

A guide for businesses on distance selling

**Summary of the responses to the
consultation paper**

September 2006

© **Crown copyright 2006**

This publication (excluding the OFT logo) may be reproduced free of charge in any format or medium provided that it is reproduced accurately and not used in a misleading context. The material must be acknowledged as crown copyright and the title of the publication specified.

CONTENTS

<i>Chapter</i>		<i>Page</i>
1	Introduction	1
2	The new guidance	1
3	Summary of responses to consultation questions	9
<i>Annexe</i>		
A	Consultation respondents	17

1 INTRODUCTION

- 1.1 This report is a summary of the consultation on the draft guidance, *A guide for businesses on home shopping - Consultation on the text of guidance for businesses about the Distance Selling Regulations (OFT 698cons)* which was published in August 2005. The final version, *A guide for businesses on distance selling (OFT 698)* and the consultation response were published in September 2006. Both documents can be downloaded from our website at www.oft.gov.uk.
- 1.2 The guidance sets out the requirements of the Consumer Protection (Distance Selling) Regulations 2000 as amended by SI 689 2005 (DSRs). It provides a convenient source of reference for businesses and their advisors about their responsibilities and consumers' rights under the law in order to ensure compliance. The guidance is also intended to assist consumer organisations and our enforcement partners, principally, the Trading Standards Services as well as consumer advisers working within Consumer Direct (www.consumerdirect.gov.uk) and other organisations involved in advising consumers of their rights. It may also be of use to other professional advisors who deal with consumer issues.
- 1.3 The OFT received 23 responses to the consultation. One respondent asked for their comments to be treated as confidential. All the responses were shared with the DTI. The respondents are listed in Annexe A.
- 1.4 We would like to thank all those who contributed.

2 THE NEW GUIDANCE

- 2.1 The points raised in the consultation responses have been taken into consideration and a number of these suggestions and amendments are reflected in the final version.
- 2.2 **Some respondents disagreed with some of the provisions of the DSRs.**

- 2.3 **Our response:** We were not consulting on the law but on the text of the guidance and how clearly we had presented the meaning of the law. While it is the duty of the OFT to enforce the DSRs, responsibility for framing the legislation lies with the DTI and as joint publishers of this guidance the DTI are aware of all the representations received on this consultation.
- 2.4 **A number of respondents took issue with our interpretation of the legislation. Some of the respondents were concerned about the way the DSRs were being enforced which they claimed had resulted in increased costs for businesses and consumers and a sense that the original balance (that of a careful balance between the interests of consumers and businesses intended by the Directive) has been lost in the UK. Businesses in the UK were, therefore, operating at a competitive disadvantage in relation to their EU counterparts. These respondents said that whilst in their view there was little difference between purchasing on the High Street and purchasing by distance means, the guidance placed greater emphasis on consumers' rights than on sellers' rights. These sentiments were expressed generally in the context of consumers' rights following cancellation to return opened goods or goods that had been tested; consumers' unconditional rights to cancel and obtain a refund, even in cases where the business was awaiting the return of goods; the service cancellation provisions; and issues over what constituted reasonable care. Some respondents went on to suggest that in the absence of a definition of 'reasonable care' in the DSRs a definition should be adopted that is consistent with taking care of items when considering a purchase from a shop.**
- 2.5 **Our response:** The intention behind the Directive was the minimum harmonisation of the laws, regulations and administrative provisions of the Member States in respect of distance contracts. The Directive also provides for Member States to introduce more stringent provisions into their domestic legislation in order to provide a higher level of consumer protection than that referred to in the Directive. The DSRs are a consumer protection measure and added new statutory rights alongside

existing domestic legislation. The UK has not introduced more stringent provisions into the DSRs than that referred to in the Directive. In our view the guidance accurately reflects the obligations and rights businesses have under the DSRs and it neither introduces additional obligations for businesses, nor diminishes the consumer protection embodied in the DSRs. Ultimately it would be for a court to determine what the law means in individual cases.

