LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

PUBLIC CONSULTATION ON THE SCHEME OF A CONSUMER RIGHTS BILL 2021

DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT

June 2021

1 INTRODUCTION

1.1 The Law Society of Ireland ("the **Society**") welcomes the opportunity to make a submission on the Scheme of the Consumer Rights Bill 2021 ("the **Scheme**"). The Society also notes that some, but not all, of its September 2015 submissions concerning the Scheme for the Consumer Rights Bill 2015 are reflected in the Scheme.

1.2 The Scheme aims to consolidate in a single, modernised enactment, provisions which are currently spread over a number of different pieces of primary and secondary legislation. It also seeks to address significant gaps in current legislation, notably those which relate to remedies available to consumers.

1.3 The Society is the representative organisation for the solicitors' profession in the Republic of Ireland. Its members provide legal advice in respect of business law, contracts and technology matters, including advising those who create, develop, supply distribute, consume and otherwise exploit digital content.

1.4 The Society has not been able to carry out a comprehensive analysis of the Scheme in the relatively short window provided for public consultation. As such, this submission reflects the Society's preliminary observations on Parts 2, 4 and 7 of the Scheme. We intend to examine the Scheme in further detail and trust that the Department will consider future submissions in this regard, in relation to both the Scheme and the Bill.

2. COMMENTS ON GENERAL FEATURES OF THE SCHEME

2.1 The Society welcomes the consolidation and reform of law in this area into a single consistent and coherent instrument, particularly the incorporation of SI 484 of 2013 into Part 5 (consumer information and cancellation rights) and SI 27 of 1995 into Part 7 (unfair terms in consumer contracts). The current state of the law (with overlapping but inconsistent legislation deriving separately from domestic law and European law) is highly unsatisfactory.

2.2 The introduction of the requirement of fitness for purpose and the prohibition of the limitation of liability in respect of implied terms in the case of contracts for the supply of services by most service providers in the professional services area should be reconsidered. These changes represent a radical alteration to the basis upon which many professionals provide services.

2.3 The price of a service should take into account the risk of providing it and the cost of insuring against that risk. Accordingly, it is commonplace that limitations are set out in the terms of engagement of professional service providers. The availability/pricing of professional services in the State is likely to be adversely affected if the providers of those services are exposed to unlimited risk.

2.4 We note that in the UK, where consumer law was reformed in the Consumer Rights Act 2015, a fitness for purpose requirement has not been included in contracts for the supply of services. We deal with these matters in paragraphs 5.4 and 5.7 below.

2.5 The Consumer Rights Bill applies only to B2C transactions. The general rule of law relating to sales of goods and supplies of services also requires urgent attention and reform. The general law will continue to be based on the Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980. It would appear that only Section 4 of the 1893 Act is being repealed. Many of the other important provisions of the 1893 Act will continue to apply other than to transactions within the scope of the proposed new legislation. Accordingly, until new legislation is introduced the pattern of our law will, in some respects, become even more complicated after the enactment of a Bill which reflects the provisions of the Scheme.

3 PART 2 – CONTRACTS FOR THE SALE OF GOODS

3.1 Head 3(10) - Standard of Reasonableness

We welcome Head 3(10) which sets an important objective criteria as to how to determine the standard of reasonableness which the goods must attain.

3.2 Head 14 - Conformity

The Society welcomes the Department's decision to give effect to its representations in September 2015 that the recipient of a gift must also be a consumer before he or she can benefit from the rights conferred on the first donee of the goods. We also welcome the Department's decision to remove reference to a consumer having made known the particular purpose for which the consumer requires the goods by way of an *implied* communication.

3.3 Head 16(3) - Spare Parts and Adequate After Sales Service

The ability of a trader to secure spare parts may be outside of its control and, as such, we would question whether such an absolute obligation should be imposed on a trader. We would suggest that the obligation should be subject to a qualification *so far as such is reasonably practicable*. Similarly, in ascertaining the reasonableness of the period during which a trader should be subject to the obligation to maintain spare parts, this should be expanded upon by requiring regard to be had to the nature of the goods, the price and the accessibility in the marketplace of such parts.

