

dti

**THE UNFAIR COMMERCIAL
PRACTICES DIRECTIVE**

**Report of DTI workshop on
the evidence for a
“general duty to trade
fairly”**

JULY 2003



The DTI drives our ambition of 'prosperity for all' by working to create the best environment for business success in the UK. We help people and companies become more productive by promoting enterprise, innovation and creativity.

We champion UK business at home and abroad. We invest heavily in world-class science and technology. We protect the rights of working people and consumers. And we stand up for fair and open markets in the UK, Europe and the world.

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1. INTRODUCTION AND BACKGROUND

1.1 There is considerable debate at present about the potential benefits of a “general duty to trade fairly”. Following its 2001 Green Paper on Consumer Protection¹, the European Commission has proposed a new framework Directive containing a general prohibition on unfair commercial practices. In the UK, the case for a general duty was discussed during the passage of the Enterprise Act 2002 through Parliament. Reports were produced by the National Consumer Council² and the National Association for Citizens Advice Bureaux.³ A seminar was also held at the DTI on 29 October 2002 and hosted by Melanie Johnson, Minister for Competition, Consumers and Markets, to discuss these issues. DTI agreed that it would carry out further work with the objective of gaining a more in-depth view of the evidence of the need for new legislation in this area, and whether or not a general duty would be likely to be effective in tackling the types of consumer detriment being targeted.

1.2 The UK is one of the few countries in the EU that does not have some form of ‘general duty’ in its national law. Between July 2002 and February 2003, a group of experts from EU Member States discussed the possibility of an EU-level general duty. During the discussions, it emerged that 13 of the 15 EU Member States⁴ currently have general fair trading clauses (albeit of varying types). However, the UK has hitherto relied largely on sector-specific legislation, although there are legal provisions which could be described as “of general application” under various pieces of legislation, including the Fair Trading Act 1973, the Consumer Protection Act 1987, the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations 1999, the Control of Misleading Advertising Regulations 1988 and, now, the Enterprise Act 2002.

1.3 This report seeks to look in as much depth as possible into the nature of consumer detriment resulting from unfair commercial practices, the problems with current legislation, and whether (and if so, how) new legislation will really assist in dealing with it. The other crucial matters it seeks to tackle is, if there is to be new fair trading legislation, what provisions should it contain in order to be as effective as possible. This report is not an indication of the scale of any consumer detriment.

1.4 The DTI is extremely grateful for the time and commitment of workshop participants in producing this report.

1.5 This report is not a statement of UK Government policy or an indication of how the Government might approach EU negotiations in this area in future.

¹ COM (2001) 531

² *The case for a general duty – evidence to support the NCC’s campaign for a general duty not to trade unfairly* (2002)

³ *Door to Door: CAB clients’ experience of doorstep selling* (September 2002)

⁴ As well as many other major economies including the United States and Australia.

2. EXECUTIVE SUMMARY

2.1 The Workshop considered five areas of consumer detriment and discussed typical case studies for each.

2.2 The key problems in each of the five areas were as follows:

- For doorstep selling: the use of high pressure selling techniques, the targeting of vulnerable (particularly elderly) consumers, misleading information about the product, continued pressure after the contract has been concluded.
- For tradesmen: inadequate or misleading information about the service and prices, lack of response to customer complaints, consumers often being vulnerable or in a vulnerable position.
- For prize draws: fraudulent activity, misleading and inadequate information, the difficulty of tracking down the company, misled consumers are often the vulnerable.
- For the holiday sector: misleading information, high pressure selling techniques, fraudulent activities.
- For household products and services: often misleading information and difficulty of obtaining proper redress and complaint handling.

2.3 Overall, the workshop participants felt that there was often legislation in the area but that coverage was patchy and often difficult to enforce, particularly in respect of gathering sufficient evidence. There seemed to be a problem of fraudulent activity in certain sectors and difficulties in tracking down companies and individuals, particularly where companies are based abroad. Consumer awareness of their rights, particularly where there is a cooling-off period, was also a factor.

2.4 The workshop participants broadly concluded that a ‘general duty to trade fairly’ could provide some useful new tools for enforcement authorities, particularly in relation to misleading information, omissions of information and the use of high pressure selling techniques. A ‘general duty’ seemed likely to be more effective in some sectors rather than others e.g. holiday sector rather than prize draws. However, the difficulties of evidence gathering and protecting the vulnerable might remain. There were also various issues relating to enforcement, particularly the ability and willingness of consumers to seek redress and consumer knowledge about their rights.

