



## **TITHE AN OIREACHTAIS**

**An Comhchoiste um Airgeadas, Caiteachas Poibli agus Athchóiriú, agus  
Taoiseach**

**Tuarascáil maidir le Grinnscrúdú ar an mBille um Chonarthaí Árachais i  
leith Tomhaltóirí 2017**

**Samhain 2018**

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## **HOUSES OF THE OIREACHTAS**

**Joint Committee on Finance, Public Expenditure and Reform, and  
Taoiseach**

**Report on Scrutiny of the Consumer Insurance Contracts Bill 2017**

**December 2018**

**32-FPERT-017**



# Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

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## 1. INTRODUCTION



The [Consumer Insurance Contracts Bill 2017](#) was introduced in Dáil Éireann by Deputy Pearse Doherty (Sinn Féin) on 19 January 2017 and was debated by Dáil Éireann at second stage on 9 February 2017 being granted a second reading on that date. The Bill was referred to the Select Committee by order of the Dáil of 9 February 2017 pursuant to Dáil Standing Orders 84A(3)(a) and 141.

The objective of the Bill is to reform and modernise the law of consumer insurance contracts by providing an appropriate balance between the bargaining powers of insurers and consumers. It aims to bring together in one piece of legislation, pre and post-claims obligations and claims handling obligations which are placed on insurers by different sources of primary and secondary legislation. The Bill is based on the Law Reform Commission's (LRC) 2015 report '[Consumer Insurance Contracts](#)'.

Private Members Bills referred to Select Committee are subject to the provisions of Standing Order 141(2) [Dáil] which provides that a Select Committee "*shall undertake detailed scrutiny of the provisions of such Bills... and shall report thereon to the Dáil prior to Committee Stage consideration...*", unless the Committee decides in relation to a particular Bill that detailed scrutiny is not necessary.

Paragraph (3) of Standing Order 141 permits scrutiny of the Bill in Joint Committee, viz. "*Nothing in this Standing Order shall preclude a Joint Committee from undertaking detailed scrutiny as set out in paragraph (2) and reporting thereon to both Houses prior to Committee Stage consideration of the Bill by the Select Committee.*"

The Joint Committee on Finance, Public Expenditure and Reform and Taoiseach undertook detailed scrutiny of the Bill by seeking written submissions from a number of stakeholders, including the Department of Finance. The Committee received written submissions from the following stakeholders:

- Central Bank of Ireland
- Department of Finance
- Insurance Ireland
- Financial Services and Pensions Ombudsman (FSPO)

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- Competition and Consumer Protection Commission (CCPC).

An examination of the key issues highlighted in the stakeholder submissions to the Committee is provided in Sections 5 of this Report.



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John McGuinness T.D.  
Chairman

13 December, 2018.

## 2. RATIONALE AND OBJECTIVE OF THE BILL

In introducing the Bill in Dáil Éireann on 19 January 2017, the proposer of the Bill, Deputy Pearse Doherty stated:

*"This Bill seeks to level the playing field so that the consumer is better equipped to stand up to the insurer and argue the toss. It represents a major modernisation of insurance contract law in Ireland and is based on a report by the Law Reform Commission from July 2015."*

The policy aims of the Bill are two-fold:

- To reform the law in relation to insurance contracts (described in Section 4.4 of this Report) and to address many issues which were identified by the Law Reform Commission Report (2015) as problematic with it.
- To consolidate and bring together the many different source of law – primary and secondary including codes of conduct – which govern the behaviour of insurers in their interactions with ‘consumers’ (outlined in Sections 4.2 and 4.3 of this Report).

The proposer of the Bill argues that the principles underpinning the law on consumer insurance contracts were designed for a time when most insurance companies were small, often with less knowledge about risk than the consumer seeking insurance.<sup>1</sup> In its detailed report on insurance contract law, the Law Reform Commission (LRC) argues that, unlike in the past, now most insurance contracts are concluded between large (often multinational) corporate bodies or conglomerates with large financial, technical, actuarial and human resources and consumers with very limited financial, technical and other resources.<sup>2</sup> In his second stage speech, the proposer of the Bill noted that currently the disparity of power between the insured and the insurance company is addressed by voluntary ‘codes of conduct’ but that the limitations of these are clear from the repudiation of the code of conduct in court by one large insurance company.<sup>3</sup>

The Bill proposes to reform core principles underlying insurance contract law, and give them a clear statutory basis, in order to address this imbalance of

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<sup>1</sup> Dáil Debate on *Consumer Insurance Contract Bill 2017*, 9 February 2017.

<sup>2</sup> Law Reform Commission (2015) *Consumer Contract Law*, p.2.

<sup>3</sup> Dáil Debate on *Consumer Insurance Contract Bill 2017*, 9 February 2017.

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power. This is with a view to setting out clear and unambiguous rights and protections against possible exploitation for consumers<sup>4</sup> who are party to an insurance contract.<sup>5</sup> Key proposals include, to:<sup>6</sup>

- Reform the consumer's duty of disclosure;
- Replace the concept of 'insurable interest' while retaining the indemnity principle;
- Introduce proportionate remedies for certain types of non-disclosure;
- Replace warranties with statutory provisions which precisely identify risk;
- Amend third party rights and grant damages for late payment of claims;
- Reform the right of insurance undertakings to subrogation in specific cases;
- Set out requirements where a contract includes unfair or onerous terms.

The Bill also sets out to consolidate the poorly-linked statutory provisions, set out in primary and secondary legislation, which place pre and post-contractual, and claims handling, obligations on insurers. As such, while sections of the Bill appear to duplicate (and in a few cases contradict) parts of the Consumer Protection Code and other regulatory instruments and which are raised by a number of stakeholders in particular regarding sections 8-11 and 13-14 – many of the fundamental reforms proposed by the Bill relate to principles of consumer contract law which are outside the scope of these regulations.

The main provisions of the Bill are set out in Section 3 of this Report.

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<sup>4</sup> For discussion of the scope of the term consumer, see section 5.1.

<sup>5</sup> LRC (2015) p.12

<sup>6</sup> As summarised by Daly et al, pp. 206-7

### 3. MAIN PROVISIONS OF THE BILL

The Bill is largely based on the draft Bill which formed part of the Law Reform Commission (LRC) 2015 Report on Consumer Insurance Contracts. The rationale for the Bill is to update outdated insurance contract law principles and rules to reflect the needs of a modern society.

The key provisions of the Bill are set out below in Table 1. Section 5 of this Report presents the policy rationale behind, and the key issues raised in submissions, for each reform in Table 1. Hyperlinks to the discussion of each are given in the Table.

**Table 1: Summary of key provisions of the Bill**

Section	Purpose of the Sections
<a href="#">Sections 1 – 4</a>	Definitions, Scope of the Bill and Governance arrangements
<a href="#">Section 5</a>	Substantive change to concept of 'insurable interest'
<a href="#">Sections 6 and 12</a>	Substantive change to pre-contractual duty of disclosure by proposer <sup>7</sup> . It replaces the 'duty to disclose' imposed on consumers, with a statutory duty on the consumer to answer carefully and honestly specific questions posed by the insurance company. Section 12 applies this also at renewal of a policy.
<a href="#">Section 7</a>	Substantive change providing for a proportionate remedy by the insurer to non-disclosure (to distinguish between fraudulent and innocent or negligent non-disclosure)
<a href="#">Sections 8, 9, 10, 11.</a>	Pre-contractual duties of insurers (information provision in particular) and consumers at different stages: prior to the signing of the contract (s8), at the cooling off period (s9), prior to renewal of a contract (s10), at the cancellation of a contract (s11). Note that s12 is covered in 'pre-contractual duties of disclosure' above (with

<sup>7</sup> The proposer is the consumer proposing to take out an insurance contract.

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	Section 6).
<a href="#">Sections 13, 14 and 15</a>	Post-contractual duties and claims handling
<a href="#">Section 16</a>	Substantive change – To replace the concept of insurance warranties with statutory provisions allowing insurers to include provisions that precisely identify or define the risk insured
<a href="#">Section 17</a>	Substantive change - that an insurer who seeks to rely on an unfair or otherwise onerous term must, in order to incorporate the term into the contract, take reasonable steps to bring such a term to the attention of the consumer.
<a href="#">Section 18</a>	Right of third parties who are intended to benefit under an insurance policy to enforce the terms of the policy
<a href="#">Sections 19 -21</a>	Reform to the right of subrogation in specific cases
Sections 22 and 23	Effect of failure to comply with the Act Short title and commencement (18 months from enactment).

## 4. LEGISLATIVE CONTEXT FOR THE BILL

### 4.1 Overview

This Bill concerns life assurance and non-life assurance contracts. Insurance contracts are divided into two core types - life assurance and non-life assurance. Within life-assurance there are a number of sub-categories - life policies related to a mortgage, related to pension schemes, where a specified benefit is paid on death and life policies which provide for a specific death benefit but may also include benefits that can be drawn on during a person's life (e.g. life-save investment bonds). Within non-life assurance there are 18 classes of insurance (as defined in Annex 1 EC Non-Life Insurance Framework Regulations 1994). Classes include accident, sickness, damage or loss to land vehicles (including motor cars), damage or loss of aircraft, damage or loss to property from fire and natural forces, damage or loss to goods in transit, (liability arising out of the use of motor vehicles, aircraft, shops etc).<sup>8</sup>

Comprehensive provisions are in place to regulate insurance undertakings in relation to licensing, prudential and solvency matters. Yet there is limited statutory regulation of insurance contracts.<sup>9</sup> There is, however, an extensive 'patch-work of regulations'<sup>10</sup> on the pre and post-contractual information obligations on insurance undertakings.

### 4.2 Regulation of licencing, prudential and solvency matters and role of the Central Bank of Ireland

The Central Bank of Ireland (CBI) regulates the authorisation and supervision of insurance undertakings and intermediaries (as it does all financial services companies).<sup>11</sup> Its regulatory focus is primarily on prudential and solvency

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<sup>8</sup> LRC Report (2015) p.283-4.

<sup>9</sup> LRC Report (2015) p.288

<sup>10</sup> (Law Reform Commission, 2015

<sup>11</sup> The Central Bank performs this role in its capacity as the national supervisor in the European Single Supervisory Mechanism for the banks, and the European System of Financial Supervision for the regulation of financial services, including insurance undertakings.<sup>11</sup> Both were established by EU Member States in the wake of the financial crisis. Historically statutory supervision of insurance companies dates from an 1870 Act which was repealed by the Assurance Companies Act 1909 which extended the regulatory structure from life assurance to other types of insurance. The Insurance Act 1936 introduced licencing and deposit-making requirements.

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regulation. It reviews corporate governance, risk management and internal control systems of regulated entities (insurance undertakings) which must submit regular returns in respect of solvency margins and technical provisions. It is empowered to conduct themed inspections across the industry and to publish guidance notes for the sector. Daly et al<sup>12</sup> describe the ongoing regulatory requirements of an authorised insurance undertaking to the Central Bank as:

- Ensuring it retains authorisation (a licence) from the Central Bank;
- Maintaining technical reserves and required solvency margins (must meet capital and solvency requirements set out under Solvency II and the Irish regulations;
- Annual and quarterly returns in respect of minimum capital requirements;
- Complying with relevant corporate government codes published by the Central Bank;
- Ensuring compliance by all directors, executives and staff with the fitness and probity regime.

The Central Bank's role in regulating the insurance sector extends beyond prudential and solvency matters to consumer protection, in part because one of the three constituent bodies of the European System of Financial Supervision has a consumer protection mandate (European Insurance and Occupational Pensions Authority).<sup>13</sup> As Ireland's national supervisor in this system, and under its power to publish guidance notes for the financial services sector, the Central Bank issues and monitors compliance with the *Consumer Protection Code 2012* (see *Appendix 1*) which all insurance undertakings must abide by (or be subject to Central Bank regulatory consequences).

