

GOVERNMENT RESPONSE
TO THE CONSULTATION
DOCUMENT ON THE EU
PROPOSALS FOR A
CONSUMER RIGHTS
DIRECTIVE

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Government Response to the Consultation Document on the EU Proposals for a Consumer Rights Directive

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Introduction

On 10 November 2008, the former Department for Business, Enterprise and Regulatory Reform (BERR) published a consultation document seeking views on the European Commission's (the Commission) proposal for a Consumer Rights Directive (CRD). The purpose of the consultation was to obtain views from consumers, retailers, manufacturers, law enforcers and from any other interested parties, on the proposals presented in the draft Directive. The consultation document is available at

<http://www.berr.gov.uk/files/file48791.pdf>. A UK Impact Assessment of the EU proposal was also carried out. This can be found at <http://www.berr.gov.uk/files/file48792.pdf>.

2. In 2004 the Commission launched a review of consumer protection Directives –the 'Consumer Acquis'. The objective of the Review was to simplify and complete the existing regulatory framework to improve the functioning of the Internal Market and strike the right balance between a high level of consumer protection and the competitiveness of business.

3. Currently eight Directives make up the EU 'Consumer Acquis'. These are:

- Doorstep selling 85/577/EEC
- Package Travel 90/314/EEC
- Unfair Contract Terms 93/13/EEC
- Timeshare 94/47/EC
- Distance Selling 97/7/EC
- Unit Prices 98/6/EC
- Injunctions 98/27/EC
- Sale of Goods and Associated Guarantees 99/44/EC

4. Following a public consultation undertaken by the Commission in 2007 available at http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf and the recommendation of the European Parliament in its Resolution of 16 July 2007 expressing its preference for a horizontal Directive based on full targeted harmonisation, the Commission published on 8 October 2008 a proposal for a Consumer Rights Directive. This is available at

http://ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf.

The Executive Summary of the Impact Assessment accompanying the proposal is available at

http://ec.europa.eu/consumers/rights/docs/impact_assessment_sum_en.pdf.

5. The proposal brings together the Doorstep Selling, Unfair Contract Terms, Distance Selling and Sale of Goods and Associated Guarantees Directives in a single horizontal Directive. Timeshare and Package Travel will continue to be covered by separate vertical Directives as they deal with specific issues. The Injunctions and Unit Prices Directives are not included in the proposed new Directive as they are not concerned with consumer contract law.

6. The proposed new Directive is a full harmonisation measure which means that within the scope of the Directive Member States may not maintain or

adopt provisions diverging from those laid down in the Directive. The Directive covers the provision of pre-contractual information to consumers, information and withdrawal rights for distance and off-premises contracts, sales contracts and unfair terms in consumer contracts. It also provides definitions of key terms.

7. Council Working Group negotiations on the Directive commenced in November 2008 and are ongoing. The Internal Market and Consumer Protection (IMCO) Committee of the European Parliament produced a draft working Document on the Proposal for a directive on Consumer Rights on 4 May 2008.

The IMCO draft working document is available on the IMCO website.

(<http://www.europarl.europa.eu/activities/committees/homeCom.do?body=IMCO&language=EN>)

8. The House of Lords EU Committee sub-committee G launched an Inquiry into the Directive and have heard evidence from a number of UK and EU stakeholders. The then Consumer Affairs Minister, Gareth Thomas MP appeared before the Committee in May 2009. Deliberations on the Consumer Rights Inquiry Report are now taking place with publication of a final Report anticipated in July 2009.

9. All the transcripts of evidence to the Inquiry on Consumer Rights can be found at <http://www.publications.parliament.uk/pa/ld/ldeucom.htm#eug>

10. In December 2007, BERR asked the Law Commission and Scottish Law Commission to review the legal remedies available to consumers when they buy goods which do not conform to the contract.

11. On 10 November 2008 the two Law Commissions issued a joint Consultation Paper with provisional proposals for reforms. Copies are available on their websites at <http://www.lawcom.gov.uk> and <http://www.scotlawcom.gov.uk>. This ran in parallel with the Government consultation on the CRD.

12. On 13 May 2008 the Law Commissions published a summary of responses to their consultation on consumer remedies. The Law Commissions' summary is available at http://www.lawcom.gov.uk/docs/cp188_summary_of_responses.pdf.

Responses to the Consultation received

13. The consultation posed 66 questions about the European Commission's proposals for a Consumer Rights Directive.

14. Areas covered by the consultation included scope and definitions, consumer information requirements, distance and off-premises rights of withdrawal, consumer remedies and unfair contract terms.

15. A total of 58 written responses to the consultation paper were received. Figure 1.1 and Table 1.1 provides a breakdown by sector. Annex A lists all of those that responded to the consultation.

Figure 1.1 Responses by sector

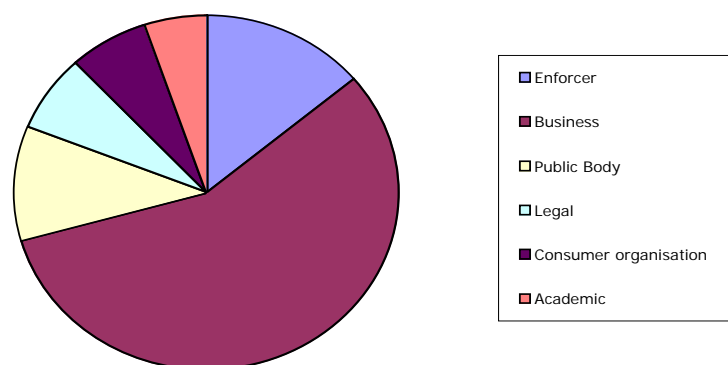


Table 1.1 Responses by sector

Sector	Number of Responses
Enforcer	8
Business	33
Public Body	6
Legal	4
Consumer organisation	4
Academic	3
TOTAL	58

General views on the proposal

16. In general, **businesses** strongly support the objectives underpinning the Directive provided it retains the concept of full harmonisation as proposed. They believe the proposal has the potential to benefit consumers and businesses, increase cross-border trade and assist the development of the business-to-consumer single market. There is a view that the benefits of full harmonisation outweigh the increased obligations on business or possible reductions in consumer protection – although some businesses expressed concerns that the proposal itself represented a missed opportunity to provide a more comprehensive principles based simplification of consumer rights across Europe.