3.4 Head 17 - Objective Conformity

We welcome the Department's decision to reference (at Head 17(2)(d)) the price of the goods as a factor to be regarded in determining the durability of the goods. This is an important feature in section 14 of the Sale of Goods Act 1893 and its preservation is welcomed by the Society.

3.5 **Head 17 - Consumer's Awareness of Defects**

We note that Head 17(8) replicates Article 7(5) of the Sales of Goods Directive ("the **SGD**") in referring to a conformity which relates to "particular characteristics". We suggest that this could be extended to cover particular categories of sale such as where the consumer is specifically advised by the trader as to the source or general category of goods so that the risk of nonconformity can be fairly passed to a consumer who is fully aware of the risks involved. In addition, goods made to the specific order and specification of a consumer could be excluded.

While noting that Head 17(9)(b) gives effect *verbatim* to the requirement of Articles 7(5) of the SGD in that, in the case of a dispute, it is for the trader to show that a consumer's consent to a deviation from objective conformity was "expressly and separately" accepted, the requirement for separate acceptance may lead to scope for ambiguity. To what extent must there be a separation? Will it be sufficient, for example, for the acceptance to be in a form attached to the contract or will there be a need for a minimum separation in time in the period between a consumer's completion of the order process and the conclusion of the contract?

3.6 **Head 18 – Incorrect Installation of Goods**

This provides that, where it is "intended" that the installation be carried out by the consumer, any incorrect installation due to shortcomings in installation instructions, the lack of conformity shall be regarded as a lack of conformity of the goods. It is unclear if both parties are required to intend that the installation be carried out by the consumer or if it is sufficient that only the consumer has such an intention. In circumstances where, due to the nature of the goods, installation by the consumer would be most unwise, we would recommend that clarity be imposed by qualifying the reference to "intended" by reference to where such is intended by both the trader and the consumer (as is the case in Head 19(2)). We consider that it should continue to be possible for the installation instructions to make clear that installation of the goods shall be effected by a competent person only and not by a consumer who does not have the skills of a competent person.

3.7 **Head 19 – Trader to Have Rights to Sell Goods**

We welcome the reformed language replacing provisions of section 12 of the Sale of Goods Act 1893 which preserve the essential concepts of charges, encumbrances and quiet position which have established meanings under Irish law. We also welcome the preservation of the right of the buyer to rescind (now the 'right to terminate') in the event that the trader does not have the right to sell the goods.

3.8 **Head 21 – Liability of Trader**

We note that the Department has decided not to implement the option in Article 10(1) of the SGD to limit the liability of the trader to one year and, as a consequence, a consumer many maintain an action for non-conformity subject only to the six-year

period for contract claims under the Statute of Limitations 1957. While noting the Department's reasoning in footnote 101, we consider that the improved position of the consumer under the Scheme should be balanced by a shortening of the period to a period of less than six years as is specifically contemplated by Article 10. A suggested reasonable period would, we believe, be three years.

From a drafting perspective, we would recommend that all of the obligations which are deemed to be imposed on a trader under Heads 15 to 19 should be given effect by deeming the contract to include a term to such effect, which is the approach taken in section 17 of the UK Consumer Rights Act 2012.

3.9 **Article 12 SGD - The Obligation of the Consumer to Notify the Trader of Non-Conformity**

We agree with the Department's decision (page 36 of the Consultation Document) not to implement Article 12 of the SGD which would deny remedies to a consumer who did not notify the trader of any non-conformity within two months of the detection.

Nonetheless, we consider that the Scheme should oblige a consumer to notify the trader of a detection within a specified period of delivery and, if not, the court should be expressly required to have regard to such non-disclosure in determining which remedy should be granted to the consumer. It seems to us to be unfair if a consumer should, after an inordinate period of time, assert non-conformity without having previously notified the trader within a prescribed period of detection of same.

