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# UCC

**University College Cork, Ireland**  
Coláiste na hOllscoile Corcaigh

## Ireland

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### A. Introduction

The Digital Content Directive<sup>1</sup> (DCD) and Sale of Goods Directive<sup>2</sup> (SGD) have 1 been transposed into Irish law by the Consumer Rights Act 2022. In May 2021, the Government published a Scheme (legislative outline) for a Consumer Rights Bill 2021, which sought to transpose the SGD in Part 2, and the DCD in Part 3, and a Consultation on the Scheme for a Consumer Rights Bill, was commenced at the same time.<sup>3</sup> Following a lengthy consultation and drafting process, proposed legislation in the form of the Consumer Rights Bill 2022 was introduced to Parliament (the Oireachtas) on 22 April 2022 and the Consumer Rights Act 2022 completed its passage through the Oireachtas and was enacted on 7 November 2022. The whole Act, bar one provision<sup>4</sup>, came into effect from 29 November 2022.

The transposition of the DCD and the SGD is part of a wider consolidation and 2 reform process of Irish consumer law which started over a decade ago. Initially, reform of consumer sale of goods law was recommended by a Government appointed

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<sup>1</sup> Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, [2019] OJ L 136/1.

<sup>2</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, [2019] OJ L136/28.

<sup>3</sup> See <https://enterprise.gov.ie/en/Consultations/Consultation-on-Scheme-of-Consumer-Rights-Bill-2021.html> (last accessed 5 July 2022).

<sup>4</sup> Section 161 had not been commenced, at the time of writing.

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expert group, the Sales Law Review Group, in its final Report on the Legislation governing the Sale of Goods and Supply of Services in 2011.<sup>5</sup> While the majority of the Report's recommendations addressed B2B transactions, important changes were also recommended in relation to consumer sales and related transactions. In broad terms, the recommendations involved a further 'Europeanisation' of Irish consumer sales law; while certain distinct aspects of the domestic legal framework were to be retained. For example, in relation to definitions, the definition of 'consumer goods' in Directive 1999/44 was to be adopted as the basis of the general definition of 'goods' in future legislation<sup>6</sup>; as was the EU definition of 'consumer'<sup>7</sup>, leading to a narrowing of the existing definition which is not expressly limited to natural persons or individuals. At the same time, the common law concepts of conditions, warranties and implied terms as a vehicle for delivering the 'quality standard' of goods, as well as a short-term right to reject defective goods, even for a minor defect, were to be retained but integrated with the EU remedies from Directive 1999/44.<sup>8</sup> More importantly perhaps, the Group recommended that a separate Consumer Contract Rights Act should be enacted that would incorporate the main statutory provisions applicable to consumer contracts, thereby simplifying and consolidating consumer law.<sup>9</sup>

- 3 Following a period of time, a consultation process was launched, and a Scheme for a Consumer Rights Bill implementing the above recommendations was published in 2015.<sup>10</sup> However, within a short number of months the EU Commission published its proposals for the two new directives, whose implementation is being considered here: one on contracts for the supply of digital content, and a second concerning online sales and distant sales.<sup>11</sup> In light of these developments at EU level, it was decided to pause the domestic reform agenda until the EU legislative process was completed.
- 4 The adoption of the DCD and the SGD in 2019 clearly delayed completion of the domestic reform agenda; but at the same time, the pursuit of an ambitious consolidation and reform process of consumer contractual rights has also delayed the transposition of the DCD and the SGD into Irish law.
- 5 The above delays and developments have resulted in some significant changes in policy and to the legislative framework for the protection of consumer contract rights in Ireland. The transposition of these two directives has dove-tailed with and influenced the wider reform agenda. Changes in policy include a jettisoning of the traditional common law concepts of conditions, warranties and implied terms, in favour of the requirements of subjective and objective conformity; and an acceptance of data as a form of counter performance in relation to contracts for digital content and digital services, something which did not feature in the earlier Consumer Rights Bill 2015. At the same time there has been a degree of cross fertilisation between the two directives and between the other provisions of the Consumer Rights Act 2022. For example, while Part 2 of the 2022 Act deals with sale of goods, and Part 3 with digital content and services, Part 4 seeks to reform the rules on contracts for the supply of

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<sup>5</sup> Sales Law Review Group, *Final Report on the Legislation Governing Sale of Goods and Supply of Services* (July 2011) (available at <https://enterprise.gov.ie/en/Publications/Report-on-the-Legislation-Governing-the-Sale-of-Goods-and-Supply-of-Services.html> last accessed 5 July 2022).

<sup>6</sup> *Ibid.* para. 2.4

<sup>7</sup> *Ibid.* para. 5.22

<sup>8</sup> *Ibid.* Ch. 4.

<sup>9</sup> *Ibid.* para.14.4.

<sup>10</sup> See <https://enterprise.gov.ie/en/Consultations/Consultation-on-the-Scheme-of-a-proposed-Consumer-Rights-Bill.html> (last accessed 5 July 2022).

<sup>11</sup> COM (2015) 634 final and COM (2015) 635 final. The former proposal was later extended to cover digital services and the latter proposal was subsequently generalised to cover all consumer sales.

## B. Definitions and Scope of Application

services, and the concepts of subjective and objective conformity have been adopted and tailored to apply to the service contract, along with a similar tailored remedial scheme.<sup>12</sup> In addition, while the proposed rules on sale of goods require payment of a price, the Consumer Rights Act also includes a provision that this requirements may be extended by ministerial order to include data as counter performance in relation to smart goods, in certain circumstances in the future.

It is notable that other related areas, such as intellectual property law and data 6 protection law remain untouched by the transposition of the two Directives.

Having set the transposition of the DCD and the SGD in its wider context, the 7 remainder of this Chapter focuses on *how* the DCD and the SGD have been implemented in Irish law with reference to certain key issues, namely, definitions and scope of application; conformity; liability of the trader; remedies; commercial guarantees; time limits; rights of redress, and other remedies.

## A. Definitions and Scope of Application

### I. Definitions

The notions or terms defined in the DCD (in particular Art. 2) and the SGD (in 8 particular Art. 2) are transposed faithfully in the Interpretation sections of the Consumer Rights Act 2022, namely in s.2 (in general); s.10 (in relation to the SGD in particular); and s.48 (in relation to the DCD in particular). For instance,

‘goods’ means any tangible moveable items (other than money and any item sold by way of execution or otherwise by authority of law) and includes

- (a) any tangible movable items that incorporate, or are inter-connected with, digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions, and
- (b) water, gas and electricity where they are supplied in a limited volume or set quantity;

but in keeping with the pre-existing legal position, the option was not taken to exclude second hand goods sold at public auction or living animals.

The vast majority of the definitions relevant to digital contracts (e.g. digital content, 9 digital service, goods with digital elements, integration, updates, price, digital environment, compatibility, functionality, and interoperability, bar durable medium) are novel to Irish consumer legislation, but have not given rise to any significant doctrinal debate.<sup>13</sup> Given the novelty of these terms, the definitions of ‘digital content’ and ‘digital service’ have been expanded to include non-exhaustive illustrative examples from Recital 19 DCD, giving national legal effect to Recital 19, such that

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<sup>12</sup> Part 5 of the Act transposes the consumer rights directive; and Part 6 unfair terms. The remaining Parts deal with enforcement and consequential amendments.

<sup>13</sup> Kelly, “Consumer Reform in Ireland and the UK: Regulatory Divergence before, after and without Brexit”, (2018) 47 *Common Law World Review* 53; “The Digital Single Market for Consumers: Mapping Reforms of European Union Consumer Law”, (2018) 25 *Commercial Law Practitioner*, 148; Gardiner, “Scheme of Consumer Rights Bill 2015: Paving the Way for Digital Consumers”, (2015) 22 *Commercial Law Practitioner*, 222.

