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REVIEW OF THE CONSUMER  
ACQUIS

UK Government's response  
to the EU Commission's  
Green Paper on the Review  
of the Consumer Acquis

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# EU COMMISSION GREEN PAPER ON THE REVIEW OF THE CONSUMER ACQUIS

## UK GOVERNMENT RESPONSE

### SUMMARY OF THE UK GOVERNMENT RESPONSE

1. The UK Government welcomes the opportunity to comment on the Green Paper and **supports its broad objectives**. We understand these objectives to be to construct a clearer set of legal rules for consumers that boost confidence (especially in cross-border shopping), protect consumers and stimulate the Single Market. We support the Commission's wish to say to EU consumers that 'wherever you are in the EU or wherever you buy from it makes no difference: your essential rights are the same'.
2. The UK Government's response to the Review of the Consumer Acquis should be considered in the context of the Commission's 'Citizens Agenda', with its focus on delivering tangible benefits to EU citizens and the UK's paper setting out a vision of the Single Market for the 21<sup>st</sup> century.
3. Consumer and business confidence is vital for opening up the European retail market, promoting more **competition** and lower prices and introducing greater consumer **choice**. Digital technology is diversifying the ways in which consumers can access goods and services and the consumer protection framework needs to be relevant to this changing environment and react quickly to new areas of consumer detriment. A **coherent and future-proofed legal framework** plays an important role in achieving this.
4. The Unfair Commercial Practices Directive (UCPD) has produced a clearer legal framework for fair trading laws. A **simplified consumer legislative framework** contained in a horizontal instrument (a 'Consumer Rights Directive') would provide similar benefits for the consumer. The UK would like to see the new Directive based on clear principles and co-ordinated with UCPD so that the two together constitute the main body and framework of EU consumer law.
5. In terms of substance, the UK supports the '**mixed approach**'. A horizontal instrument should set out more clearly what rights are conferred on consumers and when and how information requirements and limited cancellation rights are applicable. These rights should reflect the existing rights but be presented more logically. They could, in some cases, be extended to new areas **where there is evidence of consumer detriment** e.g. consumer rules to cover digital content and the supply of services could be incorporated within the overall framework. Rights of withdrawal or other rights could be extended, for example, to situations where businesses are in breach of the UCPD (the UK's Law Commission has been asked to look into what consumer redress might be available for a breach of UCPD).
6. Individual directives should in future be designed to be **specific applications of the general principles** set out in the horizontal texts. They should respect the definitions in the horizontal instrument and be seen as additions to the acquis and not as stand alone projects. The Commission should look at the scope for

developing any such industry-specific rules in future through self-regulation and co-regulation.

7. Identifying and removing barriers to the Single Market, and improving consumer confidence, are central aims of this Review which the UK supports. **Targeted, full harmonisation** has a role in achieving this where it can be proved that a regulatory difference across Member States is either causing a clear barrier to trade and/or reducing consumer's willingness to shop cross-border. All consumer rights do not need to be fully harmonised in order to provide the consumer confidence gains which should arise from their clear exposition. Where there is a substantial barrier to trade, however, the case for full harmonisation will be stronger.
8. The UK Government would like to see **more focused research and evidence** on whether an extension of consumer sales to services and digital content will deliver benefits and whether full harmonisation is the right approach for the detailed provisions of the consumer acquis. Without this data, there is a risk that unduly burdensome legislation could be passed and opportunities for deregulation missed. The UK urges the Commission to ensure that a **rigorous impact assessment** is prepared in order to build a strong evidence base.
9. The **Timeshare Directive** should be amended to cover **new detrimental developments in the long-term commitment holiday market** (discount holiday membership clubs), providing adequate and proportionate protection for consumers and in order to discourage the rogue elements in the market, but consistently with the horizontal instrument.
10. There should be a **fundamental review of the Package Travel Directive** to address and reflect the fundamental changes to the holiday and leisure travel market over the last sixteen years.

### **A vision of consumer policy in the EU – a legislative regime for the 21<sup>st</sup> century**

The UK is ambitious for the review of the consumer acquis and looks forward to a European consumer regime in 2013 that is consistent, comprehensive and easily understood by consumer and business alike.

A successful review of the consumer acquis requires a clear vision of what makes an effective consumer regime for the twenty-first century. Central to it must be a focus on empowered consumers who actively seek out access to new markets, greater choice and lower prices. The digital age, the increase in e-commerce and the strengthening of the Single Market have the potential to multiply business routes to market and allow consumers to choose between many more providers of goods and services.

#### The Review of the Consumer Acquis and the Single Market Review

The review of the consumer acquis provides an opportunity to look at the consumer regime afresh and to articulate a vision of consumer policy. But it also asks questions about what measures are most effective in delivering a truly dynamic and

competitive Single Market that brings greater choice and lower prices for consumers. The review should therefore be seen in the context of the ongoing review of the Single Market and the need for policies that are:

- **clear about their purpose** (delivering greater competition, lower prices, and more opportunities for business);
- **focused on priorities** (using research to develop a sound analysis of where the benefits to consumer are greatest);
- **take action at the right level** (where EU action can remove barriers to trade and boost consumer confidence that cannot be tackled by Member State action alone);
- **deliver a modern and flexible framework** (with consideration of non-regulatory mechanisms that are easier to adapt to new areas of consumer detriment).

What will the Review achieve?

We consider a successful review will frame a set of horizontal consumer rights that complements the principles of fair trading in the Unfair Commercial Practices Directive. The review of the consumer acquis has the potential to achieve similar better regulation gains and should be viewed as the second pillar of European consumer protection.

A bold and ambitious education strategy delivered by Member States could then explain these rights to consumers across the EU and encourage a greater understanding of what consumers can expect if something goes wrong thus boosting their confidence to shop across borders. Developing mechanisms to deliver advice and information for consumers could, for example, be achieved through the existing European Consumer Centres. European consumer policy offers the opportunity to reconnect the citizen to the benefits of EU membership, so the rewards of getting this right are great.

### **The core basis of a European consumer legislative framework**

A mature consumer acquis has now developed providing mandatory legal rules which confer rights on the consumer independently of the contract, as well as enforcement mechanisms (Injunctions Directive) and information on unit prices. The eight directives cover a wide range of areas from unfair contract terms to particular information requirements, from specific cancellation rights to remedies where there has been a lack of conformity in goods.

Outside of the eight consumer directives, there are other directives that impose obligations on business in consumer contracts (for example, e-commerce) and on traders not to trade unfairly (unfair commercial practices). There are also a number of specific financial services directives that cater for precise situations (for example, consumer credit and the distance marketing of financial services). These directives provide important protections for consumers in those circumstances.

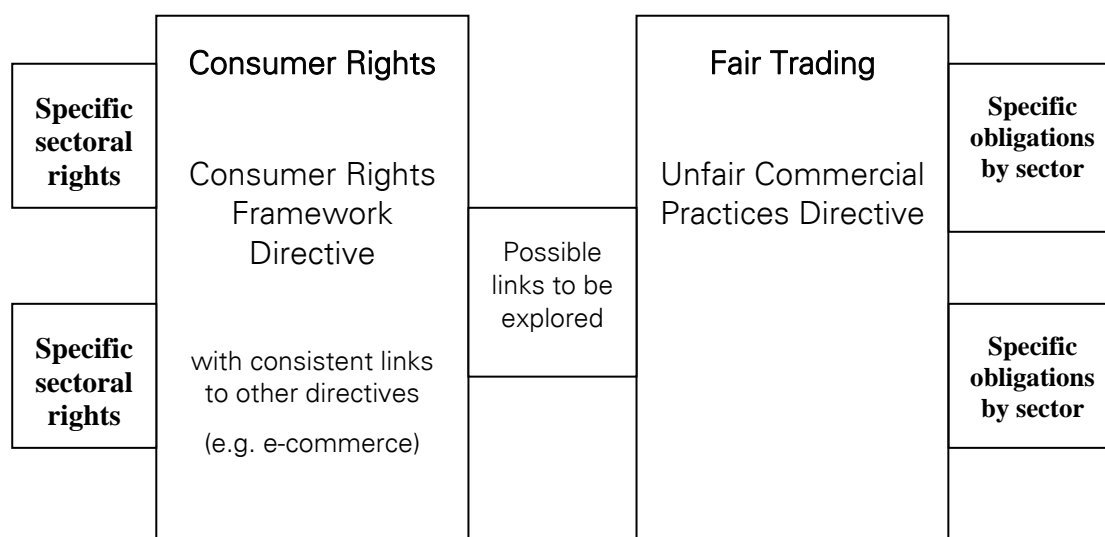
The real 'consumer acquis' therefore extends beyond the eight directives under examination. While we accept it is not possible for practical reasons to include these other directives within this review there remains a need to ensure that, as much as

possible, all these directives form part of a wider and more consistent European framework.

For example, in the area of financial services legislation, in future the Commission could consider undertaking specific impact analysis to explore whether there would be benefit in bringing some consistency to definitions and withdrawal rights in line with the consumer acquis. This should help to bring more consistency to future policymaking in this area. We urge the Commission to work together to ensure that good practice from this review is mainstreamed throughout the wider acquis.

The review of the acquis nevertheless provides the best opportunity to set out the framework for EU consumer law and then to establish a structure into which subsequent measures will have to fit.