3.10 **Article 13(7)**

We note that the SGD permits Member States to regulate whether and, if so, to what extent, a contribution by the consumer to the lack of conformity affects the consumer's rights to remedies. We consider it only fair and reasonable that the Scheme would implement this option in order to balance the respective rights and obligations of the trader and the consumer.

In this regard, we consider that the Scheme should expressly empower the court to have regard to the consumer's actions such as failing to follow user instructions or use by the consumer for an unintended purpose.

3.11 **Head 22 – Burden of Proof**

We consider that the decision not to extend the period of one year to two years (as permitted by Article 11(2) of the SGD) achieves a reasonable balance between the interests of traders and consumers.

In order to ensure appropriate clarity, we would recommend that language similar to section 14 of the Sale of Goods Act 1893 be introduced to the Scheme to ensure that, save as set out in legislation, there shall be no other implied terms as to the quality or fitness for purpose. This should also be applied in relation to contracts for the supply of services in Part 4.

3.12 **Head 22 - Burden of Proof**

The Society notes that a presumed lack of conformity will arise where the defect arises within one year of the date of delivery of the goods, which is the minimum prescribed by Article 11(1) of the SGD. The Society agrees with the Department's decision not to utilise the Article 11(2) option for Member States to extend the period to two years, which would impose an unreasonable burden on the commercial sector.

3.13 **Head 28(2) - Depreciation**

We note that the Department is interested to receive the views of interested parties in relation to this subhead. We agree with the principle that a trader should be entitled to impose a deduction for depreciation, particularly where the consumer's use of the goods has exceeded a six-month period. We note that this problematic issue is addressed in Section 24(8), (9) and (10) of the UK Consumer Rights Act 2015 which, in our view, achieves a reasonable balance. We believe that fairness requires that an allowance for depreciation be factored into the price to be repaid to the consumer.

3.14 **Head 28(5) – Trade-In-Value**

The Society believes that, in order to avoid difficulties with Head 28(5)(b) where a trade-in value was not ascribed, a trader should be to specify a monetary value for all trade-in goods, particularly in car sales and part exchanges thereunder.

3.15 **Sales of Second-Hand Goods at Public Auction**

We note confirmation (at footnote 23) that a decision was taken by the Department not to implement the opt-out at Article 3(5)(a) of the SGD to enable second-hand goods sold at public auction to be excluded from scope.

We consider that the nature of such goods and the particular features of an auction sale are such as to justify utilisation of the opt-out. If however the opt-out is not utilised then we respectfully suggest that the Department should consider reducing the 12 months in Head 22 to a shorter period, such as three months.

3.16 **Sales of Live Animals**

We note that the Department has also chosen not to implement the opt-out in Article 3(5)(b) of the SGD which enables living animals to be excluded from scope.

We consider that the nature of living animals is such that they should, in fact, be excluded from scope. While we note that the Department is concerned to ensure the legislation applies to the sale of pets for domestic use, we consider that such animals should not fall within scope and the ability of consumers to return such goods is likely to encourage speculative and Christmas purchases of pets.

4 COMMERCIAL GUARANTEES

4.1 Head 38(2) (a)

We believe it would be beneficial to consumers if the Scheme were to require a trader to ensure that the guarantee statement makes it clear that the guarantee does not exclude consumers rights under the Scheme.

5 PART 4 - CONTRACTS FOR THE SUPPLY OF A SERVICE

5.1 Head 61 – Ancillary Contract

In relation to Footnote 300, we believe that the correct reference in SI 484 of 2013 is Regulation 23(1) (Ancillary Contracts), not Regulation 29(1).

5.2 Head 62(4)(a) – Application of Other Enactments

The Society welcomes the proposed continued application of provisions such as Section 26(A) of the Solicitors (Amendment) Act 1994 and the other provisions referred to in footnote 306. We consider that, for the avoidance of any doubt, the provisions of Head 73 (exclusion or limitation of liability of traders) should expressly acknowledge the continued application of provisions such as Section 26(A) of the Solicitors (Amendment) Act 1994.