17. Concerns were raised by the financial sector regarding the proposed changes in relation to unfair terms in consumer contracts. There were also concerns about the application of the off-premises provisions to certain financial services contracts, particularly in light of the impending implementation of the Consumer Credit Directive. Many thought that the provisions of the CRD could increase burdens for business, create confusion and uncertainty for businesses and consumers and in some areas reduce consumer protection. This new Consumer Credit Directive³ (replacing the 1987 Directive) was adopted in April 2008. The Directive harmonises information rights and advertising requirements and improves consumer protection in a number of areas. It aims to bolster consumer confidence and establish a robust regulatory framework, thereby creating the conditions that will bring about a pan-European market for consumer credit. The Directive must be implemented by June 2010. The UK's consultation on its implementation proposals closed on 10 June 2009. (<http://www.berr.gov.uk/consultations/closedwaitresponse/index.html>). Some believe that the more sweeping changes in the CRD should be delayed in favour of minor changes to existing directives.

18. There were some concerns expressed in relation to information requirements which were thought by some to be too extensive and impractical for small transactions. It was thought that such provisions should not apply to low value contracts as to include these would be burdensome for business.

19. A number of concerns were expressed about the proposals on off-premises contracts including the removal of the £35 threshold below which the current doorstep selling provisions do not apply, the extension of the withdrawal period to 14 days and a concern that under the proposals on off-

³ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EC (22 May 2008, L 133, Page 66

premises contracts consumers would not be obliged to pay for services provided during the withdrawal period. Many businesses felt that consumers should be required to pay for services of non-returnable goods provided, at the consumer's request, before the end of the cancellation period.

20. **Consumer bodies** are very concerned that the Directive will result in a reduction in consumer protection in certain areas. They strongly protested against reductions in consumer protection which would occur with the loss of the "right to reject" faulty goods and receive a refund. Another cause of concern is the introduction of a two-year liability period during which a seller is liable for faulty goods. Currently the limitation period is six years in England and Wales and the prescription period is five years in Scotland.

21. Consumer organisations and enforcers believed that the draft proposal offered only a partial simplification of consumer sales law, focussing on the sale of 'tangible, moveable' consumer goods but not simplifying remedies for all consumer sales including mixed products involving goods and services and digital products. It was felt that the CRD should be wide enough to address issues arising from the use of new technology, e.g. the downloading of digital content.

22. **Enforcers** agree that European developments in consumer law have benefited consumers. However, they feel that, in an attempt to cut down on burdens placed on business, the full harmonisation measures in this proposal will reduce the level of consumer protection rather than raise standards up to the highest level. The introduction of two-year trader liability clearly demonstrates this.

23. The **legal sector** expressed concerns on several issues particularly definitions. Some believed that the definition of goods, for example, should be extended to include non tangible goods such as software or music downloads. Many believed that while maximum harmonisation may be justified in certain areas of the law, this concept will not be beneficial to Member States which offer higher levels of consumer protection – it may in fact result in a weakening of existing consumer rights.

24. Responses from **academics** centred around specific areas including definitions, information requirements, the introduction of a standard form and auctions. It was felt that there was a need for greater clarity where definitions were concerned. Some felt that once the Commission had decided to push for full harmonisation, the focus was primarily on the Internal Market rather than ensuring an optimum level of consumer protection for the whole of the EU. They feel that 'full harmonisation' will probably be the most controversial aspect of the Directive. They believe that the Commission's aim of boosting confidence in cross-border trade and bringing about an even level of

consumer protection across the Member States will not be achieved. This is because there are many practical factors which will act as deterrent, be it language barriers, lack of trust in unknown businesses, concerns regarding the practicality of transporting goods over long distances, as well as unease over the prospect of satisfactorily resolving disputes across borders.

25. Furthermore it was pointed out that the Directive will have to slot into the legal framework created by national general contract law, which invariably differ from jurisdiction to jurisdiction. General contract law in certain cases may be more favourable to the legislation transposing the Directive. As a consequence, Member States will have to reduce their national level of consumer protection leading to a reduction in consumer rights.

26. Moreover the proposal comes in the form of a Directive rather than a Regulation. This means that the Directive will have to be transposed into national legislation which is likely to give rise to diverse end results in national laws using very different language or concepts. Therefore, whilst the Directive may produce the same level of consumer protection across the EU in respect of the areas it regulates, consumers and traders would still need to identify the corresponding national legislation if they were ever in a position where recourse to the law became necessary, or seek advice on the relevant national law, one of the matters which harmonisation is intended to reduce.

Government views following the consultation

27. Following analysis of responses to the consultation and discussions in Council Working Group the Government has further developed its negotiating position on the Directive.

KEY ISSUES

Scope

28. We remain disappointed that the Commission has not taken this opportunity to provide consumer remedies for unsatisfactory services and, in particular, digital products. We believe there are strong grounds for fully including services, mixed products and digital products within the scope of this Directive. We agree that these are complex issues and it would take time to get the provisions right, but feel that we should not miss the opportunity to agree a Directive which fully addresses the whole consumer experience and takes account of the rapid developments and growth in the market for digital products, especially as these are products which are particularly suitable for cross-border selling via the internet. Although it seems very unlikely that the Directive will cover this field, we welcome the recent commitments by the Consumer Commissioner, Meglena Kuneva, to examine this area and to extend the principles of consumer protection rules that are available for more traditional goods and services.⁴ We look forward to working with the Commission on this. In the Consumer White Paper “A Better Deal for Consumers” published on 2 July 2009, the UK Government set out its intention to review the existing UK consumer laws in terms of applicability to digital products and make provision to ensure appropriate consumer protection. The White Paper is available at <http://www.berr.gov.uk/files/file52072.pdf>

Full harmonisation and consumer protection

29. The Government remains supportive of full harmonisation in principle. Full harmonisation can deliver benefits in terms of lower compliance costs for business which will make it easier for them to trade cross border, resulting in greater choice and lower prices for consumers. It should also increase consumer confidence in shopping cross-border. However, this must not be at the expense of important consumer protections. We are concerned that as the proposal is drafted the Directive is likely to result in a reduction of consumer protection for consumers in the UK. We will continue to work with the

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<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/702&type=HTML&aged=0&language=EN>

Commission and other Member States to ensure that the final text of the Directive ensures a high level of consumer protection as well as meeting the Internal Market objectives.