- 2.6 Neither the DSRs nor the underlying Directive defines 'reasonable care' or a number of other phrases or concepts used in the legislation. It is for the courts to define these terms further. That said, we have attempted to explain what some of these terms may mean. See for example paragraph 3.42 of the guidance for 'reasonable care', and paragraph 3.43 for 'breach of statutory duty'.
- 2.7 **Some respondents questioned the view in paragraph 3.46 of the consultation document that a term making cancellation (and therefore a refund) conditional on return of the goods can be considered void and therefore have no legal effect. The respondents believed that such a view was incompatible with the provisions of the Human Rights Act 1998 (HRA) and in this regard one respondent referred to particular case law to support this view.**
- 2.8 **Our response:** We believe we are interpreting the legislation as it was intended. Ultimately it would be for a court to decide where there is a dispute on interpretation or on whether a statutory provision is incompatible with the HRA.
- 2.9 **A number of respondents suggested that there should be a parallel obligation on consumers following cancellation to return goods in order to obtain a refund.**
- 2.10 **Our response:** In our view the DSRs do not link the issue of a refund to the receipt of the goods by the business. We believe the guidance accurately reflects the obligations and rights businesses have under the DSRs.

- 2.11 **A number of respondents questioned the reference at paragraph 2.15 of the consultation document to supermarket deliveries for goods purchased by distance means being excluded from the partial exceptions. The argument was that such deliveries were either concluded on the doorstep and/or considered a contract for provision of everyday goods delivered by regular roundsmen.**
- 2.12 **Our response:** It is for the courts to decide matters of the law, including whether deliveries of this nature by supermarkets or other home delivery grocery businesses are ones to which only part of the DSRs apply. Until then we maintain the view that deliveries of this nature for goods purchased by distance means fall outside this exception.
- 2.13 **A number of respondents commented that our interpretation of the DSRs had not kept pace with changes in technology. This comment was in the context of our views on durable medium and what constitutes an organised distance sale or service provision scheme. One respondent suggested that the definition of durable medium in the Financial Services (Distance Marketing) Regulations 2004 should be adopted by the DSRs and following research a non-exhaustive list of durable media included in the guidance. Another asked whether a web page that cannot be changed once a customer had entered details on it could be considered to be a durable medium.**
- 2.14 **Our response:** Inserting a definition of 'durable medium' in the DSRs would require amendments to the legislation. Researching and providing a non-exhaustive list of durable media was considered to be of limited value as technological advances change what could be regarded as durable medium in the future.
- 2.15 We have, nevertheless, at paragraph 1.6 of the guidance shared our view on what durable medium means. This is a broad view that leaves scope for technological advances to introduce other media that may be considered durable.

- 2.16 The responses concerning what constitutes 'durable medium' have been passed to the DTI to consider further.
- 2.17 **Some respondents requested a level of detailed advice that is beyond the scope of the general guidance. Others requested advice relating to their particular circumstances.**
- 2.18 **Our response:** This guidance should not be considered as a substitute for independent legal advice and in any event, no guidance can cover every possible scenario. Some areas such as contract conclusion and what reasonable care may mean in a particular scenario are specific issues relating to particular circumstances. It is, therefore, inappropriate to address such issues in a general document of this type. We restate that the guidance issued is not a substitute for seeking legal advice. Where possible, however, we have added to the existing text or addressed some of the issues in the general Q&As.
- 2.19 **Some respondents suggested a thematic approach to the way in which the information should be disseminated.**
- 2.20 **Our response:** As far as possible, the guidance follows the sequence of events in consumer transactions from pre-contract information through to performance of the contract to cancellations and refunds. The Questions and Answers are similarly grouped. We believe that this is a logical way to organise the guidance.
- 2.21 **A number of respondents commented on the need for more specific advice on the contract forming process. One respondent questioned the relevance of this section, especially as the DSRs are silent on this.**
- 2.22 **Our response:** How a contract is formed should be considered on a case by case basis. We have revised the advice on contract conclusion at 0 of the guidance, emphasising the need for businesses to make it clear to consumers when a contract is considered to have been concluded. Although the DSRs are silent on the contract forming process we considered it would be helpful to provide some information on this whilst

recognising that it is for the business to make clear when a contract is concluded.

- 2.23 **Some respondents suggested that our narrower interpretation, for example, of a consumer's right to cancel and the supplier's rights to items as new (for example see paragraph 3.40 of the guidance) could lead to suppliers restricting the online sale of some goods. Others suggested that suppliers should be able to deduct reasonable costs from the refund if goods are returned soiled or in an unsatisfactory condition.**
- 2.24 **Our response:** Where applicable the DSRs give consumers an unconditional right to cancel and receive a refund. Suppliers can seek remedies against consumers where they believe that consumers have not taken reasonable care of the goods. We believe that we are interpreting the legislation as it was intended. Ultimately it would be for a court to decide in individual cases.
- 2.25 **One respondent whilst acknowledging that that the DSRs do not require products to be returned in 'as new' condition suggested that in the vast majority of the cases, if a consumer has taken reasonable care of the goods then following basic reprocessing and repackaging of the product on its return it should be in 'as new' condition. The respondent suggested that specific reference should be made to this in the guidance.**
- 2.26 **Our response:** The purpose of the guidance is to provide a source of reference to businesses about their responsibilities and consumers' rights under the law. Acceding to this suggestion would be going beyond the scope the guidance. It is for businesses to consider how to treat goods that are returned under the DSRs.
- 2.27 **One respondent suggested that the cost of returning or recovering self assembled items where consumers had exercised their rights to cancel may be higher than the actual cost of the items themselves.**

