

**Implementation of
Directive
1997/7/EC on the
Protection of
Consumers in
Respect of
Distance Contracts**

**A consultation response by the
Office of Fair Trading**

November 2006

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1 INTRODUCTION

1.1 We are grateful for the opportunity to provide input into the Commission review of the implementation of Directive 1997/7/EC on Protection of Consumers in Respect of Distance Contracts (the Distance Selling Directive) as part of the review of the acquis process. Since its introduction the Distance Selling Directive has offered important protections to consumers who purchase at a distance and across borders, a key element in the development of the internal market. However, due to the speed of change and technological developments in relation to distance selling methods we welcome this review to ensure that the directive is able to continue to offer protections to consumers which meet the original aims, that is to ensure consumers who are purchasing at a distance are in no worse a position than consumers purchasing face to face. As set out in this paper our main points are:

- Recent developments in markets have created new categories such as the rise of the consumer business¹ in online auction sales which we would be keen to ensure are reflected in the definitions under the Directive.
- There is a lack of clarity in the directive around terms such as 'leisure services' and 'regular roundsmen' which has created confusion. We also feel that there is uncertainty relating to the status of information products, such as music downloads, which may affect their legal status.
- The growth of mobile technology to purchase items such as ring tones or music downloads has led to a need to clarify what constitutes a durable medium. We would therefore support the introduction of a definition of the term 'durable medium' in line with

¹ Consumer Business is used to refer to sellers on online auction sites who whilst not acting in the course of trade or business continue to sell goods in high volume.

the definition contained in Directive 2002/65/EC concerning the distance marketing of financial services.

- 1.2 Whilst there are some directives which are in need of vertical review to amend problems which have been identified we believe it is vital that, in general, the acquis review takes a longer term more flexible view of the development of markets, in line with the approach taken by the introduction of the Unfair Commercial Practices Directive² (UCPD). The UCPD provides a new light in which to view the acquis and we are supportive of the principles of maximum harmonisation where effective common standards of consumer protection can be applied across affected markets in the EU/EEA.³
- 1.3 We also believe that it should not be forgotten that the rules created by Consumer Protection legislation are only one half of the picture and that of equal importance is effective enforcement of those rules. We believe that many of the problems which occur around distance selling can be solved through cooperation of enforcement authorities between Member States and look forward to working closely with enforcement colleagues across the EU under the Consumer Protection Co-operation Regulation.

² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

³ It is of note that there are some markets where national development in one Member State is far in excess of other EU members and where maximum harmonisation would, consequently, significantly reduce the current level of consumer protection in that country. The consumer credit market in the UK is one such, and thus there cannot yet be one level of protection at EU level without too high a risk to consumers here.

The Office of Fair Trading

- 1.4 The Office of Fair Trading (OFT) is the UK's competition and consumer authority. Our mission is to make markets work well for consumers. Our vision is for competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition laws but are not overburdened by regulation.
- 1.5 We adopt a market-informed approach with a focus on outcomes that support productivity growth and consumer and business welfare. We believe this approach is in the best interests of both businesses and consumers as well as to the benefit of the UK economy.
- 1.6 Our capacity to remedy ill-functioning markets stems from our ability to use the most appropriate mix of consumer and competition instruments and remedies. In order for this approach to work, it is essential that the instruments at our disposal are effective and reflect current concerns in the market. To do this they must be able to adapt with advances in technology, product development and sale and marketing practices.

2 RESPONSE TO QUESTIONS CONTAINED AT ANNEXE II

2.1 Below is the OFT's response to the questions attached at Annexe II of the Commission communication⁴ regarding the implementation of the Distance Selling Directive. There are some areas where either we have no evidence to support or oppose the suggestions made in the questions or we feel it is more appropriate for DTI to answer and as such we have restricted our answers to those areas where we feel we have suitable experience.

Are the current definitions of 'consumer' and 'supplier' adequate for the purposes of the field regulated by Directive 97/7/EC?

