

**CONSUMER PROTECTION
(NATIONAL CONSUMER AGENCY) BILL 2006
SCREENING REGULATORY IMPACT ANALYSIS**

**Department of Enterprise, Trade and Employment
August 2006**

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INTRODUCTION

1. The Consumer Protection (National Consumer Agency) Bill 2006 seeks to do two main things. First, it provides for the establishment of the National Consumer Agency [NCA] on a statutory basis; in a decision of 3 May 2005 [no. S180/20/10/70], the Government approved in principle the establishment of the NCA. The Bill provides, second, for the transposition into Irish law of Directive 2005/29/EC on Unfair Commercial Practices [UCPD]; the Directive entered into force on 12 June 2005 and must be transposed into national law by 12 June 2007. In the interests of regulatory simplification, legislative provisions based on the Directive will replace a wide range of similar and related provisions in existing domestic legislation. Though a small number of provisions are being retained in modified form, in all a total of ten Acts are proposed for repeal.

2. As the two principal elements of the proposed Bill raise quite different issues of impact analysis, this screening RIA examines them separately, commencing with the proposed establishment of the National Consumer Agency.

PART ONE SCREENING REGULATORY IMPACT ANALYSIS OF PROPOSED ESTABLISHMENT OF NATIONAL CONSUMER AGENCY

1. POLICY CONTEXT, OBJECTIVES AND OPTIONS OF PROPOSED ESTABLISHMENT OF NATIONAL CONSUMER AGENCY

A. Policy Context

3. The Minister for Enterprise, Trade And Employment established the Consumer Strategy Group [CSG] in March 2004 to advise and make recommendations for the development of a national consumer policy strategy. The main catalysts for the setting up of the Group were the widespread concern expressed about the effectiveness of current consumer policy in terms of meeting the needs of the modern consumer; the increasing international focus on the empowerment of consumers; and the strongly held view of a sizeable number of Irish consumers that they were not getting a fair deal.

4. The Group, which included representatives from a variety of interests including consumers and traders examined consumer policy in detail, particularly in relation to current state structures for protecting and promoting consumer welfare and the existing body of consumer protection law. The Group's Report **Making the Consumer Count : A New Direction for Irish Consumers** was published in May 2005. The Report contains over 30 separate recommendations spanning a range of different issues and sectors. Prominent among its recommendations, however, was the proposed establishment of a new National Consumer Agency incorporating the existing Office of the Director of Consumer Affairs.

5. The Government established a High Level Inter-Departmental Committee to examine and prepare a detailed implementation plan in relation to the recommendations of the CSG, including the role and functions of the proposed National Consumer Agency. The Committee's Report, which was published in February 2006, essentially endorsed the CSG's recommendations, particularly on the functions, structure and governance of the NCA. The Consumer Protection (National Consumer Agency) Bill has been drawn up to address the deficiencies in consumer policy identified by the Consumer Strategy Group and, in particular, to give effect to the structural and legislative recommendations made by the CSG and endorsed by the High Level Inter-Departmental Committee.

B. Policy Objectives

6. The main objective in establishing the proposed National Consumer Agency is to address the current deficiencies in national consumer policy by creating an Agency with the powers necessary to enable it to act as a powerful voice for consumers and a forceful advocate for the consumer interest, thus helping to ensure that national consumer policy meets the needs of the modern consumer in to-day's marketplace.

C. Identification of Policy Options

7. The possible options considered in terms of reviewing national consumer policy were:

- Option 1 - Do nothing
- Option 2 - Provide for limited legislative and structural change by enhancing the roles and functions of existing agencies

- Option 3 - Provide for broader legislative intervention by establishing the new National Consumer Agency with all the powers and functions necessary to allow it to act as a forceful advocate on behalf of consumers as recommended by the Consumer Strategy Group and endorsed by the High Level Inter-departmental Committee.

Option 1-Do Nothing/No Policy Change

8. The ‘do nothing/no policy change’ option will not address the significant deficiencies in national consumer policy identified by the Consumer Strategy Group. The Department is satisfied that radical institutional and legislative change is needed to address the needs of the Irish consumer. The current institutional and legislative framework of consumer protection reflects the economic and social circumstances of a bygone age. To continue with this framework by adopting a ‘no policy change’ approach would mean that national consumer policy would be failing Irish consumers and would not be in accord with the Government’s *Better Regulation* programme.

Option 2- Limited Legislative and Structural Change

9. The Consumer Strategy Group considered a number of different options for institutional arrangements that would best serve key consumer welfare functions and ensure that an active and effective national consumer policy was put in place. While the establishment of a new National Consumer Agency was the option recommended by the Group, it also considered other options including the enhancement of the existing Office of the Director of Consumer Affairs, the merging of the ODCA with the Competition Authority, and the ODCA working in parallel with a new Agency. The option of enhancing the ODCA was not thought appropriate as it was considered that, as an agency of the Department of Enterprise, Trade and Employment, an enhanced ODCA would not be sufficiently independent to play the strong advocacy role that the CSG regarded as essential.

10. With regard to the possible option of merging the ODCA with the Competition Authority, the CSG noted that competition and consumer protection were the responsibility of a single organisation in a number of countries. The CSG considered however that, given the significant differences in the evolution of national

competition policy as against that of consumer policy, merging consumer and competition bodies in one “super” agency would not be appropriate. Such a merger would not be a marriage of equals and could lead to consumer issues receiving a lower priority in a unified body.

11. The CSG also considered the option of a new Agency working alongside the ODCA with specific additional responsibilities in areas such as advocacy, research, and education. While the CSG was of the view that this option could lead to the speedier establishment of the proposed new body, it concluded that having two agencies work in parallel would represent an inefficient use of resources and would also lead to confusion among consumers as to the precise remits of the two bodies.

