

**Consumer and Competition Policy Directorate
Department of Trade and Industry**

**RESPONSES TO PUBLIC CONSULTATION ON A PROPOSAL FOR
AN EU REGULATION ON SALES PROMOTIONS**

INTRODUCTION

In October 2001, the Commission proposed a Regulation on Sales Promotion to prohibit restrictions on the use of sales promotions such as discounts, prize competitions and free gifts.¹ The UK Government supports the proposed Regulation as an important internal market measure, which is central to the Commission strategy for an internal market in services and the Lisbon agenda on economic reform. Tackling barriers to cross-border marketing allows companies to reach new customers and break into new markets, which will in turn increase competition and drive innovation.

The DTI issued a consultation document on the draft Regulation in August 2002² and received 52 written responses by the deadline of 25 October. Responses were received from consumer organisations, enforcement bodies and a wide range of business sectors, including retail, advertising, broadcasting, newspaper and financial services. The vast majority of respondents supported the objectives and broad thrust of the Regulation. Many expressed concern about the detail, particularly the information requirements. The attached summary of responses outlines the main areas of concern.

The Government's broad objectives are to ensure that the Regulation is focussed on tackling the significant barriers to cross border sales promotion, as set out in the European Commission's 1996 Green Paper on Commercial Communications. As such, the Government supports the prohibition on general restrictions, the application of mutual recognition, and the use of Article 95 EC Treaty as the legal base.

The UK does not operate general restrictions on sales promotions and the use of promotional techniques is well developed in the UK. The Government will seek to ensure that the Regulation does not restrict current techniques, such as cross product promotions, and contains enough flexibility to allow for future innovation. The relationship between the provisions of this Regulation and other legislation must also be clarified, particularly in respect of information requirements, data protection and product safety.

Tackling restrictions on sales promotions will bring benefits to consumers across the EU as a result of more competitive selling and marketing. There are also important consumer protections in the form of information requirements, protection of children and rules on consumer redress. The Government supports these important provisions but would like to see the current proposals made more workable and flexible. In particular, there should be

¹ Proposal for a Regulation of the European Parliament and the Council concerning sales promotions in the internal market COM(2001) 546 final http://europa.eu.int/comm/internal_market/comcom/unfair/reg-en.pdf. Amended proposal for a Regulation of the European Parliament and of the Council concerning sales promotions in the Internal Market COM(2002) 585 final COD 2001/0227 http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0585en01.pdf

² Public Consultation on a Proposal for a regulation concerning sales promotions in the internal market, 2 August 2002, (CCP 001/02) <http://www.dti.gov.uk/ccp/consultpdf/sprconsult.pdf>

flexibility for different forms of media where the provision of detailed information requirements would be difficult – e.g. SMS, radio and television, and in-store promotions.

The Government will seek to ensure that the Regulation does not undermine UK controls on tobacco and pharmaceutical promotions. The Government will seek a ban on promotions of tobacco and an exclusion from the Regulation for medicinal products. The Government supports the ban on promotions of alcohol to under-18s and would like this to be extended to other products restricted by age, including fireworks, firearms, knives and cigarettes. There has been considerable interest from respondents in the regulation of promotional contests and games and there is a close connection with Department of Culture Media and Sport's Gambling Review. Following that review, the DCMS have conducted a separate consultation about the law on prize draws in general, and they will be announcing the results of that shortly.

The Regulation is currently at first reading stage in the co decision procedure. Developments can be viewed via the European Commission's website at:

http://www.europa.eu.int/comm/internal_market/comcom/new/index_en.htm

SUMMARY OF RESPONSES

52 written responses to the consultation were received from a wide range of consultees, including 2 consumer organisations, 2 enforcement bodies, and businesses and trade associations representing the media, advertising, sales promotions and marketing, retail, mobile communications, and the financial services sector.

The consultation demonstrated that the Regulation has the potential to affect a wide range of sectors and codes of practice – the Code on Price Indications, the British Codes of Advertising and Sales Promotions, the ICSTIS (Independent Committee for the Supervision of Standards of Telephone Information Services) Codes of Practice and the Independent Television Commission Advertising Standards Code.

