

dti

**THE UNFAIR COMMERCIAL
PRACTICES DIRECTIVE**

**Consultation on a draft EU
Directive COM (2003) 356**

JULY 2003

dti

The DTI drives our ambition of 'prosperity for all' by working to create the best environment for business success in the UK.

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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.

CONTENTS

1. Introduction and background
2. Summary of questions
3. The draft Directive – article by article
4. Regulatory Impact Assessment
5. List of consultees
6. Consultation criteria

1. INTRODUCTION AND BACKGROUND

1. A Directive on Unfair Commercial Practices was proposed by the European Commission on 18 June 2003.¹ The Directive is a cornerstone of the European Commission's consumer policy strategy² and is intended to be a radical reform of the current EU legislative framework for the protection of consumers' economic interests. One of the proposal's main objectives is to open the internal market to consumers by harmonising different national regimes, and as such the Directive is included in the Commission's Internal Market Strategy 2003 - 2006.³

2. The UK Government has expressed reservations about the Commission's proposals but now welcomes the changes that have been made to ensure it will have more targeted application e.g. a focus on business-to-consumer and targeting of unfair practices rather than prescriptive rules for fair practices. In negotiations, the Government will be seeking to ensure we have a Directive that is workable, provides certainty, and avoids duplication of regulation. The aim of this consultation is to seek views to inform the Government's position for the negotiations.

Key Issues

3. This consultation seeks views on the text of the Directive and the main issues at stake:

- Effectiveness of consumer protection;
- Legal environment for business;
- Impact on improving the internal market.

4. *Consumer protection:* The transposition of this Directive into domestic law has the potential to improve consumer protection in the UK and provide more effective tools for enforcement bodies. This consultation seeks views on how effective the current Directive is likely to be in this respect. The DTI has undertaken a workshop with trading standards officers to highlight the types of practices that are likely to be caught and how a 'general duty' might work. A report of this workshop is available on the DTI website.⁴

5. *Legal environment:* The UK does not currently have a general prohibition on unfair commercial practices in its legal regime. This is in contrast to most other EU member states that are used to the application of such a general principle. The DTI has commissioned a

¹ Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (the unfair commercial practices Directive) COM (2003) 356 final http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/directive_prop_en.pdf

² European Commission Consumer Policy Strategy 2002-2006 http://europa.eu.int/comm/consumers/overview/cons_policy/index_en.htm

³ Internal Market Strategy 2003 – 2006, Part B Priorities, Page 8.

⁴ The Unfair Commercial Practices Directive – Report of DTI Workshop on the evidence for a “general duty to trade fairly”.

study on the issues that are likely to be raised by the introduction of such rules in the UK. This research is available on the DTI website.⁵ A key concern for the negotiations will be ensuring that the Directive provides proportionate and clear consumer protection rules and legal certainty for business.

6. *Internal Market*: A central benefit arising from this Directive should be a more certain and streamlined regulatory environment within the EU for business and consumers. The Directive should harmonise national laws on unfair practices to a high level, accompanied by the application of mutual recognition to prevent member states from applying different rules and interpretations. The success of this objective will depend on the clarity of the Directive's scope and the tests used to apply the general clause. This consultation therefore seeks views on how successful the current draft is in achieving this.

Next Steps

7. The Directive is subject to the co-decision procedure, which means that the European Parliament and the Council will decide it jointly. During this process, amendments to the proposal will be put forward and possibly agreed. Your views are therefore sought on where the UK Government should be seeking changes and specific amendments to the text. The DTI will hold regular meetings to discuss developments and there will be opportunities to put forward views on any revised texts that are produced as the negotiations progress. Please indicate if you would like to be kept informed.

Background

8. In October 2001, the European Commission launched a wide-ranging consultation on a Green Paper on EU Consumer Protection.⁶ The Commission suggested there were a number of problems: gaps in the existing EU consumer protection regime; the sector-specific approach allowing rules to become quickly outdated; the use of minimum clauses allowing national legislation to create barriers to cross-border trade.

9. The Commission published a Follow-up Communication on 11 June 2002⁷, which stated that the Commission had received broad support for reform of the current regime and set out the Commission's intention to propose a framework directive containing a "general

⁵ *The Impact of Adopting a Duty to Trade Fairly* (Prof. Robert Bradgate, Prof. Roger Brownsword, Dr Christian Twigg-Flesner), July 2003

⁶ *Green Paper on EU Consumer Protection*, 2 October 2001 (COM(2001)531 final)

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/fair_comm_greenpap_en.pdf

⁷ *Follow-up Communication to the Green Paper on EU Consumer Protection*, 11 June 2002 (COM(2002) 289 final)

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/communication_en.pdf

duty not to trade unfairly”. The Commission set up an ‘expert group’ of national officials to discuss national fairness law and to consider the basis of an EU framework directive.⁸

Previous Consultation

10. There have been two previous consultations based on two European Commission documents which have involved written consultations and meetings. The DTI also set up a ‘shadow expert group’ to keep stakeholders in touch with EU developments. Information is available on the DTI website.⁹

Regulatory Impact Assessment

11. The Department has prepared the Regulatory Impact Assessment at Part 3 using information supplied in previous consultations.

Guidance

12. The OFT will consult and issue guidance on the application of the Directive in the UK prior to any new legislation coming into force.

Responses and queries

13. Responses and queries should be directed to:
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Please send your response by email if possible.

Closing Date

⁸ Minutes of the meetings are available on the Commission’s website:

http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/nat_exp/index_en.htm

⁹ <http://www.dti.gov.uk/ccp/topics1/ec.htm> - green

14. Closing date for responses is 17 October 2003.

Confidentiality / Open Government

15. Your response to this consultation document may be made publicly available in whole or in part at the Department's discretion. If you do not wish all or part of your response (including your identity) to be made public, you must state in the response which parts you wish us to keep confidential. Where confidentiality is not requested, responses may be made available to any enquirer, including enquirers outside the UK, or published by any means, including on the internet.

2. SUMMARY OF QUESTIONS

Question 1: What will be the overall impact of these new rules on consumer protection and enforcement? What changes or new additions would you like to see?

Question 2: What will be the overall impact on business practices? What changes or new additions would you like to see?

Question 3: Is there scope for simplification of the current EU and UK consumer protection regimes? How could this be done?

Question 4: What are your views on the objective of the Directive as set out in Article 1? How well do you think these objectives will be achieved?

Question 5: What are your views on the definitions in Article 2 and their likely impact? If you are a business, how well do you think these definitions will work in the context of the sector in which you operate?

Question 6: What are your views on how the Directive is likely to harmonise national laws, including the relationship with sectoral legislation?

Question 7: Do you consider that the exclusions from the Directive in Article 3 are appropriate and sufficient?

Question 8: What is your view on the application of home state control and mutual recognition as set out in Article 4?

Question 9: How well do you think the “professional diligence” test will work in practice (Article 5)? If you are a business, how well do you think these rules will work in the context of the sector in which you operate?

Question 10: How well do you think the “material distortion” test will work in practice (Article 5)? If you are a business, how well do you think these rules will work in the context of the sector in which you operate?

Question 11: What are your views on the provisions on misleading actions in Article 6? If you are a business, how well do you think these rules will work in the context of the sector in which you operate?

Question 12: What are your views on the information requirements in Article 7? If you are a business, how well do you think these rules will work in the context of the sector in which you operate?

Question 13: What are your views on the provisions on “aggressive commercial practices” in Articles 8 and 9? If you are a business, how well do you think these rules will work in the context of the sector in which you operate?

Question 14: What are your views on the provisions on codes of conduct in Article 10?

Question 15: What are your views on the enforcement provisions in Article 11?

Question 16: What are your views on the reversal of the burden of proof in Article 12?

Question 17: What are your views on the provisions on penalties in Article 13?

Question 18: What are your views on amendments to the Misleading Advertising Directive in Article 14?

Question 19: What are your views on the amendments to the Distance Selling Directive in Article 15?

Question 20: What are your views on the provisions to include this Directive under the Injunctions Directive in Article 16?

Question 21: What are your views on the requirements to inform consumers in Article 17?

Question 22: What are your views on the time allowed for transposition of the Directive in Article 18?

Question 23: Does the Annex provide a useful and complete set of examples of unfair practices? Is there anything that should be added?

Question 24: Do any of the examples in the Annex cause problems for your business?

3. THE DRAFT DIRECTIVE

16. The Directive on Unfair Commercial Practices will apply across all business sectors (including immovable property) and will set the framework for how businesses must deal with consumers. These rules will apply to pre-sale marketing, advertising and selling but will also apply to any relationship that exists post-sale where this is founded on a commitment made pre-sale e.g. after-sale support. Sectors that will be covered include: advertising, marketing, publishing, direct selling, estate agency, transport, sales promotions, financial services, consumer credit, retail, e-commerce, package travel and timeshare.

17. The Directive marks a departure from existing consumer protection legislation in that it sets few positive and detailed requirements. The UK Government has welcomed this approach because it should mean that the Directive does not set prescriptive rules which unnecessarily change the way a business operates. However, this form of regulation will be novel to certain sectors and creates issues for business compliance and enforcement. For example, there are no detailed rules on information requirements: what is material will to some extent be dependent on the circumstances of the transaction. However, the OFT will consult and issue guidance on the application of the Directive in the UK prior to any new legislation coming into force.

18. The UK Government has argued that the Framework Directive should be used to simplify and rationalise the current EU consumer protection regime. The Framework will regulate those sectors and practices currently subject to the following individual consumer protection Directives:

- Package Travel Directive.
- Timeshare Directive.
- Distance Selling Directive.
- Consumer Credit Directive.
- Doorstep selling Directive.
- Price Indications Directive.

19. Annex A sets out how the Framework Directive might interact with sectoral rules.

20. A significant feature of this Directive is the absence of any “minimum harmonisation clause”, which allows member states to introduce or retain any rules that go beyond the requirements of the Directive. This means that the UK will not be able to retain or introduce rules that provide greater protection for consumers in the field coordinated by the Directive. This could mean changes to the Sales of Goods Act 1979, the Supply of Goods and Services Act 1982, Trade Descriptions Act 1968, the Property Misdescriptions Act 1991 and the Consumer Protection Act 1987. The DTI has also commissioned a legal study on the broader impact of the new proposal.¹⁰

¹⁰ *The Impact of Adopting a Duty to Trade Fairly* (Prof. Bradgate, Prof. Roger Brownsword, Dr Christian Twigg-Flesner), July 2003

Question 1: What will be the overall impact of these new rules on consumer protection and enforcement? What changes or new additions would you like to see?