2.5 Workshop participants made various suggestions about how to ensure that the ‘general duty’ could be as effective as possible. Suggestions included the widening of the scope of cooling off periods and ensuring that all material information is given – including information about the price and the trader. More ambitious suggestions included the introduction of licensing regimes, a requirement to provide an after sales service, and making information about a trader’s record available to the public. There were also suggestions for improvements to consumer redress, including enabling consumers to recover damages for financial loss.

3. THE WORKSHOP

3.1 The basis of this report was a workshop held at the FutureFocus@dti Lab at 1 Victoria Street, London SW1H 0ET on 11 April 2003 between 10.00am and 4.30pm. The participants in the workshop were: six trading standards officers and a representative from the Local Authorities Coordinating Office on Regulatory Services (LACORS); one Citizens Advice Bureau Case Officer and a representative from the National Association of Citizens Advice Bureaux (NACAB); 3 representatives from the Office of Fair Trading (OFT); and 5 DTI officials, including a statistician and an economist. The workshop was overseen by an independent facilitator.

3.2 The stated purpose of the workshop was to:

- Gain a more detailed picture of the nature of consumer detriment resulting from unfair commercial practices in the UK;
- Ascertain where current legislation applies and why it is difficult to enforce or is unenforceable;
- Build a better understanding of how a general duty not to trade unfairly will help in dealing with unfair practices that are not covered by - or are difficult to enforce under - existing legislation; and
- Explore what needs to be contained within the general duty in order to ensure that it works.

3.3 Before the meeting, the trading standards and citizens advice representatives were asked to fill out 5 questionnaires on the model set out in the Annex giving full details of 5 specific examples of where a consumer – or group of consumers – had suffered detriment as a result of unfair pre-contractual commercial practices, including misleading claims, representations or advertisements; lack of disclosure of material information; instances where harassment, coercion and/or undue influence had been used; and situations where traders had failed to respond adequately to consumers with legitimate complaints. The participants filling out the questionnaires were asked to concentrate on examples that they considered to exemplify 5 key areas of consumer detriment that they encountered on a frequent basis.

3.4 The case studies formed the structure for the discussion and principal focus of the workshop. On the basis of the examples provided, the areas for discussion at the workshop were divided into five areas: doorstep selling; tradesmen; prize draws, holidays and furniture. At the workshop, certain participants were asked to discuss an example that they provided in advance of the workshop, fleshing out the areas covered on the forms. The discussion was then broadened out to a wider discussion about the problems encountered in the specific sector, and the participants tackled the key questions of how well existing legislation covered the area and whether new legislation would be likely to make a difference, followed by a brainstorming about what the participants would like to see in the legislation in order for it to make a difference.

3.5 The meeting was held in futurefocus@dti, a futuristic forum particularly directed at this type of workshop. The lab contained facilities for electronic voting by the participants, who were able to vote on how serious the problems were; how well existing legislation covered the area and how likely it was that the new legislation would make a difference, the results of which produced data available for immediate analysis. They were also able to enter data about what they would like to see in the new legislation which was also for subsequent analysis.

4. DOORSTEP SELLING

4.1 Doorstep selling is the term used to describe contracts concluded between consumers and traders, face to face and in the consumer's home. It is used for a wide range of products and services including disability aids, home improvements, washing machines, computers, sewing machines, vacuum cleaners, car parts, DIY equipment, slimming products, books, tapes, CDs, televisions and DVDs, jewellery, clothing, footwear, cards, furniture, disability products and aids, building and repair work, double glazing, solar heating, security systems, wills, powers of attorney, educational courses and utilities such as fuel telephone lines.

NACAB supercomplaint

4.2 In July 2002, the National Association of Citizens Advice Bureaux (NACAB) published a report on doorstep selling, entitled "Door to Door", containing evidence of problems experienced by CAB clients across a range of goods and services.⁵ The report cited evidence of practices such as high-pressure sales techniques and reliance on unfair contract terms. Complaints were particularly prevalent in doorstep sales of domestic fuel but complaints were also reported in relation to legal services, wills, debt management, disability aids, double glazing and other home improvements, domestic appliances, building work and repairs and linked credit agreements. These were particularly damaging to more vulnerable consumers.

4.3 NACAB submitted the report to the Office of Fair Trading (OFT) as a "supercomplaint" within the meaning of the Enterprise Act. In November 2002, OFT announced that they would investigate the supercomplaint. The investigation will take around a year and OFT will look at practice in other EU member states. The investigation will take a particular in-depth look at the home improvements and assistive products sectors.