ARTICLE 1 - GENERAL COMMENTS ON THE OVERALL AIM OF THE REGULATION

A majority of respondents supported the objective of the draft Regulation to remove unnecessary barriers to the cross-border use and communication of sales promotion. Many respondents felt that this would enable UK companies to use sales promotions to a greater degree across borders and would enable consumers to benefit from a greater range of offers. Only a few respondents commented specifically on the question of whether a Regulation was the most appropriate means of introducing the new rules, but those who did were supportive.

Consumer organisations questioned how the draft Regulation would fit with the Commission's Green Paper on EU Consumer Protection. These organisations wanted to see specific consumer protection rules in place before restrictions were lifted, preferably those that might be created as a result of the Green Paper consultation.

A few respondents highlighted codes of practice and specific legislation that already covered sales promotions. Some concern was expressed about overlap between different rules, and a number of respondents argued that the Code of Practice on Price Indications should not be undermined.

ARTICLE 2 -DEFINITIONS

There was some confusion over the meaning of 'temporary' and how this would apply to promotions that worked over a long period of time, such as money back schemes or permanent discounts on insurance.

(a) 'Commercial communication'

Most respondents considered the definition of commercial communication too wide because it would extend to all forms of communication, including TV, internet, radio and SMS messaging, which could create problems for information requirements. There was also some uncertainty as to whether the Regulation would cover product labelling and competitions within TV programmes and scratchcards – most thought that it should not.

(b) 'Sales Promotion'

It was not clear to many whether loyalty schemes were included or not, and some argued that such schemes should not be covered because they are not temporary in nature.

(c) ‘Promoter’

A number of respondents argued that the definition of ‘promoter’ does not recognise that a number of parties might be involved in a sales promotion e.g. the product provider and distributor for financial products. This needed to be clarified.

(d) ‘Customer’

Many respondents urged consistency with other EU legislation and did not want new definitions where this term or similar ones, such as ‘consumer’, already exist in EU law. It was also noted by many that the definition of ‘customer’ was redundant, as it was not used again in the text.

(e) ‘Discount’

A number of respondents sought clarification on how the offer of a different product would be covered by this definition, including the bundling of products such as mobile handsets and service. Retailers also raised the issue of vouchers for a different product or general price reduction.

(f) & (g) ‘Free gift’ and ‘Premium’

Many respondents argued that the definition of ‘premium’ would normally be considered a ‘free gift’ in the UK and that there was therefore scope for confusion. A number asked whether this would affect how promoters must describe their promotion.

A number of respondents wanted clarity on how financial services were covered, with some arguing that financial services should be excluded.

(h) & (i) ‘Prize contest’ and ‘Prize competition’

There was considerable interest in the definitions of ‘prize contest’ and ‘prize competition’ from the media, retail and lottery sectors. Many highlighted the Department of Culture’s Gambling Review, where UK policy on this issue is being developed. The Department for Culture, Media and Sport responded formally to this consultation. Most respondents concurred with the need to clearly differentiate contests and competitions from gambling and lotteries. Another key concern from those respondents engaged in this type of promotion was to ensure legal certainty and effective enforcement of rules.

Companies involved in TV contests and competitions sought clarification that these were considered gambling and were not therefore covered by the Regulation. This was of particular concern to those involved in the use of premium rate competitions on radio and television.

A number of respondents thought that an obligation to purchase should be allowed for contests, and it was also suggested that this should be allowed where the price of the

product was not inflated. Others argued that there should be a ban on fees, as is the current practice in the UK. However, it was also suggested that free entry should allow for the use of normal rate phone call or a first class stamp.

The issue of legal certainty arose in relation to the requirement that competitions should be “designated primarily by skill”. Those who responded thought that skill was difficult to define and that a mixture of skill and chance should be allowed.

