relation thereto,

(i) summon, at any reasonable time, any other person employed in connection with the trade, business or activity to give to the officer any information which the officer may reasonably require in regard to such activity and to produce to the officer any records which are in that person's power or control.

(6) An authorised officer may, for the purpose of obtaining any information which may be required in relation to a matter under investigation under this Bill or the enactments listed in Schedule 1, at all reasonable times enter any premises, at which there are reasonable grounds to believe that any trade or business or any activity in connection with a trade or business is, or has been, carried on and inspect any goods on the premises and may -

(a) on paying or making tender of payment therefore, take any of the goods, or

(b) confirm by such other method as appropriate the price or any other information relating to the goods for the purpose of an investigation.

(7) An authorised officer shall not, other than with the consent of the occupier, enter a private dwelling unless he has obtained a warrant from the District Court under subhead (10) authorising such entry.

(8) Where an authorised officer in the exercise of his powers under this section is prevented from entering any premises an application may be made under subhead (10) authorising such entry.

(9) An authorised officer appointed under this section, where he considers it necessary, may be accompanied by a member of the Garda Síochána when performing any powers conferred on an authorised officer by this Bill.

(10) If a judge of the District Court is satisfied on the sworn information of an authorised officer that there are reasonable grounds for suspecting that there is information required by an authorised officer under this section held on any premises or any part of any premises, the judge may issue a warrant authorising an authorised officer, accompanied by other authorised officers, at any time or times within one month from the date of issue of the warrant, on production if so requested of the warrant, to enter, if need be by reasonable force, and exercise all or any of the powers conferred on an authorised officer under subheads (5) and (6).

(11) A person shall not obstruct or interfere with an authorised officer in the exercise of his powers under this Bill or give to an authorised officer information which is false or misleading.

(12) A person shall comply with any request or requirement of an authorised officer under this Bill.

(13) An authorised officer may exercise the powers under subheads (5) and (6) of this head in respect of a third party who is not the direct subject of the investigation but where the authorised officer has reason to believe that that the third party may hold material relevant to the investigation.

(14) Where the Agency or an authorised officer proposes to retain, pursuant to this subhead, books, documents or records for a period longer than 14 days after the date on which they were seized or obtained by the authorised officer, the Agency or that officer shall, before the expiry of that period of 14 days, or such longer period with the consent of the person hereafter mentioned, furnish, on request, a copy of the books, documents or records to the person who it appears to the Agency or officer is, but for the exercise of the powers under this section, entitled to possession of them.

(15) Where an advertisement in relation to the supply or provision of any goods, services, accommodation or facilities is published and does not include the name and address of the person who procured such publication or his agent, the publisher of the advertisement shall if an authorised officer so requests within 12 months of the publication of the advertisement, give to the authorised officer, the name and address of such person or his agent.

(16) A person who contravenes subheads (11), (12) or (15) shall be guilty of an offence.

(17) In this head, “premises” includes any building, dwelling, temporary construction, vehicle, ship or aircraft.

(18) In this head “goods” includes ships, vehicles and aircraft, land, things attached to land, and growing crops.

(19) In this head “records” includes, in addition to records in writing—

(a) discs, tapes, sound-tracks or other devices in which information, sounds or signals are embodied so as to be capable (with or without the aid of some other instrument) of being reproduced in legible or audible form,

(b) films, tapes or other devices in which visual images are embodied so as to be capable (with or without the aid of some other instrument) of being reproduced in visual form, and

(c) photographs, and a reference to a copy of records includes, in the case of records falling within paragraph (a) only, a transcript of the sounds or signals embodied therein, in the case of records falling within paragraph (b), a still reproduction of the images embodied therein and, in the case of records falling within both of those paragraphs, such a transcript and such a still reproduction.

### **Explanatory Note**

This head replicates section 7 of the Consumer Credit Act 1995 in relation to the appointment and powers of authorised officers. It also replicates certain provisions of section 45 of the Competition Act 2002 and of section 16(1) of the Consumer Information Act 1978 as amended by section 30(b) of the Restrictive Practices (Amendment) Act 1987. Subhead (13) provides that the powers of an authorised officer under subhead (5) can be exercised in respect of third parties where an authorised officer has reason to believe that that the third party may hold material relevant to the investigation. Subhead (15) also retains the provisions of section 13 of the Consumer Information Act 1978 in relation to ascertaining the names and addresses of advertisers.

## **Head 25 Prohibition on Unauthorised Disclosure of Information**

Provide that:

- (1) A person shall not disclose information that—
  - (a) comes into the possession of the Agency by virtue of the exercise by it of its powers under this Bill to obtain information, or
  - (b) comes into the possession of the Agency in the course of a meeting of the Agency held in private at which he is present.
- (2) Subhead (1) shall not apply to—
  - (a) a communication made by a member of the Agency, a member of staff of the Agency or an authorised officer in the performance of any of his or her functions under this Bill, being a communication the making of which was necessary for the performance by the member or officer of any such function, or
  - (b) the disclosure of information in a report of the Agency or for the purpose of legal proceedings under this Bill or pursuant to an order of a court of competent jurisdiction for the purposes of any proceedings in that court, or
  - (c) the disclosure by a member of the Agency, a member of staff of the Agency or an authorised officer to any member of the Garda Síochána of information which, in the opinion of the member or member of staff of the Agency or authorised officer, may relate to the commission of an offence (whether an offence under this Bill or not).
- (3) If any person contravenes subhead (1) he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 6 months or to both such fine and such imprisonment.
- (4) A person who suffers loss or harm as a result of a contravention of subhead (1) shall be entitled to bring proceedings against the person referred to in subhead (1) in any court of competent jurisdiction seeking one, or more than one as appropriate, of the following reliefs in respect of that loss or harm:
  - (a) relief by way of injunction or declaration,
  - (b) damages.
- (5) The person mentioned in subhead (4) is—
  - (a) if the person who contravened subhead (1) is other than a member or a member of staff of the Agency or an authorised officer, that person,
  - (b) if the person who contravened subhead (1) is a member or a member of staff

of the Agency or an authorized officer and the relief sought, or to the extent that the relief sought, in the proceedings is—

- (i) relief referred to in subhead (4)(a), that person,
- (ii) relief referred to in subhead (4)(b), the Agency.

(6) An action under subhead (4) shall be regarded as an action founded on tort.

(7) The Agency shall be entitled, in any proceedings, to the same privilege in respect of a communication to or by the Agency, any member of the Agency or any member of staff of the Agency as any Minister of the Government.

(8) The Freedom of Information Acts 1997 and 2003 be amended to provide that this head shall be included in the Third Schedule of those Acts.

### **Explanatory Note**

This head provides that information obtained in the course of the National Consumer Agency's activities shall not be disclosed by any person and for remedies where a breach of that obligation arises. This head also provides that, notwithstanding the prohibition on unauthorised disclosure of information, the provisions of the Freedom of Information Acts 1997 and 2003 shall apply. It is based on section 32 of the Competition Act 2002.

**Chapter 3**  
***Regulations and Codes of Conduct***

**Head 26 Regulations**

Provide that:

(1) The Minister may, by regulation prescribe any matter or thing which is referred to in this Bill as prescribed or to be prescribed.

(2) Every regulation under this Bill 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 or order is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation or order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

(3) The Minister may by regulation amend or revoke a regulation under this Bill.

**Explanatory Note**

This head gives the Minister power to prescribe by regulation any matter or thing referred to in this Bill as prescribed or to be prescribed. The Minister is also given the power to amend or revoke any regulation under this Bill.

## **Head 27 Consumer Information (Marking) Orders**

Provide that:

(1) Where it appears to the Minister to be in the interest of consumers that a product of any description should be marked with or accompanied by any information, the Minister may, subject to the provisions of this Bill, by order impose requirements that a product of that description is so marked or accompanied, and the requirements may extend to the form and manner in which the information or instruction is to be given.

(2) The information requirements in an order under subsection (1) may extend to the form and manner in which the information or instruction is to be given, and that an order under the subsection may make different provisions for different circumstances and may, in the case of a product supplied in circumstances where apart from such an order the information or instruction required by the order would not be conveyed until after delivery of the product, require that all or part of that information be displayed near the product.

(3) Information requirements in any order made under subsection (1) of this head shall be regarded as material requirements in the case of an invitation to purchase and that their omission will constitute a misleading omission for the purposes of head 38.

(4) A trader who in the course of any trade, business, craft or profession sells, supplies, distributes or provides, or offers to do so, a product of a description in relation to which an order is in force under subsection (1) in contravention of the order commits an offence.

### **Explanatory Note**

This head is based on the provision for marking orders at section 10 of the Consumer Information Act 1978. One such order was made in 1984 and subsequently revoked, and another is currently in preparation. The provision at section 12 of the Consumer Information Act 1978 for definition orders is not being retained as it has never been used since its enactment.

## **Head 28 Consumer Information (Advertisement) Orders**

Provide that:

(1) Where it appears to the Minister to be in the interest of consumers that advertisements for a product of any description should contain or refer to any information relating to the product, the Minister may by order impose requirements as to the inclusion of that information, or of an indication of the means by which it may be obtained, in advertisements for a product of that description or in such classes of advertisements as may be specified in the order.

(2) An order under subsection (1) may specify the form and manner in which any such information or indication as is specified in the subsection is to be included in advertisements or in advertisements of any class specified in the order, and may make different provision for different circumstances and classes of advertisements.

(3) Information requirements in any order made under subsections (1) of this head are to be regarded as material requirements in the case of an invitation to purchase and that their omission will constitute a misleading omission for the purposes of head 38.

(4) Where an advertisement fails to comply with any requirement of an order made under subhead (1) of this head, any trader who publishes the advertisement or causes it to be published commits an offence.

### **Explanatory Note**

This head is based on the provision for advertising orders at section 11 of the Consumer Information Act 1978. Four such orders are currently in force, dealing with concert and theatre performances, airfares, disclosure of business interests and reduction in retail prices of diesel and petrol.

## **Head 29 Codes of Conduct**

Provide that:

- (1) (a) The Agency may prepare draft codes of conduct concerning matters of consumer welfare and protection for submission to the Minister, either on its own initiative or at the request of the Minister.  
  
(b) Before submitting a draft code of conduct to the Minister, the Agency shall seek and consider the views of organisations representative of consumers, and such other bodies as the Agency considers appropriate.  
  
(c) Where the Minister receives a draft code of conduct that has been prepared by the Agency he may by order declare that the code shall be an Agency code of conduct for the purposes of this Bill.
- (2) The Agency may approve a code of conduct drawn up by any other body, or any part of a code of conduct drawn up by another body, for the purpose of promoting good practice by persons engaged in the supply of products in the carrying out of activities which may affect the interests of consumers.
- (3) In carrying out its function under subhead (2), the Agency may issue guidelines or guidance notes for such codes of conduct.
- (4) The Agency may withdraw approval from a code of conduct or any part of a code of conduct which in its implementation or operation fails to comply with the guidelines or guidance notes issued under subhead (3) of this head.
- (5) In any proceedings before a Court, a code of conduct made under subhead (1) of this head or approved under subhead (2) of this head shall be admissible in evidence and any provision of the code which appears to the Court to be relevant to any question arising in the proceedings shall be taken into account in determining that question.
- (6) A failure on the part of any person to observe any provision of a code of conduct made under subhead (1) of this head or approved under subhead (2) of this head shall not of itself render him liable to any proceedings.

### **Explanatory Note**

This head provides that the National Consumer Agency may develop and promote the use of codes of conduct and issue guidelines/guidance notes in this regard. It may also approve codes of conduct made by other bodies. Such codes will be admissible as evidence in Court proceedings, though a breach of them will not be an offence. One of the key recommendations of the CSG report and agreed by the High Level Interdepartmental Committee included the promotion of uses of codes of conduct by all businesses and encouragement of self-regulation schemes. In relation to subheads (5) and (6) of this head, section 42 of the Industrial Relations Act 1990 makes similar provision for codes of conduct to be admissible as evidence in court proceedings.

**Chapter 4**  
***Product Safety Matters***

**Head 30 Banning and Recall of Products on Safety Grounds**

Provide that:

(1) The Agency may issue a notice prohibiting the distribution, sale or offering for sale any product which the Agency considers is unsafe or which the Agency considers poses a serious risk to consumers and which is described in the notice.

(2) The Agency shall publish any notice issued under subhead (1) in the national daily newspapers and in any other manner that it sees fit.

(3) Any person who continues to distribute, sell, offer for sale any product which has been the subject of a notice under subhead (1) shall be guilty of an offence.

(4) Notices issued by the Agency under subhead (1) may require any person involved in the supply, distribution, sale or offering for sale of products which are the subject of such notices to immediately withdraw those products from the marketplace and to recall such products from consumers.

(5) Any person who refuses to withdraw products as provided for in subhead (4) or who refuses to recall products shall be guilty of an offence.

(6) The Agency may by order specify the manner in which information is to be given in notices issued under this head.

(7) For the purposes of this head -

“recall” means any measure aimed at achieving the return of an unsafe product that has already been supplied or made available to consumers by the producer or distributor and to which a notice has been issued under this head;

“safe product” means any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons;

“unsafe product” means any product which is not a safe product;

“serious risk” means any serious risk, including those the effects of which are not immediate, requiring rapid interventions by the National Consumer Agency;

"withdraw" means any measure aimed at preventing the distribution, display and offer of a product, which is not a safe product, to consumers.