Question 2: What will be the overall impact on business practices? What changes or new additions would you like to see?

Question 3: Is there scope for simplification of the current EU and UK consumer protection regimes? How could this be done?

CHAPTER 1 – GENERAL PROVISIONS

Article 1 – Objective of the Directive

21. This Article states that the objective of the Directive is to approximate the laws, regulations and administrative provisions of member states relating to unfair commercial practices harming consumers' economic interests to ensure the proper functioning of the internal market and achieve a high level of consumer protection. The Extended Impact Assessment attached to the proposed Directive sets out the evidence for the existence of internal market barriers.¹¹ The Commission has also conducted an assessment of member state laws in this area, which it intends to harmonise.¹²

Question 4: What are your views on the objective of the Directive as set out in Article 1? How well do you think these objectives will be achieved?

Article 2 – Definitions

22. (a) “Consumer” is defined as “any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business or profession.” This is the same definition as in most consumer protection Directives, e.g. the Directives on unfair terms in consumer contracts¹³ and the protection of consumers in respect of distance contracts.¹⁴ It does not cover businesses either large or small. A sole trader would only be a consumer if he was not transacting for the purposes of his trade or business.

23. (b) “Average consumer” is defined as the consumer who is reasonably well informed and reasonably observant and circumspect. As is made clear in recital (13) of the Directive, this is codifying the test elaborated by the European Court of Justice in determining whether particular marketing practices are unfair to consumers¹⁵. The Directive will take this approach forward by using the average consumer (as defined above) as the reference point for determining whether a commercial practice is unfair either generally (Article 5), or in particular constitutes a misleading action (Article 6), misleading omission (Article 7) or an aggressive practice (Article 8).

¹¹ *Extended Impact Assessment – Unfair Commercial Practices*, June 2003

http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/impact_assessment_en.pdf

¹² http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/national_laws_en.pdf

¹³ Article 2(b), Directive 1993/13/EEC

¹⁴ Article 2(2), Directive 97/7/EC

¹⁵ The Explanatory Memorandum refers to Case C-315/92, *Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH* (1994) ECR I-317; Case C-210/96, *Gut Springheide GmbH v. Oberkreisdirektor des Kreises Steinfurt* (1998) ECR I-4657

24. The “average consumer” does not feature in United Kingdom legislation or case law, but the nearest equivalent is probably the notion of the “reasonable person”, which appears, for example in the law of misrepresentation. Where a party to a contract claims it should be set aside because he was induced to enter into a contract by a false statement, the court will consider not just whether the statement was false, but also whether a reasonable person would have been influenced by the statement.

25. Under the Directive, a commercial practice will not be unfair unless it causes or is likely to cause a reasonably well-informed, reasonably observant and circumspect consumer to take a decision he would not otherwise have taken. The Directive in effect assumes that a consumer will make reasonable checks before buying a product, although what is reasonable will obviously vary according to the circumstances, in particular the nature of the product.

26. Furthermore, the notion of the “average consumer” is modulated by Article 5(2) (second sub-paragraph). This deals with cases where a commercial practice is targeted at a particular group of consumers and provides that in such cases, the reference point will be the average member of that group. So, for example, where product marketing is targeted towards children, it will be judged in terms of its effect on the average child.

27. (c) “Seller or supplier” is defined as any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business or profession. “Seller or supplier” is afterwards referred to as the “trader”. This definition is one commonly used in UK and EU legislation.

28. (d) “Product” is defined as any good or service including immovable property. Significantly, the Directive will cover property and traders involved in the sale of property.

29. (e) “Commercial practices” is defined as any act, omission, course of conduct or representation directly connected with the promotion, sale or supply of a product to consumers. The definition covers pre-sale activities of advertising, commercial communication and marketing but also covers after-sale activities, such as provision of after sale service where these are held out as an inducement for the consumer to purchase that product. As the definition of a commercial practice for the purposes of this directive is focussed on activities intended to promote the sale or supply of products, it is not clear how it will apply to other activities remote from the sale such as oppressive debt collection.

30. (f) “To materially distort the economic behaviour of consumers” is a test used for the general clause and is defined here as “a commercial practice to significantly impair the consumer’s ability to make an informed decision and thereby causing the consumer to take a transactional decision that he would not have taken otherwise”. The Explanatory Memorandum explains that the test is intended to catch instances where the unfair practice has a significant enough effect to change or be likely to change the consumer’s behaviour. However, it should not cover the use of incentives such as the offer of coffee or transport. It

should also be noted that there is no requirement to show any financial loss. (*See Article 5 – use of material distortion test*).

31. (g) “Code of conduct” is defined as an agreement which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors. This definition is broadly consistent with that used in the UK, although the Enterprise Act 2002 goes further in its concept of codes and gives the power to OFT to approve consumer codes where they safeguard or promote the interests of consumers.¹⁶

32. (h) “Community level code” is defined as a code which allows any trader from any member state, who meets the requirements laid down in the code, to participate on a non-discriminatory basis, and contains appropriate and effective mechanisms for monitoring and enforcing compliance with the code.

33. (i) “Code owner” is defined as any entity, including a trader or group of traders, which is responsible for the formulation, monitoring and revision of a code of conduct.

34. (j) “Professional diligence” is defined as the measure of special skill and care exercised by a trader commensurate with the requirements of normal market practice established by custom and usage in his field of activity”. (*See Article 5 – use of professional diligence test*).

35. (k) “Invitation to purchase” is defined as a commercial communication which indicates the main characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase.

36. (l) “Undue influence” is defined as exploiting a position of power to apply pressure, without using physical force, in a way which significantly limits the consumer’s ability to make an informed decision.

Question 5: What are your views on the definitions in Article 2 and their likely impact? If you are a business, how well do you think these definitions will work in the context of the sector in which you operate?

Article 3 – Scope

37. This article sets out the extent that this Directive shall have effect. Generally, the Directive will only cover matters affecting consumers’ economic interests – health and safety, contract law, anti-trust matters and business-to-business practices are not covered. By

¹⁶ Section 8 of the Enterprise Act 2002. <http://www.legislation.hmsso.gov.uk/acts/acts2002/20020040.htm> - aofs

implication, the focus on economic interests means the Directive will not cover issues of taste and decency and social responsibility.

38. The issue of scope is particularly important in respect of understanding the impact on UK law, EU sectoral rules, and harmonisation of member states' law.

UK law

39. It is important to note that this Directive does not contain a 'minimum clause'¹⁷, which would allow member states to adopt or retain provisions that provide greater protection for consumers on matters within the scope of the Directive. This means that transposition of the Directive will require that all national legislation applicable to commercial practices is brought into line with the Directive. If such legislation is considered to go further than the provisions of the Directive, it will need to be amended or repealed. The UK will not be able to introduce measures that go beyond the scope of the Directive in future.

40. It is therefore important to note that the Directive will apply across all business sectors, including financial services, property sales, transport, retail, e-commerce etc. Although Article 3.5 states that EU sectoral legislation takes precedence over the general rules where there is overlap, the position of national sectoral legislation (which might not be based on a EU Directive) is unclear. As Article 3.1 is not explicitly limited to the 'general clause' present in most member states' national legislation, it is likely to apply to any rules applicable in this area. This means that it is not clear whether existing sectoral prohibitions on commercial practices in national legislation, which would effectively extend the "black list" in Article 1, could be retained.

41. The DTI has commissioned a legal study on the potential impact on English law. The study considered the application of general principles such as 'good faith', 'fairness' and 'reasonableness' in domestic law at present. It was found that the implementation of a 'general duty' would have a significant impact on contract law but that ideas of unfairness are already used and that the courts have shown that they are prepared to handle such general principles. In using such concepts, the courts have sought to apply guiding principles and in the case of the Unfair Terms in Consumer Contracts Regulations, guidance has been provided by the OFT.¹⁸

Member states' law

42. The Recitals to the Directive state that the objective is to replace Member States' existing divergent general clauses and legal principles and replace them with a single general clause. The absence of a minimum clause will require member states to change national law

¹⁷ For example, Article 11 of the Timeshare Directive states: "This Directive shall not prevent Member States from adopting or maintaining provisions which are more favourable as regards the protection of purchasers in the field in question, without prejudice to their obligations under the Treaty".

¹⁸ *The Impact of Adopting a Duty to Trade Fairly* (Prof. Bradgate, Prof. Roger Brownsword, Dr Christian Twigg-Flesner), July 2003

that goes beyond that required in the Directive within the co-ordinated field. The extent to which the Directive achieves the objective of harmonising national rules will depend on whether the Directive's scope extends to the right level and is defined clearly through the 'general clause' and 'unfairness categories'.

43. Article 3.2, supported by Recital 6, states that the Directive is without prejudice to the validity, formation or effect of a contract. The UK Government has supported this intention not to cover contract law. However, in most current consumer protection Directives, there is usually some impact on contract law such as the right to a cooling off period or a requirement that certain information is included in a contract.¹⁹ For example, the Sale of Goods Act 1979 and Supply of Goods and Services Act 1982 operate to protect consumers by implying certain terms into a contract e.g. that a product is of satisfactory quality and be fit for the purpose, including any specific purpose which the consumer makes known to the seller. This clause will ensure that such provisions are outside the scope of the Directive and would therefore not be affected by the 'minimum clause'. However, this exclusion therefore makes it difficult for current consumer protection Directives to be subsumed into the framework.

44. Article 3.3 states that the Directive is without prejudice to the determination of the types of damage which may be caused by an unfair commercial practice and their quantification. We believe this refers to the types of private law remedy e.g. damages or an injunction which a court might award where a consumer has suffered loss as a result of an unfair commercial practice. In this context, "quantification" is likely to mean "amount of damages". This means that the Directive is not setting out to change private law rules about the remedies courts can award to aggrieved parties.

