

**dti**

**THE UNFAIR COMMERCIAL PRACTICES  
(UCP) DIRECTIVE**

Executive Summary of the Consultation on  
implementing the EU Directive on Unfair  
Commercial Practices and Amending Existing  
Consumer Legislation

December 2005

URN 05/1908

**dti**

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

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

The Unfair Commercial Practices (UCP) Directive (2005/29/EC) will introduce, for the first time into UK law, a general duty on all businesses not to trade unfairly with consumers. In particular, it will oblige businesses not to mislead consumers through acts or omissions; or subject them to aggressive commercial practices such as high pressure selling techniques. The Directive also provides additional protections for vulnerable consumers. Some of these protections broadly replicate existing legislation, but others are new.

The Directive must be transposed into UK law by 12 June 2007. Those laws must come into force six months later, on 12 December 2007.

The consultation seeks the views of consumer bodies, academics, businesses and enforcement authorities on policy issues relating to the transposition of the Directive and the accompanying draft Regulatory Impact Assessment (RIA). The Directive will affect **all** businesses which supply or market goods and services to consumers. Your responses will help us determine the best approach to drafting the transposing legislation and accompanying Guidance. We will hold a second consultation in Autumn 2006 on the draft implementing legislation. **The consultation does not seek views on the Directive itself but on our proposed implementation of it.**

A significant feature of the Directive is that it sets out rules on business-to-consumer commercial practices which all Member States must apply and does not allow them to apply stricter provisions in the area in which the Directive applies, subject to certain important exemptions. This is known as “maximum harmonisation”. The Directive’s broad scope means that it inevitably overlaps with existing UK legislation, such as the Trade Descriptions Act 1968 and Part III of the Consumer Protection Act 1987 (misleading price indications). These, and other overlapping legislation, will have to be amended to conform with the principles contained in the Directive, or could be repealed. The Government’s stated objective will be to simplify the UK consumer framework wherever it is appropriate and sensible to do so. The consultation consequently seeks views on the benefits and disadvantages of repealing or amending 28 pieces of specific legislation that might be affected by the Directive.

**Issue** 14 December 2005

**Respond by** 8 March 2006

**Enquiries to**

Peter Deft

Department of Trade and Industry

CCP, 1 Victoria Street

London SW1H 0ET

Tel: 020 7215 0341; Fax: 020 7215 2837; E-mail:

[peter.deft@dti.gsi.gov.uk](mailto:peter.deft@dti.gsi.gov.uk)

## Introduction

This is an Executive Summary of the DTI's formal consultation paper on implementing the EU Directive on Unfair Commercial Practices and amending existing Consumer legislation.

The full version is available at:

<http://www.dti.gov.uk/ccp/consultpdf/ucpukcondoc.pdf>

The partial Regulatory Impact Assessment is available at:

<http://www.dti.gov.uk/ccp/consultpdf/ucpukria.pdf>

Unfair commercial practices harm all of us. Whether through misleading pricing, the selling of clocked second-hand cars, prize scams, or through high-pressure selling techniques, most consumers will have had first-hand experience of unscrupulous and sharp marketing practices. Tackling these deceptive and dishonest practices is key to reducing consumer detriment. It is also good for honest businesses that lose out if the activities of their unscrupulous competitors are left unchallenged. This is why the Government has committed itself to raising our consumer regime to the level of the best in the world.

But while we need to protect consumers, we must not lose sight of the need to do so within a competitive and fair trading framework. Most businesses are honest and wish to treat their consumers fairly. For these businesses, Government's role is to set the appropriate legal framework, ensure appropriate compliance with the law, and ensure that it does not introduce additional and unnecessary burdens. Only in this way can honest businesses prosper and grow.

For these reasons the Government strongly supports the Unfair Commercial Practices (UCP) Directive (2005/29/EC). The Directive was agreed in June 2005, and **the full consultation paper does not seek views on the Directive itself but on the Government's proposed implementation of it.** The full consultation closes on 8 March 2006.

### What does the Directive do?

The Unfair Commercial Practices (UCP) Directive will have two major consequences:

1. it will harmonise unfair trading laws in all EU Member States;
2. it will introduce a general prohibition on traders not to treat consumers unfairly. This prohibition is intended to act as safety-net consumer protection legislation.

Harmonisation is achieved by making the same rules apply throughout the European Union without allowing individual Member States to exceed the protections contained in the Directive. This is called maximum harmonisation.

Laws that fall within the Directive's scope will need to comply with its principles, and may be amended or repealed.

The general prohibition places a duty on all businesses not to trade unfairly with consumers. In particular, it will oblige businesses not to mislead consumers through acts or omissions; or subject them to aggressive commercial practices such as high pressure selling techniques. The Directive also provides additional protections for vulnerable consumers. Some of these protections broadly replicate existing legislation, but others are new.

