

# **CONSULTATION ON AN EC DIRECTIVE ON UNFAIR BUSINESS-TO-CONSUMER COMMERCIAL PRACTICES IN THE INTERNAL MARKET**

## **GOVERNMENT RESPONSE**

In June 2003, the European Commission proposed a Directive on Unfair Commercial Practices.<sup>1</sup> This followed an extensive period of consultation on the future of EU consumer protection that began with a Green Paper issued in October 2001. The UK Government has welcomed this period of consultation and the resulting changes that the Commission has made to its proposals.

The UK Government issued a consultation paper seeking views on the Directive in July 2003<sup>2</sup> and also arranged meetings with stakeholders to discuss the detail. A representative from the European Commission also took part in the main stakeholder meeting held on 6 October 2003. The consultation received 55 written responses from consumer organisations, public enforcement bodies, a wide range of business sectors, (including retail, advertising, estate agency, financial services, travel), academics, legal bodies and firms, and others.

A large majority of respondents welcomed the twin objectives of the Directive to improve consumer protection and tackle internal market barriers. However, many respondents expressed concern about the potential impact on existing UK and EU regulation and the need for the Directive to set proportionate and clear rules. The attached summary of responses outlines the main points made and gives a full list of respondents.

In forthcoming negotiations, the UK Government will seek to ensure that the Directive is workable, provides legal certainty and avoids duplication of regulation. The Government welcomes the scope of the Directive which is targeted on unfair commercial practices affecting the economic interests of consumers, and does not set new rules on contract or competition law, business-to-business relations, health and safety, taste and decency, offensiveness or social responsibility. The Directive should also remain directed at “unfair” practices rather than setting unnecessarily prescriptive rules for “fair” practices.

A prime concern for the negotiations will be to ensure that the Directive improves the UK’s current consumer protection regime and does not

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<sup>1</sup> [http://europa.eu.int/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/directive\\_prop\\_en.pdf](http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/directive_prop_en.pdf)

<sup>2</sup> <http://www.dti.gov.uk/ccp/consultpdf/unfaircon.pdf>

undermine it. The Directive might legitimately require amendment to the existing UK regime and provide an opportunity for simplification and rationalisation but it should not prevent more detailed domestic regulation against unfair practices for specific economic sectors such as financial services where this is necessary. The Government will therefore be seeking amendment to the “maximum harmonisation” approach to ensure the Directive allows member states this flexibility.

Clarifying the relationship with existing EU sectoral legislation is also crucial. The provision in the Directive which gives precedence to specific rules on unfair commercial practices in existing consumer protection and other Directives is welcome but further consideration must be given to how this works in practice, particularly where such Directives have a “minimum clause” which has allowed member states to introduce more detailed rules. The UK Government calls on the Commission to undertake a comprehensive study on the relationship between such rules including whether there is scope for simplification and rationalisation.

The UK Government has supported the Commission’s attempt to tackle barriers to cross-border business-to-consumer trade. This can only be achieved by having the right level of harmonised consumer protection to give consumers the confidence to shop abroad combined with the application of country of establishment and mutual recognition to encourage business to offer products across border. The UK Government therefore supports the internal market article of the Directive and the use of Article 95 of the EC Treaty as a legal base.

The UK Government supports the use of a general prohibition on unfair practices, supplemented by more detailed rules on misleading and aggressive practices and an Annex of practices which will always be considered unfair. The ‘general clause’ will capture a broad range of unfair practices and ensure the Directive remains future proof in respect of innovative techniques, while the specific provisions will provide certainty to business, consumers and enforcement bodies as to those practices that must be considered unfair.

The provision of a black list of practices provides welcome guidance on the operation of the general clause. The Government will seek to ensure that the examples in the Annex are as comprehensive as possible, target genuinely unfair commercial practices and do not have any unintended impact on legitimate selling practices. The Government will continue to seek the views of stakeholders in this respect.

To ensure that the Directive can successfully target unfair practices and provide optimum certainty for business, clear definitions will be key. Of particular importance will be the tests that apply the general clause.

- The “Professional diligence test” must be workable for UK enforcement bodies and be clearly understood by the wide variety of business sectors that will be captured by the Directive. The benchmark of “normal market practice” should not allow the perpetuation of unfair practices simply because these practices have become “normal” in a particular sector, nor should it prevent innovative but fair new practices. The test should also require the standard of skill and care which could be reasonably expected from someone carrying out that trade or profession within the UK market, which for regulated sectors like financial services is likely to equate to compliance with existing regulation and conduct of business rules.
- The “material distortion test” is important because it will ensure that for any practice to be regarded as unfair, it must significantly impair the consumer’s economic behaviour, although the test should only capture practices which cause detriment or harm to the consumers’ economic position.
- The “average consumer benchmark”, which is based on ECJ case law, of a “consumer who is reasonably well informed and reasonably observant and circumspect” should be maintained as a benchmark to ensure proportionality and should be used consistently throughout the Directive. However, the Directive should also do more to protect vulnerable consumers, such as the elderly, disabled, or mentally ill where the trader takes advantage of this. This is likely to be best done through an amendment to the tests for the general clause, although a similar explicit modulation may also be desirable for the specific rules on misleading and aggressive practices.