5.3 Head 65(4) – Indefinite Contracts

Reference is made to contracts for supply of a service for a fixed or indefinite period of time. While accepting that the majority of traders will provide services under formal terms and conditions, we recommend that if a contract does not contain a termination clause, the Scheme should provide that either party may terminate a contract for an indefinite period of time on reasonable notice after the expiry of any fixed term.

5.4 Head 65 - Service to be fit for a Particular Purpose

Head 65 (Service to be fit for Particular Purpose) represents a major change in the law. The existing law requires a supplier of services to exercise due care skill and diligence but there is currently no statutorily implied fitness for purpose standard. Whereas some traders provide relatively standardised services which are akin to goods e.g. dry cleaning, fast food, telecommunications, cable, transport and accommodation, professional services are far from standardised.

The introduction of a fitness for purpose standard represents a significant development in respect of contracts for the provision of professional services to consumers. We note that the genesis for the introduction of such a standard is based on legislation in New Zealand together with other sources referenced at footnote 317. It is noteworthy that the UK's Consumer Rights Act 2015, does not adopt an outcome-based standard for services rather, it continues to rely on the duty of care and skill.

The Society is not aware of cases where the absence of an implied term (as proposed) has caused difficulty. In appropriate cases, the courts have implied from the facts, fitness of purpose type obligations without the need for a statutory right. The Society understands the argument for such an implied term in the case of standardised services that are akin to goods of the kind referred to however, we are concerned that the proposed extension of such an implied term to a very wide range of services (including professional services, construction services and health care services) could give rise to unanticipated consequences in circumstances where it would not appear that the current state of the law gives rise to any special difficulties for consumers.

In particular, many solicitors and doctors accept instructions, particularly in litigation cases and complex surgery, where there is no assurance that a particular outcome can be achieved. Such situations do not appear to be satisfactorily addressed by Head 65 as currently drafted.

While a response to our concerns may lie in a point made at page 53 of the Consultation Document[1], the result will be the proliferation of further documentation to be considered by a consumer seeking to protect the service provider from the effect of this new provision, thereby leaving the consumer no better off.

5.5 **Head 65 (1)(c)**

We welcome the fact that the prior Scheme has been amended to reflect the Society's September 2015 submissions on this point.

5.6 **Head 68**

The Society welcomes this Head which, in enacting remedies for breach of the trader services obligations, brings consumers' remedies into line with those available to consumers under contracts for the sale of goods.

5.7 **Head 73 – Exclusion or Limitation of Liability**

As stated above in relation to Head 62(4), the Society welcomes the continued application of section 26(A) of the Solicitors (Amendment) Act 1994 together with other provisions referenced in footnote 306. However, save in relation to such exceptional circumstances, a term of a services contract to exclude or restrict a trader's liability in respect of the statutory implied terms would be prohibited. As such, enactment of this provision would require a significant change in commercial practice.

---

[1] "If the supplier of a service considers that he or she is not in a position to provide a service reasonably fit for the purpose, or one that can reasonably be expected to achieve the result, made known by the consumer, he or she can decline to accept the purpose or result proposed by the consumer."

Providers of professional services frequently agree limits on their liability. It is common for such providers to set a limit by reference to the value of the fees to be paid or some other measure. The level of exposure of a professional is commonly related to the insurance cover they purchase and thus is reflected in the fees charged for the service. Contracts for the provision of services to consumers may include transactions of enormous value and risk. The bar on limitation of liability set out in Head 73 is unduly inflexible. It should permit limitations provided that they are fair and reasonable having regard to the provisions set out in Part 7 of the Scheme.