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“digital content” means data which are produced and supplied in digital form, *including in particular computer programs, applications, video files, audio files, music files, digital games, e-books and other e-publication*; [authors’ italics]

“digital service” means-

- (a) a service that allows a consumer to create, process, store or access data in digital forms, or
- (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other user of that service, *and includes in particular video and audio sharing and other file hosting, social media, and word processing and games offered in the cloud computing environment*; [authors’ italics]

- 10 More generally, and in a similar vein with reference to the relevant recitals (e.g. SGD, Recital 22), the definition of consumer is transposed faithfully, with an additional qualification in relation to dual purpose contracts such that:

“consumer” means an individual acting for purposes that are *wholly or mainly* outside that individual’s trade, business, craft or profession;

- 11 Lastly in relation to definitions, the Consumer Rights Act 2002 uses the term ‘trader’ throughout, to encompass ‘seller’ in the SGD, given the fact that the 2022 Act is a consolidating Act dealing with a variety of transactions and regulatory measures, including the DCD and the SGD, as well as service contracts in Part 4; the consumer rights directive in Part 5; and the unfair contract terms directive in Part 6.

## **II. Types of Contracts and Scope of Application**

- 12 In relation to the different types of contracts within the scope of application of the Consumer Rights Act 2022, the proposed legislation applies to sales contracts, including for the supply of goods with digital elements in Part 2; to digital content contracts (including any tangible medium which serves exclusively as a carrier of digital content) and digital service contracts in Part 3; and to service contracts in Part 4.
- 13 Prior to the Consumer Rights Act 2022, there was no legislative provision for the supply of goods with digital elements, digital content contracts and digital service contracts in Ireland. At common law, there was no direct legal authority on these types of contracts but based on legal doctrine from other common law jurisdictions with a similar legal framework (namely, the UK and Australia) it seems highly likely that;
- contracts for the supply of goods with digital elements (such as a smart TV or laptop with software pre-installed) would have come within the statutory definition of a sale of goods contract pursuant to the Sale of Goods Acts 1893 and 1980;
  - contracts for the supply of digital content on a carrier (such software saved on a CD or a memory stick) would have also come within the statutory definition of a sale of goods contract pursuant to the Sale of Goods Acts 1893 and 1980;
  - contracts for the supply of digital content/services alone (e.g. downloaded or otherwise copied) would have not come within the definition of a sale of goods contract pursuant to the Sale of Goods Act 1893 and 1980, but could have been classified as a contract of services or *sui generis*.<sup>14</sup>

### B. Definitions and Scope of Application

Thus, the impact of the transposition of the DCD and the SGD appears to be as follow: 14

- contracts for the supply of goods with digital elements are treated the same under pre-existing legislation and the Consumer Rights Act 2022;
- contracts for the supply of digital content on a carrier are treated differently, and will no longer be classified as sale of goods contracts, but instead will be regulated by the DCD and Part 3 of the Consumer Rights Act 2022;<sup>15</sup>
- contracts for the supply of digital services are excluded from the scope of Part 4 on service contracts, and instead will be regulated by the DCD and Part 3 of the Consumer Rights Act 2022.

While this involves some re-classification of certain contracts, the transposition of the SGD and the DCD brings clarity in terms of the classification of transactions and the application of the different rules, as well as enhancing consumer protection by filling a legislative gap in relation to digital contracts.

### III. Data as Counter-Performance and the Doctrine of Consideration

Irish law has no problem is accepting data as counter-performance. The common law doctrine of consideration, with its complicated rules and voluminous jurisprudence, is flexible in recognizing a wide range of forms of counter performance as good consideration for a valid enforceable contract. Thus, in doctrinal terms, the introduction of a provision on data as a counter performance fits neatly with existing contract law doctrine and has not given rise to any doctrinal debate.<sup>16</sup> 15

Section 2 of the Consumer Rights Act 2022 expressly defines ‘digital content contract’ and ‘digital services contract’ to make clear that data as counter performance is good consideration. Accordingly, 16

‘digital content contract’ means a contract under which

- (a) a trader supplies or undertakes to supply digital content to a consumer, and
- (b) the consumer either or both:
  - (i) pays or undertakes to pay the price of the digital content;
  - (ii) provides or undertakes to provide personal data to the trader, other than where the personal data are processed by the trader only for the purpose of supplying the digital content in accordance with this Act or complying with any other legal requirement to which the trader is subject;

‘digital service contract’ means a contract under which

- (a) a trader supplies or undertakes to supply a digital service to a consumer, and
- (b) the consumer either or both:
  - (i) pays or undertakes to pay the price of the digital service;
  - (ii) provides or undertakes to provide personal data to the trader, other than where the personal data are processed by the trader only for the purpose of supplying the digital service in accordance with this Act

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<sup>14</sup> See e.g. Sales Law Review Group, *Final Report on the Legislation Governing Sale of Goods and Supply of Services* (July 2011) paras 2.5 – 2.29 (available at <https://enterprise.gov.ie/en/Publications/Report-on-the-Legislation-Governing-the-Sale-of-Goods-and-Supply-of-Services.html> last accessed 5 July 2022).

<sup>15</sup> Consumer Rights Act 2022, s.12(6) and s.49(3).

<sup>16</sup> See generally, McDermott and McDermott, *Contract Law*, 2nd edn (London: Bloomsbury Professional, 2017) Ch3 and Clark, *Contract Law in Ireland*, 8th edn (Dublin: Round Hall, 2016, Ch2).

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or complying with any other legal requirement to which the trader is subject;

While legal doctrine posed no obstacle to data as counter performance, the policy approach to this issue has vacillated in recent years. In 2014, the Department of Jobs, Enterprise and Innovation published a Consultation Paper on Reform of the Law on Consumer Contract Rights<sup>17</sup> which considered the issue of digital content supplied other than for a price. While noting that legislative initiatives in the EU and the UK, at that time, had taken somewhat different approaches, the Consultation Paper, which sought views on this issue, also noted that transactions of this kind appeared to constitute an important part of the business model and revenue generating capacity of some digital content providers. In 2015, a Scheme of a Consumer Rights Bill<sup>18</sup> was published, and Part 3 on contracts for the supply of digital content was drafted to apply only where digital content was supplied for a price. This position would appear to have been influenced by the UK position in their Consumer Rights Act 2015 and a recognition of the important role of tech companies as vehicles for direct foreign investment in the Irish economy.

- 12 In relation to the sale of goods, s.13 of the Consumer Rights Act 2022 gives the relevant Minister of State the power to extend the application of Part 2 (on sale of goods) to contracts for the sale of goods with digital elements where the consumer
- (a) does not pay or undertake to pay the price of the goods, and
  - (b) provides or undertakes to provide personal data to the trader, other than where the personal data are processed by the trader for the purpose only of supplying the goods with digital elements in accordance with this Part or complying with any other legal requirement to which the trader is subject.

This power can only be exercised where the Minister is satisfied, after consultation with such persons as the Minister considers appropriate, that (a) such contracts are being concluded on a significant scale, and (b) the regulation of such contracts would be in the interests of consumer protection and fair competition.

#### **IV. Business to Business (B2B) Contracts**

- 13 It might be wondered whether the provisions of the two Directives could apply to B2B contracts. In principle, the provisions of the two Directives would appear suitable for B2B contracts, with some modifications. Traditionally, pursuant to the Sale of Goods Acts 1893 and 1980, in relation to the sale of smart goods, and goods which act as a carrier for digital content, as well as in relation to service contracts for the supply of digital content, the same quality / conformity requirements apply to B2B and B2C transactions, subject to modifications. In particular, different rules regulating the use of limitation of liability and exclusion clauses apply, whereby in B2B transactions, parties are given freedom to limit or exclude their liability, in certain circumstances. Any future B2B legislation would need to take account of the needs of businesses to be able to regulate their own risks and liability, via such clauses.

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<sup>17</sup> August 2014, available at <https://enterprise.gov.ie/en/Consultations/Consultations-files/Consultation-Paper-Reform-of-the-Law-on-Consumer-Contract-Rights.pdf> (last accessed 5 July 2022).

