

Consumer Protection Guidelines for Mobile Phone Traders

Practical Guidance for Traders
concerning consumer
protection legislation
applicable to the sale and
supply of mobile phones

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Coimisiún um
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1. Introduction

- 1.1 The Competition and Consumer Protection Commission (CCPC)¹ receives on average 10 calls every working day regarding issues with mobile phones.² A significant percentage of these calls relate to issues with faulty handsets and consumers seeking redress when something has gone wrong. Purchasing a mobile phone can be a complex process with much information to be considered including pricing structures, tariff plans and offers involving subsidised / “free” handsets. The risk for consumers is that they might not make a purchasing decision best suited to their needs. It is vital, therefore, that consumers are given all of the relevant information they need to enable them to make an informed decision.
- 1.2 In the majority of business to consumer transactions the consumer will be the weaker party. The purpose of consumer protection legislation, therefore, is to give consumers rights before, during and after a transaction has taken place. Consumers are entitled to avail of the law to protect their rights and interests, particularly when something goes wrong. Consumer protection legislation empowers consumers to take action themselves and provides public enforcement powers to the CCPC to bring actions on behalf of consumers.
- 1.3 These Guidelines detail the CCPC’s views on the obligations that are placed on mobile phone providers and the protections that consumers must be afforded. Traders in this sector should be aware that the information contained in this document will inform the CCPC’s approach to enforcement in the sector and assessing the adequacy of information provided to consumers.
- 1.4 These Guidelines are divided into sections. Section 2 contains background information on the scope, purpose, status of, and key concepts in these Guidelines. Section 3 identifies relevant consumer protection law which applies to the sale and supply of mobile phones. Section 4 details the investigative and enforcement powers of the CCPC. Section 5 sets out some practical guidance for traders on how to ensure they comply with consumer protection law when they sell mobile phones.

¹ On 31 October 2014, pursuant to the Competition and Consumer Protection Act 2014, the Competition Authority and the National Consumer Agency were dissolved and the Competition and Consumer Protection Commission was established. In these Guidelines, the ‘CCPC’ refers to the Competition and Consumer Protection Commission, while the ‘European Commission’ refers to the Commission of the European Union.

² This statistic is based on the number of consumer contacts received in 2016. See page 64 of the [CCPC's 2016 annual report](#).

2. About these Guidelines

What is the scope of these Guidelines?

- 2.1 These Guidelines are published by the CCPC and are directed at traders³ who sell mobile phones to consumers.⁴ These Guidelines are intended to cover transactions between businesses and consumers (B2C) only and are not intended to cover contracts between businesses (B2B) or contracts between consumers (C2C).
- 2.2 These Guidelines will assist mobile phone traders in understanding the applicable consumer protection legislation and the obligations placed on traders when concluding contracts with consumers for mobile phone handsets with or without an electronic communications service.⁵
- 2.3 Consumers considering their rights in relation to mobile phone contracts will also be assisted by these Guidelines. The advice provided by our consumer helpline will reflect the content of these Guidelines. However, this document is not intended as a guide to the rights of private individuals. It does not provide information about either consumer rights generally or contract law as a whole. Nor do these Guidelines provide guidance to consumers regarding disputes with mobile phone traders.⁶ Those involved in contractual disputes with mobile phone traders are likely to need advice on a broader range of issues than are covered in these Guidelines and are advised to seek independent legal advice.

³ Throughout these Guidelines, the term traders refers to retailers of mobile phone handsets, whether or not the retailer is also the manufacturer of the handset. The terminology used in the relevant legislation to refer to manufacturers or retailers differs. For example, the Consumer Protection Act 2007 refers to “traders”, the Sale of Goods Act 1893 refers to “sellers,” the Sale of Goods and Supply of Services Act 1980 refers to “sellers” and “suppliers”, the CRD Regulations (as defined on page 9) refer to “traders” and the Unfair Terms Regulations (as defined on page 9) refer to “sellers” and “suppliers.” For consistency and ease of reference, the term traders is used throughout these Guidelines.

⁴ The term “consumer” is defined differently in different pieces of consumer protection legislation, both at a European level and a national level. However, a commonly accepted understanding of a consumer is a natural person who is acting for purposes outside his business.

⁵ An electronic communications service is defined for the purposes of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (SI No. 333 of 2011) as “a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting [...]”. In the context of these Guidelines, an electronic communications service refers to the mobile phone service operated using a sim card.

⁶ Mobile phone traders, who provide an electronic communications service or an electronic communications network, within the scope of the Universal Service Regulations Regime (as defined in footnote 17) are required to adhere to a Code of Practice for the handling of consumer complaints which was developed by ComReg. Some mobile phone traders may also have committed to resolve disputes under the voluntary ADR and ODR regime pursuant to the European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015 (as amended) (S.I. No. 343 of 2015 and S.I. No. 368 of 2015) and the European Union (Online Dispute Resolution for Consumer Disputes) Regulations 2015 (as amended) (S.I. No. 500 of 2015 and S.I. No. 32 of 2016).

- 2.4 These Guidelines are intended to cover only legislation which is enforced by the CCPC. However, the CCPC has co-enforcement powers with the Commission for Communications Regulation (ComReg) in relation to certain legislation.⁷ There is also further legislation relating to electronic communications services relevant in this context which is enforced solely by ComReg.⁸ Additional obligations of mobile phone traders pursuant to legislation outside the CCPC's remit, which is enforced by other national regulators, such as ComReg, are not within the scope of these Guidelines.
- 2.5 The matters covered in section 5 of these Guidelines represent the issues that arise most commonly in consumer contacts to the CCPC. These Guidelines do not and could not deal with all the individual issues brought to the CCPC's attention by consumers. If these Guidelines are silent on an issue, that should not be inferred to imply any particular view in relation to that issue on the part of the CCPC.
- 2.6 While the issues dealt with in these Guidelines may have general application to other products, these Guidelines are specifically addressed to issues arising from the products and/or services discussed herein.

What is the purpose of these Guidelines?

