

Submission of the Competition and Consumer Protection Commission (CCPC) to the Joint Oireachtas Committee on Finance, Public Expenditure and Reform, and Taoiseach on the Consumer Insurance Contracts Bill 2017 – Private Members Bill

20th September 2018

Overview

The Competition and Consumer Protection Commission (CCPC) welcomes the introduction of the Consumer Insurance Contracts Bill ('the Bill') and further welcomes the opportunity to make a number of observations on its contents. The report of the Law Reform Commission (LRC) on Consumer Information Contracts¹, which informed the content of the Bill, represented a welcome exercise in identifying areas of relevant law for modernisation with the intent of pro-consumer reform. A further intention behind the Bill appears to be to provide for a unified legislative instrument which covers insurance contracts and this is a further positive step.

Definition of 'consumer'

Section 1 of the Bill incorporates the definition of '*consumer*' contained in the Central Bank of Ireland's Consumer Protection Code. This effectively includes both natural persons, acting outside of their trade or profession, and Small to Medium Enterprises (SMEs), while the definition of '*average consumer*' within the Bill '*shall be read as the average member of that group*'. However, in many instances there will be a disparity in resources and experience between a consumer as a natural person and a consumer as an SME, particularly with regard to use of the courts to seek redress or damages where an insurer unreasonably withholds payment, or unreasonably delays payment, of a claim. The Bill could helpfully include a reference to the 'personal consumer', to reflect that distinction contained within the Consumer Protection Code, as guidance for the drafting of Regulations or the Code of Practice.

Regulations and Code of Practice

We note that Section 3 of the Bill provides for the introduction of Regulations by the Minister for Finance or a Code of Practice by the Central Bank. We welcome this provision as it will allow for the introduction of additional legislative measures, or Codes of Practice, as required into the future. Any such Code of Practice should be designed to complement the Consumer Protection

¹ http://www.lawreform.ie/_fileupload/Reports/r113.pdf

Code. In its report, the LRC noted that the Central Bank is responsible for enforcing the provisions of the Consumer Protection Code. The LRC also noted (at page 17) that while there is no mechanism for individual consumer enforcement of the Code, in *Irish Life and Permanent plc v Financial Services Ombudsman [2012] IEHC 367*, the High Court suggested that the Consumer Protection Code could be taken into account in an individual case. The Court ‘rejected the view that the Code was to be regarded as entirely a species of “soft” law, that is, not susceptible to legal enforcement.’ The LRC came to the view that any Code of Practice arising in relation to consumer insurance contracts should be admissible before a Court to provide guidance. Section 4 of the Bill relates to the assistance that a Code of Practice could provide to a Court or other adjudicatory body such as the Financial Services Ombudsman. The Bill should provide further clarity on the relationship between the Code of Practice and the Consumer Protection Code, specifically whether the former would supersede the latter in respect of disputes relating to consumer insurance contracts.

Unfair Terms and Prohibited Commercial Practices

We note and welcome the content of Section 14 (5) as being reflective of Section 55 (3)(d) of the *Consumer Protection Act 2007*. We further note and welcome the content of Section 17 relating to unfair or onerous terms.

Section 6

We welcome the changes in the duty of disclosure of a consumer as outlined in Section 6. Section 6 (2) in particular represents a fair and proportionate pre-contractual disclosure obligation on the consumer. More broadly Section 6 of the Bill provides for a welcome modernisation of the law relating to the duty of disclosure in particular by recognising the inequality of information and resources that an insurer will ordinarily possess as against a consumer.

As a result of its inspection and investigative activity the CCPC is concerned as to a potential significant imbalance in the relationship between the insurer and consumer. In this regard we are referring to ‘informational asymmetries’. CCPC is of the view that there is an information imbalance in the market concerning insurance claims history and the prior usage of used motor vehicles in the market. Whilst consumers are unlikely to have full access to a vehicle’s prior usage and history, the same cannot be said for insurers. The majority of insurers in the State have, for example, access to InsuranceLink, a database for claims data which the CCPC understands displays ‘flags’ against vehicles to alert the users of the database to issues relating to the history of the vehicle. This can also lead to an informational asymmetry between the insurer and the consumer in regard to the ‘write off’ history of the vehicle.

The CCPC's experience in the area of vehicle crime² suggests that some insurers may learn of a vehicle's write off history mid-policy and at that point contact the consumer to withdraw insurance and insist the consumer provides - at his or her own expense - an assessor's report on the vehicle before coverage can be reinstated. We are also aware that consumers have had their own claims reduced when, after making a claim, it is revealed that their vehicle has been previously crashed – in some cases, where it appears that the insurer had insured the vehicle at the time of the crash and so was, or should have been, aware of the fact.

The CCPC believes that Section 6 should be amended further to place an obligation on insurers to provide the consumer, specifically prior to completion of a motor insurance contract, with information already available to the insurer in regard to the history of the vehicle. This may include any previous claim or crash history related to the vehicle of which the consumer may be unaware and which could impact the insurer's liability and the level of claim payable to the consumer. The insurer should provide such pre-contractual information, to a standard of skill and care that the insurer may reasonably be expected to exercise in respect of consumers, including pertinent information on the vehicle which the insurer ought to have known, or ought reasonably to have known, prior to conclusion of the contract. In addition to an obligation to disclose what they know to consumers, Insurers should also not be able to retrospectively harm the consumer's interest (for instance by reducing a claim settlement) using information that was available to them at the time the contract was concluded but not uncovered by them due to inaction. To give such an obligation effect, insurers should be under a further obligation to seek information from previous insurers of a particular vehicle and if that information was not forthcoming they should be entitled to claim from the previous insurer for non-disclosure.