The UK would like to see a structure along the following lines:



The core 'Consumer Rights Directive' would be structured to set out consumer rights in contracts one by one, indicating when they arise. This Directive would subsume the existing Unfair Contract Terms and Sale of Goods and Associated Guarantees Directives. It would also incorporate the existing distance selling and doorstep selling provisions. The Package Travel and Timeshare Directives might be examples of specific sectoral rules, unless they can be covered by the general framework. The existing Directives on Injunctions and Unit Pricing do not appear to fit neatly into this structure.

An **alternative and more radical simplification measure** might be to look at relying on general horizontal principles to protect consumers' interests in these sectors, set out through non-regulatory mechanisms such as codes of practice, agreed with industry and perhaps consumer groups to give greater clarity to how the general principles apply to the specifics of that sector in practice – so, for example, it might be possible for the specific information obligations on package travel operators to be accounted

for under the general principles of UCPD, combined with an industry standard for information provision.

The new structure would be designed to achieve a number of key objectives:

#### Empowerment and protection

A high level of consumer protection is an important way of achieving consumer confidence. Consumers need to know, and have confidence in, the rights they are entitled to when something goes wrong and that they are protected from rogue traders in the very worst cases.

Empowering consumers must be as important a goal as protecting them, however. EU consumers have the potential to demand more products at lower prices from millions of suppliers. Internet access is growing with over a quarter of the EU population using the Internet to buy goods and services, but the vast majority only use the Internet for purchases within a single Member State. More confident cross-border consumers who were able to make informed choices about how, and where, they purchase products would deliver a boost to the Single Market; with more competition, innovation, lower prices and dynamic economic gains.

#### Consistency and clarity

There are plenty of barriers to the full development of the single retail market in the EU other than fears about consumer redress when things go wrong (languages, currency, cultural variation, unfamiliar brands, tax variations and business segmentation), but the boosting of confidence about consumer rights would likely be a contribution to solving the problem. The Commission need to be very clear what barriers to cross-border trade they are seeking to address, and the reasons why consumers may not wish to shop cross-border. Is it a lack of information about products or the unfamiliarity of foreign brands? Are there rational reasons for consumers to choose their home markets 'home bias' such as concerns about sustainability or a concern about delivery and redress? These questions require thorough research and evidence upon which to base any decisions about what type of measures to take (legislative or non-regulatory).

Greater clarity of the legal rules is important for business as well as for consumers. Many businesses do not offer their goods and services cross-border. 57% of retailers say that they sell via the Internet but more than two thirds of them sell exclusively to domestic markets. Of the 29% of those retailers who do sell cross-border most of these sell to only one or two other member states.<sup>1</sup> This appears counter-intuitive as e-commerce increasingly offers opportunities for retailers to access a much wider market.

The Green Paper has also identified inconsistencies within the existing consumer acquis. These are greater when the wider acquis is taken into consideration. The EU legislation is not sufficiently co-ordinated and the differences across Member States

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<sup>1</sup> Business attitudes towards cross-border trade and consumer protection – Flash Eurobarometer, February 2007

can impose unnecessary administrative burdens on business. One obvious example is a situation where a consumer buys a good over the Internet and that contract can be subject to legislation on the Distance Selling Directive, the e-commerce Directive and the Sale of Goods and Associated Guarantees Directive. In order to increase businesses willingness to offer their products across the EU, then it will be necessary to look at how these provisions work alongside each other and how the legal rules can become more predictable.

#### Better regulation and simplification

To achieve this greater consistency and clarity, simplification is needed. The consumer acquis should be a model of Better Regulation. We welcome the Commission's commitment to this goal. A rigorous impact assessment that focuses on a proper analysis of the problems as well as the solutions will be vital for achieving that goal. The Commission will need to build a strong evidence base of what the most important barriers to trade are.

The Commission favours a 'mixed approach' that combines a horizontal instrument with vertical actions. We agree with the Commission that this offers the best approach for simplifying the directives without losing any necessary protections that apply to particular sectors. We do, however, encourage the Commission to be bold in their efforts to repeal, through a recasting exercise, the existing consumer directives fully or in part and so reduce the volume of the acquis. The UK would like to see as much as possible built into the horizontal instrument, with sectoral exceptions and additions kept to the minimum necessary. We would also wish to avoid significant renegotiations of each Directive, however, reopening debates that had been satisfactorily decided at adoption.

Within a horizontal instrument there would need to be consistent definitions and interpretations of key terms that not only achieve consistency across the eight directives but are also extended to other parts of the wider consumer acquis. The fact that other Directives with a consumer focus (such as 'e-commerce') are not formally part of the review means that it is very important to ensure consistency. We seek assurances from the Commission that some internal discipline operates to ensure that consistent definitions are used widely and that overlapping directives imposing similar requirements are not produced. We also support definitions that as far as possible are **future-proofed** and can be flexible enough to meet new innovations, technologies and selling practices. We consider that the work of the Common Frame of Reference might be useful in achieving this. One of the advantages of a horizontal instrument is that it should be easier and quicker to update consumer rules where there is a clear need based on developments in markets. Such updates or additions could even be envisaged using a Comitology procedure or explicit approval of codes of practice agreed by businesses and consumer groups.

A simplified acquis will therefore state more clearly the main consumer rules that confer rights on consumers. We agree with the Commission that the Sale of Goods and Associated Guarantees Directive should be included within the horizontal instrument as this is the most common and broad consumer contract and we discuss below how we feel the rules on consumer sales can be improved. We encourage the Commission to set out more clearly, within the horizontal instrument,

the core rights consumers enjoy and only make more specific provision where they are necessary through vertical actions. The process to achieve this might take the form of a radical simplification measure ('big bang') that reviews all of the directives at once or a longer-term process ('rolling programme') that reviews each directive one by one, against the core rights set out in the horizontal instrument. The UK is attracted to the first option as we consider that this will be significantly more practical and there will be more impact from a fully reviewed consumer acquis, which can be more effectively explained and promoted to European consumers.

It is important to recognise that the rationale for many of the information obligations and withdrawal rights are different across the directives. There is, nevertheless, scope for setting out more clearly within a horizontal instrument how these limited rights operate across the acquis. Vertical actions could then elaborate the framework of rights set out in the horizontal instrument (for example, specific provisions on the purchase of timeshare properties).

### Improving the consumer acquis

The UK feels that consumer protection may need to be modernised in order to create a more consistent framework across the EU.

### Updating the consumer rules

The UK raises the possibility that consumer rules to cover digital content and the supply of services could be incorporated within the overall framework in order to fit the reality of consumer purchases across the Single Market. This would be dependent on evidence of consumer detriment and impact.

Since 1999, when the Sale of Goods and Associated Guarantees Directive was negotiated, there has been a rapid increase in the rise of the service sector and the growth of digital content and services. The Services Directive has recently been adopted and will break down barriers to cross-border trade in services between Member States. The digital environment has also expanded and there may now be a need to ensure that the rules currently protecting consumers apply to online services, software downloads and digital products. Issues of digital rights management, end user licence agreements and redress are all live issues that are increasingly concerning consumers.

It is not clear to us, therefore, that specific rules on the sale of goods alone provide a comprehensive or understandable European framework. For that reason, we encourage the Commission to explore, **through research and evidence**, whether consumers and businesses seeking to operate across borders are suffering detriment from the absence of specific rules on services and digital content and if legal rules conferred on consumers will meet any such problem. The consumer rights arising out of non-conformity of goods (principally rights of repair and return) do not easily read-across to services or digital content and there would need to be a careful crafting of any new rights but we consider this should be explored as a priority within the review of the consumer acquis. For example, exploring the concept of 'professional diligence' with a focus on economic compensation, rather than repair or replacement, could be usefully explored in the area of services.

We are also aware that the European Parliament has recently discussed the possibility of a horizontal instrument on the obligations of cross-border service providers to provide some general rules on pricing, contract terms and remedies in the case of defective or delayed services. We strongly encourage DG SANCO to work with their colleagues in DG MARKT to assess the need for any such legislation within this Review.

Under UK common law the provision of a service must be offered with reasonable care and skill. If it is not, the consumer has the right (in certain circumstances) to treat the contract as terminated, sue for negligence (or even misrepresentation) and secure damages. A right to demand a repeat performance of a service might not be an effective remedy, if a consumer has suffered inadequate service provision the first time. Using the principles of evidence-based policy-making, and recognising the principle of subsidiarity, we encourage the Commission to explore the costs and benefits of devising a consumer framework that provides comprehensive consumer sales protections in goods, services and new developments in digital goods and services.

#### Clearer consumer rights

Consumers will benefit from a clear statement of what their rights are when purchasing in their home markets and across the EU. A revised consumer acquis offers an opportunity to frame these rights more clearly (within a 'Consumer Rights Directive'), and where evidence suggests a clear need, by updating the existing rights.

The rights that already exist within the consumer acquis are specific to the markets they seek to regulate. Some general principles can be drawn out from these but they might not be sufficiently detailed to provide consumers with all the rights that the individual directives afford them, without complementing them with some vertical actions.