### **Explanatory Note**

This head is intended to allow the National Consumer Agency to issue a notice banning any product which it considers unsafe or which it considers poses a serious risk to consumers. This power is in addition to the powers of the NCA under the European Communities (General Product Safety) Regulations 2004 (SI No. 199 of 2004 refers) which entitles the Agency to issue directions in relation to the withdrawal and recall of unsafe products but which require that such directions to be issued to specific persons. The head obliges the Agency when issuing notices to publish such notices in the national media and also makes it an offence for any person to knowingly continue to sell any product which is the subject of a notice issued under this head.

### **Head 31 Use of Tests and Analysis**

Provide that:

(1) The Agency in determining whether a product is unsafe or poses a serious risk to consumers for the purposes of head 30, or for the purposes of those enactments listed in Schedule 1 under the title Safety of Products, may have regard to the results of any tests or analysis carried out on the product by a test facility recognised by any competent authority in any member state of the European Community.

(2) For the purposes of this head “competent authority” means any national authority designated for the purposes of Directive 2001/95/EC of the European Parliament and of the Council of 03 December 2001 on general product safety, or any Directive for which the Agency is also designated as a competent authority.

### **Explanatory Note**

This head provides that the NCA in determining whether any product is unsafe or poses a serious risk to consumers may have regard to a test carried out on the product by a laboratory recognised by any competent authority in any of the member states of the European Community.

**PART 3**  
**UNFAIR COMMERCIAL PRACTICES**

**CHAPTER 1**  
*Interpretation*

**Head 32 Interpretation**

Provide that:

(1) A word or expression used in this part of the Bill and also in Directive 2005/29/2005 of the European Parliament and of the Council of 11 May 2005 concerning Unfair Business-to-Consumer Practices in the Internal Market has, unless the contrary intention appears, the meaning in the Bill that it has in the Directive.

(2) In construing a provision of this part of the Bill, a court shall give to it a construction that will give effect to the Directive, and for this purpose a court shall have regard to the provisions of the Directive including its preamble.

**Explanatory Note**

This is a standard provision for the interpretation of terms from an EU Directive in the context of transposing legislation.

## **Chapter 2** ***Prohibition of Unfair Commercial Practices***

### **Head 33 Prohibition of Unfair Commercial Practices**

Provide that:

- (1) Unfair commercial practices are prohibited.
- (2) A commercial practice is unfair if:
  - (a) it is contrary to the requirements of professional diligence, and
  - (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.
- (3) Without prejudice to the legitimate advertising practice of making exaggerated statements or statements not meant to be taken literally, commercial practices which are likely to materially distort the economic behaviour only of a group of consumers who are particularly vulnerable to the practice or the underlying product shall be assessed from the perspective of the average member of the group where:
  - (a) the group is clearly identifiable,
  - (b) is vulnerable because of their mental or physical infirmity, age or infirmity in a way which the trader could reasonably be expected to foresee.
- (4) For the purposes of this head “professional diligence” means 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.
- (5) For the purposes of this head “to materially distort the economic behaviour of consumers” means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision he would not have taken otherwise.
- (6) A commercial practice is also unfair if it is a misleading practice as set out in chapter 3 or an aggressive practice as set out in chapter 5.

#### **Explanatory Note**

This head gives effect to the general prohibition of unfair commercial practices at article 5 of the UCPD. Ireland is one of the few EU member states that does not currently have a general clause prescribing fair trading or proscribing unfair trading. Breaches of the general prohibition of unfair commercial practices will not be criminal offences, but the National Consumer Agency, consumers and traders may apply for an injunction to halt the practice (head 50).

### **Chapter 3** ***Misleading Commercial Practices***

#### **Head 34 Misleading Commercial Practices**

Provide that:

- (1) A misleading commercial practice may be a misleading action or a misleading omission.
- (2) A representation or commercial communication (including advertising and marketing) by a trader about a future matter (including the doing of, or the refusing to do an act) directly connected with the promotion, sale or supply of a product to consumers is a commercial practice for the purposes of this chapter.

#### **Explanatory Note**

Section 1 of Chapter 2 of the Unfair Commercial Practices Directive which covers articles 6 and 7 of the Directive is entitled ‘Misleading Commercial Practices’. Article 6 is headed ‘Misleading Actions’ and article 7 ‘Misleading Omissions’. There is some uncertainty as to whether misleading omissions are covered by existing domestic legislative provisions, and their express inclusion in the UCPD provides clarification of the point. It is proposed that there will be different enforcement regimes for misleading actions and omissions, with criminal and civil remedies available for the former and only civil remedies available for the latter. This is because of doubt as to whether the provisions on misleading omissions satisfy the Constitutional and other requirements for the creation of a criminal offence under Irish law. Traders who engage in misleading omissions will not commit an offence, but the National Consumer Agency, consumers, or other traders may apply for an injunction for the cessation of a misleading omission. Because of the existence of different enforcement arrangements, it is considered desirable to provide expressly that a misleading practice may be either a misleading action or a misleading omission. There has been doubt as to whether statements or promises by a trader about matters related to the future provision of goods or services are covered by existing law. Subhead 2 which is partly based on a provision at section 75AZB of the Australian Trade Practices Act 1974 has been included in order to address this point.

## **Head 35 Misleading Actions**

Provide that:

- (1) A trader who engages in a misleading action commits an offence.
- (2) A commercial practice is to be regarded as a misleading action if it contains false information and is therefore untruthful, or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:
  - (a) the existence or nature of the product;
  - (b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;
  - (c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product
  - (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
  - (e) the need for a service, part, replacement or repair;
  - (f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;
  - (g) the consumer's rights and the risks he may face.
- (3) For the purposes of subhead 2(b) -
  - (a) the geographical origin of a product is the country in which the product was wholly produced
  - (b) the geographical origin of a product whose production involved more than one country is deemed to be the country where the product underwent its last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.
- (4) For the purposes of subhead 2(d) –

(a) a representation or commercial communication (including advertising and marketing) that a product was previously offered at a different price or at a particular price shall be treated as a representation or communication that they were so offered openly at the same place within the preceding 3 months for not less than 28 successive days;

(b) anything likely to be taken as a representation or commercial communication (including advertising and marketing) as to the price at or for which a product was previously offered shall be treated as such a representation or communication.

(c) a representation or commercial communication (including advertising and marketing) as to the price at or for which any product is offered by a trader shall be treated, unless the contrary is expressed, as a representation or communication that the product is offered at or for that price in every place in the State where that product is offered by the trader, but where such a representation or communication is given at the place where the product is offered, it shall be treated, unless the contrary is offered, as relating only to the product offered at that place.

(5) For the purposes of subhead 2(g), the consumer's rights include the right to replacement or reimbursement under Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees as transposed into Irish law by the European Communities (Certain Aspects of the Sale of Goods and Associated Guarantees) Regulations 2003, S.I. no. 11 of 2003.

(6) A commercial practice is also to be regarded as a misleading action if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

(a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;

(b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound where:

(i) the commitment is not aspirational but is firm and is capable of being verified; and

(ii) the trader indicates in a commercial practice that he is bound by the code.

### **Explanatory Note**

The UCPD provisions on misleading actions cover much of the same ground as the provisions of the Merchandise Marks Act 1887 and Consumer Information Act on false and misleading trade descriptions, advertising, and price indications. The elements of a product that can form the basis of a misleading action under paragraphs (a) – (g) are broadly similar to those that can form the basis of a false or misleading

trade description under section 3 of the Merchandise Marks Act 1887 as amended by section 2 of the Consumer Information Act 1978. The provision at subhead (3) is intended to offer guidance on the geographical origin of products and is based on articles 23-24 of Regulation 2913/12/EEC of the European Council establishing the Community Customs Code. The provision at subsection 4 is derived from section 7(2) of the Consumer Information Act 1978. Misleading actions, like misleading omissions and aggressive commercial practices, must cause or be likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

### **Head 36 Commercial Practices Involving Commercial Descriptions**

Provide that:

(1) For the purposes of this head and heads 35, 37, 38, 39, and 40 a commercial description is a commercial practice and means -

(a) any representation or commercial communication including advertising and marketing, direct or indirect, and

(b) by whatever means given, in relation to the elements of a product specified at paragraphs (a) to (g) of head 35(2).

that is directly connected with the promotion, sale or supply of a product to consumers.

(2) Anything which though not a commercial description is likely to be taken for an indication of any of the elements of a product specified at paragraphs (a)-(g) of head 35(2) is deemed to be a commercial description.

(3) In a commercial practice involving a commercial description, a trader is deemed to apply a commercial description to a product –

(a) he affixes or annexes it to it or in any manner marks it on or incorporates it with –

(i) the product itself, or

(ii) anything in, on or with which the product is sold.

(b) he places the product in, on or with anything to, on or with which the commercial description has been affixed, annexed, marked or incorporated or places any such things with the product.

(4) A trader is also deemed to have applied a commercial description to a product if he uses the commercial description in any manner likely to be taken as referring to the product.

(5) Where a product is sold in pursuance of a request in which a commercial description is used and the circumstances are such as to make it reasonable to infer that the product is sold as a product corresponding to that commercial description, the trader selling the product is deemed to have applied that commercial description to the product.

(6) An oral statement may amount to the use of a commercial description.

(7) The customs entry relating to an imported product is deemed to be a commercial description applied to the product.

### **Explanatory Note**

The legislative provisions in the Merchandise Marks Act 1887 and Consumer Information Act 1978 are based on the notion of trade description and make it an offence to apply a false or misleading trade description or to sell a good to which a false or misleading trade description has been applied. The Acts have a number of provisions which elaborate and amplify the application of the concept of trade description and these form the basis of this head. As the concept of commercial practice under the UCPD is broader than that of trade description under the current Acts, the elements of the UCPD definition of commercial practice most applicable to the existing provisions on trade descriptions were used to provide the basis of the definition of commercial description here. A number of the elaborating provisions of sections 2, 3, and 5 of the Merchandise Marks Act 1887 as amended by sections 2 and 4 of the Consumer Information Act were then applied in modified form to this term. In view of the maximum harmonisation status of the UCPD, the retention of these elaborating provisions will have to be cleared with the European Commission.

### **Head 37 Commercial Descriptions in Advertisements**

Provide that:

- (1) Where a commercial description is used in an advertisement in relation to any class of product, the commercial description is to be taken as referring to all products of that class, whether or not in existence at the time the advertisement is published.
- (2) In determining for the purposes of this section whether any product is of a class to which a commercial description used in an advertisement relates regard is to be had not only to the form and content of the advertisement but also to the time, place, manner and frequency of its publication and all other matters making it likely or unlikely that the average consumer to whom the goods are sold would think of the product as belonging to the class in relation to which the commercial description is used in the advertisement.
- (3) A commercial description or statement published in any newspaper, book or periodical or in any sound or television broadcast is deemed to be a commercial description applied in the course of a trade, business, craft or profession if, but only if, it forms part of an advertisement.

### **Explanatory Note**

This head applies the provisions of section 1(2) and section 5 of the Consumer Information Act 1978 on trade descriptions in advertisements to the term commercial description set out in head 36.

### **Head 38 Misleading Omissions**

Provide that:

(1) A commercial practice is to be regarded as a misleading omission if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

(2) It is also to be regarded as a misleading omission when, taking account of the matters described in subhead (1), a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that section or fails to identify the commercial intent of the commercial practice if not already apparent from the context and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

(3) Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

### **Explanatory Note**

This head sets out the circumstances in which a commercial practice is to be regarded as a misleading omission and is based on article 7(1), (2), (3) & (5) of the UCPD.

### **Head 39 Information Regarded as Material in Case of Invitation to Purchase**

Provide that:

(1) In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

(a) the main characteristics of the product to an extent appropriate to the medium and the product;

(b) the geographical address and identity of the trader, such as his trading name and address and, where applicable, the geographical address and the identity of the person on whose behalf he is acting;

(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such charges may be payable;

(d) the arrangements for payment, delivery, performance and the complaint-handling policy if they depart from the requirements of professional diligence;

(e) for products involving a right of withdrawal or cancellation, the existence of such a right.

(2) Information requirements in relation to commercial communication including advertising or marketing established by the European Community directives and regulations in Schedule 2 of this Act shall be regarded as material requirements for the purposes of this head.

(3) The Minister may by order provide that information requirements in relation to commercial communications in European Community directives and regulations adopted subsequent to the enactment of this Bill shall be regarded as material for the purposes of this head.

(4) Failure by a trader to provide information regarded as material for the purposes of subheads (1), (2) and (3) shall be a misleading commercial practice.

### **Explanatory Note**

This head is based on articles 2(i) and 7(4) UCPD. It defines the concept of invitation to purchase and sets out the information requirements with which traders must comply in the context of an invitation to purchase.

## **Head 40 Misleading Commercial Practices Considered Unfair in All Circumstances**

Provide that:

(1) The following misleading commercial practices are to be considered unfair in all circumstances and that a trader who engages in them commit an offence:

- (a) claiming to be a signatory to a code of practice when the trader is not.
- (b) displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
- (c) claiming that a code of conduct has an endorsement from a public or other body which it does not have.
- (d) claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.
- (e) making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered.
- (f) making an invitation to purchase products at a specified price and then with the intention of promoting a different product:
  - (i) refusing to show the advertised item to consumers; or
  - (ii) refusing to take orders for it or deliver it within a reasonable time; or demonstrating a defective sample of it.
- (g) falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.
- (h) undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.
- (j) stating or otherwise creating the impression that a product can legally be

sold when it cannot.