- 2.28 **Our response:** The DSRs state that where suppliers recover goods following a cancellation, the consumer cannot be charged more than the direct costs of recovery.
- 2.29 **One respondent suggested that similar guidance outlining consumers' responsibilities under the DSRs should also be produced.**
- 2.30 **Our response:** The OFT publishes literature aimed at consumers purchasing by distance means. We take the point that is being made and will consider this further.
- 2.31 **One respondent requested that the guidance incorporate distance contracts relating to financial services to consumers so that there is a single source for guidance on contracts concluded by distance means.**
- 2.32 **Our response:** This is beyond the scope of this guidance, which is intended to advise businesses specifically about the DSRs. Rules and guidance on Directive 2002/65/EC concerning distance marketing of consumer financial services can be found in the Financial Services Authority's (FSA's) handbook at www.fsa.gov.uk.
- 2.33 **Some respondents questioned the need or the value behind explaining some of the terms used in the Regulations and in this guidance.**
- 2.34 **Our response:** We have chosen to include this section in the guidance because reference to some of these terms has been made throughout the guidance and businesses may find it useful to refer to these terms as the need arises.
- 2.35 **Some respondents commented that the DSRs should not apply to contracts concluded through the use of a public internet kiosk.**
- 2.36 **Our response:** we have reflected what is stated in the legislation. To go beyond what is stated would require a change to the DSRs. In any case we do not see why contracts concluded in this way are any different from other ways of purchasing over the Internet.

- 2.37 **Some respondents queried what was meant by obtaining a consumer's consent (or obtaining a consumer's agreement) to starting a service early. This was in the context of complying with the service cancellation provisions.**
- 2.38 **Our response:** How businesses choose to demonstrate that they have obtained a consumer's consent to starting a service before the end of the usual cancellation period is up to them. This could be by requesting the consumer to confirm the intention in writing, for example.
- 2.39 **Some respondents questioned the refund of delivery charges following a consumer cancelling an order. Delivery was considered to be a separate element of the contract. One respondent whilst agreeing with our view that delivery forms an essential part of the contract disagreed with the view that additional services such as express delivery or gift wrapping could be treated as a separate contract. These 'additional services' were seen as options as to the manner of performing the contract and therefore refundable.**
- 2.40 **Our response:** Almost every case of distance selling involves the delivery of goods ordered. Delivery is, therefore, an essential part of the same contract. Where, however, businesses choose to offer additional services outside their normal offering these may be considered separate contracts for the provision of services provided this is made clear to the consumer in the required written information before the start of the service.
- 2.41 **A number of respondents put forward the view that in their view there was little difference between purchasing on the High Street and purchasing by distance means – see paragraph 2.4 above. This view was reinforced by the wording in paragraph 3.20 in the consultation document which referred to DSRs giving the consumer 'at the very least the same rights as when considering a purchase in a shop'.**
- 2.42 **Our response:** There is a fundamental difference between purchasing at a shop and purchasing by distance means. In distance sales consumers

cannot inspect their purchase before the decision to buy. This is recognised in the DSRs which for most goods and services provide additional rights to consumers buying at a distance to encourage confidence in this method of buying. The misleading impression given in the consultation document has been corrected at paragraph 3.21 of the guidance.

2.43 **One respondent questioned the inclusion of chapters on 'Complying with the E-Commerce Regulations and 'Who enforces the DSRs and ECRs' citing that the consultation document only refers to the DSRs and guidance on other matters already exists elsewhere and should only be referenced here.**

2.44 **Our response:** Compliance with regulations is a legal requirement and businesses need to be aware of the enforcement and the legislative framework under which they carry out their business. This is particularly important for small enterprises that may be new to conducting business via distance means.

2.45 Respondents generally agreed that the guidance would help dispel some common misunderstandings about the DSRs and that as a result transactions concluded by distance means are more likely to be compliant. This was against a backdrop of concerns that the DSRs protected consumers' rights at the expense of protecting businesses' interests.