6 PART 7 – UNFAIR TERMS IN CONSUMER CONTRACTS

Part 7 outlines intentions regarding one of the most important aspects of consumer law which applies to all types of consumer contracts, namely the law on unfair terms founded on Directive 93/13/EEC. We understand that Part 7 pursues the following broad objectives:

(i) Expand the current prohibitions on unfair terms, in the context of the Directive being a minimum harmonisation instrument which some other EU Member States have already expanded through national law;
(ii) Consolidate the law on unfair terms with other consumer laws in a single Bill; and
(iii) Provide for the law on unfair terms to be subject to radically more severe sanctions than is currently the case, with fines of up to 4% of turnover becoming possible.

We note that while the first two of the above objectives underpinned the 2015 Scheme, the third has been prompted by more recent EU legislation. We will deal with each of the three separately below.

6.1 Expand the current prohibitions on unfair terms

6.1.1. Head 105

As an initial point, we note and make no comment on the proposal to radically increase the reach of unfair terms law by bringing into its scope (i) individually negotiated consumer agreements, (ii) consumer agreements where the consumer does not pay a monetary price, and (iii) consumer agreements governed by the laws of non-EEA/EU jurisdictions.

6.1.2 New Core Exemption & Transparency Requirement – Heads 106 and 108

The first proposal on which we wish to comment is the narrowing of the so-called "core exemption". We note that the legislative objective here is to prevent the exemption being interpreted as broadly as it was by the English Supreme Court in *Office of Fair-Trading v Abbey National ([2009] UK SC 6*), where the exemption was interpreted as meaning that bank overdraft charges are not subject to unfair terms

law. We make no comment on this objective, rather our comments focus on the problematic ambiguity in the proposed drafting to effect same.

6.1.3. Ancillary & Contingent Payments – Head 108

The Scheme states that a payment term is subject to unfair terms law where it relates to a:

> *"payment that is –*
>
> *(a) incidental or ancillary to the price payable under the contract for the goods, digital content, digital services, services or other subject matter of the contract supplied in exchange; or*
>
> *(b) contingent on the occurrence or non-occurrence of a particular event."*

Our comments relate to the underlined parts of the above drafting, in particular.

Firstly, we submit that use of the wording "incidental or ancillary" is ambiguous and raises many immediate interpretative questions such as the following:

- What is the intended difference in meaning between the two words?
- Is the intention to cover every price other than the 'headline price'?
- If not, is the intention to only cover prices which are, relative to the 'headline price', a certain amount lower (in quantum/regularity/prominence)?

It is by no means clear to us that a distinction between a 'headline price' and 'a non-headline price' is compatible with future selling practices, noting in particular that digital services are increasingly personalised and focused on add-ons which are priced separately. Thus, we would query whether it is appropriate to define the limits of unfair terms law based on such a distinction.

Secondly, we submit that the breadth of the term "a particular event" should be reconsidered and specifically, consideration should be given to narrowing the term so that it only covers events unforeseen or unplanned by the consumer. As currently drafted, "a particular event" might be interpreted as covering a consumer's decision to purchase an add-on (e.g. a "Cinema Package" to add to their basic streaming service), which would have the unintended consequence that a particular price would (or would not) be assessable for fairness under unfair terms law depending on the order in which it was purchased by a consumer (i.e. assessable if purchased as an add-on, but not if purchased upfront).

Thirdly, we submit that the above drafting should be reconsidered on the basis that it may have a very uneven impact across different business models/sectors and it would be inequitable for there to be an uneven level of regulation across sectors. In particular, we envisage a particularly large impact on digital and subscription-based service providers who invite consumers to initially commit to pay for a basic service

only, with the option of subsequently paying for add-ons/'out of bundle' services (see comment above). By contrast, providers of 'once-off' supplies would be unlikely to face any impact or scrutiny of their pricing terms under unfair terms law. It is not clear that such uneven application is equitable or justifiable, where we are aware of no evidence that there is a higher risk of consumer detriment arising from a pricing term which is not a 'headline price'.

6.1.4. Transparency Requirement - Head 106

We have concerns regarding ambiguity in the drafting of the proposed transparency requirement, which must be complied with as a condition to availability of the "core exemption".

