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Department of Jobs, Enterprise and Innovation

**CONSULTATION ON ARTICLE 19 (FEES FOR THE
USE OF MEANS OF PAYMENT) AND ARTICLE 22
(ADDITIONAL PAYMENTS) OF DIRECTIVE
2011/83/EU ON CONSUMER RIGHTS**

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EXECUTIVE SUMMARY

I INTRODUCTION

1. Directive 2001/83/EU on Consumer Rights was published in November 2011 and must be transposed into Irish law by December 2013 and must be applied from June 2014. The Minister for Jobs, Enterprise and Innovation, Richard Bruton T.D., has decided that two provisions of the Directive – Article 19 on fees for the use of means of payment and Article 22 on additional payments – should be given early effect by the end of 2012. This consultation discusses both provisions and seeks views on a number of issues raised by them. Both are maximum harmonisation measures whose protections cannot be augmented in national legislation, and accordingly the issues on which views are sought relate mainly to the scope and enforcement of the provisions.

II ARTICLE 19 FEES FOR THE USE OF MEANS OF PAYMENT

2. Article 19 of the Directive provides as follows:

Member States shall prohibit traders from charging consumers in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.

While all payment methods entail some cost to the trader, charges to consumers for the use of means of payment apply in the main to credit and debit card payments. Article 19 seeks to ensure that payment charges are not used as an additional revenue source by traders but reflect instead the real cost of payment instruments to the trader.

3. Where charges for widely used payment mechanisms are inflated in order to lower the headline price of goods or services or where payment mechanisms offered free-of-charge are unavailable to most consumers, purchasing decisions are likely to be distorted in ways that result in consumer detriment. Consumers enticed by the price initially displayed can remain committed to the transaction even if the final price is significantly higher following the addition of payment or other charges. This can be expected to occur in particular where additional charges are presented at a late stage of the purchasing process. The result will be to reduce the likelihood that

consumers will invest time and effort in searching for similar goods or services from other traders.

II WHAT ARE FEES 'IN RESPECT OF THE USE OF A GIVEN MEANS OF PAYMENT' ?

4. Article 19 refers to fees 'in respect of the use of a given means of payment' but does not specify any particular payment method. As such, the provision will apply to all means of payment, including new payment methods that may be introduced in the future. Though the open-ended character of the provision is helpful in many respects, the question of what charges are to be regarded as fees 'in respect of the use of a given means of payment' requires consideration.

5. Though payment surcharging is not a widespread practice across consumer markets in Ireland, a number of traders in the passenger travel, package travel, utilities and other sectors apply fees of varying amounts to payments made by credit or debit card. Where charges are expressly stated to apply in respect of the use of a particular payment method or methods, the fees in question will clearly be covered by the legislation that will give effect to Article 19.

6. A number of airlines and ferry companies operating in Ireland apply fees described as 'administration', 'booking' or 'handling' charges that are avoidable where the consumer makes payment by means of a specified payment instrument such as Visa Electron or the Ryanair Cash Passport. The charge-free Visa Electron option offered by Aer Lingus, Irish Ferries and Celtic Link Ferries is not available, however, from any bank in the Republic of Ireland. While the Ryanair Cash Passport can be ordered by consumers in Ireland on the company's website, it involves significant costs to the card holder.

7. The charges applied by airlines and ferry companies raise a critical issue about the scope of the payment fees provision at Article 19. The companies concerned make a point of differentiating these charges from payment fees proper and present them as encompassing the cost of all aspects of the processing of bookings, including, though not limited to, the cost of processing payments for those bookings. It is

difficult, however, to see how a fee that does not apply when a specified payment method is used can be viewed as anything other than a payment fee. Subject to further consideration in the light of the responses to this consultation, it is proposed accordingly to provide in the Regulations which are to give effect to Article 19 that a charge to consumers, however described, that is avoidable where a specified payment instrument is used shall be regarded as a fee for the use of a means of payment for the purposes of the Regulations. The effect of such a provision would be to ensure that the administration charges currently imposed by a number of airlines and ferry companies would be subject to Article 19.

8. It is also common, though not universal, for tickets to entertainment and other events to be subject to a booking fee or service charge. While such charges clearly include the costs incurred in processing credit and debit card payments, they also cover the costs of a range of other aspects of the operation of the ticket administration and distribution services provided by ticketing service providers. Unlike in the case of the air and sea carriers, these charges are not avoidable where the consumer makes payment by means of a specified payment instrument. If service charges for entertainment and other events which include, but are not limited to, payment fees, are to come within the scope of the Regulations that will give effect to Article 19, it would appear necessary to make express provision for their inclusion. A provision of this kind would stipulate that, where a charge described as a service, booking or other charge which is not avoidable by the use of a specified payment method, includes a fee for the use of a means of payment, that element of the charge shall not exceed the cost borne by the trader for the use of such means of payment. It would be necessary in this event to require the trader to indicate separately the payment fee element of the service or other charge.

9. A number of businesses, mainly in the utilities sector, offer a price reduction to customers who pay their bills by direct debit. These reductions typically apply only to new customers and/or to customers who sign up for particular price plans. While it can be argued that price rebates for payment by direct debit effectively represent a charge for the use of other means of payment, it has been clarified with the

European Commission that such rebates are not a fee 'in respect of the use of a given means of payment' with the meaning of Article 19.

IV FEES THAT EXCEED THE COST BORNE BY THE TRADER

10. While the fees payable by consumers for the use of means of payment are public and readily ascertainable, the cost of those means of payment to the trader is more complex and less transparent. In the case of payment card transactions, these costs differ for different types of card transaction and also vary considerably with the turnover, business sector and other characteristics of the trader. It will be a matter for consumer enforcement authorities to investigate, and ultimately for the courts to decide, in any individual case whether the charges imposed on consumers for the use of a means of payment exceed the cost of the payment method or methods to the trader. The Directive does not define or elaborate on this cost, and the matter would be more appropriately dealt with by means of guidance to traders than by a statutory provision.

11. For most traders, the merchant service charge [MSC] applicable to payment card transactions is the largest single element of the cost of accepting such payments. For credit card transactions, the MSC is typically fixed at a percentage of the transaction value, while for debit card transactions it is more commonly, though not universally, a flat fee. The information available to us suggests that the merchant service charge for small businesses in Ireland is typically of the order of 1.5 per cent to 2.5 per cent for credit card transactions and 15-50 cent for Laser and other debit card transactions. Less is known about the merchant service charges applicable to larger businesses, though it is generally believed that these have sufficient bargaining power in most cases to negotiate substantially lower charges. Traders, particularly small and medium-sized businesses, typically also pay fees for the installation and rental of payment terminals and other equipment.

V ARTICLE 22 ADDITIONAL PAYMENTS

12. Article 22 provides that:

Before the consumer is bound by the contract or offer, the trader shall seek the

express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.

The first part of the provision seeks to tackle hidden extra charges on consumers by requiring traders to seek the consumer's explicit agreement to any payment additional to that agreed for the goods or services that form the main part of the bargain between the two parties. The second part deals with the more specific circumstance where the consumer's consent to any payment additional to that for the main contractual obligation is inferred by means of default or opt-out provisions. The most common form of such default options are the so-called pre-ticked boxes encountered on some websites which commit the consumer to paying for additional services or goods unless he or she unticks the box or boxes concerned.

13. There is relatively little firm information available on the extent to which traders in Ireland claim payment for remuneration additional to their main contractual obligation without first seeking the consumer's consent. The level of recourse to default payment options or 'pre-ticked boxes' is similarly unclear. Enforcement sweeps carried out since 2007 by consumer authorities in EU member states, however, have found evidence of anti-consumer practices in the areas of additional payments and opt-out payment mechanisms.

VI THE SCOPE OF ARTICLES 19 AND 22

14. Article 3(3) of the Consumer Rights Directive provides that Articles 19 and 22 and other provisions of the Directive shall not apply to contracts in a number of sectors and activities, including financial services, gambling, health and social services, package travel and timeshare, the creation and transfer of rights in immovable property, the construction of new buildings and the substantial conversion of existing buildings, and the rental of residential accommodation. Member states are free, however, to apply the Directive's provisions to exempted sectors in national legislation.

15. A key issue for decision in relation to Articles 19 and 22, therefore, is whether or not to apply the provisions to contracts in all, none or some of the excluded sectors. Subject to further consideration in the light of the responses to the consultation, it is proposed that the provisions of both Articles should, with the exception of financial services, apply in Irish legislation to all of the sectors excluded from the scope of the Consumer Rights Directive. With the exception of package travel where payment fees are applied by some traders, the practices regulated by Articles 19 and 22 do not appear to be common in the sectors concerned. If businesses in these sectors impose excessive payment fees, demand additional payments without seeking the consent of the consumer, or have recourse to default payment options such as pre-ticked boxes, however, it is difficult to see why they should not be subject to the same rules as apply to businesses in the rest of the economy.

16. Bank charges for card and other payments are subject to detailed regulation by the Central Bank under section 149 of the Consumer Credit Act 1995. Bringing them within the scope of the legislation that will give effect to Article 19 would represent unnecessary and undesirable regulatory duplication. The practices covered by Article 22 are similarly subject to detailed regulation under the Consumer Protection Code for Financial Services.

17. The Directive also provides that Member States may opt not to apply its provisions to low-value off-premises contracts for which the payment to be made by the consumer does not exceed €50. As defined in the Directive, an off-premises contract refers principally to a contract concluded in the simultaneous physical presence of the trader and consumer in a place which is not the place of business of the trader, such as a sale or other transaction made in the consumer's home. It is not proposed to avail of the option to exempt low-value off-premises transactions from the application of Article 19 or Article 22. This exemption was not framed with either provision in mind, and permitting off-premises traders to apply large payment surcharges to transactions under €50 in particular would undermine the whole purpose of the provision.

VII ENFORCEMENT OF ARTICLES 19 AND 22

18. It is proposed to provide for both criminal and civil enforcement of Articles 19 and 22 by the National Consumer Agency. This would give the Agency a wider and more flexible range of options with which to respond to breaches of the provisions. While these public enforcement provisions will be the main mechanism for ensuring compliance with the two Articles, it is desirable also to protect consumers from demands from traders for payment of excessive surcharges by providing that a contract term entitling a trader to recover a payment fee that exceeds the cost of the means of payment in question will be unenforceable. The Regulations should also give consumers a contractual right to recover the cost of any excessive payment fee from the trader. Similar private redress provisions should apply to Article 22.

19. The question of what constitute 'fees that exceed the cost borne by the trader' for the use of a given means of payment is not a straightforward one. In the absence of a provision for a reversal of the evidential burden of proof, consequently, the National Consumer Agency could face difficulties in taking court proceedings for a breach of Article 19. As the trader is in a position to supply the relevant details about the cost of payment, a burden shifting provision of this kind could not be said to be unfair or unreasonable. It is reasonable similarly in cases relating to Article 22 to place the evidential onus of proof on the trader to show that he or she sought the express consent of the consumer to any payments additional to those agreed upon for the trader's main contractual obligation. It is proposed therefore to provide that, in civil proceedings on any application to a court by the National Consumer Agency, the evidential burden of proving compliance with the requirements of the Regulations shall be on the trader concerned. It is proposed also to provide that, if in criminal proceedings under the Regulations, the truth of a factual representation is an issue, and the trader who made the representation does not establish its truth on the balance of probabilities, the representation shall be presumed to be untrue.

20. Responses to the consultation should be sent by Friday 12 October by e-mail to conspol@djei.ie or by post to Competition and Consumer Policy Section, Department of Jobs, Enterprise and Innovation, Earlsfort Centre, Lower Hatch Street, Dublin 2.

I INTRODUCTION

1. Directive 2011/83/EU on Consumer Rights was published in November 2011. It must be transposed into national law by EU member states by 13 December 2013 and must be applied in member states from 13 June 2014. The Directive deals with the following matters:

- Chapter I - Subject Matter, Definitions and Scope (Articles 1-4);
- Chapter II - Consumer Information for Contracts Other than Distance or Off-Premises Contracts (Article 5);
- Chapter III - Consumer Information and Right of Withdrawal for Distance and Off-Premises Contracts (Articles 6-16);
- Chapter IV - Other Consumer Rights (delivery; fees for the use of means of payment; passing of risk; communication by telephone; additional payments, Articles 17-22);
- Chapter V - General Provisions (enforcement, penalties, transposition etc., Articles 23-30); and
- Chapter VI - Final Provisions (repeals, amendment, entry into force, Articles 31-35).

2. Chapter III of the Directive will replace Directive 85/577/EEC on Contracts Negotiated Away From Business Premises and Directive 97/7/EC on Distance Contracts. Those Directives were minimum harmonisation measures whose provisions could be exceeded in national legislation, but the Consumer Rights Directive is, with the exception of Chapter II and a small number of provisions that are optional for Member States, a maximum harmonisation instrument. Member States cannot go beyond, or add to, the Directive's maximum harmonisation provisions in national legislation.