<sup>18</sup> May 2015, available at <https://enterprise.gov.ie/en/Consultations/Consultations-files/Scheme-of-a-proposed-Consumer-Rights-Bill-May-2015.pdf> (last accessed 5 July 2022).

## B. Conformity of Goods

Subject to some minor textual amendments and the re-ordering of some provisions, 19 the Consumer Rights Act 2022, Part 2 (s.17(1) and s.18) and Part 3 (ss.53(1) and s.54) faithfully transposes the subjective and objective requirements of conformity in the SGD and the DCD, respectively. One potentially significant amendment, by way of the insertion of an additional word, was made in relation to para. (a) of the objective conformity requirements whereby goods must “be fit for *all* the purposes for which goods of the same type would be normally used, ...”. This refinement derives from Irish legal doctrine of the definition of ‘merchantable quality’ under the Sale of Goods Act 1893 and clarifies that where goods have more than one normal purpose, they must be fit for all their normal purposes.<sup>19</sup> The faithful transposition of the directives also extends to incorrect installation which in relation to smart goods, is dealt with in s.19 of the Consumer Rights Act 2022; in relation to digital content and digital services, s.55 is the relevant provision. Both sections transpose faithfully, with minor textual amendments, Art. 8 SGD and Art. 9 DCD

In addition, the Consumer Rights Act 2022 takes advantage of a number of the 20 options made available to member states, and also legislates outside the areas within the scope of the DCD and the SGD, to regulate certain matters, namely in relation to:

- information requirements in distance and off-premises contracts;
- spare parts and after-sale services;
- the right to sell / supply & terminate;
- implied contract terms;
- exclusion or limitation of liability; and
- recipients of a gift and users of motor vehicles.

These distinct features of the Irish Consumer Rights Act 2022 are considered further below, as well as matters of durability, updates, exclusion of conformity, and third party rights.

### I. Information Requirements in Distance and Off-Premises Contracts

In relation to the sales contracts in Part 2, s.17 addresses further matters under the 21 heading of subjective conformity. First, s.17(2) provides that the information that a trader is required to provide in relation to distance and off-premises contracts forms part of the sales contract, and s.17(3) states that goods sold in these circumstances must comply with any terms of the contract which derive from these information requirements that are additional to the subjective requirements in s.17(1).<sup>20</sup> In relation to digital content and digital service contracts, similar information provisions apply in s.53(2) and (3).<sup>21</sup> The express inclusion of these information requirements as subjective conformity requirements brings a degree of coherency between the consumer rights directive, Directive 2011/83, and the two Directives under consideration in this Chapter, and reinforces the integral nature of these obligations.

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<sup>19</sup> *James Elliot Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 269, approved in [2014] IESC 74; see further White, “The meaning of ‘merchantable quality’”, (2012) 47 *The Irish Jurist*, 225.

<sup>20</sup> See Recital 26 SGD.

<sup>21</sup> See Recital 42 DCD.



## II. Spare Parts and After-Sale Services

- 22 A second subjective conformity requirement addressed in Part 2, s.17 relates to spare parts and after-sales services.<sup>22</sup> Section 17(4) provides that spare parts and an adequate after-sales service must be made available by the trader—
- (a) in such circumstances as are stated in an offer, description or advertisement by the trader on behalf of the producer or on the trader's own behalf, and
  - (b) for such period as is so stated or, if no period is so stated, for a reasonable period.

A similar provision exists in the Sale of Goods and Supply of Services Act 1980, s.12. Importantly, this provision does not require a trader to provide spare parts or an after-sales service. Instead, it is only where spare-parts and an after-sales service are offered, described or advertised by the trader, that the trader is legally obliged to make the spare-parts and after-sales service available. Moreover, this obligation applies to all goods, including smart goods, and is not limited to any particular class of goods, but it has no application in relation to digital content and digital service contracts.

## III. Right to Sell/ Supply & Terminate; Freedom from Charges or other Encumbrances

- 23 As a preliminary to the subjective and objective requirements of conformity, and further to Recitals 18 and 35 SGD and Recital 12 DCD, Part 2 on sales contracts and Part 3 on digital content and digital service contracts, also include an obligation on the trader to have the right to sell the goods / supply the digital content or digital service, and where the trader does not have the right to sell/supply, the consumer has the right to terminate the contract.<sup>23</sup>
- 24 In addition, Part 2 on sales contracts also includes a requirement that the goods are free from any charge or other encumbrance not disclosed to the consumer and that the consumer will enjoy quiet possession of the goods.<sup>24</sup> There is also provision for the sale of a limited title to the goods.<sup>25</sup> These provisions are reminiscent of s.12 of the Sale of Goods Act 1893.

## IV. Implied Contract Terms

- 25 Part 2 on smart goods and Part 3 on digital content and digital services both include a provision which states that the traders' obligations, including the subjective and objective conformity requirements, shall operate as implied terms in the relevant contracts.<sup>26</sup> This is of particular importance where consumers wish to seek additional remedies, such as damages, for a trader's failure to comply with their obligations.

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<sup>22</sup> See Recital 33 SGD.

<sup>23</sup> Consumer Rights Act 2022, s.14 re smart goods and s.50 re digital content and digital services.

<sup>24</sup> Consumer Rights Act 2022, s.16(1).

<sup>25</sup> Consumer Rights Act 2022, s.16(2).

<sup>26</sup> Consumer Rights Act 2022, s.20 re goods and s.56 re digital content and digital services.

## **V. Exclusion or Limitation of Liability**

Further to Art. 21, Part 2 on smart goods and Part 3 on digital content and digital 26 services both include a provision which states that a term of a contract between a consumer and a trader shall not exclude or restrict the trader's liability, in relation to the various trader obligations in the legislation, and any such term is not binding on the consumer.<sup>27</sup> Further, the provisions elaborate on what is meant by the exclusion or restriction of the trader's liability, and the legislation also provides that an agreement to submit differences to ADR within the scope of the European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015<sup>28</sup> is not to be regarded as such an exclusion. A similar provision can be found at s.31 of the UK Consumer Rights Act 2015.

## **VI. Recipients of a Gift and Users of Motor Vehicles**

Chapter 6, in two provisions, extends the rights and remedies of consumers to third 27 parties in certain circumstances. These provisions should be considered in the context of a lack of general legislation on third party contract rights in Irish law. Accordingly, a subsequent buyer does not contractually have rights against the initial seller. The initial buyer would have had to have assigned those rights.<sup>29</sup> As a matter of contractual freedom the initial seller is able to exclude the transferability of the rights under the legal guarantee or a commercial guarantee in his general terms and conditions.

First, inspired by a provision from the Australian Competition and Consumer Act 28 2010<sup>30</sup>, Part 2 on sales contracts addresses the common scenario where a consumer buys goods to give as a gift to another, such as a family member or a friend. Because of the doctrine of privity of contract in Irish law, the recipients of such gifts do not have rights or remedies against the trader under the sales contract. Accordingly, s.46 provides that where a consumer who is a party to a sales contract gives goods acquired under the contract to another consumer as a gift, that other consumer shall be entitled to exercise all rights and remedies under Part 2 on the same terms as the consumer who is a party to the sales contract.

Second, inspired by s.13 of the Sale of Goods and Supply of Services Act 1980 on 29 the sale of motor vehicles, where a consumer purchases a motor vehicle under a sales contract, and the motor vehicle is not in conformity with the sales contract, and the lack of conformity would render the motor vehicle a danger to the public (including any person travelling in the motor vehicle) any person who uses the motor vehicle with the consent of the consumer and suffers loss as a result of that lack of conformity may maintain an action for damages in respect of that lack of conformity against the trader who sold the motor vehicle as if he or she were the consumer.<sup>31</sup>

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<sup>27</sup> Consumer Rights Act 2022, s.39 re goods and s.71 re digital content and digital services.

<sup>28</sup> S.I. No. 343 of 2015.

<sup>29</sup> Supreme Court of Judicature (Ireland) Act 1877, s.28(6).

<sup>30</sup> Australian Competition and Consumer Act 2010, s.266 of Schedule 2.