3 SUMMARY OF RESPONSES TO CONSULTATION QUESTIONS

3.1 The consultation paper asked three general questions and three questions on the 'question and answer format' of the document. Not all respondents answered these questions directly. Some made general comments whilst others sought clarification on selected part(s) of the text. Where possible we have attempted to extrapolate the responses to fit into the framework of the questions that were asked. Responses are summarised as follows:

General questions

Does the draft guidance have any significant omissions?

- 3.2 Respondents made the following comments:
- 3.3 **It would be useful for businesses to feed in some model terms and conditions into the final guidance.**
- 3.4 **Our response:** The aim of the guidance is to provide a source of reference to businesses and their advisors about their responsibilities and consumers' rights under the law. To have included examples of model terms and conditions on some aspects of the distance selling process would have gone beyond the intention behind the guidance.
- 3.5 **It would be useful for the guidance to cover some major consumer protection provisions that apply to distance sellers, such as advice on: passing of risk; guarantees and faulty goods; advice on jurisdiction; some clarification of traders' obligations under Regulation 7 of the DSRs, particularly the requirement to provide the supplier's name and address; and the applicability of the DSRs to casual orders.**
- 3.6 **Our response:** These suggestions have been incorporated into the guidance.
- 3.7 **It would be useful to have clear guidance on when a contract is concluded.**
- 3.8 **Our response:** General guidance on contract conclusion is provided at paragraph 2.22. The contract conclusion process can be complex and it is up to businesses to decide and inform their customers about when it considers a contract is concluded. This advice is reinforced in the guidance.

Are there any parts of the draft guidance that need amplification or clarification? If so, which parts?

- 3.9 Amplification or clarification was requested, in respect of the following:
- 3.10 **Title of the document.** A number of respondents commented that the title of the consultation document was potentially misleading. Businesses could legitimately confuse the guidance with the provisions in the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (SI 1987 No.2117).
- 3.11 **Our response:** The title of the guidance has been amended to remove any ambiguity and reference to distance selling also clarified elsewhere.
- 3.12 A number of respondents noted the absence of a reference to the **Privacy and Electronic Communication (EC Directive) Regulations 2003.**
- 3.13 **Our response:** This has been addressed by reference to this piece of legislation at paragraph 1.3 of the guidance.
- 3.14 **One respondent queried a consumer's right to cancel with respect to software items where the licensing information is only available once a consumer has opened the packaging. This was in the context of cancellation rights relating to the supply of, amongst other things, computer software that a consumer has unsealed referred to at paragraph 3.24 of the consultation document.**
- 3.15 **Our response:** Most software is provided sealed, and needs to be unsealed before it can be used. Consumers do not have cancellation rights under the DSRs if the computer software is unsealed by them. Consumers must, therefore, be informed of this and also at the latest at the time of delivery provided with information in a durable form about the main characteristics of the software, including the hardware requirements and any limitations to the software's functionality. The issue of how software is treated under the DSRs is discussed further at paragraphs 3.92 to 3.95 of our guide 'IT consumer contracts made at a distance: Guidance on compliance with the Consumer Protection

(Distance Selling) 2000 (DSRs) and Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)' issued in December 2005 available at: www.offt.gov.uk

- 3.16 **A number of respondents sought clarification on our views on 'durable medium'. Questions were asked whether a website, or information on a CD or DVD Rom or other media could be considered to be information in a durable medium.**
- 3.17 **Our response:** There is no definition of 'durable medium' in the DSRs. In our view information in a durable medium means in a form in which information can be retained and reproduced but cannot be changed. Information that can be changed would not in our view be considered to be durable. We acknowledge in the guidance that technological advances may capture other media other than those referred to in the guidance.
- 3.18 **One respondent felt that the explanation of what constitutes an organised distance sales or service provision scheme needed to be developed into a general principle that could be applied to all forms of distance communications. The respondent went on to suggest that the guidance state that such a scheme could exist where the supplier has consciously equipped itself to be able to provide a service at a distance to consumers and taking the decision to make use of the necessary equipment or facilities for this purpose.**
- 3.19 **Our response:** This is a general guide on complying with the DSRs. The question of whether such a scheme exists is an objective one and we do not think it would be correct to introduce such a test of intention on the part of the supplier.
- 3.20 **Some respondents asked for examples of: 'goods by their nature'; 'goods made to a customer's specification' and 'goods or services where the price depends on fluctuations in the financial markets which cannot be controlled by the supplier' referred to at paragraph 3.24 of the consultation document.**

3.21 **Our response:** The Directive is silent on what these terms may mean. The DSRs do not define these categories any further but we consider:

- 'goods by their nature' could mean where returning the goods is a physical impossibility or where they cannot be restored to the same physical state in which they were supplied. This exception may apply, for example, to items such as latex or nylon clothing which could become distorted once worn or to fresh cut flowers
- 'goods made to a customer's specification' could mean goods such as custom-made curtains. This would not however apply to upgrade options such as choosing alloy wheels when buying a car; or opting for add-on memory or choosing a combination of standard-off-the shelf components when ordering a PC, for example, and
- 'goods or services where the price is dependent on fluctuations in financial markets' could mean products of an investment nature.