3. While the other provisions of the Directive are to be transposed by the end-2013 deadline, the Minister for Jobs, Enterprise and Innovation, Richard Bruton T.D., has decided that Article 19 on fees for the use of means of payment and Article 22 on additional payments should be given effect by statutory instrument by the end of 2012.¹

¹ 'Bruton Announces Major Overhaul of Consumer Law' 18 October 2011, <http://www.djei.ie/press/2011/20111018.htm> .

4. This consultation paper discusses Articles 19 and 22 of the Directive in turn, and seeks views on a number of issues raised by each of the Articles. It must be recognised that the Directive's maximum harmonisation status places substantial limits on the degree of discretion available to Member States in transposing its provisions. Aspects of the provisions on which there would have been a range of implementation options if the Directive were a minimum harmonisation measure are subject to a greater degree of constraint under a maximum harmonisation regime. As a consequence, the questions on which views are sought in this consultation relate in the main to the scope and enforcement of the provisions. These questions feature at various points throughout the paper and are collated at Annex I.

II ARTICLE 19 FEES FOR THE USE OF MEANS OF PAYMENT

5. Article 19 of the Directive provides as follows:

Member States shall prohibit traders from charging consumers in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.

This provision was not in the original text of the Directive, or the text adopted by the European Council in January 2011, but was inserted in the course of subsequent trilateral discussions between the Council, the European Commission and the European Parliament on the basis of an amendment put forward by the European Parliament's Internal Market and Consumer Protection Committee. The Committee's amendment was prompted by consumer concerns about 'the extra costs attached to certain means of payment' especially 'in online markets i.e. sale of tickets for concerts and sport events, flight tickets etc'.²

6. While all payment methods entail some cost to the trader,³ charges to consumers for the use of means of payment apply in the main to credit and debit card

² Committee on the Internal Market and Consumer Protection European Parliament. 2011. *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights: Amendments 1135-1595*, p. 3.

³ For discussions of the costs of payment to traders, see Humphrey, D. et al. 2003. 'What does it cost to make a payment?', *Review of Network Economics*, vol.2(2); Nederlandsche Bank. 2004. 'The cost of payments', *Nederlandsche Bank Quarterly Bulletin* (March), pp. 57-61; Garcia Swartz, D. et al. 2004. *The Economics of a Cashless Society: An Analysis of the Costs and Benefits of Payment Instruments* (AEI-Brookings Joint Center for Regulatory Studies); Brits, H. & Winder, C. 2005.

payments.⁴ As outlined in Part III, payment and payment-related charges are currently imposed in a relatively small number of sectors, principally passenger travel and ticket services for entertainment and other events. With isolated exceptions, such charges are not a feature of in-store transactions for goods and services.

Purpose of the Prohibition of Excessive Payment Charges at Article 19

7. The aim of Article 19 is to prevent traders from charging consumers payment fees that are in excess of the cost incurred by the trader in processing the payment. As the European Commission has stated, payment surcharging 'should not be used as an additional revenue source by merchants but should be limited to the real cost of using a payment instrument.'⁵

8. Where payment or other charges are presented as an add-on to the headline price of goods or services, consumer decision-making can be distorted in ways that result in detriment to consumers.⁶ The practice of presenting a headline price and then adding extra charges as the purchasing process proceeds is known as 'partitioned' or 'drip' pricing. Where such charges relate to genuinely optional features of goods or services – for example additional specifications in a motor car or computer – there can be benefits for both consumers and traders.

9. Payment is not of course an optional element of consumer transactions, and payment fees typically take the form of a charge or range of charges, including in some cases options that are free of charge, for the use of a specified payment mechanism or mechanisms. Where there is a genuine choice of payment mechanism

'Payments are no free lunch', *De Nederlandsche Bank Occasional Studies*, vol.3(2); Bergman, M. et al. 2007. *The Costs of Paying: Private and Social Costs of Cash and Card* (Sveriges Riksbank Working Paper Series, 212).

⁴ Charges for payments made by means other than direct debit, or rebates for payments made by direct debit, are common in the utilities sector. The application of Article 19 to such charges and rebates is discussed at paragraphs 47-50.

⁵ European Commission. 2012. *Green Paper: Towards an Integrated European Market for Card, Internet and Mobile Payments*, p.5.

⁶ Ahmetoglu, G. et al. 2010. *Pricing Practices: Their Effects on Consumer Behaviour and Welfare: A Report Prepared for the Office of Fair Trading*, pp. 8-10 & 41.

and the charges applied to each such mechanism are in line with their cost to the trader, consumers will not be subject to detriment and may benefit from the enhanced choices available to them. Where charges for widely used payment mechanisms are inflated in order to lower the headline price of goods or services or where payment mechanisms offered free-of-charge are unavailable to most consumers, there is likely to be an adverse effect on consumer welfare. Consumers enticed by the price initially displayed can remain committed to the transaction even if the final price is significantly higher following the addition of payment or other charges. This can be expected to occur in particular where additional charges are presented at a late stage of the purchasing process. The result will be to reduce the likelihood that consumers will invest time and effort in searching for similar goods or services from other traders. The practice of adding payment or other charges to the headline price also makes it more difficult for consumers to compare the price offers of different traders. For these reasons, it has been argued that partitioned pricing is the pricing practice with the greatest potential to mislead consumers, though whether any specific partitioned price offer will mislead will depend on a range of factors.⁷

10. The consumer detriment arising from excessive payment and payment-related charges must be viewed in the light of the sustained growth in card payments over the past decade. Though cash usage in Ireland remains above the EU average, payment by card, particularly debit card, has increased markedly over the past decade.⁸ In 2003, there were 142 million card payments in Ireland, of which 60 million (42 per cent) were debit card payments, compared with 166 million ATM withdrawals. In 2011, there were 340 million card payments, of which 238 million (70 per cent) were debit card payments, compared with 174 million ATM withdrawals. Though the average value of debit card payments in 2011 (€54.29) was just over half that of credit card payments (€105.31), debit card payments accounted for 55 per cent of card payments in value terms, having overtaken the aggregate

⁷ UK Office of Fair Trading. 2010. *Advertising of Prices*, paras. 2.17-2.19. www.offt.gov.uk/shared_offt_business_leaflets/659073/Advertising-of-prices/Pricing-Practices.pdf.

⁸ Irish Payment Services Organisation. *Payment Statistics: Ireland*, <http://www.ipso.ie/section/IrelandStatistics>.

value of credit card payments for the first time in 2010. The growth in debit card usage is expected to continue in future years as new developments, such as contactless cards for low-value payments, come on-stream.⁹

11. The prevalence of high payment-related fees in competitive sectors such as passenger transport tends to support the view that such fees are primarily a device aimed at lowering headline prices rather than a means of inflating overall price levels. To the extent that this is the case, it has clear implications for the outcomes to be expected from the introduction of Article 19. Though consumers may benefit from reduced prices in some instances, it is more realistic to expect that the total price to the consumer will not fall in most cases. Any reduction in payment or payment-related charges is likely instead to be offset by a rise in the core price of the goods or services. If this assessment proves correct, it will still represent a gain in consumer welfare. Consumers will find it easier to compare prices and to shop around for better value. They should also be less likely to make purchases into which they were enticed by spuriously low headline prices and for which they ended up paying more than they originally wished or intended because, once commenced, they had become committed to the transaction.

Other Legislative Provisions on Payment and Payment-Related Charges

12. It has been argued that the imposition of payment fees which bear no reasonable relation to the cost incurred by the trader may be a misleading commercial practice under existing consumer legislation.¹⁰ Section 43 of the Consumer Protection Act, which gives effect to Article 6 of the Unfair Commercial

⁹ Transactions using contactless cards are effected by a tap of the card on a terminal without the need either to swipe the card or hand it to the trader for verification.

¹⁰ A report on Airlines' Taxes, Fees, Charges and Surcharges prepared for the European Union's Consumer Protection Cooperation Network argued that the following actions can be regarded as misleading under Article 6(1)(d) of the Unfair Commercial Practices Directive:

1. incorrect calculation of fees and taxes in the price of the flight ticket;
2. presenting costs which are contributing to the air carriers' general income as taxes and fees imposed by other bodies.

Consumer Protection Cooperation Report on Airlines' Taxes, Fees and Surcharges, para. 4.3.2, http://www.ec.europa.eu/consumers/enforcement/docs/airline_charges_report.pdf. See also European Consumer Centres' Network. 2012. *The Cost of Paying: ECC-Net Study on Airlines' Currency and Payment Card Fees*. http://ecc.ireland.ie/downloads/Study_on_Currency_&_Payment_Card_Fees.pdf .

Practices Directive, provides among other things that a commercial practice is misleading if –

- (a) it would be likely to cause the average consumer to be deceived or misled in relation to the price of goods or services, the manner in which that price is calculated or the existence or nature of a specific price advantage, **and**
- (b) would be likely to cause the average consumer to make a transactional decision that he or she would not otherwise make.

Section 46 of the Act, which gives effect to Article 7 of the Unfair Commercial Practices Directive, further provides that a commercial practice is misleading if it omits or conceals material information that the average consumer would need, in the context, to make an informed transactional decision and would be likely to cause the average consumer to make a transactional decision that he or she would not otherwise make. It is reasonable to assume, given the centrality of price to consumer purchasing decisions, that ‘material information’ will usually include information relating to the price of goods or services.¹¹ It can further be argued that the material information required by the consumer in order to make an informed purchasing decision, including comparisons between the prices of competing products, should include the total cost of the goods or services in question.

13. Though payment charges are subject to general consumer law in Ireland in respect of matters such as misleading commercial practices, there are no statutory provisions of general application regulating the fees applied to consumer transactions. Directive 2007/64/EC on Payment Services in the Internal Market permits businesses to impose charges, or offer reductions, for the use of a given payment instrument, but allows Member States to regulate such charges under certain conditions. Article 52(3) of the Directive states:

The payment service provider shall not prevent the payee from requesting from the payer a charge or from offering him a reduction for the use of a given payment instrument.

However, Member States may forbid or limit the right to request charges taking into account the need to encourage competition and promote the use of efficient

¹¹ In the case of an invitation to purchase, section 46(3) lists a number of items that constitute material information for the purposes of the section, including the price of the goods or services inclusive of taxes or, where the price cannot reasonably be calculated in advance, the manner in which the price is calculated.

payment instruments.

14. The Regulations that give effect to the Directive in Ireland – the European Communities (Payment Services) Regulations 2009 (S.I. No. 383 of 2009) – did not implement the discretionary option accorded Member States to forbid or limit payment charges. EU Member States have divided more or less evenly on this option with fourteen countries choosing to ban surcharging and thirteen opting not to do so.¹² Proponents of a ban on surcharging contend that payment is integral to consumer transactions and should not attract additional fees. According to this view, surcharging limits consumer choice, creates additional complexity in the pricing of goods and services, and militates against the maintenance of a level playing field as between different payment instruments. Opponents of a surcharging ban maintain that, given the significant differences in the cost of different payment methods to businesses, charges or price reductions for the use of specific payment mechanisms can potentially enhance the transparency of payment method pricing and create incentives for consumers to use more efficient or less costly methods. Consumers who use low-cost payment methods such as debit cards, it is further argued, should not have to subsidise those who use higher-cost methods, chiefly credit and charge cards, that confer significant benefits on the card user.

15. While the main payment card schemes formerly contained blanket bans on surcharging by retailers, their rules have been amended in the light of legislative changes at EU and national level. The rules of the MasterCard scheme now permit merchants in Europe to surcharge for the use of its cards.¹³ Visa retains a general no-

¹² European Central Bank. 2011. *Interchange Fees in Card Payments* (Occasional Paper Series no. 131), pp. 26-27. The Member States that have exercised the option to forbid or limit payment charges are Austria; Bulgaria; Cyprus; Denmark; France; Greece; Italy; Lithuania; Luxembourg; Latvia; Portugal; Romania; Sweden; and Slovakia. Those which did not exercise the option are Belgium; Germany; Estonia; Spain; Finland; Ireland; Malta; the Netherlands; Slovenia; and the United Kingdom. <https://www.ecb.int/pub/pdf/scpops/ecbocp131.pdf>.