The horizontal instrument should set out a framework stating the:

- consistent definitions of 'consumers', 'professionals' and other terms;
- types of contracts covered by the consumer acquis;
- rights to have challenged (and set aside) unfair contract terms;
- rights to repair and replacement of goods which do not conform to specification;
- rights consumers have when there is a failure to perform the contract;
- remedies that can be accessed where there has been a failure to perform;
- what information consumers are entitled to under which types of contract (e.g. under distance-selling);
- under what circumstances rights of withdrawal and cancellation periods are available;
- when cancellation periods can be extended;
- when compensation or damages can be accessed.

These rights will always need to be proportionate to the circumstances and the types of contracts that consumers have entered into.

## Getting the right level - harmonisation

Full harmonisation is not always necessary at EU level as it can prove its own barrier to flexibility and the speed with which proposals can be amended as circumstances change. Identifying and removing barriers to the Single Market, and improving consumer confidence, are however central aims of this Review and some targeted, full harmonisation has a role in achieving this. This will be the case where it can be proved that a regulatory difference across Member States is either causing a clear barrier to trade and/or reducing consumer's willingness to shop cross-border. Where action is required to remove barriers to cross-border shopping within the Single Market, full harmonisation of some detailed law (at a sensible level) or the establishment of full mutual recognition of national laws may then be necessary. But in the absence of clear barriers to trade, or if measures to remove such barriers completely cannot be agreed, it may be possible, nevertheless, to boost consumer confidence in cross-border shopping through the retention of minimum harmonisation, setting out the principles and core elements of consumer protection.

The UK Government recognises the concerns that a full harmonisation approach might lead to reductions of consumer protection in some Member States. While it is not the UK Government's goal to see its own overall levels of consumer protection significantly reduced we would have to consider how other consumer gains obtained through the further strengthening of the Single Market would be measured against any need for compromise on agreed levels.

It should be recognised that the current levels of protection within the EU directives already provide for a 'high level of consumer protection', as this is a Treaty obligation that had to be met at the time of negotiation. Raising the levels of protection to the highest level in Europe should not, therefore, be the focus of any horizontal instrument.

While we can see merit in full harmonisation, it is also not clear that all issues of consumer confidence will be boosted by the full harmonisation of detailed legislation. As far as consumers are concerned, a simple set of guaranteed rights or principles of protection will be more effective in boosting confidence in cross-border shopping than large amounts of detailed legislation, which they cannot understand. It should also be acknowledged that harmonisation cannot deliver equivalent access to small claims courts, judicial redress, consumer representation with equal ease as in domestic markets, and these will remain significant inhibitions to the launch of proceedings across borders. What matters, therefore, as far as consumer confidence is concerned, is that consumers know that traders will be inhibited from short-changing them, rather than that specific rights are harmonised.

## G. Specific Questions

### General Legislative Approach

**Question A1: In your opinion, which is the best approach to the review of the consumer legislation?**

Option 1: A vertical approach consisting of the revision of the individual directives.

Option 2: A mixed approach combining the adoption of a framework instrument addressing horizontal issues that are of relevance for all consumer contracts with revisions of existing sectoral directives whenever necessary.

Option 3: Status quo: no revision.

**The UK Government support a mixed approach with a focus on simplifying existing provisions as much as possible, incorporating specific provisions within a horizontal framework and exploiting links between the Unfair Commercial Practices Directive and the consumer acquis. We therefore support Option 2.**

A horizontal instrument, as part of the mixed approach, should set out more clearly what rights are conferred on consumers and when and how information requirements and limited cancellation rights are applicable. These rights should reflect the existing rights but be presented more logically and they may, in some cases, be extended to new areas where there is evidence of consumer detriment.

We encourage the Commission to be bold in their efforts to repeal, through a recasting exercise, the existing consumer directives fully or in part and so reduce the volume of the acquis. The UK would like to see as much as possible built into the horizontal instrument, with sectoral exceptions and additions kept to the minimum necessary. We would also wish to avoid significant renegotiations of each Directive, however, reopening debates that had been satisfactorily decided at adoption.

The horizontal instrument should set out a framework stating the:

- consistent definitions of 'consumers', 'professionals' and other terms;
- types of contracts covered by the consumer acquis;
- rights to challenge (and set aside) unfair contract terms;
- rights to repair and replacement of goods which do not conform to specification;
- rights consumers have when there is a failure to perform the contract;
- remedies that can be accessed where there has been a failure to perform;
- what information consumers are entitled to under which types of contract (e.g. distance-selling);
- under what circumstances rights of withdrawal and cancellation periods are available;
- when cancellation periods can be extended;
- when compensation or damages can be accessed.

These rights will always need to be proportionate to the circumstances and the types of contracts that consumers have entered into. We support Option 2.

### Scope of a Horizontal Instrument

**Question A2: What should be the scope of a possible horizontal instrument?**

Option 1: It would apply to all consumer contracts whether they concern domestic or cross-border transactions.

Option 2: It would apply to cross-border contracts only.

Option 3: It would apply to distance contracts only whether they are concluded cross-border or domestically.

### We support Option 1.

The Green Paper sets out three possible options for the scope of any horizontal instrument. A framework that covers both domestic and cross-border transactions, or only cross-border activity, or a third option of applying only to distance selling contracts concluded cross-border or domestically.

While stimulating cross-border trade is a key aim of this Review, so is the reduction of overall legal fragmentation. Having consistent and clear rules across the EU would be necessary to achieve this. At the moment the existing provisions within the directives cover both domestic and cross-border transactions. The minimum harmonisation clauses in each directive also allow for consumer protection to be higher than that set out in each directive.

The second or third options would subject consumers to different rules for either purchases made at home or abroad, or when they use different methods of sale. This would not increase clarity for consumers or business and as the Commission note, would reduce its Better Regulation value. For this reason we support Option 1.

### Degree of Harmonisation

**Question A3: What should be the level of harmonisation of the revised directives/the new instrument?**

Option 1: The revised legislation would be based on full harmonisation complemented on issues not fully harmonised with a mutual recognition clause.

Option 2: The revised legislation would be based on minimum harmonisation combined with the with a mutual recognition clause or with the country of origin principle.

The UK support an approach that proposes full harmonisation where there is a clear barrier to trade or evidence that a regulatory difference is leading to a reduction in consumer confidence. The justification for full harmonisation must demonstrate that the harmonisation of detailed laws will lead to predictable rules for business, and greater confidence in consumers. The Commission's approach should be on a case-by-case basis and rely on evidence from the impact assessment. The UK recognise that mutual recognition or the country of origin principle will not of itself deliver more predictable rules for business or consumers but that does not suggest that full harmonisation is the most appropriate response in all cases.

Identifying and removing barriers to the Single Market, and improving consumer confidence, are central aims of this Review which the UK supports. Targeted, full harmonisation has a role in achieving this where it can be proved that a regulatory difference across Member States is either causing a clear barrier to trade and/or reducing consumer's willingness to shop cross-border. Where action is required to remove barriers to the Single Market, full harmonisation of some detailed law (at a sensible level) or the establishment of full mutual recognition of national laws may be necessary. But in the absence of clear barriers to trade, or if measures to remove such barriers completely cannot be agreed, it may be possible, nevertheless, to boost consumer confidence in cross-border shopping through the retention of minimum harmonisation, setting out the principles and core elements of consumer protection.

The UK Government recognises the concerns that a full harmonisation approach might lead to reductions of consumer protection in some Member States. While it is not the UK Government's goal to see its own overall levels of consumer protection significantly reduced we would have to consider how other consumer gains obtained through the further strengthening of the Single Market would be measured against any need for compromise on agreed levels.

It should be recognised that the current levels of protection within the EU directives already provide for a 'high level of consumer protection', as this is a Treaty obligation that had to be met at the time of negotiation. Raising the levels of protection to the highest level in Europe should not, therefore, be the focus of any horizontal instrument.

While we can see merit in full harmonisation, it is also not clear that all issues of consumer confidence will be boosted by the full harmonisation of detailed legislation. As far as consumers are concerned, a simple set of guaranteed rights or principles of protection will be more effective in boosting confidence in cross-border shopping than large amounts of detailed legislation, which they cannot understand. It should also be acknowledged that harmonisation cannot deliver equivalent access to small claims courts, judicial redress, consumer representation with equal ease as in domestic markets, and these will remain significant inhibitions to the launch of proceedings across borders. What matters, therefore, as far as consumer confidence is concerned, is that consumers know that traders will be inhibited from short-changing them, rather than that specific rights are harmonised.

## Horizontal Issues

### Definition of "consumer" and "professional"

#### Question B1: How should the notions of consumer and professional be defined?

Option 1: An alignment would be made of the existing definitions in the acquis, without changing their scope. Consumers would be defined as natural persons acting for purposes which are outside their trade, business or professions. Professionals would be defined as persons (legal or natural) acting for purposes relating to their trade, business and profession.

Option 2: The notions of consumer and professional would be widened to include natural persons acting for purposes falling primarily outside (consumer) or primarily within (professional) their trade, business and profession.

**The UK supports Option 1, the coherent alignment of definitions within the consumer acquis. Mixed transactions where a party is acting for purposes falling primarily outside (consumer) or primarily within (professional) their trade, business or profession should not however be included.**

Provided that there are no compelling reasons for differences in the terminology, it is sensible to remove the uncertainties that arise from these variations. Where differences occur it is not unreasonable for courts to infer a reason for such differences, where none exist. The use of different terms to describe the same concept undermines the coherence of the consumer acquis and the use of common terms might avoid differences between different language versions and national implementing measures.