45. Article 3.4 excludes rules relating to health and safety of products. European rules on product safety would be excluded but this would also exclude national rules in areas such as medicines, tobacco, and protection of children's health. However, the Explanatory Memorandum states that it does include misleading claims about health and safety e.g. false claims that a product can help or cure a medical condition such as those for 'miracle products'.

46. Article 3.5 states that in case of conflict between the framework directive and other Community rules governing specific aspects of unfair commercial practices the provisions in the sectoral directives will take precedence. Current Directives which include provisions on commercial practices to which this provision will apply include : Timeshare Directive, Package Travel Directive, Consumer Credit Directive, Price Indications Directive, Distance Selling Directive, Directive on contracts negotiated away from business premises.²⁰

¹⁹ The Timeshare Directive, Package Travel Directive, Doorstep Selling Directive, etc all contain such contract law provisions.

²⁰ The Directive on Unfair Terms in Consumer Contracts and the Directive on the sale of consumer goods and associated guarantees are outside the scope of this Directive because of the exclusion for contract law. Part of the Directive on Misleading and Comparative Advertising will be incorporated in this Directive.

47. The Framework Directive will apply to areas such as package travel but where there are specific provisions in EU Directives, these will take precedence. This means that the Framework Directive can work to improve consumer protection in these sectors – for example, it will apply to the timeshare sector and can be used to tackle any aggressive selling techniques or ‘holiday clubs’. However, the sectoral directives will take precedence where there is overlap – for example, information requirements in the Timeshare Directive will apply even though there are broad provisions in the Framework Directive.

48. There is a potential issue regarding the ‘minimum clause’ in sectoral directives and the lack of such a clause in the Framework Directive. The minimum clause means that member states may have national provisions which go beyond the EU minimum requirements. It is questionable whether these provisions would take precedence over the framework directive. Member states might not be able to retain such provisions where there is conflict with the framework directive e.g. if the additional national provisions cover areas such as direct marketing. Even if such provisions are allowed to continue, they could not be enforced against traders established in other member states who are supplying goods or services to consumers in the UK because of the application of the mutual recognition principle (Article 4).

49. **Annex A** sets out how the framework Directive might interact with key EU Directives.

Question 6: What are your views on how the Directive is likely to harmonise national laws, including the relationship with sectoral legislation?

Question 7: Do you consider that the exclusions from the Directive in Article 3 are appropriate and sufficient?

Article 4 – Internal Market

50. This article contains two complementary provisions, which apply the principle of “mutual recognition”:

- Member States must ensure that traders based in their jurisdiction comply with the laws prohibiting unfair commercial practices;
- A Member State may not restrict the provision of goods or services by traders based in another Member State on grounds relating to the prohibition of unfair commercial practices.

51. The principle of mutual recognition, which has been applied in other Community measures²¹, means that a trader need only comply with the relevant laws in the state where he is established: he need not additionally comply with the relevant laws of another state whose consumers are targeted by his marketing practices. This is commonly referred to as ‘country of origin’ or ‘home state’ control. Traders based in the U.K. will need to comply with the U.K. legislation implementing this Directive, whether they are advertising or offering goods or services to consumers in the U.K. or elsewhere in the E.U. Traders based elsewhere in the E.U. will be able to advertise or offer goods or services to consumers in the U.K. without having to comply with the U.K. legislation implementing this Directive (but such traders will have to comply with the relevant legislation in their state of establishment).

52. Recitals (8) and (9) of the Directive explain the background to the mutual recognition environment envisaged by article 4. According to recital (8), the Directive creates “a high level of convergence achieved by the approximation of national provisions” with “a high common level of consumer protection” which, it is considered, “create in turn the conditions to make the principle of mutual recognition applicable in the field co-ordinated by this Directive”. According to recital (9) the combination of harmonisation and the principle of mutual recognition will result in increased legal certainty for both consumers and business. The UK Government has supported the application of mutual recognition in this context.

53. Unlike earlier consumer protection Directives, this Directive does not contain a so-called “minimum clause” (whereby Member States have a discretion to impose more stringent measures than those envisaged by the Directive concerned in the interests of consumer protection). By avoiding a minimum clause in this Directive, the Commission aims to remove the barriers to trade that result from differing implementation approaches in the Member States.

²¹ Directive 2000/31/EC on certain aspects of information society services, in particular electronic commerce, in the internal market; Directive 89/552/EEC on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities.

54. Nonetheless, the very general character of the prohibition of unfair commercial practices creates the potential for varying interpretations by national courts and enforcement bodies. We envisage that the application of mutual recognition is intended to minimise the possibility of such diverging interpretations and, in any event, prevent differing interpretations creating a barrier to trade.

55. The principle of mutual recognition will apply to all domestic legislation covering the field of unfair commercial practices, as defined in the Directive. This would extend not just to general cross-sector rules, but also sector specific legislation in areas such as financial services, consumer credit, transport, utilities etc. Whilst this is intended to remove barriers to trade that may arise through Member States' differing approaches to specific sectors, it will raise questions as to the equivalence of consumer protection in different Member States in the sectors in question.

56. Although the Directive follows the E-Commerce Directive by applying the mutual recognition principle, it differs from that Directive in that there are no derogations from the principle. Member States may derogate from mutual recognition under the E-Commerce Directive, if necessary on grounds of public policy (including crime prevention or detection, protecting children, or combating the incitement of race hatred etc.), public security, public health, or consumer protection.

57. However, the derogation must be both necessary and proportionate to the objective in question and the derogating state is required to seek redress from the originating member state, as well as notifying that State and the European Commission before invoking the derogation. There should be no need for a consumer protection derogation in this Directive, whose concern is the protection of consumers from unfair commercial practices, but there may be scope for considering other appropriate public interest derogations.

Question 8: What is your view on the application of home state control and mutual recognition as set out in Article 4?

CHAPTER 2: GENERAL CLAUSE

Article 5 – Prohibition of unfair commercial practices

58. This Article sets a general prohibition on unfair commercial practices. It sets two cumulative tests for the purpose of deeming whether a practice is “unfair”:

- if it is contrary to ‘professional diligence’ and
- it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer to whom it is addressed, or of the average member of the group when a commercial practice is specifically directed to a particular group of consumers.

59. The Explanatory memorandum explains that the general clause is intended to fully harmonise national regimes and apply a precise and EU-wide set of tests.

60. This general clause is not linked to or restricted by the ‘unfairness categories’ set out in Articles 6 – 9. It is therefore important to consider carefully how the general clause and the tests might work in practice to protect consumers and the effect they will have in harmonising national law in this area. It might also be helpful to consider the types of practice that would be covered under this general clause but not under the ‘fairness categories’ – the Annex does not contain any such examples.

First test: Professional diligence

61. “Professional diligence” is defined in Article 2(j) as “the measure of special care and skill exercised by a trader commensurate with the requirements of normal market practice towards consumers in his field of activity in the internal market.” The Commission sees this concept as analogous to notions of good business conduct found in most legal systems of the Member States. However, this term has not been used in other EU consumer protection Directives, nor is it a feature of English law on the protection of consumers, although it could be seen as analogous to the ‘good faith’ or ‘reasonable expectations’ requirements currently applied in English law. The following points should be noted:

- The requirement is not limited to those commonly understood in the United Kingdom to provide professional services (e.g. doctors, lawyers, accountants), but will cover any seller or supplier of goods or services.
- By virtue of the Directive definition, the nature of the requirement will vary according to generally recognised standards of business practice in the sector in question. Differing standards would apply to a bank offering financial services products, as opposed to a shop selling electrical goods or a salesman selling household goods on the doorstep. To some extent, this could be seen as providing more certainty to a trader in a particular sector and

should allow for the law to develop with the market.

- The terminology used in Article 2(j) bears some comparison with the standard of care imposed under the law of negligence on professionals and other persons professing some special skill, who are judged against the standard of the ordinary skilled man exercising and professing to have the skill in question. In one sense the requirement of professional diligence creates a duty of care to be owed by a trader to the consumer, but it is important to note that a breach of this duty would not in itself contravene the Article 5 prohibition. The breach must also satisfy the “material distortion” test discussed below.
- Professional diligence is not wholly unfamiliar to the financial services sector. The core principles in the Conduct of Business Rules, issued by the Financial Services Authority, do not use the concept of ‘professional diligence’ as such but do include requirements that regulated firms conduct their business with integrity, with due skill, care and diligence and observe proper standards of market conduct, as well as paying due regard to the interests of their customers and treat them fairly. Professional diligence could broadly correspond to the “fit and proper” element of the consumer credit licensing and estate agents regimes in the U.K.

62. The DTI Workshop²² considered consumer detriment in 5 areas – doorstep selling, tradesmen, prize draws, holidays and household goods. In 4 of these there was a direct relationship between the trader and the consumer, most obviously in doorstep selling and tradesmen. Detriment arose from the practices of the trader, which seemed to involve the use of aggressive and misleading selling techniques and the targeting of the vulnerable. There are issues surrounding how “the requirements of normal market practice” would operate in such instances and whether the test of “special skill and care” properly captures the activities of traders engaging in unfair practice and is not unduly demanding.

Question 9: How well do you think the “professional diligence” test will work in practice (Article 5)? If you are a business, how well do you think these rules will work in the context of the sector in which you operate?

Second test: Material distortion

63. The “material distortion” test needs to be read in conjunction with the definition in Article 2 (f), which states that the practice must significantly impair the consumer’s ability to make an informed decision. The UK has a similar test in Part 8 of the Enterprise Act 2002.²³ However, the main difference is that under the Act an unlawful act or omission must harm, or have the potential to harm, consumers generally. In contrast, it could be argued that the Directive’s test as currently drafted does not distinguish between fair marketing practices which are intended to cause the consumer to act in a way they would not otherwise have done

²² Link to report.

²³ Enterprise Act 2002

and those marketing practices which are genuinely “unfair” and seek to use misleading or oppressive techniques. There is a question as to whether the ‘professional diligence’ test would fill this gap.

64. This second test uses the benchmark of the ‘average consumer’ as defined in Article 2 as a consumer who is reasonably well informed and reasonably observant and circumspect. This places some onus on the consumer to be “reasonably well informed and reasonably circumspect”. Moreover, the use of this test is backed by ECJ jurisprudence (see paragraph 23 - 26), which should ensure that member states will not be able to apply different interpretations.