¹³ *Mastercard Rules*, p. 108 & p. 245, http://www.mastercard.com/us/merchant/pdf/BM-Entire_Manual_public.pdf

surcharging rule, but acknowledges that national laws in European states may permit retailers to surcharge.¹⁴

16. Section 48 of the Consumer Protection Act 2007 sought to prohibit payment surcharges where one method of payment was chosen in preference to another. It provided that, where a trader indicated that he or she would accept payment for goods or services by any one of two or more different payment methods and made a practice of accepting payment by different methods, he or she could not impose an additional charge on a customer by reason of the customer's making payment by one of those payment methods. The commencement of the provision was delayed initially in order to facilitate a public consultation on its implementation. In response to issues that emerged in the course of the consultation, the Attorney General advised the then Minister for Enterprise, Trade and Employment that the provision was incompatible with the maximum harmonisation status of Directive 2005/29/EC on Unfair Commercial Practices.¹⁵ Unlike Article 19 of the Consumer Rights Directive which aims to prohibit *excessive* surcharging, section 48 sought to ban virtually all such surcharging.¹⁶ The provision, and the companion provision at section 49 of the Act, were not commenced and are expected to be repealed when legislation to amend the 2007 Act is enacted.

Legislative Provisions Relating to Airline Charges

17. Article 23(1) of Regulation (EC) No 1008/2008 on Common Rules for the Operation of Air Services states among other things that:

¹⁴ Visa. *Card Acceptance Guidelines for Merchants*, <http://usa.visa.com/download/merchants/card-acceptance-guidelines-for-visa-merchants.pdf>

¹⁵ *Dáil Debates*, vol.653, 30 April 2008.

¹⁶ In response to a recent Dáil question asking whether section 48 would be commenced 'in view of the ban on credit and debit card surcharges' in the Consumer Rights Directive, the Minister for Jobs, Enterprise and Innovation, Richard Bruton T.D., stated that Article 19 of the Directive: does not ban credit or debit card surcharges, but provides instead that such charges should not exceed their cost to the trader. As such, it differs materially from section 48 of the Consumer Protection Act 2007 which contains a ban on surcharges where one method of payment is chosen in preference to another. Sections 48 and 49 of the Act clearly go beyond the provisions of the Consumer Rights Directive and, as the Directive is a maximum harmonisation instrument, it is not open to Member States to exceed its provisions. The commencement of sections 48 and 49 is therefore not an option available to me in the context of the implementation of the Directive. *Dáil Debates*, vol. 356, 21 February 2012.

The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition to the indication of the final price, at least the following shall be specified:

(a) air fare or air rate;

(b) taxes;

(c) airport charges; and

(d) other charges, surcharges or fees, such as those related to security or fuel; where the items listed under (b), (c) or (d) have been added to the air fare or air rate.

18. In accordance with this provision, any airline administration or booking charge that is not avoidable by the use of a specified payment mechanism must be included in the applicable air fare.¹⁷ Article 23(2) of the Regulation further provides that access to air fares and air rates from an airport located in the territory of an EU Member State available to the general public shall be granted without any discrimination based on the nationality or place of residence of the customer or the place of establishment of the air carrier's agent or other ticket seller within the European Union. As Article 23 forms part of a Regulation, it is directly applicable in all EU Member States and is binding in its entirety.¹⁸

19. Article 23(1) was introduced in order to ensure that air travellers received more precise and user-friendly information on air fares in order to enable them to compare prices effectively and to avoid misleading advertising.¹⁹ Its introduction

¹⁷ Regulation 4(1) of the Consumer Information (Advertisements for Airfares) Order 2000 (S.I. No. 468/2000) provides that 'In every advertisement for an airfare –

(a) the total price payable for the airfare by the purchaser shall be clearly stated as one single amount and in the currency in which it is payable, and

(b) where applicable, and separately, the monetary amount of any charge to be imposed in respect of the method of payment of the airfare shall be clearly stated. '

¹⁸ Enforcement arrangements for Article 23 are provided for in the European Communities (Common Rules for the Operation of Air Services in the Community) Regulations 2008 (S.I. No. 426/2008). The Regulations empower the Minister for Transport, Tourism and Sport to appoint authorised officers for the purpose of enforcing Article 23 and provide that an air carrier, its agent or a ticket seller who fail to comply with the provision commits an offence and is liable on summary conviction to a fine not exceeding €5,000.

¹⁹ European Commission. 30 October 2008. 'Price transparency and improved *safety: more competition and better quality for the air transport sector.*'

www.europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1603

followed concerns that the partitioned pricing practices in evidence on a sizeable number of airline and travel agency websites were misleading consumers as to the true price of flights. A sweep of over 400 such websites conducted by consumer enforcement authorities in 15 EU Member States in September 2007 found evidence of misleading advertising and other unfair practices on around half of the websites surveyed.²⁰ A report on the enforcement sweep noted that:²¹

Most of the irregularities detected concerned the information given on the final air ticket prices... A widely spread practice reported by authorities consisted in dividing the final price of an air ticket into different components, using the airfare for advertising purposes and adding taxes, charges and fees later in the transaction process. These additional charges take a variety of forms such as airport charges, charges for credit card payment, handling or booking fees, fees for priority booking, fuel, or for any piece of luggage. In this way, businesses attract consumers to a given ticket selling site with what seem cheap flights that turn out to be in fact significantly more expensive. For the consumers, the final price to pay when actually booking the ticket is generally significantly higher and is only revealed late in the booking process when the consumer is less likely to initiate a new search for alternatives.

Recent Enforcement Action in the UK on Airline Charges

20. Following a super-complaint in March 2011 by the consumer organisation *Which?*, the UK Office of Fair Trading (OFT) undertook an investigation into the pricing practices of 14 airlines, including Aer Lingus and Ryanair.²² The OFT was concerned that the airlines' payment surcharges were a 'price-partitioning' device which concealed the real price of flights as the average consumer was not in a position to pay by means of the payment cards presented by the airlines as a free payment mechanism. It further concluded that there was no reasonable or legitimate reason for the airlines' failure to provide headline prices which included all unavoidable charges, such as any cost for paying by debit card.

²⁰ European Commission. 14 November 2007. 'EU crackdown on misleading airline ticket websites.' www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1694 .

²¹ Consumer Protection Cooperation Network. 2008. *Can You Trust Air Ticket Selling Sites?: An Internet Sweep by the Enforcement Network*, pp. 13-16. www.ec.europa.eu/deutschland/pdf/european_agend/sweep_report_final.pdf.

²² Which? March 2011. *Super-complaint: credit and debit surcharges*. www.which.co.uk/documents/pdf/payment-method-surcharges-which-super-complaint-249225.pdf
Office of Fair Trading. June 2011. *Payment Surcharges: Response to the Which? super-complaint*. www.offt.gov.uk/shared_offt/super-complaint/OFT1349resp.pdf

21. The legislative provisions that provided the basis for the Office of Fair Trading investigation were, first, the 2008 UK Regulations that give effect to the Unfair Commercial Practices Directive and, secondly, Article 23(1) of the EU Air Services Regulation. The OFT concluded that the airlines concerned were engaging in prohibited commercial practices under the 2008 Regulations, including misleading actions and misleading omissions as well as breaches of the requirement of professional diligence under the general prohibition of unfair commercial practices.²³ It further held that the airlines were in breach of the requirement of the Air Service Regulation that air fares be presented inclusive of all foreseeable and unavoidable charges and fees.

22. In response to the OFT investigation, eleven airlines, including Aer Lingus and Ryanair gave formal undertakings that they would amend their pricing practices as follows:²⁴

- The advertised headline price for flights would include any charge for making a payment by debit card.
- No additional fee, above any charges included in the advertised headline price, would be charged in relation to making a payment or booking in respect of any flights or ancillary services where a debit card is used.
- If an airline charges any additional fee by virtue of the payment method used above any charges included in the advertised headline price in relation to a payment or booking made other than by debit card, such a fee will not be described as an 'administration', 'transaction', 'booking' or 'handling' fee in a manner that suggests that it reflects the costs incurred by the airline where the amount of the fee is more than the increased cost to the airline of processing that payment compared to payment by debit card.
- Any additional fee charged by virtue of the payment method used that is applied to payments or bookings made other than by debit card will be described in clearly visible text in any advertising which describes the

²³ Office of Fair Trading. July 2012. Airlines' Payment Surcharges: Investigation into pricing practices by 14 airlines. www.oft.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/card-surcharges/

²⁴ Ibid.

advertised headline price and will be notified to consumers on each page of the airline's website where the headline price is displayed in clearly visible text and by means of a prominent link to a list of charges.

These undertakings are to take effect at different times but not later than 1 December 2012. Their effect will be to require airlines to include debit card charges in headline flight prices and to present any optional credit card fees clearly and transparently. As Article 19 has its origins in large part in concerns about airlines' pricing practices, the changes required by the undertakings given to the OFT will complement the provision's aims in a positive, pro-consumer fashion.

23. The focus of the OFT investigation on charges for debit card payments reflects the fact that the discrepancy between payment charges to consumers and payment costs to traders is most marked for this method of payment. Payment charges and costs are discussed further in Parts III and IV of this paper.

24. Though the undertakings given by Aer Lingus and Ryanair to the Office of Fair Trading in June 2012 are directly applicable and enforceable only in the United Kingdom, they have clear implications for the airlines' pricing practices in Ireland. The EU legislation under which the OFT investigative and enforcement action was taken – the Unfair Commercial Practices Directive and the Air Services Regulation – is applicable in Ireland and other EU Member States just as it is in the UK. As of end-August 2012, Aer Lingus and Ryanair had yet to indicate publicly whether they planned to modify their pricing practices in Ireland in line with the undertakings given to the OFT. Aer Lingus have recently revised their website as accessed by Irish consumers so as to present the administration charge in the headline price; a reduction applies on that price where payment is made by means of a Visa Electron card. The Ryanair website appears also to have been modified to give greater prominence to the administration charge at an early stage of the booking process. It has been suggested in this context that treating UK customers more favourably than those in Ireland or other EU Member States would be in breach of the non-discrimination provision at Article 23(2) of the Air Services Regulation outlined at paragraph 18 above.

III WHAT ARE FEES ‘IN RESPECT OF THE USE OF A GIVEN MEANS OF PAYMENT ‘?

25. Article 19 refers to fees ‘in respect of the use of a given means of payment’ but does not specify any particular payment method, whether cash, cheque, card, direct debit, electronic fund transfer or other. As such, the provision will apply to all means of payment, including new payment methods that may be introduced in the future. Though the open-ended character of the provision is helpful in some respects, the question of what charges are to be regarded as fees ‘in respect of the use of a given means of payment’ requires consideration. The next sections look at the main forms taken by payment and payment-related charges in Ireland and at whether, and how, Article 19 might apply in these cases.

Direct Payment Charges

26. Though payment surcharging is not a widespread practice across consumer markets in Ireland, a number of businesses in the passenger travel, package travel, utilities and other sectors apply fees of varying amounts to payments made by credit or debit card. Where fees are expressly stated to apply in respect of the use of a particular payment method or methods, the fees in question will clearly be covered by the legislation that will give effect to Article 19. Box 1 below gives examples of a number of these fees. These examples are illustrative rather than exhaustive and information on direct payment charges applied by other traders would be welcome.

Box 1 Fees For Credit/Debit Card Payments*

Stena Lines €6 credit card fee

Brittany Ferries €7.50 credit card fee

Lufthansa €5 'optional payment charge' for payments made by credit card or Paypal

Air France €5 fee for payment by credit or debit card

KLM €2 'credit card surcharge'

Club Travel 2 per cent fee on credit card bookings

Falcon Travel 1½ per cent fee on credit card bookings

Abbey Travel 2 per cent fee on credit card bookings

Sunway Travel 1½ per cent fee on credit card bookings

Airtricity €5 'payment processing fee' for payments by credit card

Iarnrod Eireann €1 fee for online credit card bookings (plus €2 'transaction fee' for online bookings)

UPC €3.75 'payment administration charge' per month for payments made other than by debit card

Sky Ireland €0.75 per month fee for payments by credit and debit card

Interflora €1.50 fee for credit card payments

Travelodge Hotels €2.00 fee for credit card bookings

*Information obtained from company websites and telephone enquiries and valid at June 2012.

Question 1

Are you aware of direct payment charges applied to consumer transactions by traders other than those listed in Box 1. If so, please give details.

Payment-Related Charges

27. While the charges outlined in Box 1 are, and are characterised by the traders concerned as, straight payment fees, other businesses apply fees that are variously termed 'administration', 'booking', 'handling' or 'service' charges. The businesses concerned appear to represent these charges as encompassing the cost of all aspects of the processing of bookings, including, though not limited to, the cost of processing payments for those bookings. Charges categorised in this way present different issues for the implementation of Article 19 than direct payment fees. The next sections discuss in turn the application of the provision to payment-related charges in air and sea passenger transport and in tickets for entertainment and other events.

'Administration', 'Handling' & 'Booking' Fees in Air and Sea Passenger Transport

28. A number of airlines and ferry companies operating in or from Ireland apply fees described as 'administration', 'booking' or 'handling' charges that are avoidable where the consumer makes payment by means of a specified payment instrument. Aer Lingus imposes an 'admin fee' of €6 per passenger per flight that does not apply where payment is made by Visa Electron. Ryanair apply an 'admin fee' of €6 per passenger per flight to card payments other than those made by Ryanair Cash Passport, the airline's branded pre-paid MasterCard.²⁵ Irish Ferries impose a €6 'handling' fee per booking which applies to all card payments except Visa Electron. Celtic Link Ferries apply a sliding scale of fees to card payments other than those made by Visa Electron.