Generally, the Directive's adoption will not add significant new burdens on businesses. The Directive is framed as a general duty *not* to trade unfairly. It does not contain positive obligations that businesses would need to demonstrate to prove that they are trading fairly.

The full consultation paper seeks views on the policy options for implementing the Directive. The Directive must be transposed into UK law by 12 June 2007. These laws will come into force in December 2007.

### **Structure**

The Directive sets out rules that determine when commercial practices are unfair. These rules fall into three distinct parts:

- the general prohibition;
- specific categories of misleading actions and omissions, and aggressive commercial practices; and
- an Annex of 31 practices which are always unfair.

### **Scope**

The Directive applies across all business sectors. It requires businesses not to behave unfairly towards consumers before, during and after a commercial transaction.

The Directive's wide scope and deliberately flexible provisions means that it will plug gaps in existing EU and UK consumer protection legislation; and set standards against which new practices will automatically be judged. Experience from other countries shows that a general duty can strengthen consumer protection. Its adoption in the UK will provide enforcers with a more comprehensive new tool for tackling rogue practices.

### **Maximum Harmonisation**

The Directive will apply "maximum harmonisation" to all Member States' laws on business-to-consumer commercial practices, subject to certain important exemptions. This means that all EU countries, including the UK, will not be allowed to deviate from the standard of protection in the Directive apart from where this is specifically provided for. This is to ensure that the consumer protection laws in all Member States achieve the necessary harmonisation to

allow for easier cross-border trade, thereby increasing choice and competition for consumers.

The practical consequence of maximum harmonisation is that the implementing regulations will need to replicate, with very limited scope for departure, the tests of unfairness in the Directive. In addition, the laws which come within the scope of the Directive and its maximum harmonisation requirements will have to be amended to conform with its principles. This includes core consumer protection measures, such as the Trade Descriptions Act 1968 and Part III of the Consumer Protection Act 1987 (misleading price indications). Transposition of the Directive consequently provides an opportunity to consider the merits of further simplification and rationalisation of these laws.

### **Implementation Issues**

The Government has a number of issues for consideration in the following areas:

- Interpretation
- Enforcement
- Simplification of existing legislation

### **Interpretation Issues**

During negotiations, some stakeholders expressed concern that certain terms and definitions (such as the “transactional decision” test; and the relationship between the “average consumer” and “vulnerable consumer” benchmarks) are ambiguous and open to different interpretations. This consultation paper sets out the Government’s understanding of the meaning of these provisions, and discusses the scope for clarifying these either in the implementing legislation or in Guidance. However, the Directive’s maximum harmonisation requirements mean that the Government will have very limited ability to provide further clarity in the implementing legislation. These issues are discussed in Chapters 1-6 of the full consultation paper.

### **Enforcement Issues**

An effective enforcement regime for the Directive is essential to secure compliance and deter traders from breaking the law. The Directive requires us to enable those persons or organisations regarded under national law as having “a legitimate interest in combating unfair commercial practices” to apply to the courts or competent administrative authority for orders stopping or preventing unfair commercial practices. The Directive is also added to the Annex of the Injunctions Directive (98/27/EC), meaning that it will automatically form part of the injunctive regime established by Part 8 of the Enterprise Act 2002. The full consultation therefore seeks views on whether the Regulations implementing the Directive should contain a separate injunctive regime in addition to adding it to Part 8 of the Enterprise Act.

Although the Directive is required to be underpinned by a civil law sanctions regime it does not prevent Member States from retaining or introducing criminal offences. At the time of writing, the Government is not minded to repeal existing criminal offences. However, the consultation paper seeks views on whether a breach of some of the new provisions of the Directive (notably aggressive practices and the 31 practices listed in its Annex) should also be made a criminal offence.

The Directive only provides for an enforcement regime targeted at preventing unfair consumer practices and is silent on private law rights. The full consultation consequently considers whether consumers should be given a private law right to seek redress for economic harm suffered due to an unfair commercial practice.

These issues are discussed in Chapters 7-10 of the full consultation paper.

### **Simplification of Existing Legislation**

There are a number of options for dealing with the existing laws that overlap with the Directive. It would be possible for the UK to fulfil its legal obligations by introducing the minimum changes necessary to comply with the tests and principles in the Directive. However, the Government has previously noted that the current consumer protection framework is fragmented and lacks coherence<sup>1</sup>. The Government's stated objective will be to take the opportunity of transposition to simplify the UK consumer framework by repealing overlapping legislation wherever it is appropriate and sensible to do so. Simplification would reduce burdens on business without reducing the protection provided to consumers. A possible disadvantage is that business and enforcers could incur much greater adaptation costs in familiarising themselves with a new consumer protection framework. These options are outlined in Chapter 11 of the full consultation paper.