### **4.3 Regulations on the behaviour of insurance undertakings (pre and post-contractual and claims handling)**

Daly et al note that while insurers in general have significant freedom of contract under existing law (see paragraph 4.4 below)<sup>14</sup>, their behaviour over the course of the negotiation and conclusion and renewal of a contract is regulated by

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<sup>12</sup> Daly et al (2017) *The Insurance and reinsurance Law Review*, Fifth Edition, London, Law Business Research Ltd. 'Ireland' p.203

<sup>13</sup> Law Reform Commission Report (2015) Appendix 3

<sup>14</sup> Daly et al (2017) *The Insurance and reinsurance Law Review*, Fifth Edition, London, Law Business Research Ltd. 'Ireland' p.206.

several pieces of primary and secondary legislation. The key legislation regulating the form of contract and pre and post information requirements is described in the Law Reform Commission's Report as '*a series of poorly-linked statutory provisions comprising a combination of primary and secondary legislation.*'<sup>15</sup> It is summarised in **Appendix 1**.

#### **4.4 Insurance contract law**

Beyond the requirements of the legislation set out above and the principle of contract law and of 'good faith', there are no specific rules for the formation of an insurance contract.<sup>16</sup>

Statutory regulation of insurance contracts is limited and much of the legislation underpinning the principles which this Bill seeks to reform is old (pre-dates the foundation of the State) and is based on common law. The Law Reform Commission Report notes that Ireland inherited the common law rules on insurance contract law which had commenced with the *Life Assurance Act 1774* and were also set out in the *Marine Insurance Act 1906 (which was based on the 1774 Act)*. It states that the Irish Courts in general agree that the provisions in the 1906 Act comprise a codification of the common law rules on insurance and apply across the board. Many of the principles which the Bill seeks to reform originate in this codification of insurance contract law i.e. the 1906 Act; which remains in law, '*has become the default influence on how consumer insurance transactions are to be tested.*'<sup>17</sup>

The common law definition of an insurance contract (set out in *International Commercial Bank plc vs Insurance Corporation of Ireland PLX (1991)*) is that:

- Generally the insured must have an 'insurable interest' in the subject matter of the policy;
- A premium is paid;
- Insurer undertakes to pay the insured party in the event of the happening of the insured risk;
  - Risk must be clearly specified;

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<sup>15</sup> LRC Report (2015) p.207

<sup>16</sup> Daly et al p.20

<sup>17</sup> Law Reform Commission Report (2015), Appendix C

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- Insurer will 'indemnify' the insured against any actual loss;
- Principle of subrogation is applied where appropriate (generally not to life assurance or personal injury policies);<sup>18</sup>
- The rules around disclosure and the consequences of non-disclosure by the policy-holder also primarily come from case law.

The regulations set out in *Appendix 1* do not concern these core principles of insurance contract law which the Bill seeks to address.

Insurance contract law has relied on voluntary codes. While section 61 of the *1989 Insurance Act* did empower the Minister to prescribe codes of conduct to be observed by the insurance industry in respect *inter alia* of the duty of disclosure and other principles, codes were not issued. Instead, the Insurance Federation of Ireland (now Insurance Ireland) introduced voluntary codes of conduct and statements of insurance practice. The Law Reform Commission's Report notes that these codes in general recommend that insurers take an approach to disclosure and other matters which this Bill proposes to make statutory.<sup>19</sup> However, it also notes that some insurers continue to rely in litigation on the existing law even where it is contrary to the approach recommended in the codes and that the Courts have then ruled in favour of the repudiation of a claim by the insurer i.e. non-compliance with the voluntary code was not deemed to be evidence in court.

This point was made by the proposer of the Bill during the second-stage debate on the Bill who argued that '*the very need for reform is confirmed by the very existence of the code and by the recent repudiation of it in open court by a major insurer.*'<sup>20</sup> It was also raised in the Department of Finance submission to the Committee which expressed support for the general principle behind the Bill's efforts to reform insurance contract law. The LRC concludes that '*codes are no substitute for legislative reform*' and also that some provisions of the codes

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<sup>18</sup> Daly et al, p.207

<sup>19</sup> Law Reform Commission Report (2015) p.290. For example, the Codes state that the insurer should not rely on the strict rules concerning non-disclosure if a policy holder has answered the specific questions posed honestly; that an insurer should ask specific questions in insurance proposal forms; and that even if the policyholder is in breach of the warranty the insurer should in general honour the policy unless the claim is fraudulent.

<sup>20</sup> Dáil Debate on *Consumer Insurance Contract Bill 2017* 9 February 2017.

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have been superseded by mandatory requirements (EU law) and the Consumer Protection Code 2012.

The Bill proposes to address these issues by reforming legislative provisions related to insurance contracts law and the obligations on insurers in their interactions with consumers.

## 5. DETAILED SCRUTINY UNDER STANDING ORDER 141 - KEY ISSUES IDENTIFIED

The Joint Committee on Finance, Public Expenditure and Reform and Taoiseach agreed to undertake scrutiny of the Bill and sought written submissions from a number of relevant stakeholders. The Committee received submissions from the stakeholders listed below:

- Central Bank of Ireland
- Department of Finance
- Insurance Ireland
- Financial Services and Pensions Ombudsman (FSPO)
- Competition and Consumer Protection Commission (CCPC).

The Committee identifies a number of key issues in the context of its scrutiny of the Bill which are examined in this section of the Report. The core reforms proposed in the Bill are examined by reference to the existing legal situation, the proposed changes and the key observations raised in the submissions received by the Committee. In considering the key issues, the Joint Committee is cognisant that the Bill passed second stage reading and thus the general principle of the Bill has been agreed by Dáil Éireann. Notwithstanding, these matters are highlighted for consideration in the context of the progression of the Bill through the legislative process.

### **5.1 Definition of Consumer, Insurer and Scope of the Bill (Sections 1-2)**

The definitions of 'consumer' and of 'insurer' in the Bill are fundamentally important to its overall impact (if enacted) and both were raised in the submissions to the Committee.

#### **Definition of 'consumer' (i.e. jurisdiction of the Bill) (S.1)**

The proposals in the Bill apply to consumers, defined in section 1 as (a) individuals acting for purposes *wholly or mainly* outside his or her trade, business, craft or profession, and (b) a company with an annual turnover not exceeding €3 million (which is not a member of a group of persons with a turnover exceeding this). Its terms apply to any such consumer who is proposing

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to enter into a contract of insurance or who is party to such a contract and, where relevant, the concept of “average consumer” applies.

Two issues were raised in the submissions regarding the application of the Bill to consumers, namely, the

1. definition of ‘personal consumer’ (section 1(a) of the Bill), raised by the Central Bank, FSPO, CCPC and Insurance Ireland, *and*
2. the Bill’s application to Small and Medium Enterprises (SMEs) - an issue raised by Insurance Ireland.

*Definition of ‘personal consumer’ (section 1(a) and (b))* - Insurance Ireland notes that by including the words ‘*or mainly*’ (s1(a)) before ‘*outside his or her trade,*’ the Bill applies a wider definition of ‘personal consumer’ than that used in the Consumer Protection Code 2012. The Code defines a personal consumer as a natural person acting *outside* his or her business, trade or profession. The definition in the Bill is wider than that used in the Consumer Protection Act 2007 (s1) which applies to a natural person (whether in the State or not) who is acting for purposes *unrelated* to the person’s trade, business or profession. It is also wider than the definition of personal consumer in the Financial and Pensions Ombudsman Act 2017 which applies to a natural person (whether in the State or not) who is ‘acting for purposes *unrelated* to the person’s trade, business or profession.’

All stakeholders suggest amending the definition of s1(a). Insurance Ireland recommends deleting ‘*or mainly*’ from s1(a). The Central Bank and FSPO recommend aligning the definition of consumer exactly with the definition of consumer set out in the FSPO 2017.<sup>21</sup> This way if the remit of the FSPO vis-à-vis insurance undertakings is amended, the jurisdiction of the Bill (if enacted) would be automatically amended. The FSPO suggests that using the same definition will help to clarify which Codes are to be admissible as evidence in court (as proposed in s4 of the Bill). This would achieve Insurance Ireland’s recommendation. The Competition and Consumer Protection Commission (CCPC) calls for reference to the term ‘personal consumer’ in the definition of consumer to reflect the distinction between personal consumers and companies and as

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<sup>21</sup> The definitions set out in the Consumer Protection Code and in the FSPO Act are slightly different. (Central Bank, Appendix 1, 3).

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guidance for the drafting of regulations or a code under the Bill (if enacted). An issue for further consideration in the context of the legislative process is whether further refinement is necessary to the definition of 'consumer' contained in the Bill.

### *Scope of the definition of consumer – applying to SMEs*

Insurance Ireland raises a second question about the definition of consumer. It proposes that the reforms in the Bill should apply only to personal consumers i.e. the legislation be confined to '*individuals that purchase insurance which is unrelated<sup>22</sup> to their trade, business or profession.*' It points to the *UK Consumer Insurance (Disclosure and Representations) Act 2012* and the *UK Insurance Act 2015*, the former which brought in reforms similar to those proposed in this Bill and which applies only to personal consumers. There the law differentiates between personal and commercial and places SMEs in the latter category.

A UK Insurance law expert explains that while the *UK 2012 Act* introduces new disclosure requirements for individual consumers (along the lines proposed in s6 of this Bill – see below) the *Insurance Act 2015*, which applies to anyone seeking insurance for their business, requires the proposer to make a 'fair presentation of the risk.'<sup>23</sup> The *2015 Act* sets out in 'clear and unambiguous language' what is expected of the parties in terms of knowledge at the time of proposing and the proposing party is to give 'sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal those material circumstances.'

In its analysis of the scope of the legislation, the Law Reform Commission considered three options, including the approach taken in the UK. It concluded that 'the bargaining powers of many small businesses are no greater than those of private individuals.'<sup>24</sup> Acknowledging that the UK approach does give insurers the freedom to contract on an equal negotiating footing with large, well-

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<sup>22</sup> 'Unrelated' reflecting its earlier criticism of 'mainly outside' of.

<sup>23</sup> DWF Insurance (March 2017) Nina Gatson, Solicitor 'Big changes proposed to Irish insurance contracts' [. See here](#). DWF Insurance publishes a blog which analyses how legislative and other changes may impact on the insurance industry.

<sup>24</sup> LRC Report (2015) p.12

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resourced businesses, the authors argued that by restricting the application of the Bill to SMEs (as defined in the Bill) larger companies will continue to be subject to current disclosure requirements. The LRC therefore recommended that the scope of the proposed Act should apply to SMEs (as defined in the Financial Services Ombudsman Commission). As well as helping to address the imbalance in bargaining power between small business and large insurance undertakings, it argues that this approach has the advantage of being in line with the scope of the Financial Services Ombudsman and the Central Bank's Consumer Protection Code (which applies to insurance contracts as they are financial services) as both apply to SMEs (with a turnover not exceeding 3 million). The approach taken in the Bill, that is, to reform the principles of contract law for personal consumers and SMEs (as defined under the FSPO Act 2017) rather than confining the reforms to insurance contracts for personal consumers is highlighted for further consideration.

The FSPO question whether the Bill applies to intermediaries under other sections of the Bill and this is highlighted for further consideration and clarification.

Regarding the definition of insurer (s.1), Insurance Ireland seeks clarity on whether the Bill applies to:

- (a) motor insurance given that s2(2)c provides that the 'Act' does not apply to 'transport insurance';
- (b) investment and savings life assurance policies<sup>25</sup> and suggests that only life-  
assurance contracts that give rise to payments on certain insured events  
(death, disability, serious illness) appear to be covered by the Bill.

It calls for an amendment to the definition of insurer to bring this clarity. Other submissions call for additional definitions to be added to the Bill such as life insurance and non-life insurance, and insurance intermediary.

## **Other Definitions**

In the submissions received by the Committee, other technical amendments are proposed by stakeholders to clarify terms or definitions in the Bill. Insurance Ireland, the Central Bank and the FSPO suggest replacing the term 'in writing'

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<sup>25</sup> Section 2 of this Briefing paper for overview of life assurance products

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with the term 'durable medium' as this term (enshrined in the Code and in financial services legislation deriving from EU law) is technology-neutral, i.e. provide documents to customers in a 'durable medium.' The Committee notes that in section 1 the definition of 'writing' *'includes on paper or other suitable durable medium'*.