(j) presenting rights given to consumers in law as a distinctive feature of the trader's offer.

(k) using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer.

(l) making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.

(m) promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is manufactured by that same manufacturer when it is not.

(n) claiming that the trader is about to cease trading or move premises when he is not.

(o) claiming that products are able to facilitate winning in games of chance.

(p) falsely claiming that a product is able to cure illnesses, dysfunctions or malformations.

(q) passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.

(r) claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.

(s) describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

(t) including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed document when he has not.

(u) falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.

(v) creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.

### **Explanatory Note**

Annex I of the UCPD contains a ‘blacklist’ of 23 misleading and 8 aggressive commercial practices considered unfair in all circumstances – that is, they are not subject to the average consumer and transactional decision tests that govern the generality of misleading and aggressive practices. This head contains 22 of the 23 misleading practices from the UCPD ‘blacklist’; the remaining ‘blacklist’ item on pyramid schemes is dealt with separately at heads 41-42.

## **Chapter 4**

### ***Pyramid Promotional Schemes***

#### **Head 41 Pyramid Promotional Schemes**

Provide that:

(1) Establishing, operating or promoting a pyramid promotional scheme where a consumer or other person gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers or persons into the scheme rather than from the sale or consumption of products is a misleading commercial practice that is to be considered unfair in all circumstances.

(2) For the purposes of this head such an opportunity to receive compensation as mentioned in subhead (1) is to be taken to apply –

(a) whether or not it confers a legally enforceable right to compensation on the consumer or other person, and

(b) whether it is limited to the introduction of new consumers or other persons into the scheme by the consumer or other person himself or extends to the introduction of new consumers or other persons by others.

(3) Provide that for the purpose of this head and head 42 –

(a) “scheme” means any pyramid promotional scheme as defined in subhead 1;

(b) “pyramid promotional scheme” includes any arrangement made in the connection with the carrying on such a scheme whether these arrangements are made or recorded wholly or partly in written or electronic form or not;

(c) “participant” in relation to a scheme means a person, other than a promoter, who participates in the scheme;

(d) “promoter” in relation to a scheme means a person who promotes a scheme;

(e) “promoters” in relation to a scheme means two or more persons acting in concert who promote a scheme.

#### **Explanatory Note**

Subsection 1 is based on the ‘blacklist’ provision on pyramid promotional schemes at annex I (14) of the UCPD. The other subsections are largely derived from provisions at section 1 of the Pyramid Selling Act 1980 which is to be repealed by this Bill.

## **Head 42 Offences and Proceedings Relating to Pyramid Promotional Schemes**

Provide that:

(1) A trader or other person who establishes, operates, or promotes a pyramid promotional scheme or induces or attempts to induce other consumers or persons to become participants in such a scheme commits an offence.

(2) If any consumer or other person who is a participant in a scheme or has applied or been invited to become a participant in a scheme -

(a) makes any payment to or for the benefit of the promoter of or (if there is more than one) any of the promoters of, or a participant in, the scheme or a person acting on behalf of a promoter of, or a participant in, a scheme, and

(b) is induced to make that payment by reason that the prospect is held out to him of receiving compensation derived primarily from the introduction of other consumers or persons into the scheme

any person to whom or for whose benefit that payment is made shall be guilty of an offence.

(3) If a promoter or any of the promoters of, or a participant in, a scheme or a person acting on behalf of a promoter of, or a participant in, a scheme by holding out to any person such a prospect as is mentioned in subhead 2(b) of this head induces or attempts to induce him to make any payment to or for the benefit of the promoter of or (if there is more than one) any of the promoters of, or to or for the benefit of a participant in, the scheme, or to or for the benefit of any person acting on behalf of a promoter of, or a participant in, a scheme, the promoter or participant inducing him to make that payment shall be guilty of an offence.

(4) In determining for the purposes of subheads (1), (2) or (3) of this head, whether an inducement is made by holding out such a prospect as is therein mentioned, it shall be sufficient if such a prospect constitutes or would constitute a substantial part of the inducement.

(5) Where the person by whom an offence is committed under subheads (1), (2) or (3) of this head is not the promoter or sole promoter of the scheme in question, any other person who is the promoter or (as the case may be) one of the promoters of the scheme shall, subject to subhead (6) of this head, also be guilty of that offence.

(6) Where by virtue of subhead (5) of this head a person is charged with an offence, it shall be a defence for him to prove that the act constituting the offence was committed without his consent or connivance.

(7) An agreement between a promoter or participant in a scheme or a person acting on behalf of a promoter or a participant in a scheme shall, insofar as it provides for the payment of money by that other person to the promoter or the person acting on his behalf or to the participant or the person acting on his behalf be null and void; and an action shall not lie in any court for the recovery of the money by the promoter or by

the person acting on his behalf or by the participant or the person acting on his behalf from that other person.

(8) For the purposes of this section, any reference to the making of a payment to or for the benefit of a person shall be construed as including the making of the payment partly to or for the benefit of that person and partly to or for the benefit of one or more other persons.

(9) In determining whether a scheme that involves the promotion or marketing of a product is a pyramid promotional scheme, a court may have regard to the following matters in assessing whether the consideration given by consumers or other persons for the opportunity to participate in such a scheme is wholly or substantially induced by the prospect of receiving compensation derived primarily from the introduction of other consumers or persons into the scheme:

(a) the emphasis given in the promotion of the scheme to the entitlement of participants to the supply of products by comparison with the emphasis given to their entitlement to compensation derived from the introduction of other consumers or persons into the scheme.

(b) the extent to which the consideration given bears a reasonable relationship to the products, if any, that participants are entitled to be supplied with under the scheme as assessed, where appropriate, by reference to the price of comparable goods or services available elsewhere;

### **Explanatory Note**

Subheads (1)-(8) of this head are based on provisions at sections 2-5 of the Pyramid Selling Act 1980. Subsection 9 is adapted from a provision at section 65AAE of the Australian Trade Practices Act 1974.

## **Chapter 5**

### ***Aggressive Commercial Practices***

#### **Head 43 Aggressive Commercial Practices**

Provide that:

- (1) A trader who engages in an aggressive commercial practice commits an offence.
- (2) A commercial practice is to be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.
- (3) In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account is to be taken of:
  - (a) its timing, location, nature or persistence;
  - (b) the use of threatening or abusive language or behaviour;
  - (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;
  - (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;
  - (e) any threat to take action that cannot legally be taken.
- (4) For the purposes of this head, "undue influence" means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.

#### **Explanatory Note**

This head is based on articles 8 and 9 of the UCPD. There are no equivalent provisions in current Irish consumer law. Coercion and harassment are dealt with in the context of the general criminal law at sections 9 and 10 of the Non-Fatal Offences Against the Person Act 1997.

#### **Head 44 Aggressive Commercial Practices Considered Unfair in All Circumstances**

Provide that:

The following aggressive commercial practices are to be considered unfair in all circumstances and that a trader who engages in any of these practices commits an offence:

- (a) Creating the impression that the consumer cannot leave the premises until a contract is formed.
- (b) Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.
- (c) Making persistent and unwanted solicitation by telephone, fax, e-mail or other remote media except in circumstances justified under national law to enforce a contractual obligation.
- (d) Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence in order to dissuade a consumer from exercising his contractual rights.
- (e) Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.
- (f) Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with article 7(3) of Directive 97/7/EC as transposed into Irish law by the European Communities (Protection of Consumers in respect of Contracts made by means of Distance Communication) Regulations 2001, S.I. No. 207 of 2001.
- (g) Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.
- (h) Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:
  - there is no prize or other equivalent benefit; or
  - taking any action in relation to claiming the prize or other equivalent benefit is
  - subject to the consumer paying money or incurring a loss.

### **Explanatory Note**

This head incorporates the eight aggressive commercial practices from the ‘blacklist’ at annex I of the UCPD. As with the equivalent misleading practices, the aggressive commercial practices listed here are not subject to the average consumer and transactional decision tests.

**Chapter 6**  
***Price Display and Control***

**Head 45 Price Display Orders**

Provide that:

(1) The Minister may from time to time by order require every trader engaged in a trade, business, craft or profession to display in a specified manner the price or charge to consumers of any product or products stated as a single amount and inclusive of any charge made by the trader for any tax payable in respect of the product.

(2) An order made under this head may apply to the whole State or to a particular area in the State.

(3) Any trader who -

(a) contravenes whether by act or omission a provision of an order made under this head,

(b) sells, supplies, or provides a product at a greater price than that shown in any list which he is required to display by order under this head,

commits an offence.

**Explanatory Note**

This head incorporates the core elements of section 19 of the Prices Act 1958 on retail price display orders. Orders are currently in force dealing with price display in licensed premises, catering establishments, hairdressers, and for diesel and petrol.

## **Head 46 Provision of Weighing Facilities in Places Where Food Sold by Retail**

Provide that:

(1) A trader who offers food for sale by retail by weight (other than food packed for such sale by its manufacturer or producer or by the person who supplied it for such sale) in any place in the course of any trade or business shall provide in a prominent position in a part of the place to which, for the purpose of such sales, the public have access, a weighing scales or weighing machine, and shall permit any person to weigh or observe the weighing of any food sold by retail or for sale by retail at the place (being food which that person has bought or is about to buy) on the scales or machine.

(2) A weighing scales or machine provided pursuant to this head shall be deemed for the purposes of the Metrology Act 1996 to be being used for trade.

(3) A trader who contravenes subhead (1) of this head commits an offence.

### **Explanatory Note**

This head is based on section 14 of the Consumer Information Act 1978.

## **Head 47 Prevention of Persons from Reading Retail Prices**

Provide that:

(1) A trader is not, without reasonable cause, to prevent another person, or interfere with, or obstruct another person who is –

(a) entering any place where products are offered for sale in the course of any trade or business for the purpose of reading any prices displayed on, with or in relation to the product, or

(b) reading any prices displayed as aforesaid, if the prices of the goods are not displayed (whether outside the place or elsewhere) so as to be capable of being read by the person while at or near the place without entering the place.

(2) A trader who contravenes subhead (1) of this head commits an offence.

### **Explanatory Note**

This head is based on section 15 of the Consumer Information Act 1978

## **Head 48 State of Emergency Affecting the Supply of a Product**

Provide that:

(1) Whenever and so often the Government are of the view that abnormal circumstances prevail or are likely to prevail in relation to the supply of any commodity, the Government may by order declare that a state of emergency affecting the supply of that product exists.

(2) An order under subhead (1) of this head may define a product in such manner as the Government think fit.

(3) An order under subhead (1) of this head may relate to more than one product.

(4) Subject to subhead (5) of this head, an order under subhead (1) of this head shall remain in force for such period not exceeding six months from the date of the making of the order as the Government think proper and specify in the order and shall then expire.

(5) Where an order is in force under subhead (1) of this head (referred to as the principal order) and the Government are of the view that abnormal circumstances still prevail in relation to the supply of that product -

(a) the Government may by order (referred to as a continuance order) made before of the principal order continue the principal order in force for a period not exceeding six months from the date on which the principal order is scheduled to expire, and may thereafter by a further continuance order continue the principal order in force for one further period not exceeding six months from the date on which the first continuance order was scheduled to expire;

(b) if only one continuance order is made, the principal order shall continue in force until the expiration of the period for which it is continued in force by that continuance order and shall then expire;

(c) if two continuance orders are made, the principal order shall continue in force until the expiration of the period for which it is continued in force by the second of those continuance orders and shall then expire.

(6) Every order made under this head be published shall be published in the Iris Oifigiuil as soon as possible after it is made.

### **Explanatory Note**

This head is based on the provision at section 15 of the Prices Act 1958. Under section 15 of the 1958 Act, emergency orders can be continued for an indefinite period. This head provides that an emergency order can be continued for no more than two periods of not more than six months each.

## **Head 49 Fixing of a Maximum Price for a Product During State of Emergency**

Provide that:

(1) Where an order under subhead (1) of head 48 is in force declaring that a state of emergency affecting the supply of a product exists, the Minister may by order fix the maximum price at which that product may be sold.

(2) An order made by the Minister under subhead (1) of this head may –

(a) define a product in such manner as the Minister thinks fit,

(b) define the conditions by reference to which a maximum price is fixed and fix different maximum prices in relation to different conditions,

(c) apply to the whole State, to a particular area in the State, or to a particular class of trader,

(d) fix a maximum price by specifying it or by setting out provisions by means of which it may be ascertained,

(e) contain any incidental or ancillary provision (including a requirement that the product to which the order relates shall be sold only in specified units of weight, measure or volume) as shall appear to the Minister to be necessary or expedient for giving full effect to any provision in the order or to secure compliance with the order.

(3) Any trader who contravenes whether by act or omission a provision of an order made under subhead (1) of this head commits an offence

(4) An order made under subhead (1) of this head will, if not previously revoked, expire on the expiration of the emergency order.

### **Explanatory Note**

This head is based on the provision at section 16 Prices Act 1958

## **PART 4**

### **PROCEEDINGS, OFFENCES AND PENALTIES**

#### **Head 50 Proceedings**

Provide that:

(1) The Agency may, on its own initiative or on a request being made by a consumer, request any trader engaging or proposing to engage in an unfair commercial practice to discontinue or refrain from such a practice.