Chapter 12 of the full consultation paper outlines the legislation and provisions that may be affected:

- Accommodation Agencies Act 1953, section 1(1)
- Administration of Justice Act 1970, section 40
- Business Advertisements Order 1977
- Charities Act 1992, sections 60(3), 60(4), 60(5), and 61
- Charitable Institutions (Fund-Raising) Regulations 1994 – regulation 7
- Consumer Credit Act 1974
- Consumer Credit (Advertisements) Regulations 2004
- Consumer Protection Act 1987 – Part III
- The Consumer Protection (Code of Practice for Traders on Price Indications) Approval Order 2005
- Consumer Transactions (Restrictions on Statements) Order 1976
- Food Safety Act 1990, section 14
- Fraudulent Mediums Act 1951

---

<sup>1</sup> *A Fair Deal for All: Empowered Consumers, Successful Business*, DTI June 2005, p. 16

- Kent County Council Act, section 13
- Medway Council Act, section 13
- Mock Auctions Act 1961
- North Yorkshire County Council Act, sections 6(6) and 6(7)
- Nottingham City Council Act 2003, section 12
- Price Indications (Method of Payment) Regulations 1991
- Price Indications (Resale of Tickets) Regulations 1994
- Price Marking (Food and Drinks Services) Order 2004
- Timeshare Act 1992
- Timeshare (Cancellation Information) Order 2003
- Tourism (Sleeping Accommodation Price Display) Order 1977
- Trade Descriptions Act 1968
- Trade Descriptions (Sealskin Goods) (Information) Order 1980
- Trading Representations (Disabled Persons) Act 1958
- Trading Schemes Regulations 1997
- Weights and Measures Act 1985, sections 29-31

## **RIA**

The Government is also seeking views on its draft RIA. This is published separately. Questions on which views are sought have been included in this consultation document.

## **Next Steps**

The Government will draft implementing regulations taking account of the responses to this consultation. We aim to consult on these, and on draft Guidance we expect to prepare in conjunction with the Office of Fair Trading, during the second half of 2006.

## **Devolution**

Consumer protection is a reserved matter in relation to Scotland and Wales. However, responsibility for certain legislation affected by the Directive is devolved. Consumer protection (other than safety in relation to goods) is a transferred matter in relation to Northern Ireland and would normally be the responsibility of Northern Ireland Executive Ministers. Whilst the Northern Ireland Assembly and Executive are suspended, these functions are discharged by Northern Ireland Departments subject to the direction and control of the Secretary of State for Northern Ireland. The relevant Northern Ireland Departments have agreed in principle that amendments to existing Northern Ireland legislation to implement the Directive should be taken forward within UK-wide implementing measures.

## **Consultation Questions**

These questions are included in the full consultation document.

### **Chapter 1 – Aim & Definitions**

1. Do you have any comments on the Government’s analysis on the definitions in Article 2?
2. Are there any other issues you would like to see covered in the Guidance accompanying the Directive? The Government would welcome views in particular on: “material distortion”; “professional diligence”; “invitation to purchase”; and “transactional decision”.

### **Chapter 2 - Scope, Internal Market Clause**

3. Do you have any comments about the Government’s analysis of the scope of the Directive?

### **Chapter 3 – The General Prohibition**

4. Do you have any comments in relation to the tests of professional diligence and to materially distort? Are there any issues you would wish to see clarified in Guidance?
5. Do you have any comments on the Department’s analysis of the relationship between average and vulnerable consumers, and its proposal to express Article 5(3) as an alternative to Article 5(2)(b)? Does this raise issues that could usefully be addressed in Guidance?
6. Do you have any comments on the Government’s analysis of the implications of applying the average consumer concept in the UK? Are there any issues that you would like to see clarified in Guidance?
7. Do you think it would be helpful to clarify that the “average member of a particular group” and the “vulnerable consumer” also apply to Articles 6-9 in the legislation implementing the Directive?

### **Chapter 4 – Misleading Actions & Omissions**

8. Do you have any comments on the Government’s view that the list of elements in Article 6(1) applies both to practices giving false information and practices that deceive or are likely to deceive?

### **Chapter 5 – Aggressive Commercial Practices**

9. Do you have any comments on the Government’s analysis relating to aggressive commercial practices? Are there any issues you would like to see clarified in Guidance?

## **Chapter 6 – The Annex of Banned Practices**

10. Do you have any comments on the Government's analysis relating to the Annex of banned practices? Are there any issues you would like to see clarified in Guidance?

## **Chapter 7 – Civil Law Enforcement**

11. What are your views on the Government's proposal not to make changes to allow court actions to be brought jointly against a group of traders?

12. Do you think that the Directive's injunctive regime should rely solely on Part 8 of the Enterprise Act or that an additional injunctive regime should also be established? Can you provide us with reasons explaining your preference? If you favour Option 2, do you have any further thoughts on how this regime should operate?