FSPO recommends deletion of the definition of 'turnover' in s1 of the Bill on the basis that efforts to include one in the FSPO Act were ultimately considered unworkable.<sup>26</sup> Insurance Ireland suggests that the definition used by FSPO (by regulation – SI 164/201400) be used for 'turnover'.

FSPO is of the opinion that the Bill should define code of practice (Consumer Protection Act 2007).

Insurance Ireland seeks clarity on the definition of 'average consumers,' suggesting an amendment to exclude subjective terms like 'vulnerable' and guidance on terms like 'social, cultural and linguistic' factors.

### **5.2 Governance (s3-4) and application of the Bill (s22)**

The Central Bank proposes that for the provisions in the Bill which impose regulatory requirements (i.e. sections 8, 9, 10, 11 and 14) the Central Bank should be explicitly designated as the regulatory body as it is in line with its current regulatory duties. This would require s3 to amend the Central Bank Act 1942 to add the proposed Act, this Bill, if enacted, as a 'designated enactment.'<sup>27</sup>

Under the Bill, the remaining sections (5-7, 12-13, 15-21), which are related solely to contract law, are enforceable through the Courts. The Central Bank and the Office of the Financial Services and Pensions Ombudsman suggest that the Bill should specifically give the FSPO a role in providing an alternative to the Courts for resolving disputes over insurance contracts. An amendment to the Bill as currently drafted would be required to bring these matters under the remit of the Financial Services and Pensions Ombudsman.

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<sup>26</sup> FSPO submission to the Joint Committee p.3.

<sup>27</sup> CB, Appendix 1.

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The FSPO is formally empowered to investigate complaints against financial service providers (which includes insurance companies entering into contracts) and takes a mediation approach to dispute resolution (FSPO Act 2017).<sup>28</sup> It argues that the Bill should preserve the parallel jurisdiction of the courts and the FSPO and not, inadvertently, reserve any new rights granted to consumers to the sole jurisdiction of the courts.<sup>29</sup> The jurisdiction of the FSPO could be set out in an amendment to s22 - effect of failure to comply with the Act.<sup>30</sup>

Section 3 assigns power to the Minister to make regulations, and to the Central Bank of Ireland to issue a Code of Practice concerning the form of, or requirements related to, insurance contracts as set out in the Bill. The Central Bank proposes, that provided the Bill is amended to specifically assign it the regulator (as per the above), that section 3(2) be deleted as it gives the Central Bank a power which it already has (code and regulation making powers).

The CCPC states that any Code issued under s3 should complement the Consumer Protection Code (issued by the Central Bank – see above) and that the Bill should clarify the relationship between the two Codes, including whether one would supersede the other in respect of disputes relating to consumer insurance contracts.<sup>31</sup>

## **5.3 Substantive reform of pre-contractual duties of disclosure (Sections 6 & 12)**

### **Existing legislative context and proposed change**

At present there is a duty on both parties to an insurance contract to disclose material facts likely to influence a prudent insurer in deciding whether to accept a risk or fix a premium. According to the LRC Report, this duty to disclose extends to information that a consumer ought to know might influence a

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<sup>28</sup> Central Bank (September 2018) Submission to Joint Committee on the Consumer Insurance Contract Bill 2018 [PMB] FSPO (September 2018) Submission to the Joint Committee on the Consumer Insurance Contract Bill [PMB] 2017 p.2.

<sup>29</sup> FSPO Submission p.2. As of 2015, over half of all complaints received by the (then) FSO related to insurance contracts.:

<sup>30</sup> FSPO submission to the Joint Committee p.9

<sup>31</sup> Competition and Consumer Protection Commission (September 2018) Submission to Joint Committee on the Consumer Insurance Contract Bill 2018 [PMB]

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hypothetical prudent insurer. It argues that this duty may then be used by insurance companies to avoid paying a claim i.e. on the basis that a particular material fact was not disclosed. The aim of the Bill is to place an onus on insurers to identify the factors that affect the risk by obliging consumers to give answers to specific questions. This is based on the assumption that insurers are far better resourced and equipped than consumers are to identify facts that will be material to insurers in deciding to accept risks or fix premiums.

Section 6 replaces this pre-contractual duty of disclosure imposed on consumers with a statutory duty on the consumer to answer carefully and honestly 'specific questions' posed by the insurance company. The objective of this reform is to move the bulk of the risk assessment work from the consumer to the insurance company. Section 12 provides that this also applies at renewal (no additional disclosure is required unless specifically asked by the insurance company).

### **Issues raised in stakeholders submissions**

The Central Bank, FSPO and CCPC in general welcome the substantive reforms in Sections 6 and 12 of the Bill while raising a number of issues on how to improve these and/or to avoid duplication with existing legislation. However, Insurance Ireland is critical of the complete removal of onus from the proposer to the insurer. These are explored below.

The CCPC welcomes the intention of this reform to address '*the inequality of information and resources that an insurer will ordinarily possess as against a consumer.*' It highlights its concern about 'information asymmetries' in the used motor vehicle industry whereby most insurers have access to a vehicle's prior usage and history via *InsuranceLink*<sup>32</sup> and proposes an additional provision to s6 to oblige insurers to provide the consumer with the information available to it regarding a vehicle's history prior to completion of a motor insurance contract. It also suggests disallowing the practice whereby an insurer, subsequent to the completion of a contract, draws on information which was available to it at the time of the contract to harm the consumer's interest (e.g. by reducing a claim settlement).

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<sup>32</sup> CCPC, Submission to the Joint Committee p.2

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## *Lists of matters to determine whether a consumer has complied with disclosure duties s6(7)*

The FSPO argues that s6 does not protect the consumer in instances where the agent, rather than the insurer, is responsible for misleading a consumer who subsequently does not disclose the right information and has a claim refused on that basis. It proposes an amendment to subsection 6(7)(b)(iv) to provide 'whether the consumer is represented by an agent *and the circumstances of that representation*' to address this. The Central Bank argues that the provisions of the Bill should apply to agents (by amending s2 of the Bill – scope of the Bill) which would also address this issue.

Section 6(7)(b) sets out criteria for consideration in determining if a consumer has complied with disclosure duties. Section 6(7)(b)(v) specifically states that '*some consumers can be expected to be in possession of more information than others.*' Insurance Ireland argues that this clause contradicts the principle 'average consumer' principle which is also in the Bill (s1).

FSPO suggests that in order to allow for case-specific issues, the list of matters to determine whether a consumer has complied with the disclosure duties should not be exhaustive (s 6(7)(b)).

## *Define 'specific and not general questions' (s6 (3))*

The Central Bank and FSPO call for a clearer definition of 'specific questions' and 'general questions' in s6(3) to avoid any risk of misinterpretation. Insurance Ireland argues that requiring that specific questions be asked 'in writing' is at odds with how many consumers now do business, for example via phone - which must be recorded as required under the Consumer Protection Code. It is possible that the proposal of the FSPO and Central Bank to replace 'in writing' with 'durable medium' may address this issue. <sup>33</sup>

*Operation of s6(6)* - FSPO suggests that the operation of s6(6) could require insurance companies to provide evidence of matters that potentially pertain to commercial discretion in order to repudiate liability.

## *S12(6) – Disclosure requirements on renewal*

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<sup>33</sup> Insurance Ireland, submission to the Joint Committee, Appendix

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The Central Bank is of the opinion that section 12(6) duplicates s10(1) and therefore should be deleted. Section 10(1) requires an insurer to issue a notification to a consumer (inviting renewal or notifying that it does not wish to invite a renewal)<sup>34</sup> *not less than 15 working days* prior to the date of expiry. Section 12(6) which deals with disclosure requirements at renewal, obliges an insurer to notify a consumer of any alteration to the terms and conditions of the policy, *'no later than 15 days'* before renewal. The issue of different deadlines contained in the Bill is highlighted here. Section 12(6) states *not less than 15 days*, and s10(1) states *not less than 15 working days*. This is a potential anomaly in the Bill.

The intention behind s12(6) requires clarification before a decision is made to delete it. Under section 12(3), if an insurer requires additional information from a consumer prior to renewal, it must apply the new disclosure rules (i.e. issue it with a set of 'specific and not general questions' in writing for answer in order to assess risk). Section 12(6) requires the insurer to notify the consumer in writing of 'any alteration to the terms and conditions of the policy' no later than 15 days before renewal. If the intention of s12(6) is that the 'specific questions' be sent to the consumer no later than 15 days before renewal, this should be explicitly provided for. If the intention is that these questions must have been issued earlier, so that an insurer is in the position to inform the consumer no less than 15 days prior to renewal of any alteration to the terms and conditions of the policy,' it may be advisable to make this explicit in s12(6).

The FSPO suggests that the period in both be increased to 20 working days. The Central Bank states that the periods should be reconciled and that the period set out in s10(1) be used, that is, 15 working days.

### *Technical issues*

The Central Bank suggests that to avoid the possibility that section 6(1) be construed as also replacing the insurer's duty of disclosure, the 'duty of disclosure' should read the 'duty of disclosure of the consumer.'

The Central Bank also highlights the need to update the references to data protection in Section 6(8).

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<sup>34</sup> FSPO (2018) Submission to the Joint Committee p.5

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## *Critical of the extent of the reform to pre-contractual disclosure*

Insurance Ireland, while recognising the need for clear and concise questions (under s6(2)), suggests that in many cases in relation to SME business insurance it is 'extremely difficult, if not impossible' to ask every pertinent question without a comprehensive and fair reflection of the risk being presented by the proposer. <sup>35</sup> It suggests that the Bill should retain an onus on the proposer to present the risk to the insurer in an honest and fair fashion and to disclose information which they know or ought to know.

Insurance Ireland notes that in relation to s.6(3) requiring the insurer to use specific, rather than general questions, may increase the set of questions which consumers have to answer and increase documentation length and average handling times. Insurance Ireland states that there will be significant costs to insurers in implementing the Bill and that these will ultimately be borne by consumers: insurers will have to review and amend application forms, policy literature, terms and conditions, IT systems and train staff.<sup>36</sup>

Issues of cost were also raised by the Department of Finance. While welcoming the principle behind Sections 6 and 12, it recommended a full consultation with the industry to avoid the risk that that the implementation of the Bill would add a cost burden to insurance providers which would result in a rise in premiums.<sup>37</sup> Both the Department and the Central Bank<sup>38</sup> recommend that a full cost-benefit analysis of the proposals and their possible impact on the Financial Services and Pensions Ombudsman and the Personal Injuries Assessment Board is necessary.

## **5.4 Warranties (Section 16)**

### **Existing legislative context and proposed change**

The purpose of a warranty is to identify or define the risk being undertaken. Warranties are special terms or conditions, frequently referred to as a 'basis of contract', which permit a party to an insurance contract to repudiate it, and

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<sup>35</sup> Insurance Ireland, submission to the Joint Committee, Appendix 6

<sup>36</sup> Insurance Ireland (2018) submission to the Joint Committee p.5, Appendix 6

<sup>37</sup> Department of Finance and Public Expenditure (July 2018) General Assessment the Bill, submission to the Joint Committee. P.4. Appendix 6

<sup>38</sup> Central Bank of Ireland Submission to the Joint Committee p. 2. Appendix 6

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refuse to meet the claim, if a provision (the warranty) is breached by the consumer.<sup>39</sup> However, at present an insurer can legally repudiate a claim on the basis of a 'breach of warranty' even where there is no connection between the breach of warranty and the event giving rise to the claim i.e. 'the content of the warranty is not material to the risk, or the breach is not material to the loss.'<sup>40</sup> An example given by the proposer of the Bill is where a functioning burglar alarm is listed as a 'basis of contract'. In this example, if the house burns down after the burglar alarm had malfunctioned for a period of time before subsequently being fixed, an insurance company can refuse to pay out, even though the burglar alarm had nothing to do with the fire at the property.