Question 2

Are you aware of administration, service, booking or handling charges in the passenger transport or other sectors (other than those referred to in paragraph 28) that are avoidable by the use of a specified method of payment? If so, please give details?

29. Though there is no evidence that 'administration' or 'handling' costs have increased significantly in recent years, the corresponding fees charged by passenger travel companies have risen substantially. The 'admin fee' per passenger per flight for credit card payments applied by Ryanair, for example, has risen from €2.50 in 2006 to its current level of €6, an increase of 140 per cent. The fee increase for debit card payments has been even greater; in 2006, the charge applied by Ryanair to payments by Visa debit card was €1 compared with the current charge of €6. At the start of 2008, the fee applied to credit card payments by Aer Lingus was €3 per passenger per flight, and the debit (including Laser) card fee €1, compared with the current fee of €6 for both types of card. These increases have been imposed over a period in which the more or less complete transition to online-only bookings is

²⁵ Up to the end of 2009, Visa Electron was the Ryanair payment option which was not liable for fees. The airline's free payment option then became the pre-paid MasterCard, followed in March 2012 by the Ryanair Cash Passport. In addition to Ireland, the Ryanair Cash Passport is the cost-free option in the UK, Italy, Germany and Spain. Pre-paid Mastercard remains the cost-free option in other markets.

widely seen as having contributed to substantial gains in airlines' administrative and cost efficiency.²⁶

30. Over the past decade, airlines' ancillary revenues – revenues from in-flight sales, seat booking and excess baggage fees, credit and debit card payment charges, and commissions on car hire, hotel and insurance sales – have grown substantially in both absolute and proportionate terms.²⁷ Ancillary revenues in Aer Lingus rose from €47.3 million in 2005 to €168.7 million in 2011, increasing from 4.7 per cent to 13.6 per cent of passenger revenues.²⁸ Ancillary revenues in Ryanair increased from €190.9 million in the year ended 31 March 2005 to €886.2 million in the year ended 31 March 2012, rising from 14.5 per cent to 20.5 per cent of operating revenues. The importance of these revenues to some air carriers is apparent from the fact that ancillary revenue per booked Ryanair passenger in the year to 31 March 2012 was €11.69 or 25.8 per cent of the average booked passenger fare of €45.36.²⁹ Ancillary earnings on this scale are consistent with the practice discussed at paragraphs 8-9 of using partitioned pricing to lower the headline cost of goods or services.

31. The prevalence and level of 'administration' and 'handling' fees in the passenger transport sector have been important factors in the growth of consumer dissatisfaction with payment-related charges in Ireland and other countries.³⁰ Though it is still possible to make ferry bookings at the reservation offices of ferry companies in some cases and thus to make payments by means other than credit or

²⁶ *Consumer Protection Co-Operation Report on Airlines' Taxes, Fees, Charges and Surcharges*, op. cit., p. 21.

²⁷ Figures cited are from the Aer Lingus annual reports for 2005 and 2011 and the Ryanair annual reports for 2005 and 2012. <http://www.ryanair.com/doc/investor/2005/050830annualreport.pdf>, www.ryanair.com/doc/investor/2012/final_annual_report_2012_310712.pdf http://www.aerlingus.com/Corporate/Current_Report/AL_AnnualReport2005.pdf, <http://www.aerlingus.com/media/aerlinguscom/content/pdfs/corporate/AerLingusGroupplcAnnualReport2010FIN.pdf>

²⁸ Ancillary revenue accounted for 14.2 per cent of Aer Lingus passenger revenues in 2010, but grew more slowly than other passenger revenues in 2011.

²⁹ In the year to 31 March 2011, ancillary revenue per booked Ryanair passenger was €11.12 or 28.3 per cent of the average booked passenger fare of €39.24. www.ryanair.com/doc/investor/2011/Annual_Report_2011_Final.pdf

³⁰ Committee on the Internal Market and Consumer Protection European Parliament. 2011. *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights: Amendments 1135-1595*, p. 3. The Consumer Council of Northern Ireland. 2009. *The Cost of Paying*. Which. 2011. *Super-Complaint: Credit and Debit Surcharges*.

debit cards, flight bookings with Aer Lingus and Ryanair are now almost exclusively made through the airline's websites.³¹ Though the airlines and ferry companies concerned will point to the fact that they offer a payment option which incurs no administration charge, the Visa Electron option offered by Aer Lingus, Irish Ferries and Celtic Link Ferries is not available from any bank in the Republic of Ireland. To our knowledge, the only way in which a Visa Electron card can currently be obtained by persons resident in the Republic involves, first, the purchase of a One4All gift card and, second, the use of this gift card to purchase a One4All Virtual Visa Electron which is a Visa Electron Card.³² This is a complicated and circuitous method of obtaining a payment card and one that most consumers are unlikely to see as a practical option.

32. Though the Visa Electron card was formerly offered by a number of UK banks, it has been all but phased out in that jurisdiction.³³ A survey of air passengers undertaken by the Northern Ireland Consumer Council in February 2010, a time when several UK banks still offered the Visa Electron card, found that just 4 per cent of passengers had paid by this method compared with 81 per cent who had paid by other credit or debit cards.³⁴ As the Visa Electron card has been even readily less accessible in the Republic, the proportion of passengers paying by this method has almost certainly been lower in this jurisdiction. It is difficult to understand consequently why some air and sea passenger companies persist in advertising a charge-free payment option that is not available from any mainstream financial institution in the Republic of Ireland.

³¹ Over 99 per cent of Ryanair bookings are made online. Ryanair. 2009. 'Introducing www.ryanair.com', http://www.ryanair.com/doc/about/090831_fr_media.

³² The purchase of a One4All gift card is subject to an admin fee of €3.49 and a further fee applies to the purchase of the Virtual Visa Card. This fee is €2 where €15-30 is loaded onto the card, €5.00 where €31-70 is loaded onto the card, and €7 where sums over €70 are loaded onto the card. The One4All gift card can be used as a Visa Electron card for the purposes of online purchases with the company's forty eight online retail partners. Until 2008, the Visa Electron card was available in the Republic of Ireland in the form of an MBNA gift card.

³³ 'Visa Electron Cards to be Phased Out', BBC News 28 November 2009, <http://news.bbc.co.uk/2/hi/8384034.stm>. Halifax Bank appears still to supply Visa Electron cards in the UK primarily as part of current accounts aimed at students.

³⁴ Northern Ireland Consumer Council. 2010. *Flights and Rights*, p. 15. Just 3.7 per cent of the payment cards issued in the UK in 2009 were Visa Electron cards. Which. 2011. *Super-Complaint: Credit and Debit Surcharges*, op. cit., p. 63.

33. While the Ryanair Cash Passport can be ordered by consumers in Ireland on the company's website, it involves significant costs to the card holder.³⁵ There is a €10 fee for the issue of the card, though the cardholder receives a Ryanair flight voucher to this value. The minimum amount that can be loaded onto the card is €175 – equivalent to almost four flights at the average Ryanair fare in the year to March 2012 - and each subsequent online reload of the card attracts a fee of €3. A monthly 'inactivity' fee of €3 is debited from the card if it is unused for six or more months, and a 'negative balance fee' of €15 also applies. A 5.75 per cent fee applies to transactions in a different currency to that attached to the card; most cards offered by other providers appear to offer more advantageous terms in this respect.

34. The administration/booking/handling charges applied by airlines and ferry companies raise a critical issue about the scope of the payment fees provision at Article 19 of the Consumer Rights Directive. Unlike the direct payment surcharges discussed in the preceding section, the companies concerned make a point of differentiating these charges from payment fees proper. Ryanair is reported to have stated that it does not 'impose any credit or debit card fees' and that its administration charge 'relates to costs associated with Ryanair's booking system'.³⁶ It is difficult, however, to see how a fee that does not apply when a specified payment method is used, whether Visa Electron or a brand of pre-paid MasterCard, can be regarded as anything other than a payment fee. The charge-free payment options offered by air and sea carriers presumably involve costs to the companies comparable to those incurred by other payment instruments for which charges are imposed by these companies. Ryanair, for example, now applies its €6 'administration' fee to flights purchased with the formerly charge-free Visa Electron card and, in Ireland and a number of other countries, to those purchased with the formerly charge-free pre-paid Mastercard.³⁷

³⁵ A statement of the fees and conditions applicable to the Ryanair cash passport can be found at <http://www.cashpassport.com/1/en-ie/Ryanair/About/Fees--Limits>.

³⁶ *Reuters* 23 December 2011 'UK Plans to Ban Excessive Credit Card Surcharges'. <http://www.reuters.com/assets/print?aid=USL6E7NN1N520111223>. *Guardian*, 23 December 2011 'Ryanair Defiant over Credit Card Surcharges Crackdown', www.guardian.co.uk/money/2011/dec/23/ryanair-credit-card-surcharges-crackdown.

³⁷ <http://www.ryanair.com/en/questions/how-can-i-pay-for-my-flights>

35. It is difficult more generally to understand or accept the justification for traders charging consumers for the taking and processing of bookings that are managed directly by the trader. The processing of bookings is integral to functioning as a business and is not an optional or peripheral activity for traders. In the case of the airlines, moreover, bookings are now made almost exclusively online and the cost of processing them will not differ as it might have done in the past when consumers booked flights in different ways.

36. Subject to further consideration in the light of the responses to this consultation, it is proposed accordingly to provide in the Regulations which are to give effect to Article 19 that a charge to consumers, however described, that is avoidable where a specified payment instrument is used shall be regarded as a fee for the use of a means of payment for the purposes of the Regulations. The effect of such a provision would be to ensure that the administration or handling charges currently imposed by airlines such as Aer Lingus and Ryanair and sea carriers such as Irish Ferries and Celtic Link Ferries would be subject to the requirement of Article 19 that any such charge should not exceed the cost to the trader of the means of payment concerned.

Question 3

Should a provision along the lines proposed in paragraph 36 be included in the Regulations to give effect to Article 19 in order to encompass the payment-related charges applied by some airlines and ferry companies? If not, why not?

37. It would of course be open to the airlines and ferry companies in this event to abolish the charge-free payment option and to apply the administration or handling charge to all bookings. In the case of the airlines, however, such a course would require them to incorporate any such charge in the headline price of the air fare in order to ensure compliance with Article 23(1) of the Air Services Regulation. As outlined at paragraph 17, this provision requires airlines to include at all times in the final ticket price all 'charges, surcharges and fees which are unavoidable and foreseeable.' In the absence of a charge-free payment option, the airlines would no

longer be in a position to maintain that their administration charge was avoidable and would accordingly have to incorporate it into the headline fare price. The Northern Ireland Consumer Council has suggested in fact that the airlines have been exploiting a loophole in the Air Services Regulation in offering a charge-free payment option which enables them to maintain that their administration charges are avoidable and hence are exempt from the requirement to be included in the applicable air fare in accordance with Article 23(1).³⁸

38. Other commentators maintain that administration fees that are difficult for consumers to avoid should already be included in the air fare in order to ensure compliance with Article 23(1) of the Air Services Regulation. This applies in particular to the Visa Electron ‘charge-free’ payment option that is unavailable from any mainstream financial institution in Ireland. A study of Regulation (EC) 1008/2008 prepared for the European Commission noted that, although the legal status of payment fees that are difficult to avoid is unclear, such fees:³⁹

- might be considered an infringement of Article 23(1) ... depending on the interpretation of the word ‘unavoidable’;
- might be considered an infringement of the Unfair Commercial Practices Directive on the basis that the separation of fees is designed to mislead consumers; and
- where the fees can only be avoided with a payment mechanism that is specific to a given State appear likely to be a breach of Article 23(2) of the Air Services Regulation on non-discrimination.

39. Though Article 23(1) applies only to air carriers, a case can be made for the introduction of a similar measure that would apply to sea carriers. As outlined at Box 1, the pricing practices of some ferry operators are similar to those of airlines in regard to payment-related charges. Air and sea carriers operating out of Ireland are, for some destinations at least, in competition with one another. The introduction of

³⁸ Northern Ireland Consumer Council. 2009. *The Cost of Paying*, p. 4.

³⁹ Steer, Davies, Gleave. 2011. *Price Transparency Provisions in Regulation 1008/2008 and Other Relevant EU Legal Texts: Report Prepared for the European Commission*, pp. 19-20.

provisions on sea fares and rates comparable to those applicable to air fares and rates under Article 23(1) would, therefore, help to create a more level playing field between air and sea carriers in respect of this aspect of their consumer pricing practices.