65. This test also provides that when a commercial practice is specifically directed to a “particular group of consumers”, the capacity to materially distort should be examined from the perspective of the average member of that group. This should make it easier for action to be taken in respect of vulnerable consumers. The DTI Workshop²⁴ found that cases of consumer detriment were often linked to the targeting of vulnerable consumers or consumers in vulnerable situations e.g. elderly people might be targeted by some door-to-door salesmen. It would seem that some assessment of the intended recipient of a marketing practice is essential in determining its fairness. The “average consumer” benchmark might allow a company to alter its practices in respect of more sophisticated consumers: for example, the provision of less information for financial services transactions where consumers have experience in this area.

Question 10: How well do you think the “material distortion” test will work in practice (Article 5)? If you are a business, how well do you think these rules will work in the context of the sector in which you operate?

66. Article 5.3 states that, in particular, commercial practices shall be regarded as unfair where they are misleading or aggressive, as set out in Articles 6 – 9. Article 5.4 refers to an Annex containing a “black list” of practices that shall in all circumstances be considered unfair. This is not an exhaustive list but is intended to provide clear guidance on practices that are unfair. However, it is important to note that these additional categories do not limit the general clause in any way.

24

CHAPTER 3: UNFAIRNESS CATEGORIES

Article 6 – Misleading Actions

67. This Article replicates some of the Misleading Advertising Directive, which is later amended by Article 19, but much is new. Article 6.1 (a), (c) and (e) reflect provisions in Article 3 of the Misleading Advertising Directive.

68. In relation to new provisions, Article 6.1(a) addresses misleading claims about after-sales. The trader must not mislead about after-sale customer assistance and complaint handling or the need for a service, part, replacement or repair. This more limited provision on after-sale is in contrast to the Commission's original suggestion that the Directive might set more detailed requirements in this area. This move has been welcomed by the UK Government. Types of misleading conduct that might be covered here are the provision of after-sales assistance by premium rate phone line where the high cost of the calls has not been made clear prior to the contract.

69. The Article 6.1(a), (f), (g) provisions also require that a trader must not mislead about benefits or risks, claims about the product which the trader cannot substantiate, or the circumstances of the consumer, including the consumer's rights and the risks he may face. These provisions would complement the Directive's overall attempt to protect vulnerable consumers and more aggressive forms of marketing. This would probably cover, for example, some door-to-door selling practices where elderly people are misled about the need for security systems.

70. The Directive (Article 6.1 (b), (c)) also requires that the trader shall not mislead in relation to claims about any statement or symbol in relation to direct or indirect sponsorship or approval or the existence of a specific price advantage. This would be likely to impact on cases where a company claims to be a member of a trade association but is not a member or where the trade association does not exist.

71. Article 6.2 mainly covers misleading actions about the company or brand. Part of the Article replicates the provisions of the Misleading Advertising Directive in relation to marketing that creates confusion between brands and competitors. There are additional new rules introducing transparency on codes of practice: non-compliance by the trader with a codes of conduct will be misleading, provided that the trader has signed up, the commitment is firm and verifiable, and membership of the code is public knowledge. In addition, a trader must not mislead with regard to non-compliance with a commitment given to a public authority to cease an unfair commercial practice under the Directive.

72. The UK currently regulates advertising through the Control of Misleading Advertising Regulations 1988 (SI 1988/915 as amended by SI 2000/914), which implements the Misleading and Comparative Advertising Directive. Although the Regulations give the OFT

the power to apply to the courts for injunctions to stop the use of misleading and unpermitted comparative advertising, compliance is achieved largely by self-regulation through adherence to industry codes of practice. Article 10 of the Directive allows for member states to continue to encourage the control of unfair commercial practices by code owners (reflecting provisions in Article 5 of the Misleading Advertising Directive). This would enable the Advertising Standards Authority to continue to act in this area although its detailed rules would need to be brought into line with the Directive.

Question 11: What are your views on the provisions on misleading actions in Article 6? If you are a business, how well do you think these rules will work in the context of the sector in which you operate?

Article 7 – Misleading Omissions

73. Article 7.1 states that a practice shall be regarded as misleading if ‘material’ information required by the average consumer to make an informed decision in a particular context is not provided. This information applies specifically to commercial practices directly connected to promotion, sales and supply of a product. This is a broad requirement that creates some degree of flexibility for the trader to decide what is material for a particular context. It is a move away from the practice in sectoral legislation of setting very specific and often detailed information requirements. It also provides more room for manoeuvre for enforcement bodies.

74. Article 7.2 sets an additional requirement that a trader should not hide information, provide it in an unclear, unintelligible, ambiguous or untimely manner, or fail to identify the commercial intent of the commercial practice. This could cover cases where the trader does not make any additional charges explicit.

75. Article 7.3 sets some basic information that should always be considered material when a trader makes an invitation to purchase as defined in Article 2. These are

:

- Main characteristics of the product;
- Name of the trader and, where applicable, the name of the person on whose behalf he is acting;
- Price inclusive of taxes and additional delivery charges or, where these additional charges cannot reasonably be calculated in advance, the fact that additional charges may be payable;
- Arrangements for payment, delivery and performance, and complaint handling policy, if they depart from the requirements of professional diligence;
- The existence of any right to withdrawal or cancellation.

76. Article 7.4 adds that any information requirements set by Community law in this field should also be considered material. Article 7.5 highlights Annex 2, which contains a non-exhaustive list of such Community law. For example, Article 3 of the Package Travel Directive requires tour operators to give consumers specified information about their package holidays.

Question 12: What are your views on the information requirements in Article 7? If you are a business, how well do you think these rules will work in the context of the sector in which you operate?

Article 8 – Aggressive commercial practices

77. This Article provides that an aggressive commercial practice is one which by harassment, coercion or undue influence significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby cause him or is likely to cause him to take a transactional decision that he would not have taken otherwise. Article 2(1) defines "undue influence" as exploiting a position of power to apply pressure, without using physical force, in a way which significantly limits the consumer's ability to make an informed decision. This provision could be used to tackle practice related to doorstep selling.

Article 9 – Use of harassment, coercion and undue influence

78. This Article sets out factors to be taken into account when determining whether a commercial practice uses harassment, coercion or undue influence:

- a) Its timing, nature or persistence;
- b) The use of threatening or abusive language or behaviour;
- c) Any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware to influence the consumer's decision with regard to the product;
- d) Any onerous or disproportionate non-contractual barriers established by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;
- e) Any threat to take any action that cannot legally be taken;

79. The list of factors in this Article is intended to help interpret the Article 8 prohibition. However, it is important to note that this list of factors is not exhaustive and the prohibition in Article 8 could be invoked even if the practice is not covered here. However, the practice would still need to meet one of the three tests – harassment, coercion and undue influence.

80. This provision will also apply both pre- and post- sale. For example, this provision could be used to tackle loan companies that might harass an individual taking out a loan,

practices where companies prevent individuals unfairly from repaying their loans early, or an offer to reschedule debt if a consumer buys another product.

Question 13: What are your views on the provisions on “aggressive commercial practices” in Articles 8 and 9? If you are a business, how well do you think these rules will work in the context of the sector in which you operate?

CHAPTER 3: CODES OF CONDUCT

Article 10 – Codes of conduct

81. This Article replicates that in the Misleading Advertising Directive²⁵ and allows the control of unfair commercial practices through codes of practice provided there is recourse to formal enforcement bodies. The type of arrangement envisaged is similar to that which exists with the Advertising Standards Authority. It is important to note that this type of enforcement is not alternative to that required by Article 11. Member states have the option of allowing Article 10 enforcement, but only in addition to that under Article 11.

Question 14: What are your views on the provisions on codes of conduct in Article 10?

²⁵ Article 5, Directive concerning misleading and Comparative Advertising 84/450/EEC as amended by 97/55/EC.

CHAPTER 5 – FINAL PROVISIONS

Article 11 – Enforcement

82. This Article sets broad requirements for enforcement. The Explanatory Memorandum explains that these largely reflect provisions in existing Directives, particularly the Directive on Misleading and Comparative Advertising.²⁶ However, the provisions in this proposal obviously go much wider given the wider scope.

83. Article 11.1 requires that member states ensure that adequate means exist to combat unfair commercial practices.

84. The Article also requires that member states ensure that persons or organisations regarded under national law as having an interest in combating unfair practices may take legal action or bring such practices before an administrative authority competent to decide on such complaints or initiate legal proceedings. The Directive gives member states the flexibility to decide what facilities should be available and also whether there should be prior recourse to another established means of dealing with complaints such as an alternative dispute resolution scheme or a body like the Advertising Standards Authority.

85. Article 11.1 states that the chosen legal facilities may be directed separately or jointly against a number of traders from the same sector or against a code owner. This means that, depending on the approach taken by national law, action should be available against individual traders or a particular group of traders. It would allow for class actions in a particular member state if such actions are normally allowed in that member state.

86. Article 11.2 requires member states to confer powers upon the courts or administrative authorities enabling them:

- to order the cessation of, or institute proceeding for an order for the cessation of, unfair commercial practices;
- if the unfair practice has not been carried out, to order the prohibition of, or institute proceedings for an order for the prohibition of, the practice. This can be done without proof of actual loss or damage of intention or negligence on the part of the trader.

87. This Article also requires that member states put in place an ‘accelerated procedure’ for measures to be taken to order the cessation of the practice *either* with interim effect *or* with definitive effect. “Interim” means temporary e.g. pending a full determination of the case by a court, “definitive” means full determination. Member states can also choose to require courts or administrative authorities to require publication of their final decision in full or in part and/or to require the publication of a corrective statement with a view to eliminating the continuing effects of an unfair commercial practice.

²⁶ Article 4

88. Article 11.3 sets requirements for the administrative authorities. They must:
- a) Be composed so as not to cast doubt on their impartiality;
 - b) Have adequate powers, where they decide on complaints, to monitor and enforce the observance of their decisions effectively;
 - c) Normally give reasons for their decisions.

89. Moreover, where powers are exercised exclusively by an administrative authority, reasons for decisions shall always be given and there should be provision for judicial review (i.e. in the event of an unreasonable or improper failure to exercise powers on the part of the authority concerned).

Question 15: What are your views on the enforcement provisions in Article 11?