The UK Government welcomes the Directive’s more limited coverage of codes of conduct. It particularly supports the recognition that member states can use codes of conduct to control unfair commercial practices, which has already proven to be successful in the UK, particularly in controlling misleading advertising. It is right that the Directive should prohibit the misleading use of code membership where non-compliance with a firm and verifiable code provision distorts the behaviour of the

consumer and causes detriment. However, the Government will not support the Directive making non-compliance with any code provision an unfair practice and will seek clarification that this is not the intention of the original draft Directive.

The Article allowing member states to encourage the use of codes to control unfair commercial practices should also remain supplemented by the provision which allows prior recourse to other established means of dealing with complaints, such as a code enforcement body. The Directive should not enable action to be taken against code owners, as it is not appropriate for this Directive to regulate the enforcement of codes, which is properly a matter for national Governments.

The UK Government will consider detailed issues of enforcement and sanctions at the time of transposition when the detail of the Directive is clear. The Government will therefore seek to ensure that the Directive provides member states with flexibility in how they enforce the Directive, although it is right that the Directive should be added to the Annex to the Injunctions Directive and therefore to the enforcement regime in Part 8 of the Enterprise Act 2002. The Government will also seek to ensure that the Directive will not introduce new liabilities for publishers who innocently publish advertisements that breach the Directive.

The UK Government will continue to consult throughout the negotiations on the Directive and to disseminate information about progress. The continued involvement of stakeholders is therefore welcomed.

## SUMMARY OF RESPONSES TO CONSULTATION PAPER

1. The Department issued a consultation paper on a proposal for an EC Directive on unfair business-to-consumer commercial practices in the internal market on 22 July 2003. We received responses from 55 consumer organisations, businesses and trade associations, trading standards departments, regulators, professional institutions and academics. These are listed at Annex A.

### **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?**

2. Consumer organisations and enforcers broadly welcomed the Directive which will act as a safety net to catch unfair practices which slip through gaps in detailed legislation. These respondents were however concerned that the Directive did not adequately cover unfair commercial practices post-sale and that maximum harmonisation might have the effect of reducing existing levels of consumer protection in the UK.

3. Several business respondents said that the impact of the Directive would remain unclear until the interaction between the Directive and existing consumer protection legislation is clarified. Subject to that reservation, most business respondents said that the impact on consumer protection should be minimal because to a large extent the areas covered by the Directive are already subject to specific UK or Community level laws.

4. The Financial Services Authority (FSA) and financial services organisations said that in this area UK consumers already enjoy high levels of protection through FSA authorisation and conduct of business rules. These respondents argued that if the Directive were adopted as a maximum harmonisation measure this could have radical implications for the UK's financial services regime. The FSA said it may prevent it from imposing detailed information requirements and may lead to under-regulation.

5. A self-regulatory body said that maximum harmonisation might also undermine the level of protection afforded to UK consumers under the Advertising Standards Association's (ASA) existing self-regulatory system for non-broadcast advertising, the adjudications of which are subject to Judicial Review. Some respondents also argued that the Directive should do more to facilitate effective self-regulation.

6. Several businesses respondents said that potentially the most important impact of the Directive will be the move towards much greater use of civil procedures through the injunctive route. These respondents said that this is a significant change and that the implications needed to be explored in full not least because it opens up the possibility of private qualified bodies having the capacity to take enforcement action.

7. Enforcers and consumer organisations expressed serious reservations about removing criminal sanctions from the UK's consumer protection regime and replacing them with purely civil measures. These respondents claimed that injunctions cannot

always replicate the deterrent effect of criminal legislation nor do they tackle past misdemeanours.

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

8. Several business respondents said that the key to this question is whether the provisions of the Directive are clear and certain for business and whether the interaction with existing legislation is clarified. Subject to that reservation, most business respondents said they believed the impact of the new regime on business practices will be largely limited because the existing level of consumer protection legislation in the UK is high and legitimate companies strive to operate within the law. However, business respondents said that if the resulting law were not to confer certainty it may have a significant effect on business behaviour and hinder innovation.

9. The FSA and financial services organisations were particularly concerned that the Directive should not conflict with, or undermine, the FiSMA (Financial Services and Markets Act) regime.

10. Consumer organisations and enforcers also said that they did not expect the Directive to have any significant effect on reputable businesses because a duty not to trade unfairly does not impose positive obligations or prescriptive rules which businesses have to comply with. The Office of Fair Trading (OFT) said that this is a proportionate approach to situations which create material consumer detriment while not imposing additional burdens on business to achieve compliance.

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

11. Most business respondents said that the Directive provided a significant opportunity to simplify both the current UK and EU consumer protection regimes and that they would strongly oppose an extra tier of legislation above existing regulation. These respondents said that a failure to rationalise could mean that for some offences, in particular Trade Descriptions Act offences, companies could be put in double jeopardy of criminal prosecutions and proceedings for injunctions.

12. Some of business respondents said that simplification was one of the Commission's original intentions behind the Directive and that it should therefore be brought about as part of an integrated package within the Directive.