Recent developments in markets have created new categories such as the rise of the consumer business in online auction sales which we would be keen to ensure are reflected in the definitions under the Directive. However we feel there is considerable scope for creating consistency regarding definitions of terms such as consumer and supplier used across the acquis directives. We would be concerned to find any use of common definitions had narrowed the scope of the directives and reduced the protection offered to consumers. We do think there is some obvious scope for creating some common definitions of the terms used to increase understanding of enforcers, traders and consumers as to when the directives apply. We would also be keen to ensure any common definitions were sufficiently broadly drafted to encompass new practices arising in the future.

⁴ COM (2006)514

Is the current definition of a 'distance contract' clear enough? In particular, is the term 'organised distance sales or service provision scheme' clear or should consumer protection be extended to all distance contracts regardless of whether the supplier usually trades at a distance?

The OFT has no evidence to suggest consumers are suffering detriment due to entering into distance contracts with traders who do not usually trade at a distance. As such we feel there is little value in extending the scope of the directive to all distance contracts.

Is the current definition of 'means of distance communication' clear enough?

We feel the current definition is suitably clear and is wide enough to include m-commerce.

Is there any added value to 'operator of means of distance communication' being defined?

We can find no value to the definition of 'operator of means of communication'.

Are definitions unclear in relation to any other concept, or are there other concepts relating to distance selling in need of definition?

There is uncertainty as to the status of information products (downloaded software, music, etc). These are hard to categorise as either goods or services, which affects their legal status and hence level of consumer protection (although, for the UK, the primary issue relates to implied terms rather than cancellation rights).

There is also a problem with lack of clarity regarding exemptions as set out in Art 3(2). There is some ambiguity regarding the interpretation of 'regular roundsmen' and how widely this can be interpreted. There was considerable divergence of interpretation on this issue in the recent online supermarkets case, whereby the supermarkets claimed an exemption for the regular delivery of foodstuffs on this basis. Whereas

OFT/DTI did not agree that supermarkets could claim a regular roundsmen exemption.

Similarly we feel the lack of a definition of 'leisure services' creates confusion for both traders and consumers. The OFT has historically adopted a narrow definition of this term, however we are aware that the number of traders who seek exemption under Art 3(2) is increasing including traders such as those providing music and DVD download services.

Article 3 – Exemptions

Do the current exemptions need to be revised, expanded or repealed in the light of new market developments (e.g. downloading of music or other services) and/or technologies (e.g. emergence of m-commerce) or interpretation problems (e.g. European Court of Justice ruling on the EasyCar case in which it was decided that car hire amounts to a 'transport service' and is as a consequence excluded from the scope of the Directive; use of broad terminology such as 'leisure services')?

New trading models such as internet auctions appear to fall outside of the scope of the Distance Selling Directive and as such are impinging on the ability of the Directive to meet its original aims. Whilst auctions are exempt from the scope, the Directive contains no definition of what constitutes an auction, thus causing confusion.

The status of music and other downloads needs to be clarified but these products should not be exempted from the Directive. In relation to m-commerce stakeholders have pointed to the difficulties of providing the requisite durable information in the context of potentially small screen displays, for example, on mobile phones. This would not, in our view, justify exempting m-commerce (far from it) but the mechanism to provide the requisite information may need to be considered.

Does the exemption covering the construction and sale of immovable property or rights related to immovable property cause any interpretation problem e.g. interaction of this Directive with the Timeshare Directive?

The Distance Selling Directive should not cover matters covered by the Timeshare Directive. However, if the Timeshare Directive were widened to cover either or both of 'timeshare like products' and 'travel discount clubs' this would obviously go further than immovable property rights, as defined in the distance selling directive, therefore this may need to be amended to avoid both duplication of regulation and any possible interaction problems between the two directives.

Should auctions or specific types of auctions be covered by the Directive?

As discussed above we would welcome a definition of what constitutes an auction for the purposes of the Distance Selling Directive to provide some clarification of the situation in relation to internet auctions. However, ensuring internet auctions are covered by the scope of the directive will not in itself provide for a greater level of consumer protection as consumers will need to know they are buying from a 'seller' as defined in the Distance Selling Directive for cancellation rights to apply. Many traders in internet auction sites masquerade as private individuals when selling via these platforms.