<sup>31</sup> Consumer Rights Act 2022, s.47.

## VII. The Durability Requirement

- 30 As well as durability being identified as an objective conformity requirement, s.18(2) drawing on Recital 32 SGD provides an elucidation of the requirement of durability such that

“... the reference to the durability of the goods is a reference to the ability of the goods to maintain their functions and performance through normal use and to possess the ability to do so which is normal for goods of the same type and which the consumer can reasonably expect having regard to—

- (a) the specific nature of the goods,
- (b) the possible need for reasonable maintenance of the goods,
- (c) any public statement on the durability of the goods made by or on behalf of any person constituting a link in the chain of transactions, and
- (d) all other relevant circumstances, including the price of the goods and the intensity or frequency of the use made of the goods by the consumer.”

- 31 Durability was an express feature of the pre-existing ‘merchantable quality’ requirement pursuant to the Sale of Goods Acts 1893 and 1980, however, there is no case law exploring this statutory requirement of durability, in practice. Product-specific Union legislation relevant to durability, such as the EcoDesign Directive 2009/125, has been transposed in domestic law by Regulation. In general, these transposing measures go no further than what is necessary to comply with EU law. The measures transposing product-specific Union legislation operate as stand-alone measures with no direct relationship to provisions transposing SGD in national law.

- 32 Directive 2009/125/EC is transposed in the European Union (Ecodesign Requirements for Certain Energy-related Products) (Amendment) Regulations 2013.<sup>32</sup> The Regulations provide for a range of enforcement options (including investigation powers; warning measures; compliance directions; withdrawal from the market directions; court orders directing withdrawal; and criminal sanctions and penalties for breach of the Regulations). In terms of penalties, a person guilty of an offence under these Regulations is liable

- on summary conviction, to a class A fine (currently up to maximum of €5,000), or
- on conviction on indictment, to a fine not exceeding €250,000.

The Regulations do not make provision for any private law sanctions.

- 33 As regards durability and links to sustainability the provisions on spare parts and after-sales services in s.17(4) of the Consumer Rights Act, should be noted. It is also arguable that the six-year limitation period (see further below), even in relation to second-hand goods, is relevant in pursuing sustainability and a circular economy, although somewhat worryingly recent research from the Competition and Consumer Protection Commission suggests that the majority of consumers are not familiar with the operation of the limitation period.<sup>33</sup>

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<sup>32</sup> S.I. No. 454 of 2013.

<sup>33</sup> See <https://www.ccpc.ie/consumers/2022/01/11/a-guide-to-january-returns-faulty-goods/> (last accessed 5 July 2022).

### VIII. The Duty to Inform and Supply Updates

While Art. 7(3) of the SGD deals in a single provision with the supply of updates in 34 sales contracts for goods with digital elements that involve a *single act of supply* of the digital content or digital service and contracts that provide for a *continuous supply* of the digital content or digital service, it was considered simpler and clearer to deal with the two types of contracts in separate provisions in the Consumer Rights Act 2022.<sup>34</sup> In addition, Art. 7(3) of the SGD states that where a contract for the sale of goods with digital elements provides for the continuous supply of the digital content or digital service over a period of time, the seller shall ensure that the consumer is informed of and supplied with the necessary updates for the period of time ‘indicated in Article 10(2) or (5) as applicable’. Article 10(2) provides that where such a contract provides for the continuous supply of the digital content or digital service for more than two years, the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract. Article 10(2) further provides that where a contract for the sale of goods with digital elements provides for a continuous supply of digital content or a digital service over a period of time (i.e less than two years), the seller shall be liable for any lack of conformity that occurs or becomes apparent within two years of the time when the goods with digital elements were delivered. The Consumer Rights Act 2022 addresses both these scenarios in separate provisions for clarity. Accordingly, where a sales contract for the sale of goods with digital elements provides for

- a single act of supply of the digital content or digital service, the trader shall ensure that the consumer is—
  - (a) informed of the availability of, and
  - (b) supplied with, any update (including a security update) that is necessary for the goods to be in conformity with the sales contract for the period of time that the consumer may reasonably expect given the type and purpose of the goods and the digital elements, and taking into account the circumstances and nature of the sales contract<sup>35</sup>;
- a continuous act of supply of the digital content or digital service for a period exceeding two years, the trader shall ensure that the consumer is informed of the availability of, and supplied with, any update (including a security update) that is necessary for the goods to be in conformity with the sales contract during that period<sup>36</sup>;
- a continuous act of supply of the digital content or digital service for a period not exceeding two years, the trader shall ensure that the consumer is informed of the availability of, and supplied with, any update (including a security update) that is necessary for the goods to be in conformity with the sales contract for the period of two years beginning with the relevant time.<sup>37</sup>

Similarly, while Article 8(2) of the DCD deals in a single provision with the supply 35 of updates in digital content and digital service contracts that involve a continuous

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<sup>34</sup> See Scheme of Consumer Rights Bill 2021, pp.53 – 54, available at <https://enterprise.gov.ie/en/Consultations/Consultation-on-Scheme-of-Consumer-Rights-Bill-2021.html> (last accessed 5 July 2022).

<sup>35</sup> Consumer Rights Act 2022, s.18(4).

<sup>36</sup> Consumer Rights Act 2022, s.18(5).

<sup>37</sup> Consumer Rights Act 2022, s.18(6).

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supply over a period of time and contracts that involve a single act of supply or a series of individual acts of supply, the Consumer Rights Act 2022 transposes this in s.54(4) in relation to the duty to inform and supply, and in s.54(9) where the different ‘relevant period’ is defined.

- 34 The liability exemption where the consumer fails to install updates is transposed in s.18(7) for smart goods and s.54(5) for digital content and digital services, as per the Directives.
- 35 Part 3 on digital content and digital service contracts transposes rules on modification beyond what is necessary to maintain the digital content/service in conformity<sup>38</sup>, but the transposition in Ireland has no further rules on the modification in Part 2 on smart goods beyond what may be necessary to provide updates.

### **IX. Exclusion of Conformity**

- 36 The exclusion of the existence of a lack of conformity in the case provided by Art. 8(5) DCD and Art. 7(5) SGD where the consumer is specifically informed that a particular characteristic of the goods, digital content or digital service was deviating from the objective requirements was transposed in s.18(8) for smart goods and s.54(7) for digital content and digital services. Both these provisions expressly extend the exclusion beyond a “particular characteristic” to include a disclosed lack of conformity with the contract ‘caused by a restriction resulting from a violation of an intellectual property right or any other third party right’. Moreover, s.18(9) for smart goods and s.54(8) for digital content and digital services provide that in case of dispute, it shall be for the trader to show that the consumer (a) was specifically informed about a particular characteristic which deviated from the legislative requirements, and (b) expressly and separately accepted that deviation when concluding the sales contract. It seems appropriate that this burden should be placed on the trader, in these circumstances.

### **X. Third Party Rights**

- 37 Art. 10 DCD on third party rights is transposed faithfully in s.57 of the Consumer Rights Act 2022. In addition, s.50 requires that the trader has a right to supply the digital content or digital service at the time at which it is to be supplied (inspired by a similar provision in relation to goods in the Sale of Goods Acts 1893 and 1980, s.12).
- 38 The transposition of Art. 9 SGD concerning third party rights is a little more complicated, as Art. 9 SGD is integrated into domestic provisions on the trader’s right to sell and freedom from charges or other encumbrances, which derive from the Sale of Goods Act 1893 and 1980, s.12.
- 39 First, s.14 provides that the trader must ensure that, at the time ownership of the goods is to be transferred, the trader has the right to sell the goods.<sup>39</sup> Where the trader does not have the right to sell goods, the consumer has the right to terminate the sales contract<sup>40</sup> (this right must be exercised in accordance with s.28 on consumers’ obliga-

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<sup>38</sup> Consumer Rights Act 2022, s.64.