Insurance Ireland's voluntary codes of practice urge insurance undertakings not to repudiate claims if a breach of warranty was immaterial to the loss.<sup>41</sup> However, the LRC Report notes that there are several cases highlighted by the courts where reliance by insurers on breaches of warranties has appeared to be unfair and unjust. Daly et al state that the 'basis of contract' clauses are considered draconian by the Irish courts and there is a reluctance to enforce them.<sup>42</sup>

Section 16 of the Bill proposes to replace the concept of insurance warranties with statutory provisions which allow insurers to include terms that precisely identify or define the risk insured, while protecting consumers from the unfair and unjust effects of the current law.<sup>43</sup>

### **Issues raised in stakeholder submissions**

FSPO supports the general principles behind the changes proposed in s16<sup>44</sup> and other stakeholders include no substantive comments on it bar broadly welcoming it as positive for consumers. However, Insurance Ireland expresses some concern at the abolition of warranties including that it could lead to a dilution of the policy holder's duty of care (16(2)), increase moral hazard (s16(3)) and that it may impact on the provision of commercial products (i.e. affect cost). It does

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<sup>39</sup> Daly et al (2017) p.209.

<sup>40</sup> Law Reform Commission Report (2015) p.79.

<sup>41</sup> Law Reform Commission report (2015) p.84

<sup>42</sup> Daly et al (2017) p209.

<sup>43</sup> Law Reform Commission Report (2015) p.4

<sup>44</sup> FSPO Submission to the Joint Committee p.8

not explain this latter point in any detail.<sup>45</sup> The Department and the Central Bank call for a cost-benefit analysis which would involve a full consultation with the industry on the effect of this and the other proposals in the Bill.

*Amend s16(5) to protect insurer*

Under s16(5), where a breach of contract has been remedied prior to any loss (and claim) the insurer is obliged to pay any claim made under the contract (provided that it does not have a separate defense to the claim). Insurance Ireland proposes that this provision be amended by adding "*provided the breach did not give rise to the subsequent claim*" at the end.<sup>46</sup> This proposal appears to be in line with the intentions of the Bill.

## **5.5 Non-disclosure and proportionate response (Section 7)**

### **Existing legislative context and proposed change**

Under current legislation, insurers may repudiate liability on the basis of misrepresentation regardless of the type of non-disclosure. Section 7 provides for the consequences of three types of non disclosure/ misrepresentation by a consumer:

- Innocent (s7(2)),
- Negligent (s7(3) and (4)); and
- Fraudulent (s7(5)).

Under section 7, insurers may no longer repudiate all liability where an innocent or negligent non-disclosure by a consumer occurs.

Where misrepresentation is 'innocent' an insurer must pay a claim s7(2).

Where a consumer's misrepresentation is 'negligent,' the remedy to the insurer must be proportionate to the loss the insurer incurs as a result of the misrepresentation, that is, it should reflect what the insurer would have done had it been aware of the full facts, (s7(3)) and be based on a compensatory and proportionate test which is provided for further in s7(4). Negligent misrepresentation is defined as 'not a deliberate or reckless misrepresentation' in s7(3)).

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<sup>45</sup> Insurance Ireland, Submission to the Joint Committee, Appendix

<sup>46</sup> Insurance Ireland, Submission to the Joint Committee, Appendix

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Where misrepresentation or other breaches of contract are fraudulent the insurer's right to completely repudiate liability remains.

### *Clarity on different categories of 'misrepresentation'*

The Central Bank and Insurance Ireland call for clearer definitions of each type of misrepresentation. Insurance Ireland suggests a code or guidance notes for that purpose.

Five different types of misrepresentation are referred to in Section 7 but only fraudulent is fully defined. In particular, Insurance Ireland is concerned that the concept of 'deliberate or reckless misrepresentation' is not accurately defined in the Bill. It is clear that it is outside the scope of 'negligent' misrepresentation but it is not clear that it is within the scope of fraudulent misrepresentation. It expresses concern that under s7 as currently drafted, an insurance company will only be able to repudiate a claim if the misrepresentation is established by the courts to have been 'fraudulent.' It suggests instead that s7(5) refer to 'deliberate or reckless' misrepresentation rather than 'fraudulent' misrepresentation and that the insurer's right to repudiate the claim in this case be retained.<sup>47</sup>

In its report, the LRC notes that the definition of fraud in the Bill is intended to 'allow the courts to ensure that exaggeration that falls short of fraud can be correctly categorised as, at worst, negligence, thus giving rise to a proportionate remedy.'<sup>48</sup>

### *Practical difficulty with applying s7(3) and (4)*

CCPC calls for guidance on calculating how the insurer reduces 'proportionately' the amount to be paid on a claim in the event of negligent misrepresentation under s7(4)(c). FSPO perceives some practical difficulties in critically assessing evidence presented by an insurer under s7(3) and (4). It states that it would be difficult to see how a statement, even an objectively unreasonable one, from an insurer stating that the premium would have been higher, or the terms of the contract different, if the negligent misrepresentation had not occurred, could be

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<sup>47</sup> Insurance Ireland, Submission to the Joint Committee page 4

<sup>48</sup> Law Reform Commission Report (2015) p.174.

challenged by the consumer or the FSPO without impinging on the commercial discretion of the insurer.<sup>49</sup>

*Right to cancel contract in event of negligent misrepresentation should include partial refund*

Section 7(4)(d) allows insurers to terminate non-life insurance contracts in cases where there has been 'negligent misrepresentation,' provided that reasonable notice has been given to the consumer. CCPC suggests that this provision should also oblige an insurance company to refund the remainder of the premium. This would be in line with s11(1) of the Bill which obliges an insurer to refund the remainder of a premium on 'termination' of contract.

## **5.6 Insurable Interest and indemnity (Section 5)**

### **Existing legislation and proposed reform**

'Insurable interest' is a requirement that a consumer may recover a benefit from an insurance contract *only* if he/she has some identifiable interest or expectation in the risk insured. For non-life insurance contracts, 'insurable interest' is required at the outset of a contract and in the event of a claim. For life assurance contract, insurable interest is satisfied when the contract is entered into.<sup>50</sup>

While not initially a requirement under common law, insurable interest was made a requirement for contracts in the 18<sup>th</sup> century when it was suggested that some marine insurance contracts were being concluded by persons who had more interest in making claims for the failure of ships to arrive in port than in trading their cargo.<sup>51</sup> The LRC Report finds 'no compelling reason to retain the historical concept of 'insurable interest' in consumer insurance contracts,' arguing that modern insurance companies have the technical and other resources to distinguish between genuine insurance consumers and speculators or gamblers. Insurers can therefore make informed decisions about a consumer's insurable interest *before* entering into insurance contracts.

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<sup>49</sup> FSPO, Submission to the Joint Committee p.5

<sup>50</sup> Insurance Ireland, Submission to the Joint Committee page 3.

<sup>51</sup> LRC Report (2015) .101. It was made a requirement in the 1906 *Marine Insurance Act* which has been interpreted as the codification of the general law of insurance. It was imported into life assurance by the *life Assurance (Ireland) Act 1866*.

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The Bill proposes to abolish the principle of 'insurable interest' in consumer insurance contracts and to replace it with legislative provisions that apply the principle of indemnity and protect the interests of the parties to the contract. If passed, an insurer would no longer be able to reject a claim on the grounds that the consumer does not have 'insurable interest.'<sup>52</sup> The Bill does not prevent an insurance company from seeking to establish insurable interest at the outset i.e. before underwriting an insurance policy. The Law Reform Commission Report suggest that insurance companies must decide before underwriting on whether the proposer has sufficient interest in taking out a policy of insurance (page 121).

### **Issues raised in stakeholder submissions**

The LRC Report argues that the concepts of 'insurable interest' and 'indemnity' (which the Bill retains) overlap and are designed to serve a similar purpose: to limit the liability of insurers to the amount of the loss suffered. Insurance Ireland also suggests that the principle of indemnity and insurable interest are intrinsically linked. However, the LRC Report and the proposer of the Bill see this linkage as a reason to abolish the concept of insurable interest, while Insurance Ireland views it as a reason to retain it.<sup>53</sup>

The LRC Report argues that as the principle of indemnity already guarantees that a policy holder cannot recover more than they have lost, a policyholder must prove that he or she suffered loss to successfully claim under the policy, that is, to prove one has suffered loss, one must have an interest in the insured matter. Insurance Ireland, however, favours retaining both principles which it perceives to be intrinsically linked. It expresses concern that the wording in s5 is so wide that a person with no interest in a non-life insurance policy could make a claim. The LRC would argue that this claim would be unsuccessful because the principle of indemnity is retained (a policyholder cannot recover more than they have lost as a result of a claim). FSPO welcomes s5(1) noting that it has encountered cases where the operation of the existing law in this respect appears to be unfair.

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<sup>52</sup> Under the 1906 Act a 'contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby by agreed, against marine losses, that is to say, the losses incident to marine adventure.'

<sup>53</sup> Law Reform Commission Report (2015) p.121

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Insurance Ireland states that for life assurance contracts, insurable interest must be satisfied at the time the contract is entered into. It stresses that s5(1) of the Bill must not restrict in any way the right of an insurer to assess insurable interest at the outset and to decide whether it is prepared to accept the risk and enter the contract. Omitting this requirement, it argues, could lead to an insurer being liable for multiple payouts on a claim that could together exceed actual loss. Insurance Ireland highlights as intrinsic to non-life insurance contracts the capacity of the insured to influence the 'safe-keeping' of the property and argues that this is linked to the 'insurable interest' principle.

The LRC argues that other provisions of the law such as indemnity and fraudulent claims, serve to address the moral hazard which insurable interest is perceived to address (moral hazard meaning the temptation of the insured to deliberately destruct the property insured or to deliberately end the life of the insured so as to make a claim on the policy). In respect of non-life insurance, under the law a policyholder cannot recover the cost of a property in respect of a loss caused by his or her own criminal or tortious act.<sup>54</sup> In respect of life assurance, if someone is prompted to murder to recover a life assurance policy, they are unlikely to be deterred by 'insurable interest.'

### **5.7 Third Parties and Privity Rule (Section 18)**

#### **Existing legislation and proposed change**

Under the current legislation, where an insurance contract is between the proposer and an insurance company, and is intended to also benefit or protect third parties (a person who is not party to the contract), the third party has no right to bring a claim to the insurer to recover compensation to which they are entitled. The LRC Report notes that under this rule – the privity rule - third parties cannot discover (a) the terms of the insurance contract, (b) if the terms of the contract have been complied with by the parties, (c) if the insurer has agreed or refused to indemnify or (d) the reasons for any refusal or departure from the terms of the contract.<sup>55</sup> This is the case even, for example:

- where employers take out an insurance contract which is for all employees;

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<sup>54</sup> LRC Report (2015) p.118

<sup>55</sup> Law Reform Commission Report (2015) pp.5-6.

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- where the policy holder is in liquidation, receivership or examinership and the third party is a creditor;
- where the policy holder has died, is missing or his/her decision-making capacity is questionable and a third party is affected by this.

The Bill (s18) provides that third parties affected in this way, where the policy holder has died, cannot be found, is insolvent or 'for any other just and equitable reasons as decided by a court', may obtain relevant documentary and other information directly from insurers and to bring claims directly against insurers i.e. gives a third party under these circumstances the right to enforce the terms of the contract.

### **Issues raised in stakeholder submissions**

*Meaning of insolvency* - The FSPO suggests that the definition of insolvent include where a corporate body is insolvent but has not yet been formally wound-up.

*Define where a person 'cannot be found'* - Insurance Ireland argues that this needs to be defined so there is certainty about its meaning.

*Rule out re-activating a cancelled policy* - Insurance Ireland suggests that s18(1) should not enable a third party to re-activate a policy which has been 'correctly' cancelled. It does not define 'correctly' but is likely to mean 'lawfully cancelled.'