The relevant change is as follows - the current law goes no further than Article 5 of the SGD in providing that written contract terms should be drafted in "plain and intelligible language". The Scheme proposes to strengthen this requirement in the following terms which go beyond anything in the SGD or relevant case law:

> *"(1) The trader shall ensure that the terms of consumer contracts are transparent.*
>
> *(2) A term of a consumer contract is transparent if –*
>
> > *(a) the term is expressed in plain and intelligible language,*
> >
> > *(b) the term, if written, is legible and presented clearly,*
> >
> > *(c) the term is made available to the consumer in a manner which gives the consumer a real opportunity of becoming acquainted with it before the conclusion of the contract,*
> >
> > *(d) the term, if novel or onerous, is given due prominence;*
> >
> > *(e) the economic costs and consequences deriving from the term would be comprehensible to the average consumer."*

We submit that the underlined parts of the above are ambiguous and specifically raise many immediate interpretative questions such as:

- What exactly is meant by a "real opportunity"?
- Does "novel" mean new to a particular consumer or new in the market?
- Does "onerous" have a fixed meaning or does its meaning depend on the circumstances and, in particular, the relevant costs/risks for the trader?
- What is the difference between "due prominence" and "real opportunity"?
- What is meant by "the economic costs and consequences"?

We note that the sub-paragraphs in respect of which we raise ambiguity concerns i.e. (c), (d) and (e), did not form part of the 2015 Bill.

6.1.5 Additions to the "Grey List" – Head 111

We have concerns arising from ambiguous drafting and a consequential lack of legal certainty as regards the proposed additions to the "grey list".

Potential legal uncertainty is of concern where the inclusion of a term on the "grey list" makes it subject to a legal presumption of unfairness in a context where the potential sanctions for using an 'unfair term' are becoming more severe (as outlined below).

In particular, we are concerned that the following drafting is ambiguous:

- *(Paras 4 & 5) "a disproportionately high sum in compensation"*
- *(Paras 7 & 9) – "without reasonable notice/unreasonably early"*
- *(Para 10) – "terms with which the consumer had no real opportunity of becoming acquainted"*
- *(Para 22) "disproportionate formal or other requirements where the consumer wishes to terminate the contract and switch to another trader"*
- *(Para 23) – "excessive*"

In addition, we are concerned that the highlighted wording wrongly assumes that a trader will know that its customer is terminating with a view to contracting with another trader.

Finally, we see potential for further confusion and legal uncertainty arising from the use of three different formulations of the same concept in Paragraphs 11, 13 and 21, namely: (i) " without a valid reason which is specified in the contract", (ii) "without a valid reason", and (iii) "without a valid justification".

In conclusion, we identify problematic ambiguity and the risk of unintended consequences arising from the proposed drafting to expand the reach and the requirements of unfair terms law. The proposed expansion needs careful consideration, noting that it goes beyond what is required by EU law and what was contemplated in the 2015 Bill, in circumstances where the potential sanctions will also become more severe (as noted below).

We do not accept that any current ambiguity is satisfactorily addressed by the provision related to the future issue of Ministerial Regulations (or plans for CCPC guidelines etc.). In our view, unambiguous drafting must be included in the Bill so that businesses can obtain definitive legal advice on key matters such as whether or not a particular contract term comes within the "core exemption" or the "grey list".

6.2 **Consolidating the law on unfair terms with other consumer laws**

We support the proposal to consolidate the law on unfair terms with other consumer laws in a single Bill. At a more granular level, we also welcome the proposals to:

- Change basic terminology in the current law on unfair terms so that it mirrors other consumer laws (e.g. using "trader" rather than "seller"/"supplier"); and
- Have the same remedies and enforcement powers apply to unfair terms law and other consumer laws.

The above will, in our view, make Irish consumer law more coherent, reduce legal uncertainty and facilitate self-assessment of compliance by businesses of all sizes.

It will be important to ensure that the Scheme's objectives of consolidation and simplification will not be undermined by future events, including the need to implement sector-specific EU legislation which will overlap with the Consumer Rights Act.