Question 4

Should consideration be given to adopting a provision similar to Article 23(1) of the Air Services Regulation for sea carriers and/or other sectors. If so, which other sectors should be covered? If the provision should not be extended in this way, why not?

Booking Fees and Service Charges for Tickets to Entertainment and Other Events

40. It is common, though not universal, for tickets to entertainment and other events to be subject to a booking fee or service charge. While some venues undertake their ticketing services solely on an in-house basis, ticketing services for many events are provided through external ticketing service companies or through a combination of outsourced and in-house provision.⁴⁰ This represents an important difference between the ticketing services market and the passenger transport and other sectors discussed in preceding sections in which the processing of bookings and the taking of payments are undertaken directly by the trader and not outsourced to a specialist provider.

41. Ticketmaster, the main provider of ticketing services in Ireland, applies a 'service charge', agreed in consultation with promoters and other clients, to each ticket sold by it and its agents.⁴¹ This service charge is:⁴²

⁴⁰ Department of Enterprise, Trade and Employment. 2007. *Consultation on Consumer Information (Advertisements for Concert or Theatre Performances) Order 1997*.

<http://www.djei.ie/publications/commerce/2007/ConcertOrderCPJuly07.pdf>, paras. 16-18.

⁴¹ For an account of the Ticketmaster business model, see Competition Authority. 2005. *Alleged Excessive Booking Fees by Ticketmaster Ireland and its Exclusive Contractual Arrangements with MCD Promotions Limited and Aiken Promotions Limited* (Case COM/107/02),

http://www.tca.ie/images/uploaded/documents/e_06_001%20Ticketmaster.pdf

the main income for Ticketmaster and ... contributes to our credit/debit card processing services, merchant fees and distribution costs and also helps pay for the technology, including installation and maintenance of computer hardware and software, telephone lines, associated labour in addition to access control at venues...

The service charge for tickets purchased through Ticketmaster varies with the method of booking and/or the cost of the ticket. Tickets purchased through retail outlets that act as agents for Ticketmaster are subject to a service charge of €2.15 per ticket.⁴³ These agents commonly apply an additional fee to payments made by credit card; this fee is in the region of €2 on transactions up to €100, €4 on transactions between €100 and €200, and €6 on transactions over €200. The service charge for tickets purchased through Ticketmaster's online and telephone booking system is generally 12.5 per cent per ticket up to a maximum charge of €6.10.⁴⁴

42. Other ticketing service providers do not apply a separate service charge, or do so only for some events. While Tickets.ie 'reserves the right to levy a charge for any particular charge provided to the customer', it does not appear to apply such charges in practice.⁴⁵ The cost of ticketing services is incorporated instead in the price of the face value of the ticket. Entertainment.ie.tickets charge a booking fee to the promoter or venue that is based on the face value of the ticket.⁴⁶ This fee is charged to the ticket buyer in some cases as an add-on to the ticket price, and in others is incorporated in the face value of the ticket.

43. There is similar variation in pricing practices among venues that process bookings and payments in-house. The Gate Theatre, for example, applies a flat €3 fee to online bookings. The Abbey Theatre and the National Concert Hall do not apply booking fees, but request a voluntary donation of €2 per transaction as a contribution to the maintenance of the services provided by each venue. The

⁴² Ticketmaster. 'Ticket Prices, Charges and Fees', http://www.ticketmaster.ie/h/service_charges.html

⁴³ For some advertised events, this charge is €2.25.

⁴⁴ For some advertised events, the maximum charge is €6.35.

⁴⁵ Tickets.ie – Terms and Conditions, <http://www.tickets.ie/B2C.aspx.Terms>

⁴⁶ Entertainment.ie tickets. Client Service Agreement, <http://www.entertainment.ie/ticketsclientserviceagreement.asp>

majority of cinemas apply a fee to bookings made online or, in some cases, by telephone. These fees are typically of the order of 50c per ticket or 80c to €1 per booking.

Question 5

Are you aware of service, booking or handling charges not avoidable by the use of a specified payment method (other than those referred to in paragraphs 41-43) that apply to event tickets or in other sectors. If so, please give details.

44. The separate presentation of ticket prices and service/booking charges in advertisements for concert and theatre performances is in accordance with the current legislative provisions applicable to such events. The Consumer Information (Advertisements for Concert or Theatre Performances) Order 1997 (S.I. No. 103/1997) provides as follows:

3. In every written advertisement for a public concert or theatre performance the admission price must be indicated and, where applicable, and separately, the amount, in monetary or percentage terms, of any additional charges and the circumstances in which such charges are payable.
4. In all other forms of advertising the admission price must be stated together with a reference to the fact that an additional charge may be payable in certain circumstances.

The apparent failure to indicate in advertisements that an additional fee applies where bookings made through a Ticketmaster agent are paid for by credit card may be in breach of this provision.

45. Though service charges and booking fees for entertainment and other events are the subject of regular criticism from consumers, the question as to whether they come within the scope of Article 19 as drafted is not clear-cut. As outlined at paragraph 5, Article 19 refers to fees 'in respect of the use of a given means of payment'. Though the service charges applied, for example, by Ticketmaster to online and telephone bookings clearly include the costs incurred in processing credit and debit card payments, they also cover the costs of a range of other aspects of the operation of the ticket administration and distribution services provided by the

company. Unlike in the case of the air and sea carriers discussed in the preceding section, moreover, these charges are not avoidable where the consumer makes payment by means of a specified payment instrument.

46. If service charges for entertainment and other events that include, but are not limited to, payment fees, are to come within the scope of the Regulations that will give effect to Article 19, there may be a case for making express provision for their inclusion. A provision of this kind would stipulate that, where a charge described as a service, booking or other charge which is not avoidable by the use of a specified payment method, includes a fee for the use of a means of payment, that element of the charge shall not exceed the cost borne by the trader for the use of such means of payment. It would be necessary in this event to require the trader to indicate separately the payment fee element of the service or other charge.

Question 6

Should a provision along the lines proposed in paragraph 46 be included in the Regulations to give effect to Article 19 in order to encompass the charges applicable to tickets for entertainment and other events? If not, why not?

Price Rebates for Payment by Direct Debit

47. A number of businesses, mainly in the utilities sector, offer a price reduction to customers who pay their bills by direct debit. These reductions typically apply only to new customers and/or to customers who sign up for particular price plans. Electric Ireland offers a reduction of 4 per cent to new electricity customers, and of 2 per cent to new gas customers, who undertake to pay their bills by direct debit. Airtricity offer discounts of 3 to 7 per cent to new electricity and gas customers who sign up to 12 or 24 month fixed term contracts and agree to pay by direct debit. Bord Gais Eireann offer a 2 per cent reduction to new electricity customers who pay by direct debit. Flogas offer a rebate of up to 8 per cent to new customers who undertake to pay by direct debit. While UPC formerly offered a monthly reduction of

€3 to direct debit customers, a 'payment administration charge' of €3.75 per month applies from August 2012 to customers who pay by means other than direct debit.

48. In addition to price rebates, utility companies commonly require security deposits from new customers who pay by methods other than direct debit. Electric Ireland requires a €300 deposit from such customers. This is refundable after 14 months if the customer has a satisfactory payment history. Airtricity also requires a €300 deposit from new non-direct debit customers, though this may be refunded after 12 months if the customer has a good payment record. Bord Gais Eireann require a security deposit of €300 from first-time tenant customers who pay by methods other than direct debit compared with a €200 deposit for equivalent direct debit customers.

49. The rebates on offer to direct debit customers would not appear to derive only or even mainly from the greater efficiency of this method of payment. The cost to utilities companies of processing a direct debit transaction is unlikely to differ significantly from that of processing a debit card payment, though it is likely to be lower than the cost of processing a credit card payment. It would appear instead that businesses with a potentially long-term relationship with customers who are billed on a monthly or bi-monthly basis regard direct debit as more reliable and regular than other payment methods and as one that may also make customers more likely to remain with the company.

50. While it is possible to argue that price rebates for payment by direct debit effectively represent a charge for the use of other means of payment, it has been clarified with the European Commission that such rebates are not a fee 'in respect of the use of a given means of payment' with the meaning of Article 19. The option of bringing rebates for particular payment methods within the scope of the provision would appear to be precluded in any event by the Payment Services Directive. As outlined at paragraph 13, Article 52(3) of this Directive empowers Member States to forbid or limit payment charges subject to specified conditions, but gives no such right in respect of price reductions for the use of a given payment instrument. The

security deposits required of customers who pay by means other than direct debit, however, are more clearly a fee in respect of the use of a given means of payment and, as such, would appear to come within the scope of Article 19. The 'payment administration charge' applied by UPC to non-direct debit customers would appear similarly to come within the scope of Article 19.

51. The preceding paragraphs have sought to outline the principal sectors in which consumer transactions are subject to payment or payment-related fees. The fact that such fees apply does not mean of course that the fees imposed in any individual case will be in breach of Article 19. Whether or not the fees applied by a trader are in compliance with the provision will depend on whether or not they 'exceed the cost borne by the trader for the use of such means'. The next section deals with the cost of payment to traders and focuses in particular on the cost of credit and debit card payments as these are the payment methods for which consumers are most likely to be charged fees.

IV FEES THAT EXCEED THE COST BORNE BY THE TRADER

52. While the fees payable by consumers for the use of means of payment are, of their nature, public and readily ascertainable, the cost of those means of payment to the trader is more complex and less transparent. In the case of payment card transactions, these costs differ for different types of card transaction and also vary considerably depending on the turnover, business sector and other characteristics of the trader. It will be a matter for consumer enforcement authorities to investigate, and ultimately for the courts to decide, in any individual case whether the charges imposed on consumers for the use of a means of payment exceed the cost of the payment method or methods to the trader. The next sections look at the cost to traders of debit and credit card payments.

The Structure of Card Payments

53. Where a consumer pays a trader with a credit or debit card, the transaction typically involves three other parties as follows:⁴⁷

- **the card scheme**, such as Visa or MasterCard, which licences banks or other entities to issue cards to cardholders and to sign up traders to accept card payments, and which sets the rules for the operation of the scheme;
- **the card issuer** – the bank that issues the card to the consumer and provides the ongoing payment and credit services associated with the use of the card;
- **the acquirer** – the bank or payment service provider that manages card transactions on behalf of the trader under a merchant agreement.

When a card payment is made, the issuer, acting for the cardholder, pays the retail price of the goods or service, minus an interchange fee, to the acquirer, acting for the trader; the issuer is reimbursed in turn by the cardholder. The interchange fee is either set, as in Ireland, by the card scheme or, as in some countries, agreed bilaterally between issuing and acquiring banks. Though the trader receives the full retail price from the acquirer, this is subject to a merchant service charge (MSC) fixed under the merchant agreement between the trader and acquirer.

54. The merchant service charge payable by the trader to the acquiring bank is made up of three main elements:

- the interchange fee paid by the acquirer to the card issuer;
- the fees paid by the acquirer to the scheme such as Visa or MasterCard; and
- the margin retained by the acquirer to cover costs and profit.

In addition to the merchant service charge, traders may pay other transaction or overhead fees to an acquirer or a payment intermediary.⁴⁸ Apart from fees paid to acquirers, the principal other cost entailed by card payments is the administrative cost incurred by the trader in processing payments and the costs of fraud and risk

⁴⁷ In three-party schemes, such as those operated by American Express and Diner's Club, the scheme owner also acts as the card issuer and acquirer.

⁴⁸ Payment services intermediaries in some cases provide some or all of the services provided by acquirers. Where they do so, the intermediary may deal with the acquirer for the trader, and charge the latter a mark-up on the fee set by the acquirer. Intermediaries may also provide other services to traders in areas such as the management of online payments and fraud detection.

management. The next section looks briefly at these different elements of the cost of card payments.

55. The charges paid by traders for card transactions are, of course, separate from, and additional to, any charges payable by consumers for the same transactions. The increasingly restrictive conditions applied to free banking transactions for personal customers mean that card transactions that were once free of cost to consumers are now increasingly liable to standing and/or transaction charges.⁴⁹

Merchant Service Charges and Other Acquirer Fees

56. For most traders, the merchant service charge applicable to payment card transactions is the largest single element of the cost of accepting such payments. For credit cards transactions, the MSC is typically fixed at a percentage of the transaction value, while for debit card transactions it is more commonly, though not universally, a flat fee. Businesses that apply payment or payment-related charges are sometimes criticised for the fact that, where a consumer makes a number of separate bookings in one transaction, these charges are usually applied to each of the bookings rather than to the transaction as a whole. While this criticism is valid for transactions where debit card payments are subject to a flat fee, the merchant service charge for credit card transactions generally applies on an ad valorem or percentage basis and will thus increase pro rata with the price of the transaction. If, for example, a consumer pays by credit card for four airline or entertainment tickets costing €100 each and the trader's merchant service charge for credit card payments is 2 per cent, the charge to the trader for the transaction will be €8 compared with a €2 charge for one ticket. Other aspects of the unit cost of processing card payments, in particular the administrative cost incurred by the trader, however, should fall where a number of bookings are made in a single transaction.

