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## Irish Consumer Law: Asserting a Domestic Agenda

Mary Donnelly and Fidelma White\*

### Introduction

Irish consumer law, as a discipline in its own right, has suffered an identity crisis, from its origins to the modern day. In part, this is because ongoing poverty post-independence<sup>1</sup> led to the late development of an Irish consumer society<sup>2</sup> and meant that issues of consumer protection did not receive the same kind of policy attention in Ireland as in more developed economies.<sup>3</sup> Even as Irish society became more affluent, mechanisms to take account of the consumer voice remained relatively under-developed and, in 2001, an OECD review of regulation in Ireland noted a poorly developed consumer culture and a policy bias in favour of producer interests.<sup>4</sup>

The establishment of a Consumer Strategy Group by the Minister of Enterprise, Trade and Employment in 2004 marked the beginnings of a policy shift towards greater recognition of consumer interests. The subsequent publication of the policy paper, *Make Consumers Count: a New Direction for Irish Consumers* led, in May 2007, to a new consumer protection body, the National Consumer Agency (NCA), being placed on a statutory footing.<sup>5</sup> Within a short time, however, in October 2008, the Minister for Finance, announced an intention to amalgamate the National Consumer Agency with the Competition Authority to create a single enforcement and protection agency in respect of consumer and competition matters. The impetus for the proposed amalgamation was cost-saving in the context of the emerging economic crisis in the public finances rather than the pursuit of more effective consumer protection. Nevertheless, the proposed institutional architecture does offer potential for better consumer protection. While progress on implementing this proposal has been slow, the amalgamating legislation is shortly expected to be brought before the Oireachtas.

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<sup>1</sup> On the interlinkage between increased affluence and the development of a consumer society, see J. Benson *The Rise of Consumer Society in Britain, 1880-1980* (London: Longman, 1994).

<sup>2</sup> The limited development is attributed to the absence of an industrial revolution and to the high rates of emigration and poverty which continued until the 1960s: Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979), at 572-581; Blackwell "Government, Economy and Society", in Litton ed., *Unequal Achievement, The Irish Experience 1957-1982*, (Dublin: Institute of Public Administration, 1982) p.43; Kennedy, Giblin and McHugh, *The Economic Development of Ireland in the Twentieth Century*, (London: Routledge, 1988); Garvin, *Preventing the Future: why was Ireland so poor for so long*, (Dublin: Gill and Macmillan, 2004).

<sup>3</sup> See for example, the United Kingdom where the Moloney Committee on Consumer Protection was established in 1959 and reported in 1962: Board of Trade, *Final Report of the Committee on Consumer Protection*, Cmnd 1781/1962.

<sup>4</sup> See Organisation for Economic Co-operation and Development, *Regulatory Reform in Ireland* (2001) available at [www.oecd.org/dataoecd/48/35/2475450.pdf](http://www.oecd.org/dataoecd/48/35/2475450.pdf); see also Consumer Strategy Group, *Make Consumers Count: a New Direction for Irish Consumers* (April 2005).

<sup>5</sup> Established by the Consumer Protection Act 2007, s.7. The NCA had been established on an interim basis in May 2005.

As might be expected, the lack of policy concern with consumers was largely reflected in an impoverished legal framework. It was not until the late 1970s, with the enactment of the Consumer Information Act 1978 and the Sale of Goods and Supply of Services Act 1980 that the Irish consumer was identified and specifically protected. Shortly thereafter, however, the active legislative role of protecting the Irish consumer shifted to Europe and any possibility of a distinct Irish consumer law agenda was brought to an abrupt end. More recently, there have been moves to reclaim Irish consumer law. For instance, following the final report of the Sales Law Review Group,<sup>6</sup> a political commitment has been made to introduce “comprehensive” consumer rights legislation.<sup>7</sup> However, the scheme of the legislation has yet to be agreed and such legislation is unlikely to be forthcoming before 2014 at the earliest.

This article argues that, in any reform of Irish consumer law, policy makers and legislators need to understand the hybrid foundations of Irish consumer law and the specific needs and circumstances of the Irish consumer.<sup>8</sup> The matter of consumer protection cannot simply be ceded to Europe. In order to advance this argument, the article begins by identifying those aspects of the legal context which make Irish consumer law distinct. It then explores the re-activation of the domestic consumer protection agenda, both in Ireland and across the European Union, in the last decade. A necessary pre-requisite in setting a domestic agenda is a comprehensive understanding of the nature and distinguishing features of the domestic consumer. Hence, the third part of this article undertakes a critical analysis of available data indicating the ways in which Irish consumers understand and use consumer law. In this, we draw on annual surveys commissioned by the National Consumer Agency between 2007 and 2012<sup>9</sup> together with an extensive EU wide Eurobarometer study on Consumer Empowerment conducted in 2010<sup>10</sup> and a focussed Irish study conducted in Winter 2012 (“the UCC study”).<sup>11</sup> The data suggests a degree of dissonance between Irish consumers’ self-perceptions and their actual levels of knowledge. It also indicates that Irish consumers may have similar levels of difficulty in understanding their rights under European-derived law and under law which is domestic in origin.

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<sup>6</sup> Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (2011) Prn. A11/1576. See F. White “Report on the Legislation Governing the Sale of Goods and the Supply of Services: Something Old, Something New” (2012) 19 *Commercial Law Practitioner* 23; “Sale of Goods Law Reform: an Irish perspective”, (2013) 42 *Common Law World Review* (forthcoming).

<sup>7</sup> See speech of Minister for Jobs, Enterprise and Innovation, 18 October 2011.

<sup>8</sup> On the importance of recognising the specifics of individual jurisdictions’ consumer cultures, see T. Wilhelmsson, ‘The Abuse of the ‘Confident Consumer’ as a Justification for EC Consumer Law’, (2004) 27 *Journal of Consumer Policy* 317, 328.

<sup>9</sup> The results of some of these studies are available at the NCA website: see *Consumer Empowerment and Complaining* (August 2009); *Consumer Empowerment and Complaining* (January 2010); *Consumer Empowerment and Complaints* (August 2011); *Consumer Empowerment and Consumer Service* (March 2012): available at [http://corporate.nca.ie/eng/Research\\_Zone/Reports/](http://corporate.nca.ie/eng/Research_Zone/Reports/).

<sup>10</sup> Special Eurobarometer No. 342 *Consumer Empowerment* (2011) available at: [http://ec.europa.eu/consumers/consumer\\_empowerment/docs/report\\_eurobarometer\\_342\\_en.pdf](http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf)

<sup>11</sup> Donnelly and White, *Consumer Perception and Knowledge*, (Cork: UCC, 2013).

## Tracing the Mixed Pedigree of Irish Consumer Law

In order to understand Irish consumer law, it is important to appreciate the mixed pedigree of the current legal framework. This has implications both in terms of how the law has developed and also for the way in which Irish consumers understand their legal rights.

### *Consumer Law as Commercial Law*

Irish consumer law derives in the first instance from commercial law cases and statutes of the late Victorian period. Cases which we might today identify as early consumer law cases typically involved consumers, purchasing goods for their own private use and consumption which turned out to be defective. As a result, this defect caused the consumer some injury or loss. The Cork case of *Wallis v. Russell*,<sup>12</sup> which made its way ultimately to the English Court of Appeal, illustrates the point. In that case, the plaintiff sought to purchase two “nice fresh crabs” for her tea from the defendant fishmonger. The defendant had no live crabs but offered boiled crabs instead. The plaintiff asked whether they were nice and fresh and the defendant assured her that they were. Having purchased the crabs, the plaintiff and others ate some that evening and subsequently became seriously ill. In order to seek redress in these circumstances the plaintiff had to resort to the Sale of Goods Act 1893: a commercial law statute.

The 1893 Act was one of a series of statutes which sought to consolidate a number of important areas of commercial law at this time.<sup>13</sup> It is notable that while the 1893 Act made a distinction between sellers acting in a private capacity and sellers acting in the course of a business (e.g. section 14 which implied terms as to the quality of goods only applied in the latter case), no such distinction was made in relation to the status of the buyer. As a result, buyers acting in the course of a business and private (i.e. consumer) buyers were treated as one, pursuant to this legislation. Mrs. Wallis brought an action for breach of the implied term as to quality in section 14(1) of the Sale of Goods Act 1893. The Court of Appeal, affirming the earlier decision, found that the crabs had been bought for a particular purpose made known to the seller (i.e. for human consumption), and that the buyer had relied on the seller’s skill and judgment, and hence there was a breach of section 14(1) because the crabs were not fit for their purpose and damages were awarded to the plaintiff in the sum of £150.<sup>14</sup> Cases of this nature led to questions about the relationship between commercial law and consumer law: in particular, whether consumer sales law was a separate discipline

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<sup>12</sup> [1902] 2 I.R. 585.

<sup>13</sup> See also the Bills of Sale (Ireland) Acts 1879 and 1883; the Bills of Exchange Act 1882; the Factors Act 1889; the Partnership Act 1890; and lastly, the Marine Insurance Act 1906. See further Bridge, “The evolution of modern sales law” [1991] *Lloyd’s Maritime and Commercial Law Quarterly* 52; Rodgers, “The codification of commercial law in Victoria Britain”, (1992) 109 *Law Quarterly Review* 570.

<sup>14</sup> There are numerous other examples from this period where private purchasers utilised the Sale of Goods Act 1893 to their advantage. In *Priest v Last* [1903] 2 K.B. 148 the purchaser of a hot-water bottle successfully sued the seller for injuries when the bottle burst, having being filled with hot water. The Court of Appeal had little difficulty in finding that the goods were not reasonably fit for their purpose under section 14(1) of the 1893 Act and damages were awarded. Again, in *Grant v. Australian Knitting Mills Ltd*, [1936] A.C. 85 a consumer bought woollen underwear and subsequently suffered severe dermatitis because there were excess sulphites, a chemical irritant, in the underwear which had not been washed out in the manufacturing process. The Privy Council held, *inter alia*, that the goods were not fit for their purpose and were unmerchantable and hence there was a breach of section 14 of the South Australian Sale of Goods Act 1895 and damages were awarded.

or merely a sub-set of commercial law.<sup>15</sup> This dominance of commercial law clearly influenced the development of consumer law and arguably retarded its progress as a distinct discipline.

