



AN BILLE UM CHOSAINT TOMHALTÓIRÍ 2007
CONSUMER PROTECTION BILL 2007

EXPLANATORY AND FINANCIAL MEMORANDUM

The purpose of the Bill is to establish a body to be known as an Gníomhaireacht Náisiúnta Tomhaltóirí or, in the English language, the National Consumer Agency, and to define its functions, to give effect to the Unfair Commercial Practices Directive (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005), to make new provision in relation to pyramid selling schemes, to amend the Industrial Development Act 1993, and to provide for related matters.

PART 1

PRELIMINARY MATTERS

Section 1 sets out the short title of the Act and provides that the Minister may commence the Act by order or orders in whole or in part on days to be decided.

Section 2 defines terms used in the Act and elaborates on the interpretation of “the average consumer” as it applies in Part 3 of the Act. It provides that a court shall construe the Act in a manner that gives effect to the Unfair Commercial Practices Directive and for this purpose shall have regard to the provisions of the Directive, including its preambles.

Section 3 empowers the Minister for Enterprise, Trade and Employment to make regulations in relation to any matter prescribed by the Act and makes provision for regulations to be laid before the Houses of the Oireachtas and for the annulling of regulations by the Houses of the Oireachtas.

Section 4 provides for the repeal of enactments listed in Schedule 2 of the Act to the extent specified in that Schedule and for the revocation of two Orders.

Section 5 provides that expenses incurred in the administration of the Act shall, where sanctioned by the Minister for Finance, be paid out of monies provided by the Oireachtas.

PART 2

NATIONAL CONSUMER AGENCY

Chapter 1

The Agency

Section 6 provides that the Minister shall by order select the establishment day for the Agency.

Section 7 provides that there shall be established an Agency known in Irish as an Gníomhaireacht Náisiúnta Tomhaltóirí and in English as the National Consumer Agency to carry out the functions assigned to it under this Act. The Section also provides that the Agency can sue or be sued, that it can be involved in the acquisition, holding and disposal of land or any other property and that the Agency shall be independent in the performance of its functions.

Section 8 provides that the Agency shall have certain functions. The Section provides the Agency with a general function of promoting and protecting the interests and welfare of consumers and that it shall also be responsible for investigating, enforcing and encouraging compliance with consumer protection legislation including, where appropriate, referring cases involving possible indictable offences to the Director of Public Prosecutions. In addition, the Agency is given specific functions in relation to advising and making recommendations to the Government, Ministers, Ministers of State in relation to any policy or legislative proposals impacting or likely to impact upon consumer protection and welfare. The Section also provides that the Agency may submit proposals to the Government, Ministers, Ministers of State to amend any existing enactment or to introduce new enactments in relation to consumer protection and welfare as well as enabling the Agency to advise and make recommendations to the Government, Ministers, Ministers of State, public bodies or other bodies prescribed under the Act in relation to any matter concerning consumer protection and welfare. The Section further provides that the Agency shall promote contacts with and consult with consumer groups and representatives and that it shall co-operate with other competent authorities both within the State and elsewhere in relation to the promotion of consumer welfare and the enforcement of consumer protection laws. The Section gives the Agency specific functions in relation to promoting alternative dispute resolution mechanisms for resolving consumer complaints, conducting and commissioning research, studies on matters relating to its functions and where it sees fit publishing any findings in relation to such research, promoting awareness and conducting information campaigns in relation to matters of consumer protection and welfare, promoting educational initiatives and activities in relation to consumer protection and when requested advising Ministers, Departments of State, public bodies and educational or training institutions on such matters. The Section provides that the Agency may, by financial or other means, support the activities of appropriate voluntary bodies in so far as they relate to consumer protection and welfare. The Section also requires the Agency to prepare and publish guidelines to traders as provided for in Section 87 and to review and approve Codes of Practice submitted to it in accordance with Section 85. The Agency is also charged with the responsibility of performing the functions assigned to the Director of Consumer Affairs and transferred to the Agency under Section 37. The Section further provides that the Agency may delegate the performance of any of its functions to any member or member of staff, including the Chief Executive.

Section 9 provides that the Minister may consult the Agency regarding proposals for legislation relating to consumer protection and welfare. The Agency is required under this Section to keep under review current consumer legislation and also where appropriate to submit to the Minister proposals in relation to that legislation and to similarly submit proposals to other Ministers responsible for any other statutory provisions impacting on consumer protection and welfare, including any proposals in relation to making or revoking any instruments under such legislation. The Minister is empowered under the Section to direct the Agency to undertake reviews of existing consumer protection legislation and to request the Agency to assist in the preparation of draft legislation. The Section obliges the Agency to consult with appropriate persons prior to submitting proposals to the Minister or other Ministers.