(j) ‘Child’

A large number of respondents pointed out that the definition of child as “under the age of 14” is not consistent with the definition in the BCASP of a child as under 16.

(k) ‘Alcoholic beverage’

There were no comments on this definition.

(l) ‘General prohibition on the use or commercial communication of a sales promotion’

There were no comments on this definition.

(m) ‘Non-regulatory public body’

Clarification was sought on the groups to be covered under this definition.

(n) ‘Sale below cost’

A number of business organisations argued that it would be difficult to provide information according to this definition – for example, delivery costs were often difficult to ascertain, particularly for larger companies. Others argued that the definition should cover retail rather than invoice price.

ARTICLE 3 - THE USE AND COMMERCIAL COMMUNICATION OF SALES PROMOTIONS

Sales Below Cost

A number of respondents supported the Regulation covering sales below cost. A response on behalf of the mobile communications sector argued that this technique was central to the promotion of new technologies, such as 3G technology. One retailer thought sales below cost was a useful technique for smaller companies and argued that a ban only served to protect large companies who have secured lower prices from their suppliers. However, one trade association did express some concern about persistent below cost selling and argued that competition law did not always provide an effective remedy.

Mutual Recognition

Few business respondents challenged the application of mutual recognition to sectoral restrictions. However, consumer organisations argued that mutual recognition could be problematic where it allowed for less stringent consumer protection. One consumer organisation argued that mutual recognition should only be applied where appropriate protection was in place and where there was effective cross-border enforcement co-operation and consumer redress mechanisms.

Limitation on the value of sales promotions

A number of respondents supported the ban on limiting the value of sales promotions. However, it was pointed out that competitions and contests with larger prizes could encourage consumers not to take part in national lotteries.

Discounts

Four respondents, including one consumer organisation, were against retaining restrictions on the discount sale of books, which they argued was anti-competitive. There was some concern about how the rules on seasonal sales interacted with the UK Code of Practice for Traders on Price Indications (1988). One consumer organisation supported the principle that Member States would not prohibit discounts prior to seasonal sales, but were concerned to ensure this would not weaken the protection contained in the UK Code.

Tobacco

No respondents queried the Government's intention to seek a derogation from the application of mutual recognition to tobacco. One campaigning organisation argued that Government should seek a ban on all sales promotions as the preferred outcome, with a fall back option being an explicit allowance for national bans and derogation from the mutual recognition clause.

Pharmaceuticals

One pharmaceutical Association argued that pharmaceutical products should be excluded from mutual recognition because medicines should not be treated as a normal product and need to be treated with caution by consumers.

ARTICLE 4 - INFORMATION TO BE PROVIDED IN RESPECT OF SALES PROMOTIONS

Most business respondents argued that the information requirements were too detailed and did not take account of different types of promotion and commercial communication. Consumer organisations argued that information provisions alone did not provide sufficient consumer protection, and that wider rules needed to be in place.

The retail sector raised the problem of providing detailed information on in-store promotions, while the financial services sector pointed out that there were already detailed information requirements for that sector. One media organisation highlighted Paragraph 3.10 of the ICSTIS code: 'Promotions transmitted by radio, television, teletext, telephone, facsimile, Internet, short message service (SMS), email or any other form of non-print

communication must observe the provisions of this Code in the manner most reasonable and appropriate to the technology employed’.

Many felt it was important to ensure consistency with other EU directives, such as the Misleading Advertising Directive. It was suggested by some that rules on information requirements could be provided through guidance or a code of practice, which could be easily updated and adapted to new promotional techniques and media.

Some respondents did not feel it was a feasible solution to explain all the information requirements where a product was sold over the telephone with an attached promotion, such as insurance, which required extensive explanation of the product itself. Some clarification was therefore sought as to whether a call initiated by a consumer could be deemed a commercial communication.

The use of the term ‘launch’ was unclear for respondents who felt it should mean ‘from the start’, which would then need to be expressly outlined.

Several respondents argued for a *de minimis* clause where a gift or prize was of a low value. They argued that providing information where a promotion is low value could be overly burdensome with little proportionate increase in consumer protection. One financial association argued that the information requirements should not apply where a prize or gift is under 10 Euros.