Article 12 – Courts and Administrative Authorities

90. This Article replicates provisions in the Misleading Advertising Directive and reverses the burden of proof so that traders must, if requested to do so in civil or administrative proceedings, substantiate any factual claims in relation to a commercial practice. Claims will be regarded as inaccurate if this evidence requested is not furnished or is deemed to be insufficient by the court or administrative authority.

Question 16: What are your views on the reversal of the burden of proof in Article 12?

Article 13 – Penalties

91. This Article requires that member states lay down penalties for infringements of the requirements of the national law which implements the Directive. This reflects provisions in certain existing Directives, for example the Directive on price indications.²⁷ In the UK, the Directive would be part of the Stop Now Order regime.

Question 17: What are your views on the provisions on penalties in Article 13?

Article 14 – Amendments to Directive 1984/450/EEC as amended by Directive 1997/55/EC

92. This Article repeals some sections of the Misleading and Comparative Advertising Directive that deal with misleading advertising undertaken by business to consumer. Advertising directed towards consumers will remain covered by the MAD insofar as such advertising is unfair to competitors.

²⁷ Directive 98/6/EC.

Question 18: What are your views on amendments to the Misleading Advertising Directive in Article 14?

Article 15 – Amendment to Directive 1997/7/EC (Distance Selling)

93. This Article will amend the Distance Selling Directive to remove the prohibition in Article 9 on the supply of goods or services to a consumer without being ordered where this involves a demand for payment. This practice is now included as an example in the Annex of commercial practices which in all circumstances are considered unfair.

Question 19: What are your views on the amendments to the Distance Selling Directive in Article 15?

Article 16 – Amendment to Directive 1998/27/EC (Injunctions)

94. This Article will replace the Misleading and Comparative Advertising Directive with this Directive amongst those covered by the Injunctions Directive.

Question 20: What are your views on the provisions to include this Directive under the Injunctions Directive in Article 16?

Article 17 – Information

95. This Article requires member states to take appropriate measures to inform consumers of the national law transposing the Directive and to encourage traders and professional organisations to inform consumer of their codes of conduct.

Question 21: What are your views on the requirements to inform consumers in Article 17?

Article 18 – Transposition

96. This Article requires transposition within 18 months of entry into force.

Question 22: What are your views on the time allowed for transposition of the Directive in Article 18?

Articles 19 and 20

97. These are technical provisions regarding entry into force etc.

ANNEX 1 – LIST OF EXAMPLES

98. The Annex provides a ‘black list’ of commercial practices that shall always be regarded as unfair, although significantly, this is limited to the two unfairness categories. Crucially, this list only provides examples and does not prevent national authorities from deeming other practices unfair under this Directive.

99. The Annex provides the following type practices shall be unfair:

- Under ‘misleading practices’: claims regarding codes of conduct, bait advertising, bait and switch advertising, claims about availability and aftersales, advertorials (although product placement is excluded in the Recitals), false claims about risk, pyramid schemes, false reference prices for discounts, falsely referring to liquidation sales.
- Under ‘aggressive practices’: not allowing the consumer to leave, prolonged and repeated visits, persistent telephone calls, targeting of bereaved or ill, requiring certain documents for insurance claims, advertising to children which misleads in relation to acceptance of peers, inertia selling.

Question 23: Does the Annex provide a useful and complete set of examples of unfair practices? Is there anything that should be added?

Question 24: Do any of the examples in the Annex cause problems for your business?

ANNEX A

SECTORAL DIRECTIVES

Package Travel Directive

The Directive contains rules on consumer information, indicates terms that must be included in the contract, provides for some rights of withdrawal and sets rules on security in the event of insolvency. The Framework Directive would cover products not covered by the Directive, such as the purchase of hotel rooms and flights where the consumer puts together a 'package'. It could complement existing regulations in the sector, for example regulations on misleading brochures.

Timeshare Directive

The Directive sets rules on information requirements and provides a 10-day cooling off period. The Unfair Commercial Practices Directive could help tackle practices in this sector that fall outside the sectoral directive because of the definitions and cope. For example, it might cover holiday and points clubs and might also help tackle problems relating to maintenance charges by requiring information to be given prior to the contract.

Consumer Credit Directive

There are current proposals to revise the Consumer Credit Directive 1987 to create an internal market with a high level of consumer protection. The provisions broadly cover advertising, information requirements, consumer protections such as a universal right of withdrawal, joint and several liability and responsible lending, recovery practices and obligations on credit intermediaries.²⁸ The Unfair Commercial Practices Directive should complement these detailed rules and provide additional protection in respect of marketing and sales and after-sales practices, where the Consumer Credit Directive is silent. However, there is the potential for overlap in the following areas:

- Article 4 of the CCD contains a 'good faith' test on advertising information;
- Article 6(3) of the CCD relates to an advisory function and Article 9 relates to responsible lending. Both might be captured by the concept of 'professional diligence'.
- Article 27 of the CCD regarding recovery of monies sets detailed rules which could be seen as having the same effect as the Framework Directive.

Doorstep Selling Directive

The Directive seeks to protect the consumer in respect of contracts negotiated away from business practices because of the particular risks that might occur and particular marketing practices that might be used. The Directive establishes rules of contract, such as information requirements and cancellation rights. The Unfair Commercial Practices Directive should help

²⁸ *Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the member states concerning credit for consumers* http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0443en01.pdf

tackle practices that can be a cause of concern in such transactions – in particular, the misleading and aggressive sales techniques of some sellers.

Distance Selling Directive

The Directive gives consumers rights when buying goods or services at a distance relating to delivery, information, and a cooling off period of 7 days. In contrast to the positive minimum requirements of this Directive, the Unfair Commercial Practices Directive will set additional rules aimed at tackling unfair practices.

Price Indications Directive

The Directive sets out positive rules about price indications when products are for sale by traders to consumers. The total price of a product must be displayed as well as a unit price to allow consumers to compare prices of similar products that are sold in a range of different sizes and packaging. The aim is to prevent consumers being misled, so the Unfair Commercial Practices Directive should complement these provisions. There is a potential overlap with the provisions of the Consumer Protection Act on misleading prices²⁹, which the Directive is likely to cover (Article 6).

²⁹ Consumer Protection Act 1987, Part III – Misleading Price Indications.

4. PARTIAL REGULATORY IMPACT ASSESSMENT (RIA)

**Directive of the European Parliament and of the Council
concerning unfair business-to-consumer practices in the internal
market
(The Unfair Commercial Practices Directive)**

A. Introduction

B. Issues and Objectives

C. Risk assessment of current problems

D. Options presented by the European Commission

E. Quantifying and valuing the benefits and costs, including compliance

F. Consultation

A. Introduction

1. In October 2001, the European Commission launched a wide-ranging consultation on a Green Paper on EU Consumer Protection (the “Green Paper”).³⁰ The Green Paper made a number of proposals to harmonise and improve the current EU consumer protection regime, including the introduction of a framework directive containing a “general duty to trade fairly”, the development of codes of practice at the EU level, and improved enforcement co-operation.

2. The Commission published a Follow-up Communication³¹ (the “Follow-up”) on 11 June 2002, which stated that the Commission had received broad support for reform of the current regime and set out the Commission’s intention to propose a framework directive containing a “general duty [not] to trade [un] fairly”. The framework would also provide for the development of self- and co- regulation and the participation of stakeholders. The Commission set up an ‘expert group’ of national officials which discussed national fairness law and considered the basis of an EU framework directive.

3. On 18 June 2003, the Commission published a draft Directive concerning unfair business-to-consumer practices in the internal market (the “Unfair Commercial Practices Directive”). The draft framework Directive consisted of a self-standing general clause containing a prohibition on unfair commercial practices; the further elaboration of two categories of unfair commercial practices - misleading commercial practices (actions as well as omissions) and aggressive commercial practices - in each case with criteria to establish whether a practice is misleading or aggressive; and an annex containing a non-exhaustive list of examples of unfair commercial practices, intended to demonstrate further the application of the criteria.

4. This regulatory impact assessment (RIA) is an assessment of the costs and benefits that might be associated with a framework directive. It is based on Commission consultation papers that provide a broad idea of the nature of any reform and the content of a future directive, but principally from the Commission’s draft Directive of 18 June 2003. Assessment of costs and benefits is based on previous consultation with business, consumer organisations and enforcement bodies. The RIA will be developed as the EU negotiations progress and will be used to inform the UK’s input into EU discussion.

³⁰ Green Paper on EU Consumer Protection, 2 October 2001 (COM(2001)531 final)

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/fair_comm_greenpap_en.pdf

³¹ Follow-up Communication to the Green Paper on EU Consumer Protection, 11 June 2002 (COM(2002) 289 final)

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/communication_en.pdf

B. Issues and Objectives

Issues:

5. In the Green Paper on EU Consumer Protection, the Commission identified the following problems:

- Gaps in the coverage of existing EU Consumer Protection Directives - key areas such as marketing practices, practices linked to the contract, payment and after sales services are not covered;
- The sector-specific approach, the long transposition period, and the time required to amend directives has meant that rules become quickly outdated and allow rogues to stay one step ahead of the law;
- Gaps between Directives and the use of minimum clauses has allowed national legislation to play an ever greater role, creating a barrier to cross-border trade and shopping. Interaction between EU rules, national law, contract law, and private international law is difficult to understand, creating confusion for consumers and business.

6. On 11 April 2003, the DTI held a workshop to discuss the nature of consumer detriment from unfair commercial practices in the UK and the extent to which a “general duty to trade fairly” could help. Key problems discussed were: the use of high pressure selling techniques; the targeting of vulnerable consumers or consumers in a vulnerable position; inadequate or misleading information about products, services or prices; and inadequate responses to customer complaints. The workshop concluded that legislation in the area was often patchy and often difficult to enforce, and that a general duty to trade fairly could provide some useful tools for enforcement.

7. The UK does not currently have a “general duty not to trade unfairly” in its legal regime. This is in contrast to most other EU member states that are used to the application of such a general principle. The DTI has therefore commissioned a study by leading academics to consider how concepts of fair trading are currently used in English law and the potential impact of an explicit ‘general duty to trade fairly.’ The Report broadly concludes that while the Directive will have a considerable impact on English law, English courts already apply general principles of fair trading and that the application of general rules has not proven problematic for courts or business. The Report also highlights the potential for deregulation and rationalisation of the current regime.