4.4 In April 2003, the Trading Standards Institute (TSI) launched a report on cold calling entitled "Door to door calling of property repairs maintenance and improvement - long overdue for statutory control". The report was based on a national survey launched in November 2002 during the TSI National Consumer Week. TSI's recommendations included prohibition of salesmen offering home improvements calling on householders unannounced. The TSI report will provide input to the OFT's investigation.

Workshop discussion

4.5 The principal case study discussed at the workshop involved doorstep selling of alarm systems, which had many of the features which are typical of the problems in this area. Typical characteristics were that consumers, often elderly, are "cold called" on the phone to say that they have won a holiday. The prize is to be delivered personally. A company representative, who apparently happens to be in the area, calls very shortly afterwards. On arrival, the representative gives a sales presentation for the alarm systems, scaring the customers with crime statistics and photos (e.g. depicting elderly people who have suffered attack through entry to premises). Following the presentation, alarms are frequently sold for many times their value (e.g. up to £3000 for an alarm worth £300-400). In addition to pricing issues, detriment also takes the form of future visits by the company to "upgrade" the equipment, sale of the consumer's details to other unscrupulous traders and physical/mental torment and guilt for the consumer following the sale. Such consumers are frequently vulnerable.

⁵ *Door to Door: CAB clients' experience of doorstep selling* (September 2002)

How well does existing legislation cover this area?

4.6 There is a variety of legislation covering this area, principally the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (commonly known as "the Doorstep Selling Regulations"). A key provision under the Regulations is a seven-day cooling off period for consumers who purchase from traders whose visit is unsolicited, or whose visit follows an unsolicited doorstep approach. The rationale behind this is to protect consumers who may be unprepared; alone; and/or not be able to consider the market or compare prices. A consumer who invited a visit at their own initiative is expected to have undertaken some preparation. Local trading standards departments are responsible for the enforcement of these Regulations.

4.7 The Trade Descriptions Act 1968, the Sale of Goods Act 1979, the Supply of Goods and Services Act 1982, the Stop Now Orders (EC Directive) Regulations 2001 and the Consumer Credit Act 1974 may also be relevant depending on the specific example of doorstep selling.

4.8 However, many of the workshop participants believed the coverage of this area to be inadequate or only partially adequate.⁶ For instance, the Doorstep Selling Regulations provide for a cooling off period for sales concluded as a result of unsolicited visits to consumers' homes. However, some participants argued that the cancellation period can effectively be lost if the product in question is already fitted in the home.⁷ In many cases, the consumer actually asks to have goods installed immediately or is offered a special deal in order to do so. In addition, there is generally no cancellation period in the UK if the salesperson has been invited to the consumer's home.⁸

4.9 In particular, there were problems relating to enforcement, as it was difficult in many cases to obtain a sufficient body of evidence to obtain a Stop Now Order against an infringing trader, especially given that communication is largely verbal. Moreover, consumers sometimes felt too intimidated to come forward. This was compounded by problems of communication between enforcement bodies in different areas, especially with traders changing their names and places of business frequently.

How likely is it that new legislation will make a difference?

4.10 Many participants argued that the general clause could assist to an extent.⁹ In particular, the proposed category under the framework directive banning aggressive commercial practices could be used to tackle, specifically for the first time, the pressure sales element in certain doorstep sales, which would not currently constitute a breach of law.

⁶ Full details: of 14 participants who voted, 4 believed that current legislation was "wholly inadequate"; 2 "inadequate", 7 "medium"; 1 adequate; and none "wholly adequate".

⁷ In the sense that, where goods have been installed (e.g. fitted kitchen units) during the cooling-off period and the contract is cancelled, the consumer may be liable for costs associated with the installation. Under Regulation 7(2)(iv), the consumer is not under a duty to restore goods which, before the cancellation, had been incorporated into the home. However, the Regulation goes on to say that the consumer, in this instance, is under a duty to pay in accordance with the cancelled contract for the supply of the goods and for the provision of any services in connection with the supply of goods before the cancellation.

⁸ However, in this case if, when the consumer invited the trader into his house, he did not know or could not reasonably have known that supplying alarm systems formed part of the trader's business activities, then the Doorstep Selling Regulations would apply to the resulting contract for alarm systems (Regulation 3(1)(b)). This point may be relevant to this case, as it seems that salespersons were seeking an invitation on the basis that they would be delivering a free holiday, without any mention of selling burglar alarms.

⁹ Full details: of 14 participants who voted, none believed that new legislation was "very unlikely" to make a difference; 1 "unlikely"; 6 "medium"; 6 "likely"; and 1 "very likely".