Right to reject

30. We remain concerned that the Commission's proposal on consumer remedies for faulty goods would result in a significant reduction in consumer protection. We are convinced that it is essential that the "right to reject" faulty goods for a short period is retained. It is a cornerstone of the UK consumer protection regime and is understood and highly valued by consumers. Whilst in the majority of cases consumers are happy to accept a replacement or repair there are certain circumstances where the "right to reject" is clearly the most appropriate remedy, for example, where the consumer has lost faith in the product or trader or where the good is not fit for a particular purpose. We will continue to work to secure an amendment to the Directive to allow the "right to reject" to be retained in the UK, including exploring the possibility of introducing a fully harmonised "right to reject" which will be available to consumers across the EU. We are optimistic that we will be able to achieve a satisfactory solution.

31. We are extremely grateful to the Law Commission for their work on consumer remedies to date (see details on page 5) and will continue to work closely with them to further develop our policy in this area.

CHAPTER 1

Definitions

32. We agree with consultation respondents that some definitions need to be improved in order to provide clarity and legal certainty and to ensure they have no unintended effects. In particular, we remain concerned that the current definition of 'trader' could have the consequence that employees could be held liable for breaches of the Directive. We also think that the definition of 'durable medium' needs to make clear that emails are included within the definition.

33. We must ensure that the definition of 'off-premises contract' prevents abuses of the system by unscrupulous traders who might induce consumers to accompany them to their business premises to sign a contract following a home visit, thereby avoiding the obligation to provide a cooling off period. However, we are keen to avoid a situation where a trader visiting a consumer's home merely to measure up or to provide a quotation automatically results in a contract subsequently entered into at the trader's business premises falling within the scope of the definition.

CHAPTER 2

Information requirements

34. It is clear from consultation responses that there are concerns that the general information requirements under Article 5 may place an unreasonable burden on business and result in information overload for consumers. We agree that the provision of information must be proportionate and reflect the circumstances of the transaction. We think that the requirement that information need only be provided where it is 'not apparent from the context' addresses these concerns.

35. During the consultation concerns were raised about the possible impact of full harmonisation of information requirements on the remedial powers of the Competition Commission. Under the Enterprise Act 2002 the Competition Commission is able to impose remedies where market investigations have concluded that there is market failure. These have included requiring traders in particular markets to provide consumers with specific information about their products. It appears that full harmonisation would prevent these remedies being applied if they went beyond or diverged from the requirements of Articles 5 and 9. We believe that this will have a negative impact on consumer protection and the proper functioning of markets and will prejudice a useful remedy that underpins this part of the UK competition regime. We will seek a solution that ensures the Directive's information requirements are without prejudice to information requirements imposed following a finding of market failure by a competition authority.

CHAPTER 3

Distance and off-premises contracts

36. Whilst we are generally happy with the information requirements in Article 9, in certain sectors there is a clear need for more detailed and extensive information to be provided to ensure that consumers receive adequate information to fully inform their decision to enter into a contract. This is particularly true of financial services. The UK requires financial service providers to comply with specific information requirements and in certain cases to provide that information in a standard format to aid understanding and comparison of offers. For these reasons we are concerned about the application of the Directive's information requirements to financial services, to the extent they are covered by Chapter 3⁵. It would require us to remove

⁵ The Commission's proposal provides that financial services contracts (other than insurance contracts, contracts covered by the Consumer Credit Directive and contracts with fluctuating prices) are covered only by the rules for off premises contracts.

many of these existing requirements resulting in a reduction in consumer protection. Furthermore, the provisions of Chapter 3 would result in a reduction in consumer protection by reducing the withdrawal period for Payment Protection Insurance and non-insurance based personal pensions. We are also concerned about the application of different rules to consumer credit contracts that fall within the Consumer Credit Directive and those that fall outside, as is proposed by Chapter 3. This would create confusion and uncertainty for both consumers and traders and impose additional burdens on traders who would be required to provide different paper work and procedures depending on the value of the contract.

37. For these reasons we would prefer financial services to be fully excluded from the scope of Chapter 3 (distance and off-premises selling) and will be putting forward this position during negotiations on the Directive. We do however fully support the application of Chapter 5 on unfair contract terms to financial services, assuming Chapter 5 and in particular the contents of the annexes of unfair terms remain appropriate and proportionate.

38. We remain concerned that although there is a requirement that information be in plain and intelligible language and be legible, there is no explicit requirement that information on the right of withdrawal be prominent within the information supplied. We think that this requirement is essential to ensuring that consumers are adequately informed of their cancellation rights.

39. We also consider that there is a strong case for amending the information requirements to require traders to inform consumers who will bear the cost of returning goods in the event of withdrawal. As the Directive provides that consumers will bear this cost unless otherwise agreed, it will be important that consumers are provided with this information at a point at which it can inform their decision as to whether or not to enter into the contract. This approach is likely to also benefit traders who bear the cost of return as a part of their competitive advantage.

40. Although concerns were expressed about the introduction of a standard withdrawal form that would place unreasonable burdens on business, there are also persuasive arguments that this will improve consumer protection and make it simpler for consumers to exercise their right to withdraw should they wish to do so. We support the introduction of a standard withdrawal form as proposed, provided that consumers have the option of withdrawing using another durable medium.

41. Businesses were generally opposed to extending the withdrawal period to 14 days while consumer groups were supportive. We believe that this change should be seen as part of the package of measures designed to balance the rights and responsibilities of consumers and traders during the exercise of the

right to withdraw. The 14-day period mirrors the cooling off period in the new Consumer Credit and Timeshare Directives. Having the same length of cancellation period in all circumstances where such a right exists will make it easier for consumers to understand how long they have to exercise their cancellation rights and will increase consumer protection. Many traders in the UK already allow consumers to withdraw beyond the seven day minimum and there is evidence that consumers usually withdraw within a few days even where longer periods apply. Many other Member States already have a 14 day withdrawal period and we are not aware that this has caused any significant difficulties. It is extremely unlikely that they would be willing to consider a reduction in this period. In order to achieve full harmonisation it is likely that we will support a 14 calendar day withdrawal period.