We would however urge the Commission to ensure that there are no unintended consequences of a consistent definition. We would be interested to know what differences the Commission consider there are between a trade, business or profession as set out in the definition of 'professional' and would encourage the Commission to use definitions that are consistent with the Unfair Commercial Practices Directive. Definitional issues could be usefully addressed by the work continuing on the Common Frame of Reference.

Research carried out for the Department of Trade and Industry by academics notes that seven of the eight directives define 'consumer' (the Injunctions Directive does not). The Timeshare Directive refers to a 'purchaser' rather than a 'consumer' – although this is defined in similar terms to that of a consumer. These definitions of 'consumer' vary across the directives although the differences are slight. Wider disparities arise across the directives for definitions of the party dealing with the consumer. These parties are variously referred to as a 'seller', 'seller or supplier', 'trader', 'retailer' and 'vendor'. The differences between these terms are points of detail although in the Package Travel Directive the link between the seller and their professional capacity is not made in order to include private individuals and non-professional organisers of package travel products. There is also a distinction

between “retailer” and “organiser” in that Directive, which is necessary in order to reflect the mechanics of the market.

### Mixed Transactions

Mixed transactions where a party is acting for purposes falling primarily outside (consumer) or primarily within (professional) their trade, business or profession should not be included (as set out in Option 2) within the scope of the consumer acquis. While some small businesses may be in no better position than a consumer in such transactions it is important to ensure that there is clarity between business-to-business contracts and business-to-consumer contracts. Some small businesses may of course also be specialists and not require any additional protections considered appropriate for consumers; although we are aware of cases where small businesses have been targeted by rogue traders because they are considered as vulnerable as consumers.

We consider that blurring this distinction would introduce uncertainty and that the scope of the directives should not therefore be widened to include transactions that are not solely for the purpose of consumers’ private consumption. For these reasons the UK supports Option 1.

### Other terms

We also urge the Commission to ensure that other key terms that are currently not defined are considered within the Review.

The term ‘**goods**’ is only partially defined in the Sale of Goods and Associated Guarantees Directive, which are defined as ‘any tangible moveable items’ subject to certain exemptions. This does not adequately deal with the question of whether digital content is considered as a ‘good’. As discussed elsewhere in the Green Paper response (see response to Question H1), this is an issue that we encourage the Commission to explore during this Review in order to clear up an issue of confusion that has produced no satisfactory answer in UK law.

The term ‘**durable medium**’ is also featured in two of the directives included within the Review (Distance-Selling, Sale of Goods and Associated Guarantees) although it is defined in neither. The term is also used in the Distance Selling of Financial Services and Insurance Mediation Directives and is defined. For the purposes of consistency within the wider Community Acquis, we would support this definition being applied to the Distance-Selling and Sale of Goods and Associated Guarantees Directives, provided that it is fit for purpose.

There is also need for clarity in relation to the use of the term ‘**auctions**’ that we discuss in our response to Question H2.

### Consumers acting through an intermediary

**Question B2: Should contracts between private persons be considered as consumer contracts when one of the parties acts through a professional intermediary?**

Option 1: Status quo: consumer protection would not apply to consumer-to-consumer contracts where one party makes use of a professional intermediary for the conclusion of the contract.

Option 2: The notion of consumer contracts would include situations where one party acts through a professional intermediary.

**The UK is not attracted to extending the scope of protection to consumer-to-consumer contracts when one of the parties acts through a professional intermediary. We have no evidence to suggest that consumers are suffering detriment in these cases. We therefore support Option 1.**

The role of an intermediary would be very difficult to define and as the Green Paper suggests, the level of advice or representation provided by the intermediary would be hard to measure. Any changes might impact on the willingness of intermediaries to offer their services and affect the wider market. Consumers (sellers) who employ the services of intermediaries would also not necessarily be aware of the change in their status towards the consumer (buyer), nor would the buyer necessarily know that their rights were different. There might also be instances where a consumer uses a professional intermediary when buying from a business and it is not clear how this situation would be dealt with.

We could see value in requiring intermediaries to make clear to each party that irrespective of their use of an intermediary, any transaction will be a consumer-to-consumer contract (or might be a consumer-to-consumer contract, if the intermediary is not entitled to, or able to, divulge or discern the exact nature of the seller).

For these reasons, and in the absence of evidence of need and effect on the market, we would support the status quo in Option 1. However, in relation to the re-selling of timeshare rights, often purported to be on behalf of the current owner but sometimes involving very complex contractual relationships, we are of the view that there may be a case for resellers to be subject to the Timeshare Directive in order that those buying in the resale market benefit from the same rights as those buying new timeshares.

### **The concepts of good faith and fair dealing in the Consumer Acquis**

**Question C: Should a horizontal instrument include an overarching duty for professionals to act in accordance with the principles of good faith and fair dealing?**

Option 1: The horizontal instrument would provide that under EU consumer contract law professionals are expected to act in good faith.

Option 2: The status quo would be maintained: There would be no general clause.

Option 3: A general clause would be added which would apply both to professionals and consumers.

**While the UK is attracted to some general principles within a horizontal framework, we are not convinced by the arguments advanced here for an over-arching duty of good faith and fair dealing, and therefore support Option 2.**

The UK supported a general duty for Unfair Commercial Practices Directive because its principles-based approach was a useful way of providing protection where gaps arose in domestic and EU legislation but clear consumer detriment was felt. The general duty to trade fairly now exists under UCPD and we are not sure that the addition of a general duty to act in good faith would add much to it – in fact it might just add further confusion.

Within the context of a Consumer Rights Directive – type, horizontal instrument the question would in any case be ‘what rights would the consumer have in the absence of good faith or fair dealing on the part of the trader?’. In our view, the Review of the Consumer Acquis could usefully focus on what consumer rights should arise out of the UCPD rather than adding to the obligations on business without providing for corresponding rights.

In Article 3 of the Unfair Contract Terms Directive, a contractual term that has not been individually negotiated shall be regarded as unfair, if contrary to good faith, it causes a significant imbalance under the contract, to the detriment of the consumer. An unfair term can be set aside so this provision confers a consumer right. Under the Commission’s proposal for a new general duty, the negative presumption in Article 3 would be replaced with a positive presumption that in contractual relations the professional has a responsibility to act in good faith.

We are not clear what benefits there would be in merely replacing the current principle with its mirror image. If the Commission were to suggest such a general principle we would ask the Commission to provide examples where such an inversion might provide more coherent protection. The advantages and disadvantages would need to be set out. Given that any change would lead to some level of uncertainty for consumers and businesses in preparing for any change we would want to be clear that some tangible benefit would be achieved by the reformulation of this principle into an overarching duty. Without this, the UK is not attracted to Option 1 or Option 3.

We acknowledge that there might be alternatives to a ‘good faith’ test applied across the consumer acquis, for example the introduction of the concept of professional diligence backed up by remedies for a failure to meet that standard might achieve a similar result.

The UK would prefer to see consideration in the review of the consumer acquis of what rights consumers should enjoy when the general duty to trade fairly (incorporated into UCPD) is breached. In some cases this could be grounds for withdrawal from the contract, in others a right to compensation for loss suffered might be more appropriate and in others a right to repair or replacement of goods. The UK Law Commission will be considering in 2008 to what extent private rights should be created under UK law for breaches of the UCPD.

## The scope of application of the EU rules on unfair terms

Extension of the scope to individually negotiated terms

**Question D1: To what extent should the discipline of unfair contract terms also cover individually negotiated terms?**

Option 1: The scope of application of the Directive on Unfair Terms would be expanded to individually negotiated terms.

Option 2: Only the list of terms annexed to the Directive would be made applicable to individually negotiated terms.

Option 3: Status quo – Community rules would continue to apply exclusively to non-negotiated or pre-formulated terms.

Provided that the Commission can produce evidence of detriment in this area, we might be attracted to Option 1 although a focus on whether a term has been genuinely negotiated might also be a workable alternative.

As there are likely to be so few cases in which the consumer will genuinely understand the clauses and be able to assess their possible impact, the Government believes that it might be possible to subject all such clauses to control even when they have been 'negotiated'. The Government might support bringing individually negotiated terms within the scope of the Directive but with the express qualification that an individually negotiated term should not be regarded as unfair if the business has taken the reasonable steps to ensure that the particular consumer understands what has been agreed to and its foreseeable implications for him or her. We therefore prefer Option 1 but would consider other options.

When the Commission reviewed the Unfair Contract Terms Directive in 2001, the UK Government consulted on a similar proposal to extending the scope of this Directive to cover individually negotiated terms.

At that time business respondents were cautious about removing the exemption as they said that the current situation provides adequate consumer protection because the exclusion applies only when there has been a genuine opportunity to negotiate.

A large majority of non-business respondents said that individually negotiated terms should be subject to the same test of unfairness as other terms even though this would involve some erosion of the principle of parties' freedom to contract. An academic respondent said that a persuasive argument for removing this limitation is that there are likely to be so few cases in which the consumer will genuinely understand the terms and be able to assess their possible impact that it is better to subject all such terms to control even when they had been 'negotiated'.