ANNEX

ALL SALES PROMOTIONS

1.1 (1st indent) – an indication of the discount

One trade association commented that they supported this provision as it reflects current UK practice.

1.1 (2nd indent) – the price of the promoted good

A large proportion of respondents did not think it was necessary to include price in all cases as a range of goods may be involved in a promotion at different prices. One retailer argued that the additional costs specified are not required by the Prices Directive, and that this should take precedence. One retailer called for the price (inclusive of taxes) to mean ‘the VAT rate of the country of origin’.

One trade association could see the merit in giving details of additional costs linked with freight, delivery or postage, when the offer is associated with taking part in a sales promotion. However, two trade associations did not want this provision to apply to discounts advertised with goods and services, because ‘that would create an inconsistency between the treatment of items advertised with a discount (where the extra costs would have to be specified) and those advertised with the normal price which would not’. One enforcement body believed that such an indication would be useful for a consumer to aid ‘pre-shopping price comparisons’.

1.1 (3rd indent) – the promoter’s identity

A number of respondents sought clarification on the requirements. Some thought the requirement should be for the full name as this is what the customer would need to seek redress, while another wanted confirmation that the identity meant the trading name. A number argued that the identity or name should not need to be provided where this was obvious e.g. for an in store promotion where the promoter is the retailer; this is also required by the ICSTIS code.

1.1 (4th indent) – indication of duration of promotion

A large proportion of the respondents felt that naming a start and end date was inflexible for situations where a promotion may run until the stocks last or where a promotion is subject to availability. It was also argued that this requirement might mean the disclosure of commercially sensitive information. One trade association felt that it would be of no benefit to give a fixed date when extending it could be of value to consumers and cause no detriment to those who have already taken part in the promotion. One retailer argued that the start date would be unnecessary as this was obvious.

Two enforcement bodies considered the inclusion of an end date as a useful tool to prevent permanent ‘sales’ and to ensure consumers could make an informed decision.

1.2 (1st indent) – the name and geographic address of the promoter

Respondents representing the retail sector argued that this was unnecessary as the name and address would be displayed in most retail premises.

DISCOUNTS

2.1 (1st indent) – exact amount of the discount

A number of respondents argued that showing the actual discount in a percentage or unit cost would be too complex a procedure that would only lead to confusion for consumers. Many wanted to maintain the UK practice of indicating the amount of a discount by showing the old priced crossed out alongside the discount price.

2.1 (2nd indent) – indication of a sale below cost

Many respondents felt the consumer had little to benefit from an indication of where a sale was below cost. It was also suggested that such an indication could be anti-competitive, as it would require companies to reveal their costs to competitors. A number of retailers argued that it would often be difficult to know where a product was being sold below cost where delivery costs covered a number of products or where different products were bundled.

2.2 (2nd indent) – preceding price

The majority of respondents wanted to see a reflection of current UK practice in indicating preceding prices i.e. that the previous price should be the last price at which the product

was available to consumers in the previous six months and should have been available at that price for 28 days, in the same shop where the reduction is offered (Section 1.2.2 & 1.2.3 UK Code of Practice for Traders on Price Indications 1988). If this type of provision were used then the need to specify the dates during which the base price was current could be limited to when that period was less than 28 days. One enforcement body considered the Regulation to allow for this rule in its current form but most wanted clarification on how the Regulation would affect UK practice.

One trade association did not think it was clear how these provisions would apply where there had been a series of price reductions for a single product.

2.3 – information to be provided on a coupon or voucher

Many respondents highlighted that coupons may not necessarily have a cash value and as such the ‘redemption value’ would be a preferred information requirement.

2.4 – information on request of a sale below cost

One trade association felt that the language used was unclear and questioned whether the obligation was on the seller to provide information to the consumer or to the original supplier. If it is the latter, it was considered unnecessary to regulate an issue provided for in the supply contract.