Such an obligation on insurers would be in addition to the proposed obligation under Section 6(6) for insurers to use remedies under the Bill only where non-disclosure of material information is an effective cause of the insurer entering into a contract of insurance. We believe that a separate provision should be included to ensure that insurers cannot rely on the terms of the contract itself to repudiate liability or reduce the claim payable where they have superior knowledge, or ought to have superior knowledge, of the condition of the vehicle to that of the consumer when writing the insurance policy.

Section 7

We welcome the intent of Section 7 to clarify the law of misrepresentation as it relates to consumer insurance contracts. We note and welcome the provision of Section 7(2) relating to

² An enforcement priority for the CCPC has been the investigation of instances whereby traders have sold clocked cars to unsuspecting consumers without informing consumers as to the false odometer reading. Odometer readings provide a good measure of the relative health of a vehicle. Tampered odometers can prevent owners and mechanics from providing an appropriate level of care for a vehicle, endangering those who travel in it. The impact on consumers has also included financial loss on trade-in or sale of car due to clocking and additional unplanned costs of repairs due to unknown service, wear and tear. In 2017, our enforcement efforts resulted in the first custodial sentence and two further criminal convictions by the courts against traders involved in misleading consumers in the sale of clocked cars.

‘innocent misrepresentation’ and the obligation on an insurer to pay out on claim despite any such misrepresentation.

The provisions of Section 7 (4) (d) as they relate to consumers who have made a *negligent misrepresentation* raise several points of note. Section 7 (4) (d) (ii) appears to allow the insurer, in cases of non-life insurance policies, the choice to cancel the contract, giving reasonable notice to the consumer. We note that a similar provision in UK legislation, the Consumer Insurance (Disclosure and Representations) Act 2012, obliges an insurer to, in addition, refund the premium paid. As a consequence of the insurer relying on Section 7(4)(d)(ii), the Bill does not appear to require the insurer to refund the balance of any premium already paid. However Section 11(1) of the Bill provides that upon cancellation an insurer ‘shall repay to the consumer the balance of the premium for the unexpired term of the contract’. It is suggested that a reference to Section 11(1) be inserted in Section 7(4)(d)(ii) or that it is made clear that termination and cancellation are to be interpreted as meaning the same thing. We also note that under Section 11(3) the insurer shall not impose any financial cost on the consumer where the contract of insurance is cancelled. What constitutes ‘financial cost’ is not defined in the Bill and CCPC would recommend that it would be so defined so as to include any cancellation or administrative fee that might otherwise be imposed.

In the case of motor insurance policies, we assume that a consumer whose contract is cancelled in line with Section 7 (4) (d) (ii) will be required to avail of the ‘Declined Cases Agreement’ operated by Insurance Ireland if, upon having their contract cancelled, they are unable to get coverage from three other insurers. This is relevant as the cancellation of a policy may impact the consumer’s ability to obtain an affordable insurance quotation. It is worth recalling in this regard that insurance is compulsory for anyone operating a vehicle. As part of the implementation of Recommendation 7 of the Cost of Insurance Working Group Report on the Cost of Motor Insurance, Insurance Ireland have called for a review of aspects of the operation of the Declined Cases Agreement (DCA) and the CCPC understands that the Department of Finance have hosted workshops to review its operation³. Any forthcoming changes to the DCA may be of relevance in considering whether this provision should be amended further.

Section 44 of the *Sale of Goods and Services Act 1980* currently provides for remedies for innocent misrepresentation, which includes rescission of a contract where the contract relies on that misrepresentation or has been performed on the basis of that misrepresentation, or both. Furthermore, Section 45 of the *Sale of Goods and Services Act 1980* provides for damages for non-fraudulent misrepresentation which we understand relates to both innocent and negligent misrepresentation. We further understand that the proposed Consumer Rights Bill is intended to repeal certain sections of the Sale of Goods and Services Act 1980 but not sections 44 or 45. However upon the passage into law of the Consumer Rights Bill a reformed bill will be proposed to replace the 1980 Act. It is suggested that further consideration be given as to whether this Consumer Insurance Contracts Bill should amend the 1980 Act, in advance of any

³ <https://www.finance.gov.ie/wp-content/uploads/2018/08/CIWG-Progress-report.pdf>

further reforms to that legislation, in order to provide for legal certainty regarding actions for misrepresentation in respect of consumer insurance contracts.

Finally, Section 7(4)(c) describes how the insurer ‘*may reduce proportionately the amount to be paid on a claim*’. However, no guidance is provided as to how this would be calculated. We note that similar UK legislation, *the Consumer Insurance (Disclosure and Representations) Act 2012*, contains such guidance at Schedule 1, paragraph 8 of that Act.

Section 10

In relation to the drafting of the Bill, Section 10 refers to ‘15 working days’ as the point at which renewal notification should be provided to the consumer. However, at Section 12 (6) reference is made to ‘15 days before renewal’, omitting the word ‘working’. This discrepancy should be resolved to ensure certainty for insurers and consumers.

Broader policy considerations

On a wider policy note, we wish to raise a potential area of consumer detriment in regard to motor insurance. It appears to be an increasingly common practice for insurance companies to refuse cover for vehicles older than 10 years unless the consumer is a current customer of the insurer. This practice disproportionately affects consumers who cannot afford to upgrade their vehicle or are unable to access finance to purchase a newer vehicle. Within this cohort are younger drivers, who would in addition be denied the opportunity to begin the process of accumulating a no-claims discount. Indeed some consumers who purchase a car older than 10 years may not be able to obtain insurance cover at all. This has a detrimental impact both on consumers and the broader competitive process as a cohort of consumers, in effect, have their ability to switch withheld.

The Consumer Insurance Contracts Bill may not be the appropriate instrument by which to remedy this situation. However, we believe it is of relevance in the broader context of insurance related consumer detriment.

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