<sup>39</sup> Consumer Rights Act 2022, s.14(1). It has been held, for example, that where an owner of goods can be stopped by process of the law from selling the goods (by a trademark owner alleging infringement of their IP rights), that the seller does not have the right to sell: *Niblett v Confectioners’ Materials Co Ltd*, [1921] 3 K.B. 387. See also, *The Irish Digest 1939–1948*, Col.107; and *O’Reilly v Fineman* [1942] Ir. Jur. Rep. 36.

<sup>40</sup> Consumer Rights Act 2022, s.14(2).

#### D. Liability of the Trader

tions on termination, and s.30 on traders' obligations on termination<sup>41</sup>). Moreover, the burden of proof is on the trader to show that the trader has the right to sell the goods.<sup>42</sup>

Second, s.16 provides that trader must ensure that (a) at the time when the ownership of goods is to be transferred under a sales contract, the goods are free from any undisclosed charge or other encumbrance, and (b) the consumer will enjoy quiet possession of the goods.<sup>43</sup>

Importantly, the consumer has the right to the remedies specified in the legislation (short term right to terminate or repair /replace, followed by price reduction and final right of termination) where the above obligations are breached and including where:

- (d) a restriction resulting from a violation of any right of a third person, in particular an intellectual property right, prevents or limits the use of the goods in accordance with section 17 or 18.

In case of dispute, it is for the trader to show that—

- (a) the goods complied with the requirements of s.16;
- (b) the trader disclosed all known charges or encumbrances;
- (c) the consumer enjoyed quiet possession of the goods.

The DCD/SGD remedies apply to these provisions, subject to a right to terminate where the trader has no right to sell under s.14, and a short-term right to terminate (as an alternative to repair / replace) otherwise under s.16.

Ireland has not adopted specific rules in order to define the place of delivery. Under the general law of sale of goods it is a matter for contract, express or implied, whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer. If the contract is silent the place of delivery is the seller's place of business, if he has one, and if not, his residence. However, if the contract is for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.<sup>44</sup>

#### C. Liability of the Trader

In terms of trader liability, the DCD distinguishes between the one-off supply of digital content and services; a series of individual acts of supply; and a contract for the continuous supply of such content or services over a period. The Consumer Rights Act 2022 adopts these distinctions around the modality of supply in relation to the duty to supply (s.51) and the liability of the trader (s.58). Accordingly Irish law provides where a digital content contract or digital service contract is concluded between a trader and a consumer, that the trader shall normally supply the digital content or the digital service to the consumer without undue delay after the conclusion of the contract.<sup>45</sup> However, where a digital content contract or digital service contract provides for a continuous supply of the digital content or digital service for a period specified in the contract, the trader is obliged to supply the digital content or digital

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<sup>41</sup> Consumer Rights Act 2022, s.14(3).

<sup>42</sup> Consumer Rights Act 2022, s.14(4).

<sup>43</sup> Consumer Rights Act 2022, s.16(1). Section 16(2) makes provision for the sale of a limited title in goods, i.e. subject to disclosed charges or encumbrances).

<sup>44</sup> Sale of Goods Act 1893, s.29.

<sup>45</sup> Consumer Rights Act 2022, s.51(2).

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service to the consumer for that period.<sup>46</sup> Where a digital content contract or digital service contract provides for the supply of the digital content or digital service on more than one occasion during the period for which the contract subsists, the trader must supply the digital content or digital service to the consumer on each of those occasions.<sup>47</sup>

- 46 In addition, s. 53(4) provides that where the digital content contract or digital service contract provides for a continuous supply of digital content or a digital service for a period specified in the contract, the digital content or digital service shall comply with the requirements of subjective conformity during that period; while in relation to objective conformity, s. 54(6) specifies that where the contract provides for a continuous supply of digital content or a digital service for a period specified in the contract, the trader shall ensure that the digital content or digital service is in conformity with the contract during that period.
- 47 In term of liability of the trader, the Consumer Rights Act 2022 states that where a digital content contract or a digital service contract is concluded between a trader and a consumer, the trader shall be liable to the consumer for any failure to supply the digital content or digital service in accordance with s. 51.<sup>48</sup> More particularly, where a digital content contract or digital service contract provides for a single act of supply, or a series of individual acts of supply, the trader is liable for any lack of conformity, including any lack of conformity resulting from a violation of an intellectual property right or any other right of a third person, which exists at the time of supply of the digital content or digital service.<sup>49</sup> Whereas, where a digital content contract or digital service contract provides for a continuous supply of digital content or a digital service for a period specified in the contract, the trader is liable for a lack of conformity that occurs or becomes apparent during that period.<sup>50</sup>
- 48 Inspired by Recital 51 DCD, s. 52(4) addresses the problem of short-term interruptions in relation to continuous supply contracts. Accordingly, where during such a continuous contract there is a short-term interruption of the supply which having regard to the type and purpose of the digital content or digital service and the circumstances and nature of the contract, is more than negligible, or which recurs, there is deemed to be a lack of conformity giving rise to remedies under the proposed legislation.
- 49 There are no special rules in the Irish implementing law on impossibility, force majeure or change of circumstances. The contract will be subject to the general law of contract and in particular the frustration doctrine though this is restrictively interpreted. Force majeure clauses may be included in the supply contract and will be enforced so long as they do not infringe unfair terms legislation.
- 50 As regards the rules on bundling contracts and coordination with Art. 107(2) European Electronic Communications Code, the Irish solution is that the consumer shall have the right to terminate where digital content or a digital service is supplied to a consumer under a contract that provides also for the sale of goods, or the supply of a service so long as the consumer would be entitled to terminate if it were a digital content contract or a digital service contract only, and the value of the goods or service to the consumer would be materially reduced in the absence of the digital content or digital service.<sup>51</sup> However, this right to terminate does not apply to a bundle within the

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<sup>46</sup> Consumer Rights Act 2022, s. 51(3).

<sup>47</sup> Consumer Rights Act 2022, s.51(4)

<sup>48</sup> Consumer Rights Act 2022, s.58(1).

<sup>49</sup> Consumer Rights Act 2022, s.58(2).

<sup>50</sup> Consumer Rights Act 2022, s.58(4).

#### *D. Remedies for the failure to supply and remedies for the lack of conformity*

scope European Electronic Communications Code which includes elements of an internet access service or a number-based interpersonal communications service together with digital content or a digital service.<sup>52</sup>

Where non-compliance with the GDPR regarding contracts for the supply of digital content and digital services constitutes non-conformity then the Acts's scheme of remedies will be available.<sup>53</sup> The Act does not specify which failures to comply will amount to non-conformity, but it must be presumed that any such breach of the GDPR will be a non-conformity as they will be the background expectations of the contract.

#### **E. Remedies for the failure to supply and remedies for the lack of conformity**

Chapter 4 of Part 2 deals with 'other rules in sales contracts' and in s.36 addresses issues around the delivery (or supply) of the goods (including smart goods). Section 36 transposes Art. 18 of the Consumer Rights Directive, Directive 2011/83 in relation to the time of delivery and more. Art. 18 does not directly state the trader's obligations to deliver the goods. As this is the trader's primary obligation under the sales contract, and in line with s.27 of the Sale of Goods Act 1893, this primary duty to deliver is restated in s.36(1). Moreover, where a trader refuses to deliver (or supply) the goods or where the time of delivery is essential and no delivery is made on time, the consumer has an immediate right to terminate.<sup>54</sup> Otherwise, where goods are not delivered on time (as agreed or within 30 days after the conclusion of the contract) the consumer must call upon the trader to make delivery within an additional period of time. Further failure to deliver on time, gives the consumer the right to terminate.

In relation to remedies for lack of conformity of goods, Ireland has followed the UK's lead in introducing a 30 day short term right to reject.<sup>55</sup> The consumer also has the choice of repair or replacement.<sup>56</sup> As regards the remedies of repair and replacement the proposed law says the consumer should make the goods available to the trader to enable him to cure.<sup>57</sup> Where they should be made available is not stated though the requirement that the remedy should be carried out free of charge<sup>58</sup> and should not cause significant inconvenience to the consumer may limit where repair and replacement can reasonably be carried out.<sup>59</sup> The Consumer Rights Act 2022 provides that the trader must take back the replaced goods and the goods to be repaired his own expense.<sup>60</sup>

Ireland does not prioritize repair over replacement in order to enhance environmental sustainability. We are unaware of any Irish doctrinal debate on this. There are no regulatory sanctions adopted for fighting premature/planned obsolescence of goods.