(2) (a) Any person including the Agency may, upon giving notice of the application to any person against whom the order the subject of the application is sought, apply to the Circuit or High Court as appropriate for, and may, at the discretion of the Court, be granted, an order for the cessation of an unfair commercial practice or, if the unfair commercial practice has not yet been carried out but is imminent, to order its prohibition.

(b) Where the Agency has made a request under subhead (1) of this head, and that request has not been complied with, the Agency may apply to the Circuit Court or the High Court as appropriate, for and may, at the discretion of the Court, be granted an order for the cessation or prohibition of the unfair commercial practice.

(3) In any case where an application under subhead (2)(a) of this head is made to the Circuit or High Court by a consumer or trader, a person acting on behalf of a consumer or trader, or any other person the court shall not make an order without first affording the Agency the opportunity to be heard on the matter.

(4) In addition to the Agency, the Minister may by order designate public authorities which enforce laws that protect consumers' interests as organisations with a legitimate interest in combating unfair commercial practices that may take legal action against such practices under subhead (2) of this head.

(5) In the exercise of its discretion under this head, a court is to take account of all the interests involved and in particular the public interest.

(6) The Agency or any other applicant for an order under subhead (2) of this head is not required to prove –

(a) actual loss or damage, or

(b) intention or negligence on the part of the advertiser

(7) In any proceedings in which it has made an order under this head, a court may –

(a) require publication of its decision in full or in part and in such form as it deems adequate, and

(b) require the publication of a corrective statement

(8) Legal proceedings for a court order seeking the cessation or prohibition of an unfair commercial practice may be taken against a code owner where the relevant code promotes non-compliance with legal requirements.

(9) For the purposes of subhead (8) of this head, “code owner” means any entity, including a trader or group of traders which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it.

(10) Where a code of conduct has been approved by the Agency under subhead (29)(2), the Minister may by order provide that the Agency may choose not to consider a complaint relating to an unfair commercial practice, or the Circuit or High Court may choose not to hear an application for an order for the cessation or prohibition of an unfair commercial practice, until the practice has been considered under the procedure in force under the code of conduct.

### **Explanatory Note**

This head gives effect to article 11 of the UCPD. Article 11 (1) gives member states discretion to give traders (i) a right to take legal action against unfair commercial practices, and/or (ii) an entitlement to bring unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings. The effect of this head is to give traders a right of action but not a right to take complaints to the National Consumer Agency. For resource and other reasons, it is preferable that the Agency should not have to involve itself in disputes between traders. Subhead (3) is based on the provision at section 47(5) Consumer Credit Act 1995. Subhead (10) is based on provisions at articles 10 and 11 of the UCPD aimed at giving codes of conduct a qualified role in the enforcement of the Directive.

## **Head 51 Undertakings**

Provide that:

(1) An authorised officer may accept from a trader to whom subhead (2) applies an undertaking that the person will comply with subhead (3).

(2) This subhead applies to a person who the authorised officer believes-

(a) has engaged in conduct which constitutes a breach of this Bill or the enactments listed in Schedule 1;

(b) is engaging in such conduct which constitutes a breach of this Bill or the enactments listed in Schedule 1;

(c) is likely to engage in conduct which constitutes a breach of this Bill or the enactments listed in Schedule 1.

(3) A person complies with this subhead if he-

(a) does not continue or repeat the conduct;

(b) does not engage in such conduct in the course of his business or another business;

(c) does not consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship.

For the purposes of this subhead, a person has a special relationship with a body corporate if he is either a director, manager, secretary, member of the committee of management or other controlling authority of such a body, or any other similar officer of the body corporate, or a person purporting to act in such a capacity.

(4) Subhead (3)(a) does not apply in the case of an undertaking given by a person in so far as subhead (2) applies to him by virtue of paragraph (c).

(5) Any undertaking given to an authorised officer shall be in writing, shall identify the nature of the undertaking, and shall be signed by the person responsible for giving such an undertaking.

(6) Where a person who has given an undertaking under this head fails to comply with that undertaking, the National Consumer Agency may apply to the Circuit Court or High Court as appropriate for an order for the cessation of the conduct covered by the undertaking. In any proceedings taken under this subhead, the Court will have regard to any failure to comply with the terms of an undertaking.

### **Explanatory Note**

This head provides that authorised officers of the National Consumer Agency may accept undertakings from traders that they will refrain from certain conduct that the officer believes to be contrary to this Bill or other consumer legislation. The aim is to provide the Agency with an enforcement option that is more clearly defined than a purely voluntary commitment. The head is based on section 219 of the UK Enterprise Act 2002.

## **Head 52 Right of Action for Damages**

Provide that:

(1) Any person who is aggrieved in consequence of any unfair commercial practice which is prohibited under this Bill shall have a right of action for relief by way of damages, including exemplary damages, against either or both of the following –

(a) any undertaking which engaged in the unfair commercial practice

(b) any director, manager or other officer of such an undertaking, or a person who purported to act in any such capacity, who authorised or consented to the unfair commercial practice

(2) Subject to subhead (3) an action under subhead (1) may be brought in the District Court (including the Small Claims Procedure of the District Court), the Circuit Court or the High Court.

(3) Where an action under subhead (1) is brought in the District Court or the Circuit Court any relief by way of damages, including exemplary damages, shall not, except by consent of the necessary parties in such form as may be provided for by rules of court, be in excess of the limit of jurisdiction of the District Court or the Circuit Court in an action founded on tort.

(4) For the purposes of this head –

(a) “undertaking” means a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply, distribution or provision of a product,

(b) “director” includes a person in accordance with whose directions or instructions the directors of the undertaking concerned are accustomed to act but does not include such a person if the directors are so accustomed to act by reason only that they do so on advice given by that person in a professional capacity.

### **Explanatory Note**

This head gives a right of action for damages to any person aggrieved in consequence of an unfair commercial practice. It will apply to traders as well as consumers. If a consumer receives compensation under head 57 for a misleading or aggressive commercial practice following a criminal prosecution against a trader, this will be taken into account in any civil proceedings for damages. The provision is modelled on section 14 of the Competition Act 2002.

## **Head 53 Prosecution of Offences**

Provide that:

(1) Summary proceedings for an offence under heads 24, 27, 28, 30, 35, 40, 43, 44, 45, 46, 47, and 49 of this Bill or under the enactments listed in Schedule 1 may be brought and prosecuted by the Agency. Subject to subhead (2) of this head proceedings for an offence under head 42 may be brought only on indictment.

(2) In cases where proceedings for an offence are to be taken on indictment, a Judge of the District Court will have jurisdiction to try summarily an offence under this head if -

(a) the Judge is of the view that the facts proved or alleged against a defendant charged with such an offence constitute a minor offence to be tried summarily,

(b) the Director of Public Prosecutions consents,

(c) the defendant (on being informed by the Judge of his right to be tried by a jury does not object to being tried summarily,

and, upon conviction under this subhead, the defendant shall be liable to the penalties set out at subheads (1) to (2) of head 54.

(3) Section 13 of the Criminal Procedure Act 1967 as amended by section 17 of the Criminal Justice Act 1984 shall apply in relation to an offence under this head as if, in lieu of the penalties provided for in subsection (3) of the said section, there were specified therein the penalties provided for in subheads (1) to (2) of head 54, and the reference in subsection 2(a) of the said section 13 to the penalties provided for in the said subsection (3) shall be construed and have effect accordingly.

(4) Despite section 10 (4) of the Petty Sessions (Ireland) Act 1851, proceedings for an offence under this Act may be instituted at any time within 2 years after the date of the alleged commission of the offence.

### **Explanatory Note**

This head empowers the National Consumer Agency to institute summary proceedings for breaches of the Bill relating to misleading and aggressive commercial practices. As is the case under the Pyramid Selling Act 1980, offences relating to pyramid promotional schemes will ordinarily be taken on indictment. Proceedings on indictment for breaches of the Bill will be taken by the Director of Public Prosecutions. In cases where proceedings for an offence are to be taken on indictment, they can be taken summarily in the circumstances set out at subhead (2).

## **Head 54 Penalties**

Provide that:

(1) A trader who contravenes any provision of the Bill, contravention of which is deemed to be an offence, is liable –

(a) on summary conviction, -

(i) in the case of a first offence, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months, or both,

(ii) in the case of a second or subsequent offence, to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months, or both.

(b) on conviction on indictment -

(i) in the case of a first offence, to a fine not exceeding €60,000 or imprisonment for a term not exceeding 18 months, or both,

(ii) In the case of a second or subsequent offence, to a fine not exceeding €100,000 or imprisonment for a term not exceeding 24 months, or both.

(c) on conviction on indictment, in the case of an offence under head 42, to a fine not exceeding €150,000 or imprisonment for a term not exceeding 5 years, or both.

(2) Where a trader is convicted of an offence under this Bill and there is a continuation of the offence by the trader after his conviction, the trader shall be guilty of a further offence on every day on which the contravention continues and for each such offence shall be liable -

(a) on summary conviction, to a fine not exceeding €500,

(b) on conviction on indictment, to a fine not exceeding €10,000

(3) When considering what penalty (if any) is appropriate to an offence under heads 28, 35 and 40, the Court may take into consideration any advertisement published by or on behalf of the trader convicted of the offence and correcting any misleading action or omission to which the offence relates.

(4) Where a trader is convicted of an offence under this Bill, the court shall, unless it is satisfied that there are special and substantial reasons for not doing so, order the person to pay to the Agency the costs and expenses, measured by the court, incurred by the Agency in connection with the investigation, detection and prosecution of the offence.

(5) The Minister may by order amend subheads (1) and (2) of this head or subhead (1) of head 56 by substituting for the amounts standing specified in those provisions

amounts in line with the increase in the Consumer Price Index since the passing of the Bill or the last previous exercise of the power under this subhead.

(6) Every order under subhead (5) of this head shall have effect on and from the date on which it is made and shall be laid before each House of the Oireachtas as soon as may be after it is made; if a resolution confirming the order is not passed by each such House within the next 21 days after that House has sat after the order is laid before it, the order shall lapse, but without prejudice to the validity of anything previously done there under.

(7) The Minister may by order amend or revoke an order under subhead (5) of this head.

### **Explanatory Note**

This head lays down penalties for breaches of the Bill. Higher penalties are provided for second or subsequent offences and additional penalties for continuing offences. The head also permits the Minister to increase fine levels by order in line with increases in the Consumer Price Index. Higher penalties are also provided for breaches of offences of the pyramid selling provisions.

## **Head 55 Publication of Names of Certain Persons**

Provide that:

(1) The Agency may from time to time compile a list of names and addresses and the description of business or other activity of every person—

(a) on whom a fine or other penalty was imposed by a court under this Bill or under the enactments listed in Schedule 1, or

(b) on whom an order was served under subhead (2) of head 50.

(2) The Agency may at any time cause any list referred to in subhead (1) to be published in such manner as it considers appropriate.

(3) Any list referred to in subhead (1) shall specify in respect of each person named in the list such particulars, as the Agency thinks fit, of—

(a) the matter occasioning any fine, penalty, or order, as the case may be, imposed on the person, and

(b) any fine, penalty, or order occasioned by the matter referred to in paragraph (a).

### **Explanatory Note**

This head is based on a provision at section 85 Safety, Health and Welfare at Work Act 2005.

## **Head 56 Fixed Payment Notices**

Provide that:

(1) Where an authorised officer has reasonable grounds for believing that a trader is committing or has committed an offence under –

- (a) any order made under head 45
- (b) any order listed in Schedule 4

he may serve the person with a notice in the prescribed form stating that—

- (i) the trader is alleged to have committed the offence, and
- (ii) that the trader may during the period of 21 days beginning on the date of the notice make to the Agency a payment of €300 accompanied by the notice,
- (iii) a prosecution in respect of the alleged offence will not be instituted during the period specified in the notice and, if the payment specified in the notice is made during that period, no prosecution in respect of the alleged offence will be instituted.

(2) Where a notice is served under subhead (1) -

- (a) the Agency may receive the payment, issue a receipt for it and retain the money so paid, and any payment so received shall not be recoverable in any circumstance by the person who made it, and
- (b) a prosecution in respect of the alleged offence shall not be instituted in the period specified in the notice, and if the payment so specified is made during that period, no prosecution in respect of the alleged offence shall be instituted.

(3) In a prosecution for an offence under this Bill the onus of proving that a payment pursuant to a notice under this section has been made shall lie on the accused.

(4) The Minister shall by order prescribe the form of the notice served under subhead (1) of this head.

### **Explanatory Note**

Fixed payment or fixed charge notices, popularly known as on-the-spot fines, are a well established part of enforcement systems in areas such as road traffic, litter, public transport, and workplace health and safety. This head makes breaches of price display orders fixed payment offences; these breaches meet the criterion for fixed payment notices of being minor offences whose infringement is readily apparent. The head follows the general model for such notices, in particular the requirement that persons alleged to have committed an offence can decide within a specified period to make the prescribed payment or to go to court.

## **Head 57 Compensation for Injury, Loss or Damage**

Provide that:

(1) Where a trader is convicted of an offence under this Bill the court, instead of or in addition to, dealing with him in any other way, may, unless it sees reason to the contrary, make on application or otherwise an order (referred to as a “compensation order) requiring him to pay compensation in respect of any personal injury, loss or damage resulting from that offence to any consumer who has suffered such injury or loss.