- 2.7 The CCPC's mission is to make markets work better for consumers and businesses. The CCPC promotes compliance with competition and consumer protection legislation throughout the economy by helping businesses take active steps to comply with the law.
- 2.8 In addition to its enforcement role, the CCPC has a mandate to promote competition and consumer welfare. The CCPC is empowered, pursuant to section 90 of the Consumer Protection Act 2007 (the CPA), to publish Guidelines to inform and assist traders in understanding their obligations under consumer protection law.
- 2.9 As part of our remit, the CCPC provides information and education to consumers regarding their consumer rights. This is provided directly to consumers through our consumer helpline and website. Monitoring of consumer contacts received by the CCPC and its predecessor, the National Consumer Agency (the NCA), has highlighted significant numbers of consumer

⁷ Both ComReg and the CCPC enforce the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 (S.I. 27 of 1995) and the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (S.I. No 484 of 2013) in the context of their individual functions.

⁸ For example the Universal Service Regulations Regime (as defined in Footnote 17 below).

queries in relation to mobile phones in recent years. For example, the CCPC's 2016 annual report shows that the highest number of consumer contacts to the CCPC related to the telecommunications sector.⁹ The issues raised in these contacts predominantly relate to queries regarding consumer rights and trader obligations under consumer protection legislation, in particular, consumers' rights and remedies with respect to faulty handsets, termination clauses, and traders' obligations regarding information on price.

- 2.10 The decision to prepare, issue and publish these Guidelines was taken to address common issues which have arisen through consumer queries to help make the relevant market(s) work better for consumers.

What is the status of these Guidelines?

- 2.11 These Guidelines are prepared, issued and published as authorised by section 90(1) of the CPA and in accordance with section 10(3)(h) of the Competition and Consumer Protection Commission Act 2014. In any proceedings before a court, Guidelines issued and published under section 90 of the CPA are admissible in evidence. If any provision of these Guidelines is relevant to a question arising in those proceedings, the provision may be taken into account in determining that question.¹⁰
- 2.12 These Guidelines reflect the views of the CCPC as of the date of publication. Although key stakeholders including mobile phone traders were consulted during the drafting of these Guidelines, the contents of these Guidelines are the views of the CCPC alone. The CCPC is not bound by this document and reserves the right to amend it as necessary and appropriate.
- 2.13 These Guidelines do not constitute legal advice. A trader must decide whether its conduct, and/or that of its staff, complies with consumer protection law. However, these Guidelines should assist traders in making that assessment. If a trader has doubts about whether or not its conduct complies with consumer protection law, traders should seek independent legal advice.

⁹ [CCPC 2016 Annual Report](#), page 64.

¹⁰ Section 90(5), the CPA.

What do these Guidelines mean by handset sale and bundle sale?

2.14 Consumers can purchase mobile phone handsets only, consumers can purchase electronic communications services only, and consumers can purchase mobile phone handsets together with an electronic communications service. To distinguish between the various options available to consumers, the following terms are used throughout these Guidelines:

- ‘handset sale’ is used to refer to a situation where a mobile phone handset is offered for sale or sold to a consumer on its own without an electronic communications service; and
- ‘bundle sale’ is used to refer to a situation where a mobile phone handset and a contract for an electronic communications service are offered for sale or sold to a consumer together.

2.15 These Guidelines do not consider contracts for the purchase of an electronic communications service only as they do not typically feature in consumer complaints to the CCPC. In addition to consumer protection legislation, any contract which includes an electronic communications service will be subject to the requirements of the Universal Service Regulations Regime.

3. Overview of Relevant Consumer Protection Law

3.1 Consumers are entitled to rely on the law to protect their rights and interests. Irish consumer protection law, which is based on a mix of Irish and European legislation, has evolved as a distinct area of law that concentrates on the general protection and promotion of those rights and interests.

3.2 There are a number of legislative provisions which the CCPC enforces that are directly applicable to traders supplying mobile phone handsets to consumers. The legislative provisions referred to in these Guidelines include:

- the Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980, (together the Sale of Goods and Supply of Services Acts 1893 and 1980);¹¹
- the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (as amended) (the Unfair Terms Regulations). The Unfair Terms Regulations give effect to the EEC Unfair Terms Directive;¹²
- the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (the CSD Regulations). The CSD Regulations give effect to the EC Directive on certain aspects of the sale of consumer goods and associated guarantees;¹³
- the Consumer Protection Act 2007. The CPA gives effect to the EC Unfair Commercial Practices Directive;¹⁴ and
- the European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013 (the CRD Regulations). The CRD Regulations give effect to the EU Consumer Rights Directive.¹⁵

¹¹ The Sale of Goods Act, 1893 is available [here](#) and the Sale of Goods and Supply of Services Act 1980 is available [here](#).

¹² The Unfair Terms Regulations (S.I. No. 27/1995) were amended by S.I. No. 307/2000 and S.I. No. 160/2013. The Unfair Terms Regulations (S.I. No. 27/1995) are available [here](#). The EEC Directive on unfair terms in consumer contracts (93/13/EEC) is available [here](#).

¹³ The CSD Regulations (S.I. No. 11 of 2003) are available [here](#). The EC Directive on certain aspects of the sale of consumer goods and associated guarantees (99/44/EC) is available [here](#).

¹⁴ The CPA is available [here](#). The Unfair Commercial Practices Directive (2005/29/EC) is available [here](#). European Commission Guidance on the Unfair Commercial Practices Directive is available [here](#).

¹⁵ The CRD Regulations (S.I. 484 of 2013) are available [here](#). The Consumer Rights Directive (2011/83/EU) is available [here](#). European Commission Guidance on the Consumer Rights Directive is available [here](#). Department of Jobs, Enterprise and Innovation Guidance is available [here](#), and the CCPC's Guidance is available [here](#).