*Section 18(3)(c) and data protection requirements* - Insurance Ireland question whether s18(3)(c), which entitles certain third parties to seek and obtain information on the terms of the insurance contract, is compatible with the Data Protection Act 2018.

*Amend section 18(1)(b) to reflect FSPO's jurisdiction to deal with complaints* - The policy of allowing affected third parties to enforce the contract is welcomed by the FSPO. It recommends that in order to preserve or properly reflect the scope of the FSPO's jurisdiction in dealing with complaints s18(1)(b) should require a ruling from a court or a finding of the FSPO. It argues that this would

be consistent with its powers under the 2018 Act (s60).<sup>56</sup> The Central Bank also suggests that the FSPO's jurisdiction be explicitly stated in the Bill.

## **5.8 Subrogation (Sections 19-21)**

### **Existing legislative context and proposed change**

Subrogation is a legal right afforded to the insurer to 'step into the shoes' of the insured in order to recover its costs (arising from the payment of a claim) from third parties who caused the damage. It applies to non-life assurance only and was intended to prevent policy-holders from 'double recovery'. In motor insurance, it allows the insurance company to defend or settle claims made against their policyholders, and then to initiate claims in the names of those policyholders in order to recover some or all of the compensation.<sup>57</sup>

The LRC Report highlights a number of unintended consequences of subrogation. For example, it can lead to claims by insurance companies against the employees of its policyholders. It can also bring unfair pressure on the insured person not to make a valid claim, for example, if a homeowner makes an insurance claim for damage caused by the carelessness of a visiting relative, subrogation entitles the insurer to bring a claim against the offending relative if the policy holder makes a claim.

Sections 19-21 proposes to modify this right to subrogation in respect of some family, personal and employer-employee relationships to avoid these unintended consequences. Section 19(1)(a) sets out the modification of the right of insurers to subrogate in respect of family or other 'personal relationships' or where the 'other person' was given express or implied consent to the use of a motor vehicle that is the subject matter of the contract. Section 19(2) modifies the right of subrogation in respect of employer-employee relationships. In neither case does this modification apply where the conduct that gave rise to the loss was 'serious or wilful misconduct' (s19(1)(b)).

Section 20 provides for the distribution of recovered funds in cases where an insurer has the right to subrogate. It provides that where the amount recovered in respect of the loss is greater than the sum paid out to the consumer plus administrative and legal costs incurred in connection with the recovery, the consumer is entitled to the excess (provided it does not exceed his or her overall loss). Where this is the case, the insurer is entitled to the excess.

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<sup>56</sup> It notes that under s52(1)(f) of the FSPO Act 2018 the FSPO may delinque to investigate compliants where the subject matter is of such a adegree of complexisty that the courts are a more appropriate forum.

<sup>57</sup> Law Reform Commission (2015) p.141

## **Issues raised in stakeholder submissions**

### *Disagreement with the fundamental direction of the reform*

Insurance Ireland expresses concerns regarding these sections of the Bill and the potential watering down of the insurer's right to subrogation and seeks clarity on the need for such reforms.

*It states, that the "section on Road Traffic Accident claims, section 19(1)(a)(ii) appears to fall out of scope of the subrogation reforms outlined in the Law Reform Commission's Consultation Paper in 2011. Clarity is sought as to why such claims were included in the Law Reform Commission's Report in 2015 and this Bill."*

The Law Reform Commission's Report evaluates the need for the reforms (Chapter 7). It notes that the report of the Principles of European Insurance Contract Law (PEICL) found that the majority of national laws prevent insurers from exercising subrogation against third parties in close relationships with the policy holder.<sup>58</sup> With regards to employer-employee relationships it argues that the Irish courts have in general favoured an approach to subrogation based on 'equitable principles' which the Bill proposes to put on a statutory basis.<sup>59</sup> This approach reflects an Agreement of the Association of British Insurer's Gentleman's in 1959<sup>60</sup> which stated that unless the weight of evidence clearly indicated collusion or willful misconduct on the part of an employee against whom a claim is made, subrogation should not be enforced.<sup>61</sup> However, the LRC argues that a 'gentleman's agreement' relies on the good faith of insurers and is not a sufficient substitute for legislative reform.<sup>62</sup>

Insurance Ireland argues that modifying the right to subrogation could impinge on an insurer's right to enforce the full terms and conditions of the policy against a third party (e.g. where a family member has deliberately set fire to the family home and has means which an insurer may recover). It should be noted that under s19(1)(b) of the Bill the insurer's right to subrogation is retained where the conduct giving rise to the loss is 'serious or willful misconduct'

*Definition of 'personal relationship' in S19(1) - Insurance Ireland queries the meaning of 'personal relationship' suggesting that it is very broad.*

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<sup>58</sup> Basedow et al (eds) *Principles of European Insurance Contract Law* Sellir, 2009 p.259 para. N8.

<sup>59</sup> Law Reform Commission Report (2015) p.145.

<sup>60</sup> Which followed on from a court ruling which interpreted an insurer's right to subrogation very broadly.

<sup>61</sup> See LRC Report p.143.

<sup>62</sup> Law Reform Commission Report (2015) p.148

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*Clarity on s21* - Insurance Ireland requests more clarity in respect of this section. Under s21 an insurer must clearly communicate to a consumer in writing, before a contract is signed, if any clause in the contract limits or excludes the consumer, including third party's, right to recover damages from a person other than the insurer. Without this communication, the insurer may not rely on this clause to limit or exclude its liability in respect of a loss.

## **5.9 Unfair and onerous terms (Section 17)**

### **Existing legislative context and proposed change**

The Bill aims to ensure that the general statutory provisions on unfair or onerous terms in contracts are adapted to apply specifically to insurance contracts.<sup>63</sup> Section 17 places an onus on the insurer to bring to the attention of consumer any terms that might be considered unfair or onerous so these terms are not hidden or buried.

### **Issues raised in stakeholder submissions**

*Should unfair terms be permitted in insurance contracts?*

FSPO questions whether 'unfair terms' should be acceptable in consumer contracts and, in fact, the Central Bank highlights inconsistencies with EU regulations which rule out 'unfair' terms (Appendix 2). It notes that s17 overlaps with, and is inconsistent with, the EU Unfair Terms and Conditions Regulations (UTCCRs) which are derived from the UTCCR Directive (a minimum harmonisation Directive). It notes that the Bill offers less protection to consumers than those required under the UTCCR Directive. It advocates deleting section 17 or replacing it with a statement that the UTCCRs apply to contracts of insurance with consumers as defined in the Bill, as the UTCCR is a minimum harmonisation directive.

*If permitted an unfair term must be unbinding if it is not highlighted as set out in legislation*

In the event that there is a case for allowing 'unfair' terms in consumer contract, the FSPO suggests that express provision be made for the unbinding nature of unfair or onerous terms where reasonable steps have not been taken to bring them to the attention of the consumer.<sup>64</sup>

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<sup>63</sup> LRC Report (2015) Chapter 9.

<sup>64</sup> FSPO Submission to the Joint Committee p.8

## **5.10 Pre and post-contractual and claims handling duties (Sections 8, 9, 10, 11 and 13 to 15)**

### **Existing legislative context and proposed changes**

A number of legislative provisions place pre and post-contractual information obligations and claims handling obligations on insurance undertakings, and these are scattered throughout different pieces of primary and secondary legislation. The Bill proposes to address this by consolidating legislative provisions, in particular regarding pre-contractual information requirements but also regarding some post-contractual and claims handling requirements, into one Act. It also proposes to add some additional requirements.

On pre-contractual obligations, **Section 8** aims to consolidate all legislation on the form of contract of insurance and information to be provided by the insurer, while **Section 9** sets out the right to withdraw from a contract by notice - 'cooling off period.' **Sections 10 and 11** set out contractual duties at renewal and cancellation respectively.

On post-contractual duties, **Section 13** replaces the post-contractual duty of utmost good faith (applied under common law) with a number of specific statutory obligations including that consumers pay premiums on time and that insurers handle claims promptly and fairly. **Section 14 and 15** set out the duties of consumers and insurers for claims handling.

Many of the submissions highlighted duplication and inconsistencies between the proposed provisions and existing regulations. These are listed in the Appendix 2. Issues are highlighted below which relate to the substantive content of sections 8-11 and 13-15.

### **Substantive issues raised by stakeholders on pre-contract requirements and on cancellation (sections 8, 9, 10 and 11)**

**Section 8** places pre-contractual information requirements on insurance undertakings.

*Clarify to which insurance undertakings s8(2) applies* - Insurance Ireland argues that s8(2) – requiring the insurer to provide the consumer with the completed application or proposal form in writing after a contract is completed – should not apply to non-risk life assurance business (pensions/investment). In fact, Insurance Ireland calls for the scope of the Bill to be amended to exclude this type of life assurance (to exclude life assurance investment policies – see paragraph 5.1 above).

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*Remove reference to 'by oral testimony' s8(4)* - The Central Bank and Insurance Ireland express concern at the inclusion of 'oral testimony' as a term in an insurance contract (s8(4)). The Central Bank argues that this creates a risk of evidential issues and a high degree of uncertainty with insurers facing claims and consumers being pressed for payments under alleged oral contracts. This could lead to increased litigation and costs. Insurance Ireland and the Central Bank note that it would place firms in breach of their record-keeping obligations under EU legislation (see Appendix 2).

**Section 9** sets out the right to and requirements for a cooling off period.

*Welcome extension of right to a cooling off period to consumers who agree contracts face-to-face*

While Section 9 duplicates (and in some instances contradicts) other regulations (see Appendix 2), the regulations it duplicates do not apply to all 'consumers' as defined in the Bill. The section has the effect of extending these cooling off rights to a new category of consumer not covered by the regulations – face-to-face non-life contracts. This is welcomed by the Central Bank.

*S9(1) start date of the cooling off period* - Insurance Ireland argues that the start date for the cooling off period must be the date of issue (and not 'after receipt of acceptance or delivery') to avoid a case where a consumer has an indefinite 'cooling off' period.<sup>65</sup>

*Return of disc and motor certificate in the case of motor insurance s9(3)* - Insurance Ireland suggests a provision requiring a consumer to return the disc and motor certificate in the case where he/she avoids a contract of insurance after the cooling off period.

*S9(3) not to apply to investment life assurance policies* - Insurance Ireland argues that s9(3) of the Bill is contrary to the requirements placed on insurers of life assurance investment policies by the Distance Marketing Regulations. These regulations allow insurers (in the case of investment policies) to refund the *actual value* at the time the cancellation is requested – rather than the initial sum - to avoid the scenario where a consumer cancels a policy merely because markets fall. Insurance Ireland suggests that the same approach be applied where a consumer avoids the contract after a cooling off period and the Bill be amended to require that the value, and not the original cost of the policy must be refunded in the case of investment policies.

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<sup>65</sup> Insurance Ireland, submission to the Joint Committee, Appendix

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**Section 10** sets out requirements at renewal applying to non life insurance policies (s10(1-2)) and annual requirements for life assurance policies (s10(3)).

The Central Bank highlights duplication with existing regulations (see Appendix 2), but it also stresses a general point that existing regulations do not always apply to exactly the same person (i.e. sometimes just to non-life insurance policy holders, sometimes to all).

### *Additional requirement in s10 regarding intermediaries*

The Central Bank suggests that in order to cover the many cases whereby consumers agree contracts through intermediaries, s10 requires a provision stating that the insurer has complied with its obligations where the renewal documents have been provided to an insurance intermediary with whom the insurer has an arrangement. Note that if the objective is that a consumer receives these documents 'not less than 15 working days' prior to the date of expiry' it may be necessary to require an insurer to send the documentation to the intermediary (where relevant) earlier so that the intermediary meets this deadline. The Central Bank calls for the scope of the Bill to be widened to include intermediaries.

FSPO states that the period in s10(1), on renewal, be increased to 20 working days.

*Industrial assurance policies (surrender or maturity value)* - Insurance Ireland queries whether this type of business is being underwritten.