(2) The compensation payable under a compensation order shall be of such amount (not exceeding, in the case of such an order made by the District Court, such amount as may stand prescribed for the time being by law as the limit of that Court’s jurisdiction in tort) as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the convicted trader, the injured party or the prosecutor, and shall not exceed the amount of the damages that, in the opinion of the court, the injured party would be entitled to recover in a civil action against the convicted person in respect of the injury or loss concerned.

(3) A compensation order may provide for payment of the compensation by such instalments and at such times as the court shall in the circumstances consider reasonable.

(4) Where the court considers -

(a) that it would be appropriate both to impose a fine and to make a compensation order, but

(b) that the convicted trader has insufficient means to pay both an appropriate fine and appropriate compensation, the court, may, if it is satisfied that the means are sufficient to justify its doing so, make a compensation order and, if it is satisfied that it is appropriate to do so having regard to the means that would remain after compliance with the order, impose a fine.

(5) An application for compensation for injury, loss or damage shall not lie if proceedings claiming damages for the injury, loss or damage have been instituted in any court.

(6) Where a compensation order is paid to a consumer, and the consumer is awarded damages by a court in respect of the personal injury, loss or damage to which the compensation order relates, the compensation order shall be deemed to be in satisfaction of so much of the damages as is equal to the amount of the order.

### **Explanatory Note**

This head is based on the provision for compensation orders at section 6(1)-(2) and (6)-(7) of the Criminal Justice Act 1993. It replaces the more restrictive compensation provision at section 17 (3) of the Consumer Information Act 1978. Under this provision, a court may direct that all or part of the fine imposed for an offence under the Act could be paid to a person summoned as a witness on behalf of the prosecution who had suffered injury, loss or damage resulting from the offence. Subheads (5) and (6) of this head are intended to ensure that consumers do not receive payment by way of a compensation order and damages in respect of the same unfair commercial practice.

## **Head 58 Offences Due to Fault of Other Person**

Provide that:

(1) Where the commission by any trader of an offence under this Bill is due to the act or default of another person in the course of his trade, business, craft or profession, that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this provision whether or not proceedings are taken against the first-mentioned trader.

(2) Nothing in subhead (1) shall prevent proceedings being taken under head 42 against a promoter of or a participant in a pyramid promotional scheme.

### **Explanatory Note**

Commonly referred to as a ‘bypass’ provision, a clause of this kind is commonly included in regulatory statutes to enable legal proceedings to be taken against a third party whose act or default has led to the commission of an offence. This head is based on section 21 of the Consumer Information Act, but unlike that section provides that the act or default of the ‘other person’ must occur in the course of his trade, business, craft or profession. The Unfair Commercial Practices Directive deals only with business-to-consumer commercial practices and, other than in the special case of pyramid schemes, it is not thought desirable or appropriate to make provision for legal proceedings against persons who were not acting in the course of a trade, business, craft or profession.

## **Head 59 Disclosure of Information Relating to Offences**

Provide that:

(1) Notwithstanding any other law, information which, in the opinion of—

- (a) the Competition Authority
- (b) a member of the Garda Síochána
- (c) an officer of the Revenue Commissioners, or
- (d) such other person as may be prescribed after consultation by the Minister with any other Minister of the Government appearing to him to be concerned,

may relate to the commission of an offence under this Bill or the enactments listed in Schedule 1 may be disclosed by any of the above to the Agency, a member or a member of staff of the Agency or an authorised officer.

(2) Notwithstanding the provisions of head 25, information, which in the opinion of the Chief Executive Officer may relate to the commission of an offence which is not an offence under this Bill or the enactments listed in Schedule 1, may be disclosed to

- (a) the Competition Authority
- (b) a member of the Garda Síochána,
- (c) an officer of the Revenue Commissioners, or
- (d) such other person as may be prescribed after consultation by the Minister with any other Minister of the Government appearing to him to be concerned,

### **Explanatory Note**

This head allows for the disclosure of information relating to the commission of an offence to the National Consumer Agency by the Competition Authority, an officer of the Revenue Commissioners, the Garda Síochána or any such person prescribed by the Minister. Additionally, subhead (2) allows the CEO of the Agency to disclose information garnered by the NCA to those bodies where the information may relate to an offence under any enactment other than this Bill or the enactments listed in Schedule 1. Subhead (1) is based on section 47 of the Competition Act 2002. Subhead (2) is based on section 17(3) of the Company Law Enforcement Act 2001.

## **Head 60 Offences in Relation to Bodies Corporate and Unincorporated Bodies**

Provide that:

(1) Where -

(a) an offence under this Bill or the Sale of Goods and Supply of Services Act 1980 is committed by a body corporate, and

(b) is proved to have been committed with the consent, connivance or approval of, or to be attributable to any neglect on the part of, a person who was either a director, manager, secretary, member of the committee of management or other controlling authority of such a body, or any other similar officer of the body corporate, or a person purporting to act in any such capacity

that person is also guilty of an offence and is liable to be proceeded against and punished as if he were guilty of the first-mentioned offence.

(2) Where a person is proceeded against as aforesaid for such an offence and it is proved that, at the material time, he was a director of the body corporate concerned or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the body corporate, or a person who purported to act in such a capacity, it shall be presumed, until the contrary is proved, that that person consented to the doing of the acts by the undertaking which constituted the commission by of it of the offence.

(3) Where the affairs of a body corporate are managed by its members, subheads (1) and (2) of this head shall apply in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate.

### **Explanatory Note**

This is a standard provision in regulatory legislation. Subhead (1) is based on section 19 of the Consumer Information Act 1978, and subheads (2) and (3) on section 8 (7) and (8) of the Competition Act 2002.

## **Head 61 Onus of Proof**

Provide that:

Where in any proceedings under this Bill the truth of any representation or commercial communication, including advertising and marketing, direct or indirect and by whatever means given is an issue and the trader who made the representation or commercial communication does not establish on the balance of probabilities that the representation or commercial communication is true, it shall be presumed to be untrue.

## **Explanatory Note**

Recital 21 of the UCPD states that ‘while it is for national law to determine the burden of proof, it is appropriate to enable courts and administrative authorities to produce evidence as to the accuracy of factual claims they have made’. Article 12 of the Directive provides accordingly that courts and administrative authorities can require traders to furnish evidence as to the accuracy of factual claims in relation to a commercial practice and consider factual claims as inaccurate if this evidence is not furnished or is deemed insufficient. The wording of this head is based on article 12 of the UCPD and section 20 of the Consumer Information Act 1978.

## **Head 62 Defences**

Provide that:

(1) In any proceedings for an offence under heads 24, 27, 28, 30, 35, 40, 43, 44, 45, 46, and 47 of this Bill, it shall, subject to subhead (2) of this head, be a defence for the trader charged to prove –

(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person not being an employee of the trader, an accident or some other cause beyond his control; and

(b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any other person not being an employee of the trader who was under his control.

(2) If in any case the defence provided by subhead (1) of this head involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless, not less than 7 clear days before the hearing, he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.

(3) (a) Anything done by a person in the course of his employment shall, in any proceedings brought under this Bill, be treated for the purposes of this Bill as done also by that person's employer whether or not it was done with the employer's knowledge or approval.

(b) In proceedings brought under this Bill against an employer in respect of an act alleged to have been done by an employee of the employer, it shall be a defence for the employer to prove that he took all reasonable precautions and exercised all due diligence to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.

(4) In any proceedings for an offence under heads 35 and 40 of this Bill relating to a misleading commercial practice involving a commercial description it shall be a defence for the person charged to prove that he did not know, and could not with reasonable diligence have ascertained, that the product did not conform to the commercial description that gave rise to the charge or that the product had been subject to the description.

(5) In any proceedings for an offence under heads 35 and 40 of this Bill relating to a misleading commercial practice involving a commercial description committed by the publication of an advertisement it shall be a defence for the person charged to prove that he is a person whose business it is to publish or arrange for the publication of advertisements and that he received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to an offence.

(6) Where a person is charged with an offence relating to a misleading commercial practice involving a commercial description under heads 35 or 40 of this Bill in relation to any product, proof -

(a) that he published a notice indicating -

(i) that he did not apply the commercial description to which the offence relates to the product,

(ii) that he did not know whether the description was true or false, and

(iii) that consumers should disregard it, or

(b) that he disclaimed by other means responsibility for the description,

shall not be a compliance with subheads (1)(b) or (3)(b) of this head where there is not proof that the person had reasonable grounds for believing had the commercial description practice on might be false and that it was not reasonably possible for him having regard to the circumstances to determine whether the commercial practice description was true or false, but where proof to the satisfaction of the court concerned is given of all the matters referred to in this subsection, it shall be for the court to determine whether, in all the circumstances, such proof is a compliance with the said subheads (1)(b) and (3)(b)

### **Explanatory Note**

As in the case of the Consumer Information Act 1978, the offences under this Bill are strict liability offences - that is there is no requirement to show *mens rea* in order to establish guilt. Where strict liability offences apply, it is customary to provide those charged with such offences with due diligence or other defences. The defence provisions at subheads (1), (2), (4), (5) and (6) largely mirror those at section 22 of the Consumer Information 1978. The provision at subsection (3) is based on section 15 of the Employment Equality Act 1998.

## **PART 5 MISCELLANEOUS**

### **Head 63 Protections for Persons Reporting Breaches**

Provide that:

(1) A person who, apart from this head, would be so liable shall not be liable in damages in respect of the communication, whether in writing or otherwise, by him to the Agency of his opinion that—

(a) an offence under this Bill has been or is being committed, or

(b) an offence under the enactments listed in Schedule 1 has been or is being committed, or

(c) any provision of this Bill or of the enactments listed in Schedule 1 that prohibits a person from doing a particular thing or things has not been or is not being complied with,

unless it is proved that he has not acted reasonably and in good faith in forming that opinion and communicating it to the Agency.

(2) The reference in subhead (1) to liability in damages shall be construed as including a reference to liability to be the subject of an order providing for any other form of relief.

(3) An employer shall not penalise an employee for having formed an opinion of the kind referred to in subhead (1) and communicated it, whether in writing or otherwise, to the Agency if the employee has acted reasonably and in good faith in forming that opinion and communicating it to the Agency.

(4) Schedule 6 shall have effect for the purposes of subhead (3).

(5) A person who states to the Agency that a person –

(a) has committed or is committing an offence under this Bill , or

(b) has committed or is committing an offence under the enactments listed in Schedule 1 , or

(c) has failed or is failing to comply with any provision of this Act or of the enactments listed in Schedule 1 ,

knowing that statement to be false shall be guilty of an offence.

(6) Subhead (1) is in addition to, and not in substitution for, any privilege or defence available in legal proceedings, by virtue of any enactment or rule of law in force immediately before the commencement of this section, in respect of the

communication by a person to another (whether that other person is the Agency or not) of an opinion of the kind referred to in paragraph (a), (b) or (c) of subhead (1).

### **Explanatory Note**

This head provides immunity from suit to persons who make complaints or furnish information in good faith to the National Consumer Agency in relation to possible breaches of the this Bill and the enactments in Schedule 1. A similar provision can be found at Section 50 of the Competition Act 2002.

## **Head 64 Expenses**

Provide that:

The expenses incurred by the Minister in the administration of this Bill shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of monies provided by the Oireachtas.

## **Explanatory Note**

This head is a standard provision.

## **Head 65 Saving for Certain Contracts**

Provide that:

A contract for the supply of any goods or the provision of any services shall not be void or unenforceable by reason only of a contravention of any provision of this Bill.

### **Explanatory Note**

Article 3(2) UCPD states that the Directive is without prejudice to contract law. This head is based on the provision at section 25 Consumer Information Act 1978. It makes clear that the Bill is concerned only with criminal law and that the fact that an offence has been committed under it is not evidence in civil proceedings.

## **Head 66 Transfer of Functions**

Provide that:

- (1) Any reference to the Director of Consumer Affairs and the office of the Director of Consumer Affairs contained immediately before the commencement of this Bill in any existing enactment shall, be construed as references to the Agency.
- (2) Where, immediately before the commencement of this Bill, any legal proceedings are pending to which the Director of Consumer Affairs is a party and the proceedings have references to functions transferred by this Bill to the Agency, the name of the Director of Consumer Affairs, shall, in so far as the proceedings relate to any functions transferred by this Bill, be substituted in the proceedings for that of the Agency or added in the proceedings, as may be appropriate, and the proceedings shall not abate by reason of such substitution.
- (3) Anything commenced before the commencement of this Bill by or under the authority of the office of the Director of Consumer Affairs may, so far as it relates to functions transferred by this head to the Agency, be carried out and completed on or after such commencement by the Agency.
- (4) Every document granted or made in the exercise of a function transferred by this head shall, if and in so far as it was operative immediately before the commencement of this Bill, have effect on and after such commencement as if it had been made by the Agency.

### **Explanatory Note**

This head provides for the transfer of existing functions from the Director of Consumer Affairs to the National Consumer Agency. The National Consumer Agency will be responsible for any legal proceeding the Director of Consumer Affairs is a party to and for any documentation or actions commenced by the Director of Consumer Affairs. Similar provisions are provided for in section 6 of the Restrictive Practices (Amendment) Act 1987, section 9 of the Aviation Regulation Act 2001 and section 7 of the Gas (Interim) (Regulation) Act, 2002.