If the problem is not remedied the consumer may be able to go on to seek price reduction or final termination.<sup>61</sup> If the right of final termination is invoked there

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<sup>51</sup> Consumer Rights Act 2022, s.65(1).

<sup>52</sup> Consumer Rights Act 2022, s.65(6).

<sup>53</sup> Consumer Rights Act 2022, s.52(5).

<sup>54</sup> Consumer Rights Act 2022, s.36(4).

<sup>55</sup> Consumer Rights Act 2022, s.24.

<sup>56</sup> Consumer Rights Act 2022, s.25.

<sup>57</sup> Consumer Rights Act 2022, s.25(4).

<sup>58</sup> Consumer Rights Act 2022, s.25(2)(a).

<sup>59</sup> Consumer Rights Act 2022, s. 25(2)(c).

<sup>60</sup> Consumer Rights Act 2022, s.,25(5).



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may be a deduction for any depreciation in the value of the goods in excess of the depreciation that could reasonably be expected to result from their normal use.<sup>62</sup> In some circumstances the consumer may need to allow the trader another attempt to cure.<sup>63</sup> The consumer remains free to seek other remedies such as damages.<sup>64</sup>

- 55 In Part 3 on digital content and digital service contracts, similar remedies for failure to supply<sup>65</sup> and for lack of conformity (including a right to have the digital content/service brought into conformity, price reduction and termination) are provided for.<sup>66</sup> The consumer remains free to seek other remedies such as damages.<sup>67</sup>
- 56 Ireland has introduced a specific right to withhold payment in consumer contracts under the DCD.<sup>68</sup> The Consumer Rights Act 2022 provides that the consumer has the right to withhold payment of any outstanding part of the price until the trader has fulfilled the trader's obligations under the legislation.<sup>69</sup> The part of the price withheld by the consumer should be proportionate to the decrease in the value of the digital content or digital service received by the consumer that does not conform with the contract compared with the value the digital content or digital service would have if it were in conformity with the contract.<sup>70</sup> It is assumed that this would be calculated in the same way as price reduction. In addition, the consumer shall exercise the right to withhold payment by means of a statement to the trader expressing the consumer's decision to withhold payment until the trader has fulfilled his trader's obligations under this legislation.<sup>71</sup>
- 57 Ireland has also introduced a specific right to withhold payment in consumer contracts under the SGD, along the same lines as with the DCD.<sup>72</sup> Thus, consumers are allowed to withhold payment until the trader has fulfilled his obligations to deliver goods in conformity with the contracts, at the relevant time.<sup>73</sup> The amount withheld should be proportionate to the decrease in value of the goods received compared to the value the goods would have if they had been in conformity.<sup>74</sup> Again, it is assumed that this would be calculated in the same way as price reduction. The right to withhold payment will be exercised by the consumer making a statement to the trader expressing the consumer's decision to withhold payment until the trader has fulfilled their obligation to deliver goods that are in conformity with the sales contract.<sup>75</sup>
- 58 Previously the position was governed by the Irish Sale of Goods Acts 1893 and 1980. The buyer would have to decide whether to accept or reject the tender of goods. If goods were accepted a breach of condition would be treated as a breach of warranty. A breach of warranty alone did not entitle the buyer to reject the goods; but he may set up against the seller the breach of warranty in diminution or extinction of the price or maintain an action against the seller for damages for the breach of warranty.<sup>76</sup>

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<sup>61</sup> Consumer Rights Act 2022, s.26.

<sup>62</sup> Consumer Rights Act 2022, s.30(3).

<sup>63</sup> Consumer Rights Act 2022, s.26(5).

<sup>64</sup> Consumer Rights Act 2022, s.34.

<sup>65</sup> Consumer Rights Act 2022, s.60.

<sup>66</sup> Consumer Rights Act 2022, ss.61 – 63.

<sup>67</sup> Consumer Rights Act 2022, s.73.

<sup>68</sup> Consumer Rights Act 2022, s.69.

<sup>69</sup> Consumer Rights Act 2022, s.69(1).

<sup>70</sup> Consumer Rights Act 2022, s.69(2).

<sup>71</sup> Consumer Rights Act 2022, s.69(3).

<sup>72</sup> Consumer Rights Act 2022, s. 32.

<sup>73</sup> Consumer Rights Act 2022, s. 32(1).

<sup>74</sup> Consumer Rights Act 2022, s. 32(2).

<sup>75</sup> Consumer Rights Act 2022, s. 32(3).

<sup>76</sup> Sale of Goods Act 1893, s.53(1).

*E. Remedies for the failure to supply and remedies for the lack of conformity*

The requirement in Art. 15 DCD that the termination be through a statement to the trader is more prescriptive than the norm in Irish law whereby termination could be inferred by conduct though in the digital context conduct may be harder to show. 59

The position regarding the rules on the right to terminate possibly affecting the right to withdraw consent for the processing of personal data and the contractual consequences thereof has not been addressed in Irish law. Consideration had been given to the inclusion of such a provision, but the Data Protection Commission's view, prevailed that "the inclusion of such a provision risked creating a prescriptive rule that went beyond what was foreseen in the GDPR."<sup>77</sup> It was felt that this could result in a situation where new and potentially different data protection rules introduced in Member States could undermine a harmonised approach, but of course that is the very risk if left to national law where there is uncertainty over what the legal consequences are when this is left to the general law of contract.

In Ireland where the trader supplies digital content and/or digital services restitution is achieved on termination by the consumer not using the digital content or digital service or making it available to any third person.<sup>78</sup> Where the digital content was supplied on a tangible medium, the consumer shall, upon request return the tangible medium to the trader without undue delay.<sup>79</sup> Failure to fulfil these criteria will lead to the requirement to pay damages.<sup>80</sup> 61

Where the consumer provides personal data as a counter performance, the trader after termination shall not normally use any content that was provided or created by the consumer when using the digital content or digital service.<sup>81</sup> However, the trader may use such content so long as the content is not personal data and the content— 62

- (a) has no utility outside the context of the digital content or digital service supplied by the trader,
- (b) relates only to the consumer's activity when using the digital content or digital service supplied by the trader,
- (c) has been aggregated with other data by the trader and cannot be disaggregated or can be disaggregated only with disproportionate effort, or
- (d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content.<sup>82</sup>

When requested the trader shall, at the request of the consumer, make available to the consumer any digital content (other than personal data), which was provided or created by the consumer when using the digital content or digital service.<sup>83</sup> This obligation does not apply to data under (a)-(c) above.

Consumers should be able to retrieve the digital content free of charge, without hindrance from the trader, within a reasonable time, and in a commonly used and machine-readable format.<sup>84</sup> Notwithstanding the obligation to return data the trader may prevent any further use of the digital content or digital service by the consumer, in particular by making the digital content or digital service inaccessible to the consumer or disabling the user account of the consumer.<sup>85</sup> 63

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<sup>77</sup> Department of Enterprise, Trade and Employment, *Consultation on Scheme of Consumer Rights Bill 2021*, para. 3.18

<sup>78</sup> Consumer Rights Act 2022, s.66(3).

<sup>79</sup> Consumer Rights Act 2022, s.66(4).

<sup>80</sup> Consumer Rights Act 2022, s.66(6) – (7).

<sup>81</sup> Consumer Rights Act 2022, s.67(5).

<sup>82</sup> Consumer Rights Act 2022, s. 67(6).

<sup>83</sup> Consumer Rights Act 2022, s..66(7).

<sup>84</sup> Consumer Rights Act 2022, s.67(9).