13. Consumer organisations and some enforcers said they could see some sense in simplifying the current regime but were concerned that, in an effort to streamline provisions, important consumer protection elements and criminal sanctions may be lost. These respondents said that the overriding principle is that simplification should aim to improve or at least maintain the levels of consumer protection and enforcement provision.

14. The FSA said that while there was scope to simplify the EU's consumer protection regime this should not be done by new horizontal directives overlaying

existing vertical directives and that for financial services, the Commission should take a more uniform approach across the board.

15. The interface between the Directive and sectoral EC rules was also an important issue for non-financial services business respondents. Of particular importance were: (i) the status of minimum clauses in sectoral directives and the extent to which Member States can continue to use these to get around the general clause and (ii) exactly where the sectoral directives cut in and the UCP Directive ends. On the latter one business respondent suggested that the Commission undertake a review of all sectoral directives and how they will interact with the new provisions.

**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?**

16. Almost all respondents supported the twin objectives of the Directive to protect consumers against unfair business practices and to encourage freer consumer and business participation in the internal market. Respondents also broadly welcomed the improvements that had been made to the Directive, in particular the limitation to consumers' economic interests and the negative expression of the Directive. But business respondents in particular continued to have doubts as to whether the Directive, as drafted, would achieve its desired objectives.

17. Several business respondents said they remained sceptical as to the extent to which consumer protection issues are a factor in limiting consumers' desire to shop across borders. These respondents said that other factors such as language, cultural diversity, tax, differences in technical specifications, etc are much more likely to persuade consumers to choose a local supplier over one from another part of the EU.

**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?**

18. All respondents were agreed that clarity of definitions is a key element in ensuring that the Directive is workable in practice. It was noted that this is fundamental in ensuring that the framework of the Directive and the obligations within it are set at a reasonable level and are capable of being applied in national law in a way which makes clear what is expected of business.

**Article 2(b): "average consumer"**

19. See Question 10.

**Article 2(e): "commercial practice"**

20. One business respondent said that it was concerned that the current definition of "commercial practice" could make newspaper publishers liable for the publication of advertisements which breach the Directive or indeed editorial content. This

respondent said the definition should be amended so as to confine liability to the trader whose product is being promoted/supplied.

21. Consumer organizations, enforcers including the FSA and a legal respondent said they doubted whether as currently drafted the definition was capable of applying to certain post-sale commercial practices that are inherently unfair (e.g. use harassment and coercion by lenders in enforcing overdue payments, failure to investigate a complaint).

**Article 2(f): ‘to materially distort the economic behaviour of consumers’**

22. See Question 10.

**Articles 2(g), (h) and (i): ‘code of conduct’, ‘Community level code’ and ‘code owner’**

23. A few respondents drew attention to apparent discrepancies between the definition of “code of conduct” and “Community level code” - for example a “Community level code” requires there to be effective mechanisms for monitoring and compliance whereas a “code of conduct” does not. These respondents said that these asymmetries should be removed. There was also some uncertainty as to whether the definition of “code of conduct” would apply to binding codes of practice such as the British Code of Advertising, Sales Promotion and Direct Marketing (CAP) administered by the ASA, where no trader actually “signs up”. It was therefore suggested that the definition be amended to make it explicit that it covers both voluntary and non-voluntary codes.

**Article 2(j): professional diligence**

24. See Question 9.

**Article 2(k): ‘invitation to purchase’**

25. One business respondent said the definition of ‘invitation to purchase’ was too wide and could in principle apply to any advertisement which quotes a price although there may be no intention of soliciting mail order or other direct response sales. This respondent said such advertisements would be in breach of the Directive if they did not include all the information requirements in article 7, however inappropriate or impracticable. Another business respondent said that the definition should also not apply to communications where the consumer would not be in a position to purchase the product on the basis of the information in that communication alone.

**Article 2(l): ‘undue influence’**

26. Noting that the definition of ‘undue influence’ explicitly excludes the use of physical force, a consumer organisation said that it would be odd if exploitative behaviour escaped the Directive only because it was coupled with physical force.

## **Other**

27. Some respondents said that the Directive should include definitions for the phrases “transactional decision” and “commercial transaction”. For example, a consumer organisation said that it was apparent from the Commission’s explanatory memorandum that a transactional decision is intended to include a decision to exercise rights under a contract but that this was not evident from the text of the Directive.

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

28. Several business respondents said that it was difficult to see how the objective to harmonise national laws will be met. These respondents said that although the Directive sets out a common general clause backed by a more or less common set of rules, there will still be divergences about how the clause and the rules are applied, interpreted and enforced in different Member States. Business respondents said that safeguards should therefore be incorporated into the general clause to increase legal certainty and reduce the scope for variations of application across the EU.

29. Consumer organisations, enforcers and an academic respondent were also concerned that maximum harmonisation might result in a significant weakening in existing levels of consumer protection in the UK, particularly in respect of licensing regimes or prior authorisation requirements which require licensees or authorised persons to comply with mandatory conduct of business rules intended to promote high standards of integrity in that sector. These respondents said that a shift towards maximum harmonisation requires a thorough assessment of substantive consumer policy and this has not taken place. The FSA and financial services businesses said that many UK financial services requirements go beyond what is required in EU directives and could require the FSA rules and guidance to be changed, resulting in increased compliance costs for business and a reduction in consumer protection.