## **Head 67 Repeals and Consequential Amendments**

Provide that:

(1) The enactments mentioned in column 1 of schedule 7 are repealed to the extent specified in column 2 of that Schedule.

(2) Without prejudice to the operation of section 21 (which relates to the effect of repeals) of the Interpretation Act, 1937, nothing in this head shall affect the continuing operation of orders made under sections 10 and 11 (which relate to Marking Orders and Advertising Orders) of the Consumer Information Act 1978 and section 19 of the Prices Act 1958, and accordingly, any such orders shall have effect, after the coming into operation of this Bill, as if that section continued in force.

(3) The Casual Trading Act 1995 is amended by inserting a provision enabling the Minister to introduce statutory based guidelines to prescribe the basis upon which local authorities would issue casual trading licences and to provide for the amendment and revocation of such guidelines.

### **Explanatory Note**

This head provides for the repeal of a number of statutes listed at Schedule 7. It also provides for Regulations made under specified sections of the Prices Act 1958 and the Consumer Information Act 1978 to remain in force. Similar provisions are provided for in section 5 Employment Equality Act 1998.

The Consumer Strategy Group report referred to the manner in which local authorities are carrying out their responsibilities of issuing casual trading licences under the Casual Trading Act, 1995. It highlighted concerns at the lack of consistency amongst local authorities in exercising their licensing functions, pointing to the large variation in the fees imposed by local authorities and significant differences in the level of facilities provided to traders. The CSG concluded that this lack of consistency has stifled the potential of casual trading as a retail channel and thereby limited the choices available to consumers.

The Group recommended the introduction of statutory guidelines that would prescribe the basis upon which local authorities would issue casual trading licences.

The Inter-departmental Committee considered this matter and concluded that the introduction of statutory guidelines as recommended by the CSG would necessitate amending the 1995 Act. The Department is of the view that the voluntary guidelines should be reviewed after 12 months in operation and that statutory guidelines in this area should only be imposed if the voluntary code was not working.

Given that the Consumer Information Act is to be repealed, Section 156 of the Consumer Credit Act which amended section 9 of the Consumer Information Act 1978 should similarly be repealed.

## SCHEDULE 1

### ENACTMENTS FOR WHICH THE NATIONAL CONSUMER AGENCY SHALL ASSUME THE RESPONSIBILITY OF THE DIRECTOR OF CONSUMER AFFAIRS UPON THE ENACTMENT OF THIS BILL.

<b>ADVERTISING:</b>	
Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising	
European Communities (Misleading Advertising) Regulations, 1988	S.I. 134 of 1998
<b>CONSUMER INFORMATION:</b>	
Consumer Information (Advertisements for Concert or Theatre Performances) Order 1997	S.I. 103 of 1997
Consumer Information (Advertisements) (Disclosure of Business Interests) Order, 1984	S.I. 168 of 1984
Consumer Information (Diesel and Petrol) (Reduction in Retail Price) Order, 1997	S.I. 179 of 1997
Consumer Information (Advertisements for Airfares) Order 2000	S.I. 468 of 2000
<b>RESTRICTIVE PRACTICES:</b>	
Restrictive Practices Act, 1972 as amended by Restrictive Practices (Amendment) Act, 1987	No. 11 of 1972 No. 31 of 1987
Restrictive Practices (Confirmation of Order) Act, 1987	No. 23 of 1987
<b>CONSUMER PROTECTION:</b>	
Package Holidays and Travel Trade Act, 1995	S.I. 235 of 1995
European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations 1989	S.I. 224 of 1989

European Communities (Contracts for Time Sharing of Immovable Property) (Protection of Purchasers) Regulations, 1997	S.I. 204 of 1997
European Communities (Contracts for Time Sharing of Immovable Property) (Protection of Purchasers) (Amendment) Regulations, 2000	S.I. 144 of 2000
European Communities (Protection of Consumers' Collective Interests) Regulations, 2001	S.I. 449 of 2001
European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995	S.I. 27 of 1995
European Communities (Unfair Terms in Consumer Contracts)(Amendment) Regulations, 2000	S.I. 307 of 2000
European Communities (Protection of Consumers in respect of Contracts made by means of Distance Communication) Regulations, 2001	S.I. 207 of 2001
European Communities (Directive 2000/31/EC) Regulations 2003	S.I. 68 of 2003
European Communities (Amendment of S.I. No. 68 of 2003) Regulations, 2004	S.I. 490 of 2004
<b>FOOD LABELLING and FOOD SAFETY:</b>	
European Communities (Food Imitations)(Safety) Order, 1991	S.I. 265 of 1991
Food Safety Authority of Ireland Act 1998	No. 29 of 1998
European Communities (Labelling, Presentation and Advertising of Foodstuffs) Regulations, 2002	S.I. 483 of 2002
European Communities (Labelling, Presentation and Advertising of Foodstuffs) (Amendment) (No. 2) Regulations, 2003	S.I. 528 of 2003
European Communities (Marketing of Cocoa & Chocolate Products) Regulations, 2003	S.I. 236 of 2003
European Communities (Marketing of Fruit Juices & Certain Similar Products) Regulations, 2003	S.I. 240 of 2003

European Communities (Dehydrated Preserved Milk) Regulations, 2003	S.I. 298 of 2003
<b>LABELLING OF NON-FOOD PRODUCTS:</b>	
European Communities (Labelling of Footwear) Regulations, 1996	S.I. 63 of 1996
European Communities (Names and Labelling of Textile Products) Regulations, 1998	S.I. 245 of 1998
<b>PRICES/PRICE DISPLAY:</b>	
Prices and Charges (Tax-inclusive Statements) Order, 1973	S.I. 9 of 1973
Charges (Hairdressing) Display Order, 1976	S.I. 156 of 1976
Retail Price (Food in Catering Establishments) Display Order, 1984	S.I. 213 of 1984
Prices (Stabilisation of Profit Margins of Retailers of Motor Cars) Order, 1984	S.I. 223 of 1984
Retail Price (Beverages in Licensed Premises) Display Order, 1999	S.I. 263 of 1999
Retail Price (Diesel and Petrol) Display Order, 1997	S.I. 178 of 1997
European Communities (Requirements to Indicate Product Prices) Regulations 2002	S.I. 639 of 2002
<b>SAFETY OF PRODUCTS:</b>	
European Communities (Safety of Toys) Regulations, 1990	S.I. 32 of 1990
European Communities (Safety of Toys) (Amendment) Regulations, 1994	S.I. 458 of 1994
European Communities (Appliances Burning Gaseous Fuels) Regulations, 1992	S.I. 101 of 1992
European Communities (Appliances Burning Gaseous Fuels) (Amendment) Regulations, 1995	S.I. 150 of 1995
European Communities (Personal Protective Equipment) Regulations, 1993	S.I. 272 of 1993

European Communities (Personal Protective Equipment)(CE Marking) Regulations, 1994	S.I. 13 of 1994
European Communities (General Product Safety) Regulations, 2004	S.I. 199 of 2004
European Communities (Low Voltage Electrical Equipment) Regulations, 1992	S.I. 428 of 1992
European Communities (Low Voltage Electrical Equipment) (Amendment) Regulations, 1994	S.I. 307 of 1994
Industrial Research and Standards (Hood cords for Children's Clothing) Order, 1976	S.I. 140 of 1976
Industrial Research and Standards (Fire Safety) (Domestic Furniture) Order, 1995	S.I. 316 of 1995
Industrial Research and Standards (Section 44) (Babies Dummies) Order, 1988	S.I. 122 of 1988
Industrial Research and Standards (Section 44) (Children 's Cots) Order, 1983	S.I. 232 of 1983
Industrial Research and Standards (Section 44) (Children's Night-wear) Order, 1979	S.I. 3 of 1979
Industrial Research and Standards (Section 44) (Children's Night-wear) (Amendment) Order, 1979	S.I. 215 of 1979
Industrial Research and Standards (Section 44) (Gas Catalytic Heaters) Order, 1984	S.I. 125 of 1984
Industrial Research and Standards (Section 44) (Gas Operated Ovens) Order, 1983	S.I. 237 of 1983
Industrial Research and Standards (Section 44) (Perambulators and Pushchairs) Order, 1981	S.I. 212 of 1981
Industrial Research and Standards (Toxicity of Pencils and Graphic Instruments) Order, 1983	S.I. 231 of 1983
National Standards Authority of Ireland (Section 28) (13A Plugs and Conversion Adaptors for Domestic Use) Regulations, 1997	S.I. 525 of 1997
National Standards Authority of Ireland (Section 28) (Electrical Plugs, Plug Similar Devices and Sockets for Domestic Use) Regulations, 1997	S.I. 526 of 1997

National Standards Authority of Ireland Act, 1996	No. 28 of 1996
<b>SALE OF GOODS:</b>	
Sale of Goods and Supply of Services Act, 1980	No. 16 of 1980
European Communities (Sale of Consumer Goods and Associated Guarantees) Regulations, 2003	S.I. 11 of 2001
<b>MISCELLANEOUS:</b>	
Liability for Defective Products Act, 1991	No. 28 of 1991
European Communities (Liability for Defective Products) Regulations, 2000	S.I. 401 of 2000
Occasional Trading Act, 1979	No. 35 of 1979
Trading Stamps Act, 1980	No. 23 of 1980

## SCHEDULE 2

### Community Law Provisions Setting Out Rules for Advertising and Commercial Communication Which Are Material Requirements in the Case of an Invitation to Purchase

Community Instrument	Provisions
Directive 97/7/EC of the European Parliament and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts	Articles 4 and 5
Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours	Article 3
Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis	Article 3(3)
Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers	Article 3(4)
Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the community code relating to medicinal products for human use	Articles 86 to 100
Directive 2001/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (Directive on electronic commerce)	Articles 5 and 6
Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit	Article 1(d)
Directive 2002/65/EC of the European Parliament and of the Council of 27 September 2002 concerning the distance marketing of consumer financial services	Articles 3 and 4
Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses	Article 1(9)
Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation	Articles 12 and 13
Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance	Article 36
Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments	Article 19
Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (third non-life assurance Directive)	Articles 31 and 43

Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading	Articles 5, 7 and 8
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### SCHEDULE 3

#### Offences under Consumer Legislation Punishable by Fines.

Regulation	Number
Consumer Information (Advertisements)(Disclosure of Business Interests) Order 1984	S.I. No. 168/1984
Consumer Information (Advertisement for Concert or Theatre Performances) Order 1997	S.I. No. 103/1997
Consumer Information (Diesel and Petrol)(Reduction in Retail Price) Order 1997	S.I. No. 179/1997
Consumer Information (Advertisement for Airfares) Order 2000	S.I. No. 468/2000
Prices & Charges (Tax Inclusive Statements) Order 1973	S.I. No. 9/1973
Charges (Hairdressing Display) Order 1976	S.I. No. 156/1976
Retail Price (Food in Catering Establishments) Display Order 1984	S.I. No. 213/1984
Retail Price (Diesel and Petrol) Display Order 1997	S.I. No. 178/1997
Retail Price (Beverages in Licensed Premises) Display Order 1999	S.I. No. 263/1999
Occasional Trading Act 1979	No. 35/1979
Sale of Goods and Supply of Services Act 1980	No.16/1980
Package Travel and Travel Trade Act 1995	No. 17/1995
National Standards Authority of Ireland Act 1996	No. 28/1996
Industrial Research and Standards (Hood cords for Children's Clothing) Order 1976	S.I. No. 140/1976
Industrial Research and Standards (Fire Safety)(Domestic Furniture) Order 1995	S.I. No. 316/1995
Industrial Research and Standards (Section 44) (Babies Dummies) Order 1988	S.I. No. 122/1988
Industrial Research and Standards (Section 44) (Children's	S.I. No. 232/1983

Cots) Order 1983	
Industrial Research and Standards (Section 44)(Children's Night-wear) Order 1979	S.I. No. 3/1979
Industrial Research and Standards (Section 44)(Children's Night-wear)(Amendment) Order 1979	S.I. No. 215/1979
Industrial Research and Standards (Section 44)(Gas Catalytic Heaters) Order 1984	S.I. No. 125/1984
Industrial Research and Standards (Section 44)(Gas Operated Ovens) Order 1983	S.I. No. 237/1983
Industrial Research and Standards (Section 44)(Perambulators and Pushchairs) Order 1981	S.I. No. 212/1981
Industrial Research and Standards (Section 44)(Toxicity of Pencils and Graphic Instruments) Order 1983	S.I. No. 231/1983
National Standards Authority of Ireland (Section 28)(13A Plugs and Conversion Adaptors for Domestic Use) Regulations 1997	S.I. No. 525/1997
National Standards Authority of Ireland (Section 28)(Electrical Plugs, Plug Similar Devices and Sockets for Domestic Use) Regulation 1997	S.I. No. 526/1997

## SCHEDULE 4

### Regulations Covered by Provisions for Fixed Payment Notices.

Regulation	Number
Prices and Charges (Tax-inclusive Statements) Order 1973	S.I. No. 9/1973
Charges (Hairdressing) Display Order 1976	S.I. No. 156/1976
Retail Price (Food in Catering Establishments) Display Order 1984	S.I. No. 213/1984
Retail Price (Diesel and Petrol) Display Order 1997	S.I. No. 178/1997
Retail Price (Beverages in Licensed Premises) Display Order 1999	S.I. No. 263/1999

## SCHEDULE 5

### Statutory Bodies and their Responsible Ministers of the Government

Statutory body (1)	Minister of the Government responsible (2)
Commission for Energy Regulation	Minister for Communications, Marine and Natural Resources
Commission for Communications Regulation	Minister for Communications, Marine and Natural Resources
Commission for Aviation Regulation	Minister for Transport
Central Bank and Financial Services Regulatory Authority	Minister for Finance
Competition Authority	Minister for Enterprise, Trade and Employment
Health Insurance Agency	Minister for Health and Children
Financial Ombudsman	Minister for Finance
Fáilte Ireland	Minister for Arts, Sport and Tourism

## SCHEDULE 6

### Redress for Contravention of Head 63

(1) In this Schedule —

"Act of 1994" means the Terms of Employment (Information) Act, 1994;

"employee" and "employer" have the same meaning as they have in the Act of 1994.