- 62 Ireland provides no express regulation for the cases in which:
- the consumer bought goods and then moved to another country;
  - the seller delivered the goods in accordance with the Geo-Blocking Regulation and is now obliged to carry out repair or replacement in a country he does not offer delivery to.

## F. Commercial Guarantees

- 63 The Consumer Rights Act 2022 seeks to regulate commercial guarantees in Chapter 5 (ss.40 – 45) of Part 2 of the 2022 Act. In doing so, Chapter 5 seeks to transpose Art. 17 SGD and more, thereby relying on the option provided in Art. 17(4).
- 64 In general, the Consumer Rights Act 2022 seeks to transpose Art. 17 by following closely the wording of the Directive, subject to a number of minor textual changes. Accordingly,
- s.40 transposes Art. 17(1) on the liability of guarantors and producers for their commercial guarantees, and the relationship between guarantee statements and associated advertising; and
  - s.44 transposes Art. 17(2) and (3) on the provision and content of the guarantee statement.

A couple of minor points of textual divergence may be of note. First, the rules on commercial guarantees are expressly made applicable ‘to goods sold under a sales contract’ (see e.g. s.2 definition of ‘commercial guarantee’; and s.44(1) on provision of commercial guarantee to consumer). Second, Part 5 utilises the word ‘trader’, and not ‘seller’ (in line with broader context of whole Act).

- 65 The remaining provisions of Part 5 (ss.41 – 43 and s.45) make use of the option to lay down rules on other aspects concerning commercial guarantees which are not regulated by the SGD. These additional rules are both inspired and shaped by pre-existing rules on guarantees found in the Sale of Goods and Supply of Services Act 1980 (ss.15 – 19). In brief, the additional rules in ss.41 – 43 and s.45 seek to provide additional trader liability; protection to subsequent consumers; along with a right of action; and rules on the exclusion or limitation of rights in commercial guarantees.
- 66 More particularly, s.41 provides that where a trader (seller) gives a consumer a commercial guarantee provided by another guarantor, the trader (seller) shall be liable for the observance of the guarantee as if the trader (seller) were the guarantor.<sup>86</sup> Thus, for example, in the typical situation where goods are sold to a consumer in a retail outlet and the goods are sold with a guarantee statement from a producer/manufacturer, (i) the producer / manufacturer will be liable as guarantor under s.40 (transposing Art 17(1)), and (ii) in addition, the retailer/trader/seller will be liable for the observance of *that guarantee also*. The consumer thus has a choice of two persons who are equally liable under the guarantee and against whom the consumer can choose to enforce the one guarantee. Importantly, the trader (seller) can avoid this type of *dual liability* in two different circumstances. First, where the trader (seller) expressly indicates that they will not be liable under the guarantee given by another person (e.g. producer/manufacturer) when the guarantee is given to the consumer.<sup>87</sup> And second,

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<sup>85</sup> Consumer Rights Act 2022, s. 67(10).

<sup>86</sup> Consumer Rights Act 2022, s.41(1).

<sup>87</sup> Consumer Rights Act 2022, s.41(1).

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where the trader (seller) gives the consumer the *trader's own guarantee*, it is presumed, unless the contrary is proven, that the trader (seller) is not liable under any guarantee from another guarantor which the trader has given to the consumer.<sup>88</sup>

Section 42 expressly addresses the position of the rights of subsequent consumers 69 in relation to guarantees. This provision operates in the broader context of a lack of legislation on third party rights in Irish contract law, and the doctrine of privity of contract at common law.<sup>89</sup> Accordingly, where a commercial guarantee is provided to a consumer in relation to goods under a sales contract, and during the period of the guarantee the goods are acquired by another consumer, that other consumer is entitled to rely on the guarantee against the guarantor under s.40 or the trader (seller) under s.41, as if they were the original consumer. In other words, the guarantee attaches to the goods, for its duration, and is not personal or limited to the original consumer. Moreover, these rights can be passed along a chain of subsequent consumers, so long as the guarantee period remains operative. Arguably, similar rights for subsequent consumers could be implied in Art. 17 SGD, but are not explicit.

Drawing on the common law distinction between conditions and warranties in 70 Irish contract law (whereby a condition is an important term of the contract, breach of which allows the innocent party to repudiate – or terminate – the contract and sue for damages; and a warranty is a less important or minor term of the contract, breach of which does not allow the innocent party to repudiate – or terminate – the contract but they may sue for damages), s.43 provides that a consumer may maintain an action against a guarantor, or other person liable under s.41, who fails to comply with the terms of the guarantee, as if the guarantor or other person has sold the goods and had committed a breach of warranty.<sup>90</sup> Where such an action is taken, a court may order the guarantor or other person to pay damages to the consumer.<sup>91</sup> Moreover, where a guarantor or other person is liable for damages, the court may, at its discretion, afford the guarantor or other person the opportunity of performing the obligations under the guarantee to the satisfaction of the court.<sup>92</sup> Importantly, this remedy of *specific performance* is at the court's discretion and not a right of the guarantor or the consumer.

Lastly, s.45 prohibits certain terms in commercial guarantees and the criminal 71 law is utilised to enforce this provision. Three particular features of guarantees are identified in this provision:

1. a commercial guarantee must not exclude or limit the rights of consumers under any enactment or rule of law;
2. a commercial guarantee must not impose obligations on the consumer that are additional to their obligations under the sales contract;
3. a commercial guarantee must not purport to make the guarantor the sole authority to decide whether goods are in conformity with the sales contract or whether the consumer is entitled to make a claim under the guarantee.

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<sup>88</sup> Consumer Rights Act 2022, s.41(2). Section 40(3) makes clear that the liability of a trader (seller) under s.41 is without prejudice to the rights conferred on a consumer under s.40.

<sup>89</sup> This common law position persists in Ireland, despite a recommendation from the Law Reform Commission in 2008 that legislation should be introduced allowing for third party rights in certain circumstances (Law Reform Commission, *Report on Privity of Contract and Third Party Rights* (LRC 88–2008).

<sup>90</sup> Consumer Rights Act 2022, s.43(1).

<sup>91</sup> Consumer Rights Act 2022, s.43(2).

<sup>92</sup> Consumer Rights Act 2022, s.43(3).

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In terms of sanctions, any provision in a guarantee contrary to the above is not binding on the consumer<sup>93</sup>, and a guarantor who gives a guarantee in contravention of the above commits an offence.<sup>94</sup>

### **G. Time Limits**

72 Ireland has not introduced a two year liability period and instead the general six year limitation period for contractual claims applies for goods and digital content and digital services as permitted by Art. 10 SGD and Art. 11 DCD. This is in keeping with an earlier measure which transposed Directive 1999/44 on consumer sales.<sup>95</sup> In a consultation paper, the Department of Enterprise, Trade and Employment did not consider that there was any reason for having a restricted two year period ‘regardless of the type, cost and durability of the goods concerned or the nature of the lack of conformity’.<sup>96</sup> The Department has taken a similar approach in relation to digital content and digital services, offering consistency on the matter for consumers and business alike.<sup>97</sup> On consultation, different views were expressed about the limitation period, with some respondents seeking a shorter limitation period<sup>98</sup>, although consumer organisations favoured maintaining the current 6 year period.<sup>99</sup> This latter view has prevailed in the Consumer Rights Act 2022, although there is some evidence that consumers are not generally aware of the 6 year limitation period.<sup>100</sup>

73 The general rule on the limitation period is found in s.11 of the Statute of Limitations, 1957 which provides that an action founded on contract cannot be brought after the expiration of six years from the date on which the cause of action accrued. Further relevant rules on digital content and digital services can be found in the Consumer Rights Act 2022. Accordingly, the consumer’s right to a remedy in respect of a lack of conformity for which the trader is liable applies for 6 years from

- (a) the time of the supply of the digital content or digital service, in the case of a digital content contract or digital service contract which provides for a single act of supply, or a series of individual acts of supply, and
- (b) the time at which the lack of conformity occurs or becomes apparent, in the case of a contract which provides for a continuous supply of the digital content or digital service.<sup>101</sup>

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<sup>93</sup> Consumer Rights Act 2022, s.45(2).