- The Competition and Consumer Protection Act 2014.¹⁶

3.3 There may be other legislation which is relevant to mobile phone traders but these Guidelines consider only the legislation listed in paragraph 3.2 above. For example, contracts which include an electronic communications service, including bundle sales, will also be within the scope of the Universal Service Regulations Regime¹⁷ which is enforced by ComReg. However, traders' obligations and associated consumer rights with respect to bundle sales pursuant to the Universal Service Regulations Regime are not within the scope of these Guidelines.

¹⁶ The Competition and Consumer Protection Act 2014 is available [here](#).

¹⁷ S.I. No. 337 of 2011 European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 is available [here](#). S.I. No 374 of 2007 European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) (Amendment) Regulations 2007 is available [here](#). S.I. 308 of 2003 European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003 is available [here](#). Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) is available [here](#). Together these Regulations are referred to as the Universal Services Regulations Regime in these Guidelines.

4. The CCPC's Statutory Powers

4.1 The CCPC is the main body responsible for investigating and enforcing Irish and EU consumer protection law in Ireland. Under the Competition and Consumer Protection Act 2014, the CCPC has powers of investigation as follows:

- the power to enter and inspect: for the purposes of investigating relevant statutory provisions under the CPA authorised officers may enter and inspect any business premises and take copies of documents and records relating to that business;
- the power to enter and search: authorised officers may enter and search a business premises or home with a valid warrant issued by the District Court;
- the power to seize documents and records: authorised officers can seize documents or records, including computer hard-drives and laptops with a valid warrant issued by the District Court;
- the power to summon witnesses: the CCPC can summon witnesses to be questioned under oath. Witnesses have the same immunities and privileges as a witness before the High Court. Failure to appear before the CCPC on foot of a witness summons is a criminal offence;
- the power to demand records and documents: the CCPC has the power to require witnesses and third parties, such as telephone companies and financial institutions, on foot of a witness summons, to produce records and information; and
- the power to demand written information: the CCPC has the power to require any person to provide written information that the CCPC considers necessary to enable the CCPC to carry out its functions.

4.2 The CPA provides the CCPC with a range of enforcement powers to help achieve compliance with consumer protection law. These include:

- Undertakings - The CCPC has the power to seek and obtain a written undertaking that the trader will comply with the requirements of consumer protection law;
- Compliance Notices - An Authorised Officer of the CCPC may issue a Compliance Notice to a trader who is deemed to have committed a 'prohibited practice'. A Compliance Notice is a written notice directing them to remedy the relevant contravention of consumer protection legislation. The trader has the right to appeal the notice to the District Court within 14 days;
- Fixed Payment Notice - This sanction may be used as an alternative to prosecution. It involves the issuing of a penalty notice by an Authorised Officer to a trader who is believed to have committed certain offences. The penalty is €300 per breach and must be paid within 28 days. Failure to pay will result in prosecution. More than one Fixed Payment Notice may be issued to a trader, in respect of breaches found by an Authorised Officer;

- Prohibition Order - Any person, including the CCPC, can apply to the Circuit or the High Court for an order prohibiting a trader from committing or engaging in a prohibited act or practice (as defined in the CPA). In granting a Prohibition Order, a Court may impose additional remedies on a trader such as a requirement to publish a corrective statement where the trader is found to have provided misleading information to consumers;
- Prosecution - The power to prosecute traders who have breached consumer protection law. Fines and penalties for prosecutions under the various pieces of legislation the CCPC has responsibility for enforcing can be significant; and
- Consumer Protection List – The names and address of traders against whom the CCPC has concluded enforcement actions are recorded on a list called the Consumer Protection List which is published regularly by the CCPC.

5. Practical Guidelines on Contracts for Mobile Phones

5.1 This section contains practical guidance on trader obligations and requirements with respect to the sale of mobile phones. The section is split into six subsections: (i) quality standards for handset sales; (ii) quality standards for bundle sales; (iii) issues to note regarding quality standards; (iv) trader obligations regarding distance sales; (v) pricing information; and (vi) termination clauses. Where possible, these Guidelines contain examples of common issues raised by consumers to the CCPC to illustrate the relevant point.

I Quality Standards for Handset Sales

5.2 A handset sale is a contract for the sale of goods. Contracts for the sale of goods, including sales of handsets, are subject to obligations pursuant to the Sale of Goods and Supply of Services Acts 1893 and 1980 and the CSD Regulations.

5.3 The Sale of Goods and Supply of Services Acts 1893 and 1980 and the CSD Regulations respectively offer similar rights to consumers and impose similar obligations on traders. The CSD Regulations are in addition to, and not in substitution for, any other legislation relating to the sale of goods such as the Sale of Goods and Supply of Services Acts 1893 and 1980.¹⁸ Consumers are entitled to invoke and rely on provisions of either the Sale of Goods and Supply of Services Acts 1893 and 1980 or the CSD Regulations.¹⁹ Therefore, traders must ensure that they comply with the obligations of both the Sale of Goods and Supply of Services Acts 1893 and 1980 and the CSD Regulations.

5.4 For the purpose of these Guidelines, therefore, the CCPC will address consumer rights and trader obligations in contracts for the sale of goods pursuant to both: i) the Sale of Goods and Supply of Services Acts 1893 and 1980; and (ii) the CSD Regulations.

¹⁸ Regulation 3(1), CSD Regulations.

¹⁹ Regulation 3(2)-3(4), CSD Regulations.

Sale of Goods and Supply of Services Acts 1893 and 1980

a) Quality standards for handset sales

5.5 The Sale of Goods and Supply of Services Acts 1893 and 1980 apply to contracts for the sale of goods.²⁰ Where a trader transfers ownership of a handset to a consumer in return for a money consideration, this is a contract for the sale of goods and is subject to the Sale of Goods and Supply of Services Acts 1893 and 1980.