**Section 11** sets out obligations on the insurer on the cancellation of a contract. The submissions do not identify duplication or inconsistencies with existing regulations for s11.

*Clear statement on the right to cancel an insurance contract* – The FSPO suggests that s11 should clearly state that its provisions are subject to there being a right to cancel the terms of the contract. The conditions under which there is a right to cancellation are set out in other sections of the Bill.

*Welcome the explicit provision requiring refund of unexpired part of the premium s11(1)* - The FSPO and the Central Bank welcome the provision explicitly requiring the refund of an unexpired part of the premium where an insurance contract is cancelled. The FSPO calls for this principle to be reiterated in other sections of the Bill. Insurance Ireland queries whether this refund should be absolute e.g. should it apply where a policy has incurred a claim in excess of the unearned portion of the premium.

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*S11(2) notification of cancellation* - Insurance Ireland queries the requirement that notification of cancellation must be recorded by delivery, stating that it is sufficient to send it to last known email or mobile number.

*Right of insurer where consumer chooses to cancel a contract 11(3)* - Insurance Ireland states that where a consumer cancels a contract outside of the cooling-off period, the insurer should retain the right to impose a cancellation fee. It is important to note that the right of a consumer or an insurer to cancel a contract is already prescribed by legislation and is the subject of other provisions in the Bill.

## **Substantive issues raised by stakeholders on post contractual duties and claim handling (s13-15)**

**Section 13** relates to claims handling and replaces the post-contractual duty of 'utmost good faith' (applied under common law) with a number of specific statutory obligations including that consumers pay premiums on time and that insurers handle claims promptly and fairly.

In particular, it sets out that an insurance company may refuse a claim made by a consumer if there is a change in the subject matter of the contract described in an 'alterations of risk clause' (sets out the circumstances under which conditions have so changed that it can be said that the new risk is something which the company did not agree to cover). It distinguishes between 'alteration' and 'modification of risk' due to changed circumstances and provides that only the first is the basis for refusing to pay a claim. According to the proposer of the Bill, s13 removes much of the criteria which insurers can use to avoid paying out.<sup>66</sup>

**Sections 14 and 15** set out duties of consumer and insurers for claims handling, s15 setting out proportionate remedies for unfair claims handling.

Duplications and inconsistencies with existing regulations were identified in s13 and s14 (Appendix 2). Other substantive points are highlighted below.

### *Welcome the placement of common law principles on a statutory footing*

FSPO notes that common law principles on post-contractual duties have in general afforded important protection to consumers and welcomes sections 13-15 for putting post-contractual duties on a statutory basis. It stresses the need

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<sup>66</sup> Dail Debate *Consumer Insurance Contracts Bill 2017* Second stage debate 9 February 2017.

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to avoid any curtailment of consumer rights which have been interpreted by the courts as a result of their being placed on a statutory footing.

*Define 'alteration of risk' and 'material change' s13(4)* - FSPO suggests that 'alteration of risk' and material change require definitions so that consumers are clear about their obligations and the circumstances in which they may lose cover.

*Amend definition in s14(5)(b)* - FSPO suggests that the clause 'persistent failure to respond to a consumer in order to dissuade the consumer from exercising contractual rights in respect of that claim' is too narrow and should be replaced with 'failure to meaningfully engage' with the consumers.

*Insurer withholds payment (s15(1))* - Insurance Ireland states that insurers need to be afforded proper time to investigate and evaluate a claim without being deemed 'unreasonable.' It suggests that the wording in the Bill reflect this *and* that s15(1) oblige consumers to use dispute-resolution-mechanisms contained in the policy.

*S15(1) FSPO's alternative jurisdiction* - FSPO's alternative jurisdiction to deal with all aspects of complaints related to insurance contracts should be clearly stated. FSPO considers this particularly important in the context of the introduction of a new statutory category of damages (suggested in s15(1) - 'non-pecuniary loss and damage including stress.')

S15 (2-5) concerns the requirements on termination of policy (for reasons related to claims handling).

*15(4) insurer's rights on receipt of a fraudulent claim to refuse all liability under the contract* - Insurance Ireland highlights inconsistencies with the Road Traffic Act which provides for 10 days notice of cancellation in these instances to protect innocent third parties.

*15(4)(b) right to recover monies* - Insurance Ireland suggests that in addition to the premium, insurers may under certain circumstances, be entitled to recover monies paid out under the claim. However, s15(3) states that 'valid' claims made previously under the policy (under which there is subsequently a fraudulent claim) is not affected.

*15(5) Third party and cancellation of contract*

S15(5) aims to protect third parties in cases where an insurance contract is validly cancelled following a fraudulent claim. It states that the exclusion of

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coverage (i.e. cancellation of the contract) only applies to a person whose act or omission caused the loss of damage, who colluded with this initial person, or who consented to the act or omission and knew, or ought to have known, that the act or omission would cause the loss or damage. S15(5)(c) requires that a person – who under s15(5)(a) is not excluded from coverage - must cooperate by submitting a statutory declaration and specific documents. Insurance Ireland argues that the person seeking protection under 15(5)(a) should retain the burden of proof to demonstrate innocence. It also argues that the person seeking such protection should be obliged to report any criminal activity to an Garda Síochana and assist with inquiries.

### *15(6) substantive policy issue highlighted by Insurance Ireland*

Insurance Ireland is critical of the policy behind this provision which, it argues, removes a deterrent to fraudulent claims (by preventing insurers from claiming the cost of investigating a fraudulent claim from the consumer). It notes that this runs contrary to Government policy to deter fraudulent claims via the Garda Insurance Fraud Investigation Group and to the recommendations in the Motor Insurance Working Group. The LRC Report considered this issue and found that, while there is an argument that an insurer be entitled to 'damages' for the cost of investigating fraudulent claims, such a requirement could encourage insurers to outsource investigations so they can demonstrate cost with the result being rising costs. Instead, it argued that investigative costs are inherent to an insurer's business. It also noted that there had been no major demand for this and no attempts by insurers to add a clause to contracts to the effect that investigations for a fraudulent claim are recoverable from the policy-holder, an option which it states has been open to them.<sup>67</sup>

### **5.11 Reform or Consolidation Bill?**

All stakeholders, in particular the Central Bank, Insurance Ireland and the Department, note the significant overlap between certain sections of the Bill and existing regulatory requirements in European and Irish law. It is argued that the overlap would create duplication and, in the case of some provisions, would place contradictory requirements on insurance undertakings. Insurance Ireland argues that 'providing for the same issue in two different enactments will result in additional legal complexity and compliance costs with no material improvement in the position of the consumer.'

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<sup>67</sup> Law Reform Commission Report (2015) p.178.

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However, the rationale for these provisions, in particular for example section 8 of the Bill, is to consolidate existing legislation to ensure that policy holders receive clearly-written information on the terms of the insurance contract including policy documents. The LRC argues that the requirements are 'scattered in a disparate collection of primary and secondary legislation, some of which apply only when insurance contracts are entered into at a distance including online, while others apply to both online and traditional forms of insurance provision'. The LRC Report, and the proposer of the Bill, recommends that they should be consolidated into a single piece of legislation.<sup>68</sup>

*Appendix 2* highlights duplications and inconsistencies brought to the attention of the Committee in the submissions received by it. The Committee is of the opinion that where there is clear duplication and inconsistencies in the Bill with existing legislation, these must be remedied. Consideration should be given regarding the requirement to consolidate relevant law in the context of enactment of the Bill.

### **5.12 Application of the Bill and timing**

Insurance Ireland questions whether the Bill intends to affect contracts in force or to be applicable from a future date to be specified in the legislation.

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<sup>68</sup> LRC Report (2015) p.207

## 6. GOVERNMENT RESPONSE TO THE BILL

On 9 February 2017, during [Second Stage debate](#) on the Bill, the Minister for State at the Department of Finance, Eoghan Murphy T.D., expressed support in principle for the objectives of the Bill and stated the Government's willingness to engage constructively and also cited the need for in-depth analysis of the complex legal and other issues arising. The Committee requested a General Assessment of the Bill from the Department of Finance to inform its scrutiny of the Bill. The salient points are highlighted below (the conclusion is provided first).

### 6.1 Conclusion

The Department is of the opinion that there is a need to analyse the provisions of the Bill for unintended consequences and the effect it will have on the insurance industry. Also that, due to the complex legal nature of the Bill, its wide-ranging nature and the breadth of its impact, the necessary in-depth review of the Bill will take a substantial amount of time and involve a number of relevant stakeholders.

### 6.2 Policy Implications

The Department supports the objectives and its aim of providing an appropriate balance between the bargaining powers of insurers and consumers. The Department is of the opinion,

*“that some of the proposed measures constitute fundamental change and that the Bill is legally complex and cuts across a number of fundamental and well-established legal principles”.*

The Department is of the view that it will be necessary to develop a better understanding of the Bill's potential impact on consumers and insurers, in particular:-

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- The proposal to replace the current pre-contractual duty of disclosure imposed on consumers with a statutory duty to answer carefully and honestly specific questions posed by an insurer that identify the material risks and the relevant information actually relied on by the insurer;
- The provision which proposes to provide for proportionate remedies for innocent or negligent mistakes by a consumer, but continues to allow insurers to be able to repudiate liability completely in cases of fraud;
- Its application to insurance contracts between insurance companies and individual consumers or SMEs with a turnover of less than €3million;
- The replacement of the concept of insurance warranties with statutory provisions allowing insurers to include provisions that precisely identify or define the risk insured but which also protect consumers from unfair and unjust outcomes. The Law Reform Commission gives an example of a consumer wrongly “warranting” that a particular type of burglar alarm has been installed (or states will be the “basis of the contract”) and the premises subsequently burns down as a result of faulty electrical wiring. In such a case the insurer will likely be able to repudiate liability under the policy, even though there is no connection with the breach;
- The abolition of the requirement that a consumer must have an “insurable interest” in the risk insured to be replaced with legislation that (a) requires a consumer, when making a claim, to prove actual loss, and (b) applies the principle of indemnity (that is, that a policyholder cannot make a profit on any claim);
- Permitting third parties intended to benefit under an insurance contract to make a direct claim against the insurer;
- Reforming and modifying the current laws governing subrogation in order to avoid unintended consequences for family and employer-employee relationships (subrogation is the means by which an insurer can “step into the shoes” of its policyholder after it has paid out a claim in order to take action to recover the compensation from the person responsible for the claim being paid out in the first place);
- The replacement of the post-contractual duty of good faith with specific statutory duties, including a duty on consumers to pay premiums within a

reasonable period and a duty on insurers to handle claims and complaints promptly and fairly;

- Adapting the existing legislation on unfair terms for insurance contracts;
- The consolidation and reform of existing legislation to ensure that policyholders receive clearly written information on the essential terms of the insurance contract, including policy documents.

### 6.3 Technical, legal and drafting aspects

The Department outlined the following technical, legal and drafting issue arising from the Bill which will require an in-depth review by all relevant stakeholders to understand the implications of the changes being proposed.

- **A review of the Central Bank's Consumer Protection Code** is required to determine what elements of the Bill are currently catered for in the Code. The Department states *"Without such a review, overlapping or contradictory provisions could be introduced which will muddy the waters as regards insurance requirements."*
- **A review of current Irish legislation:** An analysis of Acts and Statutory Instruments is required to determine the compatibility of the Bill with current law. The Department states, *"There are potentially overlapping or conflicting provisions in existence that may require to be repealed, or amended. This review is essential to prevent superfluous, possibly overlapping or contradictory provisions, on the statute book"*.
- **A review of EU legislative developments and Directives due to be transposed:** There are EU legislative developments, which whilst not specifically aimed at the regulation of insurance contracts, address some of the reforms being introduced by the Bill.
- **A comparison between the recommendations of the Report of the Cost of Motor Insurance and the Bill:** There is potential for the recommendations contained in the Report of the Cost of Motor Insurance to overlap with the provisions of the Bill.