42. Similarly there seems to be little support from other Member States for retaining a *de minimis* monetary threshold below which the off-premises provisions would not apply. Providing a threshold was optional under the current Doorstep Selling Directive and many Member States chose not to implement this in their national law or have implemented it at different amounts which some traders have found problematic when trading cross border. The UK implemented a £35 threshold as we were concerned that applying the requirements to very low value contracts would place a disproportionate burden on traders. We remain concerned about the impact on businesses, particularly SMEs, of removing the threshold.

43. There is a clear attempt in Chapter 3 to balance the rights and obligations of the consumer and trader. This includes the new provision proposing that traders may make a deduction for diminished value of returned goods where that decrease in value is as a result of the consumer handling the goods other than is necessary to ascertain their nature and functioning. Business welcomes this approach but consumer groups have expressed strong reservations. Whilst we generally support the principle and agree that consumers must act responsibly and take reasonable care of goods in their possession until they make the decision to keep them, we share concerns about how this provision will operate in practice. It is clearly an area which could result in disputes between traders and consumers. It may not always be clear whether diminished value is a result of inappropriate handling by the consumer and once the good has been returned it will be difficult for the consumer to dispute the trader's reduction. We think further clarification will be required as to how consumers may inspect or use goods without incurring a deduction, how traders should determine whether decreased value has resulted from inappropriate handling and how they should calculate the deduction. Although these issues could be addressed in guidance we feel that we need further clarification in the Directive before we can reach a final position on this issue.

44. We remain concerned by Article 17(3) which provides that for off-premises contracts the consumer shall bear no cost for services performed during the withdrawal period. We believe that this will be detrimental to consumers who wish for services to be performed during the withdrawal period, and particularly so for housebound consumers who rely on off-premises provision of services to meet their everyday needs. Traders would understandably refuse to provide services during this period knowing that the consumer could then withdraw without being required to make any payment. We strongly believe that this could be resolved by including a provision, similar to that in existing UK legislation, which would allow the consumer to expressly request, by durable medium, performance of the contract during the withdrawal period. In such circumstances the consumer would be liable to pay the reasonable cost of any services performed during the withdrawal period provided they were notified of this in advance of agreeing to performance. This mechanism should also apply to off-premises contracts responding to immediate emergency situations. We are also considering whether it should apply to certain goods delivered during the withdrawal period. The situation we are considering concerns those goods which it is not possible to return because, for example, they have been incorporated into another good or property, such as, paint or used building materials or goods that are made to the customer's specifications or clearly personalised.

45. We think it is essential that there is clarity that Chapter 3 applies to off-premises contracts for works, construction, home maintenance and repair as there is clear evidence of consumer detriment in these areas. We are receptive to the concerns of a number of stakeholders that applying a withdrawal right to property rental contracts is unnecessary and would be detrimental to the proper functioning of the rental property market in the UK. There are clear arguments that this would have negative impacts on both traders and consumers.

46. We agree that the information requirements should apply to auctions, whether they are public auctions or concluded at a distance or off-premises. We also agree with the Commission that the very nature of the auction process means that a right of withdrawal is not appropriate and welcome the exclusion from the right of withdrawal for distance auctions. However, we think that the same rationale applies to auctions held away from business premises such as house clearances and country house auctions. We will therefore seek an equivalent exception for off-premises auctions.

CHAPTER 4

Sale of goods

47. The provisions on remedies for faulty goods are a key area of concern. The Commission's proposal would result in a reduction of consumer protection in the UK and other Member States, since consumers would not be able to reject faulty goods in the first instance. As stated above we strongly oppose the removal of the "right to reject" faulty goods and are actively seeking an amendment to the Directive to ensure this right is retained. Although the Commission have indicated that it will be possible to retain this right in general contract law in addition to the remedies provided by the Directive, we feel that including the right in the Directive is by far the better option as the alternative approach would not meet the objectives of harmonisation and simplification.

48. We will also seek an amendment to give the consumer rather than the trader the choice of remedies as we think that the current proposal to give the choice to the trader would result in an unjustified reduction in consumer rights.

49. In light of consultation responses we think that it is important to increase the flexibility of the period during which the trader is liable for faults that existed at the time of delivery. Whilst the proposed two-year period may be appropriate for low value goods which are not intended to be long-lasting, we share stakeholders concerns that for complex and expensive products such as cars, heating systems and goods related to home improvements it is not unreasonable that where faults appear after two years, and it can be proved that the fault existed at the time of sale, the trader should be liable.

CHAPTER 5

Unfair contract terms

50. In principle we are supportive of the introduction of the lists of banned terms and terms that are presumed to be unfair. However, we share concerns raised by many stakeholders that the drafting of Chapter 5 and Annexes 2 and 3 needs to be improved to ensure that the unfair contract terms provisions operate effectively and provide clarity and certainty for business and enforcers. We are considering whether allowing for the comitology procedure (effectively delegated legislation) is appropriate for the amendment of Annexes 2 and 3. If it were appropriate, we would seek further clarification about precisely how the comitology procedure would operate before finalising a position on this issue.

CHAPTER 6

Inertia selling

51. During the consultation a number of stakeholders raised concerns that the provision on inertia selling in Article 45 could have the unwanted effect of preventing auto-enrolment in workplace pension schemes (which is a key feature of the Government's pension policy) and the tacit renewal of insurance contracts such as motor insurance. We would not want this provision to prevent these activities and will therefore be seeking assurance that the Directive will not have this effect.

Overview of consultation responses to questions posed

KEY ISSUES

Scope

52. Most respondents to the question on whether the scope of the Directive should be widened believed that the scope should not be widened. However, some do see this as a missed opportunity to provide remedies in relation to services, mixed contracts and digital products. It was recognised that the remedies would have to differ from those provided for faulty goods but that the same principles should apply so that remedies would be available for non-performance or failure to provide a service that was fit for purpose and delivered with professional diligence. It was also felt that this approach would improve consumer understanding of their rights and enable enforcers and advisors to have consistency in the laws they follow.