4.11 However, whilst it might help, some participants believed that new legislation could simply replicate existing problems. With the EU proposals for a framework directive on unfair commercial practices likely to be enforced by Stop Now Orders, the problems of accumulating evidence (see above) would remain. Especially with powers provided for by the Enterprise Act 2002, one Trading Standards Officer said that in some ways the powers needed were already available. The problems were with using such powers practically, and this situation could continue even with the new legislation.

4.12 Some participants said that the legislation could only be effective with adequate civil redress mechanisms for individual consumers suffering loss. It was also crucial that consumers understood their rights and how to enforce them.

What would you like to see in the new legislation in order to make a difference?

4.13 A large (and wide ranging) number of suggestions were made as to how the legislation could actually make a difference. Some of the principal ones were as follows:

- Cancellation rights should cover all contracts signed in the home (i.e. not just unsolicited visits), or possibly those above a certain value (e.g. £300 or £500)
- Banning problem traders through introduction of a “negative licensing” system
- Individual civil redress mechanisms for consumers suffering loss from misselling
- A requirement that salespeople should leave the home by a “latest” time, e.g. after 2 hours or before 9pm, whichever is the earlier
- No work should be carried out during the cooling-off period (thus ensuring that it is not lost due to the product already being installed)¹⁰
- A prohibition on receiving payments/monies from consumers during the doorstep visit
- A requirement for the trader to bring the right of cancellation (or the fact that such right is not available) to the attention of the consumer – it should be for the trader to provide evidence that he has done this
- An upper age limit above which contracts signed in the home would not be valid (similar to restriction of minors contracting), aimed at protecting elderly consumers whose capacity to contract may be in doubt.

¹⁰ Although this could be a problem if a consumer genuinely wanted the work carried out immediately. If this was the case, in this situation there may have to be additional paperwork to ensure that the consumer was both made aware of and understood the effect on their cancellation rights and confirmed that they were still prepared to go ahead. NB: this is theoretically already possible under existing EU legislation. In certain EU Member States, contracts only commence at the end of the cooling off period.

5. TRADESMEN

5.1 This case study area covers a wide range of sectors but focuses on detriment that arises between a consumer and a particular tradesman or company, usually operating locally and involved with household services.

Workshop discussion

5.2 From the case studies presented by participants, common elements of detriment appeared to be that: the consumer is not fully informed in relation to the service that is being provided; information advertised about prices is misleading; problems arise principally through misleading omissions rather than misleading information.

For this area, two typical case studies were presented:

5.3 One involved a local locksmith advertising a 24-hour service. When consumers contact the trader (often at night when they find they are locked out) they agree a fee of around £60 for his services. The locksmith then comes out and drills out the lock. Consumers assume the lock will be “picked” but as it is drilled out they find although they have access they then have no way of securing their premises. The locksmith then offers to fit a lock (usually a cheaply-manufactured one) for a cost of £240. The consumer is in a vulnerable position as a result of the work of the locksmith destroying the original lock, as they cannot secure their home late at night. Detriment to the consumer may be up to £200, depending on the cost of (possibly) more reputable locksmiths.

5.4 A second case involved a plumber. Complaints ranged from charging high/extortionate rates for jobs, not finishing work, or taking days to complete jobs which should not take more than a few hours. Also damaging consumer’s property whilst carrying out work (e.g. breaking a washbasin when changing taps) and charging for such damage. Customers are often elderly or vulnerable. Trader advertises ‘special OAP rates’ but as the trader’s pricing structure is unknown it is doubtful whether OAPs actually pay any less than other customers. The monetary value of detriment can amount to hundreds of pounds. The trader does not respond to telephone and written complaints, including those written by advice agencies or Trading Standards, and does not turn up at court when consumer eventually does pursue a claim.

5.5 Most participants agreed that this area caused significant problems.¹¹

How well does existing legislation cover this area?

5.6 Whilst the above cases cover a number of different issues, the consensus among participants was that existing legislation in this area was inadequate.¹²

5.7 There is some relevant legislation, including the Consumer Protection Act 1987 (misleading price indications) and the Trade Descriptions Act 1968. In the case of the plumber, action under Part III of the Fair Trading Act 1973 had been considered in the past but there were difficulties in accumulating sufficient evidence to take action. Most complaints were civil breaches, rather than criminal, so efforts were made to resolve complaints through civil action.

¹¹ Full details: Of 13 participants who voted, 1 believed that this issue was a “very significant problem”; 8 “significant problem”; 3 “neutral”; zero “minor problem”; and 1 “not much of a problem”.