30. The OFT claimed that applying maximum harmonisation to such a wide field is not necessary to achieve the internal market objectives of the Directive. It said that harmonising Member States general clauses will create significant harmonisation and will provide EU wide principles for how business should deal with consumers. Home state control and mutual recognition (see Question 8) will apply to such rules and therefore the internal market objectives of the Directive will still be achieved.

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

31. Respondents generally welcomed the exclusions from the Directive, as set out in Article 3 but made the following observations.

32. Business respondents strongly supported the fact that the Directive is limited to the effect on the consumers' economic interests, rather than extending to matters of taste and decency which they said are much more difficult to judge objectively. However these respondents said they would like to see this exclusion specifically referred to in article 3. A self-regulatory body said that it would be helpful if this article made clear that issues of offensiveness and social responsibility are also outside the scope of the Directive.

33. A business respondent said that given ambiguity with regard to the status of editorial content it would be helpful if the Directive were explicit that communications classified as programme content (eg sponsorship credits or viewer competitions) fall outside its scope.

*Article 3(1)*

34. Although article 3(1) states that the Directive shall apply to unfair commercial practices both before and after a commercial transaction, enforcers and consumer organisations said that it was difficult to see how the provisions of the Directive can apply to post-sale non-transactional decisions due to the wording of articles 6, 7 and 8 which require a transactional decision to be made.

*Article 3(2)*

35. Respondents generally supported the exclusion for contract law but had some doubts about how this would be achieved in practice given that many of the unfair commercial practices which the Directive seeks to tackle are reflected in the validity, formation and effect of the contract. Several respondents said that further clarification on the interaction between the two was needed.

*Article 3(4)*

36. Respondents agreed that it is appropriate that rules regarding the health and safety aspect of products should be excluded from the scope of the Directive. However, a business respondent said that the implications of the word "affect" in respect of this exclusion is unclear. A consumer organisation said that that article 3.4 should be amended to avoid any ambiguity that the Directive does not apply to the mis-selling of expensive equipment for elderly people such as hearing and mobility aids.

*Article 3(5)*

37. Several business respondents said that if there is a potential for conflict between the UCP Directive and sectoral directives, the Commission should amend the latter or prepare a definitive table of the inter-relationship between the two. These respondents said that such a list would be essential for legal certainty.

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

38. Most business respondents strongly supported the application of home state control and mutual recognition. These respondents said this was essential to achieve the single market objectives of the Directive because the general clause will inevitably be subject to a degree of different interpretations: article 4 was therefore vital to provide certainty and consistency for business.

39. There was nevertheless some concern especially from financial services organisations that applying the mutual recognition principle could place UK firms at a competitive disadvantage to traders from other Member States with a lower level of consumer protection. The FSA supported the country of origin approach but recognised that to be acceptable there would need to be a high harmonised level of consumer protection.

40. Consumer organisations, enforcers and legal respondents were generally opposed to mutual recognition because of fears that the general clause was unlikely to be enforced uniformly in all Member States and that this could lower consumer protection in the UK. A consumer organisation and a legal respondent also drew attention to the difficulties consumers would face if they had to deal with systems of law with which they were unfamiliar.

**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?**

41. All respondents argued that “professional diligence” was not a concept currently recognised under UK or EC law and will need to be carefully and clearly defined. Several of these respondents queried whether requirements of normal market practice would be judged at the EU level or nationally given the inclusion of the phrase ‘in the internal market’. These respondents questioned whether this would be workable because marketing practices will differ from one Member State to another. It was suggested that the firm’s jurisdiction should be the relevant test.

42. A number of business respondents, especially those representing the advertising industry, were concerned that the definition of professional diligence should not inhibit the development of new and innovative commercial practices which may not be viewed as being “normal market practice”.

43. Most business respondents said that the reference to “special skill and care” set an unreasonably high standard.

44. Consumer organisations and enforcers were particularly concerned that the existing definition would not enable enforcers and the courts to imply an objective standard for market sectors where either no or sub-standard rules exist. The OFT argued that the use of the word “commensurate” in the definition of professional diligence did not insert the necessary objectivity into the test. These respondents said that the professional diligence test should be equivalent to what a reasonable consumer would expect in the circumstances.

45. The FSA said that the definition of “professional diligence” should differentiate between economic areas that are already subject to conduct of business

rules and those that are not. For regulated sectors, the applicable rules should define professional diligence in the area which they cover. Financial services organisations supported this view.

46. Business respondents were generally opposed to any suggestion that voluntary codes of practice should provide the reference point as to what constitutes professional diligence. This is because codes often seek to raise standards in a particular sector and should not therefore be used to determine the normal standards for that sector. However there was support that adherence to a high quality consumer code should be taken into account when assessing compliance with the professional diligence test.

**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?**

47. Business respondents generally welcomed the fact that a causal link must be established between the commercial practice and the transactional decision by the consumer. These respondents said that it was helpful that the distortion must be established to be “material” and that the consumers’ ability to make their decisions must be “significantly” impaired.