While the UK has no evidence that such consumers are suffering significant detriment in this regard we accept that in practice consumers will rarely have a genuine opportunity to influence the substance of contract terms either because a business would be unwilling to incur the cost of altering its conditions for an

individual consumer or because of the difference in the bargaining strengths of the parties. For this reason, and the fact that there are likely to be so few cases in which the consumer will genuinely understand the clauses and be able to assess their possible impact, the Government believes that it might be possible to subject all such clauses to control even when they have been 'negotiated'. An alternative would be to assess whether or not a term had been genuinely negotiated, with consideration of this test rather than a broader extension.

### List of unfair terms

**Question D2: What should be the status of any list of unfair contract terms to be included in a horizontal instrument?**

Option 1: Status quo: To maintain the current indicative list.

Option 2: A rebuttable presumption of unfairness (grey list) would be established for some contractual terms. This option would combine guidance with flexibility as to the assessment of fairness.

Option 3: A list of terms – presumably much shorter than the existing list – which are considered to be unfair in all circumstances (black list) would be established.

Option 4: A combination of options 2 and 3: some terms would be banned completely, while a rebuttable presumption of unfairness would apply to the others.

**The UK Government supports Option 4 which allows for a list of 'black' terms which are void under all circumstances, such as terms excluding liability for death or personal and injury caused by the fault of the other party; and a rebuttable presumption of unfairness ("grey list") that would apply to others and could be updated over time.**

When the UK consulted in 2001, there was support for the idea of a 'black list', in addition to a 'grey list'.

The UK Government considers that the indicative ("grey") list of terms which may be, but are not necessarily, held to be unfair provides useful guidance to the courts, to enforcement bodies, to businesses wishing to draw up contract terms, and to consumers considering challenging contract terms.

We also consider that the list as it stands could be usefully clarified and amplified to take account of the experience gained since the Directive's implementation. In 2001 it was felt that the list could be amended to remove or tidy up some of the anomalies, overlaps, etc. and additional types of unfair term could be added to the list or taken into account by widening some of the existing examples. A number of respondents said there was scope to redraft the examples in clearer terms with the use of plain English.

We would also see value in introducing a mechanism for periodically adding to or changing the lists to ensure they reflect current thinking and jurisprudence about what constitutes an unfair term without the need for primary legislative changes.

Provided there is evidence of consumer detriment, we can see the case for a rebuttable presumption of unfairness for some contractual terms and for the creation of a 'black list' for very specific terms.

### Scope of the unfairness test

**Question D3: Should the scope of the unfairness test of the directive on unfair terms be extended?**

Option 1: The unfairness test would be extended to cover the definition of the main subject matter of the contract and the adequacy of the price

Option 2: Status quo - the test of unfairness would be kept in its present form.

**The UK Government strongly supports Option 2 but can see a benefit in seeking to define more clearly what constitutes a 'core term' in relation to the test of unfairness.**

When the Government consulted on this issue in 2001, there was a mixture of views with business respondents being opposed to removing the exclusion for terms which define the main subject matter of the contract, or which set the price to be paid for it ("core terms"), provided they are written in plain, intelligible language. These respondents said that it would be inequitable if the courts had the power to interfere with commercial bargains which had been made between the supplier and the consumer, and that the inclusion of core terms could lead to the regulation of prices through unfair terms.

All consumer bodies and several trading standards departments/organisations said however that core terms and the price/quality ratio should be capable of being assessed for fairness. Examples of consumer detriment that respondents said could be challenged if the exclusion of the price were removed from the Directive included excessive charging by "emergency" call out services such as plumbers, and the exploitation of the elderly and otherwise vulnerable who are sometimes targeted by some unscrupulous traders and sold goods or services at exorbitant prices.

### Definition of the main subject matter of the contract

Although the distinction between terms which define the "main subject matter of the contract" and incidental terms may not always be straightforward, the UK Government does not believe that it would be an appropriate response to remove the exclusion which is correct in principle simply because it is hard to apply. It suggests that a more measured response would be for the Directive to contain a tighter definition of what constitutes a "core term" to ensure the exemption applied only to terms of this nature. The UK Government therefore favours retaining the exemption for terms which define the main subject of the contract but only insofar as those terms are central to how the consumer would have interpreted the main

characteristics of the deal on offer, taking into account the terms in which they were advertised or sold, the way the contractual terms were presented and what would normally be expected of the type of contract apparently being offered.

### **Price**

The Government is opposed to the complete removal of the exclusion for the price/quality ratio because even in reasonably competitive markets prices do vary quite a lot (not least because of the different costs faced by traders working in different locations and on different scales, factors which may not be apparent to the average consumer) with the risk that traders could be faced with a large number of challenges to allegedly unfair prices. There may be a need in some Member States, including the UK, to protect vulnerable consumers against deliberate over-charging in certain circumstances where the price is exorbitant or grossly contravenes the ordinary principles of fair trading but the UK does not support the inclusion of such provisions in this broad Directive.

### **Information requirements**

**Question E: What contractual effects should be given to the failure to comply with information requirements in the consumer acquis?**

Option 1: The cooling-off period, as a uniform remedy for failure to comply with information requirements, would be extended, e.g. up to three months.

Option 2: There would be different remedies for breaching different groups of information obligations: some breaches at the pre-contractual and contractual level would give rise to remedies (e.g. incorrect information on the price of a product could entitle the consumer to avoid the contract), whilst other failures to inform would be treated differently (e.g. through an extension of the cooling-off period or with no contractual sanction at all).

Option 3: Status quo: The contractual effects of failure to provide information would continue to be regulated differently for different types of contract.

The Government would urge the Commission to consider possible ways in which the existing legislation could be simplified. Broader principles could be established about how specific information obligations in the consumer acquis tie in with the UCPD, and in particular whether there is scope for more consistent rules on information requirements, followed by detailed sector specific rules where necessary. Any broad consumer rights arising out of the failure to supply relevant information should be correlated with the obligations on its businesses to supply the information in the first place. The starting point for such rights should therefore be for breaches of the UCPD.

We would be interested to see a uniform application of the extension of the cooling-off periods where there has been a failure to supply information but only in instances where that is a proportionate remedy. In other such instances alternative remedies should apply. Option 2 would allow for greater flexibility, as well as the rationalisation of the consumer acquis and its integration with UCPD.

## Information Requirements in the Consumer Acquis

The Consumer Acquis has extensive information duties which are generally imposed on professionals to require them to provide the consumer with information about particular aspects of the transaction. The factual information duties under the Consumer Acquis differ as to: (i) circumstances in which they are required, (ii) detail and (iii) timing.

### General Principle – advantages and disadvantages

In their report for the UK Government on the simplification of the consumer acquis, academics considered a general principle on information duties, based on the types of information required under the various directives. This principle would 'require the supplier to make available to the consumer such information about the nature of the goods, the identity of the parties and the terms of the contract and the consumer's rights under it as is reasonably necessary to enable the consumer to make an informed transactional decision whether to enter into the contract, proceed with it or enforce any rights available to him under the contract or under the general law, such information to be accurate and to be supplied in good time to enable the consumer to make an informed decision, and to be supplied in a form appropriate to the nature of information and the nature of the transaction'.

Such a principle looks very similar to that contained in the Unfair Commercial Practices Directive. What is needed in the consumer acquis is to take account of this general duty and perhaps the specific information requirements contained in the individual Directives (e.g. package travel) and to set out what specific rights consumers can enjoy when information is not made available to them in compliance with those obligations.

### Withdrawal rights

Withdrawal rights are often linked to information requirements and can be extended where there has been a failure to provide information. Withdrawal rights are complicated because they sit alongside similar rights in other EC legislation as well as domestic law provisions. One obvious example is in situations where a consumer buys a good over the internet and the contract can be subject to legislation on the Distance Selling Directive, the e-commerce Directive and the Sale of Goods and Associated Guarantees Directive – all of which may provide for rights of withdrawal or termination of a contract.

The UK Government is therefore attracted to the idea of rationalising these rules as part of the simplification of the consumer acquis. While there are reasons why the lengths of these extensions vary, the extensions of the cooling-off periods can be complex and it is difficult to see how consumers would find them clear without professional advice. It would be a useful improvement in the overall coherence of the acquis for consumers and professionals if these variations could be reduced to a minimum without reducing the overall level of consumer protection.

We would be interested to see a uniform application of the extension of the cooling-off periods where there has been a failure to supply information but only in instances

where that is appropriate. In other such instances alternative remedies should apply. For example, in some cases which entail a significant financial commitment on the conclusion of a cooling off period, for example Timeshare, it may be appropriate, and logical, given that the information required is deemed to be crucial to the consumer's ability to reach a reasoned decision, that the contract is nullified if the information is not forthcoming within a reasonable period. Option 2 would allow for greater flexibility, as well as the rationalisation of the consumer acquis.

## Right of withdrawal

The cooling-off periods

### **Question F1: Should the length of the cooling-off periods be harmonised across the consumer acquis?**

Option 1: There would be one cooling-off period for all cases when the Consumer Rights Directives grant consumers a right to withdraw from the contract, e.g. 14 calendar days.