Option 3- Legislate for a new National Consumer Agency (subsuming the existing Office of the Director of Consumer Affairs) with all the Necessary Powers and Functions to Deliver a Full Set of Services to Irish Consumers

12. The Consumer Strategy Group was strongly of the view that the establishment of an independent, statutory, national consumer agency represented the best option for addressing the current deficiencies in national consumer policy. While accepting that the exercise of new statutory functions in areas such as advocacy, research, education etc. would require additional funding, the CSG concluded that the assimilation of such functions within the statutory remit of the new Agency was essential to ensure that the Agency would make an impact in terms of delivering a comprehensive and forceful consumer policy. The CSG concluded that the establishment of a statutory new Agency represented the most effective way of delivering a robust national consumer protection policy and that the advantages of pursuing this option significantly outweighed any possible disadvantages. The High Level Inter-Departmental Committee endorsed the conclusions of the CSG in this regard.

Costs and Benefits of Options 1-3

13. In carrying out its work, the Consumer Strategy Group examined a broad range of issues relating to consumer protection policy, including the impact of current national policy on consumers’ perceptions of value for money. Research commissioned by the Group showed that, in a wide range of areas, consumers did not consider that they

were getting value for the money they spent on goods and services. The Group was of the view that, in focussing primarily on legal protection and enforcement, current policy responses did not give sufficient weight to the provision of consumer information, the advocacy of consumer interests, and to research into consumer concerns. It concluded that the net effect of the current approach to consumer protection was that consumers were experiencing significant detriment in purchasing goods or services that did not meet their requirements, or were faulty, over-priced or sub-optimal in some way. The Group estimated that, based on research carried out in other countries, the extent of such loss could amount to over €800 million per year.

14. In the light of this analysis, it is apparent that deficiencies in current policy are “costing” consumers and that a “no policy change option” is not tenable. The question, therefore, arises as to the extent and nature of the structural and legislative changes required to address the deficiencies in consumer protection policy together with the attendant costs and benefits of any such changes.

15. The options for “limited” structural change are outlined in option 2 above. While clearly the option of creating a “super agency” through merging the ODCA with the Competition Authority could have benefits in terms of consolidating resources and reducing administration costs through sharing of services, the subsuming of consumer protection within an enlarged agency would represent a dilution of the vision of both the CSG and the High Level Inter-Departmental Committee that any new Agency must be independent with a core statutory mandate to raise the profile of consumer issues and to present a strong consumer voice. It is considered, therefore, that a merger of the Competition Authority with the existing Office of the Director of Consumer Affairs does not represent the best means of achieving a dynamic and forceful consumer policy. It is considered similarly that the other options detailed above for limited structural change, such as enhancing the existing ODCA or having it work in tandem with a new Agency, would not provide the radical institutional change necessary to deliver a credible consumer policy.

16. The third option of creating a new National Consumer Agency that would subsume the existing ODCA also has its advantages and disadvantages. The main disadvantage relates to the cost of setting up a new Agency. The NCA when formally

established will assume the funding of the ODCA (currently €4.2 million per annum). Given the wider remit proposed for the new Agency (in areas such as advocacy, research, education, awareness etc.) it will require additional funding. While the terms of reference of the Interim Board of the NCA require it to prepare a detailed estimate of the staffing, resource and budget requirements of a fully operational Agency, the establishment of the new body will require additional subvention from the exchequer. A further disadvantage of creating a new Agency is that it will require the enactment of primary legislation.

17. In terms of advantages, the Bill seeks to ensure that the proposed new Agency will have all the powers and functions needed to deliver the integrated set of services required by today's consumer. For example, the Bill includes provisions to provide the NCA with a statutory function to act as a forceful advocate for the consumer in public debate and in the preparation of legislation, and also that the Agency be empowered to advocate the consumer case with regulated industries and individual regulators. The Bill will also empower the NCA to undertake targeted research so as to ensure that the Agency can engage with and challenge vested interests on an equal footing. The Bill also proposes that the NCA should have a specific statutory role in informing and providing information to consumers in order to assist them make informed choices about the goods and services that they buy. It is considered that the benefits of establishing a strongly mandated agency for protecting consumers considerably outweigh the disadvantage of the additional cost of creating a new body along these lines.

2. OTHER IMPACTS

Socially Excluded/Vulnerable Groups

18. It is expected that, as part of its advocacy, information and education and awareness functions, the NCA will, in conjunction with other state and voluntary organisations, pay particular attention to the needs of vulnerable consumers.

National Competitiveness

19. The development of a strong consumer culture is one of the primary reasons for establishing the NCA. Discerning consumers who discriminate on the basis of price and quality can help to increase competitive pressures in the marketplace and create

opportunities for new and improved goods and services. The CSG expressed the view that businesses should also compete on the basis of customer satisfaction/service as well as on price and quality. The Bill includes provisions enabling the NCA to approve Codes of Conduct drawn up by businesses or their trade associations in areas of customer service. It is considered that embedding a strong consumer culture as part of the economic framework through measures such as those detailed above will help to improve national competitiveness.

Environmental Impacts.

20. The establishment of the NCA will not have any specific environmental impacts

Rights of Citizens

21. The provision of consumer information, education and awareness and the advocacy and enforcement of consumer rights will be core functions of the National Consumer Agency. The Bill provides that the Agency will have specific statutory functions in these areas. In proposing these provisions, it is intended that the NCA will have a key role in ensuring that consumers are fully aware and informed as to their rights. It is considered, therefore, that the establishment of the National Consumer Agency will help to ensure that greater cognisance is taken of the rights of citizens.

Compliance Burden

22. The establishment of the NCA is not expected to impose any greater compliance burden upon businesses. Consumer law is currently enforced by the Office of the Director of Consumer Affairs. The Bill provides that this enforcement function will transfer to the NCA on its establishment. It is not expected that this transfer of itself will give rise to any greater compliance burden, neither is it expected that the additional statutory functions proposed for the NCA should increase the compliance burden on businesses

Economic Impact including impacts on Consumers and Competition

23. The establishment of the National Consumer Agency represents a very significant change in national consumer policy. The need for change was highlighted by the Consumer Strategy Group whose view was endorsed by the High Level Inter-

Departmental Committee. The objective of this structural change is to create an Agency with all the necessary powers and functions to meet the needs of the modern consumer. It is considered that this change together with the other changes to consumer protection policy in the Bill will have a positive economic impact by boosting consumer confidence and stimulating economic activity thereby helping to sustain existing employment and to create further growth in employment.