Full Harmonisation

53. The majority of business respondents were in favour of full harmonisation highlighting benefits such as increased trade, decreased transaction costs and increase in consumer confidence in cross border trade. It is seen as a necessary measure for the development of the single market. Respondents laid emphasis on ensuring coherence, certainty and clarity in rights, with consumer protection levels at a sufficiently high level, such that consumers have real confidence and security when making purchasing decisions and asserting their rights if something goes wrong. Others did not support full harmonisation and felt that the benefits would not outweigh the increased costs to business.

54. The consumer groups that responded took a different view and were very concerned that full harmonisation of the Directive as currently drafted would lead to a reduction in consumer protection. Some respondents were also of the opinion that full harmonisation policies should not apply to all goods and services, e.g. the energy and water industries, art and antiques.

Consumer remedies

55. Consumer bodies fully support the retention of the “right to reject” which is seen as underpinning the UK regime and bolstering consumers’ confidence. Only providing for repair or replacement in the first instance was not seen as adequate. A repaired product may not be as good as one which has never shown a fault and a replacement may not be acceptable to a consumer who has lost confidence in the product which revealed an early fault.

56. A number of business respondents supported the retention of the “right to reject” provided it is a fully harmonised time-limited right accompanied by the remedies currently proposed. Others believed that the removal of the UK “right to reject” would not necessarily amount to a reduction in consumer protection as many traders would continue to offer refunds and that the “prize of full harmonisation outweighs the retention of the “right to reject”.

Chapter I: Subject matter, Definitions and Scope

57. Many respondents felt that definitions should be in line with those under the Unfair Commercial Practices Directive. It was felt certain definitions needed to be clarified to ensure an accurate interpretation of terms. Concerns were expressed about the current definition of 'trader' as the words "and anyone acting in the name of or on behalf of a trader" seems to give rise to personal liability on the part of employees of the trader. Some thought that the definition of business premises should apply to temporary art galleries, hotel space hired for art fairs etc.

58. It was strongly felt that a clearer definition for 'durable medium' was required. It should be defined in such a way as to include on-line forms, emails, etc. Some thought that an indicative list of 'durable medium' should be provided. Some business stakeholders thought that it is not necessary to require that a 'durable medium' should be addressed personally to a consumer as this would impose additional costs on business who currently make information available on a website or printed in a newspaper.

59. It was suggested by some consultees that the definition of 'distance contract' used in the Distance Selling Directive should be retained. The CRD should exclude occasional sales where a trader does not advertise a distance sales service but is willing to accept an occasional one. Other stakeholders, particularly consumer groups supported the new wider definition on the basis that it would increase consumer protection.

60. There was strong support from consumer groups for the new definition for 'off-premises contract' which is based on two key elements common to all off-premises contracts, i.e. the negotiation and/or conclusion of the contract away from business premises and the trader's and consumer's simultaneous physical presence. A number of respondents thought that a higher level of consumer protection was needed for consumers who had been approached at home or on the street.

61. Other consultees were concerned that the definition is too wide. Many thought that situations where the consumer makes a positive decision to go to business premises but the final price cannot be agreed or contract signed until the trader has visited the home to take measurements etc. should not be covered by the definition of off-premises contracts where the contract is concluded on business premises.

62. Strong support was expressed in favour of gas, water and electricity being covered as services in the Directive since it is the supply of the service rather than the goods themselves that cause problems for consumers. The definition of services in the Directive includes these services.

Chapter 2: Consumer Information

63. There is a view from business that the Article 5 information requirements are not necessary or appropriate. It is believed that any information requirement should be practical and in-line with the Unfair Commercial Practices Directive. Such information should be relevant, failing which, there will be a risk of information overload for consumers and burdens for business. Furthermore, many businesses opposed the requirement of contractual remedies for failure to provide required information.

64. On the other hand, views were expressed in favour of one set of information requirements to be supplied in the best format at one time. Some respondents agreed with the proposal that traders must provide information about codes of conduct and amicable dispute resolution where applicable.

65. There is a call for clarity with regards to when information would have to be provided under Article 5. The proposal states that information need only be provided if it is 'not apparent from the context' or where arrangements for payment, delivery, performance and complaint handling policy 'depart from requirements of professional diligence'. It is felt that this is over complicated and unclear in its practical impact and is likely to increase the potential for conflict.

66. Some respondents thought that consumers need to be informed where premium rate phone numbers are used. However other consultees believe that this would be difficult to provide because of the number of different communication providers and tariff rates, particularly in cross border transactions.

67. Consumer organisations expressed concerns about the scope of the consumer information provisions when read in conjunction with the full harmonisation provision. It was pointed out that consideration should be given to how the CRD may impact on existing legislation which imposes information requirements either in connection with certain products, for example food and medicine, or certain traders, for example companies. There were also concerns about the impact of full harmonisation of information requirements on the remedial powers of the Competition Commission. The Competition Commission has powers to impose information requirements to remedy market failure following an in-depth market investigation.

68. Furthermore it was felt that there are additional matters which should fall within the prescribed information requirements. For example, consumers should be given information on the trader's obligation to deliver within 30 days and the consumer's right to a refund if this is not complied with.

Chapter 3: Consumer Information and the Right of Withdrawal for Distance and Off-Premises Contracts

69. Strong opposition was expressed by business respondents to the extension of the withdrawal period for distance and off-premises sales to 14 calendar days. It is believed that there is no evidence to justify switching to 14 calendar days. It is thought that the extension would delay the start of the contract to the detriment of the consumer. It will also cause significant cost to business in terms of lost resale value. Moreover evidence has shown that there is a greater likelihood of damage to goods the longer they stay with the consumer. Furthermore, the higher the legal minimum for the withdrawal period, the less room there is for competitive positioning by business. In contrast, consumer groups and enforcers supported an extension to 14 days as an increase in consumer protection. There was little support for a sunset clause to time-limit the existence of a right to withdrawal for distance selling contracts.