Option 2: Two categories of directives would be identified and to each of them a specific cooling-off period would be attached (e.g. 10 calendar days for door-to-door and distance contracts as opposed to 14 calendar days for timeshare).

Option 3: Status quo: cooling-off periods would not be harmonised in the consumer acquis; they would be regulated in the sectoral legislation.

**It is not clear that the lengths of the cooling-off periods should vary within the categories of directives set out in Option 2. While the rationales for the periods are different, a period of 10 calendar days for Doorstep Selling and Distance Selling seems proportionate and likewise 14 calendar days for Timeshare. We certainly support a uniform method of applying calendar days for the benefit of consistency within the consumer acquis and for consumers and professionals. We therefore support Option 2.**

Withdrawal rights in various forms exist across the consumer acquis and specifically in the Distance-Selling, Timeshare, Package Travel and Doorstep Selling Directives. The reasons for the withdrawal rights vary and the rights vary in detail e.g. the grounds for exercise, the time and manner of exercise. In respect of the directives examined, the rights are given – as a sanction for breach of contract by the professional (Distance and Sale of Goods and Associated Guarantees (under certain circumstances)), to protect the consumer against unwanted purchases and pressure selling (Doorstep Selling and Timeshare), to protect the consumer against ill-considered decisions made prior to the consumer viewing the product (Distance Selling), or to protect the consumer where there has been a variation in the contract (Package Travel). The Unfair Contract Terms Directive could also allow for a contract term to be assessed in light of the ability to access a right of withdrawal.

The length of time during which a consumer can make use of a right of withdrawal may vary and it could be argued that it is difficult for consumers to understand why

these differences exist and for businesses to apply. We consider there is some merit in this view but it is unlikely that this is the most complicated aspect of the consumer acquis for business or consumers. Businesses find the overlapping provisions imposed on them by different directives (and their implementation and interpretation in Member States) harder to apply than numerical differences in a cooling-off period. Differences in the cooling-off periods across Member States ranked as the smallest obstacle in the Eurobarometer report on business attitudes towards cross-border trade and consumer protection (February 2007).

Academics have concluded that it is not possible to replace individual instances of withdrawal rights with a general principle, not least because the underlying rationales, as detailed above, differ. There are common features however that could benefit from rationalisation and the alignment of the method of calculation of time periods to calendar days is one area.

The modalities of exercising the right of withdrawal

**Question F2: How should the right of withdrawal be exercised?**

Option 1: Status quo: Member States would be free to determine the form of the notice of withdrawal.

Option 2: One uniform procedure for the notice of withdrawal across the consumer acquis would be established.

Option 3: All formal requirements for the notification of withdrawal would be excluded. A consumer would then be able to withdraw from the contract by any means (including by returning the goods).

**Clarifying the rules on how consumers can exercise the right of withdrawal and how to return products could be part of a set of general rules applicable to withdrawal rights. A variant of Option 2 which allowed for a number of sensible methods for giving notice of withdrawal might be attractive in favour of rationalising the consumer acquis.**

It is not clear what the Commission mean by 'one uniform procedure' for the notice of withdrawal. If they mean one method then that would be too restrictive, however a set of options that are recognised and proportionate could prove useful for both professionals and consumers. Option 3 would appear too onerous on professionals and there would be certain instances where some methods of withdrawal would be inappropriate (text messaging, for example). A variant of Option 2 which allowed for a number of sensible methods for giving notice of withdrawal might be attractive in favour of rationalising the consumer acquis.

## The contractual effects of withdrawal

### **Question F3: Which costs should be imposed on consumers in the event of withdrawal?**

Option 1: The current regulatory options would be removed - consumers would then not face any costs whatsoever when exercising their right of cancellation.

Option 2: The existing options would be generalised: consumers would then face the same costs when exercising the right to withdrawal irrespective of the type of contract.

Option 3: Status quo: The current regulatory options would be maintained.

**The UK is not attracted to Option 1 as consumers already have a duty to pay certain costs when accessing a withdrawal right. We tend to support Option 3 unless the Commission can supply evidence of the benefits of Option 2.**

Under the Distance Selling Regulations, the consumer can be charged for the direct cost of returning the goods (in certain circumstances) and under Regulation 4(5) of the Doorstep Selling Regulations, the contract will be cancelled on notice. Regulation 6 of the Doorstep Selling Regulations provides that a consumer is automatically released from his obligations under a contract. The consumer is however, under a duty to restore the goods to the trader and pay for certain goods (if those goods are perishable or provided in an emergency and not capable of being restored) as well as for any services in connection with the supply of the goods or services before cancellation in accordance with the contract. The Doorstep Selling Regulations also apply other rules for part-exchange and cancellation of credit whilst the Distance Selling Regulations contain further provisions on the use of payment cards and technologies.

These costs are pertinent to each contract and type of selling method and it is not clear that general rules would provide much greater confidence for consumers or be fair to professionals in all circumstances. In light of these arguments, the UK support the status quo in Option 3, but if the Commission can present evidence of the benefits arising out of Option 2, the UK would examine it with interest.

## General contractual remedies

### **Question G1: Should the horizontal instrument provide for general contractual remedies available to consumers?**

Option 1: Status quo: the existing law provides for remedies limited to the particular types of contracts (i.e. sales). The general contractual remedies would be regulated by national law.

Option 2: A set of general contractual remedies available to consumers in the case of a breach of any consumer contract would be provided. These remedies would include: the right of a consumer to terminate the contract, to ask for a reduction of the price and to withhold performance.

**While we do not support general contractual remedies available to consumers in the case of any breach of any consumer contract, we are attracted to a clearer framework of remedies that are available within a horizontal instrument. Consumers benefit from easily understood rules and there are clear advantages in knowing when consumers have the right to a remedy; even when these remedies vary from situation to situation.**

UK laws in the sale of goods are well-established and contain several protections that go beyond the requirements of the Sale of Goods and Associated Guarantees Directive. The UK Government is therefore not attracted to prescriptive legislation that would impose one set of remedies on all consumer contracts without regard to the type, or breach, of contract. As with the remedies in the Sale of Goods and Associated Guarantees Directive, it is not reasonable for consumers to be able to choose from any remedy irrespective of the nature of the fault.

Moreover, the Directives provide for different contractual remedies specific to the nature of the contract. The remedies that currently exist within the Doorstep and Distance Selling Directives are different due to the different factual circumstances and differences in the subject matter of the contracts. In these instances we cannot see how a general contractual remedy could be created in respect of these different types of contract.

An issue that was raised in the UK's academic report is the absence of a general principle that the supplier should be liable to the consumer if he fails to perform a contractual obligation. The Sale of Goods and Associated Guarantees Directive imposes an obligation on the seller to deliver goods in conformity with the contract, but gives the consumer no remedy if the seller fails to deliver at all. The UK's academic report argued that if general principles of consumer contract law are applied, one of the most basic must be that the supplier will supply the goods or services contracted for and will compensate the consumer for any loss if he fails to do so.

We do consider however that a horizontal instrument could set out a framework of consumer rights that cover more broadly rules on consumer sales (including goods, and possibly services and digital content). There may be scope here for a clearer

statement of when remedies are available, the principles that underpin remedies in consumer sales (failure to perform a contractual obligation) and specific remedies for different types of consumer sale. Separate contractual remedies under vertical actions would cater for the different circumstances and subject matter of contracts in distance selling and timeshare, for example.

### General right to damages

#### **Question G2: Should the horizontal instrument grant consumers a general right to damages for breach of contract?**

Option 1: Status quo: the issue of contractual damages would be governed by national laws, except when provided for in the Community acquis (e.g. package travel).

Option 2: A general right to damages for consumers would be foreseen - they would be able to claim damages for all breaches, irrespective of the type of breach and the nature of the contract. It would remain up to the Member States to decide what types of damages could be compensated.

Option 3: A general right to damages for consumers would be foreseen and it would be provided that these damages should at least cover purely economic (material) damages that the consumer has suffered as a result of the breach. Member States would then be free to regulate non-economic loss (e.g. moral damages).

Option 4: A general right to damages for consumers would be introduced and it would be provided that these damages should cover both the purely economic (material) damage and moral losses.

**If the Commission can demonstrate that there is evidence of need for a wider right to damages, where there has been a failure to perform a contractual obligation, we would consider this in light of our stated desire to see a clearer and more consistent framework of consumer rights. If a strong case for this can be made we might consider a variation of Option 3 that allowed Member States to regulate non-economic loss and what types of damages could be compensated for. Otherwise we would support the status quo in Option 1.**

The right to damages is not regulated in the consumer acquis except in the Package Travel Directive. Neither the Distance-Selling nor the Doorstep Selling Directives provide for a general right to damages. In the Sale of Goods and Associated Guarantees Directive the right to financial compensation is limited to a reduction in price or, if the contract is rescinded, a refund. There is no provision for compensation or damages taken more widely. Some consider that this represents a striking gap in the remedies available to consumers for a breach of a Community obligation.

UK law is more generous than EU law in relation to the sale of goods as consumers have the right to reject goods for a full refund and/or claim damages provided there is a failure in the implied terms of the contract. This right to reject is limited to a

short period after delivery and is an absolute right if the seller is in breach of the contract. When the Sale of Goods and Associated Guarantees Directive was implemented it was decided to retain this right and therefore UK law goes further than the Directive.