Section 10 provides for membership of the Agency, its numbers, how they are to be appointed, paid, replaced, removed etc. The Section provides that the Agency shall consist of a chairperson and 12 ordinary members and that the CEO shall be a member of the Agency. When appointing persons as members of the Agency, the Minister is obliged to appoint persons of experience or capacity in matters relevant to the functions of the Agency and to ensure as far as practicable that there is an equitable balance between men and women in the composition of the Agency. The Section also includes provisions in relation to payments to the members of the Agency and the terms and conditions of such members in addition to providing for the rotation and the retirement of Agency members. The Section requires that members of the Agency (other than the Chief Executive) shall not serve more than 10 years. Further provision is made in the Section in relation to the disqualification of persons from membership of the Agency, the resignation of persons from membership of the Agency and also the conditions under which the Minister may remove a member of the Agency from office. The Section provides that a member whose period of membership expires shall be eligible for reappointment subject to the maximum term. The Section also allows for persons to be appointed by the Minister as members of the Agency to fill vacancies arising from death, resignation, retirement, disqualification or removal from office. The Minister is obliged to ensure that vacancies are filled as soon as practicable.

Section 11 provides that the Minister shall designate one member of the Agency as the chairperson and that the chairperson's term of office shall be 5 years. The Section specifies that where the chairperson ceases to be a member of the Agency, he also ceases to be the chairperson. The Section further provides that the chairperson shall continue to hold office until the expiration of his or her period of membership of the Agency and that if re-appointed as a member of the Agency, he or she may be eligible for reappointment as chairperson.

Section 12 provides for the procedure in relation to meetings and other business of the Agency. The Section allows the Agency to hold as many meetings as it considers necessary to perform its functions and also provides that the Minister may fix the date, time and place of the Agency's first meeting. The Section stipulates that the quorum required for a meeting of the Agency is 5 members. Provision is also made in the Section enabling the Agency, in the absence of the chairperson, to select one of its members to perform that role. The Section provides that each member present at a meeting shall have a vote and additionally stipulates that matters on which a vote is required shall be decided by majority and where there is a tie, the chairperson shall have a second and casting vote.

Section 13 provides that the Agency may establish committees to assist it in the performance of its functions, that such committees shall have a chairperson and such other members as the Agency may appoint, including persons who are not members or members of staff of the Agency. The Section obliges the Agency when appointing members of a committee, to have regard to the qualifications and experience necessary to enable the committee to discharge its functions, the gender balance of the committee, fix the period of membership and the terms of membership of the committee. The Section further provides that the Agency may pay fees to members of a committee subject to the consent of the Minister and the Minister for Finance. The Section also includes provisions allowing for the removal of a member from a committee and for the dissolution of a committee.

Section 14 provides that the Agency shall have a chief executive officer, that the chief executive shall be appointed and may be removed from office by the Agency with the approval of the Minister, that the chief executive shall be appointed under a written contract for a period of not more than 5 years subject to terms and conditions determined by the Agency with the approval of the Minister and the consent of the Minister for Finance, that the chief executive's contract may be renewed, that the chief executive shall not hold any other position or office for which emoluments are payable without the consent of the Agency and the approval of the Minister and that the CEO shall be subject to the control of the members of the Agency. The Section further provides that where a competition is held prior to establishment day, the Minister may appoint the successful candidate as the chief executive designate of the Agency and that the person holding the post of chief executive designate immediately before establishment day shall on that day become the chief executive of the Agency. The Section requires that a person who ceases to be the chief executive shall not, for a period of 12 months following the person ceasing to be the chief executive, act as a consultant or hold office or employment where he or she may be likely to use or disclose information acquired in the performance of his or her functions as chief executive.

Section 15 provides that the chief executive shall carry on and manage the staff and business of the Agency and shall carry out any other functions conferred on him or her under the Act or determined by the Agency, that the chief executive shall advise the Agency in relation to the performance of the functions of the Agency, that the chief executive shall be answerable to the Agency for the performance of his or her functions and the implementation of the Agency's policies, that the chief executive shall provide the Agency with any information that it may require in relation to the performance of his or her functions and that the chief executive may delegate the performance of his or her functions to any member of staff of the Agency duly authorised for that purpose. The Section also provides that where the chief executive is temporarily unable to discharge his duties, the Agency may appoint a person to act in place of the chief executive and that a person so appointed has all the powers and duties conferred on the chief executive.

Section 16 provides that the chief executive shall, when required, give evidence to the committee of Dáil Éireann established to examine appropriation accounts and reports of the Comptroller and Auditor General. The Section stipulates the bases on which the chief executive shall give evidence to that committee and also provides that in giving evidence to the committee of the Dáil, the chief executive shall not question or express an opinion on Government or Ministerial policy.

Section 17 provides that the CEO shall, when required, attend before an Oireachtas Committee to give account for the general administration of the Agency. The Section defines Oireachtas Committees as including committees appointed by either House of the Oireachtas or jointly by both Houses but excludes the Committee referred to in Section 16 and also the Committees of the Dáil and the Seanad on Members' Interests.