### *The Emergence of a Distinct Consumer Agenda*

The Sale of Goods Act 1893 governed Irish sales law for the majority of the twentieth century. The concept of the statutory implied terms was borrowed from the 1893 Act and adapted to hire-purchase transactions in the Hire-Purchase Act 1946, which also made no distinction between commercial and consumer hirers.<sup>16</sup> It was not until the 1970s that the weaker position of consumers was identified and addressed in legislative form. In line with other jurisdictions, such as the UK and various Canadian provinces, concerns were raised about the suitability of the 1893 Act to a modern society and economy and, in particular, it was argued that the interests of consumers were not being protected.<sup>17</sup> In response to these concerns, the Sale of Goods and Supply of Services Act 1980 was enacted. It made a number of important changes to the law. First, the 1980 Act recast the implied terms on quality, including by providing a statutory definition of 'merchantable quality';<sup>18</sup> adding a few more implied terms to the mix;<sup>19</sup> as well as regulating, for the first time, product guarantees provided by manufacturers and others.<sup>20</sup> Second, the remedies regime was amended<sup>21</sup> and a new consumer right to request cure was introduced to supplement the buyer's primary right to reject goods (and claim a refund of the price) where goods are defective.<sup>22</sup> Third, and perhaps most significantly, rules on the enforceability of exclusion clauses were introduced whereby clauses which sought to exclude or limit the liability of sellers for breach of the statutory implied terms were rendered void against consumers.<sup>23</sup>

The Sale of Goods and Supply of Services Act 1980 represented a major step forward in the development of Irish consumer law.<sup>24</sup> Moreover, the 1980 Act was part of a package of legislative measures which began to address the position of the Irish consumer, at that time. Other such measures included the Consumer Information Act 1978, which amongst other things established the Office of the Director of Consumer Affairs; the Trading Stamps Act 1980 and the Pyramid Selling Act 1980. However, as outlined below, in the 1980s the impetus for the further development of consumer law shifted from Ireland to Europe. Many innovative provisions from the Sale of Goods and Supply of Services Act 1980, such as those

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<sup>15</sup> See e.g. Reynolds, "The Applicability of General Rules of Private Law to Consumer Disputes", in Andermann et al eds *Law and the Weaker Party* (Abingdon, 1982) Vol. 2, 93-110.

<sup>16</sup> In fact, the Bill as introduced was limited to transactions not exceeding £100 (as per the equivalent UK legislation at that time); however, this limitation did not find its way into the legislation as enacted.

<sup>17</sup> See National Prices Commission, Occasional Paper No. 9. *Consumer Protection Law in America, Canada and Europe* (Dublin: Stationery Office, 1973) (known as the Whincup Report); National Consumer Advisory Council, Submission to the Minister for Industry and Commerce on Proposals for Legislation to Assure the Consumers' Interests (Dublin: Stationery Office, 1974); *Dáil Éireann Debates*, Vol. 309, No. 7, Cols 1100–1106 (16 November, 1978).

<sup>18</sup> 1980 Act, s.10 which substitutes re-drafted ss. 10-15 into the 1893 Act.

<sup>19</sup> 1980 Act, ss.12-13.

<sup>20</sup> 1980 Act, ss.15-19.

<sup>21</sup> 1980 Act, s.20 which substitutes re-drafted ss.34-35 into the 1893 Act.

<sup>22</sup> 1980 Act, s.21 which substitutes a re-drafted s.53 into the 1893 Act.

<sup>23</sup> 1980 Act, s.3 and s.22 which substituted a re-drafted s.55 into the 1893 Act.

<sup>24</sup> Indeed, various aspects of this legislation was recognised as progressive and innovative by the European Commission in its preparations for the consumer sales directive: see the Green Paper on Guarantees for Consumer Goods and After-Sales Services, COM(93)509, p.6 and p.96.

in relation to contracts made away from business premises,<sup>25</sup> standard form contracts,<sup>26</sup> and the size of type in printed contracts,<sup>27</sup> were never brought into effect. Instead from the 1980s onwards, the development of consumer protection was dominated by a steady flow of EC/EU consumer protection measures, in the form of directives.

### *The Shift to Europe*

The original founding treaty of the European Economic Community, the Treaty of Rome 1957, contained only five explicit references to consumers, all of which were essentially incidental in nature.<sup>28</sup> Nonetheless, as Weatherill shows, notwithstanding this “barren Treaty background”, European consumer policy began to develop in the years following the Treaty, through the application of core EC provisions on market integration and through the development of “soft” law initiatives and greater harmonization of national laws.<sup>29</sup> It was, however, only in the mid-1970s that the European consumer protection agenda began to solidify with the introduction of a Council Resolution establishing a preliminary programme for a European consumer protection and information policy.<sup>30</sup> Progress on the European agenda was far from dramatic with only a small number of measures being introduced in the following ten years, primarily relating to food labelling.<sup>31</sup> It was the mid-1980s before a more activist legislative agenda became evident, with the introduction of a number of consumer directives during this period.<sup>32</sup> These measures were introduced in the context of harmonisation and market integration. The measures were a reaction to the divergence in national legal systems which were seen as barriers to trade and contrary to the perfection of the internal market.

It was not until the Maastricht Treaty in 1992 that specific legislative competence in respect of consumer protection was established. This competence derives from Article 153(1) EC (now Art. 169 TFEU) which states that:

“In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interest”.

The introduction of a specific consumer protection competence was generally welcomed by consumer groups as providing “a potential constitutional basis for the development of an EC strategy on consumer protection which is independent of harmonization policy in particular and the process of market integration in general”.<sup>33</sup> However, Weatherill argues that, in practice, the introduction of an explicit legislative competence did not impact to any significant extent on the nature of directives introduced. Instead, these continued to fit

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<sup>25</sup> 1980 Act, s.50.

<sup>26</sup> 1980 Act, s.52.

<sup>27</sup> 1980 Act, s.53.

<sup>28</sup> S. Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar, 2005), p. 3.

<sup>29</sup> *Ibid*, p. 4.

<sup>30</sup> Council Resolution [1975] C92/1. Chronologically, this mirrors the emerging Irish interest in this regard.

<sup>31</sup> Weatherill, above n.28, p. 9.

<sup>32</sup> See e.g. Council Directive 84/450 on misleading advertising; Council Directive 85/374 concerning liability for defective products; Council Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises; Council Directives 87/102 and 90/88 concerning consumer credit; Council Directive 90/314 on package travel, package holidays and package tours.

<sup>33</sup> Weatherill, above n.28, p. 17.

with a harmonisation/market integration agenda and a potentially more broad-based consumer agenda was not pursued.<sup>34</sup> The stream of directives continued post 1992,<sup>35</sup> leading to the establishment of a wide ranging consumer *acquis*. Crucially, however, the European legislative agenda did not extend to the comprehensive regulation of consumer contracts.<sup>36</sup>

A number of features of early European consumer law, and of the Irish response to this, contributed to a stagnation in the development of the nascent Irish consumer law. First, inevitably, consumer protection directives constitute a compromise between the civil and common law.<sup>37</sup> This kind of cross-fertilisation results in the introduction of concepts into diverse legal systems in which there may be no conceptual grounding within existing frameworks. From a common law perspective, a classic example of this is the reliance in the Unfair Terms Directive<sup>38</sup> on the civil law, and in particular, the German conception of “good faith” (in German “Treu und Glauben”).<sup>39</sup> As has been pointed out by numerous commentators, this concept of “good faith” does not sit comfortably within the common law tradition.<sup>40</sup> The difficulties with assimilating the concept into the common law tradition are evident in the decision of the House of Lords in *Director General of Fair Trading v First National Bank plc*.<sup>41</sup> Here, Lord Bingham described the requirement of good faith as “one of fair and open dealing.”<sup>42</sup> The House of Lords unanimously held that the applicable term met this standard notwithstanding that Lord Bingham had “no hesitation” in accepting the submissions of the Director General of Fair Trading that the “situation is unacceptable”<sup>43</sup> and that it was “readily understandable that a borrower may be disagreeably surprised if he finds that his contractual interest obligation continues to mount despite his duly paying the instalments ordered by the court”.<sup>44</sup> The decision has been criticised as failing “to reassure consumers that the law really works for their protection or benefit.”<sup>45</sup> In Ireland, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (which

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<sup>34</sup> Above n.28, p. 18.

<sup>35</sup> See e.g. Council Directive 93/13 on unfair terms in consumer contracts; Council Directive 98/27 on injunctions for the protection of consumer interests; Council Directive 97/7 on the protection of consumers in respect of distance contracts; Council Directive 99/44 on certain aspects of consumer sales and associated guarantees.

<sup>36</sup> H. Schulte-Nölke and L. Tichy eds. *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and Beyond* (Munich: Sellier, 2010), p. 1.

<sup>37</sup> See H.W. Micklitz, N. Reich, P. Rott, *Understanding European Consumer Law* (Antwerp: Intersentia, 2008).

<sup>38</sup> Directive 93/13/EEC on unfair terms in consumer contracts, [1993] OJ L 95/29.

<sup>39</sup> Article 3(1) of the Directive states that a term shall be regarded as unfair “if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer” and the recitals to the Directive outline a set of factors to be taken into account in making an assessment of good faith.

<sup>40</sup> See R. Brownsword and G. Howells, ‘The Implementation of the EC Directive on Unfair Terms in Consumer Contracts: Some Unresolved Questions’ [1995] *Journal of Business Law* 243; R. Brownsword, “Two Concepts of Good Faith” (1994) 7 *Journal of Contract Law* 197; H. Collins, “Good Faith in European Contract Law” (1994) 14 *Oxford Journal of Legal Studies* 229.

<sup>41</sup> [2001] UKHL 52.

<sup>42</sup> [2001] UKHL 52, [17]. This description was also adopted by Lord Steyn at [36].

<sup>43</sup> [2001] UKHL 52, [24].

<sup>44</sup> [2001] UKHL 52, [24]. The case concerned a term in a loan contact which allowed the lender to continue to charge the contractual rate of interest after judgment for default had been entered using language which was far from clear and accessible.

<sup>45</sup> M. Dean, “Defining Unfair Terms in Consumer Contracts – Crystal Ball Gazing *Director General of Fair Trading v First National Bank plc*” (2002) 65 *Modern Law Review* 773, 780.

transposes the unfair terms Directive)<sup>46</sup> would appear to have had a very limited impact for consumers. There has been only one reported case involving the Regulations and the analysis in the case is limited.<sup>47</sup> The limited recourse to the Regulations in practice may derive from a similar difficulty with conceptual assimilation into Irish law.<sup>48</sup>

A second feature of early European consumer law, derived in part from the same foundation of necessary compromise, was the fragmented nature of the measures introduced. Consumer protection directives generally applied only in specific areas, based around distribution methods<sup>49</sup> or particular contract types.<sup>50</sup> As described by Schulte-Nölke and Tichy, “[t]he individual directives are badly inter-coordinated. There are gaps and contradictions. The legislative quality of the directives is far below the usual quality of national legislation.”<sup>51</sup>

Many of these difficulties with European consumer law could have been addressed at a domestic level during the transposition process. The bulk of Community Directives in this early phase of development were minimum harmonising measures, harmonising consumer laws in member states to a designated minimum level, leaving member states the freedom to pursue a higher level of consumer protection in keeping with their particular socio-economic circumstances and consumer needs and expectations. In general, however, the Irish approach was to harmonise to the minimum level only<sup>52</sup> and not to enhance consumer protection beyond that afforded at a European level.<sup>53</sup> This approach is in contrast with that taken by many other member states which have been more prepared to expand, sometimes significantly, the protections afforded to consumers at transposition stage.<sup>54</sup> Thus, the compromises made at a European level, which were not intended to dictate the scope of domestic consumer protection measures, became reified in Irish law.