Summary of Costs, Benefits and Impacts

24. The Department is satisfied that, having considered the relative costs, benefits and impacts of the various options for structural change outlined above, the establishment of the new National Consumer Agency represents the best option for addressing the deficiencies in consumer policy and protection identified by the Consumer Strategy Group and for providing an effective mechanism to enhance consumer welfare and protect consumer interests.

Consultation

25. The establishment of the National Consumer Agency was the principal recommendation of the Consumer Strategy Group who were asked as part of their terms of reference to make specific recommendations in relation to the development of national consumer policy. The Group in carrying out its work engaged in a wide-ranging consultation. It sought views and submissions from the general public and various public and private sector bodies, businesses and organisations by means of advertisements in the national media and through targeted mail campaigns. The following key issues were highlighted in the course of the Group's consultation process

- Access
- Safeguards
- Advice and Support
- Redress
- Consumer Influence and Power
- Business and the Consumer

26. In total the Group received in excess of over 230 separate submissions. In addition the Group's core recommendation that a new National Consumer Agency be established was fully endorsed by the High Level Inter-Departmental Committee established to examine and prepare an implementation plan in relation to the CSG's recommendations. The Committee's conclusions on this and the other recommendations of the CSG were also published. Furthermore it is intended to publish the general scheme of the Bill and to invite comments from the public including in relation to the details of the proposed NCA.

Enforcement and Compliance

27. The Bill proposes to transfer responsibility for enforcing consumer protection legislation from the Office of the Director of Consumer Affairs to the National Consumer Agency. Enforcement will be one of the core statutory functions of the new Agency. In addition to the existing powers of the ODCA, it is proposed to give the NCA additional powers/options to achieve compliance with consumer protection law, particularly in the area of minor offences. One option proposed in the Bill is to permit the NCA, where it considers it appropriate, to accept a written undertaking from a business which it believes to be in breach of consumer legislation that it will cease whatever conduct is constituting that breach. In addition the Bill proposes to allow the NCA to impose fixed penalty notices on traders whom it believes may have committed an offence. It is considered that new enforcement tools such as these will facilitate the more effective enforcement of consumer legislation.

28. In terms of the existing regulatory framework, the Bill proposes that the NCA will enter into co-operation agreements with the existing sectoral regulators. The main purpose of such agreements is to facilitate co-operation between the various regulatory bodies, to avoid duplication of activities by the various agencies and to allow for a stronger consumer voice in the regulated sector as recommended by the CSG. In terms of accountability, the Bill includes specific provisions requiring the NCA to account for its activities. Specifically the Board will be required to prepare an annual report of its activities together with annual accounts. In addition, the Bill proposes that the Board will be required to prepare a strategic plan of its key objectives and targets every three years as well as annual work plans and to submit

these plans to the Minister for Enterprise, Trade and Employment. Furthermore the Chief Executive Officer of the Board will be required to attend before relevant Committees of the Oireachtas to discuss the activities of the NCA. Finally the NCA shall be a statutory body for the purposes of the Freedom of Information Act.

Review

29. The Bill proposes that the NCA will have the statutory function of reviewing existing consumer protection legislation, submitting proposals to the Minister in relation to any legislation that it considers appropriate, and also of advising the Government of the implications for consumer welfare and protection of any legislation or proposed legislation. These provisions reflect the recommendations of the Consumer Strategy Group that consumer considerations should be incorporated in regulatory impact analysis procedures and that all relevant Government decisions should be ‘consumer-proofed’.

PART TWO TRANSPOSITION OF UNFAIR COMMERCIAL PRACTICES DIRECTIVE

1. POLICY CONTEXT, OBJECTIVES AND OPTIONS OF UNFAIR COMMERCIAL PRACTICES DIRECTIVE

A. Policy Context

30. The Green Paper on EU Consumer Protection of 2001 [COM (2001) 531] first outlined the case for the reform of EU consumer legislation in order to harmonise consumer protection at a high level and to tackle barriers to the cross-border provision of goods and services to consumers. It identified a framework directive governing unfair business-to-consumer commercial practices as a basis for reform. Responses to the Green Paper from member states and stakeholders showed that a majority of respondents supported the case for reform of EU legislation governing commercial practices. A majority of those expressing a specific preference, including a majority of member states, favoured reform on the basis of a framework Directive. Following resolutions of the European Parliament and a decision of the European Council, a proposal for a Directive of the Parliament and Council concerning Unfair Business-to-

Consumer Commercial Practices in the Internal Market [COM (2003) 356] was published in June 2003. Political agreement on the Directive was reached in May 2004 during the Irish Presidency, and a common position text was agreed in November 2004.

31. The European Commission case for the Directive on Unfair Commercial Practices rested on three related propositions: (i) the consumer dimension of the internal market was markedly under-developed; (ii) barriers resulting from the divergent regulation of unfair commercial practices in member states were a significant factor in that under-development; and (iii) a framework directive setting out general principles on unfair commercial practices that would provide for a high level of consumer protection and operate on a maximum harmonisation basis was the most effective way of tackling these barriers.

32. A study of cross-border consumer transactions undertaken by the Commission in 2002 found that:

- Only 13 per cent of EU consumers surveyed had made one or more cross-border purchases in the preceding twelve months. Just 5 per cent of consumers had opened a bank account in another member state. Cross-border sales to consumers had stagnated over the past decade
- The growth of e-commerce had been slower than expected with fewer than 2 per cent of retail sales made online in 2002, and only 4 per cent of e-commerce users classifying themselves as 'frequent purchasers.
- 55 per cent of EU consumers reported that they had not seen or heard cross-border advertising or commercial information in the previous twelve months.
- Price divergences between member states – an indicator of the under-development of the internal market – remained substantial. The average divergence in retail prices was estimated to be 30 per cent across the Community, compared with a variation of around 5 per cent within member states. While the period following the establishment of the internal market saw progress towards price convergence, this had since faltered.

33. Legal studies undertaken on behalf of the European Commission found that there were marked differences in the approach taken to the regulation of unfair trading in EU member states. With the exception of Ireland and the United Kingdom, the then

thirteen other member states relied on a general clause to regulate fair and unfair trading. These general clauses took a variety of forms:

- *bonos mores* (Germany, Austria, Greece and Portugal);
- fair commercial practices (Belgium, Italy, Luxembourg, and Spain);
- good marketing practices (Denmark, Finland, and Sweden);
- unlawful acts (Netherlands);
- fault (France).