The UK is interested in exploring how the right to damages would work within a wider horizontal instrument. We are not attracted to a general right of damages for any contract, irrespective of the type of breach and the nature of the contract, but we could possibly accept a right to damages being offered under a horizontal instrument in certain defined circumstances.

## **Specific rules applicable to Sale of Goods**

### **Types of contracts to be covered**

**Question H1: Should the rules on consumer sales cover additional types of contracts under which goods are supplied or digital content services are provided to consumers?**

Option 1: Status quo: i.e. the scope of application would be limited to sales of consumer goods, with the only exception of goods which are still to be produced.

Option 2: The scope would be extended to additional types of contracts under which goods are supplied to consumers (e.g. car rental).

Option 3: The scope would be extended to additional types of contracts under which digital content services are provided to consumers (e.g. on-line music).

Option 4: Combination of Option 2 and 3.

**The UK Government considers that the Commission should explore whether consumer rules covering digital content and the supply of services could be incorporated within the overall horizontal framework, provided that there is evidence of need and consumer detriment. We do not consider that the rules on consumer sales could easily be read across however to these new areas. We therefore support Option 4 subject to that qualification.**

Goods, services and digital content are sufficiently different to need to be treated separately, for example appropriate remedies would need to be finely crafted to ensure they are fit for purpose. For example, is software "goods" when it forms part of a contract of supply (as opposed to supply under a licensing agreement)? The position under English law is uncertain. The UK considers that if a horizontal instrument is unable to deal effectively with these types of contracts it will be difficult to achieve a future-proofed framework of consumer rights.

## Second-hand goods sold at public auctions

**Question H2: Should the rules on consumer sales apply to second-hand goods sold at public auctions?**

Option 1: Yes.

Option 2: No, they would be excluded from the scope of Community rules.

For the reasons below, we support Option 2 and encourage the Commission to maintain the status quo.

### Position in UK law

The general rules applying to sales by auction are set out in the Sale of Goods Act 1979. Section 12 of the Unfair Contracts Terms Act 1977 implements into UK law the exemption for second-hand goods sold at public auctions provided for in Article 1.3 of the Sale of Goods and Associated Guarantees Directive. The Distance Selling Regulations 2000 exempt contracts concluded at an auction as provided for in Article 3.1 of the Distance Selling Directive.

### Maintaining the status quo

The UK would strongly resist any proposals to alter the existing position whereby cooling-off periods and rights of withdrawal do not apply to goods bought at auctions. Many different types of goods can be sold at auction. For example, art and antiques, livestock, bloodstock or property. Where second-hand goods are 'unique', rather than mass-produced goods, and as such irreplaceable (for example, many works of art and antiques), the concept of conformity is not appropriate. Their value is related more to their cultural and artistic attributes rather than their function. The specific nature of second-hand goods makes it generally impossible to replace them and a limitation of liability is appropriate (Recital (16) of the Sale of Goods and Associated Guarantees Directive). The UK is the second largest player in the world in the sales of fine arts and antiques and this is therefore an important market for the UK. Without any evidence of consumer detriment, harmonisation of new rules at a European level would have a serious effect on what is essentially a global market and could lead to shifts of trade to the US or the Far East.

### Auctions

The UK considers that there is a difference between a live/public auction, where a purchaser can bid via various methods, albeit simultaneously with those taking part in the live auction (and the product is likely to be unique) and online auctions, that do not allow the consumer to inspect (physical inspection) the product and can take place over a longer period of time (and where the product is less likely to be irreplaceable). Consumer protection in the area of auctions should recognise the distinct nature of each market and the important distinction between the products traded in each. The UK considers that live/public auctions and online auctions, while

different for the reasons stated above, are both exempt as auctions under the Distance Selling Directive. Both involve competitive bidding and are therefore inappropriate business models for the inclusion of a cooling-off period or a right of withdrawal and we encourage the Commission to make this clearer in the Directive.

### **General obligations of a seller – delivery and conformity of goods**

#### **Question I1: How should delivery be defined?**

Option 1: Delivery would mean that the consumer materially receives the goods (i.e. the goods are handed over to the consumer).

Option 2: Delivery would mean that goods are placed at the consumer's disposal at the time and place specified in the contract.

Option 3: Delivery would mean, by default, that the consumer takes physical possession of the goods, but the parties can agree otherwise.

Option 4: Status quo: the term delivery would not be defined.

**We are attracted to Option 3 provided the passing of risk is linked to this definition of delivery.**

The UK recognises that the failure to define 'delivery' within the Directive can lead to some confusion about when the time limits related to remedies for non-conformity begin. Article 2.1 of the Sale of Goods and Associated Guarantees Directive makes delivery the point at which conformity of the goods should be assessed. The failure to define delivery also has a practical consequences for the timing of the passing of property because as it is not clear who bears the risk of loss or damage to the goods during transit to the consumer.

In order to avoid such confusion, UK law has introduced a definition of delivery and also provides that in the case where the buyer deals as a consumer, goods remain at the seller's risk until they are delivered to the consumer. Risk will therefore be with the seller during transit.

We are attracted to Option 3 as we can see some benefit in a default definition of delivery within the Directive. This would allow for flexibility but would also achieve greater internal coherence within the Directive and achieve clarity for professionals and consumers.

## The passing of risk in consumer sales

### Question I2: How should the passing of the risk in consumer sales be regulated?

Option 1: The passing of the risk would be regulated at Community level and be linked to the moment of delivery.

Option 2: Status quo: the passing of risk would be regulated by the Member States, with the consequence of divergent solutions.

For the reasons discussed above, the UK can see benefit, in terms of greater internal coherence within the horizontal instrument, to defining the passing of risk and linking it to the moment of delivery (Option 1).

Under UK law, if the buyer is a consumer, risk always passes when goods are delivered to the consumer and risk will therefore remain with the seller during transit.

## Conformity of goods

### Question J1: Should the horizontal instrument extend the time limits applying to lack of conformity for the period during which remedies were performed?

Option 1: Status quo: no changes would be made.

Option 2: Yes. The horizontal instrument would provide that the duration of the legal guarantee is extended for a period during which the consumer was not able to use the goods due to remedies being performed.

Provided that evidence can be brought forward of problems arising from the differences that exist across Member States, and of consumer detriment where the two-year time limit expires while remedies are being performed, we could see a justification for Option 2.

In English law (slightly different rules apply under Scottish law) the time limit for starting legal actions to enforce contractual claims is considerably longer (six years) than that provided for under Article 5.1(g) of the Directive. This provides a considerably more generous period during which consumers have the right to make a claim against a seller for lack of conformity. While the UK would not wish to see any extension of this more generous period, we could see a justification (provided that there was evidence of consumer detriment) for an extension of the two-year time limit in the Directive to cover any period during which a consumer is unable to use goods while a seller attempts to cure defects.

## Recurring defects

**Question J2: Should the guarantee be automatically extended in case of repair of the goods to cover recurring defects?**

Option 1: Status quo: The guarantee would not be extended.

Option 2: The duration of the legal guarantee would be extended for a period to be specified after the repair to cover the future re-emergence of the same defect.

**The UK has no evidence that its consumers are suffering significant detriment in this regard but we accept that this situation might create uncertainty for consumers in cases where a fault has emerged again after repair. However, for the reasons stated below, we are cautious about such an extension but would look at Option 2 provided that the Commission can demonstrate evidence of a need.**

Because the actual identification of what constitutes a re-emergence of the same defect is problematic, this can result in legal uncertainty. Other eventualities could arise which would not be envisaged by the proposal in Option 2; for example it is not clear that Option 2 would meet the situation where a new defect occurred which had been caused during the repair of the original defect. It is also not clear whether the professional or the consumer would be expected to prove when a fault (or indeed which fault) had been repaired. If this fell to the professional this could impose a disproportionate burden on professionals in respect of record-keeping. If it fell to the consumer it could impose a burden to prove it was the same fault that had re-emerged, perhaps requiring some specialised technical knowledge. If it was not made clear who was to retain documentation or prove technical evidence this would cause legal uncertainty for both parties.

## Second-hand goods

**Question J3: Should specific rules exist for second hand-goods?**

Option 1: A horizontal instrument would not include any derogation for second hand goods: the seller and consumer would not be able to agree on a shorter period of liability for defects in second hand goods.

Option 2: A horizontal instrument would contain specific rules for second hand goods: the seller and the consumer may agree on a shorter period of liability for defects in second hand goods (but not less than one year).

**The UK supports neither option but would support an additional option to maintain the status quo.**

English law does not provide for any shortening of the liability for second-hand goods. The very nature of second-hand goods means the seller and consumer must be free to agree terms as appropriate for the goods in question. We are not aware that the differences that apply across Member States cause a lack of consumer and

business confidence or significant legal uncertainty. Unless this can be demonstrated we see no justification for either option and would support the status quo.

### Burden of proof

**Question J4: Who should bear the burden to prove that the defects existed already at the time of delivery?**

Option 1: Status quo: During the first six months it would be up to the professional to prove that the defect did not exist at the time of delivery.

Option 2: It would be up to the professional to prove that the defect did not exist at the time of delivery for the entire duration of the legal guarantee, as long as this would be compatible with the nature of the goods and the defects.