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- **A review of the Bill as regards appropriate legal drafting.** In view of the length of the Bill and the complex legal principles it seeks to fundamentally change, time is required for an examination to ensure the text achieves its stated aims. The Department States that *“without appropriate Committee Stage amendments there would be a myriad of legislative overlapping provisions on the statute book which insurers would be required to follow, even if contradictory. Such a situation must be avoided.”*
- **Consultation with industry:** Proper consultation is required to be carried out with industry in order to fully understand their likely impact in particular, to establish how the Bill, if enacted, is likely to change the way insurers conduct their business, how it impacts their systems, the timescales for them to implement any new legislation, and most importantly whether it has any consequences for cost and availability of particular products in the future.
- **A cost-benefit analysis:** It is essential for the reforms which would be introduced by the Bill to be considered in terms of their cost and the benefit to be gained, including having regard to other jurisdictions where similar reforms have been made. It is also essential to consider the impact on the Personal Injuries Assessment Board and the Financial Services Ombudsman.

Links to written submissions at **Appendix 6.**

## 7. CONSULTATION WITH THE EUROPEAN CENTRAL BANK

Standing Order 149(3) of Dáil Éireann provides that Committee Stage consideration of any Bill which falls within Articles 127(4) and 282(5) of the Treaty of the Functioning of the European Union “...shall not be taken by Dáil Éireann, or any Committee thereof, unless and until the outcome of consultation with the European Central Bank...has been report to the Dáil”.

On 22 March 2017, the Ceann Comhairle informed the Committee that the Consumer Insurance Contracts Bill 2017 required consultation with the European Central Bank (ECB), under Standing Order 149(3) and, accordingly on 29 March 2017, an opinion of the ECB was requested by the Committee Chairman, Deputy John McGuinness.

In response, the ECB on 2 May 2017, confirmed its decision not to adopt an opinion on the Bill based on the understanding that the draft law does not substantially affect the advisory competencies of the ECB, as the draft law does not confer a genuinely new role in the field of insurance prudential supervision or customer protection on the Central Bank of Ireland (CBI).

See ECB correspondence at **Appendix 3**.

**8. FINANCIAL PROCEDURE FOR BILLS - MONEY MESSAGE**

Standing Order 179(2) of Dáil Éireann provides that Committee Stage of a Bill which involves the appropriation of revenue or other public moneys, including incidental expenses, cannot be taken unless a Money Message recommending the purpose of the appropriation has been received from the Government and printed on the Order Paper.

On 19 May 2017, the Ceann Comhairle confirmed in correspondence to the Committee that the provisions of Standing Order 179(2) apply to the [Consumer Insurance Contracts Bill 2017](#) and that a request to Government had been made in respect of this Bill.

The Minister for Finance, Public Expenditure and Reform informed the Committee that, on 10 July 2018, Cabinet had approved the issuing of a Money Message for the Bill. The Money Message must be printed on the Order Paper prior to Committee Stage consideration of the Bill.

**9. OBSERVATIONS AND CONCLUSIONS OF THE JOINT COMMITTEE**

The Committee agreed, that pursuant to Standing Orders, it would report to Dáil Éireann that it has undertaken and completed pre-Third Stage scrutiny of the Bill, with the following observations and conclusions:-

The Joint Committee:-

1. Commends the proposer of the Bill in drafting and bringing the Bill before the Committee for scrutiny;
2. Notes the broad support expressed for the general principle of the Bill by Dáil Éireann and that the Bill passed second stage reading unopposed by the Government;
3. Notes that a Money Message from the Government is required before the Bill can progress to Committee Stage consideration of the Bill pursuant to Standing Order 179(2) of Dáil Éireann;
4. Notes the European Central Bank has not adopted an opinion on the Bill on the basis that it does not substantially affect the advisory competencies of the ECB, as the Bill does not confer a genuinely new role in the field of insurance prudential supervision or customer protection on the Central Bank of Ireland (CBI);
5. Notes that the Government is supportive in principle of the objectives of the Bill and is willing to engage constructively on the Bill. In that regard, notes the written evidence of the Department of Finance in its assessment of the Bill, in particular that,

*“some of the proposed measures constitute fundamental change and that the Bill is legally complex and cuts across a number of fundamental and well-established legal principles” and “that without appropriate Committee Stage amendments there would be a myriad of legislative overlapping*

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*provisions on the statute book which insurers would be required to follow, even if contradictory. Such a situation must be avoided."*

6. Notes that, in addition, the Department states that there is a need to analyse the provisions of the Bill for unintended consequences and the effect it will have on the insurance industry. Also, that due to the complex legal nature of the Bill, its wide ranging nature and the breadth of its impact, the in-depth review of the Bill it considers necessary, will take a substantial amount of time and involve a number of relevant stakeholders.
7. Furthermore, notes the view of the Department regarding technical, legal and drafting aspects of the Bill and that significant work is required to understand the implications of the changes being proposed by the Bill. Section 6 of the Report refers (*Government Response*).
8. Notes that the Department of Finance and the Central Bank of Ireland recommend that a full cost-benefit analysis be conducted of the proposals contained in sections 6 and 12 of the Bill and their possible impact on the Financial Services and Pensions Ombudsman and the Personal Injuries Assessment Board and the cost of insurance in general.
9. Notes the views of stakeholders set out in submissions to the Committee highlighting aspects of the Bill which require detailed consideration and clarification, which are examined in detail in Section 5 of the Report (*Detailed Scrutiny*).
10. Notes that the Bill as drafted is ambitious in its objectives in aiming to both (a) implement the substantive reforms set out in Sections 5,6,7,12,16,17,18,19-21 of the Bill *and* (b) simultaneously to consolidate existing legislation.

The Committee recommends that in progressing the Bill, sections 6, 8, 9, 10, 13 14 and 17 in particular be reviewed in order to identify, and remedy all duplications and inconsistencies with existing regulations. The Committee has sought to highlight duplications and inconsistencies which were brought to its attention and these are set out in **Appendix 2** of the Report for reference.

## 10. RECOMMENDATIONS OF THE COMMITTEE

### **Recommendation 1:**

The Committee notes that the Bill was read a second time on 9 February 2017 and has been subject to detailed scrutiny by the Joint Committee as required by Standing Orders, including consultation with the Department of Finance, the Central Bank of Ireland and other stakeholders. The Committee is of the opinion that the interests of consumers lie in progressing the Bill without delay. The Committee is also of the opinion that there may be benefit in further consultation with stakeholders and a cost-benefit analysis of the Bill in order to inform the legislative process. However, such consultation and cost-benefit analysis should not cause further delay in progressing the Bill. The Committee, therefore, recommends that the Department of Finance proceed to undertake a consultation with stakeholders and a cost-benefit analysis of the Bill without delay, concurrent with the passage of the Bill through the legislative process in both Houses of the Oireachtas.

### **Recommendation 2:**

Requests that a Money Message be sent by the Government in respect of the Bill, see section 8 of this Report, '*Financial Procedure for Bills – Money Messages*'.

### **Recommendation 3:**

The Committee notes the views of the Department of Finance on the Bill and recommends that the Department review the provisions of the Bill as a matter of priority and that the Minister bring forward amendments at Committee Stage to remedy any technical, legal and drafting deficiencies identified in the Bill as a result, including duplications, inconsistencies highlighted and unintended consequences that may arise should the Bill be enacted.

### **Recommendation 4:**

The Committee recommends that the proposer of the Bill and the Minister for Finance work together to remedy the issues identified in the course of detailed scrutiny of the Bill.

The Joint Committee commends this Report to the House.

## Appendix 1

### Regulations affecting pre and post-contract information requirements (form of contract)

#### EU Level (life and non-life assurance)

At the EU level, the **Solvency II Directive** brings together in a single text 13 EU Insurance Directives including the **EC (Non-life Assurance) Framework Directive 1994** and the **EC Life-Assurance Framework Directive 1994** which have been implemented respectively by the EU Life Assurance Framework Regulations 1994 and the EU non-life insurance framework regulations 1994. These set out general good requirements on insurance undertakings notable rules concerning supply of services unfair terms, and unfair commercial practices.<sup>69</sup> The **EU Unfair Terms in Consumer Contract Regulations 1995** also imposes information requirements on insurance contracts even though they are not specifically for insurance contracts.

[\*Principles of European Insurance Contract law \(PEICL\)\*](#) – this is an optional instrument which re-states many of the requirements in earlier instruments in one comprehensive document.

**Insurance Distribution Directive 2016** (applies from 2016 and must be incorporated into national law by 1 October 2018). It has a number of aims one of which is to upgrade consumer protection in the insurance sector by creating common standards regarding transparency of costs, better information to inform customers on products. It includes mandatory pre and post contractual disclosure rules for insurance distributors.<sup>70</sup> It applies to providers and intermediaries. Insurance distribution is defined as 'to sell, propose to sell, advise on or carry out other work before concluding an insurance contract including dealing with claims after an insurance event.'<sup>71</sup>

#### Life policies specifically

**Insurance Act 1989 Third Schedule s43B** (mandatory pre-contractual and post-contractual information requirements which must be in writing). This Act implemented requirements of Article 31 of the EC Third life Assurance Framework Directive.

**Life Assurance (Provision of Information) Regulations 2001** supplemented the requirements of s43B of the 1989 Act by prescribing in detail the specific form of the pre-contractual information to be provided and elements of the life insurance policy post-contractual.<sup>72</sup>

#### Non-Life Policies specifically

**Article 27 EC Non-Life Assurance Framework Regulations 1994** prescribes a less extensive list of pre-contractual information to be provided to proposers in advance of concluding a non-life insurance policy. Unlike life insurance, no comparable pre-contractual or post-contractual requirement has been added by means of ministerial

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<sup>69</sup> The Law Reform Commission notes that Article 45(1) and (2) of the *European Communities Life Assurance Framework Regulations 1994*, and Annex III to that Framework, originally imposed the relevant requirements concerning pre-contractual and post-contractual documents in life insurance contracts.

<sup>70</sup> In its submission to the Joint Committee the **Department highlights this Directive the need to review all EU legislative developments and Directives for consistency.**

<sup>71</sup> See EU Lex Link to [Insurance Distribution Directive](#)

<sup>72</sup> The *Insurance Act 1989* (and *Insurance Act 2000*) was on foot of a 1976 Report of the Committee of Inquiry into the Insurance industry which called for *legislation that would require life-assurance undertakings to provide the proposer with a statement of his rights under the contract in a form approved by a supervisory authority. The regulation-making power in section 5 of the 1989 Act was not used until 2001; and Section 61, which provided for power to issue statutory codes of practice on duties of disclosure and insurance warranties, was not used until 2006.*

Regulations (akin to the 2001 regulations made under the Insurance Act 1989). Regulations were issued in 2007 also under the 1989 Act – **Non life Insurance (provision of Information (Renewal of policy insurance) regulations 2007).**

**Report on the cost of motor Insurance (recommendations only not legislation). There is overlap and possible contradiction.**

## **All policies**

### **Distance Marketing Regulations**

**EC Distance Marketing of Consumer Financial Services Regulations 2004** sets out pre contractual information requirements and that the terms of contract must be provided to consumers post-contract. Mandatory requirements are listed and LRC says this list is comparable to the list in schedule 43B of and Third Schedule to the Insurance Act 1989 that apply to life assurance policies though the 2004 Regulations apply to life and non-life (and other financial products).

### **Consumer Protection Code (published and implemented by the Central Bank) – see section 2 above**

Where the proposer is a consumer (under the Consumer Protection Code) insurance undertakings must abide by the Code. The Code (see above under Central Bank) refers to the detailed requirements in the 2001 and 2007 regulations (above). The Code places specific pre-contractual and post-contractual information, claims handling and complaints handling requirements on insurance undertakings and consumers in contractual relationships. It has more detailed requirements on the contents of contracts – information which must accompany an insurance quotation and information in respect of motor insurance policies, permanent health insurance policies, property insurance policies and serious illness policies. It requires insurers to explain to consumers the consequences for the consumer of failure to make full disclosure of relevant facts. Breaches of the Code are subject to the regulatory powers of the Central Bank but they do not constitute a basis on which the individual policy holder may claim a breach of insurance contract law.<sup>73</sup>

### **Other relevant legislation**

Where the insured 'deals as a consumer' the **Sale of Goods and Supply of Services Act 1980** also imposes information requirements on insurance contracts.