5.6 Pursuant to the Sale of Goods and Supply of Services Acts 1893 and 1980, handsets must:

- be as described – the handset must match the description by which the goods are sold (whether that description is provided verbally or in an advertisement);²¹
- be of merchantable quality – the handset must be reasonably fit for purpose and durable;²²
- be fit for the particular purpose intended – the handset must be fit for the particular purpose for which it was bought and which was made known to the trader by the consumer at the point of sale;²³ and
- correspond with the sample (where the goods are sold by sample).²⁴

Example 1:

A consumer purchases a handset in-store. However, when the consumer opens the box later that day at home, he/she realises that the handset is a different model to the handset viewed and selected in-store. This would be an example of where a handset is not as described.

Example 2:

A consumer purchases a handset. However, when the consumer charges the handset, he/she realises that, even though the charger is functioning properly, the handset is not charging. This would suggest that the handset is not of merchantable quality nor fit for the purpose intended.

²⁰ Section 1(1), Sale of Goods Act 1893 states that “A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.”

²¹ Section 13, Sale of Goods Act 1893.

²² Section 14(2) and section 14(3), Sale of Goods Act 1893.

²³ Section 14(4), Sale of Goods Act 1893.

²⁴ Section 15, Sale of Goods Act 1893.

Example 3:

A consumer wants to purchase a handset which is compatible with his/her smart watch. The consumer explains to the trader that he/she requires the handset to be compatible with a certain smart watch, and after discussion the trader recommends a particular handset model. The consumer purchases the model. However, when the consumer uses the handset, it is apparent that the smart watch is not compatible with the handset. In this case, although the handset is not faulty, the handset is not fit for the particular purpose for which the handset was intended and which the consumer made known to the trader.

b) *What remedies are available to consumers for handset sales?*

5.7 Where a trader breaches any of the quality standards above, the consumer is entitled to request a number of remedies:²⁵

- **Repair** - A consumer has a right to require that the trader repair the defective handset;²⁶
- **Replacement** – A consumer may require that the trader replace the defective handset.²⁷ The replacement should be an identical model and make of handset to the original handset. Where the trader is unable to offer an identical model, the trader can offer an alternative but the consumer does not have to accept it; and
- **Reject handset and full refund** - A consumer has a short-term right to reject the goods and claim a full refund of the price of the handset.²⁸ The exact timeframe within which consumers have a right to exercise this right is not specified in the legislation, although our position is that this short-term period should be at least 30 days.

5.8 If the trader refuses to comply with a request for a repair or replacement or fails to do so within a reasonable time, the consumer may reject the goods and seek a refund, or have the defect remedied elsewhere at the trader's expense.

5.9 Any provisions in a trader's terms and conditions which seek to limit or restrict the above rights and remedies will be void and therefore legally unenforceable under the Sale of Goods and Supply of Services Acts 1893 and 1980.²⁹ Traders should also be aware that the possibility of consumers or the CCPC challenging such terms, where a standard form contract seeks to

²⁵ Outside the scope of consumer protection law, consumers also have a common law right to claim damages for any loss suffered as a result of failure by a trader to comply with the quality standards detailed above. The loss suffered by the consumer may extend not only to the loss of the handset but damage or personal injury caused by a faulty handset (e.g. if the handset caught fire and caused damage to furniture or the consumer suffered burns).

²⁶ Section 53, Sale of Goods Act 1893.

²⁷ Section 53, Sale of Goods Act 1893.

²⁸ Sections 35 and 53, Sale of Goods Act 1893.

²⁹ Section 55(4) Sale of Goods Act 1893.

limit a consumer's legal rights, is available through the Unfair Terms Regulations. It is also an offence to mislead a consumer as to his or her legal rights.³⁰

CSD Regulations

a) *Quality standards for handset sales*

5.10 The CSD Regulations operate in tandem with the Sale of Goods and Supply of Services Acts 1893 and 1980. The CSD Regulations apply to contracts for the sale of consumer goods, including handsets sold by traders to consumers. The CSD Regulations require that goods must conform to the sales contract at the time of delivery.³¹ To conform with the sales contract, handsets must:

- be as described – the handset must comply with the description given by the trader and possess the qualities of the goods which the trader has held out to the consumer as a sample or model;³²
- be fit for the purpose intended – the handset must be fit for the purpose for which it was bought and which was made known to the trader;³³
- be fit for normal use – the handset must be fit for the purpose for which handsets are normally used;³⁴ and
- demonstrate the quality and performance which are normal for handsets and which consumers can reasonably expect.³⁵

b) *What remedies are available to consumers?*

5.11 Where a trader breaches any of the quality standards above, the trader is liable for the lack of conformity and the consumer is entitled to a number of remedies:

First Tier Remedies

- **Repair or Replacement** – The handset must be repaired or replaced free of charge;³⁶

³⁰ Section 47 as described in section 43(3)(j), CPA.

³¹ Regulation 5(1)(a), CSD Regulations.

³² Regulation 5(2)(a), CSD Regulations.

³³ Regulation 5(2)(b), CSD Regulations.

³⁴ Regulation 5(2)(c), CSD Regulations.

³⁵ Regulation 5(2)(d), CSD Regulations.

³⁶ Regulation 7(2)(a), CSD Regulations.

Second Tier Remedies

- **Reduction in Price** – A consumer may demand an appropriate reduction to the price;³⁷ or
- **Contract Rescinded** – The consumer may insist that the contract be terminated or ended.³⁸

5.12 In the first place, consumers can require the trader to repair the goods or replace them free of charge unless this is impossible or disproportionate.³⁹ Repair or replacement are the first-tier remedies for goods not in conformity with the contract and it is for the consumer to decide whether they require a repair or a replacement. The trader cannot charge for the cost incurred in repairing or replacing the handset, including the cost of postage, labour, or materials.⁴⁰

5.13 The consumer can require the trader to refund a proportion of the price or have the contract rescinded (the second-tier remedies) if:

- the consumer is not entitled to a repair or a replacement because it is impossible or disproportionate to repair or replace the handset;
- the trader has not completed the repair or replacement within a reasonable time; or
- the trader has not completed the repair or replacement without significant inconvenience⁴¹ to the consumer.⁴²

If the lack of conformity is minor, the right to rescind the contract is not available.⁴³

5.14 Where any lack of conformity becomes apparent **within six months from the date of delivery** of the goods there is a rebuttable presumption that the lack of conformity existed at the time of delivery.⁴⁴ In other words, if a fault appears in the handset in the first six months, it is presumed that the fault was there at the time of purchase, unless the trader can prove otherwise, for example, that the fault was caused by the consumer misusing the handset. At

³⁷ Regulation 7(2)(b), CSD Regulations.