In the absence of any harmonising initiative, this divergence in the national legislative frameworks governing unfair commercial practices was set to increase further with the enlargement of the European Union.

34. The relationship between fair trading legislation and consumer protection legislation also differed among EU member states. Some member states (for example, Austria, Germany, and Portugal) used the same legislation to cover the protection of both consumers and business competitors from unfair trading practices. Some countries (Denmark, Sweden, and Belgium) had legislation governing trading practices which applied only to consumers. Self-regulation through codes of practice developed and enforced by industry associations played a significant role in consumer protection in the United Kingdom and to a lesser extent Ireland, but not in most other member states. There were also differences in some of the definitions and tests used in the legislation governing unfair trading and other aspects of consumer protection. Different ‘benchmark consumers’ are used, for example, with courts in some countries assuming the average consumer to be reasonably well-informed and vigilant, and those in others assuming a greater degree of vulnerability or ignorance.

35. A survey of the impact of these divergences on employer and consumer willingness to engage in cross-border transactions found that:

- Almost half of business respondents claimed that the need to comply with different national regulations on commercial practices, advertising and other consumer protection regulations was either a very (19 per cent) or fairly (29 per cent) important obstacle to the development of cross-border sales and marketing.

- Around two-thirds of business respondents reported that measures such as better information for companies on consumer protection regulations in other member states, the harmonisation of national regulations, and the introduction of European codes of conduct would represent very or fairly efficient ways of facilitating the growth of cross-border transactions.
- 26 per cent of consumer respondents said that they were generally less confident in buying in another country than in their own. 46 per cent declared themselves to be as confident; 6 per cent said that they were more confident; 14 per cent reported that it depended on the country (9 per cent) or product (5 per cent); and 9 per cent had no view.
- Among consumers expressing a lack of confidence in making purchases in other countries, the main reasons given were problems in resolving after-sales problems relating to complaints and returns (88 per cent of these respondents declared this to be an important or very important reason), and the difficulties in taking legal action in other jurisdictions (this was an important or very important reason for 83 per cent of these respondents).
- A large majority of consumers who were reluctant to make cross-border purchases stated that measures such as strengthening consumer protection laws in all EU countries, improving information about consumer rights in other member states, and enhancing enforcement and access to the courts, would make them more confident about cross-border shopping. When all consumer respondents were asked if they would buy more abroad if they could do so with the same confidence with which they shopped at home, 15 per cent said they would buy a little more, and 4 per cent indicated that they would buy a lot more, in this event. 57 per cent said they would not buy any more in this event, 13 per cent said that it depended, and 12 per cent said that they had no opinion in the matter.

36. In summary, the empirical evidence of these preparatory studies supports the view that the consumer dimension of the internal market is markedly under-developed. While differences in national regulatory regimes governing business-to-consumer commercial practices were not the only, or even the most important reason for this under-development, they were a significant factor. Business respondents in particular attributed considerable weight to this factor and believed that harmonisation of member states' legislation would have a positive impact on cross-border trade.

Irish Policy Context

37. As a small, highly exposed economy, Ireland strongly supported the initiative to harmonise consumer protection regimes at a high level and tackle barriers to the cross-border provision of goods and services to consumers. In addition to providing

enhanced export opportunities to Irish companies, easier access to cross-border trade would help to address some of the competitive weaknesses that underlie the relatively high cost base of the Irish economy. Irish consumers would benefit from greater competition in the provision of goods and services and from access to a wider range of products and providers.

38. Data from surveys of Irish businesses and consumers showed that, while Irish consumers were more enthusiastic about making cross-border purchases than those in most other member states, they were noticeably less confident about making such purchases. 41 per cent expressed equal or greater confidence in cross-border purchases as in domestic ones compared with an EU average of 52 per cent and a high of 75 per cent in the Netherlands. Consistent with this finding, a higher proportion of Irish respondents said that they would shop more in other member states if they could be as confident in doing so as they were in shopping at home. 23 per cent said they would buy a little more in other countries in this event, and 7 per cent that they would buy a lot more. Irish businesses for their part devoted a significantly higher proportion of their advertising and marketing budgets to the promotion of cross-border business than the EU norm, and along with Swedish companies expressed the highest levels of interest in developing such sales. The proportion of Irish businesses reporting that the harmonisation of consumer protection regimes would lead to increased cross-border sales was also above the EU average. 44 per cent of Irish companies expected sales to increase a little in this event while 12 per cent thought that they would increase a lot. The figures for business respondents throughout the Community were 37 and 9 per cent respectively.

39. These findings are consistent with Ireland's well-established policy of support for measures to strengthen and develop the Internal Market. As a small, highly exposed trading economy, this policy is in accord with long-term strategic interests. For businesses who sell in markets in other EU member states, and consumers who make purchases in those member states, the implementation of the Unfair Commercial Practices Directive will result in a broadly similar legal framework for business-to-consumer commercial practices throughout the European Union. This will help create a more secure and comprehensible Community-wide regulatory environment for both businesses and consumers. While increased cross-border shopping by Irish consumers

would have an effect on the sales of indigenous businesses as well as on tax revenues, sales' losses by Irish businesses in a domestic market of four million people can be more than offset by increased sales by Irish companies into a European Union market of four hundred million people. The long-term competitive health of the Irish economy and enterprise sector will also be aided by greater competition in those mainly service sector activities in which competitive forces pressures are inadequate.

B. Policy Objectives

40. Article 1 of the Unfair Commercial Practices Directive states that its purpose 'is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests.' The aim is that, by harmonising national laws on business-to-consumer commercial practices, the Directive will at once make it easier for businesses to engage in cross-border trading and make consumers more confident about engaging in cross-border transactions. The internal market will thereby be deepened in a way that benefits both traders and consumers.