Other aspects of the Irish approach to transposition also contributed to the stagnation of Irish consumer protection law. Transposing measures tended, perhaps because of the introduction of unfamiliar concepts, to follow closely the original wording of the Directive. As a result, any uncertainties about the meaning of terms or omissions in the Directive are

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<sup>46</sup> SI 27/1995 as amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000, SI 307/2000.

<sup>47</sup> See *Marshall v Capitol Holdings Ltd* [2006] IEHC 271.

<sup>48</sup> See E. Ferrante “Contractual Disclosure and Remedies under the Unfair Contract Terms Directive” in eds. G. Howells, A. Janssen and R. Schulze *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Aldershot: Ashgate, 2005), p. 115 who also suggests that the directive’s “easy reception into the German cultural environment” may be explained because it was so similar to German law.

<sup>49</sup> See e.g. Council Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises; Council Directive 97/7 on the protection of consumers in respect of distance contracts (both now amended and consolidated in Directive 2011/83; Council Directive 2002/65 on the distance marketing of financial services.

<sup>50</sup> See e.g. Council Directives 87/102/EC and 90/88/EC concerning consumer credit repealed and replaced by Council Directive 2008/48/EC; Council Directive 90/314/EC on package travel, package holidays and package tours.

<sup>51</sup> Above n. 36, p. 1.

<sup>52</sup> One notable exception to this was the Consumer Credit Act 1995 which, in addition to transposing Directives 87/102 and 90/88, introduced detailed consumer protection measures in respect of hire purchase; consumer hire and housing loans.

<sup>53</sup> See H. Schulte-Nölke et al eds. *Consumer Law Compendium: the consumer acquis and its transposition in the member states* (Munich: Sellier, 2008), p. 42.

<sup>54</sup> For a state-by-state overview, see *Consumer Law Compendium ibid.*



replicated in the Irish transposing measure and there is no attempt at clarification. This cautious approach may have meant that Ireland was not at any risk of being found to be in breach of its transposition obligations. However, it also meant that the necessary measures in order to integrate European legislation into domestic law were not taken. A further feature of the Irish approach to transposition was a preference for a standalone legal instrument, usually a statutory instrument, without any attempt to address or integrate into pre-existing legal rules. The result is a number of unconsolidated measures giving rise to inconsistencies and, at times, conflicts.<sup>55</sup>

## **Reactivating the Domestic Agenda**

A number of domestic initiatives, which commenced mid-way through the last decade, led to a reactivation of the domestic consumer protection agenda. At around the same time, European institutions began to consolidate European consumer protection law.

The potential for conflict was inevitable and, as discussed below, this was played out in the protracted negotiations leading to the eventual adoption of Directive 2011/83/EU on consumer rights.<sup>56</sup> First, however, the steps in the re-activation of the domestic agenda are reviewed.

### *Reinvigorating the Irish Agenda*

The reinvigoration of the Irish consumer protection agenda came first in the context of financial services. The gaping lacunae in consumer protection in this context emerged in the wake of consumer-related scandals in the late 1990s.<sup>57</sup> The difficulties arose in part from the absence at this time of a clear consumer protection agenda in respect of financial services. Besides Directives 87/102/EC and 90/88/EC concerning consumer credit, there had been limited European initiatives in the broader financial services field. The European gap had not been filled at a domestic level. Instead, the task of consumer protection fell somewhere between the Central Bank (which was responsible for prudential regulation) and the Office of the Director of Consumer Affairs (which had limited expertise in the financial services sphere). Acknowledging the regulatory gap, the then Governor of the Central Bank noted that “[t]here is, somewhere, a cross-over point where prudential supervision ends and what I might describe as consumer protection begins. I have to admit this is a grey area”.<sup>58</sup>

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<sup>55</sup> See e.g. the Sale of Goods Act 1893, as amended by Part II of the Sale of Goods and Supply of Services Act 1980, and the European Community (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (SI No. 11 of 2003) – see further F. White, “The EC Directive on certain aspects of consumer sale and associated guarantees: one step forward, two steps back?” (2000) 7 *Commercial Law Practitioner* 3.

<sup>56</sup> [2011] OJ L304/64.

<sup>57</sup> The most prominent was the deliberate over-charging of customers at National Irish Bank (NIB). Following a journalistic investigation, inspectors were appointed (under s. 8 (1) of the Companies Act 1990) to investigate the way in which NIB had conducted its business. The investigation concluded that NIB had “loaded” certain accounts of more troublesome customers in relation both to interest and bank charges: see *Report on the Investigations into the Affairs of National Irish Bank Ltd and National Irish Bank Financial Services Ltd by High Court Inspectors Mr Justice Blayney and Tom Grace FCA* (Dublin: Office of Director of Corporate Enforcement, 2004).

<sup>58</sup> Speech by the Governor of the Central Bank, Mr Maurice O Connell, to the *Joint Oireachtas Committee on Finance and the Public Service*.

The legislative response to the gap identified included the establishment of the Central Bank and Financial Services Regulatory Authority of Ireland,<sup>59</sup> which had a strong consumer protection agenda, and included the creation of the statutory position of Consumer Director,<sup>60</sup> as well as the establishment of a Financial Services Consumer Consultative Panel<sup>61</sup> and a statutory Financial Services Ombudsman (FSO) to provide consumer redress. One of the most significant innovations of the Consumer Director was the introduction of an enforceable Consumer Protection Code with a statutory basis.<sup>62</sup> Although a number of aspects of this regime are now defunct,<sup>63</sup> both the Code and the FSO continue in operation,<sup>64</sup> with the Code having been substantially expanded in 2012.<sup>65</sup>

The establishment of a Consumer Strategy Group in 2004 to make proposals for the development of a national consumer strategy heralded a widening of the agenda beyond financial services. In its 2005 Report, *Make Consumers Count: a New Direction for Irish Consumers*, along with many sector specific recommendations (in relation to groceries, pharmaceuticals, and transport, for example) the Group recommended major structural change which resulted in the establishment of an independent National Consumer Agency, on an interim basis,<sup>66</sup> to replace the Office of Director of Consumer Affairs, with direct responsibility for consumer research, advocacy, information, enforcement, and education and awareness.<sup>67</sup> Underlying many of the recommendations of the Group was a recognition that “[i]nformed and empowered consumers are a powerful social and economic force”.<sup>68</sup>

The momentum to review and reform continued with the establishment of an expert group, the Sales Law Review Group, in 2008. The Group’s focus was on both commercial and consumer sales law and its remit included both domestic and European agendas. Thus, the Group was asked to review the general sales law provisions of the Sale of Goods Acts 1893 and 1980 and to make recommendations for an appropriate modern scheme and also to examine the provisions of the proposed consumer rights Directive and to make

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<sup>59</sup>Established by the Central Bank and Financial Services Authority of Ireland Act 2003.

<sup>60</sup> Central Bank Act 1942, s. 33S(1)(b) inserted by Central Bank and Financial Services Authority of Ireland Act 2003, s. 26.

<sup>61</sup>Central Bank Act 1942, s. 57CW, inserted by CBFSAI Act 2004,s. 17.

<sup>62</sup> On the innovative nature of the Code, see M. Donnelly, “The Consumer Protection Code: A New Departure in the Regulation of Irish Financial Services Providers” (2006) 13 *Commercial Law Practitioner* 271; M. Donnelly “The Consumer Protection Code: Regulatory Innovation from the Irish Financial Regulator” in D. Parry et al (eds) *Yearbook of Consumer Law 2009* (Aldershot: Ashgate, 2008).

<sup>63</sup> The office of Consumer Director (together with the Central Bank and Financial Services Authority of Ireland) and the Financial Services Consumer Consultative Panel were all abolished by the Central Bank Reform Act 2010 and responsibility for aspects of consumer protection in financial services (providing information to consumers and promoting the development of financial education and capability) were transferred to the National Consumer Agency.

<sup>64</sup> On the current operations of the FSO, see M. Donnelly “The Financial Services Ombudsman: Asking the ‘Existential Question’” (2012) 35 *Dublin University Law Journal* 229.

<sup>65</sup>See M. Donnelly “Revisions to the Consumer Protection Code: Expanding the Scope of Financial Services Regulation” (2012) 19 *Commercial Law Practitioner* 3.

<sup>66</sup> The Agency was put on a statutory basis in the Consumer Protection Act 2007, Part 2. The 2007 Act also transposed Directive 2005/29/EC on unfair business-to-consumer commercial practices into Irish law: see further Reilly, “The Consumer Protection Act 2007: Rationalising the regulation of misleading commercial practices in Ireland”, (2008) 6 *Commercial Law Practitioner* 127 and 157.

<sup>67</sup> See further Consumer Protection Act 2007, s. 8.

<sup>68</sup> Consumer Strategy Group, *Make Consumers Count: a New Direction for Irish Consumers* (2005) at viii.

recommendations as to “how the Directive and Irish contract and sales law may best be integrated”.<sup>69</sup>

### *A Changing European Agenda: Moving towards Maximum Harmonisation*

At around the same time as Irish consumer law was beginning to re-establish itself, the European institutions were seeking to bring a new level of coherence and direction to European consumer law as part of a “more aggressive internal market strategy.”<sup>70</sup> This led to a shift in the European legislative agenda towards the introduction of “full” or “maximum” harmonising measures.<sup>71</sup> As described in the *Green Paper on the Review of the Consumer Acquis*, maximum harmonisation means that “no Member State could apply stricter rules than the ones laid down at Community level”.<sup>72</sup> Thus, maximum harmonisation does not mean the introduction of a uniform law; rather, as Mak describes “the degree of harmonisation can only be seen within the context, or indeed *within the scope* of regulation set down by the directive.”<sup>73</sup> This approach was favoured at a European institutional level because it was argued by the European Commission that it would lead to a more coherent legislative framework within the European Union, thereby encouraging cross-border shopping while at the same time ensuring a more competitive environment by reducing transaction costs and preventing consumer protection from being used as “goldplating” in order to restrict new entrants in the market.<sup>74</sup> From 2005 on, a number of significant maximum harmonisation consumer protection measures were introduced. These included the Unfair Commercial Practices Directive;<sup>75</sup> the Consumer Credit Directive<sup>76</sup> and the Payment Services Directive.<sup>77</sup>

The move towards maximum harmonisation was inevitably controversial.<sup>78</sup> Generally, these kinds of measures aim to advance business interests by lowering transaction costs and increased consumer confidence in cross-border shopping.<sup>79</sup> From a consumer perspective, there is considerably less enthusiasm. Critics argue that the maximum harmonisation project lacks a sufficiently strong empirical basis to support either the lower transactions costs or the increased cross-border consumer confidence arguments.<sup>80</sup> Even in a fully harmonised context, member states have different interpretations of concepts (for example “good faith”) and different ways of giving effect to the law. Thus, from a trader’s

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<sup>69</sup> Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (2011) Prn. A11/1576, p.7.