Section 18 provides that where a member of the Agency or the chief executive is nominated, elected, regarded as elected or co-opted as a public representative, the member shall cease to be a member and the chief executive shall cease to be the chief executive. In the case of members of staff of the Agency so nominated, elected, regarded as elected or co-opted, the Section provides that the member of staff shall stand seconded from employment by the Agency and shall not be entitled to any remuneration from the Agency until the member of staff ceases to be a public representative. The Section also provides that periods served as a public representative shall not count as service with the Agency for the purposes of superannuation as provided for in Section 36.

Section 19 provides that members of the Agency, a member of a committee, persons engaged by the Agency under Section 26, members of staff of the Agency including the chief executive and authorised officers are indemnified by the Agency against all actions or claims in respect of the discharge by them of their duties provided such duties were discharged in good faith.

Section 20 provides that as soon as practicable after establishment day and thereafter at least 3 months before the third anniversary of the establishment day, the Agency shall prepare and submit to the Minister a strategy statement for the following 3 year period. The Section stipulates the information to be included in the strategy statement. The Section empowers the Agency to consult appropriate persons or bodies when preparing its strategy statement. The Minister is obliged under the Section to lay the statement before the Houses of the Oireachtas as soon as practicable after it has been submitted to him. The Section further provides that the Agency shall submit an annual work programme to the Minister at least 2 months before the commencement of the financial year and that the Minister may issue guidelines or directions to the Agency in relation to the preparation of the work programme.

Section 21 provides for co-operation between the Agency and certain prescribed bodies. The Section provides that the Agency shall enter into co-operation agreements with bodies prescribed by the Minister for the purposes of co-operation, avoidance of duplication of activities, consultation and conducting joint studies and analysis with such bodies. The Section stipulates that co-operation agreements shall include provisions enabling parties to an agreement to share information necessary for the performance of their functions, to forbear to perform any of their respective functions in circumstances where another party to the agreement is performing such functions and to require parties to agreements to consult with each other where the exercise of respective functions by the parties involves the determination of issues of consumer protection and welfare. The Section allows the parties to a co-operation agreement to vary the agreement. The Section requires that within one month of completion (or variation) of a co-operation agreement, a copy of the agreement (or variation) should be provided to the Minister and to the Minister or Ministers with responsibility for any other party to the agreement. The Section further requires that co-operation agreements be in writing, that notice of the making of an agreement shall

be published by the parties as soon as practicable after the agreement has been furnished to the Minister and the relevant Minister or Ministers and that such notices should include details where the agreement may be inspected or purchased by the public. The Section also stipulates that where, pursuant to a co-operation agreement, information is given by one party, the restrictions under any statute in relation to the disclosure of that information shall apply equally to the party in receipt of such information. The Section requires that when prescribing bodies for the purpose of entering into co-operation agreements with the Agency, the Minister shall have regard to the functions, role, objectives and activities of the body and the impact of the body's functions on consumer protection and welfare. In addition, the Section obliges that before prescribing a body (as a body with whom the Agency shall enter into a co-operation agreement) for which another Minister has responsibility, the Minister shall consult with that other Minister.

Section 22 provides that, no later than 6 months after the end of the financial year, the Agency shall provide the Minister with a copy of its annual report, which shall include such information as the Minister may direct and that before the report is published, the Minister shall, as soon as practicable after he has received it, lay the report before the Houses of the Oireachtas. The Section also provides that the Agency may submit to the Minister such other reports, advice or information in relation to its functions as it feels appropriate or as requested by the Minister.

Section 23 requires that the Agency keeps proper and usual books and records of accounts of monies received and expended by the Agency and of all property, assets and liabilities of the Agency and that the Agency submit to the Minister estimates of income and expenditure and such other information relating to those estimates as required by the Minister. The Section obliges the chief executive and the other officers of the Agency to allow any person appointed by the Minister to examine the books or records of accounts of all moneys received or expended by the Agency in respect of any financial year and the Agency shall pay the fees associated with the examination. The Section further requires that the Agency's accounts, signed by the chief executive, shall be submitted for audit to the Comptroller and Auditor General no later than 3 months after the end of the financial year to which the accounts relate. The Section also provides that when audited, a copy of the accounts and a copy of the Comptroller's report shall be presented to the Minister who shall lay copies of them before the Houses of the Oireachtas as soon as practicable but no later than 3 months after receiving them.

Section 24 provides that the Minister may, with the consent of the Minister for Finance, advance monies to the Agency for the performance of its functions.