48. However, there was widespread concern from most respondents that reliance on ‘impairment’ rather than ‘unfairness’ does not necessarily distinguish between fair marketing practices which are intended to cause the consumer to act in a way he would not otherwise have done and those marketing practices which are genuinely “unfair” and seek to use misleading and oppressive techniques. Serious doubts were expressed that the professional diligence test would fill this gap. The OFT said that it would therefore prefer to see this test framed in terms of unfairness or a notion of harm.

49. Business respondents said that it must also be made clear that the definition of material distortion includes consumer detriment and also that the practice which is being challenged affects the collective interests of consumers (in line with the Injunctions Directive).

50. Business respondents said that it should also be clarified that the material distortion test applies not only to the professional diligence test in Article 5.2 but also to the two specific categories of unfair (misleading and aggressive) practices in Article 5.3 and that the definition of “to materially distort the economic behaviour of consumers” in Article 2(f) should refer to the economic behaviour of the average consumer.

51. Consumers’ organisations and enforcers were concerned that the material distortion test cannot objectively be applied to any post-sale commercial practice where no transactional decisions are affected.

**“average consumer”**

52. Business respondents welcomed the use of the ECJ definition of “average consumer” and some proposed the addition of a clause similar to that operating in the US to reflect a greater balance of responsibility on the part of consumers. However there was some concern about how this would be defined - for a particular market (eg insurance) or different products within this market (eg home insurance, travel insurance) – and that Member States will have different views as to how informed, observant and circumspect an “average consumer” should be leading to divergent interpretations. A number of businesses respondents drew attention to inconsistencies about the use of the term “consumer” and “average consumer” in the text.

53. The “average consumer” test is modulated by article 5(2) so that where a commercial practice is targeted at a particular group of consumers the reference point will be the average member of that group. Business respondents said they could agree to this modulation but said the definition of special groups of consumers should be more tightly drafted to make it clear that the group must have economic characteristics and be capable of being judged objectively as a group rather than being just a random collection of individuals.

54. Non-business respondents said it was important that the Directive should safeguard the interests of vulnerable consumers such as children, the elderly or the mentally ill who were often the targets of rogue practices and who therefore suffer more severe detriment. The same respondents said that the modulation in article 5(2) does not necessarily assist because a product or selling practice might not be specifically directed at vulnerable consumers but to all. Furthermore it may not always be easy to apply the average standard to a particular group – eg what is the average old person like.

55. Non-business respondents made a number of suggestions on how to protect vulnerable consumers. For example, a consumer organisation suggested that where a trader has knowledge or can reasonably be expected to know of the consumer’s particular characteristics or vulnerability, and abuses this knowledge, then this should be regarded as unfair. An academic respondent suggested that conduct is unfair if it distorts the economic behaviour of (i) the average consumer or (ii) a less than average consumer in a way which was foreseeable and not justifiable. A legal respondent suggested that the test should be whether the practice is likely to cause the consumer *to whom it is addressed* to take a transactional decision which he would not otherwise have taken because he is deceived.

**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?**

56. Respondents agreed that misleading practices, whether through actions or omissions, should fall within the category of unfair commercial practices. Most respondents also welcomed the detailed rules in the Directive which they said would contribute to providing legal certainty.

57. Business respondents said they welcomed the concept of deception in Article 6.1, but that it should also be necessary to show that consumers have suffered detriment. Two business respondents said that the reference to a practice being

“likely” to cause the consumer to take a transactional decision that he would not have taken otherwise should be deleted from articles 5, 6, 7 and 8 because it is open to interpretation and could cause legal uncertainty for the advertising and marketing industries.

58. Consumer organisations and enforcers were concerned that unlike article 5, articles 6, 7 and 8 do not provide for a modulation of the “average consumer” test where a misleading or aggressive commercial practice is directed at particular groups of consumers.

59. On the list of factors in article 7(3) in relation to which a commercial practice may be misleading, several respondents identified certain factors which they considered needed to be added, amended, or which should be worded more clearly.

60. A majority of business respondents expressed strong reservation about Article 6(2)(b) which will allow action to be taken in respect of breaches of firm and verifiable commitments in industry voluntary codes of practice which affect the transactional decision of the consumer. These respondents argued that such codes are voluntary and should not become part of the regulatory regime. They also argued that to cover codes in this way could actually act as a disincentive to code sponsors in developing codes to raise standards beyond legal requirements and also to companies to sign up to codes.

61. Business respondents suggested that Article 6(2)(b) could be amended to make it clear that breach of a firm commitment within a code would normally be dealt with by the code sponsor and would only be a matter for an enforcement authority as a last resort where there is an established pattern of breaches or where the authority was specifically requested by the code sponsor to intervene. The same respondents said they would also like to see clarification that a firm commitment by a business to a code as a whole would not convert every soft commitment within that code into a firm commitment.

62. The OFT said it interpreted article 6(2)(b) as reflecting current EU and UK law, namely that a representation to a consumer that a business subscribes to a code of conduct which is subsequently ignored amounts to misleading advertising. The OFT said that in applying article 6(2)(b) it would, in all but exceptional circumstances, have regard to the code sponsor as the most appropriate body to resolve infringements. The exception would be where a breach of a code commitment poses a serious and tangible risk to consumers.