57. The information available to us suggests that the merchant service charge for small businesses in Ireland is typically of the order of 1.5 per cent to 2.5 per cent for

⁴⁹ For details of consumer current account charges, see <http://compare.NCA.ie/CurrentAccount> .

credit card transactions and 15-50 cent for Laser and other debit card transactions.⁵⁰ Less is known about the charges applicable to larger businesses, though it is generally believed that these have sufficient bargaining power in most cases to negotiate substantially lower charges. Though no data were given for individual Member States, the European Commission's Inquiry into Retail Banking found that the merchant service charges for small businesses under the Visa and MasterCard schemes in 2000-2004 was around 70 per cent higher than that for large businesses.⁵¹ Applying this EU-wide differential to the Irish figure for small businesses would suggest that the average charge for large businesses in Ireland is under 1 per cent. It must be borne in mind, however, that relatively few Irish businesses qualify as large businesses under the definitions employed by the European Union.⁵²

58. The European Commission study also found sizeable sectoral differences in the level of merchant service charges. Among large businesses, the highest average charges were found in hotels, airlines and contracted services, while among small businesses the highest charges applied in car rentals, restaurants, grocery stores and travel agencies.⁵³ The above-average MSCs for airlines and hotels may reflect the fact that card transactions in the airline sector in particular are predominantly 'card not present' transactions which are subject to higher interchange fees. A recent analysis of acquirers' fees in the UK by the Office of Fair Trading confirmed the large-

⁵⁰ Laser Card, the national debit card established by the Irish banks in 1995, is in the process of being wound down and replaced by Visa Debit and Debit MasterCard.) Bank of Ireland, while still operating Laser cards, has ceased to issue them and expects to complete its transition to Visa Debit by October 2012. AIB will begin its rollout of Visa Debit Cards, and the associated replacement of Laser cards, in 2013 and expects to complete the process in the first quarter of 2014. National Irish Bank intends to cease issuing Laser cards by end-2012 and will replace them with Visa Debit cards. EBS is now issuing Debit MasterCard, while Permanent TSB and Ulster Bank have replaced their Laser cards with Visa Debit cards. The interchange fees for Visa Debit and Debit MasterCard are higher than the fee for Laser Card and this is, and will be, reflected in the Merchant Service Charge for transactions made with these payment instruments.

⁵¹ European Commission. 2006. *Sector Inquiry on Retail Banking: Interim Report I Payment Cards*, pp. 35-40. www.ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_1.pdf

⁵² The EU defines as a large business as one with 250 or more employees and with an annual turnover of €50m. or more and/or an annual balance sheet total of €43m. or more. European Commission. 2005. *The New SME Definition*, p. 5 et passim, http://www.ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf

⁵³ European Commission. 2006. *Sector Inquiry on Retail Banking: Interim Report I Payment Cards*, op. cit., pp. 40-42.

scale variation in merchant service charges.⁵⁴ In the travel sector, including airlines, the MSC for debit card transactions ranged from £0.01 to £1.50 with the average charge being £0.30. For credit card transactions, the charge ranged from a low of 0.12 per cent to a high of 4.70 per cent, with the average being 1.80 per cent.

59. Data on interchange fees can also shed light on the level of merchant service charges. These fees are generally held to be the largest single component of the MSC.⁵⁵ Arising from agreements with the European Commission, Visa and MasterCard publish the interchange fees set by them for domestic and cross-border card transactions in Ireland and other EU member states.⁵⁶ Different fees apply to different types of consumer card transaction, while commercial (i.e. non-consumer) payment card transactions are typically subject to higher fees. The fees applicable to the main types of domestic consumer card transaction in Ireland are outlined in table 1.

⁵⁴ Office of Fair Trading. 2011. *Payment Surcharges: Response to the Which? Super-Complaint*, op. cit., pp. 66-68.

⁵⁵ The UK Office of Fair Trading has estimated that 'In general, around seventy per cent of the MSC is made up of the multilateral interchange fee that the acquirer pays to the card issuer.' Ibid., p.63. The European Central Bank has noted that 'Interchange fees are usually the main component of the merchant's service commission'. European Central Bank. 2011. *Interchange Fees in Card Payments*, op. cit., p. 11.

⁵⁶ The European Commission has taken action against the interchange fees applied to cross-border transactions by MasterCard and Visa. In 2007, the Commission published a decision that MasterCard's cross-border interchange fees were in breach of European Treaty rules on restrictive business practices. This decision led MasterCard to apply a new methodology to the fees for cross-border transactions which resulted in a reduction in the maximum weighted average fee per transaction of 0.30 per cent for consumer credit cards and 0.20 per cent for consumer debit cards. An action brought by MasterCard and a number of banks for annulment of the Commission's decision was the subject of a judgment of the General Court of the European Union in May 2012 (Case T-111/08 MasterCard Inc and Others v Commission). The Court dismissed the action and upheld the decision of the European Commission. MasterCard have indicated that they will appeal the decision to the European Court of Justice, though such appeals are limited to points of law. In 2009, the European Commission communicated its preliminary view to Visa Europe that its interchange fees restricted competition. Under a settlement with the Commission, Visa agreed to reduce the maximum weighted interchange fee for cross-border debit card transactions, and for domestic debit card transactions in countries such as Ireland where the interchange fee was set directly by Visa, to 0.2 per cent of the value of the transaction. This settlement was made legally binding by a Commission decision of December 2010 which will apply for four years. Competition authorities in a number of countries, including several EU member states, have also acted to regulate interchange fees. Notwithstanding the reductions resulting from such actions, it is noteworthy, as the European Commission have pointed out that the scale effects that might have been expected from the steep increase in the volume of card payments over the past decade have not led to any significant fall in the charges to consumers for, or the costs to businesses of, card payments. European Commission. 2011. *Green Paper: Towards an Integrated European Market for Card, Internet and Mobile Payments*, op. cit., p. 2.

Table 1		
Domestic Interchange Fees for Consumer Cards in Ireland		
	Debit	Credit
VISA		
Low Value Payments*	€0.05	n/a
Chip and PIN	€0.10	0.55%
Card Not Present CVV2**	€0.15	0.75%
Card Not Present	€0.20	1.30%
MASTERCARD		
Paypass***	€0.05	0.80%
Chip and PIN	€0.10	0.80%
Merchant UCAF****	€0.12	0.95%
Full UCAF*****	€0.23	1.20%

*Applies to contactless and chip and PIN transactions between €2 and €15.

**A transaction in which neither the card nor the cardholder is physically present such as online or telephone transaction. A card not present CVV2 transaction is one in which a three-digit security code is given by the cardholder.

***Contactless payments up to €25. These are yet to come on-stream in Ireland.

**** An e-commerce transaction where SecureCode verification is deployed by the merchant.

***** An e-commerce transaction where SecureCode verification is deployed by both the merchant and the cardholder's issuer.

Source: www.visaeurope.com/idoc.ashx?docid=3e03c9aa-85f-4ccc
<http://www.mastercard.com/us/wce/PDF/Ireland.pdf>

It can be seen that transactions at greater risk of fraud because of the absence of card security features are generally liable to higher fees. In some cases, acquirers also charge fees in addition to the merchant service charge for certain transactions, most commonly 'charge-backs' – that is, the refund of a payment to a consumer's account where a purchase or other transaction is reversed due to a dispute with the consumer or their card issuer.

60. Acquiring banks and intermediaries also commonly charge small and medium-sized traders fees for the installation and rental of payment terminals and other equipment. Installation or set-up fees for small traders appear to be of the order of €100-€250, while monthly rental fees range from €20 to €40. A monthly minimum merchant service charge of €30 or more also commonly applies under merchant agreements. For small businesses with a modest volume of card transactions, these overhead and minimum fees can constitute a sizeable part of the overall cost of processing card payments. Such fees are non-existent or minimal for larger traders

as they either own the equipment used to process payments – though the purchase and maintenance of such equipment is obviously a cost to the trader - or the volume of transactions renders fixed fees relatively insignificant.

61. The administrative cost to the trader of processing a payment is probably the aspect of the payment cost issue about which least information is available. It is widely accepted, however, that electronic payment methods such as payment cards and direct debit are more efficient than paper-based methods such as cash or cheques.⁵⁷ Where a retailer takes payment by means of a credit or debit card, the only operating cost that arises would appear to result from the staff costs incurred by the trader during the brief period while the card is being read or swiped. The other elements of the payment transaction are undertaken by the issuing and acquiring banks in return for the interchange fee and merchant service charge discussed above. Cash, by contrast, must be collected, counted, grouped by denomination, and conveyed to the bank by the trader, and can also give rise to significant security costs.

62. The final types of cost associated with card payments are those arising from fraud and risk management. Again, there is a lack of reliable data in the public domain about these costs, though they are understood to vary significantly with the sector and other characteristics of the trader. Fraud losses for face-to-face transactions are also believed to have declined significantly since the introduction of chip and PIN technology. Retailers who utilise card scheme tools such as 3D Secure for card not present transactions are protected against fraud-related chargebacks and may also pay reduced merchant service charges.

Question 7

Are the figures on the costs of payment to traders cited in paragraphs 57 and 60 broadly accurate? Information on these costs would be welcomed in responses to this consultation and will be treated in confidence.

⁵⁷ For discussions of the greater efficiency of electronic payment methods, see the studies cited at footnote 3 above.

What Costs Should Be Assessable For the Purposes of Article 19?

63. As the foregoing account suggest, payment costs are characterised by considerable complexity and diversity. It is not proposed accordingly to specify in the implementing legislation what costs are to qualify for the purpose of determining ‘the cost borne by the trader’ for the use by consumers of a given means of payment. The Directive does not define or elaborate on this cost, and the matter would be more appropriately dealt with by means of guidance to traders than by statutory provisions. It would be helpful for the purposes of any such future guidance to get views on the costs of payment that should be taken into account for the purpose of determining ‘the cost borne by the trader’. Subject to further consideration in the light of the responses on this issue, the Department’s view is that only costs arising directly from the use of a particular means of payment should be considered in this context. In the case of credit or debit card payments, for example, the cost borne by the trader would include the merchant service charge, any additional charges for chargebacks or other transactions, fees to payment services intermediaries, IT and other equipment costs directly relating to the processing of card payments, as well as such operating costs as can be shown to result directly from the processing of these payments. It is less clear-cut whether other costs arising from card payments, such as fraud losses or penalties imposed by card companies, should qualify as costs assessable for the purposes of Article 19. Costs incurred under these headings may be attributable in some cases to the trader’s failure to comply with security requirements or other card scheme rules. Indirect costs such as the cost of training staff to process payments, or of establishing and maintaining websites, should not, in our view, be included in the assessment of ‘the cost borne by the trader’. Nor should general business overheads such as the cost of telecommunications or other utilities.

Question 8

Do you agree that only costs arising directly from the use of a given means of payment should be taken into account in determining the ‘cost borne by the trader’ for the purposes of Article 19? If not, what other costs should be taken into account in your view?

V ARTICLE 22 ADDITIONAL PAYMENTS

64. Article 22 of the Consumer Rights Directive provides that:

Before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.

In the original text of the Directive, Article 22 formed part of the provisions on the transparency requirements of contract terms at Article 31 of Chapter V on unfair contract terms. Though the remainder of Chapter V was deleted from the final text of the Directive, this provision was retained with virtually unchanged wording.

65. The provision at Article 22 has two distinct, though closely linked, elements. The first part of the Article seeks to tackle hidden extra charges on consumers by requiring traders to seek the consumers' explicit agreement to any payment additional to that agreed for the goods or services that form the main part of the bargain between the two parties. This provision can be seen as an amplification of the transparency rules in Directive 93/13/EEC on unfair terms in consumer contracts. Article 5 of the Directive provides that written contract terms 'must always be drafted in plain, intelligible language' and that 'where there is doubt about the meaning of a term' the 'interpretation most favourable to the consumer shall prevail'. Recital 20 of the Directive states that 'the consumer should actually be given an opportunity to examine all the terms.'⁵⁸ The second part of Article 22 deals with the more specific circumstance where the consumer's consent to any payment additional to that for the main contractual obligation is inferred by means of default or opt-out provisions. The most common form of such default options are the so-called pre-ticked boxes encountered on some websites which commit the consumer

⁵⁸ In *Interfoto Picture Library v Stilleto Visual Programmes Ltd* [1989 QB 433], the English Court of Appeal held, among other things, that unusual or onerous contract terms must be fairly brought to the attention of the other party. This judgment has been endorsed by Irish courts in a number of cases; see *Carroll v An Post National Lottery Co.* [1996 1IR 433]; *Finnegan v J.E. Davy* [2007 IEHC 18] and *McCabe Builders (Dublin) Ltd v Sagamu Developments Ltd* [2007 IEHC 391].

to paying for additional services or goods unless he or she unticks the box or boxes concerned.