¹² Full details: of 14 participants who voted, 1 believed that current legislation was “wholly inadequate”; 8 “inadequate”, 3 “medium”; 2 adequate; and none “wholly adequate”.

5.8 Stop Now Orders could be an effective way of stopping the tradesman in question from trading unfairly, but again the difficulties of accumulating the requisite evidence to take action apply. In the case of the locksmith, evidentially it would be difficult to establish that a new lock was not needed. As with doorstep selling, there was a problem of traders changing names or closing down and setting up again in a different area.

How likely is it that new legislation will make a difference?

5.9 With some exceptions, in general the participants believed that a general duty to trade fairly could potentially make a difference.¹³ In particular, the prohibition on misleading commercial practices may require the trader to be more transparent in disclosing all material information, such as full pricing details/costs (including about the cost of possible consequential action as in the case of the locksmith), resulting in the consumer having a better idea of how the tradesman is likely to proceed and likely costs of such action. The prohibition on aggressive commercial practices could assist if it prevented traders from using undue influence to exploit the specific misfortune or circumstance of the consumer.

5.10 In the case of the plumber, it was suggested that it would assist consumers if there were a statutory requirement for the trader to have some complaint handling procedure in place. However, it seems unlikely that this will be provided for under the new legislation, although the Directive is likely to apply to unfair commercial practices performed before and after the purchase of the product.

5.11 It was mentioned that “bait” advertising could be prohibited under the list of examples annexed to the framework directive. This could cover traders who offer a low call-out rate followed by substantial charges for extra work.

5.12 With the new legislation enforced by Stop Now Orders, there would remain the same difficulties of gathering sufficient evidence.

What would you like to see in the new legislation in order to make a difference?

5.13 Again, there were a wide number of suggestions. The principal ones are summarised:

- A duty to disclose all of the obvious economic consequences/ potential costs of entering into a contract
- Provisions preventing advertising of OAP rates or special rates unless the trader can provide evidence of these discounts
- It was suggested that requiring relevant authorities to provide information to consumers about trader profiles, along the lines of the information provided by the US Better Business Bureau. (NB this could cause issues of data protection/ libel which would have to be addressed)
- Licensing/ local authority approval of emergency call-out service providers (e.g. plumbers, locksmiths, electricians)
- A duty to provide local trading standards officers with details of current charges and a log of complaints on request

¹³ Full details: of 14 participants who voted, none believed that new legislation was “very unlikely” to make a difference; 4 “unlikely”; 3 “medium”; 7 “likely”; and none “very likely”.

6. PRIZE DRAWS

6.1 This is a specific practice where Citizens Advice Bureaux regularly report consumer detriment. The implication of a communication to consumers is that something, money or goods, has already been won but the small print indicates that consumers are buying into entry into a competitive process. The common elements also include a payment, which may be an entry fee or a fee for administration. Frequently consumers respond to such communications, small sums are sent in and nothing is received back. Addresses tend to be outside the UK with perhaps a UK mailing address. Some play on vulnerability (e.g. the elderly) and/or guilt to induce participation. Time limits for replies may lead to undue influence on the consumer. The scale of detriment is commonly only £10 - £20 or a premium rate phone call¹⁴, but a large number of consumers may be affected. Also, the frequency with which some consumers have received these communications indicates that the addresses of participants may be sold on.

Workshop discussion

6.2 The typical case discussed at the workshop involved a retired couple who received a letter from a company which at first indicated that they had won a prize of £1100. They had to return the letter with £15 and bank or address details. Further explanation was received giving a PO Box number in London and a statement that said that the consumer's letter would be entered into a draw with a first prize of £1100. Other prizes would be discount vouchers.

6.3 The majority of the participants believed that these misleading prize draws were a significant problem.¹⁵

How well does existing legislation cover this area?

6.4 The majority of participants believed that the existing legislation in this area was either inadequate or wholly inadequate.¹⁶ In some cases, action could be taken under the Control of Misleading Advertising Regulations. Other applicable provisions, in some cases, included disclosure requirements for prize draws. Criminal proceedings under the Theft Act 1968 (deception) may be relevant.

6.5 The OFT's International Liaison Section is active in gathering information on bogus draws and lotteries originating overseas and work with overseas counterparts to shut them down. At least in the EU, Stop Now Orders are an additional weapon that they have which is expected to help.

6.6 However, in terms of enforcement the principal problem, frequently, is that enforcers do not know whom they are dealing with. Companies supply PO Box numbers or use local mailing companies but the companies themselves are not based in the UK. Frequently, such mailings originate from overseas, for example the Netherlands and Canada.