63. Consumer organisations generally welcomed the inclusion of article 6(2)(b), but one such organisation said the requirement that a code commitment is firm and verifiable should be deleted because it might encourage code owners to draft their codes in a vague fashion which would conflict with the intention that codes should raise business standards.

**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?**

64. A large majority of all respondents broadly supported this proposal with some business respondents arguing that such information was likely already to be provided. However, there was general concern among business respondents that Article 7.3 does not make clear whether the information is intended to be included in the communication or be available on request. These respondents suggested that where there are physical limitations of space or transmission time, it should be satisfactory if the information is made available on request.

65. One business respondent while welcoming the requirement that the information only has to be provided if it not already apparent from the context, said that Article 7 should be more explicit in allowing a trader to assume a certain amount of knowledge on the part of the average consumer.

66. Some concern was expressed by business respondents on the implications the provision might have for disclosure requirements in relation to UK contract law, especially where, eg property sales, the rules of *caveat emptor* apply.

67. The FSA expressed concern about the implications of maximum harmonisation which would imply that FSA information requirements that go beyond what are set out in article 7 would be deemed to be super-equivalent and therefore would have to be removed. The FSA said that this would require the removal of many of the FSA's pre-contract information requirements especially in relation to riskier products where there is not adequate harmonisation at EC level.

68. Several consumer organisations and enforcers said that to enable consumers to seek redress should things go wrong Article 7(3) should include a requirement for the legal name and a geographical address of the trader to be identified mirroring certain requirements under the Business Names Act 1986 and the Companies Act 1985. It would also establish the home state if home state rules are adopted under Article 4.

**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?**

69. All respondents supported in principle the provisions on “aggressive commercial practices”. Enforcers said this provision could make a real improvement to the consumer protection regime in the UK given the existing limitations in the ability of enforcers to tackle abuses in selling methods - eg high pressure selling techniques. However some non-business respondents were concerned that that the “average consumer” test would fundamentally weaken the provision, not least because it is often the most vulnerable who are subject to aggressive commercial practices.

70. Business respondents suggested that the tests set out in Article 9 (c) and (d) should also relate to “the average consumer” rather than to “the consumer” and argued that as currently drafted the text raises the possibility that actions could be brought by individual consumers.

71. On the specifics, business respondents' main concern was that Article 9 (c) was potentially too wide-ranging in referring to the taking into account of “the use by

the trader of a specific misfortune of such gravity as to impair the consumers' judgement" and could prevent, for example, marketing material in relation to funerals.

72. There was also some business concern about article 9(a), in relation to lenders or their agents pursuing defaulting debtors, especially the small number of consumers who use all means to evade their responsibility. One business respondent said it would be helpful to have clear definitions of the circumstances where there would be a presumption of "undue influence" and what would be considered "harassment".

73. However, several non-business respondents, including the FSA, said that their major concern was that articles 8 and 9 did not effectively capture post-sale practices, such as debt collection or handling of complaints, given the requirement for a "transactional decision" to be taken.

74. A consumer organisation said that article 9(e) should be extended to include not only any threat to take action that cannot be taken but also the consequences of such action. It said this would deal with threats from creditors who claim that non-payment will lead to consequences which do not actually follow, such as the consumer having to pay the creditor's legal costs where this is not in fact true.

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

75. Respondents broadly welcomed this Article which acknowledges the valuable role that effective self-regulation can play in combating unfair commercial practices. Taken in conjunction with Article 11 it will allow the UK to retain the current approach to the regulation of advertising, which is predominantly via the Advertising Standards Authority.

76. Most businesses respondents were concerned that the provisions in Article 6(2)(b) would have the effect of rendering supposedly voluntary codes legally binding and would therefore undermine the attributes that make such codes more attractive to business than statutory regulations (see Question 11).

77. A consumer organisation and an enforcer did not agree that Member States should be allowed to require that before legal action can be taken to stop an unfair commercial practice, use must be made of other established means of dealing with complaints including use of codes of conduct. These respondents said that the choice should be open to the person/organisation pursuing the enforcement action.

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

78. Respondents generally regarded the enforcement provisions in Article 11 as reasonable in that they give Member States the flexibility to decide what facilities should be available to enforce the provisions of the Directive at a national level. Several business respondents said that existing mechanisms should be used wherever possible – for instance that existing bodies such as the FSA and ASA should continue to regulate those activities within their jurisdictions and that wider powers should not be given to cross-sectoral regulators which would overlap with these.

79. However two specific aspects of this Article caused concern to business respondents. First, the final paragraph of Article 11.1 provides for enforcement action to be taken against a code owner. Business respondents said it would be neither appropriate nor equitable for a code owner to be held responsible for an unfair commercial practice committed by a company that was a signatory to its code. These respondents argued that this would impact negatively on the relationship between the code owner and the member. A legal respondent said it was not clear whether code owners are capable of behaving unlawfully under the Directive and it is therefore difficult to see how this would be enforced.

80. Second, business respondents were concerned that Article 11.2 allows action to be taken where a certain practice is imminent without proof of actual loss or damage, or intention or negligence on the part of the trader. These respondents argued that there needs to be an indication of the standard of evidence which would be required.