66. A number of the enforcement sweeps carried out since 2007 by consumer authorities in EU member states have found evidence of anti-consumer practices in the areas of additional payments and opt-out payment mechanisms. The 2007 airline ticket sweep revealed that ‘the practice of using pre-checked boxes to offer additional services with the purchase of the air ticket, such as travel insurance, ranks among the most frequent irregularities found by the authorities.’⁵⁹ The 2009 sweep of websites offering mobile phone content services (i.e. ring tones, chat services, phone games etc.) undertaken in 2009 found evidence of services advertised as ‘free’ which were not in fact free as well as unclear disclosure of key information whether by hiding it in small print or presenting it in an ambiguous or untimely way.⁶⁰ The 2009 sweep of websites selling consumer electronic goods disclosed a sizeable number of instances involving misleading information about the total price of the goods.⁶¹ Information on additional delivery charges was either absent or difficult to find, while some websites applied delivery charges despite having promised ‘free delivery’. The 2010 sweep of websites selling tickets for cultural and sporting events similarly found that missing, incomplete or misleading price information was provided to consumers in a substantial number of cases.⁶²

⁵⁹ Consumer Protection Cooperation Network. 2008. *Can You Trust Air Ticket Selling Sites?: An Internet Sweep by the Enforcement Network*, op. cit., p.16.

⁶⁰ European Commission. 17 November 2009. ‘EU clean-up on ringtone scams: Frequently Asked Questions.’ <http://europa.eu/rapid/PressReleasesAction.do?reference=MEMO/09/505&type=HTML> . The Code of Practice on Premium Rate Services issued by the Commission for Communications Regulation in April 2012 requires the providers of premium rate services supplied through an electronic communications network or service to ensure, among other things, that end-users are informed clearly, comprehensively and unambiguously of the full and true cost of using such a service prior to incurring such a charge. Any costs, additional to the cost of the service, must also be conveyed in a transparent, prominent and clear manner. http://www.comreg.ie/publications/code_of_practice_premium_rate_services.505.104073.p.html , paragraph 4.8 et passim.

⁶¹ European Commission. 9 September 2009. ‘Consumers: EU crackdown on websites selling consumer electronic goods’ . <http://europa.eu/rapid/PressReleasesAction.do?reference=IP/O9/1292&format=HTML&aged=1&language=EN^guiLanguage=EN> .

⁶² European Commission. 16 September 2010. Sweep Investigations. Frequently Asked Questions: 2010 Sweep on tickets for cultural and sporting events (first phase). <http://europa.eu/rapid/PressReleasesAction.do?reference=MEMO/10/41/418&format=HTML&aged=1&language=EN^guiLanguage=en> .

67. As outlined at paragraph 17, Article 23(1) of the Air Services Regulation requires air carriers to indicate both the final price of flights and any taxes and charges added to the air fare or rate. In response to concerns about the prevalence of payment supplements in airline ticket sales and the application of default payment options to some such supplements, the following provision was also included in Article 23(1):

Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an opt-in basis.

The European Court of Justice has clarified the purpose and application of this provision as follows:⁶³

optional price supplements therefore relate to services, which supplementing the air service itself, are neither compulsory nor necessary for the carriage of passengers or cargo. It is precisely because the customer is in a position to make that choice that such price supplements must be communicated in a clear, transparent and unambiguous way at the start of any booking process and that their acceptance by the customer must be on an opt-in basis... That specific requirement in relation to optional price supplements ... is designed to prevent a customer of air services from being induced, during the process of booking a flight, to purchase services additional to the flight proper which are not unavoidable and necessary for the purposes of the flight, unless he expressly chooses to purchase those additional services and to pay the corresponding price supplement.

The provision at Article 22 of the Consumer Rights Directive can be seen as an extension to all consumer contracts within the Directive's remit of the provision at Article 23(1) that applies only to air fares and air rates.⁶⁴

68. There is relatively little firm information available on the extent to which traders in Ireland claim payment for remuneration additional to their main contractual obligation without first seeking the consumer's express consent. The level of recourse to default payment options or 'pre-ticked boxes' is similarly unclear. As noted above, such practices were common in the past in the European airline sector, but have been addressed by Article 23(1) of the Air Services Regulation. Misleading pricing practices, including the advertising of 'free services' that prove to involve significant costs for the consumer, have been a feature of the market in telephone

⁶³ European Court of Justice Case C-112/11. *e.bookers.com Deutschland GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände*, paragraphs. 14-15.

⁶⁴ *Ibid.*, paragraph 16.

content services and other premium rate telecommunications services. Information on such practices in these and other sectors would be welcome in responses to this consultation.

Question 9

Are you aware of cases where traders seek extra payment in addition to the payment agreed for their main contractual obligation without seeking the consumer's express consent? If so, please give details.

Question 10

Are you aware of cases where traders use default payment options, such as pre-ticked boxes, which the consumer is required to reject in order to avoid having to make a payment additional to that that agreed for the main contractual obligation? If so, please give details.

VI THE SCOPE OF ARTICLES 19 AND 22

69. The scope of Articles 19 and 22 is determined, in the first instance, by the scope of the Directive. Article 3(1) of the Directive states that it:

shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity, or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.

Article 3(3) of the Directive provides that the Directive shall not apply to contracts in the sectors and activities set out in Box 2 below. Member states may, however, apply the Directive's provisions to exempted sectors in national legislation.⁶⁵

⁶⁵ Recital (13) of the Directive states that: 'Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope, Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive.'

BOX 2

EXEMPTIONS FROM SCOPE OF CONSUMER RIGHTS DIRECTIVE

Contracts -

- a) for social services, including social housing, childcare, and support of families and persons permanently or temporarily in need, including long-term care;
- b) for healthcare, as defined in point (a) of Article 3 of Directive 2011/24/EU,⁶⁶ whether or not they are provided via healthcare facilities;
- c) for gambling, which involves wagering a stake with pecuniary value in games of chance, including lotteries, casino games and betting transactions;
- d) for financial services;⁶⁷
- e) for the creation, acquisition or transfer of immovable property or of rights in immovable property;
- f) for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes;
- g) which fall within the scope of Council Directive 90/314/EEC on package travel, package holidays and package tours;⁶⁸
- h) which fall within the scope of Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts;⁶⁹
- i) which, in accordance with the laws of Member States, are established by a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope;
- j) for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;
- k) for passenger transport services, with the exception of Article 8(2) and Articles 19 and 22;⁷⁰
- l) concluded by means of automatic vending machines or automated commercial premises;
- m) concluded with telecommunications operators through public payphones for their use or concluded for the use of one single connection by telephone, Internet or fax established by a consumer.

⁶⁶ This defines 'healthcare' as 'health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices'.

⁶⁷ Defined in Article 2(12) of the Directive as 'any service of a banking, credit, insurance, personal pension, investment or payment nature'.

⁶⁸ Given effect in Ireland by the Transport (Travel Trade) Acts 1982 and 1995.

⁶⁹ Given effect in Ireland by the European Union (Protection of Consumers in respect of Timeshare, Long-Term Holiday Product, Resale and Exchange Contracts) Regulations 2011, S.I. No. 73/2011.

⁷⁰ Article 8(2) of the Directive deals with information and related obligations on the trader where 'a distance contract to be concluded by electronic means places the consumer under an obligation to pay'.

70. The sectoral exemptions from the scope of the Directive outlined in Box 2 were adopted for different reasons. Some were included because the sectors in question were already subject to detailed regulation under EU legislation. This applies in particular to financial services, package travel, timeshare, and passenger transport.⁷¹ While the sectoral EU legislation in these areas contains substantial overlaps with other elements of the Directive, however, it does not contain provisions similar in substance to Articles 19 and 22. The exemptions for contracts in the areas of immovable property, social services, healthcare and gambling were adopted because it was held that the nature of these activities made them either inappropriate to regulation by European Union legislation of the kind proposed or, at least, more appropriate to regulation at national level.⁷²

71. A key issue for decision in relation to Articles 19 and 22, therefore, is whether or not to apply the provisions to contracts in all, none or some of the excluded sectors. Subject to further consideration in the light of the responses to this consultation, it is proposed that the provisions of Article 19 on fees for the use of means of payment and Article 22 on additional payments should, with the exception of financial services for reasons set out in paragraph 73 below, apply in Irish legislation to all of the sectors excluded from the scope of the Consumer Rights Directive. These provisions would not impose a significant burden on businesses in the sectors in

⁷¹ Recital (32) of the Directive states that the ‘existing Union legislation, inter alia, relating to consumer financial services, package travel, and timeshare contains numerous rules on consumer protection. For this reason, this Directive should not apply to contracts in those areas.’ Recital 27 states that passenger transport ‘should be excluded from the scope of this Directive as it is already subject to other Union legislation or, in the case of public transport and taxis, to regulation at national level’, but adds that the ‘provisions of the Directive protecting consumers against excessive fees for the use of means of payment or against hidden costs should apply also to passenger transport contracts.’

⁷² ‘Contracts related to the transfer of immovable property or of rights in immovable property or to the creation or acquisition of such immovable property or rights, contracts for the construction of new buildings as well as contracts for the rental of accommodation for residential purposes are already subject to a number of specific requirements in national legislation... The provisions of this Directive are not appropriate to those contracts which should be therefore excluded from its scope.’ (Recital 26). ‘Social services have fundamentally distinct features that are reflected in sector-specific legislation, partially at Union level and partially at national level... The provisions of this Directive are not appropriate to social services which should be therefore excluded from its scope.’ (Recital 29). ‘Healthcare requires special regulations because of its technical complexity, its importance as a service of general interest as well as its extensive public funding... The provisions of this Directive are not appropriate to healthcare which should therefore be excluded from its scope.’ (Recital 30).

question as their purpose is to promote price transparency and to prevent practices that can mislead consumers. They will apply only where businesses impose payment fees or use default payment options and, as is evident from the discussion in earlier sections of this paper, these practices are, with the exception of package travel where some traders apply payment fees, not common in the sectors excluded from the scope of the Directive. In some exempted sectors such as gambling, there would appear to be potential for the imposition of payment or payment-related fees. If businesses in the sectors concerned impose excessive payment fees, demand additional payments without seeking the consent of the consumer, or have recourse to default payment options such as pre-ticked boxes, it is difficult to see why they should not be subject to the same rules as apply to businesses in the rest of the economy.

72. In considering this issue, it is important to keep in mind that the sectoral exemptions outlined in Box 2 were adopted in the light of the Directive's provisions as a whole, and not the specific provisions of Articles 19 and 22. These exemptions had in fact been agreed before the inclusion of Article 19 in the Directive. The rationales for the exemptions are also of little or no relevance to Articles 19 and 22. The other European Union legislation applicable to the sectors in question does not contain provisions directly comparable to either Article. The concerns that prompted the exclusion of healthcare and social services are also less applicable to Ireland where payment for these services is more common than in many other EU member states.

73. Though Article 19 was not intended to apply to the charges applied to consumers by banks for the use of credit or debit cards or other means of payment, it can be argued that, as worded, it does in fact apply to such transactions. Such charges might be said to comprise fees 'in respect of the use of a given means of payment' within the meaning of the provision. As bank charges are subject to detailed regulation by the Central Bank under section 149 of the Consumer Credit Act 1995,⁷³ bringing

⁷³ Section 149, among other provisions, requires credit institutions to notify the Central Bank of new charges or increases in existing charges in relation to the provision of any service to customers, and

them within the scope of the legislation that will give effect to Article 19 would represent unnecessary and undesirable regulatory duplication. The practices covered by Article 22 are similarly subject to detailed regulation under the Consumer Protection Code for Financial Services.

Question 11

Should Article 19 and/or Article 22 be applied to all of the sectors excluded from the scope of the Consumer Rights Directive other than financial services? If not, why not?

Exemption of Low-Value Off-Premises Contracts

74. Article 3(4) of the Directive further provides that:

Member States may decide not to apply this Directive or not to maintain or introduce corresponding national provisions to off-premises contracts for which the payment to be made by the consumer does not exceed €50. Member States may define a lower value in national legislation.

An off-premises contract as defined in the Directive refers principally to a contract concluded in the simultaneous physical presence of the trader and consumer in a place which is not the place of business of the trader – for example a sale or other transaction made in the consumer’s home. This exemption follows a similar provision in Directive 85/577/EEC on Contracts Negotiated Away from Business Premises and was primarily included in order to permit Member States to reduce the regulatory burden applying to such transactions by dis-applying the Directive’s provisions on information and withdrawal rights for consumers.⁷⁴

75. It is not proposed to exclude low-value off-premises transactions from the application of either Article 19 or 22. The exemption was not framed with either

empowers the Central Bank to direct a credit institution to refrain from imposing a charge in relation to the provision without the prior approval of the Bank. It further empowers the Central Bank to keep under general review the terms and conditions applying to the provision of services to customers by credit institutions, and to require a credit institution to discontinue or refrain from the use of terms that are, or are likely to be regarded as, unfair.