70. Consumer groups and enforcers supported the introduction of a standard withdrawal form provided it was not mandatory for consumers to use the form to withdraw. It was also suggested that systematic failure to provide adequate information to the consumer should be punishable by law. Business consultees were generally against the introduction of a standard withdrawal form. They thought that such a form would be onerous and may even encourage consumers to withdraw in some cases where otherwise they would not have done so. Instead it is felt that the trader should indicate the minimum information a consumer needs to provide in order to withdraw. This would provide the flexibility to allow the consumer to withdraw in his own words should he wish to do so (as would be permitted under the Directive). However there was strong support for the requirement that consumers must use a durable medium which would be useful as a means of protection for both parties in case of dispute.

71. Some businesses thought that if a standard form is required it should not be too prescriptive but that it should include the order number and require the consumer to indicate whether he is cancelling the whole or part of the order. It was also felt that the form should remind the consumer of the duty of care towards the goods that he must only examine them as he would in a shop and is obliged to return the goods at his own expenses within 14 days or as otherwise agreed.

72. Business consultees generally support the Commission's proposals for commencement of cooling off periods. However consideration should be given to the legal right to withdraw before the goods have been dispatched as proposed by BERR. It was suggested by a number of respondents that the starting point for the withdrawal period must be, in all cases, the point where

the contract is concluded as this would avoid confusion and allow consumers to withdraw before goods are received. The Directive should then define in more detail the end of the period, not its beginning. This should be 14 calendar days after the point at which the consumer is fully equipped to make a decision about whether to withdraw, i.e. for goods contracts, the withdrawal period ends 14 days after receipt of the goods and for services contracts, 14 days after the contract is concluded. Other respondents were very strongly of the view that the withdrawal period for off-premises contracts for goods should run from the date of conclusion of the contract rather than on receipt of goods, as consumers would have had a chance to inspect a sample or display model before placing their order.

73. Concerns were expressed about the importance of immediate performance by traders not being fully recognised by these proposals. It was generally agreed that if consumers agree to performance during the withdrawal period, they should be liable to pay for any services or non-returnable goods provided, as is the position under the UK regulations on off-premises contracts. This is seen as fair and equitable. Without such a provision traders will be unwilling to provide services during the withdrawal period. Consumers should be required to inform the trader using a durable medium of the services they want to be performed immediately and similarly agree that they will pay for any services or non-returnable goods provided during the withdrawal period.

74. Both business and consumer organisations have expressed the opinion that there should be a fair balance of the rights and responsibilities of both the consumer and the trader during the exercise of the right of withdrawal. Some thought that the rules on who bears the cost of delivery and return as well as duty of care towards the goods acquired should be clarified in the Directive. Businesses suggested that since the cost of delivery and return may be high in relation to the value of the good, it would be unfair for the trader to meet both costs if the consumer withdraws and therefore support the proposal that the consumer should bear the cost of return unless otherwise agreed. However many traders would still pay for return as part of a competitive package. It was suggested that consumers should be informed as to who would bear the cost of return before they conclude the contract. Businesses also thought that consumers should also bear the cost of delivery, at least when they have requested non-standard delivery, and then withdraw. Where a consumer withdraws from part of the order, they should not be refunded the delivery costs of the goods they keep.

75. Other respondents expressed concern about the consumer bearing the cost of return as it could discourage consumers from shopping by distance or off-premises and from exercising the right to withdraw. It could be very expensive for the consumer to return bulky or heavy goods. It was also

thought that this measure could remove the incentive for traders to provide the cost effective returns systems which consumers currently rely on and in particular could discourage consumers from shopping cross-border as the costs of return are likely to be higher.

76. Many believed that 30 days is a reasonable period for processing the refund. Business consultees thought it was important that no repayment is necessary until goods have been returned and inspected for loss in value. Such provisions will give traders greater confidence that consumers will return goods and treat them appropriately. This is particularly important for SMEs. Furthermore such provisions are essential if cross-border trade is to be encouraged.

77. Business strongly supports the provision to allow traders to hold consumers liable for diminished value. This they believe balances the rights of consumers and traders and would ensure that the consumer would return the item in good condition. They see it as particularly important if the withdrawal period is extended to 14 days as they fear that the longer period will result in more damage to goods caused by inappropriate use during the withdrawal period.

78. Consumer groups on the other hand see this as a reduction in consumer protection. It will be left to the trader to determine what reasonable handling of the item is and assess quantification of diminution in value. This could lead to an increase in disputes between consumers and traders and consumers would not be in a position to refute the reduction.

79. A general agreement was expressed regarding the exceptions from the right of withdrawal from both distance and off-premises contracts. Many thought that goods that cannot be resold for health or hygiene reasons or once they have been used in any way should not give rise to a withdrawal right. Such goods should be sent in sealed packaging clearly indicating that there would be no withdrawal right if the seal were broken. Custom-made products or products which are liable to expire or deteriorate should also be exempted. Some respondents argued that rental and works contracts should not be covered whilst others thought that it is essential that they were covered to protect consumers from rogue traders. Consumer groups were generally opposed to the exception for distance contracts for the provision of accommodation, transport, car rental services, catering or leisure services to be provided for a certain date or period.

80. Both business and consumer bodies supported the proposed inclusion of both solicited and unsolicited visits within the definition of 'off-premises' contracts. This is the existing position under UK law. There was clear support from businesses for retaining a monetary threshold below which the off-

premises provisions would not apply, although it was recognised that it would be difficult to set the same one across the EU given the standard of living in the different Member States. Many consumer groups support the removal of the threshold to increase consumer protection and because of the simplification benefits of applying one set of rules to all transactions regardless of value.

81. It was felt that the proposal that contracts for rental of property are to be covered by Chapter 3 of the CRD was a cause for concern. This is because in common with sales of land, rentals are subject to significant legal formalities, protections and regulation which makes additional provision undesirable and, if implemented, likely to lead to significant legal and practical complications for landlords and tenants, as well as, for property professionals dealing with lettings. There were clear arguments that applying the provisions to rental contracts would have negative impacts on both traders and consumers.