Article 5 – Written confirmation

Can Article 5 be improved e.g. introduction of a definition of 'durable medium' as defined in Directive 2002/65/EC; introduction of further information to be confirmed in writing or deletion of some information)?

The growth of mobile technology to purchase items such as ring tones or music downloads has led to a need to clarify what constitutes a durable medium. We would therefore support the introduction of a definition of the term 'durable medium' in line with the definition contained in Directive 2002/65/EC.

Would the merger of the information requirements at Article 4(1) and 5(1) simplify these rules for both consumers and suppliers?

We would not be opposed to the merger of the two information requirements as long as information was required to be provided before the conclusion of the contract and there remained a requirement, similar to that currently contained in Article 5 that the information is provided in a durable medium.

Article 6 – Right of withdrawal

Do you think the length of the distance selling cooling off period should be harmonised across the Member States and if, so how long should this period be?

We are supportive of a harmonisation of cooling off periods across the acquis. However any attempt at complete harmonisation or standardisation would need to be done with care in order to ensure that harmonisation occurred at a level which was appropriate for all the acquis directives, otherwise this could result in increased, or decreased, levels of protection beyond those currently thought necessary in individual directives. For example the cooling off period contained in the Timeshare Directive exists, according to recital 11 of the Directive, to:

'... give the purchaser the chance to realize more fully what his obligations and rights under the contract are...since the property in question is often situated in a State and subject to legislation which are different from his own.'

Given the purchaser in many instances will, at the time of entering into the contract, be on vacation and may only be able to seek legal advice on the obligations and rights contained in the contract when back in their own Member State we would recommend that this cooling off period is increased to the level set in the UK transposition of 14 days. Given this clear reason for having the increased period under the

Timeshare Directive any general principle involving cooling off periods would need to be set at this level. A 14 day cooling off period would also create harmonisation with the cooling off period provided in Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services.

Do the rules concerning the exercise of the right of withdrawal and its consequences need to be clarified?

The OFT is supportive of any proposals to increase clarity and understanding for both traders and consumers as to how the Directive operates. However, it is important that any clarification seeks to take account of all media by which a distance contract may be concluded as procedures to exercise the right to withdrawal may be different.

Do the current exemptions to the right of withdrawal need to be revised, expanded or repealed in the light of new market developments and/or technologies?

Some revisions may be needed to the cancellation provisions with respect to interdependent contracts - e.g. mobile phone and service contract. There are essentially two contracts here and therefore two cancellation periods - one for the goods and the other for services. Depending on the timing of the durable information the cancellation period for both contracts may run side by side or one may overlap the other. This has caused problems in the past.

Should the provisions concerning the cost of return be harmonised in the field of distance selling and if so, who should pay the cost of return?

Harmonised return costs may impose too many burdens on either traders or consumers depending on which group is asked to pay. As such we feel current situation, under which the contract will specify who bears the cost of return, is the most suitable arrangement, as long as consumers are given information regarding who bears the cost of return clearly, in advance and in a durable medium.

Article 7 – Performance

Should the optional provision concerning substitute goods at Article 7(3) be made compulsory to raise the level of consumer protection evenly across the Internal Market?

The OFT is supportive of measures to increase harmonisation across Member States where this does not negatively impact on the necessary levels of consumer protection in the UK. As such we can see merit in extending the provision of Art 7(3) to all Member States.

Article 10

Should Article 10 be expressly repealed to clarify the relationship between Article 10 and the Directive 2002/58/EC on privacy and electronic communications?

Whilst we have no experience of problems relating to the inter relationship between the two articles, we feel that in the interests of clarity it would be appropriate to repeal Article 10 in order to rely solely on the provisions contained within Article 13(1) of Directive 2002/58/EC.

3 CONTACT DETAILS

- 3.1 Should you have any enquiries regarding this response, in the first instance, please contact:

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