<sup>70</sup> N. Reich “From Minimal to Full to ‘Half’ Harmonisation” in J. Devenney and M. Kenny (eds.) *European Consumer Protection: Theory and Practice* (Cambridge: Cambridge University Press, 2012), p.3

<sup>71</sup> See *Green Paper on the Review of the Consumer Acquis* COM (2006) 744 final (8 February 2007).

<sup>72</sup> *Ibid.*, p.10.

<sup>73</sup> V. Mak “Review of the Consumer Acquis: Towards Maximum Harmonisation” (2009) 17 *European Review of Private Law* 55.

<sup>74</sup> On the Commission’s “allocative efficiency” argument (and the underlying flaws with this argument), see H. Micklitz and N. Reich “Crónica de Una Muerta Anunciada: The Commission Proposal for A ‘Directive on Consumer Rights’” (2009) 46 *Common Market Law Review* 471, 474-476.

<sup>75</sup> Directive 2005/29/EC, [2005] OJ L 149/22.

<sup>76</sup> Directive 2008/48/EC.

<sup>77</sup> Directive 2007/64/EC.

<sup>78</sup> Duterque, “Do we really want a *ius commune* for EU consumer protection?”, [2012] *Dublin University Law Journal* 72.

<sup>79</sup> I. Ramsay “Regulation and the Constitution of the Single Market: The Contribution of Consumer Law” (2010) 50 *Canadian Business Law Journal* 322.

<sup>80</sup> See Howells and Wilhelmsson, “EC Consumer Law: Has it Come of Age?”, (2003) 28 *European Law Review* 370 at 376.

perspective, while the need to take legal advice on different jurisdictions before commencing to trade might be reduced, it would not be removed.<sup>81</sup> In respect of increased consumer confidence, it has been convincingly argued that the barriers to cross-border shopping derive primarily from psychological factors, based on language and culture, and that these are not addressed by formal legal harmonising measures.<sup>82</sup>

While the benefits for consumers from maximum harmonisation are questionable, the disadvantages from a consumer perspective are considerable. This is especially the case for consumers in more developed consumer societies, where the effect of maximum harmonisation may well be to lower consumer protection standards.<sup>83</sup> In an Irish context, the disapplication of much of the Consumer Protection Code in respect of consumers to whom the Consumer Credit Directive and the Payment Services Directive (both maximum harmonisation measures) apply shows the negative practical impact of maximum harmonisation from a consumer perspective.<sup>84</sup> Other difficulties derive from the complex apparatus of the European legislative framework which means that law-making is unable to respond quickly to newly emerging situations. Additionally, because the measure is applicable across the EU, it is unable to take account of the specific contexts of consumer societies at different stages of development.<sup>85</sup>

Many of these concerns with the maximum harmonisation agenda came to the fore in the context of the proposals for a consumer rights Directive.<sup>86</sup> These proposals emerged from the harmonisation agenda relating to European contract law which started in 2001, when the European Commission published a Communication on *European Contract Law*.<sup>87</sup> It is notable that 'European contract law', in so far as it existed at the time, did so largely in the form of consumer directives.<sup>88</sup> Subsequently, in 2003, the Commission issued an Action

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<sup>81</sup> See Loos "Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders: The Example of the Consumer Rights Directive" (University of Amsterdam, Centre for the Study of European Contract Law, Working Papers Series 2010/03) p. 9.

<sup>82</sup> See G. Low "The (Ir)relevance of Harmonisation and Legal Diversity in European Contract Law: A Perspective from Psychology" (2010) 18 *European Review of Private Law* 288; see also Ramsay *ibid*, 335 who argues that the impact analysis for the proposed Consumer Rights directive had difficulty in linking low levels of cross-border shopping to legal regulation.

<sup>83</sup> See S. Weatherill "Maximum versus Minimum Harmonisation: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market" in N. NicShuibhne and L. Gormley (eds) *From Single Market to Economic Union: Essays in Memory of John Usher* (Oxford: OUP, 2012), p. 175.

<sup>84</sup> See Consumer Protection Code 2012, p. 6. The measures in respect of consumer credit in CPC 2012 are more advantageous for consumers than those contained in Directive 2008/48/EC and transposed by the European Communities (Consumer Credit Agreements) Regulations 2010, SI 281/2010.

<sup>85</sup> See V. Mak "The Degree of Harmonisation in the Proposed Consumer Rights Directive: A Review in Light of Liability for Products" in G. Howells and R. Schulze (eds) *Modernising and Harmonising Consumer Contract Law* (Munich: Sellier, 2009), p. 318

<sup>86</sup> Smits, "Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights" (2010) 1 *European Review of Private Law* 5 at 9.

<sup>87</sup> COM(2001) 398 final. See further e.g. Clark, "Irish Contract Law Reform and the European Commission's Agenda", (2001) 7 *Bar Review* 126; Gerven, "Codifying European private law? Yes, if ...!", (2002) 27 *European Law Review* 156. In 2010, the Commission published a new Green Paper on European Contract Law: COM(2010) 348 final. The policy options considered therein ranged from: non-binding model contract rules; to an optional (28<sup>th</sup> system) European contract law; to harmonisation of national contract law by means of a Directive or Regulation; to a fully-fledged European Civil Code.

<sup>88</sup> For example, between 1985 and 1999, seven consumer law directives dealing with contractual issues were adopted. Other directives addressing contractual issues but outside the consumer law remit include Directive

Plan proposing to improve the quality and coherence of European contract law by establishing a Common Frame of Reference (CFR) to act as a “toolbox” or handbook containing common principles, terminology and model rules to be used by the European legislator when making or amending legislation.<sup>89</sup> It was also proposed to review the *acquis* in the area of consumer contract law, to remove inconsistencies and fill regulatory gaps.<sup>90</sup> As a result of this review, in October 2008, and before the CFR was finalised, the Commission submitted a Proposal for a Directive on consumer rights.<sup>91</sup> This proposal sought to amalgamate and rationalise four existing consumer directives (the door-step selling directive;<sup>92</sup> the distance selling directive;<sup>93</sup> the consumer sales directive;<sup>94</sup> and the unfair terms in consumer contracts directive<sup>95</sup>) into one new maximum harmonised consumer rights Directive. Shortly thereafter, in 2009, following comparative research across the member states of the European Community, the Draft Common Frame of Reference (DCFR) was published.<sup>96</sup>

### *Maximum Harmonisation: A Step too Far?*

Notwithstanding the re-emergence of a domestic consumer protection agenda at around the same time, there is little evidence that the encroachment on domestic competence brought about by maximum harmonisation was a source of initial Irish concern.<sup>97</sup> This changed, however, when the Sales Law Review Group (SLRG) examined the proposed consumer rights Directive. In three of the four areas covered by the proposed directive – door-step selling; distance selling and unfair terms – there had been no prior Irish law when the three directives were originally transposed and so they were incorporated into virgin territory without any difficulty. Further, any revision to this legislation, in the form of the proposed consumer rights Directive, would be equally easy to assimilate into Irish law.

However, the position in relation to consumer sales law was different. When Directive 1999/44 on consumer sales and associated guarantees was transposed into Irish law, this was done on the basis that the directive was a minimum harmonising measure and member states were free to maintain higher levels of consumer protection. It was arguable that some aspects of domestic sales law, at that time, pursuant to the Sale of Goods Acts 1893 and 1980 provided a greater level of consumer protection, in particular as regards consumer remedies. Under the Sale of Goods Acts, the buyer’s primary remedy when supplied with

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86/653/EEC on self-employed commercial agents; Directive 2000/31/EC on e-commerce and Directive 2000/35 on combating late payment in commercial transactions.

<sup>89</sup> See e.g. Kenny, “The 2003 action plan on European contract law: is the Commission running wild?” (2003) 28 *European Law Review* 538.

<sup>90</sup> Commission Communication on “European Contract Law and the revision of the *acquis*: the way forward” - COM(2004) 651 final.

<sup>91</sup> COM(2008) 614.

<sup>92</sup> Directive 85/577, [1985] OJ L 372/31.

<sup>93</sup> Directive 97/7/EC, [1997] OJ L 144/19.

<sup>94</sup> Directive 1999/44/EC, [1999] OJ L 171/12.

<sup>95</sup> Directive 93/13/EC, [1993] OJ L 95/29.

<sup>96</sup> See Miller, “The Common Frame of Reference and the feasibility of a common contract law in Europe”, [2007] *Journal of Business Law* 378; Whittaker, “A framework of principle for European contract law?”, (2009) 125 *Law Quarterly Review* 616; Jansen & Zimmermann, “A European civil code in all but name”: discussing the nature and purposes of the draft common frame of reference’, (2010) 69 *Cambridge Law Journal* 98.

<sup>97</sup> See for example the Irish response to the *Green Paper on the Consumer Acquis* which was that it was too early to take a stance on the question of full harmonisation given the limited experience at that time: see M. Loos above n. p. 6.

non-conforming or defective goods, is to reject the goods (and seek a refund of any price paid) thereby terminating the contract.<sup>98</sup> In contrast, the remedy regime found in Directive 1999/44 ranks the remedies of repair and replacement as primary remedies and leaving the right to repudiate or terminate the contract (and reject the goods) as a remedy of last resort.<sup>99</sup> When Directive 1999/44 was transposed into Irish law, consumers were offered the option to assert their rights and seek remedies under the tradition Sale of Goods Acts rules or the newer European rules.<sup>100</sup> The maintenance of the primary right to reject was permissible due to the minimum harmonising nature of Directive 1999/44. However, the consumer rights Directive as proposed would require the Irish government to amend the law to remove the right to reject as a primary remedy for consumer buyers and instead to allow its use only as a last resort. On the advice of the Sale Law Review Group,<sup>101</sup> the Irish negotiators were not willing to agree such a change in the levels of consumer protection for Irish consumers.