(2) In proceedings under this Schedule before a rights commissioner or the Employment Appeals Tribunal in relation to a complaint that head 63(3) has been contravened, it shall be presumed, until the contrary is proved, that the employee concerned acted reasonably and in good faith in forming the opinion and making the communication concerned.

(3) If a penalisation of an employee, in contravention of head 63(3), constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts, 1977 to 1993, relief may not be granted to the employee in respect of that penalisation both under this Schedule and under those Acts.

(4) An employee may present a complaint to a rights commissioner that his employer has contravened head 63(3) in relation to him and, if he does so, the commissioner shall give the parties an opportunity to be heard by the commissioner and to present to the commissioner any evidence relevant to the complaint, shall give a decision in writing in relation to it and shall communicate the decision to the parties.

(5) A decision of a rights commissioner under paragraph 4 shall do one or more of the following:

(a) declare that the complaint was or, as the case may be, was not well founded,

(b) require the employer to comply with head 63(3) and, for that purpose, require the employer to take specified steps,

(c) require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding 104 weeks remuneration in respect of the employee's employment calculated in accordance with regulations under section 17 of the Unfair Dismissals Act, 1977,

and the references in the foregoing subparagraphs to an employer shall be construed, in a case where ownership of the business of the employer changes after the contravention to which the complaint relates occurred, as references to the person who, by virtue of the change, becomes entitled to such ownership.

(6) For the purposes of this head—

(a) subsections (3) to (6) and subsection (7)(a) of section 7 of the Act of 1994 shall apply in relation to a complaint presented under this Schedule as they apply in relation to a complaint presented under subsection (1) of that section 7, with the following modifications, namely—

(i) the deletion in that subsection (3) of all the words from "if it is presented" to the end of that subsection and the substitution of "unless it is presented to him within the period of 12 months beginning on the date of the contravention to which the complaint relates or (in a case where the rights commissioner is satisfied that exceptional circumstances prevented the presentation of the complaint within the period aforesaid) such further period, not exceeding 6 months from the

expiration of the said period of 12 months, as the rights commissioner considers reasonable",

(ii) the substitution in that subsection (6) of a reference to a decision for the reference to a recommendation, and any other necessary modifications,

(b) sections 8 to 10 of the Act of 1994 shall apply as they apply for the purposes of that Act, with the following modifications, namely—

(i) the substitution in those provisions of references to a decision for references to a recommendation,

(ii) the addition to section 8 of the following subsection:

"(7) Proceedings under this section before the Tribunal shall be heard otherwise than in public.",

(iii) the substitution in section 9 of the Act of 1994 of—

(I) references to the Circuit Court for references to the District Court, and

(II) the following subsection for subsection (3):

"(3) An application under this section to the Circuit Court shall be made to the judge of the Circuit Court for the circuit in which the employer concerned ordinarily resides or carries on any profession, trade or business.",

and any other necessary modifications.

### **Explanatory Note**

This Schedule gives immunity from suit to employees who bona fide and in good faith make complaints or furnish information to the National Consumer Agency in relation to possible breaches of this Bill and the enactments in Schedule 1. Similar provisions are provided in section 50 of the Competition Act 2002 and The Protection for Persons Reporting Child Abuse Act, 1998.

## SCHEDULE 7

### Enactments Repealed

Short Title (1)	Extent of Repeal (2)
Merchandise Marks Act 1887	The whole Act
Merchandise Marks Act 1891	The whole Act
Merchandise Marks Act 1911	The whole Act
Merchandise Marks Act 1931	The whole Act
Prices Act 1958	The whole Act
Prices (Amendment) Act 1965	The whole Act
Prices (Amendment) Act 1972	The whole Act
Consumer Information Act 1978	The whole Act
Pyramid Selling Act 1980	The whole Act
The Restrictive Practices (Amendment) Act 1987	The whole Act except sections 31, 32, and 33 (2)
Consumer Credit Act 1995	Section 156

## SCHEDULE 8

**Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance)**

Official Journal L 149 , 11/06/2005 P. 0022 - 0039

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive") (Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) Article 153(1) and (3)(a) of the Treaty provides that the Community is to contribute to the attainment of a high level of consumer protection by the measures it adopts pursuant to Article 95 thereof.

(2) In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The development of fair commercial practices within the area without internal frontiers is vital for the promotion of the development of cross-border activities.

(3) The laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market. In the field of advertising, Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising [3] establishes minimum criteria for harmonising legislation on misleading advertising, but does not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers. As a result, Member States' provisions on misleading advertising diverge significantly.

(4) These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. These barriers increase the cost

to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions. Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market.

(5) In the absence of uniform rules at Community level, obstacles to the free movement of services and goods across borders or the freedom of establishment could be justified in the light of the case-law of the Court of Justice of the European Communities as long as they seek to protect recognised public interest objectives and are proportionate to those objectives. In view of the Community's objectives, as set out in the provisions of the Treaty and in secondary Community law relating to freedom of movement, and in accordance with the Commission's policy on commercial communications as indicated in the Communication from the Commission entitled "The follow-up to the Green Paper on Commercial Communications in the Internal Market", such obstacles should be eliminated. These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of legal certainty.

(6) This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible. It neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so. Nor does this Directive cover or affect the provisions of Directive 84/450/EEC on advertising which misleads business but which is not misleading for consumers and on comparative advertising. Further, this Directive does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers' perceptions of products and influence their behaviour without impairing the consumer's ability to make an informed decision.

(7) This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. It does not address commercial practices carried out primarily for other purposes, including for example commercial communication aimed at investors, such as annual reports and corporate promotional literature. It does not address legal requirements related to taste and decency which vary widely among the Member States. Commercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. Member States should accordingly be able to continue to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers' freedom of choice. Full account should be taken of the context of the individual case concerned in applying this Directive, in particular the general clauses thereof.

(8) This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields coordinated by it. It is understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers. The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.

(9) This Directive is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law, on intellectual property rights, on the health and safety aspects of products, on conditions of establishment and authorisation regimes, including those rules which, in conformity with Community law, relate to gambling activities, and to Community competition rules and the national provisions implementing them. The Member States will thus be able to retain or introduce restrictions and prohibitions of commercial practices on grounds of the protection of the health and safety of consumers in their territory wherever the trader is based, for example in relation to alcohol, tobacco or pharmaceuticals. Financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders. For this reason, in the field of financial services and immovable property, this Directive is without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers. It is not appropriate to regulate here the certification and indication of the standard of fineness of articles of precious metal.

(10) It is necessary to ensure that the relationship between this Directive and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. This Directive therefore amends Directive 84/450/EEC, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [4], Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests [5] and Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services [6]. This Directive accordingly applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products. This is particularly important for complex products with high levels of risk to consumers, such as certain financial services products. This Directive consequently complements the Community acquis, which is applicable to commercial practices harming consumers' economic interests.

(11) The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers' economic behaviour. It also

sets rules on aggressive commercial practices, which are currently not regulated at Community level.

(12) Harmonisation will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU. The effect will be to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests and to enable the internal market to be achieved in this area.

(13) In order to achieve the Community's objectives through the removal of internal market barriers, it is necessary to replace Member States' existing, divergent general clauses and legal principles. The single, common general prohibition established by this Directive therefore covers unfair commercial practices distorting consumers' economic behaviour. In order to support consumer confidence the general prohibition should apply equally to unfair commercial practices which occur outside any contractual relationship between a trader and a consumer or following the conclusion of a contract and during its execution. The general prohibition is elaborated by rules on the two types of commercial practices which are by far the most common, namely misleading commercial practices and aggressive commercial practices.

(14) It is desirable that misleading commercial practices cover those practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice. In conformity with the laws and practices of Member States on misleading advertising, this Directive classifies misleading practices into misleading actions and misleading omissions. In respect of omissions, this Directive sets out a limited number of key items of information which the consumer needs to make an informed transactional decision. Such information will not have to be disclosed in all advertisements, but only where the trader makes an invitation to purchase, which is a concept clearly defined in this Directive. The full harmonisation approach adopted in this Directive does not preclude the Member States from specifying in national law the main characteristics of particular products such as, for example, collectors' items or electrical goods, the omission of which would be material when an invitation to purchase is made. It is not the intention of this Directive to reduce consumer choice by prohibiting the promotion of products which look similar to other products unless this similarity confuses consumers as to the commercial origin of the product and is therefore misleading. This Directive should be without prejudice to existing Community law which expressly affords Member States the choice between several regulatory options for the protection of consumers in the field of commercial practices. In particular, this Directive should be without prejudice to Article 13(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [7].

(15) Where Community law sets out information requirements in relation to commercial communication, advertising and marketing that information is considered as material under this Directive. Member States will be able to retain or add information requirements relating to contract law and having contract law consequences where this is allowed by the minimum clauses in the existing Community law instruments. A non-exhaustive list of such information

requirements in the *acquis* is contained in Annex II. Given the full harmonisation introduced by this Directive only the information required in Community law is considered as material for the purpose of Article 7(5) thereof. Where Member States have introduced information requirements over and above what is specified in Community law, on the basis of minimum clauses, the omission of that extra information will not constitute a misleading omission under this Directive. By contrast Member States will be able, when allowed by the minimum clauses in Community law, to maintain or introduce more stringent provisions in conformity with Community law so as to ensure a higher level of protection of consumers' individual contractual rights.

(16) The provisions on aggressive commercial practices should cover those practices which significantly impair the consumer's freedom of choice. Those are practices using harassment, coercion, including the use of physical force, and undue influence.

(17) It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.

(18) It is appropriate to protect all consumers from unfair commercial practices; however the Court of Justice has found it necessary in adjudicating on advertising cases since the enactment of Directive 84/450/EEC to examine the effect on a notional, typical consumer. In line with the principle of proportionality, and to permit the effective application of the protections contained in it, 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, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices. 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. It is therefore appropriate to include in the list of practices which are in all circumstances unfair a provision which, without imposing an outright ban on advertising directed at children, protects them from direct exhortations to purchase. The average consumer test is not a statistical test. National courts and authorities will have to exercise 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.

(19) Where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.

(20) It is appropriate to provide a role for codes of conduct, which enable traders to apply the principles of this Directive effectively in specific economic fields. In sectors where there are specific mandatory requirements

regulating the behaviour of traders, it is appropriate that these will also provide evidence as to the requirements of professional diligence in that sector. The control exercised by code owners at national or Community level to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and should therefore be encouraged. With the aim of pursuing a high level of consumer protection, consumers' organisations could be informed and involved in the drafting of codes of conduct.

(21) Persons or organisations regarded under national law as having a legitimate interest in the matter must have legal remedies for initiating proceedings against unfair commercial practices, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings. While it is for national law to determine the burden of proof, it is appropriate to enable courts and administrative authorities to require traders to produce evidence as to the accuracy of factual claims they have made.

(22) It is necessary that Member States lay down penalties for infringements of the provisions of this Directive and they must ensure that these are enforced. The penalties must be effective, proportionate and dissuasive.

(23) Since the objectives of this Directive, namely to eliminate the barriers to the functioning of the internal market represented by national laws on unfair commercial practices and to provide a high common level of consumer protection, by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to eliminate the internal market barriers and achieve a high common level of consumer protection.

(24) It is appropriate to review this Directive to ensure that barriers to the internal market have been addressed and a high level of consumer protection achieved. The review could lead to a Commission proposal to amend this Directive, which may include a limited extension to the derogation in Article 3(5), and/or amendments to other consumer protection legislation reflecting the Commission's Consumer Policy Strategy commitment to review the existing acquis in order to achieve a high, common level of consumer protection.

(25) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER 1

### GENERAL PROVISIONS

#### Article 1

##### Purpose

The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.

#### Article 2

##### Definitions

For the purposes of this Directive:

- (a) "consumer" means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;
- (b) "trader" means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;
- (c) "product" means any goods or service including immovable property, rights and obligations;
- (d) "business-to-consumer commercial practices" (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;
- (e) "to materially distort the economic behaviour of consumers" means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;
- (f) "code of conduct" means an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;
- (g) "code owner" means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it;
- (h) "professional diligence" means 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;
- (i) "invitation to purchase" means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase;
- (j) "undue influence" means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision;
- (k) "transactional decision" means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;
- (l) "regulated profession" means a professional activity or a group of professional activities, access to which or the pursuit of which, or one of the modes of pursuing which, is conditional, directly or indirectly, upon possession of specific professional qualifications, pursuant to laws, regulations or administrative provisions.