41. The original text of the Directive contained a 'country of origin' clause – i.e. that the law of the country in which the trader was based would be the applicable law - but this was deleted at a later stage of the Community legislative process due to opposition from a majority of member states. This deletion notwithstanding, the Directive's internal market objectives are evident from the fact that, unusually for a consumer protection instrument, it is a maximum harmonisation measure. This means that member states must ensure that the Directive's provisions are fully implemented in national legislation, but cannot extend or exceed those provisions. They must also screen existing domestic legislation within the Directive's domain for compatibility with its provisions. The Commission was prepared to accept the deletion of the 'country of origin' clause on the understanding that, as the Directive provided for maximum harmonisation, such a clause was not legally required to ensure the proper functioning of the internal market in this field.

42. The harmonisation sought by the UCPD is to be advanced on the basis of a high level of consumer protection. The consumer protection provisions of the Directive have four main elements:

- a general prohibition of unfair commercial practices,
- a specific prohibition of misleading commercial practices,
- a specific prohibition of aggressive commercial practices,
- a blacklist of twenty three misleading commercial practices and eight aggressive commercial practices that are prohibited in all circumstances.

Of these four elements, the general prohibition of unfair commercial practices and the specific prohibition of aggressive commercial practices are new to Irish consumer legislation, while the other two elements have novel features. The Directive represents a new departure for Irish consumer law, therefore, and provides significant new protections for consumers. It goes considerably beyond its precursor, Directive 84/450/EEC on Misleading Advertising, whose scope was limited to misleading advertising. The UCPD will replace the provisions of the Misleading Advertising Directive on business-to-consumer advertising. The surviving provisions of the Misleading Advertising Directive now cover only misleading advertising affecting traders and comparative advertising. It is planned to introduce a separate statutory instrument in 2007 to implement these provisions into Irish law.

43. With very limited exceptions, the Directive does not impose positive or additional obligations on traders in the areas of commercial communication, marketing or advertising. Its concern rather is to proscribe practices that would not be engaged in by responsible businesses. As such, the substantive burden of the legislation implementing the Directive on compliant traders should not be significant once they have become familiar with its provisions.

44. The general prohibition of unfair commercial practices and the specific prohibitions of misleading and commercial practices – though not the blacklist of prohibited practices – are subject to the requirement that they must cause the average consumer to take a transactional decision that he or she would not otherwise have taken. The intention behind this provision is essentially that the law will only come

into play when traders' actions impinge on consumers in ways that affect their freedom of information or action - a feature of the legislation that should lighten the enforcement burden on compliant businesses. The impact of the average consumer and transactional decision tests on the criminal law enforcement of the legislation implementing the Directive has given rise to considerable debate. While there appears to be a reasonable measure of agreement that the average consumer test should not present undue difficulties, there is less consensus about the transactional decision requirement. It has been argued that it may make it more difficult to secure prosecutions against traders and may also lead to longer trials and more appeals. While the test as contained in the Directive is a novel requirement for Irish law, it is not entirely without precedent or parallel. Under the Merchandise Marks Act 1887 as amended by the Consumer Information Act 1978, false or misleading trade descriptions must be false or misleading 'to a material degree'. There is British case law in support of the view that this is not merely a *de minimis* requirement, but means that the deception must be such as to be capable of inducing a consumer to make a purchase. Section 8 of the Consumer Information Act 1978 which makes publication of misleading advertisements an offence requires, among other things, that the advertisement be 'likely to mislead and thereby cause loss, damage or injury to members of the public to a material degree.' More generally, prosecutions under consumer legislation tend only to be taken in practice where consumers have suffered actual detriment as a result of a trader's action or inaction.

C. Identification of Policy Options

Option 1 – Do Nothing/No Policy Change

45. The 'do nothing/no policy change' option is not a credible position in this case. Failure to implement the Unfair Commercial Practices Directive would be a breach of our obligations under the European Treaty and would expose this country to financial and other sanctions. It would be at odds with our long-standing support for measures promoting the development of the Internal Market – a support grounded in a strategic assessment of our fundamental economic interests. In the absence of any major change in the intervening period, it would also be inconsistent for this country to fail to implement a measure it had consistently supported through the Community legislative process. This option will not be considered further consequently.

46. As the Directive is a maximum harmonisation measure, member states effectively have no discretion in the transposition of its substantive provisions. Even though the language of some of the UCPD's provisions is unfamiliar from an Irish perspective, the transposing legislation will adhere very closely to the wording of the Directive. The main matters over which member states have a measure of discretion are the method of transposition and aspects of the enforcement of the Directive connected with the choice of transposition method. There are two main options: (a) transposition by statutory instrument with the minimum of changes to existing legislation; and (b) transposition by primary legislation with the repeal and, where appropriate the retention in updated form, of domestic legislative provisions within the domain of the Directive.

Option 2: Transposition by Statutory Instrument with Minimum of Changes to Existing Legislation

47. With very limited exceptions, EU consumer legislation has been implemented in Ireland by means of secondary legislation. Enforcement of EU Directives has generally been by civil law remedies alone. The European Communities Act which provides the legal basis for secondary legislation based on EU instruments prohibits the creation of indictable offences by Regulation, though summary offences can be created.

48. In the case of the UCPD, this option would involve:

- 1) The introduction of a statutory instrument to transpose the Directive, with enforcement by means of civil law remedies.
- 2) The introduction of a statutory instrument to cover the remaining business-to-business provisions of the Misleading Advertising Directive,
- 3) The amendment of existing domestic legislation - the Merchandise Marks Act 1887, the Consumer Information Act 1978, the Prices Act 1958-72, and various statutory instruments enacted under these Acts – to align it with the provisions of the UCPD as required by the Directive's maximum harmonisation status.

Costs and Benefits of Option 2

49. The main advantage of implementation by secondary legislation is that the legislative process is simpler, quicker and less demanding. It also keeps to a minimum the alterations to the established, familiar legislative framework, though these will still be significant because of the Directive's maximum harmonisation status.