81. The FSA said it would be concerned if Article 11(2) were intended to operate on a maximum harmonisation basis because this would appear to prevent it from operating a wide range of FiSMA powers (including criminal powers and powers to seek or make freezing, remedial or restitution orders).

82. Consumer organisations and enforcers welcomed the use of injunctive relief to stop unfair commercial practices but said they would not like to lose the criminal sanctions in many pieces of UK legislation in transposition of the Directive.

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

83. A majority of all respondents said it is reasonable, where requested to do so in court or administrative proceedings, that traders should be required to substantiate factual claims in relation to a commercial practice. This is in line with the current provisions of the Misleading Advertising Directive. A self-regulatory body said that an advertiser's ability to substantiate claims made for their goods or services is also a key aspect of the ASA's investigatory process. Failure to produce is in itself a Code breach.

84. Business respondents said that it was important that this provision should be restricted to factual claims made by the trader himself, and not to claims made by others, for instance a retailer should not be required to substantiate claims made by manufacturers.

85. A self-regulatory body said that the powers to reverse the burden of proof should be explicitly granted to backstop enforcers as well as the courts. However, a business respondent said that it would have significant concerns if this system was to be put in place in such a way that it required businesses to produce evidence on the basis of simple requests where no suggestion of an unfair commercial activity had been shown.

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

86. Respondents agreed that penalties must be effective and constitute a deterrent, but they should also be proportionate. However, concern was expressed that varying national interpretations will result in enforcement regimes which are widely divergent. To encourage consistency, a consumer organisation proposed that Member States should be obliged to notify the Commission about their provisions under this obligation.

87. There was some confusion as to whether this article would provide for the use of criminal sanctions. Most business respondents argued that the appropriate enforcement route for this Directive was through injunctions and that the only penalties should therefore be those (a fine or imprisonment) associated with contempt of court for infringing an injunction.

88. An enforcer argued that Member States should have the ability to include criminal sanctions for breaches of the Directive in addition to the ability to take injunctive action. The OFT, while agreeing that the injunctions are the most appropriate route in most cases, also said it considered that civil remedies are not proportionate in all cases and criminal sanctions could have stronger impact on businesses that wilfully fails to comply with its obligations.

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

89. Respondents had no substantive comments to make on this Article and most argued that the overall effect would not be significant.

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

90. Article 15 of the Directive will remove the prohibition in Article 9 of the Distance Selling Directive on the supply of goods or services without being ordered where this involves a demand for payment (“inertia selling”). Respondents broadly said that this was acceptable as the practice of inertia selling will be included in Annex 1 of the UCP Directive.

91. Several respondents noted that the practical effect of adding inertia selling to the Annex of the UCP Directive will be that it may no longer be a criminal offence to demand payment for unsolicited goods and services, as the means of enforcement will be by civil actions for injunctions. The OFT said that it was not aware that the current criminal sanction has been applied and consequently had no objection to this amendment. One business respondent also argued that the entry in Annex 1 would have the effect of extending the law beyond practices which are carried out at a distance.

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

92. Respondents were broadly supportive of bringing the Directive within the Injunctions Directive. There was however some concern from business respondents

to giving enforcement powers to private consumer organisations bearing in mind the scope for interpretation of the general clause.

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

93. The few respondents who replied to this question were broadly supportive of the measures to inform consumers particularly for cross-border sales where knowledge about rights and redress is a particular barrier to shopping.

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

94. Consumer organisations said that they would welcome implementation of the Directive into UK law as soon as possible and would therefore oppose any proposal to extend the 18 months allowed for transposition.

95. Enforcers and business respondents said that transposition of the Directive is likely to be complex and that there should be a minimum of at least two years (preferably longer) to allow for proper consideration, consultation and transposition.

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

96. Most respondents broadly supported the inclusion of Annex 1 which provides a non-exhaustive list of misleading and aggressive commercial practices which will always be regarded as unfair. These respondents said that a binding “black list” of prohibited practices promotes certainty and consistency because enforcers are likely to refer to the Annex as the starting point for considering whether a commercial practice is unfair. For this reason, and the fact that the Annex will be difficult to amend once the Directive has been agreed, consumer organisations and enforcers argued that the list needs to be as comprehensive as possible.

97. Business respondents were concerned that a few of the provisions were too broad or insufficiently defined and could capture certain reasonable activities. For example, it was questioned whether normal debt enforcement procedures (which, almost by definition may be “persistent” and “unwanted”) fall into the category of “persistent and unwanted solicitations by telephone, fax, e-mail or other remote media”.

98. A few business respondents also questioned whether Member States would be able to add to that list when transposing the Annex. These respondents argued that to confer certainty, the list should be genuinely definitive and amendment of the Annex should be according to the co-decision procedure to ensure common application.

99. The OFT said that as new unfair commercial practices emerge, it is vital that the non-exhaustive blacklist is capable of being updated in an efficient and timely

manner through a simple and transparent mechanism and not only by amendment of the Directive. Two consumer organisations also said that the Commission should consider making an amendment that will provide for a more dynamic means of keeping the list up to date in the light of enforcement experience, subject to appropriate involvement of the Parliament and Council.

