

## **RESPONSE TO EUROPEAN COMMISSION'S CONSULTATION ON THE IMPLEMENTATION OF DIRECTIVE 1997/7/EC**

### **On the Protection of Consumers in respect of Distance Contracts**

#### **First Consultation on the Distance Selling Directive**

The Advertising Association (AA) is a federation of 31 trade bodies and organisations representing the British advertising and promotional marketing industries including advertisers, agencies, media and support services. Its members include representation from the direct mail, direct selling and online advertising sector (see list of members attached). It is the only body that speaks for all sides of an industry worth almost £19 billion in 2005. For further details, see the AA's website: <http://www.adassoc.org.uk/>.

The AA welcomes the opportunity to contribute to this consultation. The development of the worldwide web and e-commerce means that the market has changed considerably since the Distance Selling Directive was adopted in 1997 and implemented into UK law via the Consumer Protection (Distance Selling) Regulations 2000 and 2005. Most of the implementation problems arise from the technological changes the web has introduced to distance selling. If the Directive is reviewed – and there are some points raised below where it would be useful to have greater clarity - it should take account of the consumer empowerment the web has brought to distance selling contracts. It should therefore be cautious about extending protections to consumers unnecessarily, as this would distort the market with companies not supplying services at a distance.

We are conscious of the fact that some of the questions below are asked from the wider perspective of harmonisation under the consumer acquis. The AA would caution against any consolidation that tries to homogenise definitions and legislative approaches across the consumer acquis for the sake of it, since the disparities in different Directives arise quite reasonably from the different set of situations the consumer faces in each purchasing case.

We would propose that some of the issues of compliance, or differences in approach between Member States, could be tackled via better cooperation between enforcement authorities to ensure a more level playing field in terms of implementation.

## Article 2 – Definitions

1. *Are the current definitions of “consumer” and “supplier” adequate for the purposes of the field regulated by Directive 97/7/EC?*
  - *Article 2(2): “consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession*
  - *Article 2(3): “supplier” means any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity”.*

The AA appreciates that this issue is to be considered in the broader context of the Consumer Acquis review. Whilst the above definitions remain adequate, we support consistency in definitions across all eight Directives forming part of the Consumer Acquis review, as well as the Unfair Commercial Practices Directive (UCP).

2. *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?*
  - *Article 2(!) “distance contract” means any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded”.*

The AA considers the current definition to be adequate.

3. *Is the current definition of “means of distance communication” clear enough?*
  - *Article 2(4) “means of distance communication” means any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties”.*

The definition should be revised to clarify that where the supplier trades at a distance at the request of the consumer, the transaction is excluded.

The Commission might also consider adding

*Telephone by short message service (SMS)*

to Annex 1 of the Directive for clarification purposes.

4. *Is there any added value to “operator of means of distance communication” being defined?*

The term is self-explanatory. There is no added value to further defining it.

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

The concept of “durable medium”, by which the consumer must receive written confirmation of the order, needs to be redefined to take account of developments in the market, and to achieve greater consistency with other Directives (e.g. the proposed Consumer Credit Directive). A definition of the term ‘on-line auction’ would not go amiss.

### Article 3 – Exemptions

6. *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. ECJ 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”)?*

The AA does not support revision, expansion or repeal of current exemptions. Services like accommodation, transport and leisure must be protected from late cancellations or refund demands, to protect the supplier.

7. *Has the insertion of a definition of financial services by Article 18 of Directive 2002/65 solved any transposition problems Member States may originally have encountered when transposing the Directive?*

Yes. Most Member States seem to have implemented correctly the exemption for financial services.

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

We are not aware of any interpretation issues in the UK.

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

The AA supports the inclusions within the Directive’s scope of B2C sales on websites such as eBay only. Excluding them would constitute unfair competition vis-à-vis distance selling companies which do not use those website platforms to sell their products. However, when it is not a fixed transaction and the price is fixed by bidding, suppliers should be exempted from the right of withdrawal, as there is no guarantee that the supplier would obtain the same price if the goods were put for bidding a second time. That

should not free businesses from the rest of their obligations, such as providing prior information as required by the Directive.

Consumer-to-consumer transactions or any other type of auction shall not be covered by the Directive.

#### Article 4 – Prior Information

10. *Can Article 4 be improved (e.g. clearer provisions concerning timing and/or format of the prior information; introduction of additional requirements or repeal of certain requirements)?*

There are already sufficient obligations regarding prior information and the AA does not support any case for adding to them.

11. *Are all groups of consumers (e.g. minors) sufficiently protected by the Directive? If not, how can their protection be improved?*

The Directive provides a sufficient level of protection for all consumers, including minors.

#### Article 5 – Written Confirmation

12. *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?*

In respect of defining ‘durable medium’, see answer to question 5 above.

With regard to the introduction of further information, the AA believes that consumers should not be overloaded with information –the right balance needs to be struck.