82. Similarly it is felt that the off-premises contract provisions should not apply to financial services. This is because rather than simplifying the regulatory environment and increasing consumer protection, the off-premises provisions will create a more complex and confusing regulatory environment for consumers and will lower the level of consumer protection for a number of financial services products when sold off-premises. It is also felt that the proposed information requirements of the CRD may restrict the ability of Member States to maintain more detailed information requirements or specify the format of any information for consumers as they have been able to do under current legislation.

Chapter 4: Other Consumer Rights Specific to Sales Contracts for goods

83. There were very strong objections to the removal of the “right to reject” faulty goods from consumer groups and enforcers. It was felt that consumer confidence would be significantly impaired by its removal. Respondents asserted that this is generally the one remedy UK consumers are fairly confident about and if this remedy were removed consumers would likely be less adventurous in their purchasing, choosing to favour known brands and suppliers. Research conducted on behalf of the Law Commissions showed that the vast majority of consumers are aware of the “right to reject” and value it highly, even though alternative remedies are available.

84. It was felt that the “right to reject” provided consumers with bargaining power and confidence and stopped them from being caught in a cycle of repairs or being forced to accept a replacement where they had lost faith in the good. The “right to reject” gives traders an incentive to ensure products are of the right standard before they are sold in order to minimise returns and encourages higher standards of consumer service in terms of speedy repair or replacement where faults occur as the consumer has the option to ask for their money back.

85. It was also strongly argued that cancellation rights under distance and off-premises contracts should not be viewed as a substitute for the “right to reject”. There was support for retaining the common law right to damages particularly as enforcing specific remedies of repair or replacement through the courts may be difficult.

86. Businesses are generally in favour of retaining a “right to reject” provided it is time-limited and fully harmonised. The introduction of a short time-limit (as suggested by the Law Commission) would provide certainty for both traders and consumers but would not be detrimental as there would be a hierarchy of remedies available after this period. However, many businesses believe that the proposed new approach to consumer remedies will not be detrimental to consumers. They asserted that evidence shows that retailers would continue to offer a refund regardless of the legal requirements.

87. Many respondents felt that the full range of legal remedies should be available, even when the non-conformity is minor, with the right to a full refund also underpinning any failed attempts to repair or replace. They felt that the consumer and not the trader should have the choice of remedies. The choice of remedy should rest with the consumer as they are the innocent party and not the trader who is in breach by supplying the faulty good. Business was generally happy for the choice of remedies to remain with the consumer although some argued that the trader was better placed to judge which remedy is most appropriate.

88. Consumer groups are strongly opposed to the proposed two-year time limit on trader liability for faulty goods as this would result in a reduction in consumer protection in the UK. They felt the guarantee period should reflect the fact that some goods are expected to last far longer than two years. Many stakeholders would prefer the current UK position to be retained. Some respondents also felt that the proposed two year cut-off is inconsistent with the provisions in Article 24 on conformity. One of the factors used to determine whether the good is in conformity with the contract is whether it 'shows the quality and performance which are normal in goods of the same type'. Such an analysis involves an assessment of the durability of the product and must take into account that some products are expected to last longer. Some stakeholders felt two years is acceptable as, in general, most defects are apparent within the first two years and therefore the consumer would still be covered.

89. The Commission's research suggests that the main difficulties for consumers and sources of dispute with traders are about delivery of goods to a deadline. The proposal therefore aims at clarifying and harmonising the rules on delivery and passing of risk. Consultees felt that the option must be retained for the consumer and trader to agree the time and means of delivery, especially in cases of bespoke products, as is proposed by the Directive. No refund should be required if consumer accepts late delivery. However it is essential for clear rules to be in place to protect the consumer's interest in receiving the good within time. Furthermore there was a strong support for the trader to bear the risk while the good was in transit.

90. Consumer groups believe that the scope of Chapter 4 should, in principle, be extended to cover all consumer purchases of goods and services, including digital products. Not only does significant detriment arise from the provision of services that do not conform to contract, but such an approach would also ensure disputes over whether the non-conformity relates to a 'good' or a 'service' are avoided, a particular issue with the increasing prevalence of bundled goods and services contracts. They felt that it may also be of particular relevance in the context of digital goods and services where difficult legal questions arise in respect of whether certain products are goods or services. Furthermore since digital goods and services seem to be one of the fastest growing sectors, then rules that vary depending on exactly what is being bought and/or how it is being bought will cause unnecessary confusion thereby hindering cross-border trade.

91. A number of business stakeholders agreed in principle that there could be a general provision for both goods and services where consumers are entitled to goods and services that are as described, fit for purpose, with a quality that might be anticipated given the price and description, and provided with good faith and professional diligence. A right to remedies would exist where these

entitlements are breached. However the specific remedies for failure in service provision would need to be different from those of goods. For that reason, they believe that, unless the Directive is for any reason withdrawn or re-cast, the scope should be limited as is in the proposal, even though it gives rise to some confusion with regard to mixed contracts and digital products. They would welcome a separate proposal on services from the Commission, a proposal that is coherent with the current proposal and does not attempt to change yet again the provisions on goods.

Chapter 5: Consumer Rights concerning Unfair Contract Terms

92. There was general support for the introduction of the list of banned terms and 'grey list' of goods presumed to be unfair. It was thought that these lists will prove valuable to traders, enforcers, consumers and advisers as they will increase legal certainty. It was noted that the banned list, for the most part, reflects rights which consumers have in the ordinary course of events but which unscrupulous traders may try to misrepresent or exclude. It is therefore felt that consumer protection has been strengthened by the introduction of the list. However there was some concern over how the new approach would work in practice and strong feelings from business and enforcers, in particular, that the drafting of Chapter 5 and the terms in annexes 2 and 3 needs to be improved.

93. Among businesses there was support for fully harmonised lists of banned and grey terms which could not be altered by Member States. However there are concerns that different interpretations by national courts will lead to inconsistencies and mean that full harmonisation will not be achieved in practice. Some respondents argued that the applicable law should therefore be that of the trader. Nevertheless it was felt that the lists would be helpful to traders engaged in cross-border trade.

94. Some were not supportive of the banned list and were concerned about the breadth of the drafting of certain terms in Annex 2 arguing that some terms might be fair in certain circumstances.