FREE GIFTS AND PREMIUMS

3.1 (1st indent) – the actual value of the free gift or premium

Of the 52 respondents, 24 expressed concern about this requirement. It was pointed out that many free gifts will be produced specifically for the promotion and will not be available commercially. Such gifts might be bought at a low cost and revealing this cost might be unnecessarily off-putting for the consumer. It was also argued that providing such information could be commercially sensitive or even misleading if the good is available at a different price from different companies or countries.

3.2 1st indent - conditions or limitations applicable to the free gift or premium

Two enforcement bodies supported the provision of information on any conditions or limitations in the communication itself, rather than ‘on request’, to make it consistent with the code of practice on price indications.

PROMOTIONAL CONTESTS AND GAMES

4.1 (1st indent) – the value and nature of a prize

Some respondents, including a consumer organisation, felt that this provision could enable consumers to make an informed choice. However, many respondents pointed out that it could be difficult to give the value where prizes are not available commercially or are unique, such as a visit to a TV studio or a celebrity autograph. Respondents reiterated the

practicality of the ICSTIS codes in this area which provide for an ‘adequate description of prizes and other items’ (5.2.5 ICSTIS Codes)

4.1 (5th indent) – the need to obtain permission

One media organisation highlighted that the ICSTIS Code states that children must seek the permission of the person responsible for paying the phone bill. Three trade associations and two retailers questioned why there should be a general requirement to obtain permission where there is a minimum qualifying age e.g. alcohol.

(4.1 7th indent) – the odds of winning a prize

Most respondents considered the requirement to state the actual or estimated odds of winning a prize as potentially misleading and almost impossible to predict. It was argued that the odds would be dependent on the number of people entering a promotion and could not be known until after the promotion has been launched. Some suggested that it would be more appropriate to tackle exaggerated or misleading claims about the odds of winning a prize. However, one consumer organisation felt that this type of information would be useful for consumers and could be done without difficulty where the odds were pre-determined.

4.2 (5th and 6th indent) – the criteria for judging entries and composition of the jury

Clarification was sought on how the requirements concerning the composition of the jury examining promotional contests would work in practice - would the names of members of the jury be necessary and what arrangements would be required where members change. One communications association suggested that it should only be necessary to set out the criteria for judging entries and the composition of the jury for promotional contests that involved skill.

4.2 (9th indent) – the time period during which prizes must be collected

Retailers felt the introduction of a time period during which prizes must be collected was a positive addition to UK law.

ARTICLE 5 - PROTECTION OF CHILDREN AND ADOLESCENTS

Protection of personal data

Eleven respondents argued that the Regulation should not set new rules on data protection in addition to those in the Data Protection Directive, which it was felt offered adequate protection to children. There was also concern about how promoters could obtain ‘verifiable prior consent’, which would be extremely difficult for on-line, SMS and automated telephone communications.

It was suggested that the requirement could be made more workable if the need for ‘prior’ consent was dropped. One mobile communications association also suggested that it might be more proportionate and effective to regulate against the retention and/or use of such data where collected. Another suggested that it should be necessary to require

consent to be obtained, but to include an obligation to delete the child's data if the collector had reason to believe the consent was invalid.

Safety

Many respondents argued that the Regulation should not introduce rules in addition to EU general product safety legislation. It was not clear to many how the requirements interacted with existing safety legislation - two respondents representing the newspaper sector were concerned that promoters might be liable for normally safe items having caused accidents because of negligence or misuse. One consumer organisation considered the scope of the article to protect physical health was too narrow and should be redrafted to include psychological health.

Prohibition according to age

A number of respondents felt that the age of a child was either a matter for Member States to decide or that it should be increased to 16 years to reflect the current limit in the UK. For example, it was pointed out that National Lottery tickets can only be sold to a person over 16.