6.7 The OFT and some trading standards departments have received post office assistance in trying to trace letters back to the source of where such scams originate, but it is difficult to get results from this. Attempts to return payments to consumers have proved not only costly but also

¹⁴ It is often the case that sums lost through these scams are relatively small. However, there are certain examples, for instance lottery scams originating overseas, where people have been persuaded to part with (and then lost) large sums, sometimes running into thousands of pounds.

¹⁵ Full details: of 13 participants who voted, 3 believed that this issue was a "very significant problem"; 7 "significant problem"; none "neutral"; 2 "minor problem"; and 1 "not much of a problem".

¹⁶ Full details: of 13 participants who voted, 4 believed that current legislation was "wholly inadequate"; 6 "inadequate", 2 "medium"; 1 adequate; and none "wholly adequate".

raise complex legal issues in terms of whether the OFT is acting within its powers in seeking to do this.

How likely is it that the new legislation will make a difference?

6.8 None of the participants thought it likely that the legislation would make a difference in this specific area.¹⁷

6.9 Potentially, this could be covered by the prohibition on misleading commercial practices, although often there is usually already small print informing the consumer that they have not actually won. A duty to provide material information could include full name details of the company sending the letter.

6.10 It is unlikely that the prohibition on aggressive commercial practices will apply – there is no undue influence as the consumer has time to consider before replying to the letter.

6.11 The principal problem of enforcement, however, is likely to remain. Even when it is possible to identify the company sending out the correspondence, it is very difficult for UK enforcers to enforce against overseas companies. Even in the event of effective legislation stopping such communications in the EU, the letters could continue to be sent from countries outside the EU. Worldwide scams of this nature are extremely difficult to combat: improved consumer education was therefore suggested by some as a more effective tool than legislation.

What would you like to see in the new legislation in order to make a difference?

6.12 The principal suggestions were the following:

- A requirement to provide full and transparent trading terms, including information about the true nature of the offer
- Full disclosure of business and address
- A requirement to publish a list of all winners to all participants
- A duty on the mailing companies to assist enforcement bodies when evidence of complaints come to light. Action to include suspending the handling and forwarding all mail.
- A ban on unsolicited prize draws
- Place responsibilities on postal box providers to regulate user, although this will (as above) only move the problem outside the EU

¹⁷ Full details: of 13 participants who voted, 2 believed that new legislation was “very unlikely” to make a difference; 5 “unlikely”; 6 “medium”; none “likely”; and none “very likely”.

7. HOLIDAYS

7.1 This case study area was chosen to draw together problems that related to specific holiday sectors partly regulated by EU Directives covering timeshare and package travel.

Workshop discussion

7.2 Most workshop participants said that unfair commercial practices relating to the holiday sector were a significant problem.¹⁸

7.3 A considerable area of detriment seemed to be the selling of ‘holiday clubs’. This is a product similar to timeshare where consumers purchase membership of a club which enables them to take a holiday each year. Areas of detriment particularly relating to holiday clubs included offering a limited choice of holidays, imposing age restrictions (as below) on holidays and imposing high additional charges year-on-year. Pressure selling of holiday club membership was also an issue.

7.4 The case discussed in the workshop represented a typical example. This involved a couple, both aged over 65 years, who entered into a contract for a holiday club at a presentation. When they tried to book a holiday they were only ever offered one location, and further charges were levied which had not previously been disclosed. The company then informed the consumers that they were too old to qualify for the contract, which had contained no information regarding age restrictions. No benefit was therefore received from the contract, worth approximately £1,695.

How well does existing legislation cover this area?

7.5 The majority of workshop participants believed that the legislation covered this area inadequately or, in some cases, wholly inadequately.¹⁹

7.6 Relevant legislation in this area includes the Timeshare Act 1992, although holiday club ownership is not covered by these provisions. It may be possible to argue that the cooling-off period under the Doorstep Selling Regulations (which apply to contracts concluded away from “business premises”) may apply to presentations at hotels, although this has not been established legally.

7.7 The Package Travel Regulations 1992 may apply (this depends on the circumstances and the holidays in question would have to be packages as opposed to, say, accommodation-only holidays) with the effect that information on the holiday would have to be provided before conclusion of the contract: this may cover information on an age limit.

7.8 Unfair contract terms may be struck out in some cases under the Unfair Terms in Consumer Contracts Regulations 1999, although whether and how the Regulations would apply will vary sharply according to the circumstances. A term or collection of terms which have the effect of preventing or significantly impeding the consumer's enjoyment of the rights available to him under the contract may, if not accompanied by a corresponding reduction in the contract price, be seen as creating a significant imbalance to the consumer's detriment. If the holiday club organiser did not take adequate steps to ensure that a consumer, who the organiser ought to have realised would be affected by this term, was aware of its existence, then this could be a breach of good faith, thereby bringing the Regulations into play.