Objective:

8. In the Explanatory Memorandum accompanying the draft Directive, the Commission sets out the broad objectives of the introduction of a framework directive. The Directive is intended to:

- Address internal market barriers by harmonising the requirements in an EU-wide framework of legal principles governing unfair business-to-consumer commercial practices;
- Deliver a high level of consumer protection in order to promote consumer confidence, while minimising the burden on business; and
- Achieve legal certainty whilst remaining as simple as possible and adaptable to market developments.

C. Risk Assessment of current problems

Consumer protection:

9. The National Consumer Council has presented an analysis of over 50 case studies of consumer detriment covering misleading practices, non-disclosure of important information and charges, exploitation and coercive selling, failure to deal with after sales problems.³² The paper argues that a general duty would tackle gaps in the law and assist in covering future practices. The National Association of Citizens Advice Bureau has produced a report on the problems related to doorstep selling. The report is based on more than 1,500 evidence reports from 353 bureaux. The report argues that consumers are commonly subjected to unfair trading practices including high-pressure sales techniques and deception.³³

10. On 11 April 2003, the DTI held a workshop attended by representatives from Trading Standards, Citizens Advice Bureaux (CAB), Office of Fair Trading (OFT) and National Consumer Council (NCC). The purpose of the workshop was to discuss in detail: the nature of consumer detriment from unfair commercial practices in the UK, including ascertaining where current legislation applies and why it may be difficult to enforce or unenforceable; how a “general duty to trade fairly” could help to deal with practices that are not covered or difficult to enforce under current legislation; and what would need to be contained within the general duty in order to ensure that it works.

11. The workshop participants concluded that:

³² NCC “The case for a general duty – evidence to support the NCC’s campaign for a general duty not to trade unfairly”.

³³ NACAB Evidence Report “Door to Door: CAB clients’ experience of doorstep selling”, September 2002.

- There was often legislation in the area but that coverage was patchy and often difficult to enforce, particularly in respect of gathering sufficient evidence. Consumer awareness of their rights was also an issue.
- A general duty to trade fairly could provide some useful tools for enforcement authorities, particularly in relation to misleading information, omissions of information and the use of high-pressure selling techniques: this would be more effective in some sectors than others. However, the difficulties of evidence gathering, enforcement and protecting the vulnerable may remain.

Barriers to cross border shopping:

12. The Commission has published an ex-ante assessment produced by GFA Management of the options presented in the Green Paper.³⁴ The study uses consumer and business surveys to argue that there is significant potential for business-to-consumer cross border trade – nearly 40% of European companies targeting consumers would increase the proportion of their marketing and advertising budget to encourage cross border sales. A consumer survey undertaken as part of the study suggests that a potential 80 million European consumers would buy more cross border if they were confident about making purchases from shops in another EU country.

13. In a Eurobarometer survey on business experience of, and attitudes to, cross-border shopping, business reported that cross-border sales make up only a small percentage of sales to final consumers: 3% of Internet sales, 3.7% of telephone/mail order, 8% of door-to-door, 4.8% of sales to tourists in shops. Only 6.6% of advertising and marketing budgets are aimed at encouraging cross-border sales. Harmonisation of regulations on commercial practices, advertising and other consumer protection regulation was cited as the most efficient of the options in facilitating cross-border sales and/or advertising (68.2% of businesses).³⁵

14. The proposal should also help to tackle the problem of rogue practices. For example, within the timeshare sector, the Organisation for Timeshare in Europe (the “OTE”), estimates that approximately 8-10% of sales are lost to rogue operators in Spain out of total revenue of €131million per annum.

³⁴ GFA Management “Ex-ante Impact Assessment of the options outlined in the Green Paper on EU Consumer Protection” (B5-1000/02/000074).

http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/gfa_report_en.pdf

³⁵ Standard Eurobarometer 57.2 - Flash Eurobarometer 128 Public opinion in Europe: Views on business-to-consumer cross-border trade, 14 November 2002
Opinion Studies conducted by: The European Opinion Research Group EEIG and Eos Gallup Europe

D. Options presented by the European Commission

15. Two options were identified in the Green Paper as potential routes for reform of the EU consumer protection regime. The Follow-up stated that the majority of respondents to the consultation on the Green Paper supported the second option. As a result, the Commission has stated its intention to make a proposal for a framework directive based on the “mixed approach”.

Option 1:

A “specific approach” based on the adoption of a series of further specific directives.

16. In its Green Paper, the Commission considered the possibility of achieving further harmonisation through the adoption of a series of further specific directives. The Green Paper suggested that the number of measures required would be difficult to estimate, but it was likely that directives covering advertising, marketing practices, payment and after sales service would be required, in addition to certain additional sector-specific directives. Existing directives would also need to be reviewed and reformed to keep them up to date. The Commission also stressed the importance of removing the ‘minimum clause’ in existing directives to encourage greater harmonisation of rules amongst member states. The minimum clause allows member states to retain or introduce higher levels of protection than those in the Directive.

Option 2:

A “mixed approach” of a comprehensive framework directive, supplemented by targeted directives where necessary.

17. The Green Paper presented the option of a new “mixed approach” consisting of an EU framework directive which would harmonise national fairness rules for business-consumer commercial practices. The Follow-up set out the Commission’s initial thoughts on a framework Directive in more detail.

18. In the draft Unfair Commercial Practices Directive, the general clause stipulates that a commercial practice is unfair if two core elements are met: the practice is contrary to the requirements of professional diligence; and it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer to whom it is addressed or whom it reaches. The general clause is supplemented by two unfairness categories:

- A prohibition on misleading commercial practices. This may consist of misleading actions, i.e. deceiving the consumer in relation to an aspect of the product; or misleading

omissions, i.e. failing to provide material information that the consumer needs to take an informed transactional decision.- A prohibition on aggressive commercial practices, i.e. the use of harassment, coercion or undue influence which leads to the average consumer's freedom of choice or conduct with regard to the product being significantly impaired;

19. Attached to the framework Directive is an annex containing a non-exhaustive, indicative list of commercial practices which will in all circumstances be regarded as unfair.

Transposition

20. Transposition of the framework Directive in the UK may present an opportunity to deregulate some of the existing body of UK regulations. In particular, transposition of the Directive will require the amendment of conflicting domestic sectoral provisions which relate to unfair commercial practices. Domestic legislation which implements existing EU directives may remain, but other sectoral provisions that go beyond or conflict with the provisions of the framework Directive may need to be removed.

E. Quantifying and valuing the benefits and costs

Option 1: “specific approach”

Benefits

21. The Green Paper recognises that this is a familiar and tried-and-tested method that has led to the adoption of existing legislative provisions. It is easier to reach agreement on and adopt directives with limited scope. Moreover, specific targeted pieces of legislation offer clear rules for business and make it more likely that regulation will only apply where it is necessary.

Costs

22. The specific approach has been criticised on the basis that it takes a protracted period to adopt, review and amend directives. For instance, it took approximately 6 years of negotiations before the Sale of Goods Directive³⁶ was adopted. In addition, it has been claimed that the use of specific directives has created gaps that have enabled unscrupulous traders to stay ahead of the law.

23. A failure to introduce harmonisation might maintain costs to consumers and business seeking to shop or market across border. However, business response to the Green Paper claimed that regulation was only one factor affecting how consumers and business act across border – other factors were likely to include different languages, the desire to make purchases face-to-face, delivery time.

Question 1: Do you have any comments on this assessment? Do you have examples of particular costs or benefits of the specific approach?

Option 2: “mixed approach with general duty not to trade unfairly”

Benefits

24. The Green Paper and the Follow up set out a number of the potential benefits of a framework directive.

³⁶ 1999/44/EC

- Better regulation. The Commission intends for the framework to provide a more flexible and less prescriptive means of regulation. The comprehensive nature of such a clause should, in theory, reduce the need for further detailed consumer protection regulation. It might also provide a mechanism for simplification and reform of existing Directives, such as the Misleading Advertising Directive.
- Reducing internal market barriers. It is intended that the framework directive would make it easier for business to trade across border. Harmonised consumer protection rules and the elimination of the minimum clause in consumer protection directives should reduce regulatory barriers and reduce the legal cost of ensuring compliance with different regimes.
- Empowering consumers. The introduction of safety net legislation and clearer rules should increase the confidence of consumers to shop across border. This would enable consumers to get better deals and would open new markets for business.
- Strengthening the internal market. Empowered consumers, increased cross border marketing and shopping, and stronger action against rogue practices will drive competition within the internal market.
- Targeting rogues. If the general clause is used to tackle instances of bad practice currently not caught under existing law, there is a potential benefit for those companies who lose customers to companies engaged in rogue practices.

Question 2: Do you have any comments on this assessment of the potential benefits? How might these benefits affect your business or businesses in your sector? What are the most important benefits?

Question 3: What are the most important factors in maximising the benefits? e.g. how should existing legislation be simplified to create most benefits?

Compliance Costs

25. The following costs are based on the Commission's initial proposals for a framework Directive (Option 2). Figures are provided where possible and are based on costs provided through informal consultation with UK companies.

The General Clause

26. Compliance costs for the general clause are difficult to estimate because its nature is at this stage unclear. In the draft Unfair Commercial Practices Directive, the general clause stipulates that a commercial practices is unfair if two core elements are met: the practice is contrary to the requirements of professional diligence; and it materially distorts or is likely to

materially distort the economic behaviour with regard to the product of the average consumer to whom it is addressed or whom it reaches.

27. A prime objective of any framework directive is to harmonise rules across the EU – thus creating consumer and business benefits. However, there is the risk, due to different legal traditions, that the general prohibition on unfair commercial practices will be interpreted differently across the Member States of the EU if it is defined too broadly. A freestanding general clause that is not confined to the unfairness categories and indicative list of unfair commercial practices has the potential for creating widely diverging national interpretations. This would lead to increased legal uncertainty and therefore increased compliance and ongoing legal costs. This is more likely to be the case if a framework directive contains a ‘minimum clause’, which allows member states to apply their own definition of fairness. This would lead to increased legal uncertainty and therefore increased compliance and ongoing legal costs.