Free gifts to children under 14 - alcohol

No respondents challenged the ban on giving promotions of alcohol to children, and some welcomed the move. One drinks trade association asked whether accidental possession by a child was covered by the Regulation. They provided an alternative to Article 5(3) preferring it to read 'against the potentially harmful effects of uncontrolled access to alcohol'. The issue of how to verify a person's age was also raised. One enforcement body also argued that the restriction in Article 5(3) could be extended to other products where sales were subject to age restrictions such as knives, fireworks, party poppers, tobacco products etc.

ARTICLE 6 - REDRESS

Provision of evidence by the promoter

One trade association felt the requirement for a promoter to provide evidence as to the accuracy of information was unnecessary as it was just a repetition of what already happens in practice. Others supported this provision, although one consumer organisation felt the term administrative authority should be broadened out to include qualified entities such as consumer associations. Some trade associations were concerned that the requirement could lead to 'fishing expeditions', with companies required to provide evidence on information without any real concern of consumer detriment. One retailer suggested there should be 'reasonable grounds for requesting such information'.

Means of making a complaint

Many respondents felt it would be unacceptable to allow complaints only in writing as many consumers complain in store or by telephone. Such a requirement could disadvantage the visually impaired and the functionally illiterate (one organisation pointed

out that there are 7 million in the UK). Many also argued that the six week rule was too short for resolution of a complaint and argued that six weeks was realistic only for acknowledging the complaint.

It was also considered by most respondents that the provision of free advice should preclude a standard charge such as a stamp or the normal cost of a call. It was argued that requiring companies to provide a totally free service would disadvantage small firms and would be a disincentive for companies to offer the service. Some highlighted that companies would frequently have one call service, which would also consider other queries such as the use of the product or service and not just the promotion. Clarification was also sought of the meaning of “appropriate resources”.

On the requirement to respond in the language of the communication of the sales promotion, one retailer argued that there would be many occasions when the response is more appropriate in the language of the consumer and this should not be precluded.

Information about ADR schemes

Many respondents felt providing information about ADR mechanisms could overload the amount of information provided to consumers. One retailer suggested this information could be effectively communicated at customer information points in-store.

IMPLEMENTATION

The majority of respondents felt there should be an implementation period. It was argued that this would allow for existing sales promotions to expire and the new requirements to be introduced. Suggestions ranged from 3 months to 1 year. There were some concerns that the Regulation should not come into effect during the January sales period.

One consumer organisation felt this Regulation should come into force on the same day as the proposed directive on fair-trading, to enable the two measures to be compatible. One mobile communications association advocated implementation at the same time as any new UK rules on gambling.

RESPONSES TO THE CONSULTATION

1. Advertising Association
2. Advertising Standards Authority / Committee of Advertising Practice
3. Amazon.com
4. ASH
5. Associated Newspapers (Daily Mail, Mail on Sunday, Evening Standard).
6. Barclays
7. Boots
8. BRC
9. British Beer and Pub Association
10. British Brands Group
11. British Institute of Innkeeping
12. British Phonographic Industry
13. Camelot Group
14. Carpetright
15. CBI
16. Chris Reed (Director of Commercial Studies) and Camilla Baasch Anderson (Lecturer) University of London
17. Consumer Credit Trade Association
18. Consumers Association
19. Department for Culture, Media and Sport
20. Direct Line Insurance
21. Direct Marketing Association
22. Eurocare
23. Federation of Bakers
24. FSA
25. Halfords
26. HBOS Group (financial services)
27. ICSTIS
28. Independent Television Standards Commission
29. Institute of Sales Promotions
30. Intext Media
31. ISBA
32. ITV
33. J Sainsbury Plc
34. LACORS
35. Law Society of Scotland
36. Lloyds Pharmacy
37. Mobile Phone Operators
38. National Association of Cider Makers
39. National Lottery Commission
40. National Pharmaceutical Association
41. NCC
42. News International
43. Newspaper publishers association
44. Newspaper Society (Local and regional press)
45. Premium Rate Association
46. Radio Authority
47. Scotch Whisky Association
48. Strategic Rail Authority
49. Tesco
50. Trading Standards Institute
51. UKPIA – Petroleum Industry Association Ltd
52. William Overington