**Before supporting Option 2, we would need to see evidence of the problems described by the Commission and that it is best dealt with by reversing the burden of proof for the entire two year legal guarantee. As the reversal of the burden of proof is unusual within UK law we would need to be convinced of a further extension of this.**

Article 5.1 of the Sale of Goods and Associated Guarantees Directive provides that the seller is to be liable for any lack of conformity which becomes apparent within two years from delivery of the goods. In the UK the time limit is six years for starting legal actions to enforce contractual claims (five years in Scotland). The UK has implemented the reversal of the burden of proof, introduced under Article 5.3, which applies to the new remedies introduced under the Sale of Goods and Associated Guarantees Directive. Alongside these remedies, under UK law consumers who wish to reject goods and terminate a contract will have to prove a defect existed at the time of delivery. On the other hand, if the consumer asks for repair/replacement under the remedies introduced by the Directive, the burden is on the seller to show goods were not defective at the time of delivery (for the first six months).

There is an argument that consumers will find it more difficult than business to prove a lack of conformity existed after this six-month period has elapsed, and therefore this acts a limitation of the legal guarantee. This fits in with the general premise of the rules on consumer contracts that consider the consumer to be the weaker party in any transaction. Technical reports are expensive (and time-intensive), often above the price of the good itself, and act as a disincentive for consumers to take action. Equally businesses may be reluctant to ask potentially intrusive questions about the use to which the good has been put in order to judge whether the defect has occurred through normal wear and tear which is compatible with the nature of the goods and the defects. This would be made harder if it was up to the professional to prove that any fault had existed at the time of delivery and was not therefore related to normal wear and tear over the two-year period. Businesses will often seek to avoid such a scenario by employing one of the other alternatives (manufacturer's guarantee, extended warranty or after sales service) rather than demanding evidence of a lack of conformity. The balance is finely judged. We would

need to see evidence that a problem arises due to the existing rebuttable presumption only being available when it is compatible with the nature of the goods and the defects. We would need to see evidence that Option 2 provides a solution to this perceived problem.

## Remedies

### Question K1: Should the consumer be free to choose any of the available remedies?

Option 1: Status quo: consumers would be obliged to request repair/replacement first, and ask for a price reduction or termination of contract only if the other remedies are unavailable.

Option 2: Consumers would be able to choose any of the available remedies from the start. However, termination of the contract would only be possible under specific conditions.

Option 3: Consumers would be obliged to request repair, replacement or reduction of price first, and would be able to ask for termination of contract only if these remedies are unavailable.

**The UK is attracted to a right to an appropriate remedy for non-conformity (or its equivalent) across all types of contracts under a horizontal instrument, with Member States free to regulate exactly how these apply. The UK does not however support consumers being able to choose any remedy for a sale of goods contract, irrespective of the cost or burden of that remedy on the business. These issues will also be considered by the UK Government in relation to recommendations made by the recent UK Davidson Review, which has recommended that existing remedies should be overhauled in order to create a more coherent domestic framework.**

Prior to the Sale of Goods and Associated Guarantees Directive, English law did not provide for a right to repair or replacement, but gave a buyer the right to reject or terminate the contract, or to claim damages, at the point of acceptance. The Sale of Goods Act 1979 (as amended) allowed the consumer to reject the goods outright and get his money back, provided this was done within a short time.

These remedies have been retained after the implementation of the new remedies provided for in the Directive and consumers now have the option of a variety of remedies. UK law provides that a consumer cannot ask for repair or replacement where this would be disproportionate in comparison to price reduction or rescission.

The UK is not attracted to a position (Option 2) that would allow consumers to choose without limitation between all four remedies provided for in the Directive. The economic burden on business of consumers choosing replacement or price reduction for small defects could prove onerous and it is likely that consumers would absorb the costs in the longer term. As an extreme example, consider the possibility that a purchaser of a motor car might be able to request a refund or replacement on an expensive car for the failure of a bulb in the first few months.

However, one aspect of the present framework which could be improved is that the Directive does not make clear whether the consumer is free to choose between repair or replacement, or whether this choice is at the option of the seller. (Nor is there any ranking or priority as between repair and replacement.) The lack of clarity in this area frequently gives rise to disagreements. One option that the UK Government might consider would be to allow consumers to choose between repair, replacement or price reduction, provided that where repair is more cost-effective than replacement the seller can opt for this remedy. Termination of contract would remain available only in specific conditions, for example where other remedies were unavailable.

Another area that suffers from a lack of clarity in the Directive at the moment is whether the consumer can request an alternative remedy when the first has proved unsatisfactory. The Directive is silent on whether repair is available if a replacement has not been provided within a reasonable time or without significant inconvenience, or vice versa. We see no reason why this should not be so, provided that neither remedy was impossible, or disproportionate, when the consumer made his initial choice of remedy.

#### **Notification of the lack of conformity**

**Question K2: Should consumers have to notify the seller of the lack of conformity?**

Option 1: A duty to notify the seller of any defect would be introduced.

Option 2: A duty to notify in certain circumstances would be introduced (e.g. when the seller acted contrary to the requirement of good faith or was grossly negligent).

Option 3: The duty to notify within a certain period would be eliminated.

**While we support the status quo (as we do not believe Option 1 to be practicable and Option 2 could introduce uncertainty), we would consider Option 3 if there was evidence of confusion for consumers and businesses.**

The UK has not introduced a notification period as permitted in Article 5(2) of the Sale of Goods and Associated Guarantees Directive. It is not clear how such a notification could be effectively policed as it would be hard to prove when a consumer had discovered a lack of conformity.

## Direct producers' liability for non-conformity

**Question L: Should the horizontal instrument introduce direct liability of producers for non-conformity?**

Option 1: Status quo: no rules on direct liability of producers would be introduced at EU level.

Option 2: A direct liability for producers would be introduced under the conditions described above.

**The UK responded to the Commission's questionnaire on Direct Producer's Liability on 15 September 2006. In line with that response, the UK favour Option 1 where no rules on direct liability of producers are introduced at EU level.**

The UK has chosen not to exercise the option to add direct liability on the producer in its transposition of Directive 1999/44/EC into national law. The UK does not see a case for extending the Directive to introduce a requirement to add direct producer liability.

We consider that by introducing direct producer responsibility in the UK, responsibility as to who is liable for a defective product, e.g. the seller or the manufacturer, may be obscured to the detriment of the consumer. For example, more unscrupulous traders are likely to try and pass responsibility on to the manufacturer of the product. Manufacturers could then argue that is the seller's responsibility because he has the contract with the consumer. The consumer could then find themselves in the middle getting redress from neither. It is for this reason that the UK has always favoured having clear and unequivocal rights against the seller so that there can be no arguments as to who is liable.

## Consumer Goods Guarantees (Commercial guarantees)

**Question M1: Should a horizontal instrument provide for a default content of a commercial guarantee?**

Option 1: Status quo: the horizontal instrument would contain no default rules.

Option 2: Default rules for commercial guarantees would be introduced.

**The UK support Option 1.**

The issue of vague statements is dealt with by the Unfair Commercial Practices Directive as it will be unlawful to offer a guarantee which offers no additional benefits. The Consumer Transactions (Restrictions on Statements) Order 1979 which made it a criminal offence to try to restrict consumers' statutory rights, is

being repealed under the implementation of the Unfair Commercial Practices Directive.

We would not support any extra administrative burden on businesses where they seek to offer market differentiation through a commercial guarantee that is clear and does not seek to mislead consumers; nor should any ambiguities in the guarantee lead to a default presumption of the highest level of protection for the individual consumer.

There may be a case for a commercial guarantee setting out clearly the consumer's statutory rights in detail before outlining any additional benefits to the consumer. It might be difficult to set out a series of default rules for a guarantee that would cover all types of contract.

The transferability of the commercial guarantee

**Question M2: Should a horizontal instrument regulate the transferability of the commercial guarantee?**

Option 1: Status quo: the possibility to transfer a commercial guarantee would not be regulated by Community rules.

Option 2: A mandatory rule that the guarantee is automatically transferred to the subsequent buyers would be introduced.

Option 3: The horizontal instrument would provide for the transferability as a default rule, i.e. a guarantor would be able to exclude or limit the possibility to transfer a commercial guarantee.

**The UK support Option 1.**

It is not reasonable to compel a retailer to have to honour a commercial guarantee where a consumer has sold the goods on to another consumer. Consumers will often use goods in a different way and any such differences that might occur once ownership has passed could affect the performance of the goods, making it difficult to judge the effects of normal wear and tear (compatibility with the nature of the good).

## Commercial guarantees for specific parts

### **Question M3: Should the horizontal instrument regulate commercial guarantees limited to a specific part?**

Option 1: Status quo: the possibility to provide commercial guarantee limited to specific part would not be regulated by the horizontal instrument.

Option 2: The horizontal instrument would only provide for the information obligation.

Option 3: The horizontal instrument would include an information obligation and would provide that, by default, a guarantee covers the entire contract goods.

### **The UK support Option 1.**

A commercial guarantee is provided by retailers as a form of market differentiation and it is not the role of any horizontal instrument to regulate this in terms of which parts the retailer chooses to offer an additional guarantee for. Any ambiguities with the guarantee could be dealt with by the Unfair Commercial Practices Directive.

End

DTI  
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