⁷⁴ Recital 38 of the Directive states: ‘In order to avoid the administrative burden being placed on traders, Member States may decide not to apply this Directive where goods or services of a minor nature are sold off-premises.’

provision in mind. Permitting off-premises traders to apply large surcharges to transactions under €50 in particular would undermine the whole purpose of the provision.

Question 12

Should off-premises transactions below €50 be subject to Articles 19 and 22. If not, why not?

VII ENFORCEMENT OF ARTICLES 19 AND 22

76. The Consumer Rights Directive is the most recent in a series of European Union Directives from the mid-1980s which deal with the contractual rights of consumers and the contractual and pre-contractual obligations of traders.⁷⁵ As noted in paragraph 2, the Directive will replace two of those earlier Directives - Directive 85/577/EEC on Contracts Negotiated Away From Business Premises and Directive 97/7/EC on Distance Contracts. The Regulations that have given effect to these various Directives in Ireland have provided for a range of enforcement arrangements. The enforcement provisions under the Regulations that give effect to Directive 1999/44/EC on Consumer Sales and Guarantees, for example, leave it up to the consumer to seek remedies for breaches of the Regulations, though the National Consumer Agency may, 'for the purpose of protecting the collective interests of consumers', apply to the Circuit Court for an order against an infringement of the

⁷⁵ The consumer contract rights Directives for which the Department of Enterprise, Jobs and Innovation has responsibility are: Directive 85/577/EEC on Contracts Negotiated Away from Business Premises implemented by the European Communities (Cancellation of Contracts Negotiated Away from Business Premises) Regulations 1989 (S.I. No. 224 of 1989); Directive 93/13/EEC on Unfair Terms in Consumer Contracts implemented by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 and 2000 (S.I. No. 27 of 1995 and S.I. No. 307 of 2000); Directive 97/7/EC on Distance Contracts implemented by the European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) Regulations (S.I. No. 207 of 2001); Directive 1999/44/EEC on Certain Aspects of Consumer Sales and Associated Guarantees implemented by the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (S.I. No. 11 of 2003); Directive 2000/31/EC on Electronic Commerce implemented by the Electronic Commerce Act 2000 and the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. of 68 of 2003); and Directive 2008/122/EC on Time Share, implemented by the European Union (Protection of Consumers in Respect of Time Share, Long-Term Holiday Product, Resale and Exchange Contracts (S.I. No. 73 of 2011).

Directive under the Regulations that give effect to the Injunctions Directive.⁷⁶ The Regulations that implement Directive 85/577/EEC on Doorstep Selling by contrast envisage mainly criminal enforcement by the National Consumer Agency (NCA), though the Agency can similarly apply for a Circuit Court order under the Regulations that implement the Injunctions Directive. The Regulations that transpose other consumer contract Directives – for example those that give effect to Directive 97/7/EC on Distance Selling – empower the National Consumer Agency both to take criminal prosecutions for breaches of the Regulations and to apply to the High Court for an order to ensure compliance with the provisions of the Regulations. The mix of criminal and civil enforcement under these Regulations is similar to that under the legislation that implements EU consumer Directives which deal with the advertising, marketing and pricing practices of traders, namely Directive 98/6/EC on Product Pricing and Directive 2005/29/EC on Unfair Commercial Practices.⁷⁷ Part V of the Consumer Protection Act 2007, which gives effect to the Unfair Commercial Practices Directive, contains a wide range of enforcement mechanisms in addition to civil and criminal court proceedings, including undertakings, compliance notices, fixed payment notices, and the consumer protection list

Public Enforcement

77. The issues around the public enforcement of Articles 19 and 22 relate mainly to the nature and locus of that enforcement. Though the Directive of which they form part is mainly concerned with the contractual rights of consumers, Article 19 in particular applies independently of any contractual context. It is arguable that it is more akin to the provisions dealing with the commercial practices of traders contained in the Unfair Commercial Practices Directive than with the contract-related provisions found elsewhere in the Consumer Rights Directive. As such, it would arguably be appropriate to provide for both criminal and civil enforcement by the National Consumer Agency. Though Article 22 is more integrally connected to contracts between a trader and a consumer, there would not appear to be any

⁷⁶ European Communities (Court Orders For The Protection of Consumer Interests) Regulations 2010 (S.I. No. 555 of 2010).

⁷⁷ Implemented by the European Communities (Requirements to Indicate Product Prices) Regulations (S.I. No. 639/2002) and the Consumer Protection Act 2007 respectively.

intrinsic reason why provision should not also be made for it to be enforceable through both civil and criminal channels. Making provision for both criminal and civil enforcement along the lines contained in the Consumer Protection Act 2007 would give the NCA a wider and more flexible range of options with which to respond to breaches of the provisions. It would also help bring greater consistency and coherence to the enforcement of statutory consumer protection provisions.

Question 13

Should Article 19 and/or Article 22 be subject to both criminal and civil enforcement? If not, why not?

78. If, as proposed, the Regulations that will give effect to Articles 19 and 22 are to empower the National Consumer Agency to apply for a court order against infringements of Articles 19 and 22, the court or courts to which they may apply for such an order will have to be specified. At present, the Regulations that give effect to the Unfair Contract Terms and Distance Selling Directives allow for an application only to the High Court, while those that give effect to the Injunctions Directive provide for an application to the Circuit Court. The Consumer Protection Act 2007 which gives effect to the Unfair Commercial Practices Directive provides that the Agency may apply to the Circuit or the High Court for a prohibition order.

79. The National Consumer Agency is of the view that, in appropriate cases including cases relating to Articles 19 and 22, it should be permissible for it to seek an order in the District Court. In the Agency's view, this would facilitate enforcement in the consumer interest that would be speedier and less costly than enforcement in the Circuit or High Courts. The District Court Rules provide that an appeal from a judgment of the Court lies to the Circuit Court. An action may also be forwarded from the District Court to the Circuit Court or the High Court where the lower Court is of the opinion that the action is one fit to be tried in the higher Court. The High Court also has jurisdiction to halt a trial in the District Court and to prohibit its continuation, though this power will be exercised only in exceptional circumstances.

The case for permitting the National Consumer Agency to apply for an order in the District Court has merit in the Department's view.

Question 14

Should the National Consumer Agency be empowered to apply for prohibition orders in respect of breaches of Articles 19 and 22 in the District Court as well as the Circuit Court? If not, why not?

Private Redress

80. Article 19 requires Member States to prohibit traders from charging consumers fees for the use of a method of payment that exceed the cost of that payment method to the trader. While the public enforcement arrangements discussed in paragraphs 76-79 will be the main mechanism for ensuring compliance with the provision, it is desirable also to include a provision to protect consumers from demands from traders for payment of excessive surcharges. This can be done by providing in the Regulations to give effect to Article 19 that any contractual term entitling a trader to recover a payment fee that exceeds the cost of the means of payment in question to the trader shall be unenforceable. As payment charges are typically included in the upfront price paid by consumers for goods or services, the Regulations should also give consumers a contractual right to recover the cost of any excessive payment charge from the trader.

81. Similar private redress provisions should apply to Article 22 on additional payments. The Article expressly provides that consumers shall be entitled to reimbursement of any additional payment to which the consumer's consent has been inferred by the use of default payment options. Consumers should therefore be given a contractual right to the repayment of any monies paid in such circumstances, as well as protection from demands from traders for additional payments in breach of Article 22. It should be noted in this connection that section 74 of the Consumer Protection Act 2007 gives consumers a right of action for

damages against a trader who commits or engages in a wide range of commercial practices prohibited by the Act.

Question 15

Should consumers be given a private right of redress for payment charges in breach of Article 19 or additional payments in breach of Article 22. If not, why not?

Burden of Proof

82. As is evident from Part IV of this paper, the question of what constitute ‘fees that exceed the cost borne by the trader’ for the use of a given means of payment is a complex one. The cost of payment to traders differs widely among businesses, has a number of different elements, and is often shrouded in secrecy. In the absence of a provision for a reversal of the evidential burden of proof, consequently, the National Consumer Agency could encounter difficulties in taking a prosecution for the breach of Article 19 with the degree of assurance required to justify the initiation of court proceedings. As the trader is in a position to supply the relevant details about the cost of payment, such a requirement could not be said to be unfair or unreasonable. It is not unreasonable similarly in cases relating to Article 22 to place the onus of evidential proof on the trader to show that he or she sought the express consent of the consumer to any payments additional to those agreed upon for the trader’s main contractual obligation.

83. Provisions for a reversal of the burden of the proof have been included in previous Regulations enacted to give effect to EU consumer Directives. The European Communities (Protection of Consumers in Respect of Distance Contracts) Regulations and the European Communities (Requirements to Indicate Product Prices) Regulations both provide that, in civil proceedings on any application to a court by the National Consumer Agency or other party, the onus of proving compliance with the requirements of the Regulations shall be on the trader

concerned.⁷⁸ In criminal proceedings, the effect of conviction on the liberty and reputation of the person on trial places limits on the extent to which the burden of proof can be reversed. It is permissible, however, to have a presumptive provision about factual claims made by the trader along the lines of the following provision at section 68 of the Consumer Protection Act 2007:

If, in any proceedings under this Act, the truth of a factual claim in a representation is an issue and the trader who made the representation, or on whose behalf the representation was made, does not establish on the balance of probabilities that it is true, then the representation shall be presumed to be untrue.

Question 16

Should a reversal of the evidential burden of proof along the lines proposed in paragraphs 82-83 apply in civil and criminal proceedings involving breaches of Articles 19 and 22? If not, why not?

Responses to Consultation

84. Responses to the consultation should be sent by Friday 12 October by e-mail to conspol@djei.ie or by post to Competition and Consumer Policy Section, Department of Jobs, Enterprise and Innovation, Earlsfort Centre, Lower Hatch Street, Dublin 2.

⁷⁸ European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) Regulations 2001 (S.I. No. 207/2001), Regulation 13(6). European Communities (Requirements to Indicate Produce Prices) Regulations 2002 (S.I. No. 639/2002), Regulation 8(1).

ANNEX I: QUESTIONS INCLUDED IN CONSULTATION

1. Are you aware of direct payment charges applied to consumer transactions by traders other than those listed in Box 1? If so, please give details.
2. Are you aware of administration, service, booking or handling charges in the passenger transport or other sectors (other than those referred to in paragraph 28) that are avoidable by the use of a specified method of payment? If so, please give details?
3. Should a provision along the lines proposed in paragraph 36 be included in the Regulations to give effect to Article 19 in order to encompass the payment-related charges applied by some airlines and ferry companies? If not, why not?
4. Should consideration be given to adopting a provision similar to Article 23(1) of the Air Services Regulation for sea carriers and/or other sectors. If so, which other sectors should be covered? If the provision should not be extended in this way, why not?
5. Are you aware of administration, service, booking, or handling charges not avoidable by the use of a specified payment method (other than those referred to in paragraphs 41-43) that apply to event tickets or in other sectors? If so, please give details.
6. Should a provision along the lines proposed in paragraph 46 be included in the Regulations to give effect to Article 19 in order to encompass the charges applicable to tickets for entertainment and other events? If not, why not?
7. Are the figures on the costs of payment to traders cited in paragraphs 57 and 60 broadly accurate? Information on these costs would be welcomed in responses to this consultation and will be treated in confidence.
8. Do you agree that only costs arising directly from the use of a given means of payment should be taken into account in determining the 'cost borne by the trader' for the purposes of Article 19. If not, what other costs should be taken into account in your view?
9. Are you aware of cases where traders seek extra payment in addition to the payment agreed for their main contractual obligation without seeking the consumer's express consent? If so, please give details.
10. Are you aware of cases where traders use default payment options, such as pre-ticked boxes, which the consumer is required to reject in order to avoid having to make a payment in addition to that agreed for the main contractual obligation? If so, please give details.
11. Should Article 19 and/or Article 22 be applied to all of the sectors excluded from the scope of the Consumer Rights Directive other than financial services? If not, why not?
12. Should off-premises transactions below €50 be subject to Articles 19 and 22. If not, why not?
13. Should Article 19 and/or Article 22 be subject to both criminal and civil enforcement? If not, why not?
14. Should the National Consumer Agency be empowered to apply for prohibition orders in respect of breaches of Articles 19 and 22 in the District Court as well as the Circuit Court? If not, why not?
15. Should consumers be given a private right of redress for payment charges in breach of Article 19 and additional payments in breach of Article 22. If not, why not?
16. Should a reversal of the burden of proof along the lines proposed in paragraphs 81-82 apply in civil and criminal proceedings involving breaches of Articles 19 and 22? If not, why not?