50. The main disadvantages of implementation by secondary legislation are as follows:

- The UCPD is a framework measure of broad scope and application which covers a wide range of commercial practices relating to advertising, marketing and commercial communications across all sectors of the economy. The Commission see it as a major initiative, a view shared by most academic and legal commentators. Transposition by means of a statutory instrument may not be the most appropriate method for legislation of this scope and status.
- Transposition of the UCPD by means of a separate, stand-alone statutory instrument would add another layer to what is already a complex and difficult body of law. The law on false and misleading trade descriptions is still based on the Merchandise Marks Act 1887 as amended textually in 1891 and 1911, and then subject to extensive textual and non-textual amendment in the Consumer Information Act 1978, and further supplemented by the European Communities (Misleading Advertising) Regulations 1988. The 1887 Act was described by a Law Lord in the 1950s as 'a most difficult Act to construe'. Half a century on, its unsuitability as the basis for a modern code of consumer law is even more apparent. The legislation on price display and control presents a similar, if less marked, pattern. The Prices Act 1958 has been substantially amended and augmented by amending legislation enacted in 1965 and 1972. The extensive price control powers and provisions in these Acts are now largely outmoded, while the provisions on price display have been supplemented by the European Communities (Requirements to Indicate Product Prices) Regulations 2002.
- The transposition of the UCPD on a stand-alone basis by means of secondary legislation and the retention of existing domestic legislation within the Directive's domain is problematical because of the Directive's maximum harmonisation status. This means that, at a minimum, existing legislation would have to be amended to incorporate the UCPD's requirement that, in order for a court order to be granted or an offence to be committed, false or misleading trade descriptions and advertising must cause the average consumer to take a transactional decision that he would not have taken otherwise. As this is perhaps the aspect of the Directive that may prove to have the most significant impact on the application and enforcement of the law, the need to incorporate it into our domestic legislation would significantly lessen the advantages of retaining existing legal provisions alongside the UCPD. It would certainly appear to erode at least some of the relative legal

certainty that might otherwise be expected from the retention of established legislation.

51. For these reasons, transposing the Unfair Commercial Practices Directive by means of secondary legislation and with the minimum changes to related domestic legislation is open to serious question and is not the Department's preferred course. This approach would also be at odds with the aims of the *Better Regulation* programme.

Option 3: Transposition by Primary Legislation with Repeal, and where appropriate Retention in Updated Form, of Domestic Legislative Provisions within Domain of Directive

52. The requirement to transpose the UCPD into Irish law presents an opportunity to rationalise and consolidate a substantial body of law in a single statute based on the Directive. Such an Act would repeal the following statutes, retaining a limited number of their provisions in updated form:

- The Merchandise Marks Acts 1887, 1891, 1911, and 1931;
- The Prices Act 1958, the Prices (Amendment) Act 1965, and the Prices (Amendment) Act 1972 ;
- The Consumer Information Act 1978;
- The Pyramid Selling Act 1980;
- The Restrictive Practices (Amendment) Act 1987.

53. Implementation of the Directive by primary legislation would also give greater flexibility and provide more options as regards the enforcement of the Directive. At present, domestic and EU consumer protection legislation is enforced through a mix of civil and criminal remedies. The Director of Consumer Affairs can seek a court order under the Consumer Information Act 1978 to prevent misleading practices, while false or misleading trade descriptions, statements as to services, advertising, and price indications are also criminal offences under the Act. The Director of Consumer Affairs can initiate summary proceedings for these offences, while the Director of Public Prosecutions can bring prosecutions on indictment. The Director of Consumer Affairs can also apply for a court order to restrain misleading advertising under the European Communities (Misleading Advertising) Regulations 1988.

54. If, as is proposed, the Unfair Commercial Practices Directive is transposed by means of primary legislation which repeals most of the provisions of the domestic legislation within the Directive's domain, the new legislation will have to make provision for a complementary regime of civil and criminal remedies. As in the case of the UCPD's precursor, the Misleading Advertising Directive, any person, including the National Consumer Agency, will be entitled, upon giving notice of the application to the person against whom the court order is sought, apply to the courts for an order to restrain an unfair commercial practice. As well as applying for an injunction, persons aggrieved in consequence of any unfair commercial practice prohibited under the legislation will have an express right of action for damages, including exemplary damages. This is a new provision in consumer legislation and is modelled on section 14 of the Competition Act 2002.

55. It is proposed to retain the broad framework of criminal offences in force under existing consumer legislation. With the exception of offences concerning statements as to services, the offences created under the Merchandise Marks Act 1887 and the Consumer Information Act 1978 are so-called 'strict liability' offences – that is they impose criminal liability on the accused trader without the need to show fault on his part. This contrasts with the normal position under criminal law in which the prosecution is required to show *mens rea*. The rationale for this is two-fold. First, the stigma of conviction under consumer protection laws is not considered to be as grave as that in other areas of law. A strict liability regime has been favoured, second, because it facilitates effective enforcement. A requirement to prove a mental element in the prosecution of offences under consumer legislation would, it is argued, make these offences difficult, if not impossible, to enforce.

56. Under section 22 of the Consumer Information Act 1978, strict liability is balanced by the provision of a 'due diligence' defence. This gives a trader a defence to a charge if he can show that the commission of the offence was (a) due to a mistake or the reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control, and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of an offence by himself or any other person under his control. It is proposed to retain this broad framework of strict liability offences and due diligence defences for the

purposes of the criminal law provisions of the legislation to implement the UCPD. Unlike the Consumer Information Act 1978 which requires false or misleading statements as to services to be made knowingly or recklessly (but still applies the section 22 defences to them), the UCPD treats unfair commercial practices relating to goods and services in the same way. The strict liability approach will therefore apply in future to false or misleading practices relating to services.

57. It is proposed also to make enhanced provision for compensation for consumers suffering loss or damage as a result of breaches of the legislation implementing the UCPD. Based on the provision for compensation orders at section 6 of the Criminal Justice Act 1993, this would permit a court, in addition to or instead of any penalty it might impose, to direct that a trader pay compensation to the consumer or consumers concerned. An application for a compensation order could not be made where a consumer had instituted civil proceedings for the same injury or damage. This provision will replace the more restrictive compensation arrangements in place under section 17 of the Consumer Information Act 1978.

58. Provision is also being made for the introduction of fixed payment notices (or on-the-spot fines) for breaches of price display orders; it is planned to seek the retention of these orders in their present form without amendment under the transitional arrangements provided for in article 3 (5) of the UCPD. Fixed payment notices are a well-established part of enforcement regimes in areas such as road traffic, litter, public transport, and workplace health and safety. Breaches of price display orders would meet the criteria for fixed payment notices of being minor offences whose infringement is generally readily apparent. The provision will follow the established model for such offences, in particular the requirement that persons alleged to have committed an offence can decide within a specified period either to make the prescribed payment or to opt for court proceedings.