Section 25 provides that the chief executive, a member of the Agency or of a committee, a member of staff, a consultant, adviser or person engaged by the Agency shall disclose any pecuniary or other beneficial interest in relation to any matter which is to be considered by the Agency. The Section requires where any of the aforementioned has a beneficial or pecuniary interest in a matter, he or she shall not influence or seek to influence a decision on the matter, take part in consideration of the matter or, where appropriate, withdraw from a meeting during the consideration of the matter. The Section specifies the circumstances wherein a person shall be deemed to have a beneficial interest. The Section stipulates that it is a matter for the Agency to determine any question as to whether a course of conduct by any person would represent a failure to disclose the

person's interest as required under the Section and that where a disclosure is made its details shall be recorded in the minutes and the person who made the disclosure shall be excluded from the numbers required for a quorum for the meeting. The Section empowers the Minister to remove a member of the Agency from office if he is satisfied that the member has not disclosed a beneficial or pecuniary interest as required by the Section. In the case of persons other than members of the Agency, the Section provides that the Agency in consultation with the Minister shall determine a course of action in relation to any failure to disclose beneficial or pecuniary interests.

Section 26 provides that the Agency subject to terms and conditions it considers appropriate may enter into contracts or engage consultants and advisers to assist it in the performance of its functions.

Section 27 provides that the Agency may, subject to the consent of the Minister and the Minister for Finance, lease, equip or maintain offices and premises.

Section 28 provides that the Agency shall have a seal and that the seal shall be authenticated by either the chairperson, a member of the Agency, the chief executive or such other person duly authorised. The Section also provides that judicial notice shall be taken of the seal.

Section 29 provides that the Agency may, subject to the consent of the Minister and the Minister for Finance, borrow money for the purpose of performing any of its functions.

Section 30 provides that the Agency may appoint persons, including members of its staff, as authorised officers for the purposes of any or all of the relevant statutory provisions. The Section provides that authorised officers appointed by the Agency shall be given a warrant of appointment and shall produce the warrant if requested when exercising any power conferred on him or her. The Section allows for authorised officers appointed under the Consumer Information Act 1978 immediately before the commencement of Section 37 to continue in office as if authorised under this Section. The Section also sets out the powers of authorised officers in relation to entering premises, inspecting, securing, copying, removing and retaining records and requiring persons to give information. The Section also empowers authorised officers to take goods by paying or making tender for payment of the goods or confirm the selling price of the goods by other appropriate methods. The Section prohibits authorised officers from entering a private dwelling except with the consent of the occupier or unless he or she has obtained a warrant from the District Court authorising such entry. The Section empowers authorised officers to apply to a judge of the District Court for a warrant to enter premises and the judge if satisfied that there are reasonable grounds that there is information required by the authorised officers may issue a warrant authorising the officer to enter the premises using reasonable force if necessary. The Section provides that authorised officers when exercising any of their powers may be accompanied by such other authorised officers or members of the Garda Síochána. The Section makes it an offence to obstruct or impede an authorised officer or to refuse to comply with an officer's request or to give false information to an officer. The Section allows for the retention for a specified period of any books, documents or records seized by authorised officers. It also requires where officers propose to retain records for more than 14 days, to furnish on request copies of those records before the expiry of 14 days to those persons entitled to possession of the records. The

Section further provides that the publisher of an advertisement in relation to the supply or provision of any product shall if requested by an authorised officer within 12 months of the publication of the advertisement, supply the name and address of the person who procured the advertisement and further makes it an offence for persons to refuse to comply with such requests. The Section also provides definitions of certain terms.

Section 31 provides for the disclosure of information relating to the commission of any offence under the statutory provisions to the Agency by the Competition Authority, a member of the Garda Síochána, an officer of the Revenue Commissioners or any such other persons prescribed by the Minister following consultation with other relevant Ministers. The Section also allows for any information, which in the opinion of the chief executive may relate to the commission of an offence other than offences under the statutory provisions, to be disclosed to the Competition Authority, a member of the Garda Síochána, the Director of Corporate Enforcement, an officer of the Revenue Commissioners, or any such other persons prescribed by the Minister following consultation with other relevant Ministers.

Section 32 provides that, save as otherwise provided by law, a member of the Agency or of a committee of the Agency, the chief executive, a member of the staff of the Agency, a consultant or adviser engaged by the Agency or an employee of such a consultant or adviser, an authorised officer or a person engaged by the Agency in any other capacity cannot unless authorised by the Agency, disclose confidential information obtained while performing his or her duties. The Section makes it an offence for persons to disclose information in breach of their obligations under this Section. The Section further provides that persons suffering loss or harm arising from any breach of obligation under this Section may bring proceedings for relief by way of injunction or declaration or damages in respect of such breach.

Section 33 provides for an amendment to the Freedom of Information Act 1997 to bring the Agency within the ambit of that Act.

Chapter 2

Staff of Agency

Section 34 provides that the Agency may appoint persons to be members of staff of the Agency and may determine the grades and numbers of such staff and their terms and conditions subject to the approval of the Minister given with the consent of the Minister for Finance.