Other governments were similarly minded, in particular the UK and French governments.<sup>102</sup> Others again were opposed to the maximum harmonising nature in relation to other aspects of the directive. Ultimately, in order to achieve agreement, large aspects of the proposal dealing with consumer sales and unfair terms were jettisoned and final version of the directive adopted was a considerably more modest measure than that originally envisaged by the Commission.<sup>103</sup> Alongside this, the Commission proposed an optional Common European Sales Law in the form of a Regulation. If adopted, this Regulation will not replace national contract laws but will offer consumers and businesses an optional (28<sup>th</sup> system) of European sales law. The choice of a Regulation reflects a growing recognition at a European level that Directives (and in particular maximum harmonising measures) may not be the most effective way to achieve the economic goal of enhanced cross-border trade and that targeted Regulations to deal with the particulars of this context may be preferable.<sup>104</sup> More generally, the Commission's experience in respect of the consumer rights Directive means that it is unlikely to attempt a repeat on the scale in the original proposal. From an Irish perspective, too, the Government's assertion of the specific concerns of the Irish consumer is to be welcomed.

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<sup>98</sup> An additional action for damages for any loss suffered is also permissible: Sale of Goods Act 1893, s.53.

<sup>99</sup> As per Article 3(5) only where the rights of repair or replacement are impossible, or disproportionate or where the seller does not complete repair or replacement within a reasonable time, and without significant inconvenience to the consumer, can the consumer progress to the remaining remedies of price reduction or rescission.

<sup>100</sup> See the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations, 2003, S.I. No. 13 of 2003, Regs 3(2) – 3(4).

<sup>101</sup> See Sales Law Review Group, *Position Paper on the proposal for a Directive of the European Parliament and of the Council on Consumer Rights* (Dublin, May 2009): see further [www.djei.ie/commerce/consumer/slrg.htm](http://www.djei.ie/commerce/consumer/slrg.htm).

<sup>102</sup> Re right to reject in French law see L. Miller, "The Common Frame of Reference and the feasibility of a common contract law in Europe" [2007] *Journal of Business Law* 378 at 391-396; A. Pinna, "La transposition en droit français" (2001) 9 *European Review of Private Law* 223.

<sup>103</sup> Directive 2011/83 on consumer rights, [2011] OJ L304/64.

<sup>104</sup> See C. Twigg-Flesner "Goodbye Harmonisation by Directives, Hello Cross-Border Only Regulation? A Way Forward for EU Consumer Contract Law" (2011) 7 *European Review of Contract Law* 235; Busch and Domrose, "From a Horizontal Instrument to a Common European Sales" (2012) 1 *Journal of European Consumer and Market Law* 48; Hondius, "Common European Sales Law: If It Does Not Help, It Won't Harm Either(?)", (2013) 21 *European Review of Private Law* 1.

### *Policy Convergence – Confident/Informed Consumer*

Even if, at an operational level, the maximum harmonisation agenda has stalled, there is still a degree of policy convergence around the paradigm of “consumer” at the heart of the European consumer agenda. This is the well-informed, confident, empowered consumer.<sup>105</sup> The creation of this kind of consumer through the provision of information is a cornerstone of European consumer protection law and policy.<sup>106</sup> In adopting this focus, European and Irish consumer law and policy are similar. The primary foundation for this model of consumer protection is economic growth rather than individual protection.<sup>107</sup> Thus, the Commission in its Consumer Policy Strategy 2007-2013 states: “[t]he Internal Market cannot function properly without consumer confidence. Adequate consumer protection is necessary for growth and competitiveness”.<sup>108</sup> The goal is to ensure that sufficient numbers of consumers have sufficient levels of confidence to engage in the market and achieve the economic goal of market growth.<sup>109</sup>

The choice of a policy focus on the confident consumer through information provision has been critiqued on a number of grounds.<sup>110</sup> At a very basic level, the information provided may never actually reach the consumer.<sup>111</sup> Secondly, drawing on insights derived from behavioural economics, critics challenge the presumption that consumers act rationally on the basis of information received.<sup>112</sup> Thirdly, behavioural economics also lends doubt to the view that more information is better and suggest that too much information, or “information overload”, may decrease the individual’s ability to make decisions.<sup>113</sup> Finally, and of particular relevance to the discussion in this article, the information provision model is critiqued because of its adoption of a “one size fits all” approach which does not differentiate between types of consumer. Yet, studies have shown that information provision is most effective in the context of consumers from more “privileged” socio-economic or education backgrounds and that consumers from “less privileged” backgrounds

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<sup>105</sup> Both case law and legislation subscribe to this stereotype. For instance, average consumers have been described as “reasonably well informed and reasonably observant and circumspect”: see Case 210/96 *Gut Springenheideb GmbH v Oberkreisdirektordes Kreises Steinfurt* [1998] ECR I-04657. See also Recital 18 of Directive 2005/29/EC, [2005] OJ L149/22 (the Unfair Commercial Practices Directive), which “takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect”.

<sup>106</sup> See M. Everson “Legal Constructions of the Consumer” in F. Trentmann (ed) *The Making of the Consumer: Knowledge, Power and Identity in the Modern World* (Oxford: Berg, 2006), p. 111.

<sup>107</sup> G. Howells, “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 *Journal of Law and Society* 349, 350.

<sup>108</sup> Commission Communication, “Healthier, Safer, more confident citizens - a health and consumer protection strategy”, COM (2005) 115 final.

<sup>109</sup> See Wilhelmsson above n. 8.

<sup>110</sup> For a summary of the critiques, see Howells above n. 107; I. Ramsay “From Truth in Lending to Responsible Lending” in Howells *et al* (eds) *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Ashgate, 2005); Ramsey “Consumer Protection in the Era of Informational Capitalism” in ed Wilhelmsson *et al Consumer Law in the Information Society* (Kluwer, 2001); M. Donnelly and F. White “The Effect of Information Based Consumer Protection: Lessons from a Study of the Irish Online Market” in C. Twigg-Flesner ed, *Yearbook of Consumer Law 2007* (Aldershot: Ashgate, 2008), p. 282-284.

<sup>111</sup> Wilhelmsson “The Informed Consumer v the Vulnerable Consumer in European Unfair Commercial Practices Law – a comment”, [2006] *Yearbook of Consumer Law* 211, 216.

<sup>112</sup> See in particular, Howells above n. 107, 360 and Ramsey “From Truth in Lending” above n. 110, p 52. For a general overview of this approach, see C. Sunstein (ed) *Behavioural Law and Economics* (Cambridge University Press, 2000).

<sup>113</sup> See Howells above n. 107, 360; for an explanation of why difficulties with information overload apply, see T. Parades “Blinded by the Light: Information Overload and Its Consequences for Securities Regulation” (2003) 81 *Washington University Law Quarterly* 417.

stand to benefit less.<sup>114</sup> Underpinning all of these critiques is a recognition that consumer protection policy needs to respond to the needs of “real world” consumers. A difficulty here is that, as Ramsay describes “[t]here is unfortunately little empirical study of the effects, if any, of consumer law on consumer behaviour and the relationship of consumer law to other non-legal pressures on market behaviour.”<sup>115</sup>

The critiques of the paradigmatic informed, confident consumer have begun to impact on European consumer policy and there are signs of a policy move beyond a simple focus on informing consumers to take greater account of the broader requirements for consumer empowerment.<sup>116</sup> Underpinning this shift is a greater recognition of the need for an empirically-based understanding of “real world” consumers and the Eurobarometer study discussed in the next section represents a valuable first step in this direction.

## **Understanding the Irish Consumer**

We contend that an Irish consumer protection agenda must recognise the nature and particular needs of the Irish consumer. Clearly, such an understanding can only be reached following detailed empirical investigation. This part of the article presents a range of available data which provides the beginnings of a picture of the Irish consumer, focusing on consumers’ understanding of their legal rights. By way of background, a brief account of the nature and scope of the legal rights in respect of which consumers were tested is provided. The discussion draws in the first instance on the annual surveys published by the National Consumer Agency which present a helpful longitudinal picture of consumers’ self-perceptions. However, it is arguable that the contribution of these surveys is limited because they rely entirely on consumers’ self-assessment and do not test the reality of consumers’ understanding of the law. The 2010 Europe-wide Eurobarometer study on Consumer Empowerment addresses this limitation, providing information not just in respect of consumers’ self-assessment but also testing consumers’ actual knowledge. Inevitably, given its context, this study focuses entirely on evaluating consumers’ knowledge of consumer rights arising under European law. Thus, it does not reflect the hybrid nature of Irish consumer law. The final study discussed here is the UCC study which was conducted in November/December 2012 and which attempts to identify Irish consumers’ knowledge of rights which derive from domestic rather than European law. Although the sample size is small relative to the Eurobarometer work, the study provides some interesting insights.

### **NCA Studies: How Irish Consumers Self-Identify**

Beginning in 2007, the National Consumer Agency has commissioned a series of studies into Irish consumer empowerment and preparedness to complain.<sup>117</sup> Of particular relevance to the discussion in this article are the questions asked in respect of consumer rights

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<sup>114</sup> See W. Whitford “The Functions of Disclosure Regulation in Consumer Transactions” (1973) 2 *Wisconsin Law Review* 400; Crow, Howells, Moroney “Credit and Debt: Choices for Poorer Consumers” in ed Crow, Howells, Moroney *Aspects of Credit and Debt: Choices for Poorer Consumers* (London: Sweet and Maxwell, 1993).

<sup>115</sup> Ramsay above n. 79, 335.

<sup>116</sup> See European Commission Staff Working Paper *Consumer Empowerment in the EU* SEC (2011) 469 final.

<sup>117</sup> For details, see n.9 above. Studies were based on face-to-face interviews with 1,000 people aged between 15 and 74. In order to ensure that data was nationally representative, quotas were applied on the basis of age, gender, social class and region.



awareness levels. These required consumers to self-identify in respect of their confidence as consumers; their knowledge as consumers and how protected they felt as consumers. The first survey was conducted in November/December 2007 (some six months after the statutory establishment of the NCA) and this provides the benchmark for the eight subsequent studies.<sup>118</sup> A consistent finding of the studies was that over 3 in 4 Irish consumers self-reported as being confident about their rights as a consumer with only 10-11% of consumers stating that they were not confident.<sup>119</sup> Slightly less than 3 in 4 consumers self-reported as being knowledgeable, with data indicating an increase of 10% of consumers (from 62% to 72%) self-reporting as knowledgeable between the first study in November 2007 and the last study in the series, in March 2012.<sup>120</sup> Finally, approximately, three out of four consumers self-reported as feeling protected by the law.<sup>121</sup> Once again, this shows an ongoing and substantial improvement from the first study conducted, where 60% of consumers reported feeling protected by the law, to the most recent study, where 76% of consumers reported that they felt protected.