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

The AA does not believe this would simplify the rules and would oppose any measure to provide all the mandatory prior information required in Article 4(1) with the written confirmation of information required by Article 5(1), which must be delivered to the consumer during the performance of the contract or at the time of delivery.

#### Article 6 - Right of withdrawal

14. *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?*

It would be helpful to cross-frontier distance selling to harmonise the cooling off period for consumers across Member States at 7 days, suitably defined. If this were extended to, for example 14 days, that would not be a constructive approach for businesses trying to compete with others in the Single Market. Periods longer than 7 days should be optional and at the discretion of the business, and should not be imposed by legislation.

In answering this question, we appreciate that the issue of harmonisation of cooling off periods will be considered in the broader framework of the consumer acquis. We do not believe they should be harmonised, because the conditions relating to transactions under each Directive are different. In the Distance Selling Directive, the conditions provide the consumer with time to examine the goods after receipt. In the case of the Doorstep Selling Directive, the consumer will have seen the goods, but is given time to reflect after perhaps making an ad hoc purchase under pressure on the doorstep of his/her home.

The AA agrees with the Commission that when different products under a single order are delivered in batches, the consumer should be entitled to a cooling-off period following receipt of each of those products.

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

Yes. The AA considers that the rules concerning the exercise of the right of withdrawal and its consequences need to be clarified.

*16. 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?*

The Commission highlights one of the differences between Member States being the duty of care by the consumer of goods within the return period whilst they are in the consumer's possession. It is essential to businesses that they can re-sell returned goods as new, and there is no good reason for allowing the consumer to have a refund if they are not returned in this condition. Distance selling businesses should be able to reject goods that have clearly been used, beyond what is reasonable, by the consumer, and/or are not returned in their original packaging, together with any ancillary items. This does not reduce essential protections for the consumer when the goods are faulty, etc.

There are also concerns about the fact that health and safety considerations are not reflected in the right to return products that have been tried (underwear, earrings, personal care products, etc.). There would be health risks in re-selling these products and exemptions should be made to avoid that kind of risks and comply with health and safety regulations.

17. *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?*

Just as businesses are required to give refunds for returned goods, so should there be reasonable obligations on consumers. Refunds should be conditional on returning the goods and the cost of return should not be imposed on the supplier by legislation. The costs of handling returns have increased considerably in those countries (Finland and Germany) where the supplier has to bear the costs of return, making it impossible for businesses to compete across borders. It also raises the question of whether initial handling and delivery costs, usually paid by the consumer, should also be refunded upon return of the goods. If a business, with the aim of getting a commercial marketing advantage, offers to bear the cost of return, it should be able to do so but it should not be imposed by legislation.

#### Article 7 – Performance

18. *Do the provisions of Article 7 ensure proper performance of distance contracts, e.g. are the rules concerning timing and form clear?*

We note that Article 7(2) has been interpreted in different ways and that two Member States have imposed financial penalties in the form of interest for the supplier not adhering to the time requirements for performance of the contract. We do not support such additional costs being imposed on the supplier. Article 7 could provide for more legal certainty by indicating when the refund period of 30 days (suitably defined) should start (i.e. when a consumer instructs the supplier to where a payment should be made).

19. *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?*

We see no reason for doing so.

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

Article 10 should either be repealed or amended to fall in within the additional requirements of Directive 2002/58/EC on privacy and electronic communications.

#### General Questions

21. *How had the use of minimal clause, i.e. the possibility for Member States to retain or introduce provisions offering a higher standard of consumer protections affected cross-border trade and competition,*

*e.g. has it constituted a hindrance to cross-border trade or raised obstacles to the exercise of the right of establishment? If so, please give examples.*

The UK's implementation of the right to cancel a contract for services exceeds the Directive's requirements, which do not permit the consumer to cancel the contract once the service has started. In the UK, he/she may cancel the contract up to 7 days (suitably defined) after receipt, even if the service has started. This is unnecessary gold-plating, as a consequence of the UK's transposition of the original Directive, and creates an anti-competitive principle.

The fact that Member States are able to adopt or maintain more restrictive provisions than those adopted by European legislation creates barriers and obstacles for the development of the Internal Market.

A maximum harmonisation approach should be taken but should it not be feasible to do so, then the country of origin principle should apply for aspects such as the right of withdrawal and the information requirements.

22. *Have you encountered any other problem with the regulation of distance selling as it currently stands?*

The AA has not encountered any other problem with the regulation of distance selling as it currently stands that has not already been covered in this response.

23. *Do you feel that there are other aspects of distance selling that require regulation?*

No. The AA does not consider there to be any other aspect of distance selling that requires regulation.

21 November 2006

## **AA MEMBERS**

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Channel Four Television  
Cinema Advertising Association (CAA)  
Communication Advertising and Marketing Education Foundation  
Data Publishers Association (DPA)  
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