Where the proposer is a consumer (under the **Consumer Protection Act 2007**) insurance undertakings must abide by its provisions.

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<sup>73</sup> Law Reform Commission (2015) p.212.

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## Appendix 2

### Duplication or inconsistency with existing regulations highlighted in the submissions to the Committee

#### Section 6 – Reform to disclosure requirements

Section	Duplication/inconsistency with existing regulations
<b>S6(5) and 6(9)</b>	Section 6(5) requires that questions (to assess risk) must be drafted in plain and intelligible language and that the onus of proving that the questions are so lies with the insurer. Central Bank and Department note provision 4.1 of the Code* – ‘all information provided to a consumer must be accurate, up to date and written in plain English.’
<b>S6(9)</b>	s6(9) of the Bill requires an insurer to ‘inform the consumer’ of the general nature and effect of the pre-contractual duty of disclosure’ before entering into or renewing a contract. Under Provision 4.35 of the Code a regulated entity is obliged to explain to a consumer the consequences of his or her failure to make full disclosure of relevant facts. Section 6(9) is specifically referring to the new disclosure requirements proposed by the Bill (the consumer must disclose the information requested by the insurer).

\*‘The Code’ refers to the Consumer Protection Code 2012.

#### Section 8 – pre-contractual information

Section	Duplication/inconsistency with existing regulations
<b>s8(3)</b>	S8(3) requiring insurer to give the contractual terms and conditions on paper to the consumer at any time so requested duplicates Regulation 9(3) of the DMRs
<b>s8(5)</b>	Duplicates the UTCCRs* terms on plain and intelligible language and where there is doubt the interpretation most favourable to the consumer prevails and the Code (all information provided to a consumer must be clear, accurate, up to date, and in plain English DMRs (regulation 6(2) and 6(3) require information to be clear and comprehensive Life Assurance Regulations 2001 that information is in writing in a clear and accurate manner
<b>8(4)</b>	In accepting <b>oral testimony</b> this is <b>inconsistent</b> with DMRs (regulation 9) and the definition of a ‘policy’ in Solvency II Regulations
<b>8(6)</b>	Provided for in provision 4.1 and 6.13 of the Code Overlap and duplication of Insurance Distribution Directive and Renewal Regulation (2007) <sup>74</sup>

\*EU Unfair Terms and Conditions in Contracts Regulations 1995

#### Section 9 – ‘cooling off’ period

The right to a cooling off period should be consistent with existing financial services legislation. Alternatively, the Central Bank notes, that existing legislation should be repealed and the general cooling-off right should be consolidated into this Bill.<sup>75</sup>

<sup>74</sup> Insurance Ireland, Appendix

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Section	Duplication/inconsistency with existing regulations
S9 (1)	Inconsistency as DMRs* and Solvency II refer to 'days' whereas the Bill refers to 'working days' <sup>76</sup> Insurance Ireland is particularly critical of the Bill's provision for '30 working days' cooling off period for life assurance (as well as noting that it contradicts DMRs). Day on which cooling off period begins should be consistent with Solvency II
S9(2)	Exceptions to the right to withdraw should be consistent with DMRs (which also include a 'contract under which the service is supplied, was entered into at the consumer's request and has been fully performed by both parties before the consumer gave notice of cancellation') .
S9	Does not deal with whether any purported waiver of a right to cooling off is void (as under DMRs)
S9(2)	Excluding consumers whose existing contract is renewed on substantially the same terms from the right to withdraw and the cooling off period is inconsistent with the DMRs (under Regulation 11).
9(3)	Insurance Ireland highlights inconsistencies with the DMR (which permit the insurer to return the value of the investment at the time of cooling off rather than the amount originally invested in the case of investment life policies). <sup>77</sup>

\*EU Distance Marketing Regulations 2004

## Section 10 – duties on renewal

Insurance Ireland notes requirements under s10 appear to be covered under the Consumer Protection Code, the Renewal regulations and existing requirements for Life and non-Life . Also overlap with s5 of the health Insurance Amendment Act 2016 and Renewal of Health Insurance Contracts.

Section	Duplication/inconsistency with existing regulations
S10(2)	S10(2) requires an insurer of a non-life insurance contract to provide renewal documents not less than 15 working days prior to expiry. This is already provided for in the Non Life (Provision of Information (Renewal of policy of insurance Regulations) 2007. Central Bank is currently consulting on whether to extend this to 20 working days. The 2007 regulations apply to clients generally and the Bill to 'consumers' (but the regulations cover consumers as defined in the Bill). Similar also to Provision 6.13 of the Code (that policy documents in all insurance contracts be issued to the consumer within 5 working days).
10(3) and 10(4)	Similar (but less prescriptive) to Regulation 6 (life assurance policies) and regulation 9 (re industrial assurance policies) of the 2001 regulations. The remit of the Bill is <b>slightly broader</b> as it applies to consumers (as defined in the Bill) while the 2001 regulations <u>do not</u> apply to life assurance policies where none the clients is an individual.

<sup>75</sup> (Central Bank, Submission to the Joint Committee (Appendix).

<sup>76</sup> Highlighted by Central Bank and Insurance Ireland

<sup>77</sup> Insurance Ireland, submission to the joint Committee Appendix

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## Sections 13 – 14 - Post-contractual duties and claims handling

Section	Duplication/inconsistency with existing regulations
13(6)	Obliges insurer to explicitly state in writing, prior to start of the contract, if it is excluding certain matters from coverage. Overlap and duplication of requirements with Code, Insurance Distribution Directive and clarification required that the Distance Marketing Regulations 2004 apply.
S14 (in general)	Claim handling duties on insurers duplicate the Code (Chapter 7) and the Consumer Protection Act 2007. <sup>78</sup>
14(5)	In particular Insurance Ireland draws attention to 14(5) and says it is vague and gives no timelines on what is 'reasonable' and that claims handling is already dealt with by the Code and the 2007 Act.

## Sections 17 – Unfair and onerous terms

Section	Duplication/inconsistency with existing regulations
17(1)(a)	Contradicts UTCCR Regulation 6 which provides that a contract with an unfair term is not binding on a consumer. The Bill suggests that an unfair term may be in a contract provided reasonable steps are made to draw it to the attention of the consumer
17(1)(b)	Is provided for in regulations 3(2), 3(3) and 9 and Schedule 2 and 3 of the UTCCR
17(2)(a)	Inconsistent with regulation 4 of UTCCRs which do not permit a consumer to argue that the price of a contract is unfair
17(3)	Provided for in regulation 3(2) of the UTCCRs
17(4)	Provided for in Schedule 3(1)(b) of UTCCRs
17(4)(c)	Already provided for in Schedule 3(1)(q) of the UTCCRss and the Code includes claims processing obligations in chapter 7 re timing requirements. Any attempt to impose evidentiary obstacles or onerous rules on maintaining and proving a claim would breach the Code
17(4)(d)	Provided for in Schedule 3(1)(f and g) of the UTCCR
17(4)(e)	Provided for in Schedule 3(1)(j, k and p) of UTCCRs
17(4)(f)	Provided for in Schedule 3(1)(j) of UTCCRs

<sup>78</sup> Noted by Central Bank and Insurance Ireland.

# Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

## Appendix 3

### Correspondence from the European Central Bank

Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach  
Correspondence Item No: 2017/316



ECB-RESTRICTED

Yves Mersch  
*Member of the Executive Board*

Mr. John McGuinness, TD  
Chairman of the Oireachtas Joint Committee  
on Finance, Public Expenditure and Reform,  
and Taoiseach  
Leinster House  
Dublin 2  
Ireland

2 May 2017

Contact person: Sarah Palmer, ext. 6176

[Sarah.Palmer@ecb.int](mailto:Sarah.Palmer@ecb.int)

Your reference: I 2017/195

**Request of Oireachtas Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach for an ECB opinion regarding proposed legislation on consumer insurance contracts – non-issuance of ECB opinion**

Dear Mr. McGuinness,

I refer to your letter of 29 March 2017 requesting an ECB opinion on proposed legislation on consumer insurance contracts (the 'draft law').

After careful consideration of the draft law the ECB has decided not to adopt an opinion in the present case. This decision is based on the understanding that the draft law does not substantially affect the advisory competences of the ECB, as the draft law does not confer a genuinely new role in the field of insurance prudential supervision or consumer protection on the Central Bank of Ireland (CBI), given that it provides solely for the authorisation of the CBI to issue a non-binding, advisory code of practice concerning the form of, or any other requirements related to, a consumer insurance contract, as set out in the draft law. While the CBI is already responsible for the prudential supervision of insurance undertakings, as well as supervision of their business conduct, and also has a broad consumer protection mandate in the field of financial services, including insurance, no further extension of these tasks is foreseen in the draft law. In addition, the ECB is of the view that the draft law does not have potential to materially influence the stability of financial institutions and markets.

The ECB appreciates the Joint Committee's request for consultation on the draft law.

Yours sincerely,



Yves Mersch

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**Appendix 4**

**Orders of Reference**

**a. Functions of the Committee – derived from Standing Orders [DSO 84A; SSO 70A]**

- (1) The Select Committee shall consider and report to the Dáil on—
  - (a) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and
  - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.
- (3) Without prejudice to the generality of paragraph (1), the Select Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments, such—
  - (a) Bills,
  - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 187,
  - (c) Estimates for Public Services, and
  - (d) other mattersas shall be referred to the Select Committee by the Dáil, and
  - (e) Annual Output Statements including performance, efficiency and effectiveness in the use of public monies, and
  - (f) such Value for Money and Policy Reviews as the Select

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Committee may select.

- (4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:
- (a) matters of policy and governance for which the Minister is officially responsible,
  - (b) public affairs administered by the Department,
  - (c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
  - (d) Government policy and governance in respect of bodies under the aegis of the Department,
  - (e) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,
  - (f) the general scheme or draft heads of any Bill,
  - (g) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,
  - (h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
  - (i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
  - (j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (d) and (e) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and

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- (k) such other matters as may be referred to it by the Dáil from time to time.
- (5) Without prejudice to the generality of paragraph (1), the Joint Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments—
- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,
  - (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
  - (c) non-legislative documents published by any EU institution in relation to EU policy matters, and
  - (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.
- (6) Where a Select Committee appointed pursuant to this Standing Order has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.
- (7) The following may attend meetings of the Select or Joint Committee appointed pursuant to this Standing Order, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:
- (a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
  - (b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
  - (c) at the invitation of the Committee, other Members of the European Parliament.

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- (8) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department or Departments, consider—
- (a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and
  - (b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select.

## **b. Scope and Context of Activities of Committees (as derived from Standing Orders) [DSO 84; SSO 70]**

- (1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders; and
- (2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.
- (3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993; and
- (4) any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Orders [DSO 111A and SSO 104A].
- (5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—
  - (a) a member of the Government or a Minister of State, or
  - (b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request

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made to the Ceann Comhairle / Cathaoirleach whose decision shall be final.

- (6) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.

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## **Appendix 5**

### **Membership of the Joint Committee**

#### **Members of the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach**

##### **Deputies:**

John McGuinness T.D. (FF) (Chairman)

Peter Burke T.D. (FG)

Joan Burton T.D. (Lab)

John Deasy (FG)

Pearse Doherty T.D. (SF)

Michael McGrath T.D. (FF)

Paul Murphy T.D. (Solidarity-PBP)

##### **Senators:**

Gerry Horkan (FF) (Vice-Chairman)

Paddy Burke (FG)

Rose Conway-Walsh (SF)

Kieran O'Donnell (FG)

**Appendix 6**

**Written Submissions**

**Links to Written Submissions received**

[Central Bank of Ireland](#)

[Competition and Consumer Protection Commission](#)

[Department of Finance](#)

[Financial Services and Pensions Ombudsman](#)

[Insurance Ireland](#)