In particular, we note the potential for confusion between parts of the Scheme and the telecoms industry-specific consumer protection laws under the EU Electronic Communications Code which will be transposed into Irish law in the near term. In all sectors where there is sector-specific consumer protection rules, a lot of time and resources by both industry and (sector-specific) regulators is invested in ensuring compliance with those rules. As such, it will be vital to avoid a situation where the Consumer Rights Act causes conflict, confusion or additional unnecessary burdens.

6.3 **Strengthening remedies & sanctions for non-compliance with unfair terms law**

The Scheme makes provision for the law on unfair terms to be subject to radically more extensive and severe sanctions. While the current law does not provide any offences or penalties for use of unfair terms, the Scheme provides for both. In this context, we are again concerned regarding the proposed drafting being more difficult to interpret than ought to be the case.

6.3.1. <u>Head 139</u>

Our first comment is that the proposed drafting does not make it sufficiently clear, and easily accessible, that severe fines of up to 4% of turnover will be possible for use of unfair terms subject to EU law (e.g. a term which applies to cross-border sales and thus affects the collective interests of consumers in other EU member states).

This hugely significant change in law is buried in Head 139 and is effected through amendment of a statutory instrument which is not widely understood (S.I. No. 14 of 2020) rather than through inclusion of a provision in the Bill itself. This inaccessibility is further compounded by the fact that the relevant statutory instrument (as amended) does not even include definitions for the key terms which determine whether such severe fines may be imposed by an Irish court ('intra-Union infringement', 'repeated infringement').

6.3.2. Head 111

Our second comment relates to problematic ambiguity arising from the below drafting:

> *"The continued use in a consumer contract of a contract term presumed unfair in accordance with Part 1 of Schedule 4 shall be a prohibited commercial practice"*

What exactly is meant by "continued use"? The word "continued" implies that a certain relevant event occurs and usage continues after that, but it is not clear what would be the relevant event in this context? If the intention is to refer to a term being used in multiple contracts, perhaps the appropriate term is "repeated use"? If the intention is to refer to a term being used over a long period of time, perhaps the appropriate term is "prolonged use"?

Our third comment relates to the below provision regarding applications for a court order regarding an unfair term by a regulator or a consumer body (Head 113(6)):

> *"(6) An injunction granted pursuant to subhead (4) may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any trader."*

We regard as complex this provision for a Court injunction against one trader (granted based on case-specific facts including a case-specific balance of power between trader and consumer) being handed down in terms which also prevent all other traders selling into Ireland from using "any similar term, or a term having like effect". Even leaving aside the key question of whether a Court will have sufficient legal and factual material before it to enable it to conclude that 'universal prohibition' is appropriate, we identify a number of important practical complexities and challenging as follows:

- How are traders expected to know about a Court injunction which impacts them when they were not party to the case, they may be based overseas and may not regularly monitor Irish news sources, regulators' websites etc.?
- Why is there no provision for third party traders impacted by such an injunction to have an explicit statutory right to appeal the injunction decision?
- What would be the consequences of breach of such an injunction by such third-party traders?

6.3.3. Head 129

Our fourth comment relates to the proposed insertion of a three-year time limit for the commencement of summary proceedings for an offence under unfair terms law. We welcome this proposed amendment as it removes a cause of legal uncertainty.

6.3.4. Head 112

Our final comment relates to the proposed clarification that an Irish court is not required to consider compliance with unfair terms law on its own volition unless the court has enough material before it to enable an assessment of same.

We also welcome this proposed amendment as it removes a cause of legal uncertainty.

7. CONCLUSION

The Society welcomes the Scheme.

If many of the concepts within the Scheme are implemented, it will represent a significant improvement from the point of view of coherence and clarity as well as improving the position of consumers.

We hope that the Department finds our observations to be helpful and we will be glad to engage further on any of the matters raised.

For further information please contact:

Fiona Cullen
Public and Government Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7

Tel: 01 672 4800
Email: f.cullen@lawsociety.ie