The consistent findings of these studies would seem to indicate that a substantial number of Irish consumers feel empowered<sup>122</sup> and that there has been a steady increase in consumers' feelings of empowerment over the period in which the studies were conducted. This longitudinal picture is very helpful and is certainly encouraging in terms of consumers' self-perceptions at any rate. The limit of these studies, however, is that consumers' self-assessment is not tested against objective fact. This is especially problematic in respect of self-reported levels of knowledge. In developing a domestic agenda for consumer law, reliance on self-assessment alone cannot be sufficient. The question which must be asked is whether Irish consumers are over (or under) estimating actual levels of knowledge. The two studies discussed below provide some objective data on this matter.

### **Eurobarometer: Testing Knowledge of Rights under European Law**

Between February and April 2010, Eurobarometer, which undertakes surveys on behalf of the European Commission, undertook an extensive<sup>123</sup> EU-wide study, covering all member states, of consumer empowerment which sought to examine both consumers' self-perceptions in terms of empowerment and also their actual levels of knowledge and skills.

In terms of self-assessment, Irish consumers reported largely in accordance with the NCA studies discussed above. Thus, 83% of Irish consumers self-reported as confident (compared with an EU27 average of 73%, putting Irish consumers in the top tier of countries (alongside the Netherlands, Sweden, the United Kingdom, Denmark, Slovenia, Belgium and

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<sup>118</sup> Subsequent studies were carried out in August 2008; November/December 2008; May/June 2009; November/December 2009; June 2010; November/December 2010; May/June 2011 and March 2012: for details, see *NCA Market Research Findings: Consumer Empowerment and Consumer Service* (March 2012), p. 4.

<sup>119</sup> *NCA Market Research Findings 2012*, p. 6: the highest reported percentage of confident consumers occurred in March 2012 with 78% self reporting as confident while the lowest reported percentage was in November 2007 with 70% reporting as confident.

<sup>120</sup> *NCA Market Research Findings 2012*, p.7.

<sup>121</sup> *NCA Market Research Findings 2012*, p.7.

<sup>122</sup> In the NCA studies, the measure of empowerment was calculated with reference to the three empowerment indicators of confidence, knowledge and protection: *NCA Market Research Findings 2012*, p.8.

<sup>123</sup> A total of 56,471 interviews were carried out as part of the survey, taking place in two waves. A total of 2,014 interviews were carried out in Ireland (by MRBI).

Luxembourg).<sup>124</sup> Further, 77% of Irish consumers self-reported as knowledgeable (compared with an EU27 average of 63%), again placing Ireland in the top tier of countries in this regard (alongside Netherlands, Sweden, the United Kingdom, Denmark, Finland and Slovenia).<sup>125</sup> Finally, 70% of Irish consumers reported feeling protected by the law (as compared to an EU27 average of 55%), once again placing Ireland in the top tier of member states (alongside Sweden, the Netherlands, Denmark, Finland and the United Kingdom). Thus, the encouraging figures from the NCA commissioned studies are replicated (and indeed improved upon) across all measures.

However, when Irish consumers were actually tested, the findings evidenced significant deficiencies in knowledge. Of particular relevance to the discussion in this article are the seven questions which seek to identify consumers' awareness of EU consumer legislation.<sup>126</sup> The questions focussed on four themes from European consumer law: unfair commercial practices; cooling-off periods; guarantee periods and cross-border transactions. To summarise the findings across the seven questions, in most respects, Irish interviewees were broadly in line, although slightly below, the EU27 average.<sup>127</sup> However, Ireland stood out as being one of the member states with the highest number of respondents who could not answer even one question correctly. The fellow member states in this category are rather different to the member states which shared similar responses in respect of the self-assessed questions. Only Romania and Bulgaria have similar percentages of zero correct answers to Ireland.<sup>128</sup> When account was taken of respondents who could only answer one question correctly, Ireland is still in the bottom tier of member states, this time sharing this category with Greece and Luxembourg (as well as Romania and Bulgaria).<sup>129</sup>

In terms of individual questions, three related to unfair commercial practices. These are regulated by Directive 2005/29/EC which, unusually for Ireland, is transposed by primary legislation, the Consumer Protection Act 2007. Directive 2005/29/EC deals with three kinds of commercial practices. These are first, "unfair commercial practices" which are prohibited under Art. 5. A practice is "unfair" if it is contrary to the requirements of due diligence and 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".<sup>130</sup> Secondly, the Directive prohibits misleading practices (both actions and omissions). A commercial practice is defined as "misleading" where it contains false information in respect of a designated list of factors and is as a result "untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the

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<sup>124</sup> Eurobarometer, p. 12.

<sup>125</sup> Eurobarometer, p. 14.

<sup>126</sup> The study extends well beyond a focus on the law alone, including valuable data on all sorts of consumer empowerment matters, including arithmetic and financial skills; capacity to read labels and logos; levels of interest in consumer information; and preparedness to talk about purchasing experiences.

<sup>127</sup> One percent of Irish consumers (compared with 2% of EU27) answered all seven questions correctly; 4% (compared to EU27 average of 8%) answered six questions correctly; 12% (compared to an EU27 average of 15%) answered five questions correctly; 21% (compared to an EU27 average of 22%) answered four questions correctly; 25% (compared to an EU27 average of 23%) answered 3 questions correctly; 20% (compared to an EU27 average of 18%) answered two questions correctly and 10% (compared to an EU27 average of 9%) answered one question correctly: see Eurobarometer, p. 101.

<sup>128</sup> Eurobarometer, p.103.

<sup>129</sup> Eurobarometer, p. 103.

<sup>130</sup> Directive 2005/29/EC, Art. 5(2).

information is factually correct.”<sup>131</sup> In order to fall within the provision, the information in question must relate to the existence or nature of the product; the main characteristics of the product; the extent of the trader’s commitments; the price or the manner in which the price is calculated; the need for a service, part, replacement or repair; the nature and attributes of the trader or his agent and, finally, the consumer’s rights.<sup>132</sup> A practice may also be 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 the marketing of the product or compliance with codes of conduct.<sup>133</sup> The third commercial practice targeted is “aggressive” practice, which includes harassment, coercion and undue influence.<sup>134</sup>

In respect of two out of the three questions on unfair commercial practices, the level of knowledge of Irish consumers, although far from comprehensive, was in fact slightly higher than the EU27 average. The first question related to the legality of a newspaper offer of free sunglasses which requires calling a very costly premium rate telephone number without mentioning the cost,<sup>135</sup> in response 25% of Irish consumers incorrectly identified this offer as legal and 18% did not know whether or not this was legal. Thus, close to half (43%) of Irish consumers would have difficulty asserting their legal rights in this regard. The equivalent EU27 average (comprising incorrect answers and consumers who did not know the answer) was 26%. Interestingly, the only other common law jurisdiction, the United Kingdom, also had strikingly poor responses, with 33% of United Kingdom consumers incorrectly identifying the practice as legal and 9% not knowing.<sup>136</sup> This may reflect the conceptual unfamiliarity of aspects of Directive 2005/29/EC in common law jurisdictions.

The second unfair commercial practices question related to receipt of unsolicited DVDs together with a bill in the post.<sup>137</sup> In this case, 49% of Irish consumers incorrectly responded that the recipient was not obliged to pay for the DVDs provided that they sent the DVDs back, with only 40% giving the correct answer that there was no obligation to pay and no obligation to return.<sup>138</sup> The responses were slightly better than the EU27 average (where 39% gave a correct answer) but strikingly worse than the other member states which had self-assessed as knowledgeable.<sup>139</sup> The final unfair practices question related to an airline pricing advertisement. Here, Irish consumers performed better than the EU27 average with 63% (as compared to an EU27 average of 56%) correctly stating that an advertisement must state the total amount to be paid, including taxes, fees and charges.<sup>140</sup> It is possible that, as an island nation, Irish consumers’ particular dependence on the airline industry is a relevant factor in this stronger performance.

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<sup>131</sup> Directive 2005/29/EC, Art. 6(1).

<sup>132</sup> Directive 2005/29/EC, Art. 6(1).

<sup>133</sup> Directive 2005/29/EC, Art. 6(2).

<sup>134</sup> Directive 2005/29/EC, Art. 9.

<sup>135</sup> The question as asked was: “An advertisement in your newspaper says: ‘Free sunglasses, just call this number to collect them’. You call the number and later you discover that it is a very costly premium rate telephone number. Was the advertisement legal or illegal?”: see Eurobarometer, p. 68.

<sup>136</sup> Eurobarometer, p. 69.

<sup>137</sup> The question as asked was: Imagine you receive by post two educational DVDs that you have not ordered, together with a 50 euros bill for the products. Are you obliged to pay the bill?”: Eurobarometer, p. 72.

<sup>138</sup> Eurobarometer, p. 73.

<sup>139</sup> In Denmark, 57% of consumers gave correct answers while in Finland, 55% of answers were correct.

<sup>140</sup> Eurobarometer, p. 79.

Two questions related to knowledge of cooling-off periods in distance selling, one of which related to Directive 97/7/EC on the protection of consumers in respect of distance contracts<sup>141</sup> and other to Directive 2002/65/EC concerning the distance marketing of consumer financial services.<sup>142</sup> Art. 6(1) of Directive 97/7/EC states that consumers who purchase goods at a distance, shall have a period of “at least seven working dates in which to withdraw from the contract without penalty and without giving any reason”. In Directive 2002/65/EC, the right of withdrawal is contained in Art. 6(1) and allows the consumer 14 calendar days to withdraw from the contract without penalty and without giving a reason. Under Art. 7(1), a consumer may be required to pay for any service actually performed by the supplier under the contract up until the time of withdrawal. However, Art. 7(2) states that member states may provide that a consumer cannot be required to pay for services which have been provided under an insurance contract.

When questioned, 63% of Irish consumers knew that there was a right to return goods bought at a distance (by post, phone or on the Internet) 4 days after delivery and to get money back without having to give a reason. This response was more or less in line with the EU27 response although notably lower than other member states where consumers self-assessed as knowledgeable.<sup>143</sup> In respect of the question on the cooling-off period in distance marketing of financial services, only 25% of Irish consumers answered that a consumer could cancel a car insurance contract concluded at a distance (over the phone in the question asked) two days after the contract was concluded and get their money back. This maps fairly closely onto the EU27 data where 28% gave this correct answer, as interpreted by Eurobarometer. Most Irish consumers (36%) believed that they could cancel but that it was necessary to pay an administration fee, an answer which Eurobarometer categorised as incorrect. In fact, the position in Ireland is somewhat more complex than this suggests. As described earlier, although Art. 7(2) permitted member states to provide that a consumer did not have to pay for insurance service received prior to withdrawal, this option was not taken on transposition into Irish law<sup>144</sup> and therefore Irish consumers do have an obligation to repay the supplier for the service provided (in this case, the insurance cover). Thus, while the repayment cost cannot be accurately categorised as an administration fee, nor is it correct to state that the Irish consumer is entitled to cancel the contract and get all of their money back.