3.22 Ultimately, it is for the courts to define these terms further.

Does the draft guidance give a clear overview of the Regulations?

3.23 **A few respondents felt that the structure could be improved by the use of themed chapters.**

3.24 **Our response:** Where possible, the guidance follows the structure of the DSRs with signposts to the relevant parts of the legislation. The Q&As have also been grouped where possible.

3.25 **A number of respondents felt that the advice on mobile phone and services contracts could be made clearer and more comprehensive. For example, whether there may be circumstances whereby a business could apply one cancellation right for some inextricably linked goods and service contracts. This may arise where goods are considered an adjunct to the provision of a service, for example a mobile phone with a service contract.**

- 3.26 **Our response:** This is a general guide to complying with the DSRs and is not intended to replace legal advice on specific issues that may be excluded or covered by the DSRs; such detail falls outside the scope of this document. OFT will keep under review the benefit of publishing other forms of guidance.
- 3.27 **A number of respondents commented that the guidance on the cancellation provisions for service contracts needed simplification.**
- 3.28 **Our response:** these are complex provisions. However we have attempted to simplify the text.

Question and answer format

Is the way the question and answer format is currently set out useful?

- 3.29 **The consensus was that the balance is about right. Some respondents felt that the structure of the questions might be considered overly complex, whilst others sought improvements to the grouping of the Q&As.**
- 3.30 **Our response:** The Q&As have been grouped into themes reflecting where possible the structure of the legislation. Where possible the questions have also been simplified.
- 3.31 **The Q&A format did not find favour with one respondent who favoured devoting Part 1 to a more in depth analysis of the DSRs, and then follow on with frequently asked questions on some of the principles covered in Part 1.**
- 3.32 **Our response:** This is a general guide to the DSRs that is primarily aimed at small and medium sized businesses. The objective is to highlight the main parts of the DSRs and to share our experiences of interpreting and enforcing them. The Q&As reflect issues we have considered since the DSRs were enacted in 2000.

If this should be changed to be more accessible, then how?

- 3.33 The general consensus was that that the Q&A format was an effective way of imparting information. Several respondents suggested grouping the Q&As into themes and signposting to the relevant parts of the legislation.

Are there any other questions that should be included?

- 3.34 **One respondent referred to the concept of an 'initial services agreement' in the Financial Services Distance Marketing Directive (FSDMD) which is a framework agreement under which a series of different operations can be carried out (for example the provision of financial advice) and where the requirements of the FSDMD need only be applied to the initial services agreement and not each and every successive operation under it. The respondent observed that the distance selling regime does not explicitly contain an equivalent concept but the recitals to the Distance Selling Directive acknowledge that possibility. The respondent asked for inclusion of this concept in the guidance so that suppliers can be clear as to when they need to comply in relation to the 'first of a series of operations' or when they need to comply in relation to each operation.**
- 3.35 **Our response:** whether the requirements of the DSRs need to be applied at the initial agreement or successive stages of each of the individual 'agreements' in a series would depend on the terms and conditions of the contract. If each successive agreement is considered to be a separate agreement then the information giving provisions may apply. Each case would need to be examined on its merits.

ANNEXES

A CONSULTATION RESPONDENTS

ASDA Stores Ltd

Baby Products Association

Booksellers Association of the UK and Ireland Ltd

British Retail Consortium

British Telecommunications plc (BT)

British Vehicle Rental and Leasing Association (BVRLA)

Confederation of British Industry (CBI)

Consumer Credit Trade Association

Direct Marketing Association

Direct Selling Association

Interactive Media in Retail Group (IMRG)

Karate-Kid Ltd

Littlewoods Shop Direct Group

Local Authority Coordinators of Regulatory Services (LACORS)

Mail Order Traders Association (MOTA)

National Consumer Federation

Out-law.com

Outside In (Cambridge) Ltd

South West of England Regional Coordination of Trading Standards (SWERCOTS)

The Regulatory Law Committee of the City of London Law Society

The Jenks Partnership Ltd

Toys R Us