¹⁸ Full details: of 12 participants who voted, 2 believed that this issue was a “very significant problem”; 7 “significant problem”; 3 “neutral”; none “minor problem”; and none “not much of a problem”.

¹⁹ Full details: of 12 participants who voted, 4 believed that current legislation was “wholly inadequate”; 7 “inadequate”, 1 “medium”; none adequate; and none “wholly adequate”.

7.9 Even where legislation does apply, it can be difficult to enforce against companies operating overseas (e.g. Spain or Portugal).

How likely is it that the new legislation will make a difference?

7.10 The majority of workshop participants believed that, in this sector, the new legislation would be likely to make a difference.²⁰

7.11 All of the proposed unfairness categories could potentially be relevant to this area. The prohibition on misleading commercial practices could ensure that all relevant information pertaining to these schemes, and the terms and conditions of the contract, is clear and readily available, prior to agreement of the contract. The prohibition on aggressive commercial practices could also be relevant. It is frequently claimed that consumers are pressurised into joining holiday clubs by salespersons and this category could assist in deterring such high-pressure sales.

7.12 In terms of enforcement, Stop Now Orders could be an effective means of protecting the collective interests of consumers in this area, where such companies are based in the UK. However, there are likely to remain difficulties of enforcement against overseas companies (although this will hopefully be addressed by the proposed EU Regulation on Consumer Protection Cooperation).

What would you like to see in the new legislation in order to make a difference?

7.13 The principal suggestions were the following:

- A duty to provide all information that participants need to make an informed decision, including full and transparent pricing details, exclusions and inclusions
- Extend timeshare cancellation rights to holiday clubs
- Where unfair contract terms are struck out, affected consumers should be awarded compensation
- A requirement for the trader to notify the consumer if a contract is patently unsuitable
- A full refund for holidays not materially similar to those sold
- Make it compulsory to provide incentive “free” holidays within a certain period, with a duty to refund if the holiday is not offered within this period
- A requirement for all holiday club companies to be bonded
- A prohibition on taking money from consumers by way of deposit at presentations

7.14 In a sector where salesmen are notorious for getting around the law, it was suggested that there was a particular need for future-proofing of any new legislation (for instance consistent rights for the same selling method whether it be in relation to timeshare, holiday clubs etc.).

²⁰ Full details: of 12 participants who voted, none believed that new legislation was “very unlikely” to make a difference; none “unlikely”; 2 “medium”; 9 “likely”; and 1 “very likely”.

8. HOUSEHOLD PRODUCTS AND SERVICES

8.1 This area covered the range of instances where consumers find problems with the product but are unable to obtain an appropriate response from the company.

Workshop discussion

8.2 The case chosen for discussion involved a consumer who ordered a 3-piece suite with “fully reclining chairs.” On delivery, the chairs did not “recline”: only the lower part of the chair moved, with the upper part static. The consumer informed the delivery man that he did not want the furniture as it was not as they had requested. The consumer also phoned the store to advise them of his rejection of the suite, and then followed this up in writing to the store. There then followed many months of correspondence between customer and store, with the store refusing to accept that there was a problem with the non-reclining chairs. The Trading Standards Department also wrote several letters on the consumer’s behalf, but the store would not accept there was a problem. It was their contention that, as the lower part of the chair moved, they were “fully reclining”. The consumer had to pursue a small claim against the store in order to get redress. The District Judge found in favour of the consumer, i.e. that their order clearly stated that they had ordered fully reclining chairs, and they had not been supplied with these. The Judge awarded them the full cost of the suite.

8.3 The main detriment was the store’s refusal to accept that there was a justified complaint, and then to deal with it appropriately. This case therefore concerned principally poor after-sales service/complaints handling procedures, which the majority of the workshop participants considered to be a significant problem.²¹

How well does existing legislation cover this area?

8.4 There was an even split between the participants who believed that the legislation covered this area inadequately and those who believed that it was adequate or wholly adequate.²² After all, in the case cited above, the matter was (albeit after a protracted process) resolved in favour of the consumer, presumably contractually on the basis that the goods did not conform to description. It was hoped that the increased use of Stop Now Orders should assist in tackling this problem.

8.5 However, many participants believed that the lack of after-sales procedures, traders being obstructive or, in many cases, a complete refusal to deal with complaints, was leading to detriment to consumers, even in cases where they do have clear legal rights.