Costs and Benefits of Option 3

59. The introduction of new primary legislation based on the UCPD would underline the significance of the new legislative regime in this area of consumer law. The replacement of the present multiplicity of legislation by a single statute would create a simpler and more accessible legislative code for consumers and businesses and is in

keeping with the objectives of the Government's *Better Regulation* programme. In the field of business-to-consumer trade descriptions and advertising, for example, businesses and consumers currently have to consult the Merchandise Marks Act 1887, the extensive textual and textual and non-textual amendments made to that Act by the Consumer Information Act 1978, and the European Communities (Misleading Advertising) Regulations 1988. In the future, they would just have to consult a single statute. Improving the coherence of legislation through revision, restatement and repeal is one of the key action points in the Government White Paper on regulatory reform.

60. The possible disadvantages of implementing the UCPD through primary legislation that would replace a number of existing statutes are as follows:

- The replacement of a sizeable body of established legislation by a new Act based on a European Union directive containing a number of concepts relatively new to Irish law clearly carries some risk of legal uncertainty. The current legislation has been in place for a considerable time and, unlike the equivalent and broadly comparable legislation in the United Kingdom, has been subject to little or no interpretation or challenge in the courts. Challenges to the new legislation may be more likely not simply because of its novelty, but also because it provides for higher fines for traders who breach its provisions as well as for enhanced civil and criminal compensation provisions for consumers affected by unfair commercial practices. If more and/or longer court cases ensue, this will result in higher enforcement costs for regulatory bodies such as the National Consumer Agency. The proposed introduction of fixed payment notices for breaches of price display orders, however, should reduce enforcement costs in this particular area of consumer law. In 2005, nine of the twenty court actions taken by the Director of Consumer Affairs concerned breaches of these orders, while in 2004 such cases accounted for eight of the twenty eight court actions taken by the Director.
- New legislation imposes initial familiarisation costs on consumers, traders and enforcement bodies. The more extensive the legislative changes, the greater those once-off costs are likely to be.

61. The impact of both these drawbacks is lessened however by the fact that, because of the UCPD's maximum harmonisation status, our domestic legislation would require significant modification to align it with the UCPD irrespective of which transposition method is favoured. Though any new law entails some transitional costs while businesses and consumers become familiar with its provisions and requirements, the overall effect of the proposed Bill should be to create a simplified

and more accessible regulatory regime. The impact of new legislation with novel provisions on businesses, consumers and enforcers can also be ameliorated. The draft Bill provides for the retention in the UCPD-based legislation of some of the elaborating provisions of (i) the Consumer Information Act 1978 on false or misleading trade descriptions, statements as to services, advertising, and price indications, and (ii) of the Pyramid Selling Act 1980. These provisions will have to be cleared with the European Commission in view of the Directive's maximum harmonisation status. Guidance can also be issued to traders and consumers in order to assist their understanding of new legislative provisions. The provisions of the Bill relating to the proposed National Consumer Agency provide for such a role for the NCA, and it is planned that such guidance will be issued in the case of the legislation implementing the UCPD.

62. As noted above, the Bill contains provisions for more effective enforcement and enhanced civil and criminal compensation arrangements. It is not considered that this will impose a significant burden on the vast majority of traders who make a reasonable effort to comply with their legal obligations. Under existing legislation, criminal proceedings are taken against some 20-30 traders per year for breaches of consumer legislation, while civil proceedings are uncommon. Effective enforcement of the law can have a positive impact on responsible and law-abiding traders who, where the law is not effectively enforced, can find themselves at a competitive disadvantage vis-à-vis traders who do not comply with their legal obligations.

2. OTHER IMPACTS

National Competitiveness

63. The legislation implementing the Unfair Commercial Practices Directive will not have a significant impact on national competitiveness. Insofar as the Directive promotes greater competition by facilitating cross-border trade in goods and services, its impact on national competitiveness should be positive.

The Socially Excluded and Vulnerable Groups.

64. The Unfair Commercial Practices Directive contains a provision inserted specifically in order to take account of the position of vulnerable consumers. This provides that a commercial practice which is likely to affect the economic behaviour

of a clearly identifiable group of consumers who are particularly vulnerable to the practice because of their mental or physical infirmity, age or credulity in a way that a trader could reasonably be expected to foresee must be assessed from the perspective of the average member of that group.

Environmental Impacts

65. The proposed legislation will not have an impact on the environment.

Significant Policy Change in an Economic Market, Including Impacts on Competition and Consumers

66. This has been dealt with in detail in the discussion of the costs and benefits of options A and B above. Insofar as the internal market objectives of the Unfair Commercial Practices Directive are achieved, this will expand consumer choice and will also improve business access to cross-border markets. Some domestic businesses may experience greater competition from cross-border competitors, but any negative impact should be offset by the potential for increased sales of goods and services by Irish enterprises to other member states. The consumer protection provisions of the legislation include significant new protections for Irish consumers. As the Directive does not generally impose positive obligations on traders but rather proscribes certain unfair practices, it should not impact on the majority of responsible traders. The increased range of unfair practices covered by the legislation coupled with enhanced enforcement provisions should benefit compliant businesses.

Rights of Citizens

67. The proposed legislation does not bear directly on the rights of citizens.

Compliance Burden

68. This has been considered in the discussion of the costs and benefits of options A and B above.

Summary of Costs, Benefits and Impacts

69. As noted above, the 'do nothing/no policy change' option is not a credible stance in this instance. Given the requirement to transpose the Unfair Commercial Practices Directive, the effective options concern the method of transposition and the enforcement provisions connected to the choice of transposition method.

Transposition by statutory instrument with the minimum of changes to existing legislation would offer the short-term advantage of a simpler implementation process, though significant amendments to existing primary legislation would still be required. Post-implementation, however, it would add another layer to what is already a complex and fragmented legislative code. Consumers, businesses and enforcers would have to acquaint themselves with a number of pieces of disparate legislation and to decide which was most appropriate in each case. While there is some advantage in retaining established and familiar legislative provisions, this would be reduced in the present case by the need to amend that legislation significantly to align it with the Directive's provisions.