28. In an attempt to address issues of uncertainty, the OFT will consult and issue guidance on the application of the Directive in the UK prior to any new legislation coming into force. This should help counter any additional costs to business. However, as an illustrative example of potential legal costs, a trade association representing SME’s in the UK offers a free legal help line as part of its membership fee. However, for advice falling outside this service the trade association’s lawyers charge a reduced rate of £140 per hour. While most small businesses would usually do the majority of the ground work themselves, this is a significant potential cost if rules are uncertain.

Question 4: Do you have any comments on the assessment of costs and benefits associated with the general prohibition?

Question 5: Are you able to quantify what it might cost your business to change practice in this area?

Question 6: How could costs be minimised and benefits maximised?

Particular Categories of Unfair Commercial Practices

29. In addition to the general clause, there are two broad categories of unfairness – misleading actions and omissions and aggressive practices.

Misleading Actions

30. The draft Framework Directive expands on the requirements of the Misleading Advertising Directive. New requirements include requirements that a trader must not mislead about:

- after-sale customer assistance and complaint handling or the need for customer assistance and repair;

- the benefits or risks, claims about the product which the trader cannot substantiate, or the circumstances of the consumer including the rights and risks he may face;
- claims about any statement or symbol in relation to direct or indirect sponsorship or approval;
- the existence of a specific price advantage

31. There are also provisions relating to misleading actions about the company or brand. A trader must not mislead through: non-compliance with a commitment in a code of conduct where the trader has agreed to be bound; or non-compliance with a commitment given to a public authority to cease an unfair commercial practice.

32. UK companies engaging in advertising or sales promotions must currently comply with the British Codes of Advertising and Sales Promotions (“the Codes”). The Codes are created and enforced by the Committee of Advertising Practice and are endorsed and administered by the Advertising Standards Authority. This well established self-regulatory system is recognised by the OFT, the Government and the courts as one of the established means of consumer protection for non-broadcasting marketing. The system applies to all companies whether they take part in the creation of the code or not and is reinforced by the Control of Misleading Advertisement Regulations (1988).

33. As the provisions of the framework incorporate a number of requirements of the Misleading Advertising Directive and still allow for the use of self-regulatory systems, then the cost could be minimal. As the provisions do not create any positive requirements for how a company must trade to show it is not misleading, the costs should be minimal. There is even the possibility of reduced costs or new trade opportunities if there is harmonisation of such provisions across the EU.

34. There is scope for increased compliance costs if the UK’s self-regulatory system requires substantive structural change or if business needs to comply with new rules which cannot be implemented by the code. This is more likely to be the case if the framework directive contained requirements for how codes should work (e.g. stakeholder involvement) or if it required code owners to obtain EU approval or for businesses to join EU codes. Increased costs are also more likely if the framework directive does not allow flexibility, which would hinder the ability of the Codes to adapt to market circumstances and which might even restrict innovations in marketing and advertising.

Question 7: Do you have any comments on the costs and benefits associated with rules on misleading actions?

Question 8: How could costs be minimised and benefits maximised?

Misleading Omissions

35. The Directive prohibits commercial practices which omit or hides material information that the average consumer needs to make an informed decision. The Directive provides core information that must be provided in all circumstance, including the traders name and the main characteristics of the product. Information requirements in specific EU Directives will also be considered material.

36. Businesses currently need to comply with a range of information requirements: many of these are the result of EU Directives. Information usually needs to be provided in advertisements, promotional literature, at any point of sale communication, and in any contract. Any new compliance cost will depend on the extent of the framework directive's additional information requirements and whether business is clear about which information requirements it must comply with. The Framework Directive does make clear that the sectoral directive would take priority. There is the potential for savings if the framework directive were to harmonise and / or replace existing information requirements.

37 The provision of information creates costs in terms of the amount of paper required and the amount of a brochure, contract or advertisement it takes up. Costs would be minimized if certain information were available "on request" and if provisions were made for different forms of media. For example, it is easier to provide more information in brochures but more burdensome to provide the same information in an in-store poster or a radio advertisement.

Question 9: Do you have any comments on the costs and benefits associated with rules on misleading omissions?

Question 10: How could costs be minimised and benefits maximised?

Aggressive commercial practices

38. The Directive contains specific provisions to tackle aggressive commercial practices which, through harassment, coercion and undue influence, significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct.

39. The Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 (as amended), which implemented the Doorstep Selling

Directive³⁷, currently provides protection to consumers faced with salesmen away from a business premises or visiting them at home. However, it has been argued that this Directive does not cover many cases of pressure selling and does not provide sufficient tools to enforcement bodies. The National Association of Citizens Advice Bureau report provides 1,500 evidence reports demonstrating unfair trading practices in the sector.³⁸

40. Direct and doorstep selling is significant sector in the UK and across the EU. In the UK, annual sales of consumer goods and services amount to £1.7 billion, with sales having doubled over the last 10 years. Around 480,000 men and women are engaged in the sector in the UK.³⁹ Direct selling is a useful technique where products benefit from explanation or demonstration, where the product is novel, and where conventional advertising might not be appropriate.

41. To the extent that any framework directive tackled the minority of companies engaging in bad practices, the compliance costs to business should be limited. In fact, there could be a saving to companies adopting high standards in their direct selling if it ensures that all companies act at the same level and drives out rogues. There could also be savings if the framework directive introduces harmonised consumer protection rules, particularly in respect of cooling off periods. Costs could also be minimised if companies are able to use a code of practice to ensure conformity with EU requirements.

42. There is the potential for increased costs if the framework directive sets new prescriptive procedures, sets certain requirements as to how a company should prove that they have not engaged in aggressive selling, or if the cooling off period is increased. There are also issues surrounding how vulnerable consumers are protected – if such consumers are targeted by the framework directive, care will need to be taken to ensure that this does not prevent companies from selling to such consumers or leads to unnecessarily prescriptive requirements for other sectors e.g. e-commerce.

Question 11: Do you have any comments on the assessment of costs and benefits associated with rules on aggressive commercial practices?

Question 12: How could costs be minimised and benefits maximised?

³⁷Council Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises.

³⁸ NACAB Evidence Report “Door to Door: CAB clients’ experience of doorstep selling”, September 2002.

³⁹ Figures provided by the Direct Selling Association.

Estimated Total Compliance Cost

43. It is difficult to estimate total compliance costs at present although business estimates of the potential costs associated with the four fairness categories would be helpful.

Other Costs

Government

44. A move from a sector specific approach to a framework directive has the potential to introduce savings for Government in respect of the time taken to negotiate and transpose EU Directives. However, any savings will be reduced if there is a need to take part in EU discussions on new ‘fairness categories’ or the upkeep of an indicative list of unfair practices.

Enforcement bodies

45. There is a potential benefit for enforcement bodies if new tools are created that enable action against rogue traders and practices. However, any benefits will be reduced if rules are unclear and do not tackle the intended practice.

Business Sectors Affected

46. There is a potential impact on all sectors that are involved in business-to-consumer transactions. However, it is likely that the following sectors are likely to be most affected – retail, distance selling including e-commerce and mail order, doorstep selling, financial services, consumer credit, estate agency, transport, sales promotions, package travel, timeshare, education and training, and the holiday sector. Business sectors that provide services to other business will also be affected, namely the marketing, advertising and publishing sectors.

Question 13: Is this an accurate assessment of the business sectors likely to be affected by the proposals?

F. Consultation

Consultation

47. There have been two rounds of written consultation. The first was conducted on the basis of the Green Paper and the second in response to the Follow-up Communication. Copies of the two documents were circulated widely amongst stakeholders (businesses and

business organisations, consumer bodies and enforcement bodies). 35 formal responses were received by British stakeholders relating to the Green Paper; 21 formal responses have been received in respect of the Follow-up Communication.

48. For both consultations, a meeting was arranged with a representative from the European Commission. Bilateral meetings with individual companies and organisations also took place. As work on the proposal progresses in a Commission chaired Expert Group of officials from national governments, a “shadow expert group” will provide a forum for discussion and information exchange.

Consultation with small businesses

49. All sectors of small business are liable to be affected by the introduction of a framework directive. Stakeholders representing small business have been involved in consultation on the Green Paper and Follow-up.

50. The principal concerns expressed by small business were:

- that the framework Directive may impose an extra layer of unnecessary regulation as opposed to simplifying existing legislation;
- that there is need for more clarity about how a framework Directive would relate to existing directives, both in substance and with regard to the timing of implementation and reform. In particular, that there should not be a period of overlap in which businesses face a duplication of regulation;
- that codes of conduct should not be made legally binding as this would discourage businesses from signing up to codes and would go against the nature of self-regulation.

Particular issues raised by business

51. A number of issues have been expressed by business about the proposals:

- Need for more evidence on the extent of consumer detriment, and attitudes to cross-border trade and the role of consumer protection in these attitudes.
- Concern that the Framework directive should complement market opening and the internal market. In this respect, the issue of legal certainty and effective guidance is key.
- The framework Directive should be framed in terms of “unfairness” and should not be overly prescriptive. In this respect, there has been concern that the inclusion of provisions on after-sales service and complaints handling might create unnecessary burdens.

- Business groups have welcomed the Commission's suggestions that the introduction of any general duty could be accompanied by a simplification of existing directives. However, there is concern that this should take place when the framework Directive is introduced or that a firm commitment is provided of when it will happen.

