



**AN BILLE UM GHNÓTHAIS GHNÓ (RÓ-ÍOCAÍOCHTAÍ A
NOCHTADH), 2012**
**BUSINESS UNDERTAKINGS (DISCLOSURE OF
OVERPAYMENTS) BILL 2012**

EXPLANATORY MEMORANDUM

Background

Currently, if an overpayment is made by one party to another in the course of trade no statutory obligation exists to require the benefitting party to disclose the fact of the overpayment or to return it. This unsatisfactory position can give rise to grossly opportunistic approaches to overpayments and occasion loss to those who overpay. The common law provides a remedy through a claim for Restitution in respect of *unjust enrichment for monies had and received*. Since most overpayments are made inadvertently this remedy is often self defeating since the ability to bring a claim requires knowledge of the overpayment in the first instance. In particular where the trading relationship of the payer with the beneficiary is sporadic or at end of life, where the debtor pays round sums on account, on demand, or without due attention to statement reconciliation the possibility for an unscrupulous beneficiary taking advantage of unjust enrichment in regard to an overpayment is very real. In the event of the beneficiary closing down insolvent before returning an overpayment the loss potential is exacerbated. No priority distribution status accrues to overpayments in such situations.

The multiplicity of trade payment transactions taking place daily and the often impersonal and system driven nature of payments creates ready possibility for overpayment. The absence of a more regulated environment has led to unmistakable incidences of retention and unilateral appropriation of trade overpayments and other credits and is in contrast to the tightly controlled procedures that exist in sectors governed by the Dormant Accounts Acts 2001-2005, which govern customer balances in Credit Unions and other deposit holding institutions.

Purpose of the Bill

The Business Undertakings (Disclosure of Overpayments) Bill 2012 fills an important regulatory gap by imposing a statutory duty to disclose overpayments and to facilitate their return. As a stand alone Bill dealing with an important area of commercial activity its provisions apply equally to both incorporated and unincorporated business undertakings. It provides a valuable safeguard to anyone who overpays in the course of business by imposing obligations on

the beneficiaries of such payments and by establishing objective legal criteria in this area.

The Bill's duty of disclosure introduces an obligation to provide visibility of the fact of overpayment within a defined time frame and to ensure the giving of all relevant details necessary to arrive at a just outcome between the parties. It removes the most frequent barrier to the correct treatment of over payments by imposing appropriate standards around notification of such receipts. It introduces certainty around practices and expectations as to how overpayments are handled by beneficiaries and provides a viable and effective complaints mechanism where the provisions of the Bill are not being met.

The Bill closes avenues to a range of fraudulent and suspicious practices such as the omission of overpayments and other credits from customer statements and the use of retained overpayments for irregular ends. Examples of the latter are the use of customer overpayments to offset other losses of the undertaking or to show either incorrectly reduced liabilities or excessive levels of profit. It prevents the taking of unfair advantage by a beneficiary especially where this advantage would be created by failure to disclose relevant information.

This Bill complements in the private sector important aspects of the role of the Dormant Accounts Acts in relation to the financial services sector in terms of due diligence and duties to customer.

The Business Undertakings (Disclosure of Overpayments) Bill 2012 provides a remedy to the regulatory deficit on overpayments in a way which maintains a correct balance between the rights of the parties and promotes the due conduct of fair and equitable trading relationships.

Provisions of the Bill

Section 1 defines a number of key terms which are used in the Bill — “authorised officer”; “Minister”; “overpayment”; “person” and “undertaking”.

Section 2 is a core provision of the Bill. *Section 2(1)* requires a business to make a disclosure, within 60 working days, of the fact that it has received an overpayment, and also obliges the business to ask the payer for instructions as to how the overpayment is to be handled. *Section 2(2)* requires the business which holds the overpayment to provide, at the request of the payer, any additional details concerning the overpayment. *Section 2(3)* requires the business to follow the payer's instructions regarding the handling of the overpayment. *Section 2(4)* outlines the means by which a business in receipt of an overpayment is to notify the payer of that fact.

Section 3 provides that a person may request the Minister to investigate an alleged contravention of the various requirements which are set out in section 2.

Section 4 empowers the Minister for Jobs, Enterprise and Innovation to appoint authorised officers for the purpose of investigating complaints. The powers of such authorised officers are also detailed in section 4.

Section 5(1) makes it an offence for a person to fail to comply with certain aspects of section 2. *Section 5(2)* makes it an offence for a

person to conceal an overpayment. Section 5(3) makes it an offence to issue accounts which omit details of an overpayment. Section 5(4) details the penalties which may be imposed in respect of those offences.

Section 6 is a standard provision which allows for the prosecution of undertakings as well as individuals within undertakings for offences under this Bill.

Section 7 provides for three defences which may be asserted by an undertaking which is charged with offences relating to the non-disclosure or non-payment of an overpayment.

Section 8 enables the Minister to make regulations under the Bill.

Section 9 sets out the short title of the Bill and provides for a delayed commencement of the Bill so as to afford all affected parties a sufficient period of time to prepare for the coming into force of the new requirements being introduced by the Bill.

*Senator Rónán Mullen,
June, 2012.*