³⁸ Regulation 7(2)(c), CSD Regulations.

³⁹ Regulation 7(3), CSD Regulations.

⁴⁰ Regulation 7(6), CSD Regulations.

⁴¹ Regulation 7(5) of the CSD Regulations provides that “where the remedy of repair or replacement is provided the repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required them.”

⁴² Regulation 7(7), CSD Regulations.

⁴³ Regulation 7(8), CSD Regulations.

⁴⁴ Regulation 8, CSD Regulations.

any time after six months from the date of delivery, it is the responsibility of the consumer to prove any lack of conformity at the time of delivery.

II Quality Standards for Bundle Sales

5.15 A bundle sale is a contract, where the trader contracts for the provision of a service (e.g. the bill pay phone service) and agrees to supply a product (e.g. the handset) together as part of a bundle. The CCPC's view is that a bundle sale is one contract to supply services and goods together. Such contracts are subject to obligations pursuant to the Sale of Goods and Supply of Services Acts 1893 and 1980.⁴⁵

5.16 Part IV of the Sale of Goods and Supply of Services Act 1980 applies to contracts for the supply of services.

Sale of Goods and Supply of Services Acts 1893 and 1980

a) *Quality standards for bundle sales*

5.17 The Sale of Goods and Supply of Services Acts 1893 and 1980 implies the following terms into every contract for a bundle sale:

- the trader has the necessary skill to render the service;⁴⁶
- the service will be supplied with due skill, care and diligence;⁴⁷
- where materials are used, they will be sound and reasonably fit for the purpose for which they are required;⁴⁸ and
- where goods are supplied they will be of merchantable quality, e.g. the handset must be reasonably fit for purpose and durable.⁴⁹

5.18 The merchantable quality requirement is given the same meaning as that under section 14(3) of the Sale of Goods Act 1893.⁵⁰ Therefore, handsets sold as part of a bundle sale must be i)

⁴⁵ As they include a mobile phone service, bundle sales are also subject to obligations pursuant to the Universal Service Regulations Regime, which are not covered in these Guidelines.

⁴⁶ Section 39(a), Sale of Goods and Supply of Services Act 1980.

⁴⁷ Section 39(b), Sale of Goods and Supply of Services Act 1980.

⁴⁸ Section 39(c), Sale of Goods and Supply of Services Act 1980.

⁴⁹ Section 39(d), Sale of Goods and Supply of Services Act 1980.

⁵⁰ Section 14(3), Sale of Goods Act 1893 (as amended by section 10 of Sale of Goods and Supply of Services Act 1980).

fit for the purpose intended; and ii) as durable as it is reasonable to expect having regard to any description applied to them.⁵¹

5.19 Although different legislative instruments apply to handsets depending on whether they are sold as part of a handset sale or part of a bundle sale, the quality standard is very similar.

b) What remedies are available to consumers for bundle sales?

5.20 The Sale of Goods and Supply of Services Acts 1893 and 1980 does not prescribe a statutory remedy regime for breach of the implied terms listed in paragraph 5.17 above. Where a trader breaches an implied term above (e.g. provides a consumer with a faulty handset sold as part of a bundle sale and breaches the implied merchantable quality term) the consumer is entitled to seek a remedy for a breach of that term. In circumstances where the breach of the term is serious in nature, the consumer can seek to terminate the contract, reject the goods and seek a full refund. In circumstances where the breach of the term is minor, the consumer can seek damages. In practice, therefore, traders are advised to provide the same remedies as those available to consumers under the Sales of Good and Supply of Services Acts 1893 and 1980 including a:

- repair;
- replacement; or
- full refund.

III Issues to note regarding Quality Standards

Limitation Periods

5.21 The statutory quality standards regarding handset sales or bundle sales, described in paragraphs 5.6, 5.10, and 5.17 above, form part of the contract between the trader and the consumer. A consumer can enforce a statutory remedy (as described in paragraphs 5.7, 5.11, and 5.20 above) for up to six years from the date the cause of action accrues.⁵² That is the limitation period for breach of contract claims. A consumer will only be entitled to a remedy

⁵¹ Ibid.

⁵² The limitation period provided in Section 11 of the Statute of Limitations, 1957, for actions of contract is six years.

if one of the statutory quality standards is breached – that is if the consumer can show that the goods did not meet the quality standards at the time of delivery.

Second hand handsets

5.22 Both the Sale of Goods and Supply of Services Acts 1893 and 1980 and the CSD Regulations apply to the sale of second hand handsets to the same extent as to the sale of new handsets. Therefore, the quality standards and remedies provided under the Sale of Goods and Supply of Services Acts 1893 and 1980 and the CSD Regulations described above apply to second hand goods. The quality standards may be lower for second hand handsets compared to new handsets, in some circumstances, and this is typically reflected in the price of the second hand handset. Nevertheless, the traders' obligations and consumer remedies provided for under the Sale of Goods and Supply of Services Acts 1893 and 1980 and the CSD Regulations detailed above apply to second hand handsets.

Guarantees

5.23 Some mobile phone traders provide guarantees with the sale of handsets as part of either a bundle sale or a handset sale. Guarantees are regulated by both the Sale of Goods and Supply of Services Acts 1893 and 1980⁵³ and the CSD Regulations⁵⁴.

5.24 Such guarantees, whether free or paid for by the consumer, are in addition to the consumer rights provided for by the CSD Regulations and the Sale of Goods and Supply of Services Acts 1893 and 1980. They do not replace the statutory rights but rather operate in parallel. Consumer rights provided for under a guarantee cannot limit or exclude a consumer's statutory rights provided for under the CSD Regulations or the Sale of Goods and Supply of Services Acts 1893 and 1980.⁵⁵ In circumstances where a guarantee has expired, a consumer can pursue a remedy pursuant to their statutory rights.

