



CHAMBERS
IRELAND
IN BUSINESS FOR BUSINESS

Submission on the Consumer Rights Bill 2015

28th August 2015

Introduction

Chambers Ireland represents the largest network of businesses in the State. With almost 50 Chambers located in every major town and city in the country, we are uniquely positioned to understand the needs of the business community and to represent their views.

We welcome the opportunity to feed into this consultation. Our views set out in this submission have been structured in accordance with the areas we feel are most relevant to the needs and interests of the Irish business community.

The Scheme of the Bill as drafted outlines the rights of consumers and the relevant remedies they may avail of if these rights are breached. This covers contracts for transfer of goods, digital content, and provision of services. Unfair and disproportionate terms in consumer contracts will also be addressed in the Bill.

The Scheme of the Bill itself is a substantial piece of work running to some 184 pages. While the vast majority of the proposed Scheme is reasonable and will be supported by responsible businesses, there are a number of provisions that could be described as well meaning but potentially problematic.

The two key areas of concern to us in the Bill relate to the proposals regarding gifts cards and to the new proposals regarding contract rights and remedies for digital content.

Part Three: Contracts for the Supply of Digital Content

Chambers Ireland welcomes the initiative taken by the Department in bringing legal clarity to businesses and consumers with regard to digital contracts.

Though digital technology has undergone rapid development, the law has been slower to respond. A review of EU consumer protection legislation undertaken by the European Commission in 2006-2007 identified the non-application of existing legislation to contracts for intangible digital content as a 'particularly important problem', especially with respect to the absence of legislative rights and remedies for intangible content.¹

While the rights and remedies for consumers who enter digital contracts are broadly similar to those outlined in the rest of the Bill, we are concerned that the legislation may impact the efficacy of the Digital Single Market.

In a Digital Single Market, both consumers and traders should be confident in trading cross-border without barriers that may be created by differences between national rules. The EU's Digital Single Market Strategy identified several obstacles preventing businesses and consumers from fully enjoying the benefits of the Digital Single Market and highlighted the objective of "*ensuring that traders in the internal market are not deterred from cross-border trading by (...) differences arising from product specific rules such as labelling*".²

¹ European Commission. 2007. Green Paper on the Review of the Consumer Acquis [COM (2006) 744], p. 24.

² See Digital Single Market strategy at http://ec.europa.eu/priorities/digital-single-market/index_en.htm

Therefore, the introduction of any national measures that may hinder the free movement of goods must be fully justified. There is a concern that if multiple jurisdictions introduce their own rules for digital contracts, this will mean that online suppliers of goods and services who wish to serve a pan-European market may potentially need to be knowledgeable about, and comply with, 28 differing sets of national regulations. Identifying which regulation applies in each individual case will be extremely difficult for business owners.

From a business perspective, it would be ideal to have in place one set of contract rules for digital content. To date, few jurisdictions (with the exception of the UK and our own) have introduced statutory provisions that expressly regulate consumer rights and remedies for digital content. We would ask that the Department remain mindful during this consultation process of the ongoing developments in Europe regarding the Digital Single Market and the proposals for one set of digital contract rules that will govern all 28 states.

With regard to the specific proposals made in the General Scheme of the Scheme, Chambers Ireland would broadly welcome the reforms but would suggest that the Department remain mindful of ever evolving market for digital goods.

We note that during the first consultation, some digital content providers expressed concern about including a quality standard with reference to 'freedom from minor defects'. This concern centres on the fact that, in a sector characterised by continuous product innovation, 'bugs' must be expected in new versions of complex products such as software and games. Applying a quality standard that includes freedom from minor defects is, it is contended, unrealistic and unreasonable in such cases.

Furthermore, legislation on the sale of goods requires goods to comply with their description, sample or model. While the general principle that digital content should comply with any description or sample provided by the trader is not open to challenge, it is important to ensure that its application does not have negative implications for traders of digital products.. Software providers in particular are concerned that the requirement that digital content comply with its original description does not take adequate account of the dynamic nature of software products. These products are subject to regular updates that may replace obsolete or vulnerable functionalities with the result that the software might no longer comply with its original description.³

We welcome the steps taken by the Department to integrate this feedback into the General Scheme of the Consumer Rights Bill, particularly in Heads 44, 46 and 51, where acknowledgement is given to the rapidly evolving nature of digital content with regard to the need for updates, patches for potential bugs and so forth.

However, we would urge the Department as they draft this legislation to ensure that the ever evolving nature of digital goods is taken into account. As companies and entrepreneurs continuously innovate, it is important that our legal structures support that innovation rather than stem it.

Part Five: Unfair Contract Terms and Gift Voucher Contracts

³ DJEI Consultation Paper, August 2014, p14 at <https://www.djei.ie/en/Consultations/Consultations-files/Consultation-Paper-on-Reform-of-the-Law-on-Consumer-Contract-Rights.pdf>

Head 81 of the Scheme states that:

“No expiry date for gift vouchers

(1) A trader shall not include in a gift voucher contract a term that makes the future performance of the contract subject to an expiry date.

(2) A gift voucher contract which includes an expiry date on its future performance shall be effective as if it had no expiry date if the contract is otherwise valid”⁴

From a business perspective, there are a number of problems with this concept. A gift card is in many ways a form of debt owed by the body corporate to the owner of the gift voucher. Under the current legislative framework, at some point the voucher’s validity should expire, and the debt would no longer be due. However, without an expiry date, the voucher becomes a liability which may sit on the business’ balance sheet in perpetuity. This raises a number of issues for businesses. For example, uncertainty as to what their true outstanding liabilities are, the accounting treatment of an ever accumulating liability comprised of issued but unlikely to be redeemed gift vouchers, and the risk that an unquantifiable number of gift vouchers issued at some point in the past could be ‘called in’ at some indeterminate point in the future when the business may not have the necessary stock, capacity or cash reserves to fulfil the contract terms.

We note that the Department of Jobs, Enterprise and Innovation, as the department responsible for drafting the Scheme, has stated that although they are “committed to introducing a Consumer Rights Bill along the lines outlined in the Scheme, the provisions of the Scheme are subject to review in the light of the responses to the present consultation.”⁵

We would ask that the Department review the provisions included under Head 81 to take into account the potential difficulties businesses will have in managing their accounts and liabilities.

Conclusion

Chambers Ireland welcomes the steps the Department for Jobs Innovation and Enterprise has taken to review, update and clarify our legislation so that both the consumer and the business better understands their rights and obligations.

However, we would urge the Department to consider the importance of ensuring that businesses, particularly SMEs, are not subject to any extra burdens or liabilities as a result of reforming contract terms of gift vouchers.

Additionally, we would ask that the Department continue to work with our partners in Europe when drafting new legislation for digital contracts. Ensuring that the Digital Single Market works for businesses across all 28 member states will be hugely important in the coming years, as the cross-border trade of digital good and services becomes a much larger part of all our economies.

⁴ <http://www.djei.ie/publications/commerce/2015/crbschememay2015.pdf>

⁵ <http://www.djei.ie/commerce/consumer/issues.htm>