100. As an alternative an enforcer and a consumer organisation said that Member States should be able to add to the list of banned unfair practices in Annex 1, with the approval of the Commission. As referred to above, business respondents were opposed to this because it would conflict with maximum harmonisation.

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

101. Business respondents identified a number of examples in the Annex which caused them problems, the most significant of which are:

- Unlike the Annex to the Directive on Unfair Terms in Consumer Contracts, Annex 1 to the UCP Directive does not adequately deal with financial services products where prices fluctuate according to variations in interests rates or exchange rates which are outside the seller's control. There was also concern that point 3 of the misleading commercial practices list may unintentionally prohibit the legitimate practice of risk-based pricing for credit because of the very widely written description of "bait advertising". Risk based pricing enables credit suppliers to tailor interests rates and credit limits more accurately to individual customers that reflect their individual circumstances.
- Point 9 of the misleading practices list which an insurance respondent said may make it more difficult for insurers to use statistics such as mortality figures in advertisements to illustrate the benefits of their products.
- On point 11 of the misleading commercial practices list it was suggested that it was strange to single out information requirements from one particular Community instrument, and that this could provide for double jeopardy. Failure to provide the required information should either be dealt with in the Sales Promotion Regulation or should be a matter for misleading omissions in the UCP Directive.
- Point 4 of the aggressive practices list on targeting consumers who have recently suffered a bereavement or serious illness in their family caused major concern for many businesses who said it would seriously inhibit the ability of businesses to offer specific services to the bereaved. One business respondent suggested that it would be helpful if this example could be amended by the insertion of the word "aggressively" at the beginning of the paragraph.
- Point 5 of the aggressive practices list was unacceptable from the insurance industry's point of view because the term 'could not reasonably considered relevant' appears unduly restrictive. These respondents said that if this example is not deleted it needs to be redrafted to make clear that insurers

should be allowed to require documents or other information that is relevant in the proof of a claim.

- Point 6 of the aggressive practices list provides an outright ban on advertising to children in a way which might increase peer pressure or pester power. Such practices and others are already covered by the International Chamber of Commerce (ICC) codes of practice on which national codes based. Its inclusion in self-regulatory codes is standard and has the active support of all responsible advertisers. It was therefore considered illogical to pick out this one specific issue for inclusion in the Annex. Also, including features of self regulation in legislation removes flexibility and undermines self-regulation

## **Other issues raised**

### **Legal base**

102. Two consumer organisations said that it was important that the consumer protection objective should be reflected in the legal base of the Directive, which should be based jointly on articles 95 and 153 of the EC Treaty.

### **Extension to unfair business-to-business commercial practices**

103. A significant number of business respondents said that their replies to the consultation paper, including their qualified support for the Directive, was based on the clear understanding that it would be restricted to unfair business-to-consumer commercial practices. These respondents said that they would be strongly opposed to any suggestion that business-to-business commercial behaviour should be covered by the Directive, which they argued were are totally different from those relating to business-to-consumer transactions.

### **Redress for individual consumers**

104. Consumer organisations and enforcers expressed disappointment that consumer redress is not dealt with under this Directive. These respondents said that it was important that consumers should be able seek redress if they suffer economic detriment as a result of an unfair commercial practice and the Directive should leave open the scope for redress to be included in the UK's implementing regulations. An academic respondent said this might include a right to rescind a contract which was entered into as a result of an unfair commercial practice. Business respondents were strongly opposed saying the Directive should be confined to unfair commercial practices which affect the collective interests of consumers.

## LIST OF RESPONDANTS

1	Advertising Association
2	Advertising Standards Authority
3	Amway (UK) Limited
4	Association of British Insurers
5	Association of Payment Clearing Services
6	Association of Personal Injury Lawyers
7	Association of Private Client Investment Managers and Stockbrokers
8	Boots Group Plc
9	British Bankers' Association
10	British Brands Group
11	British Retail Consortium
12	Building Societies Association
13	Cinema Exhibitors Association
14	Citizens Advice
15	Confederation of British Industry
16	Consumer Credit Association
17	Consumers' Association
18	Council of Mortgage Lenders
19	Direct Line
20	Direct Marketing Association
21	Direct Selling Association
22	European Sponsorship Consultants Association
23	Faculty of Advocates
24	Federation of Tour Operators
25	Finance and Leasing Association
26	Financial Services Authority
27	Financial Services Consumer Panel
28	Geraint Howells, University of Sheffield
29	HBOS
30	Independent Television Commission
31	Information Commissioner
32	Institute of Directors
33	International Communications Round Table
34	ITV Network Ltd
35	Investment Management Association
36	ISBA
37	Local Authorities Coordination Group on Regulatory Services
38	Law Reform Committee of the General Council of the Bar
39	Law Society
40	London Investment Banking Association
41	Martineau Johnson
42	National Association of Estate Agents
43	National Consumer Council

44	National Consumer Federation
45	Nationwide
46	Newspaper Society
47	Office of Fair Trading
48	Radio Authority
49	Scottish Advisory Committee on Telecommunications
50	Strategic Rail Authority
51	Tesco Stores Ltd
52	Timeshare Consumers Association
53	Trading Standards Institute
54	Vodafone
55	Zurich

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