<sup>94</sup> Consumer Rights Act 2022, s.45(3). For penalties, see 2022 Act, s.142.

<sup>95</sup> See European Community (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003, S.I. No.11 of 2003.

<sup>96</sup> Department of Enterprise, Trade and Employment, *Consultation on Scheme of Consumer Rights Bill 2021*, para 2.21.

<sup>97</sup> Department of Enterprise, Trade and Employment, *Consultation on Scheme of Consumer Rights Bill 2021*, para 3.10.

<sup>98</sup> See e.g. Law Society Submission, where a three-year limitation period was proposed to counter-balance the improved position of consumers: para. 3.8, available at <https://enterprise.gov.ie/en/Consultations/Consultations-files/Law-Society-submission-submission-consumer-rights-bill-2021-consultation.pdf> (last accessed 26 May 2022).

<sup>99</sup> See e.g. CCPC Submission, p.4, available at <https://enterprise.gov.ie/en/Consultations/Consultations-files/CCPC-submission-consumer-rights-bill-2021-consultation.pdf> (last accessed 5 July 2022).

<sup>100</sup> See <https://www.ccpc.ie/consumers/2022/01/11/a-guide-to-january-returns-faulty-goods/> (last accessed 5 July 2022).

<sup>101</sup> Consumer Rights Act 2022, s.58(5).

## H. Right of Redress

The consumer's right to a remedy in respect of a failure to supply for which the trader is liable applies for 6 years from the time at which the trader was required to supply the digital content or digital service in accordance with s.51.<sup>102</sup>

In the consultation paper, the Department of Enterprise, Trade and Employment 74 stated that it saw no need for having rules on interruption or suspension of the limitation period given that they adopted a six rather than two-year period.<sup>103</sup> On a related point, the Department had given serious consideration to providing for the suspension of the thirty day period for the short term right to terminate the contract as it considered this would be of benefit to consumers. However, the European Commission advised the Department that the discretionary provision for this right was not intended to be extended by a facility for its suspension.<sup>104</sup> With respect, this seems more a political statement to keep the exception within limited bounds. If the short term right is permissible it seems entirely appropriate that it should not be made less effective by the period not being suspended if the consumer allows the trader to cure. This is indeed the position as regards the short term right to reject under the UK Consumer Rights Act 2015.<sup>105</sup>

In relation to an obligation to notify, there is no tradition of imposing a notification 75 requirement on the consumer as a condition for seeking redress for non-conformity in Irish law. Therefore, the option of requiring notification of non-conformity within two months was not taken up. This is in keeping with an earlier measure which transposed Directive 1999/44 on consumer sales.<sup>106</sup> In the consultation paper, the Department considered such an obligation to be unfair and unreasonable and would give rise to obvious issues and difficulties that were not justified absent a convincing policy rationale for an obligation of this kind.<sup>107</sup> It was noted that delay in seeking redress for a significant length of time would have the practical effect of making it more difficult for the consumer to obtain redress. This in itself would provide an incentive for the consumer to act promptly. Consumers have complex busy lives at times and providing a technical defence to a substantively merited claim seems unnecessary. Most consumer claims are for relatively small amounts and there is not the same need for contracting parties to be put on notice as there might be in large commercial claims.

## H. Right of Redress

Where there is a lack of conformity in goods or digital services or content, or 76 failure to supply digital services and content, then the trader is entitled to pursue remedies against the party in the chain of transactions who is liable for the failure or non-conformity.<sup>108</sup> This is a rather curious provision for it seems merely to restate the ordinary rule that a contracting party can seek to pass liability up the value chain.

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<sup>102</sup> Consumer Rights Act 2022, s.58(6).

<sup>103</sup> Department of Enterprise, Trade and Employment, *Consultation on Scheme of Consumer Rights Bill 2021*, para 2.22.

<sup>104</sup> Department of Enterprise, Trade and Employment, *Consultation on Scheme of Consumer Rights Bill 2021*, para 2.22

<sup>105</sup> UK Consumer Rights Act 2015, s.22(6).

<sup>106</sup> See European Community (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003, S.I. No.11 of 2003.

<sup>107</sup> Department of Enterprise, Trade and Employment, *Consultation on Scheme of Consumer Rights Bill 2021*, para 2.39.

<sup>108</sup> Consumer Rights Act 2022, s.38 (goods) and s.72 (digital content and digital services).

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The ability to do so is dependent on the rights the parties have under those contracts. As these contracts are most likely commercial in nature they may have clauses that extensively exclude or restrict liability. This provision does not provide any restriction on the normal commercial freedom of a party to negotiate contracts and restrict their obligations to the extent permitted by the law. In other words, it adds no new rights of redress. An earlier measure transposing a similar requirement in Directive 1999/44 on consumer sales was silent on this issue of right of redress for the trader for this very reason.<sup>109</sup> However, the approach to transposition would appear to have changed in the meantime with this rather obvious provision being expressly transposed in the Consumer Rights Act 2022. This right to redress for the trader is transposed in stand-alone provisions and is not coordinated with the consumer remedies in any way.

### **I. Relationship with other Remedies**

77 The remedies implementing the SGD and the DCD do not affect the right of the consumer to pursue other remedies where goods or digital content and digital services are not in conformity with the contract. However, the proposed legislation makes clear that the consumer is not allowed to recover twice for the same loss.<sup>110</sup> These other remedies are said to include:

- claiming damages,
- relying on the lack of conformity against a claim by the trader for payment of the price,
- seeking to recover money paid to the trader if there is non-conformity,
- having a lack of conformity remedied elsewhere and recovering reasonable costs from the trader<sup>111</sup>

In the case of goods, an order can also be sought for specific performance under s.52 of the Sale of Goods Act, 1893 in an action for breach of contract to deliver specific or ascertained goods. While comprehensive, this is not intended to operate as an exhaustive list of other remedies.

78 In order to facilitate an action for damages (and the application of the relevant common law rules on damages) following a breach of contract, s.20 on goods and s.56 on digital content and digital services provide that the various trader obligations in s.14 and ss.16 – 19 on goods (the right to sell; freedom from charges or other encumbrances; requirements of subjective and objective conformity and rules around incorrect installation) and s.50 and ss.53 – 55 (the right to supply; requirements of subjective and objective conformity and rules around incorrect integration of digital content or digital service) are implied in every contract and have the effect as if they were terms of the contract.

### **J. Concluding Remarks**

79 The transposition of the DCD and the SGD, in relation to smart goods, and digital content and services has been broadly welcomed as it fills a major gap in

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<sup>109</sup> See European Community (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003, S.I. No.11 of 2003.

<sup>110</sup> Consumer Rights Act 2022, s. 34(1) (goods), and s.73(1) (digital content and services).

<sup>111</sup> Consumer Rights Act 2022, s. 34(2) (goods), and s.73(2) (digital content and services).

### *J. Concluding Remarks*

Irish consumer protection, providing a detailed and coherent legislative framework of consumer rights and remedies in relation to digital contracts, while at the same time forming part of a wider agenda of reform in the form of the Consumer Rights Act 2022. Transposition of the DCD and the SGD represents a significant further ‘Europeanisation’ of Irish consumer law. And yet, despite the maximum harmonising nature of these two Directives, a review of the Consumer Rights Act 2022 shows that many examples of the common law and legislative tradition have been maintained, including the very generous 6 year limitation period and the use of implied terms in relation to the subjective and objective conformity requirements as a vehicle to deliver other remedies, such as damages. This hybrid approach, marrying European concepts and norms with our common law and legislative tradition is most evident in relation to the SGD and Parts 2 of the Consumer Rights Act 2022 in relation to the short term right to reject, the rules on spare parts and services, and commercial guarantees, for example, ensuring the highest levels of protection for Irish consumers. Now that the Consumer Rights Act 2022 has been enacted, further major challenges lie ahead, in informing and educating consumers and traders alike about this new consumer protection regime, which is vast, with many novel features, and largely depend on private enforcement to be a success.

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