⁵³ Section 15 – Section 19, Sale of Goods and Supply of Services Act 1980.

⁵⁴ Regulation 9, CSD Regulations.

⁵⁵ Section 18, Sale of Goods and Supply of Services Act 1980.

5.25 Traders who provide a manufacturer’s guarantee to a consumer are obliged to honour the terms of the guarantee as if they were the manufacturer, unless at the time of delivery of the handset, the trader expressly informed the consumer otherwise.⁵⁶

Purchases during a discount period or sale

5.26 It should be noted that consumers’ statutory rights are not affected because the handset was purchased in a sale or discount period. Trader notices such as “No Refunds” or “No exchanges”, whether during a sale or not, do not limit traders’ obligations pursuant to the CSD Regulations or Sale of Goods and Supply of Services Acts 1893 and 1980. Furthermore, it is an offence for a trader to make any unqualified statement suggesting that a consumer’s statutory rights are restricted and/or excluded.⁵⁷ If a handset sold is not as described, not fit for the purpose intended, or not of merchantable quality, consumers are entitled to a refund, a repair or replacement of the handset, or a reduction in price regardless of whether the handset was purchased during a sale.

Faulty handsets

5.27 A high proportion of the consumer contacts received by the CCPC relate to faulty handsets. In particular, the following issues form the basis of such common consumer contacts:

- recurring faults with handsets;
- further faults after the handset has been repaired by the trader;
- traders taking excessive time to carry out the repair; and
- traders unwilling to resolve an issue.

5.28 Where a trader sells a faulty handset to a consumer, and where the fault is not attributable to consumer misuse, the consumer is entitled to appropriate redress under either the Sale of Goods and Supply of Services Acts 1893 and 1980 or the CSD Regulations. Goods are not expected to last forever but should be as durable as a reasonable consumer would expect.⁵⁸

5.29 Before offering consumers redress in respect of the sale of a faulty handset a trader may seek proof of purchase from the consumer. However, as there is no legal obligation on a trader to

⁵⁶ Section 17, Sale of Goods and Supply of Services Act 1980.

⁵⁷ Section 11, Sale of Goods and Supply of Services Act 1980 and section 47, CPA.

⁵⁸ Section 14(3), Sale of Goods Act 1893.

provide receipts to consumers, when returning a faulty handset, consumers need only provide proof of purchase. Such proof of purchase does not necessarily need to be in the form of a receipt. Proof of purchase could also include:

- a credit or debit card statement;
- an invoice;
- a cheque book stub; or
- if the product is own-brand and has clearly come from the retailer in question this may be accepted as proof of purchase.

Example 4:

A consumer purchases a handset during a sale. As soon as the consumer gets home the speakerphone function on the handset does not work. The consumer returns to the shop and seeks a refund. However, the trader says that no redress is available as the handset was purchased during a sale.

The problem with the speaker phone would be considered a major fault as the handset is not working as it is supposed to. In this case, the consumer is entitled to reject the handset, rescind the contract, and the trader is obliged to provide a refund. Alternatively, the consumer is entitled to require the trader to replace or repair the handset. The consumer has discovered a major fault with the handset as soon as they used it for the first time. In the shop the consumer agreed to buy it, but clearly there is something wrong with the handset provided. The fact that the handset was purchased during a sale is not relevant.

Example 5:

A consumer purchases a handset. The handset functions well but after a short time, the volume button stops working and it is no longer possible to increase the volume. The consumer returns the handset and is offered a repair. The handset is repaired and the volume button works for a short period but, after a couple of weeks, it stops working again. The consumer returns the handset again and asks for a replacement handset. The trader offers another repair before a replacement is considered.

The trader is obliged to repair or replace the handset free of charge. In general, the consumer can require the item to be repaired first. However, it should be a permanent repair and the problem should not reoccur. Where the same fault reoccurs, the consumer may require a replacement or a refund. A trader is not entitled to insist on a minimum number of repairs before a replacement is considered. The right to choose whether a repair or replacement is required is with the consumer.

Example 6:

A consumer purchases a handset and after a period of time the handset no longer switches on. The consumer returns to the trader's shop and is offered a repair. The consumer is not provided with a replacement handset for the period of the repair. The repaired handset is returned to the consumer after four weeks, during which period the consumer had no handset.

Traders should recognise that handsets are considered a necessity by consumers. The trader is required to refund a proportion of the price or rescind the contract if the trader does not complete

the repair without significant inconvenience to the consumer. Causing a consumer to have no handset for four weeks would be considered a significant inconvenience to the consumer. To avoid causing any significant inconvenience to the consumer, the trader should provide a similar replacement phone to the consumer while the defect is being rectified.

IV Distance Sales – Key Trader Obligations

5.30 The quality standards and consumer remedies applicable to handset sales and bundle sales (detailed in sections 5 I and 5 II above respectively) apply equally to sales concluded on-premises, e.g. in-store, or by means of distance communication, e.g., online.

5.31 Handset sales and bundle sales are also subject to the requirements of the CRD Regulations.⁵⁹ The CRD Regulations impose certain obligations on traders to provide information to consumers purchasing a good or service, including a handset sale or a bundle sale, in-store or online.⁶⁰ The CRD Regulations impose further obligations on traders with respect to distance sales as compared to on-premises sales. For example, the CRD Regulations impose, amongst other requirements, the following obligations on traders regarding distance sales but which are not required for on-premises sales:

- Additional information requirements, including, for example:⁶¹
 - the conditions, time limit and procedures for exercising the right to cancel;⁶² and
 - where applicable the costs of returning a handset.⁶³
- A 14 day right of cancellation for consumers.⁶⁴ Subject to any applicable exemptions,⁶⁵ the cancellation period for handset sales and bundle sales⁶⁶ expires 14 days after the

⁵⁹ Regulation 3, CRD Regulations.