Article 3

## Scope

1. This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.
2. This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.
3. This Directive is without prejudice to Community or national rules relating to the health and safety aspects of products.
4. In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.
5. For a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. The review referred to in Article 18 may, if considered appropriate, include a proposal to prolong this derogation for a further limited period.
6. Member States shall notify the Commission without delay of any national provisions applied on the basis of paragraph 5.
7. This Directive is without prejudice to the rules determining the jurisdiction of the courts.
8. This Directive is without prejudice to any conditions of establishment or of authorisation regimes, or to the deontological codes of conduct or other specific rules governing regulated professions in order to uphold high standards of integrity on the part of the professional, which Member States may, in conformity with Community law, impose on professionals.
9. In relation to "financial services", as defined in Directive 2002/65/EC, and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates.
10. This Directive shall not apply to the application of the laws, regulations and administrative provisions of Member States relating to the certification and indication of the standard of fineness of articles of precious metal.

## Article 4

### Internal market

Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.

## CHAPTER 2

### UNFAIR COMMERCIAL PRACTICES

## Article 5

### Prohibition of unfair commercial practices

1. Unfair commercial practices shall be prohibited.
2. A commercial practice shall be unfair if:
  - (a) it is contrary to the requirements of professional diligence, and
  - (b) it materially distorts or is likely to materially distort the economic

behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

3. Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

4. In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,  
or

(b) are aggressive as set out in Articles 8 and 9.

5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.

## Section 1

### Misleading commercial practices

#### Article 6

##### Misleading actions

1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

(a) the existence or nature of the product;

(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;

(c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;

(e) the need for a service, part, replacement or repair;

(f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;

(g) the consumer's rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [8], or the risks he may face.

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:
- (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;
  - (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
    - (i) the commitment is not aspirational but is firm and is capable of being verified,
    - and
    - (ii) the trader indicates in a commercial practice that he is bound by the code.

#### Article 7

##### Misleading omissions

1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.
3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.
4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:
- (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
  - (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
  - (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
  - (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
  - (e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.
5. Information requirements established by Community law in relation to

commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.

## Section 2

### Aggressive commercial practices

#### Article 8

##### Aggressive commercial practices

A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

#### Article 9

##### Use of harassment, coercion and undue influence

In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of:

- (a) its timing, location, nature or persistence;
- (b) the use of threatening or abusive language or behaviour;
- (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;
- (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;
- (e) any threat to take any action that cannot legally be taken.

## CHAPTER 3

### CODES OF CONDUCT

#### Article 10

##### Codes of conduct

This Directive does not exclude the control, which Member States may encourage, of unfair commercial practices by code owners and recourse to such bodies by the persons or organisations referred to in Article 11 if proceedings before such bodies are in addition to the court or administrative proceedings referred to in that Article.

Recourse to such control bodies shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in Article 11.

## CHAPTER 4

### FINAL PROVISIONS

#### Article 11

##### Enforcement

1. Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.

Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:

(a) take legal action against such unfair commercial practices;  
and/or

(b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 10. These facilities shall be available regardless of whether the consumers affected are in the territory of the Member State where the trader is located or in another Member State.

It shall be for each Member State to decide:

(a) whether these legal facilities may be directed separately or jointly against a number of traders from the same economic sector;

and

(b) whether these legal facilities may be directed against a code owner where the relevant code promotes non-compliance with legal requirements.

2. Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and in particular the public interest:

(a) to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices;

or

(b) if the unfair commercial practice has not yet been carried out but is imminent, to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice, even without proof of actual loss or damage or of intention or negligence on the part of the trader.

Member States shall also make provision for the measures referred to in the first subparagraph to be taken under an accelerated procedure:

- either with interim effect,

or

- with definitive effect,

on the understanding that it is for each Member State to decide which of the two options to select.

Furthermore, Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of unfair commercial practices the cessation of which has been ordered by a final decision:

(a) to require publication of that decision in full or in part and in such form as they deem adequate;

(b) to require in addition the publication of a corrective statement.

3. The administrative authorities referred to in paragraph 1 must:

(a) be composed so as not to cast doubt on their impartiality;

(b) have adequate powers, where they decide on complaints, to monitor and enforce the observance of their decisions effectively;

(c) normally give reasons for their decisions.

Where the powers referred to in paragraph 2 are exercised exclusively by an administrative authority, reasons for its decisions shall always be given.

Furthermore, in this case, provision must be made for procedures whereby improper or unreasonable exercise of its powers by the administrative authority or improper or unreasonable failure to exercise the said powers can be the subject of judicial review.

#### Article 12

Courts and administrative authorities: substantiation of claims

Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 11:

(a) to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice if, taking into account the legitimate interest of the trader and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case;

and

(b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority.

#### Article 13

Penalties

Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive.

#### Article 14

Amendments to Directive 84/450/EEC

Directive 84/450/EEC is hereby amended as follows:

1. Article 1 shall be replaced by the following:

"Article 1

The purpose of this Directive is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted."

;

2. in Article 2:

- point 3 shall be replaced by the following:

"3. "trader" means any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and any one acting in the name of or on behalf of a trader."

,

the following point shall be added:

"4. "code owner" means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it."

;

3. Article 3a shall be replaced by the following:

"Article 3a

1. Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

(a) it is not misleading within the meaning of Articles 2(2), 3 and 7(1) of this

Directive or Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [9];

(b) it compares goods or services meeting the same needs or intended for the same purpose;

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(e) for products with designation of origin, it relates in each case to products with the same designation;

(f) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(g) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

(h) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.

;

4. Article 4(1) shall be replaced by the following:

"1. Member States shall ensure that adequate and effective means exist to combat misleading advertising in order to enforce compliance with the provisions on comparative advertising in the interest of traders and competitors. Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating misleading advertising or regulating comparative advertising may:

(a) take legal action against such advertising;

or

(b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

It shall be for each Member State to decide which of these facilities shall be available and whether to enable the courts or administrative authorities to require prior recourse to other established means of dealing with complaints, including those referred to in Article 5.

It shall be for each Member State to decide:

(a) whether these legal facilities may be directed separately or jointly against a number of traders from the same economic sector;

and

(b) whether these legal facilities may be directed against a code owner where the relevant code promotes non-compliance with legal requirements."

;

5. Article 7(1) shall be replaced by the following:

"1. This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for traders and competitors."

Article 15

Amendments to Directives 97/7/EC and 2002/65/EC

1. Article 9 of Directive 97/7/EC shall be replaced by the following:

## "Article 9

### Inertia selling

Given the prohibition of inertia selling practices laid down in Directive 2005/29/EC of 11 May 2005 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [10], Member States shall take the measures necessary to exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent.

;

2. Article 9 of Directive 2002/65/EC shall be replaced by the following:

## "Article 9

Given the prohibition of inertia selling practices laid down in Directive 2005/29/EC of 11 May 2005 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [11] and without prejudice to the provisions of Member States' legislation on the tacit renewal of distance contracts, when such rules permit tacit renewal, Member States shall take measures to exempt the consumer from any obligation in the event of unsolicited supplies, the absence of a reply not constituting consent.

## Article 16

Amendments to Directive 98/27/EC and Regulation (EC) No 2006/2004

1. In the Annex to Directive 98/27/EC, point 1 shall be replaced by the following:

"1. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p. 22)."

2. In the Annex to Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of the consumer protection law (the Regulation on consumer protection cooperation) [12] the following point shall be added:

"16. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p. 22)."

## Article 17

### Information

Member States shall take appropriate measures to inform consumers of the national law transposing this Directive and shall, where appropriate, encourage traders and code owners to inform consumers of their codes of conduct.

## Article 18

### Review

1. By 12 June 2011 the Commission shall submit to the European Parliament and the Council a comprehensive report on the application of this Directive, in particular of Articles 3(9) and 4 and Annex I, on the scope for further harmonisation and simplification of Community law relating to consumer protection, and, having regard to Article 3(5), on any measures that need to be taken at Community level to ensure that appropriate levels of consumer protection are maintained. The report shall be accompanied, if necessary, by a proposal to revise this Directive or other relevant parts of Community law.

2. The European Parliament and the Council shall endeavour to act, in accordance with the Treaty, within two years of the presentation by the Commission of any

proposal submitted under paragraph 1.

#### Article 19

##### Transposition

Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 12 June 2007. They shall forthwith inform the Commission thereof and inform the Commission of any subsequent amendments without delay.

They shall apply those measures by 12 December 2007. When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication.

Member States shall determine how such reference is to be made.

#### Article 20

##### Entry into force

This Directive shall enter into force on the day following its publication in the Official Journal of the European Union.

#### Article 21

##### Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 11 May 2005.

For the European Parliament

The President

J. P. Borrell Fontelles

For the Council

The President

N. Schmit

[1] OJ C 108, 30.4.2004, p. 81.

[2] Opinion of the European Parliament of 20 April 2004 (OJ C 104 E, 30.4.2004, p. 260), Council Common Position of 15 November 2004 (OJ C 38 E, 15.2.2005, p. 1), Position of the European Parliament of 24 February 2005 (not yet published in the Official Journal) and Council Decision of 12 April 2005.

[3] OJ L 250, 19.9.1984, p. 17. Directive as amended by Directive 97/55/EC of the European Parliament and of the Council (OJ L 290, 23.10.1997, p. 18).

[4] OJ L 144, 4.6.1997, p. 19. Directive as amended by Directive 2002/65/EC (OJ L 271, 9.10.2002, p. 16).

[5] OJ L 166, 11.6.1998, p. 51. Directive as last amended by Directive 2002/65/EC.

[6] OJ L 271, 9.10.2002, p. 16.

[7] OJ L 201, 31.7.2002, p. 37.

[8] OJ L 171, 7.7.1999, p. 12.

[9] OJ L 149, 11.6.2005, p. 22."

[10] OJ L 149, 11.6.2005, p. 22."

[11] OJ L 149, 11.6.2005, p. 22."

[12] OJ L 364, 9.12.2004, p. 1.

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## ANNEX I

### COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

#### Misleading commercial practices

1. Claiming to be a signatory to a code of conduct when the trader is not.
2. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
3. Claiming that a code of conduct has an endorsement from a public or other body which it does not have.
4. Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.
5. Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).
6. Making an invitation to purchase products at a specified price and then:
  - (a) refusing to show the advertised item to consumers;
  - or
  - (b) refusing to take orders for it or deliver it within a reasonable time;
  - or
  - (c) demonstrating a defective sample of it,with the intention of promoting a different product (bait and switch)
7. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.
8. Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.
9. Stating or otherwise creating the impression that a product can legally be sold when it cannot.
10. Presenting rights given to consumers in law as a distinctive feature of the trader's offer.
11. Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). This is without prejudice to Council Directive 89/552/EEC [1].
12. Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.
13. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.

14. 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 sale or consumption of products.
15. Claiming that the trader is about to cease trading or move premises when he is not.
16. Claiming that products are able to facilitate winning in games of chance.
17. Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.
18. Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.
19. Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.
20. Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.
21. Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.
22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.
23. Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.

#### Aggressive commercial practices

24. Creating the impression that the consumer cannot leave the premises until a contract is formed.
25. Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.
26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC [2] and 2002/58/EC.
27. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.
28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting.
29. Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer except where the product is a substitute supplied in conformity with Article 7(3) of Directive 97/7/EC (inertia selling).

30. Explicitly informing a consumer that if he does not buy the product or service, the trader's job or livelihood will be in jeopardy.

31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:

- there is no prize or other equivalent benefit,

or

- taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

[1] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ L 298, 17.10.1989, p. 23). Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31). Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

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ANNEX II

COMMUNITY LAW PROVISIONS SETTING OUT RULES FOR ADVERTISING AND COMMERCIAL COMMUNICATION

Articles 4 and 5 of Directive 97/7/EC

Article 3 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1]

Article 3(3) of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis [2]

Article 3(4) of Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers [3]

Articles 86 to 100 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [4]

Articles 5 and 6 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [5]

Article 1(d) of Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit [6]

Articles 3 and 4 of Directive 2002/65/EC

Article 1(9) of Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a

view to regulating management companies and simplified prospectuses [7]  
Articles 12 and 13 of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation [8]  
Article 36 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [9]  
Article 19 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments [10]  
Articles 31 and 43 of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance [11] (third non-life insurance Directive)  
Articles 5, 7 and 8 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading [12]

[1] OJ L 158, 23.6.1990, p. 59.  
[2] OJ L 280, 29.10.1994, p. 83.  
[3] OJ L 80, 18.3.1998, p. 27.  
[4] OJ L 311, 28.11.2001, p. 67. Directive as last amended by Directive 2004/27/EC (OJ L 136, 30.4.2004, p. 34).  
[5] OJ L 178, 17.7.2000, p. 1.  
[6] OJ L 101, 1.4.1998, p. 17.  
[7] OJ L 41, 13.2.2002, p. 20.  
[8] OJ L 9, 15.1.2003, p. 3.  
[9] OJ L 345, 19.12.2002, p. 1. Directive as amended by Council Directive 2004/66/EC. (OJ L 168, 1.5.2004, p. 35).  
[10] OJ L 145, 30.4.2004, p. 1.  
[11] OJ L 228, 11.8.1992, p. 1. Directive as last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).  
[12] OJ L 345, 31.12.2003, p. 64.

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