95. Whilst the introduction of the banned list was welcomed by consumer groups and enforcers, it was felt that while specifying terms to be treated as unlawful or unfair makes it easier for enforcers to take action against them, it does this at the cost of a loss of flexibility to deal with the full range of cases that may not exactly fall within those specifications. Therefore they highlighted a need to ensure that the drafting of terms in the annexes is extremely precise and comprehensive in coverage. Furthermore consumer groups welcome the fact that the 'burden of proof' in relation to the grey list terms is placed on the trader as this increases consumer protection. However, certain businesses felt this was a problematic change and would impose a significant burden on business when seeking to prove that terms were fair.

96. As mentioned above, there was a general feeling that there is a need for clarification in the drafting of Chapter 5 and annexes 2 and 3. Similarly clarification was sought in respect of penalties for infringements happening in more than one Member State. This was an opportunity to ensure that where unfair terms are subject to enforcement action in one Member State, the results should be applicable across the EU.

97. Some stakeholders felt in that certain terms in Annex 3, for example, paragraph 1(c), would be better included in the banned list, others felt this particular provision was unclear. Similarly, whilst the CRD reflects certain terms set out in the indicative list in the Annex to the Unfair Terms in Consumer Contracts Directive (UTCCD), it was felt that the omission of some important aspects is to the detriment of the consumer, for example, Annex 3, paragraph 1(d) although similar to paragraph 1(f) in the Annex to UTCCD, omits the part of the latter paragraph relating to the termination of the contract by the trader and his retention of monies paid to him by the consumer for services not supplied. The same concern is expressed about financial services firms being able to unilaterally terminate open-ended contracts without notice and without having to provide a valid reason for doing so.

98. Some financial institutions expressed concerns about the drafting and details of some terms in Annex 3. For example, they were concerned at the omission of the words “where this may serve to reduce guarantees for the consumer” which are to be found in the UTCCD equivalent to Annex 3, paragraph (1)(p). The concern stemmed from re-packaging of consumer financial contracts for the wholesale markets and portfolio transfers in the insurance market.

99. Concerns were expressed about the Comitology procedure (effectively delegated legislation to the Commission) whereby the Commission could alter the lists of banned and grey terms. It was strongly suggested that the Commission should not be able to amend the lists without involving Member States and the European Parliament. Furthermore any new additions will need to be strictly assessed by all parties concerned. There were concerns that the use of the words “shall amend” in Article 39 would require the Commission to amend the list whenever they received a notification, rather than allowing for detailed assessment of the merits of the suggested amendment.

Chapter 6: General Provisions

100. There were fewer comments on Chapter 6. However concerns were expressed about the possible implications of Article 45. Whilst consumer bodies supported the provision to introduce a contractual remedy in relation to inertia selling, insurers and other respondents had serious concerns about the potential effect of Article 45 of the Directive. They believe it has the potential to seriously undermine the ability of contract-based pensions to automatically enrol employees and request that nothing in the whole of the proposed Directive, including Article 45, affect the ability of contract-based pension schemes to auto-enrol employees.

101. Furthermore concerns were also expressed about Article 45 having the potential to prohibit tacit renewals of insurance contracts. Tacit renewals provide useful protection for consumers as where insurance cover is compulsory, e.g. motor insurance, a tacit renewal ensures that consumers do not unwittingly break the law, e.g. by driving a motor vehicle without insurance.

Annex B: Impact Assessment

102. Very few respondents commented on the Impact Assessment although there was general agreement that further analysis would need to be conducted in future when there is a firmer idea of precisely what the Directive will ultimately contain in order to have a clear picture of its impact on the UK. To help determine this, a further Impact Assessment which will contain an analysis of the costs, benefits and evidence base for the Directive in the UK will be produced once the proposals are finalised.

Next Steps

103. Council Working Group discussions on the Directive are continuing. The UK Government will use the responses received to help inform its negotiating position.

104. The text of the proposed Directive may undergo major changes during these negotiations and as negotiations progress we will continue to discuss developments with stakeholders to inform our position.

105. The European Parliament has requested that the Commission provide an analysis of the impact of the proposals on consumer rights in each Member State and undertake further work on the impact assessment for the Directive. We will give careful consideration to this document when published to determine whether any further analysis is required at UK level.

106. When the Directive is adopted, the UK will need to produce legislation to implement the Directive and will consult stakeholders at this stage.

107. It is our intention in due course to bring forward a new Consumer Rights Bill, as set out in the Government White Paper "A Better Deal for Consumers", which will implement the proposed EU Consumer Rights Directive as well as placing all European protections within a simplified domestic consumer law framework.

Annex A

List of respondents

London Borough of Richmond upon Thames TS

Birmingham City Council TS

South Lanarkshire Council TS

Borough of Poole TS

Slough Borough Council

HSBC

Retail Motor Industry Federation

Wine and Spirit Trade Association

Direct Selling Association

City of London Law Society

East of England Trading Standards Authorities

Trading Standards Institute

LACORS – Local Authorities Coordinators of Regulatory Services

Direct Marketing Association

Lloyd's of London

Simplification Centre at the University of Reading

Which?

Credit Services Association

Royal Bank of Scotland

Society of Chief Trading Standards Officers in Scotland

Bar Council of England and Wales – Brussels Office

Dr Christine Reifa – Brunel University

British Retail Consortium

Association of British Insurers

Finance and Leasing Association

Consumer Focus

Building Societies Association

Cattles plc

Vorwerk & Co KG

Scottish and Southern Energy

Institute of Legal Executives

APACS' Card Payments Group

Association of Personal Injury Lawyers

British Gas

Consumer Credit Association

Council of Mortgage Lenders

Financial Services Consumer Panel

British Standards - BSI

Newspaper Society

Periodical Publishers Association

Office of Fair Trading

Lloyds TSB

Citizens Advice

National Association of Funeral Directors

Royal Institution of Chartered Surveyors

Heating and Ventilating Contractors Association

Confederation of British Industry

National Federation of Property Professionals

Paul Dobson (Visiting Professor at Anglia Ruskin University)

Financial Ombudsman Service

The Voice of British Advertisers - ISBA

British Vehicle Rental and Leasing Association

Law Society

National Consumer Federation

Competition Commission

Slough Trading Standards

This list does not include the respondents who asked for their responses to be regarded as confidential.