Section 35 provides that following a request from the chief executive made in concurrence with the Agency and within 24 months following the establishment day, the Minister may transfer the employment of persons employed in a Department of State or by a public body to the Agency provided the persons concerned agreed to have their employment transferred to the Agency. This Section provides that the conditions of employment of persons so transferred shall be no less favourable than the conditions applicable to those persons immediately before the transfer except where changes are negotiated by collective agreement with recognised trade unions or staff associations. The Section further provides that the previous service of persons whose employment is transferred to the Agency shall be counted as service for the purposes of certain employment rights legislation.

Section 36 provides that the Agency may with approval of the Minister given with the consent of the Minister for Finance make a scheme for the granting of superannuation to members of staff of the Agency and that any such scheme shall fix the time and conditions of retirement for all staff in respect of whom superannuation benefits are payable. The Section further provides that superannuation benefits granted to persons transferred to the Agency under Section 35 shall be no less favourable than the benefits which those persons were entitled to immediately before the transfer. The Section also requires that superannuation schemes made under the Section shall provide for an appeal from a decision relating to superannuation benefits payable under the schemes.

Chapter 3

Transfer of Functions, etc.

Section 37 provides for the transfer of functions vested in the Director of Consumer Affairs under the existing enactments to the Agency on establishment day. The Section further provides that, on the establishment day, references to the Director and the office of the Director in any Act or instrument including references in licences, authorisations or certificates granted, nominations made etc. shall be read as references to the Agency. The Section allows the Agency to carry on or complete anything commenced by the Director of Consumer Affairs in so far as it relates to functions transferred to the Agency under this Section. The Section provides that in any legal proceedings pending immediately before the establishment day to which the Director is a party, the Agency shall be substituted for the name of the Director and the proceedings shall not be abated by reason of such substitution.

Section 38 provides that existing bonds, guarantees, contracts, agreements etc. of a continuing nature between the Director and any person immediately before establishment day shall continue in force after that day and shall have the effect as if the Agency was substituted for the name of the Director. The Section further provides that every document made or granted by the Director immediately before establishment day including any certificate, licence, authorisation etc. will continue in force after that day as if it had been granted or made by the Agency.

Section 39 provides for the transfer of all the property, rights, assets and liabilities of the Director of Consumer Affairs to the Agency on establishment day and that every right and liability transferred on that day to the Agency may be sued on, recovered or enforced by or against the Agency in its own name. The Section further provides that the Agency shall not dispose of any land or any interest therein transferred to the Agency, without the consent of the Minister.

PART 3

COMMERCIAL PRACTICES

Chapter 1

Unfair Commercial Practices

Section 40 gives effect to Article 5 of the Unfair Commercial Practices Directive. A commercial practice will contravene this section

where it is contrary to the requirements of professional diligence and would be likely to cause appreciable impairment of the average consumer's ability to make an informed choice in relation to a product and to cause him or her to make a transactional decision that they would not otherwise make.

Chapter 2

Misleading Commercial Practices

Section 41 prohibits traders from engaging in commercial practices that mislead consumers.

Section 42 gives effect to Article 6 of the Unfair Commercial Practices Directive. A commercial practice is misleading if it includes false information or in any way deceives or misleads the average consumer in relation to any matter specified in subsection (3) of the section and would be likely to cause him or her to make a transactional decision that they would not otherwise make. It will not be a defence in proceedings where this section is at issue to show that the information provided in the course of a commercial practice is factually correct. The section also sets out factors to be taken into consideration in determining whether certain forms of price comparison are misleading and in determining the geographical origin of goods whose manufacture or production involves more than one country.

Section 43 prohibits commercial practices which would be likely to cause the average consumer to confuse a trader's product, trade name, trade mark or other distinguishing feature or mark with that of a competitor and to make a transactional decision that he or she would not otherwise make.

Section 44 prohibits non-compliance by traders with firm commitments in a code of practice where they have made representations that they are bound by that code of practice. This prohibition is subject to the requirement that it would be likely to cause the average consumer to make a transactional decision that he or she would not otherwise make.

Section 45 provides that a commercial practice is misleading if a trader omits or conceals material information that the average consumer would need, in the context, to make an informed transactional decision. It prohibits a trader from providing such material information in a manner that is unclear, unintelligible, ambiguous or untimely or from failing to identify the commercial intent of a commercial practice if these practices would be likely to cause the average consumer to make a transactional decision that he or she would not otherwise make. It also sets out the information requirements with which traders must comply in the context of an "invitation to purchase" as defined in section 2.

Section 46 provides that contraventions of section 42 are an offence.

Section 47 empowers the Minister for Enterprise, Trade and Employment to make regulations prescribing information with which a product must be marked, or which must be contained in advertisements for a product, where the Minister is satisfied that the average consumer would need this information in order to make an informed transactional decision. The Minister must further be satisfied that the withholding of this information would be likely to cause the average

consumer to make a transactional decision that he or she would not otherwise make. These requirements do not apply in the case of regulations relating to the hallmarking of precious metals.