Consumer and Competition Policy Directorate
Department of Trade and Industry
July 2003

5. LIST OF CONSULTEES

Advertising Association
The Advertising Standards Authority Limited
Age Concern
Agricultural Engineers Association
Airtours PLC
Alliance of Independent Retailers & Businesses
Amazon
Amway
Antiquarian Booksellers' Association
APCO UK
Argos Limited
Aromatherapy Trade Council
Associated News
Association for Payment & Clearing Services
Association of Beekeeping Appliance
Manufacturers
Association of British Insurers
Association of British Introduction Agencies
Association of British Oil Industries
Association of British Travel Agents
Association of Building Hardware Manufacturers
Association of Convenience Stores
Association of Cycle Traders
Association of Electricity Producers
Association of Independent Business
The Association of Licensed Multiple Retailers
Association of Manufacturers of Domestic
Appliances
Association of Master Upholsterers & Soft
Furnishers Limited
Association of Recognised English Language
Services
The Association of Residential Letting Agents
Association of Translation Companies
Association of Unit Trusts & Investment Funds
AT UK PLC
Austin Reed Group PLC
Baby Products Association
Bakers Federation
Barclays PLC
BBC
Beachcroft Wansbroughs
BHS Limited
The Booksellers Association
The Boots Company
Bradstock Group PLC
British Advertising Gift Distributors Association
British American Business
British Association of Leisure Parks & Attractions
British Association of Removers
British Association of Toy Retailers
British Audio Dealers Association
British Bankers Association
The British Beer & Pub Association
British Brands Group
British Casino Association
British Ceramic Confederation
The British Chambers of Commerce
British Consultants Bureau
British Copyright Council
British Cutlery & Silverware Association
British Equestrian Trade Association
British Essential Oils Association
British Footwear Association
British Gas Services
British Gas Trading Limited
British Hardware & Housewares Manufacturers
Association
British Hat Guild
British Horological Federation
British Hospitality Association
The British Institute of Inn Keeping
British Insurance Brokers Association
British Interior Textiles Association
British Jewellery & Giftware Federation
British Leather Confederation
British Luggage & Leather Goods Association
British Marine Equipment Council
British Market Research Association
British Menswear Guild
British Music Rights Limited
The British Phonographic Industry Limited
British Promotional Merchandise Association
British Property Federation
British Retail Consortium
British Shops & Stores Association
British Telecommunications PLC
BT Cellnet
The British Toy & Hobby Association
British Vehicle Rental & Leasing Association
British Wood Preserving & Damp Proofing
Association
Broadcast Advertising Clearance Centre
Building Societies Association
Business & Accounting Software Developers
Association Limited
Business Europe
Business Services Association

Cable & Wireless Global Operations
 Camelot
 Carlton
 Carpet Right
 CBI
 The Centre for the Visually Impaired
 CGU Insurance
 Chartered Institute of Marketing
 The Chartered Institute of Patent Agents
 Chartered Society of Designers
 Chinese Information & Advice Centre
 The Cinema Exhibitors' Association
 Citizens Advice - National Association of Citizens Advice Bureaux
 Clifford Chance
 Cleaning & Hygiene Suppliers Association Limited
 Cleaning & Support Services Association
 Commercial Horticultural Association
 Competition Commission
 Computer Cab PLC
 Computer Software & Services Association
 Computing Suppliers Federation
 Confederation of Passenger Transport UK
 Consumer Credit Association
 Consumer Credit Trade Association
 Consumers Association
 Consumers International
 Co-operative Retail
 Corporation of Finance Brokers Limited
 Corporation of London
 The Cosmetic Toiletry & Perfumery Association Limited
 Council of Mortgage Lenders
 The Council for Registered Gas Installers
 Courts (UK) Limited
 Creative Industries Association
 Credit Card Research Group
 Credit Services Association
 Cutlery & Allied Traders Research Association
 Dairy Industry Federation
 Debenhams PLC
 Dell Products
 Denton Wilde Sapte
 The Digital Content Forum
 Direct Line
 Direct Mail Services Standards Board
 Direct Marketing Association (UK) Limited
 Direct Selling Association
 Dixons Group Limited
 Domestic Appliance Service Association
 Domestic General
 e-centre UK
 Electricity Association
 EMI Music
 English Tourism Council
 The Environmental Industries Commission Limited
 Equifax Limited
 Ericsson Limited
 EURIM - the European Information Society Group
 Europe Analytica
 Eversheds
 Experian Limited
 Faculty of Advocates
 Federation of British Hand Tool Manufacturers
 Federation of Crafts & Commerce
 The Federation of European Direct Marketing
 Federation of Master Builders
 Federation of Multiple DIY Retailers
 Federation of Petroleum Suppliers Limited
 Federation of Small Businesses - Birmingham
 Federation of Small Businesses - Blackpool
 Federation of Small Businesses - Cardiff
 Federation of Small Businesses - Glasgow
 Federation of Small Businesses - Inverness
 Federation of Small Businesses - Lincoln
 Federation of Small Businesses - London
 Federation of Small Businesses - Newcastle Upon Tyne
 Federation of Small Businesses - Newtownabbey
 Federation of Small Businesses - Preston
 Federation of Small Businesses - Sutton Coldfield
 Field Fisher Waterhouse
 Finance & Leasing Association
 Finance Industry Standards Association
 Financial Ombudsman Service Limited
 Fine Art Trade Guild
 First National Bank PLC
 First National Motors Finance
 Food and Drink Association
 Force Internet Limited
 The Forum of Private Businesses
 FTO
 Gardenex: The Federation of Garden & Leisure Manufacturers
 General Consumer Council for Northern Ireland
 The General Council of the Bar
 Granada
 Greeting Card Association
 Guernsey Trading Standards
 Guild of Architectural Ironmongers
 The Guild of British Coach Operators
 Gun Trade Association
 Halfords Limited
 Halifax PLC

Health Food Manufacturers Association
 Help the Aged
 Hire Association Europe
 Home Office
 Honda (UK)
 Horticultural Traders Association
 Hotel, Catering International Management Association
 House Builders Federation
 HSBC Bank PLC
 IBM UK Limited
 Imperial Tobacco Pension Fund
 Incorporated Society of British Advertisers Limited
 Independent Committee for the Supervision of Standards of Telephone Information Services
 Independent Television Commission
 The Independent Food Retailers Confederation
 Independent Footware Retailers Association
 Institute of Consumer Affairs
 Institute of Credit Management
 Institute of Direct Marketing
 Institute of Directors
 Institute of Management
 Institute of Practioners in Advertising
 The Institute of Public Relations
 Institute of Sales Promotions
 Institute of Waste Management
 Intellect
 InterForum
 International Consumer Policy Bureau
 International Swaps & Derivatives Association
 Intext Media
 IPC Media
 ITN
 ITV
 John English Gifts Limited
 John Lewis Partnership
 LAPADA: The Association of Art & Antique Dealers
 Law Centres Federation
 Law Commission
 The Law Society
 The Law Society of Northern Ireland
 The Law Society of Scotland
 Laytons
 Lighting Association
 Lincolnshire Seed Growers Association
 Local Authorities Co-ordinators of Regulatory Services
 London Internet Exchange
 Made in Scotland Limited
 The Mail Order Traders Association
 Market & Opinion Research International
 The Market Research Society
 Marks & Spencer PLC
 McCann Erickson
 Merit (NW) Limited
 MGM Assurance
 Microsoft PLC
 Motor Cycle Industry Association Limited
 Museums Association
 Music Industries Association
 National Association for Pre-Paid Funeral Plans
 National Association of Balloon Artists & Suppliers
 National Association of Bank & Insurance Customers
 The National Association of Estate Agents
 National Association of Tool Dealers
 National Car Parks
 National Caravan Council Limited
 National Carpet Cleaners Association
 National Consumer Council
 The National Consumer Credit Federation
 National Consumers Federation
 National Federation of Consumer Groups
 National Federation of Retail Newsagents
 National Fireplace Association
 National Lottery Commission
 The National Newspapers Mail Order Protection Scheme Limited
 National Packaging Council
 National Pharmaceutical Association
 National Wool Textile Export Corporation
 The Newspaper Society
 Next Retail Limited
 Nottingham & Derbyshire Clothing & Textile Association
 Office for the Regulation of Electricity & Gas
 Office of Fair Trading
 Office of Gas & Electricity Markets - Leeds
 Office of Gas & Electricity Markets - London
 Office of Telecommunications
 Office of the Information Commissioner
 The Ombudsman for Estate Agents
 Oppenheimer Wolff & Donnelly LLP
 Orange PLC
 Organisation for Time Share in Europe
 Osborne Clarke
 Outdoor Advertising Association
 Outdoor Industries Association
 Oxfam Publishing
 Pearl Assurance PLC (MP35)
 Periodical Publishers Association

Pet Care Trust
Petrol Retailers Foundation
Philatelic Traders Society Limited
Philips Electronics UK Limited
Photo Marketing Association International
Pine Manufacturers Association
The Post Office
Poundland PLC
PowerGen
Prince's Trust
PRM
Provident Financial
Provident Personal Credit
Provision Trade Federation
QVC
The Radio Advertising Bureau
The Radio Advertising Clearance Centre
Radio Authority
Radio, Electrical & Television Retailers Association Limited
Readers Digest
The Restaurant Association
Retail Motor Industry Federation
Reuters
The Reward Group
Royal & Sun Alliance Insurance
Royal Faculty of Procurators
Royal Institute of British Architects
Royal National Institute for the Blind
Sainsburys
Scotch Whisky Association
SCBG
Scottish & Southern Energy PLC
Scottish Consumer Council
Scottish Grocers Federation
Scottish Law Commission
Scottish Motor Trade Association

Scottish Software Federation
Scottish Textiles Network
Scuba Industries Trade Association
SITA
Small Business Europe
Small Electrical Appliance Marketing Association
Society of London Theatre
Society of Motor Manufacturers & Traders Limited
Software Industry Federation
Somersetfield
Sports Industries Federation
Strategic Rail Authority
Tesco Home Shopping
Textile Services Association Limited
Thermal Insulation Manufacturers & Suppliers Association
Time Group Limited
Tobacco Manufacturers Association
Toshiba UK Limited
Tower Records
Trade Marks Patents & Designs Federation
Trading Standards Institute
UK Fashion Export
Unilever PLC
Union of Independent Companies
United Kingdom Offshore Operators Association
Virgin.biz.net
VISA International Service Association
Vodafone Airtouch Group Services Limited
Waitrose
Welsh Consumer Council
West Sussex Trading Standards Service
Which? Legal Services
Willans
Wine & Spirit Association of Great Britain & Northern Ireland
Zurich UK

6. THE CONSULTATION CRITERIA

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others) and effectively drawn to the attention of all interested groups and individuals.
5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation
6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and the reasons for decisions finally taken.
7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated. The complete code is available on the Cabinet Office's web site, address <http://www.cabinet-office.gov.uk/servicefirst/index/consultation.htm>.

COMMENTS OR COMPLAINTS

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to Philip Martin, DTI Consultation Co-ordinator, Room 725, 1 Victoria Street, London SW1H 0ET or telephone him on 020 7215 6206 or mail to: Philip.Martin@dti.gsi.gov.uk