⁶⁰ Regulation 5, CRD Regulations for on-premises contracts, Regulation 7 CRD Regulations for off-premises contracts and Regulation 10, CRD Regulations for distance contracts.

⁶¹ Regulation 10-11, CRD Regulations and as set out in Schedule 2 to the CRD Regulations. The information requirements for on-premises sales are set out in Schedule 1 of the CRD Regulations.

⁶² Paragraph (l), Schedule 2, CRD Regulations.

⁶³ Paragraph (m), Schedule 2, CRD Regulations.

⁶⁴ The withdrawal periods are set out in Part 4, CRD Regulations.

⁶⁵ Regulation 13, CRD Regulations provides that a list of distance contracts which are exempt from Part 4, CRD Regulations.

⁶⁶ Both handset sales and bundle sales would be considered “sales contracts” for the purposes of the CRD Regulations.

consumer receives the handset.⁶⁷ The consumer must return the handset within 14 days of the day the consumer notified the trader of his/her decision to cancel.⁶⁸

- The requirement to secure the consumer's express request in a durable medium before commencing performance during the cancellation period;⁶⁹ and
- Requirements regarding the payment of refunds of all monies paid, including payment for delivery costs, in the event of cancellation under the CRD Regulations.⁷⁰ The amount refunded to the consumer may be reduced by certain costs that a consumer may be liable for in certain circumstances, including: (i) the cost for non-standard delivery (e.g. express post)⁷¹; or ii) the diminished value of the handset (e.g. in cases where a consumer damages the handset by handling it beyond that necessary to establish its nature, characteristics and functioning).⁷²

5.32 Further information on traders' obligations pursuant to the CRD Regulations is available in the CCPC's CRD Guidance which is accessible [here](#). However, traders should refer to the text of the CRD Regulations to fully understand their obligations under the legislation.

V Pricing Information

5.33 Traders are required under consumer protection law to provide accurate information regarding the price of a product or service.⁷³

5.34 When a consumer purchases a product whether on-premises, off-premises or at a distance⁷⁴ the trader must comply with particular information requirements as set out in the CRD Regulations. These include the requirement to provide the consumer with information concerning the total price of the handset sale or bundle sale inclusive of taxes.⁷⁵ Sector specific legislation imposes further information obligations on traders.⁷⁶

⁶⁷ Regulation 15, CRD Regulations.

⁶⁸ Regulation 20, CRD Regulations.

⁶⁹ Regulation 21, CRD Regulations.

⁷⁰ Regulation 19, CRD Regulations.

⁷¹ Regulation 19(2), CRD Regulations.

⁷² Regulation 20(6), CRD Regulations.

⁷³ In addition to the provisions of the Universal Service Regulations Regime.

⁷⁴ These concepts are defined at Regulation 2, CRD Regulations.

⁷⁵ Paragraph (d), Schedule 1 and paragraph (f) to (h), Schedule 2, CRD Regulations.

⁷⁶ Regulation 14, European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337/2011)

- 5.35 In addition, under the CPA traders must not mislead consumers as to the price of the handset sale or the price of the bundle sale, the manner in which that price is calculated, or the existence or nature of a specific price advantage.⁷⁷ Traders must, therefore, ensure that the price of either the handset sale or bundle sale is clear and transparent to consumers.

Example 7:

A consumer purchased a bundle sale at a mobile phone retailer. The cost of the handset was €100 and the monthly bill pay option was €30. When the consumer received his/her first monthly bill, the invoiced amount was €36.90, €6.90 more than was offered to the consumer. The retailer had not indicated that the €30 was exclusive of VAT, thereby breaching the CRD Regulations.

“Free” Handsets

- 5.36 Traders often describe handsets sold as part of a bundle sale as “free.” For example, a trader may offer a bundle sale which includes a 12 month bill pay contract at a cost of €30 a month with a “free” handset.
- 5.37 It is a prohibited commercial practice to describe a product as “gratis”, “free”, or “without charge” if the consumer must pay anything other than the necessary and reasonable cost of (i) responding to the description; and (ii) collecting the product or having it delivered.⁷⁸ The CPA makes it an offence for traders to engage in prohibited commercial practices.⁷⁹
- 5.38 Consumers are entitled to expect something advertised as “free” to be exactly that, meaning they receive something without giving money in exchange. A handset can only be described as free if consumers pay no more than:
- a) the minimum, unavoidable cost of responding to the offer;
 - b) the true/real cost of freight or delivery; and
 - c) the cost, including incidental expenses, of any travel involved if consumers collect the offer.
- 5.39 The CCPC considers that traders should take into account the following principles when offering “free” handsets as part of bundle sales:

⁷⁷ Section 43, the CPA.

⁷⁸ Section 55(1)(H), the CPA.

⁷⁹ Section 56, the CPA.

- traders must not try to recover their costs by reducing the quality or composition or by inflating the price of any product or service that must be bought as a pre-condition for obtaining a separate, free item; and
- traders should not describe an individual element of a package as “free” if the cost of that element is included in the package price.

5.40 These principles are in line with European Commission Guidance on the Unfair Commercial Practices Directive⁸⁰ and are supported by European case law.⁸¹

VI Termination Clauses

5.41 It is common practice for traders to provide terms in B2C contracts relating to the duration of the contract.⁸² These will often be found in a standard form consumer contract. Traders offering bundle sales typically offer contracts for a fixed term period ranging from 12 months to a maximum of 24 months.⁸³

5.42 Traders offering bundle sales typically include termination clauses in the terms and conditions. Termination clauses that require consumers who terminate the contract early to pay the outstanding balance of the monthly charges or to reimburse the trader for applied discounts may, in some circumstances, be considered penalty clauses at common law and/or unfair pursuant to the Unfair Terms Regulations and therefore unenforceable by the trader.