Section 48 provides that contraventions of regulations made under section 47 are an offence.

Chapter 3

Aggressive Commercial Practices

Section 49 prohibits traders from engaging in aggressive commercial practices.

Section 50 identifies the forms of aggressive commercial practices as coercion, harassment or undue influence, defines “undue influence”, and sets out factors to be taken into account in determining whether an aggressive commercial practice is being engaged in. Such practices must also be likely to cause significant impairment of the average consumer’s freedom of choice or conduct in relation to a product and to cause him or her to make a transactional decision that they would not otherwise make.

Section 51 provides that contraventions of section 50 are an offence.

Chapter 4

Prohibited Commercial Practices

Section 52 lists specific commercial practices that are prohibited regardless of their effect on the transactional decisions of the average consumer. It is based on the ‘blacklist’ at Annex I of the Unfair Commercial Practices Directive save for the Annex provision on pyramid promotional schemes which is given effect by section 61.

Section 53 provides that contraventions of section 52 are an offence.

Section 54 empowers the Minister for Enterprise, Trade and Employment to make regulations requiring the price or charge to consumers of or for a product, or a class or type of product, to be displayed in a manner or form specified in the regulations. It is based, with some amendments, on the provision at section 19 of the Prices Act 1958.

Section 55 provides that contraventions of regulations made under section 54 are an offence.

Section 56 requires grocery retailers offering food for sale by weight (other than food packed for sale by its manufacturer or supplier) to provide a weighing scale in a public and prominent position as near as reasonably possible to where the food is on display and to allow persons purchasing the food either to weigh the food or to observe it being weighed. It is based, with some amendments, on the provision at section 14 of the Consumer Information Act 1978. Contraventions of the requirement to provide a weighing scale in accordance with the section are an offence.

Section 57 makes it an offence for a trader, without reasonable cause, to prevent or obstruct a person from reading the display price of a product or from entering a trader’s premises for that purpose.

It is based, with some amendments, on the provision at section 15 of the Consumer Information Act 1978.

Section 58 empowers the Government by order, subject to the conditions specified in the section, to declare a state of emergency affecting the supply of a product where abnormal market conditions prevail in relation to the supply of that product. It is based, with some amendments, on the provision at section 15 of the Prices Act 1958.

Section 59 empowers the Government, where an emergency order under section 58 is in force in respect of a product, to fix in the form and manner prescribed by the section the maximum price at which that product may be supplied to consumers. It is based, with some amendments, on the provision at section 16 of the Prices Act 1958.

Section 60 provides that contraventions of an order made under section 59 are an offence.

PART 4

PYRAMID PROMOTIONAL SCHEMES

Section 61 provides a definition of “pyramid promotional scheme” based on the provision at annex I of the Unfair Commercial Practices Directive and clarifies aspects of that definition. Unlike the provisions of Part 3 which apply only to the commercial practices of traders, the provisions of this Part apply to all persons who establish, operate, promote or participate in a pyramid promotional scheme.

Section 62 makes it an indictable offence to establish, operate, promote, participate in or induce another person to participate in, a pyramid promotional scheme. It specifies a number of matters, proof of which is not required in proceedings relating to such schemes. It sets out factors to be taken into account in such proceedings in determining whether a scheme is a pyramid promotional scheme within the meaning of the Act.

Section 63 provides that an agreement between a scheme promoter and another person in respect of a pyramid promotional scheme is void and that no action shall lie for the recovery of money paid under such an agreement.

PART 5

PROCEEDINGS, REMEDIES AND PENALTIES

Chapter 1

Interpretation and General Matters related to Proceedings

Section 64 defines “prohibited act or practice” for the purposes of other provisions of this Part relating to civil and criminal proceedings.

Section 65 provides that if, in any proceedings under the Act, a trader does not establish, on the balance of probabilities, the truth of a factual claim made in a representation relating to a consumer transaction, the representation will be presumed to be untrue. It gives effect to article 12 of the Unfair Commercial Practices Directive and is based, with some amendments, on the provision at section 20 of the Consumer Information Act 1978.

Section 66 deals with the application of specified sections of Part 3 to advertisers. It defines “advertiser” and “contravening advertisement” and provides that advertisers are not liable criminally or in damages for a contravening advertisement where they did not know and had no reason to suspect that the advertisement was in contravention of the Act. Advertisers who publish an advertisement for a trader are required to keep a record of the trader’s name and address for a period of not less than two years. Contraventions of this requirement are an offence.

Section 67 enables legal proceedings to be taken against a third party whose act or default has led to the commission of an offence by a trader, regardless of whether proceedings are taken against the trader who committed the offence.