The final two questions related to “doorstep” selling and to sales guarantees. “Doorstep” selling is regulated by Directive 85/577 to protect the consumer in respect of contracts

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<sup>141</sup> Directive 97/7/EC is repealed by Directive 2011/83/EU on consumer rights as of 13 July 2014. The current Irish transposing measure is the European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communication) Regulations 2001, SI 207/2001 as am. by the European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communication) (Amendment) Regulations 2010, SI 370/2010.

<sup>142</sup> Transposed by the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004, SI 853/2004 as am. by the European Communities (Distance Marketing of Consumer Financial Services)(Amendment) Regulations 2005, SI 63/2005.

<sup>143</sup> Eurobarometer, p. 83. The highest number of correct responses was from Germany where 83% answered correctly with Finland and Denmark reporting 75% and 74% respectively.

<sup>144</sup> See SI 853/2004, Reg. 15.

negotiated away from business premises.<sup>145</sup> Under Art. 5, a consumer has a right to cancel a contract concluded away from the trader's premises within seven days without giving a reason. In response to a question regarding whether a consumer has a right to return a vacuum cleaner bought at the door and get their money back without giving a reason, only 28% of Irish consumers correctly answered yes while 47% answered no and 18% did not know.

Sales guarantees are covered by Directive 1999/44.<sup>146</sup> Under Art. 2, goods sold to consumers must be in conformity with the contract. Goods are presumed to conform with the contract if they meet a number of criteria, such as where they comply with the description provided by the seller and they are fit for their normal purpose. Art. 3 states that the seller is liable to the consumer for any lack of conformity which exists at the time the goods were delivered and that, in that situation, the consumer is entitled to have the goods brought into conformity by repair or replacement.<sup>147</sup> The Directive provides, in Art. 5, that the seller is liable for any non-conformity that arises within 2 years of delivery of the goods. The question in respect of guarantees was, in the case of a fridge which broke down, and where an extended guarantee was not purchased, whether there was a right to repair or replacement 18 months after purchase. Only 30% of Irish consumers correctly responded that they had such a right with 41% stating that no such right existed. Again, as with question regarding the cooling-off period for online financial services, there may have been some confusion around this question in terms of its phraseology and its substance. The term 'guarantee' is actually not used in Directive 1999/44 (nor indeed the Irish sale of goods legislation) in relation to the *legal* quality standard with which goods must comply. Instead, the word 'guarantee' is more commonly used in relation to voluntary 'warranties' or 'guarantees' which may be offered by manufacturers and others, free or otherwise for variable periods. Moreover, when Ireland transposed Directive 1999/44, we did not implement the 2 year time limit; rather we continue to apply our more generous 6 year limitation period.

To summarise, Ireland receives specific mention as an outlier in the Eurobarometer study, at the top end in self-assessed levels of knowledge and at the lower end in objective assessment of knowledge, suggesting a dissonance between Irish consumers' self-perception and their actual knowledge. Of particular concern is the number of consumers who do not have any idea of their rights under European law and could not answer any questions correctly. The Eurobarometer study also reinforces the point, however, that legal rights operate differently across different member states with several of the questions asked not quite fitting the Irish context. Thus, some care needs to be taken with these findings (or indeed any European-wide findings) in the development of the Irish consumer agenda. A limitation of the Eurobarometer survey is that its focus is on European legislation. From an Irish perspective, consumer rights which are derived from the other foundation for Irish consumer law are not addressed. The study discussed in the next

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<sup>145</sup> Directive 85/577 is repealed by Directive 2011/83/EU on consumer rights as of 13 July 2014. Transposed by the European Communities (Cancellation of Contracts Negotiated Away from the Business Premises) Regulations 1989, SI 224/1989.

<sup>146</sup> Transposed by the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations, 2003, S.I. No. 13 of 2003.

<sup>147</sup> On the relationship between this right and the right to reject under the Sale of Goods Acts, see text to n. 98 above.

section attempts to integrate actual knowledge of this aspect of Irish consumer law into the analysis.

### **The UCC Study: Testing Knowledge of Rights under Domestic Law**

The study discussed in this section was conducted in November-December 2012. The study builds on the Eurobarometer study in that it encompasses both consumer self-assessment and actual levels of consumer knowledge. However, the concern of this study is with rights which derive from domestic, rather than European, law and it investigates the hypothesis of whether Irish consumers are better informed in respect of these rights. This possibility arises because these rights are longer established and, arguably therefore, more ingrained in the Irish consumer psyche.

The sample size for this study is relatively small, comprising 262 face-to-face interviews with individuals at various locations through-out Cork City.<sup>148</sup> In evaluating the findings, account should be taken of the small sample size and the limited geographical coverage. For the purposes of this article, the relevant parts of the study are, first, consumers' self-assessment and secondly, consumers' actual knowledge of their rights under domestic law.

In self-assessment, the findings in respect of confidence closely matched those of the NCA and Eurobarometer, with 83% of respondents indicating that they felt very or quite confident.

There was however a disparity between the NCA/Eurobarometer responses and those of this study in self-assessment regarding knowledge and feeling protected. Only 41% of respondents self-assessed as feeling knowledgeable while only 56% described themselves as feeling protected by the law. These discrepancies may well be simply as a result of the small sample size. However, it is possible that the fact that the introduction to the survey expressly told consumers that they would be tested on their knowledge may have led to a somewhat more circumspect response.<sup>149</sup>

In evaluating actual levels of knowledge, the relevant parts of the study can be divided into knowledge about different aspects of consumer remedies in sale of goods transactions and knowledge about legal terms. All of the questions relate to rights arising under the Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980. Under this legislation, various contractual terms (conditions) are implied into the contract of sale requiring that the goods supplied reach a certain minimum quality standard. For example, section 13 of the 1893 Act requires that where goods are sold by description, the goods supplied must comply with that description. Therefore, where goods are sold are described as "100% beef burger" and they are found to contain horsemeat mixed with beef, there is a breach of section 13 and the legislation provides a series of remedies for the disappointed

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<sup>148</sup> Locations were identified on the basis of socio-economic variation. All interviews took place in a public place: street or shopping centre. Demographic data was gathered in respect of gender; age and education. Breakdown was as follows: Gender: 54% female and 46% male; Age: 15-24 years: 22%; 25-39 years: 35%; 40-55 years: 24%; 55 plus: 18%; Education: up to 15 years: 2%; 16-19 years: 37%; 20 plus years: 47%; Still studying: 14%.

<sup>149</sup> At the beginning of each interview, the interviewer read the following statement: "This survey is being conducted on behalf the Law Faculty at UCC, and it asks questions about consumers perceptions of themselves and their knowledge of the law. It takes between 5 -10 minutes. Would you be willing to participate in this short survey and please feel free to withdraw at any time?"

buyer. Another key implied term can be found in section 14(2) of the 1893 Act which provides that where goods are sold in the course of a business, the goods supplied must be of merchantable quality, defined as requiring reasonable fitness for purpose and durability, in light of any description applied to the goods, the price and any other relevant circumstances.<sup>150</sup>

Where any of the above implied terms are breached, the buyer is provided with a range of remedies. Because the statutory implied terms as to quality are classified as conditions, where any term or terms are breached, the buyer can terminate the contract, reject the goods (claiming a refund of any price paid) and claim damages for any loss. Alternatively, the buyer can opt to keep the goods, though not perfect, and sue for damages only. Importantly, the buyer can select whichever option suits his particular circumstances. Of these remedies, the right to reject (and seek a refund) is particularly powerful. It places the consumer buyer in a strong of bargaining position (i.e. he can demand a refund on return of the goods) and its self-help nature makes it both easy and relatively cheap to operate. However, this right to reject does not continue indefinitely. Pursuant to the legislation the right to reject can be lost, in particular with the passing of time.<sup>151</sup> English caselaw suggests that the right to reject can be lost relatively quickly, as happened in *Bernstein v. Pamsons Motors (Golders Green) Ltd*,<sup>152</sup> where a new car seized up after three weeks driving and 142 miles due to a blob of sealant in the lubrication system. While the court held that the car was unmerchantable; it also held that the buyer was too late to reject: he had lost his right to reject and was limited to a claim in damages only. In addition, since 1980, the consumer buyer may demand that the goods are repaired or replaced (known as a right of cure) under sale of goods legislation (and pursuant to Directive 1999/44).<sup>153</sup> Importantly though, it is the buyer's choice whether to seek to reject or cure the goods.

The results of the UCC study affirm the fundamental significance in Irish consumer law of the right to reject defective goods. When asked a question regarding the right to reject defective goods, 98% of consumers gave a correct response, reflecting an almost perfect level of consumer knowledge about this aspect of the right to reject.<sup>154</sup> The study found that Irish consumers were less sure of their rights in respect of repair or replacement instead of rejection. When asked if a seller could insist on repair rather than return and refund,<sup>155</sup> only 34% of consumers gave the correct answer (which is that they could not), with 61% saying that the seller could insist on repair and 5% saying that they did not know. Thus, two thirds of respondents do not know that the bargaining power rests with the consumer: it is the consumer who can select, either, rejection or cure.

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<sup>150</sup> See 1893 Act, s.14(3): See F. White "The Meaning of 'Merchantable' Quality" (2012) 47 *Irish Jurist* 255. Other implied quality terms relate to fitness for particular purpose (s.14(4), 1893 Act); sales by sample (s.15, 1893 Act); and sales of motor vehicles (s.13, 1980 Act).

<sup>151</sup> 1893 Act, ss.34-35.