Penalty v Liquidated Damages Clauses – the common law position

5.43 Where a consumer terminates a bundle sale contract (otherwise than permitted by the contract) before the end of the term of the contract, this is a breach of contract. Traders often include a provision that a certain sum of money is payable by the consumer to the trader as damages for a breach of contract.⁸⁴ This is known as a “liquidated damages clause.”

⁸⁰ [European Commission Guidance on the Unfair Commercial Practices Directive](#), page 94-98.

⁸¹ Joint Judgments Dnr B 2/11 and B 3/11 by Marknadsdomstolen, 11 May 2012.

⁸² The CRD Regulations require that a trader provide information to a consumer on, *inter alia*, “the duration of the contract where applicable or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating it.” This information must be provided in clear and understandable language before the consumer is bound by the contract. Regulations 5, 7, and 10, CRD Regulations.

⁸³ The Universal Service Regulations Regime requires that the initial period of the contract cannot exceed 24 months (Regulation . 25(6)(a) of S.I. No. 337 of 2011 - European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011)

⁸⁴ Undertakings within the scope of the Universal Service Regulations Regime are permitted to recover certain charges due on termination of the contract including any cost with respect to terminal equipment (Regulation 14(2)(d)).

- 5.44 At common law, where a “liquidated damages clause” represents a reasonable pre-estimate of the loss the clause is enforceable, but where it is excessive and/or acts as a deterrent against termination, then it can be classed as a “penalty clause”. A penalty, imposing an excessive payment as a deterrent to breach, is not enforceable. Damages for breach of contract should be compensatory, not punitive.
- 5.45 Case law indicates that the key test to determine whether a provision is a liquidated damages clause or a penalty clause is whether the sum of damages paid is extravagant when compared to the greatest loss that could conceivably follow the breach.⁸⁵
- 5.46 Traders should take into account the following non-exhaustive list of principles when drafting termination clauses and determining the amount of damages consumers are required to pay pursuant to such clauses:
- **Mitigation** – traders are required to mitigate or minimise their loss following a breach of contract by a consumer. Termination clauses which demand payment of all remaining monthly fees do not factor this fundamental duty to mitigate;
 - **Accelerated payment** – termination clauses which demand immediate payment of all sums due, where payment is due on a monthly basis and over a fixed period, accelerate the payment obligation. Accelerated payments are one factor in determining whether a clause is a penalty clause;⁸⁶ and
 - **Net loss** – termination clauses should provide for the actual loss or net loss suffered by the trader. Termination clauses which require consumers to pay all future sums due, effectively seek damages for the gross profit and are likely to be considered penalty clauses.⁸⁷
- 5.47 The CCPC considers that a clause which requires a consumer to pay all the remaining monthly charges for the term of a bundle sale where a consumer terminates the contract early is likely to be considered a penalty clause and unenforceable.

Unfair Terms Regulations

- 5.48 Termination clauses may be considered unfair, and therefore unenforceable, under the Unfair Terms Regulations. The Unfair Terms Regulations apply to terms in standard form consumer

⁸⁵ *Dunlop v New Garage & Motor* [1915] AC 79; approved and applied in the Irish courts in the High Court in *Irish Telephone Rentals Ltd v Irish Civil Service Building Society* [1992] 2 IR 525; and in the Supreme Court in *O'Donnell & Co Ltd v Truck and Machinery Sales Ltd* [1998] 4 IR 191. The recent High Court cases of *Sheehan v Breccia and others* [2016] IEHC 67 and *Flynn & Anor v Breccia* [2016] IEHC 68 affirmed the position of these earlier cases.

⁸⁶ *Irish Telephone Rentals Ltd v Irish Civil Service Building Society* [1992] 2 IR 525.

⁸⁷ *Irish Telephone Rentals Ltd v Irish Civil Service Building Society* [1992] 2 IR 525.

contracts, concluded between a trader and a consumer, that have not been individually negotiated. The Unfair Terms Regulations apply to terms concerned with both handset sales and bundle sales. A term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance of the parties' rights and obligations to the detriment of the consumer.

5.49 Schedule Three of the Unfair Terms Regulations sets out a list of terms which could be regarded as unfair – the “Grey List” which is available [here](#)⁸⁸. The Grey List includes terms that have the object or effect of requiring any consumer who fails to fulfil his/her obligation to pay a disproportionately high sum in compensation.⁸⁹ Terms which are unfair are unenforceable and are not binding on the consumer.⁹⁰ Further guidance relating to unfair terms is available in the National Consumer Agency (the CCPC's predecessor) guidelines which is available [here](#).

5.50 The CCPC considers that any termination clause which allows a trader to recover more from the consumer than the losses it is reasonably likely to incur as a result of the consumer's early termination will be open to scrutiny for unfairness.

5.51 To ensure a termination clause is fair, complies with the principles of the Unfair Terms Regulations, and is enforceable traders should ensure that the termination clause reflects any:

- savings for the trader associated with no longer having to provide the electronic communications service;
- ability of the trader to mitigate (reduce) its loss, for instance by finding another customer; and
- benefit to the trader of receiving a payment earlier than it would have otherwise.

⁸⁸ The Grey List includes other terms which may be considered unfair which are not necessarily relevant to termination clauses. For example, the following is a non-exhaustive list of some terms contained on the Grey List: terms which i) inappropriately exclude or limit the legal rights of the consumer vis-a-vis the seller or supplier in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him; ii) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone; iii) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract; and iv) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract.

⁸⁹ Schedule 3, paragraph 1(e), Unfair Terms Regulations.

⁹⁰ Regulation 6, Unfair Terms Regulations.

5.52 The basis upon which this termination figure is calculated should be set out clearly and communicated to the consumer before they enter into a contract.⁹¹

Example 9:

A trader's terms and conditions for a bundle sale contain a termination clause. The termination clause provides that consumers who terminate the contract before the end of the 12 month contract must pay all the outstanding payments due to the trader, including the monthly service subscription costs.

In this case, such a term is open to scrutiny for unfairness and may be unenforceable under common law and the Unfair Terms Regulations.

⁹¹ Regulations 5, 7, 10, CRD Regulations.