Chapter 2

Civil Proceedings

Section 68 permits any person, including the National Consumer Agency, to apply for a court order prohibiting a trader from engaging in a prohibited act or practice. Article 11 of the Unfair Commercial Practices Directive gives member states discretion to give traders a right to take legal action against unfair commercial practices, and the effect of the section is to afford this right to traders as well as consumers and others. Where a court order is sought by an applicant other than the National Consumer Agency, the Agency must be given the opportunity to be heard and adduce evidence. A trader who, without reasonable excuse, fails to comply with a court order commits an offence.

Section 69 defines “code owner” and empowers the National Consumer Agency to apply for a court order against a code owner if a code or its owner promotes a prohibited act or practice.

Section 70 provides that the National Consumer Agency may accept written undertakings from traders that they will refrain from certain acts or practices prohibited under the Act or the enactments specified at Schedule 3. In addition to commitments to cease engaging in prohibited acts or practices and to comply with the Act or enactments, undertakings may also include commitments to compensate consumers or to publish a corrective advertisement. Where a trader fails to comply with the terms of an undertaking, the Agency may apply for a court order against the trader.

Section 71 gives consumers aggrieved by certain prohibited acts or practices, a right of action for relief by way of damages, including exemplary damages, against any trader who commits or engages in the prohibited acts or practices. Where a trader is a body corporate, consumers will have a right of action for damages against any director, manager, secretary or other officer of the company who authorised or consented to the prohibited acts or practices.

Chapter 3

Compliance Notices

Section 72 empowers an authorised officer of the National Consumer Agency who is of the opinion that a person is engaging or has engaged in a prohibited act or practice or is contravening or has contravened an enactment specified in Schedule 4, to serve a compliance notice, in the form and manner prescribed by the section,

directing the person to cease engaging in the prohibited act or practice or to remedy the contravention. A person on whom a compliance notice is served may appeal to the District Court within 14 days of the notice being served, and the Court may confirm, vary or cancel the notice. A person who, without reasonable excuse, does not comply with a compliance notice commits an offence.

Chapter 4

Criminal Proceedings

Section 73 provides that a prosecution for an offence under the Act may be brought within two years of the date of the alleged commission of the offence.

Section 74 deals with offences under the Act committed by a body corporate and provides for the prosecution of executive officers of a body corporate where an offence is proved to have been committed with their consent, connivance or approval or to have been attributable to any neglect on their part.

Section 75 provides that, in proceedings for an offence under the Act, it is a defence for an accused person to prove that the commission of the offence was due to a mistake, reliance on information supplied to him or her, the act or default of another person, an accident or some other cause beyond his or her control, and that he or she exercised due diligence and took all reasonable precautions to prevent the commission of the offence.

Section 76 sets out penalties for persons found guilty of offences under the Act on summary conviction and on conviction on indictment. Higher penalties are provided for convictions for second or subsequent offences. If after a conviction for an offence under the Act, a person continues to contravene the requirement or prohibition to which the offence relates, he or she is guilty of a further offence on each day that the contravention continues. Higher penalties apply to persons convicted of offences relating to pyramid promotional schemes. In imposing a penalty for offences under specified sections of the Act, a court may take into consideration any corrective advertising published by or on behalf of the trader. Provision is also made for the penalties to apply where an accused person pleads guilty to an indictable offence.

Section 77 provides that, unless there are special and substantial reasons for doing otherwise, a court shall order a person convicted of an offence under the Act to pay to the the National Consumer Agency any costs and expenses which the Agency has incurred in the investigation, detection and prosecution of the offence.

Section 78 permits a court, on an application by the National Consumer Agency on behalf of an aggrieved consumer, to make a compensation order requiring a trader convicted of an offence under the Act to pay appropriate monetary compensation in respect of any loss or damage to that consumer resulting from the trader's offence. A compensation order may be instead of or in addition to any fine or penalty the court may impose on the person convicted, but shall not exceed the amount that the aggrieved consumer would be entitled to recover in an action for damages under the Act. If a consumer is subsequently awarded damages by a court in respect of the same prohibited act or practice, the damages awarded by that court will be reduced by the amount of the compensation order.

Section 79 provides that, where a person has been convicted of an offence under specified sections of the Act, a court may, in addition to any fine or penalty imposed, order the convicted person to publish at his or her own expense a corrective statement in respect of the facts relating to the commission of the offence.

Section 80 permits indictable offences under the Act to be tried summarily subject to the conditions provided for in the section, and sets out the fines and penalties to apply in such cases.

Section 81 empowers the National Consumer Agency to prosecute summary offences under the Act.

CHAPTER 5

Fixed Payment Notices

Section 82 empowers an authorised officer of the National Consumer Agency who has reasonable grounds for believing that a person is committing, or has committed, an offence under specified enactments relating to price display to serve a fixed payment notice in the form prescribed by the section on that person. Where the person pays the required amount to the Agency within the specified period, no prosecution will be initiated. Where the person does not make a payment in accordance with the notice, he or she will be prosecuted for the alleged offence. Payments received by the Agency under the section will be paid into the Exchequer.