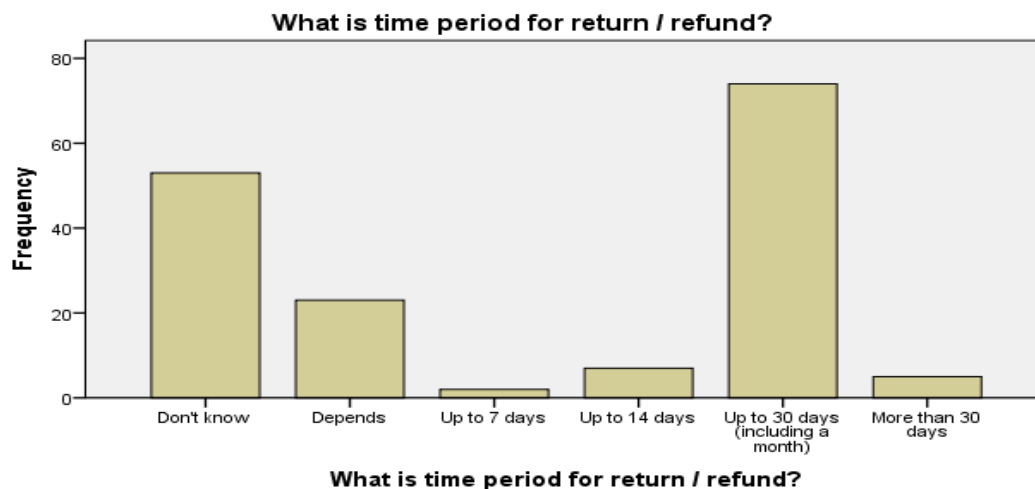
<sup>152</sup> [1987] 2 All E.R. 220.

<sup>153</sup> 1893 Act, s.53(2).

<sup>154</sup> The question asked was "Suppose you buy something in a shop, (say a TV), and it turns out to be defective (i.e. it doesn't work), are you entitled in law to return it and get a refund?"

<sup>155</sup> The question asked was "Suppose you buy a washing machine in a shop and within the first week, it stops working (because the heating element breaks). Can the seller insist on repairing or replacing of the washing machine instead of allowing you to return the washing machine and get a refund?"

Importantly, the right to reject under the Sale of Goods Acts is typically only available where the goods are defective and hence are in breach of the statutory implied terms as to quality. A consumer does not have the right to reject /return goods merely because he or she changes his or her mind. The answers to a question about this showed clear evidence of consumer misunderstanding.<sup>156</sup> In response, 48% of consumers correctly answered that there was not a right to refuse simply on the basis of a change of mind but a slightly greater percentage (49%) incorrectly answered that there was. Only a very small number of respondents (3%) stated that they did not know. The high number of incorrect responses here may reflect the business practice of many retailers who allow consumers to return goods without giving a reason. Further questions built on the exercise of the right to reject and, again, there was evidence of consumer confusion. Irish law does not specify a fixed time limit within which you can reject/return defective goods. However, as described above, the right to reject is limited and a consumer can lose the right to reject with the passing of time. In response to the question of whether there was a time limit for the right to reject, 63% of respondents correctly answered yes, with 6% answering no and 31% saying that they did not know. We then asked the respondents who knew that there was a time limit what this time limit was. Here, there was clear confusion with only 9% giving the correct answer that it depended on the circumstances. As is clear from the graph below, there was a wide range of answers. Once again, it may well be that consumers' answers in this context are influenced by some retailers' business practices which can leave consumers with a false sense of security.



We used two questions to assess consumers' recognition of legal terminology surrounding the Sales of Goods statutory framework. While recognition of terminology is clearly different to substantive understanding, it is nonetheless worthwhile to examine the extent

<sup>156</sup> The question asked was: "Suppose you buy something in a shop, (say a pair of shoes), and subsequently change your mind about them, does consumer law provide you with a right to return the shoes and get your money back?"



to which terminology has entered the broader lexicon. There may also be practical benefits for a consumer who is able to articulate his or her rights against a supplier using the appropriate terminology. To this end, we asked respondents: “suppose you buy something in a shop, say a TV, there is a legal requirement that the TV must be of a certain quality: do you know the legal term used to describe this quality?” A substantial majority (75.2%) did not know the term. Of those who did know the term, 54% identified the quality term correctly as merchantable quality; 35% accurately described the quality terms in terms simply of ‘fitness’; while 11% used the more exact phrase ‘fitness for purpose’. The second terminological question related to the commonly used term, especially in retail premises, “does not affect your statutory rights”. When questioned, 76.7% of respondents said that they had seen this term and, of these, 70% could correctly explain what this term meant.<sup>157</sup> Thus, it would seem that this term has more effectively permeated consumer consciousness, probably because of its widespread usage in retail premises.

The final question asked was aimed at testing consumer awareness of the distinction between legal rights and business practices. All respondents were asked: are you legally entitled to a receipt when you purchase goods or services? The almost unanimous (99.6%), and incorrect, response was yes. This finding accords with some of the earlier findings which showed that consumers may be misled in respect of their legal rights by business practices which, in this context, almost inevitably involves the provision of receipts by retailers.

In summary, although the sample size is smaller, the UCC study reinforces the conclusion which emerged from the Eurobarometer study that a significant proportion Irish consumers lack of knowledge about their rights. It also suggests that, even though the sale of goods legislation is longer established, with the exception of the right to reject defective products, the protections afforded are not necessarily more embedded in the Irish consumer consciousness.

## Conclusion

Under the Treaty on the Functioning of the European Union, competence in the area of consumer protection is shared between the EU and the member states, such as Ireland.<sup>158</sup> As well as this formal sharing of legal competences, it is clear that at a policy level the EU institutions and the relevant Irish institutions (government departments and National Consumer Agency) also share a common strategy which involves the creation of confident, well-informed consumers. Empirical data from the EU and Ireland, detailed above, shows that Irish consumers identify themselves as confident, knowledgeable about their rights and protected by the law, but significantly, objective testing of these self-perceptions, in particular in relation to knowledge of consumer rights, displays a dissonance between consumers’ perceived level of knowledge and their actual knowledge about their legal rights. As noted above, Ireland received specific mention in the Eurobarometer study, both in terms of self-reported levels of knowledge and in terms of actual lack of knowledge although, as also argued, the Eurobarometer study does not take account of differences between member states in transposition and therefore some care should be taken with the

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<sup>157</sup> All respondents who said that they had seen the term were asked by the interviewer to explain what the term meant and the responses were categorised by the interviewer as correct or incorrect.

<sup>158</sup> TEFU, Art. 4.

findings. It is concerning, however, that Ireland stood out as being one of the member states with the highest number of respondents who could not answer even one question correctly, suggesting that a significant number of Irish people may have little or no knowledge of their consumer rights. Perhaps these results in the Eurobarometer study could be explained by the fact that many of these EU rights are relatively new, and sometimes alien to our common law system, but the picture appears no better when we turn to consumer rights established under domestic sale of goods law, as illustrated by the UCC study. The detailed testing of the right to reject in Irish law, illustrates poor penetration of the legal quality standard of ‘merchantable quality’ and confusion about the mechanics of the operation of the right.

The question is: how to respond to the above findings and analysis? Clearly, law reform could help. The poor responses to questions about the Sales of Goods Acts may derive in part at least from the continued use of archaic language, such as ‘merchantable quality’, and the lack of clarity in the law around the time-limit for rejection, as well as the complicated nature of the rights to reject and cure. And so in this regard, the recommendation from the Sales Law Review Group to alter the quality standard from merchantable quality to “satisfactory quality” is to be welcomed, along with their recommendation to introduce a default 30-day rejection period and to better integrate consumer remedies.<sup>159</sup> These recommendations would modernise and simplify the law, and bring a greater level of clarity and certainty. In addition, more and better education of consumers about their rights is needed in Ireland and this is something which the proposed Consumer and Competition body must address as a matter of urgency.

From a broader perspective, the analysis raises questions about the models of consumer protection adopted at European and Irish levels. It is arguable that we expect too much from consumers in terms of knowledge. Even if the recommendations to modernise and simplify the law, referred to above, are adopted, the reality is that consumer knowledge of the law is clearly affected by numerous factors.<sup>160</sup> One factor which emerges from the UCC study is that consumer knowledge is influenced by retail practices which may offer more favourable terms than the relevant legal regulation. Some degree of consumer confusion is therefore unavoidable and any policy which is based on a presumption of the achievement of “perfect” consumer knowledge is inevitably flawed. Thus, consumer protection policies based primarily on the creation of the confident, informed consumer as an actor in promoting market growth are too limited. We would argue therefore that Irish law and policy makers need to develop an Irish consumer protection policy which places the protection of consumers at its heart; with any resultant growth in the market to be seen as a welcome by-product. This approach to consumer policy is grounded in considerations of consumer welfare rather than solely fulfilling economic purposes. This is fundamentally different to the EU policy position, as discussed above, where internal market imperatives are key drivers and the consumer welfare agenda appears to be secondary.

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<sup>159</sup> Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (2011) Prn. A11/1576, paras 4.43; 9.44; and 9.53.

<sup>160</sup> Relevant factors include amount of time spent shopping/comparing products/reading terms and conditions: see Eurobarometer, p.108 *et seq.*

Second, Irish law and policy makers must recognise the complex and distinct characteristics of Irish consumers: for example, they can be both confident and ill-informed and their perceptions of the law derive as much from market practice as from legal regulation. Therefore, Irish legal regulation needs to be engaged, responsive, and flexible to address these complexities. For instance, greater use of codes of practice should be considered as alternative way of delivering on consumer protection. The innovative Consumer Protection Code in relation to financial services, discussed above, presents a useful model. Third, as was the case with the negotiations around the consumer rights Directive, Irish negotiators must resist any attempts at maximum harmonisation which seek to stifle difference, innovation and experimentation. The input of the Sales Law Review Group provided Irish negotiators with expert opinion thus enabling a more effective assertion of the domestic interest in the context of the proposed consumer rights directive. Utilising these kinds of competencies and expertise must be key to the ongoing development of the Irish consumer protection agenda within the European context.

Finally, in advancing the Irish consumer protection agenda, it is necessary to revisit existing consumer protection legislation and to engage critically with the choices which were made on transposition. One area which would benefit from such an approach is the regulation of unfair contract terms. On transposition of the relevant directive, Ireland, unlike most other member states, limited the scope of the regulations to standard form contracts only and utilised the core terms exemption to the full extent.<sup>161</sup> As a result, Irish consumers benefit from a lower level of protection in this respect than most other European citizens. This gap in regulation needs to be addressed in the context of a wide-ranging Consumer Contract Rights Act. A measure of this kind has been recommended by the Sales Law Review Group.<sup>162</sup> Such a measure would bring together the main provisions dealing with consumer contracts, supported by enforceable codes of practice and must be a priority in asserting a distinct domestic agenda for Irish consumers.

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<sup>161</sup> See M. Donnelly “Unfair Terms in Consumer Contracts: Time for Legislative Recalibration?” (2012) 19 *Commercial Law Practitioner* 115.

<sup>162</sup> Sales Law Review Group, *Report on the Legislation Governing the Sale of Goods and Supply of Services* (2011) Prn. A11/1576, para14.14.