How likely is it that the new legislation will make a difference?

8.6 It was suggested that it would assist consumers if there were a statutory requirement for the trader to have some sort of complaint handling procedure in place. Some participants believe that such a requirement would at least be effective in dealing with traders that refuse completely to deal with complaints.

8.7 However, it seems unlikely that this will be provided for under the new legislation, although the Directive is likely to apply to unfair commercial practices performed before and after the purchase of the product where this materially distorts, or is likely to materially distort, the economic

²¹ Full details: of 13 participants who voted, 2 believed that this issue was a “very significant problem”; 7 “significant problem”; 2 “neutral”; 1 “minor problem”; and 1 “not much of a problem”.

²² Full details: of 13 participants who voted, none believed that current legislation was “wholly inadequate”; 5 “inadequate”, 3 “medium”; 3 adequate; and 2 “wholly adequate”.

behaviour of the consumer. Also, it may be a misleading commercial practice to deceive the consumer as to the characteristics of the product, specifically including the existence of after-sale customer assistance/ complaints handling procedures.

8.8 The participants were split as to whether or not new legislation could make a difference in this area.²³

What would you like to see in the new legislation in order to make a difference?

8.9 The principal suggestions were the following:

- The definition of unfairness should include obstructive behaviour
- A duty on traders to consider consumer complaints (rather than ignore them totally)
- Speed up systems for receiving redress
- Provisions for “naming and shaming” businesses which constantly fail to address consumer complaints/ require information to be made available to consumers on the track records of complaint handling (NB this could cause issues of data protection/ libel which would have to be addressed)
- A requirement for all traders to have a customer guarantee scheme.

²³ Full details: of 13 participants who voted, 1 believed that new legislation was “very unlikely” to make a difference; 4 “unlikely”; 4 “medium”; 4 “likely”; and none “very likely”.

9. OTHER MATTERS THAT COULD HAVE BEEN DEALT WITH UNDER THE NEW LEGISLATION

9.1 The workshop participants were asked to consider other matters that they would like to have seen the legislation achieve. Some of the principal suggestions were:

- Small businesses to be protected from misleading scams (e.g. those with a threshold of turnover of £30-50 000 could be defined as “consumers”)
- Special provisions relating to vulnerable consumers
- A wider definition of unfairness to include harsh practices that exploit and exacerbate financial difficulties
- A definition of unfairness should be wide enough to capture future variants of current scams
- A need for local/ regional dispute resolution outside the court system and need for action between central, local and voluntary agencies to fully reflect the needs of consumers
- Provisions dealing with harassment of debtors, using unreasonable charges for letters and threats of blacklisting
- Make it contempt of court if judgments against traders are not paid within a specific time (as is the case with payment of costs/fines at criminal law)
- A licence to trade for all businesses, removable from traders who breach its conditions (i.e. by persistently flouting the law)

ANNEX

Data collection of evidence of consumer detriment and issues of enforcement in relation to EU general duty not to trade unfairly

Consumer Complaint Case Study Form

Section 1

Name/Source (TSO or CAB):

Address:

Telephone No:

Fax No:

E-mail Address:

Section 2 -

Full Description of Complaint:

Monetary value (if possible) of consumer detriment:

Profile of consumer (i.e. if vulnerable please specify):

Section 3 -

To what extent could existing legislation and enforcement procedures (or threat of them) be used to tackle this problem?

1. It could be effectively dealt with using existing powers/procedures |
2. It could be dealt with using existing powers/procedures, but there were difficulties in using them |
3. It could not be dealt with using existing legal powers/enforcement procedures |

If (2.) ticked, what are the powers/procedures available and what was the nature and extent of the problem in using them? (please give detail, e.g. were problems related to cost/delay in using the measure; that the measure used would be inappropriate; or that it would only partially resolve the complaint?)

If (3.) ticked, which powers/procedures (if any) were considered and rejected?

Section 4 -

If there were a general duty not to trade unfairly (instead of existing legal powers) do you think the problem could be dealt with under by one of the following? (please give details of how you think that it might be covered):

- A generally-worded clause containing a duty not to act unfairly (where the unfair practice is likely to materially distort the economic behaviour of the consumer)?

- **Prohibition on misleading commercial practices?**
- **Duty to disclose material information relating to the transaction?**
- **Prohibition on use of harassment, coercion and undue influence?**
- **Possible provisions on after-sales service/complaints handling?**

Section 5 -

What powers of enforcement would be required to effectively deal with the complaint under the above categories?

End