CHAPTER 6

Publication of Trader Names (Consumer Protection List)

Section 83 provides that the National Consumer Agency shall maintain a list (the Consumer Protection List) of the names and addresses of persons on whom fines or penalties have been imposed by a court under the Act or other specified enactments; persons against whom a court order has been made; persons who have given an undertaking to the Agency; persons against whom a compliance notice has taken effect; and persons who have made a payment to the Agency pursuant to a fixed payment notice. The Agency may publish all or any part of the Consumer Protection List in any form it considers appropriate.

PART 6

MISCELLANEOUS

Section 84 provides that a person, who would otherwise be liable, will not be liable in damages in respect of a communication made reasonably and in good faith to the National Consumer Agency about the commission of an offence under the Act or other specified enactments. An employer shall not penalise an employee in respect of a similar communication to the Agency. A person who provides information relating to offences to the Agency knowing that information to be false is guilty of an offence.

Section 85 empowers the National Consumer Agency to approve codes of practice submitted to it by a person or any body representing one or more traders if it is satisfied that the code protects consumer interests and is not inconsistent with the Act or any other enactment. An approved code may not be amended without Agency

approval of the proposed amendments. The Agency may withdraw its approval from a code if it is of the opinion that the implementation or operation of the code fails to protect consumer interests or is inconsistent with the Act or any other enactment. Where an approved code includes procedures for handling consumer complaints, the Agency may defer consideration of a complaint, or a court may defer hearing an application for an order or an action for damages, involving a signatory to an approved code until these procedures have been exhausted.

Section 86 provides for the admissibility of codes of practice, whether approved or not, in any proceedings before a court. If a provision of a code is relevant to a question arising in any such proceedings, the provision may be taken into account in determining the question.

Section 87 empowers the National Consumer Agency to prepare and publish guidelines applicable to traders, or bodies representing traders, on matters relating to consumer welfare, practical guidance to traders regarding commercial practices, and the submission of codes of practice to the Agency for approval. A failure to observe Agency guidelines will not of itself render a person liable to any proceedings, but such guidelines will be admissible in evidence in any proceedings before a court, and any provision of such guidelines relevant to a question arising in court proceedings may be taken into account in determining that question.

Section 88 provides that a contract for the supply of goods or the provision of services will not be void or unenforceable by reason only of a contravention of any provision of the Act other than the provision rendering void agreements relating to pyramid promotional schemes.

Section 89 provides for the retention of specified price orders made under Section 19 of the Prices Act 1958.

Section 90 deems specified orders made under Section 11 of the Consumer Information Act 1978 to have been made as regulations under this Act and to remain in force notwithstanding the repeal of the Consumer Information Act 1978 by this Act.

Section 91 amends the provisions of section 6 of the Sale of Goods and Supply of Services Act 1980 concerning offences committed by a body corporate. A similar provision was included in an amendment of the Consumer Information Act 1978 effected by the Restrictive Practices (Amendment) Act 1987, and its inclusion in this section is necessitated by the repeal of both those Acts in their entirety.

Section 92 provides that the Act will not affect rights under any other enactment or under any rule of law.

Section 93 provides for the amendment of the Industrial Development Act 1993 by the insertion of a new section 9A in order to give retrospective effect to the assignment of powers to the enterprise development agencies to give employment grants that was made on 26 May 2006. It describes the assignment of powers that is being made retrospective, provides that the assignment of powers made on 26 May 2006 will have effect as if were made on 25 July 2003 [the date on which the Industrial Development (Science Foundation Ireland) Act 2003 came into effect], and states that the retrospective assignment of powers will not affect any legal proceedings commenced prior to the publication of this Bill.

Schedule 1 lists the existing enactments by or under which functions vested in the Director of Consumer Affairs will be transferred to the National Consumer Agency on its establishment day.

Schedule 2 lists Acts repealed by this Act and the extent of that repeal.

Schedule 3 lists enactments in respect of which the National Consumer Agency may accept undertakings from traders under section 70.

Schedule 4 lists enactments in respect of which authorised officers of the National Consumer Agency may serve compliance notices under section 72.

Schedule 5 contains further provisions on redress for an employee penalised by an employer for a communication made reasonably and in good faith to the National Consumer Agency about the commission of an offence under the Act or other specified enactments.

Financial Implications

Beyond the figures provided in the vote of the Department of Enterprise, Trade and Employment, the detailed financial implications of establishing the new Agency cannot be quantified at this stage. However, it is likely that the exercise of the specific functions given to the Agency under the Act may give rise to additional costs to the Exchequer.

*An Roinn Fiontar, Trádála agus Fostaíochta,
Eanáir, 2007.*