70. Transposition by primary legislation would arguably be more in keeping with the UCPD's status as a major framework measure regulating the field of business-to-consumer advertising, marketing and commercial communications. It would also permit the replacement by a single statute of a large, complex, and in some respects archaic, body of domestic legislation. While this statute would have a number of novel elements, the difficulties that this might cause consumers, businesses and enforcers would be offset by the gain from simplification. Although new legislation with novel elements presents a risk of legal uncertainty and challenge, avoidance of legal challenge should not be the basis of policy. If case law reveals aspects of the legislation to be unsatisfactory or to require modification, that situation will have to be addressed as and when it arises.

71. Enacting the UCPD by primary legislation also makes it possible to strengthen enforcement and redress provisions. This is clearly of benefit to consumers – weaknesses in redress provisions have been recognised to be one of the shortcomings of our consumer code. While strengthened provisions for enforcement and redress may seem to place an increased burden on business, this is not a general burden but will only apply in the relatively small number of cases in which businesses have been found by a court in civil or criminal proceedings to have infringed the requirements of the legislation. Effective enforcement of legislation is in the interests of responsible traders as it fosters a culture of compliance and helps to eliminate any advantage rogue traders may gain from flouting their legal obligations.

Consultation

72. Since the original publication of the UCPD in 2003, the Department has undertaken a number of public consultations on its provisions with stakeholders. A first public consultation was held in November 2003, with a public consultation meeting attended by representatives of the European Commission taking place in December 2003. A further consultation on a revised text of the Directive was initiated in April 2004. A third public consultation was held in February 2005 in the lead-in to the final negotiations on the text of the Directive. The views of other Government Departments and of regulators were also sought in February 2005 on the possible implications of the Directive for legislation within their remit. A number of issues raised in the course of these consultations, such as the need to ensure that our consumer protection regime for financial services was not adversely affected by the UCPD's maximum harmonisation status, helped to inform our position in the negotiations on the draft Directive. As a result of concerns expressed by Ireland and a small number of other member states, financial services was exempted from the maximum harmonisation provisions of the Directive.

Enforcement and Compliance

73. The main responsibility for the enforcement of the legislation implementing the UCPD will rest with the National Consumer Agency which is to assume the current responsibilities of the Office of the Director of Consumer Affairs for the enforcement of consumer legislation. The NCA will have a role in both the civil and criminal law enforcement of the legislation implementing the UCPD. As some of the provisions of the Directive do not appear to satisfy the constitutional requirements for the creation of a criminal offence, it is proposed to confine redress to civil law remedies in these instances. While the UCPD covers a broader range of practices than the legislation it is to replace and may give rise therefore to a larger volume of enforcement work for the NCA, the enforcement function will not differ in its essentials from that currently discharged by the ODCA. The provision for fixed payment notices or on-the-spot fines for breaches of price display Regulations should also help to ease somewhat the enforcement burden on the NCA.

74. In addition to the National Consumer Agency, the Minister may by order designate other public authorities which enforce laws protecting consumers' interests as enforcers for the purposes of the Bill. Subject to consultations, this is likely to include bodies such as the Central Bank and Financial Services Regulatory Authority and the Commission for Communications Regulation.

Article 11(1) UCPD requires member states to ensure that 'adequate and effective means exist to combat unfair commercial practices' in order to ensure compliance with the provisions of the Directive in the interests of consumers. Such means 'shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:

- (a) take legal action against such unfair commercial practices; and/or
- (b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.'

75. The Commission have confirmed that member states have discretion as to whether or not to give competitors a right to take legal action against unfair commercial practices or to bring such practices before an administrative authority that could either adjudicate on the complaint or initiate legal action in response to it. In the Irish context, the latter option would involve giving competitors the right to take complaints about unfair commercial practices to the new National Consumer Agency which would investigate the complaint and could then decide to initiate legal proceedings.

76. It is proposed to follow the approach taken to the implementation of the Misleading Advertising Directive and provide that any person including a competitor may, upon giving notice of the application to the other party, apply to the courts for an order to restrain an unfair commercial practice. This provision has not given rise to any obvious difficulties and, given the dearth of Irish case law relating to consumer legislation, the right of action afforded businesses has clarified aspects of the interpretation of the Misleading Advertising Regulations. Any such right of action for

traders would apply only to an unfair business-to-consumer commercial practice as defined and elaborated in the Directive. Among other requirements, such a practice would have to cause the average consumer to take a transactional decision he would not have taken otherwise. While competitors would naturally have their own commercial reasons for taking action under the Directive, any such action could only hope to succeed if they could establish, among other things, that the average consumer had been affected by the practice concerned. Given the obstacles to the initiation of legal action by consumers, the consumer interest might be served in some instances by legal action taken by traders.

77. While competitors will have a right of action under the legislation implementing the Directive, it is not proposed to give businesses a right to bring complaints about unfair commercial practices to the National Consumer Agency [NCA]. The NCA has a large and diverse mandate in protecting and representing consumer interests and will inevitably face resource constraints in fulfilling that mandate. It does not make sense in this context to require it to divert scarce resources to investigating complaints from traders. It is appreciated that small businesses in particular may find it difficult to take legal action against larger competitors. Requiring the NCA to assist them is not the answer to these difficulties, no more than would requiring County Enterprise Boards or other bodies charged with supporting SMEs to act on behalf of consumers be an appropriate response to the problems encountered by consumers in enforcing their rights.

Review

78. Article 18 of the Unfair Commercial Practices Directive requires the European Commission to report on the application of the Directive by June 2011, five years from the transposition deadline. This report is required, among other things, to deal with the scope for further harmonisation and simplification of Community law relating to consumer protection and with any measures that need to be taken at Community level to ensure that appropriate levels of consumer protection are maintained. The report is to be accompanied, if necessary, by a proposal to revise the Directive or other relevant parts of Community law.

79. The proposed legislation also gives the National Consumer Agency the function of keeping its provisions under review and submitting to the Minister any proposals relating to the legislation that it considers appropriate.