13. Do you have any comments on the proposed approach to designating public enforcers for the Directive?

14. If Option 2 is chosen, do you think the courts should be enabled to require publication of their decisions? What are your views on requiring the publication of a corrective statement by traders? Do you think that any or both options should be chosen?

15. If Option 2 is adopted, what are your views on giving the OFT a specific power to publish information relating to voluntary undertakings and court proceedings?

16. What are your views on introducing a duty to enforce in the legislation implementing the Directive? Do you agree that this duty should apply to the OFT, trading standards services in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland? And do you agree with the proposal not to introduce a duty to consider complaints?

17. Do you have any comments on the proposal to amend Part 8 of the Enterprise Act in relation to substantiation of claims only if Option 1 is adopted?

## **Chapter 8 – Criminal Law Enforcement**

18. Do you have any comments on the proposal to retain the balance between criminal and civil sanctions in existing legislation?

19. Considering Articles 5, 7, 8 & 9 in turn, do you think it appropriate that criminal sanctions should be provided for any of the new provisions contained in the Directive? If yes, are there any provisions that you consider particularly important? Can you provide evidence supporting your recommendation?

20. If criminal sanctions are introduced for some of the Directive's provisions, do you have any comments on the Government's proposals to model powers and defences on the Trade Descriptions Act 1968? And do you have any comments on the proposal to provide flexibility in the range of penalties, including possible custodial sentences?

### **Chapter 9 – The Role of Self-Regulation**

21. Do you have any comments on the proposal to allow certain codes a role in enforcing breaches of the Directive? Are there any particular codes that you think should be used for controlling unfair commercial practices?

22. Do you agree with the proposal that enforcers should be able to take civil action against any person, including code owners, who recommends breaches of the Directive?

### **Chapter 10 – Civil Redress**

23. Given existing protections, do you think that individuals should have a right of action in order to seek redress for breaches of the Directive? Can you provide examples of the benefits and drawbacks associated with this approach?

24. If a right of action is provided for, should it apply to all of the Directive or only to specified parts of it? If the latter, which parts in particular and why?

25. If an individual right of action is provided, is a breach of statutory duty an appropriate form?

26. Would damages be an adequate remedy if an individual right of action were provided for, or might additional remedies be needed? Why?

### **Chapter 11 – Amending Existing Legislation**

27. Do you think the Government should adopt a single uniform approach to dealing with existing legislation, and if yes, what should it be and why?

### **Chapter 12 – Indicative List of Affected Legislation**

28. Do you think this section of the Accommodation Agencies Act should be repealed or left unamended; and why?

29. Do you think this section of the Administration of Justice Act should be partially or wholly repealed, amended or left unaffected; and why?

30. Do you think the Business Advertisements Order should be repealed or left unamended; and why?

31. Do you think these sections of the Charities Act 1992 should be repealed, amended or left unamended; and why?

32. Do you think Regulation 7 of the Charitable Institutions (Fund-Raising) Regulations 1994 should be partially or wholly repealed or left unamended; and why?
33. Do you think the relevant provisions of the Consumer Credit Act 1974 should be amended or repealed; and why?
34. Do you think the relevant provisions of the Consumer Credit (Advertisements) Regulations 2004 should be repealed or amended; and why?
35. Do you think Part III of the Consumer Protection Act 1987 should be amended or repealed; and why?
36. Do you think the Consumer Protection (Code of Practice for Traders on Price Indications) Approval Order 2005 should be repealed or reproduced; and why?
37. Do you think the relevant provisions of the Consumer Transactions (Restrictions on Statements) Order 1976 should be repealed, amended or left unamended; and why?
38. Do you think that section 14 of the Food Safety Act 1990 should be repealed, amended or left unamended; and why?
39. Do you think section 13 of the Kent County Council Act 2001 should be repealed, amended or left unamended; and why?
40. Do you think section 13 of the Medway Council Act 2001 should be repealed, amended or left unamended; and why?
41. Do you think the Mock Auctions Act 1961 should be repealed or left unaffected; and why?
42. Do you think the relevant sections of the North Yorkshire County Council Act 1991 should be repealed, amended or left unamended; and why?
43. Do you think the Price Indications (Method of Payment) Regulations 1991 should be repealed or amended; and why?
44. Do you think the Price Indications (Resale of Tickets) Regulations 1994 should be repealed or amended; and why?
45. Do you think the Price Marking (Food and Drinks Services) Order 2003 should be revoked or left unaffected; and why?
46. How do you think the relevant parts of the Timeshare Act 1992 should be amended; and why?

47. Do you think the affected parts of the Timeshare (Cancellation Information) Order 2003 should be repealed or amended; and why?
48. Do you think the Tourism (Sleeping Accommodation Price Display) Order 1977 should be revoked or amended; and why?
49. How do you think the Trade Descriptions Act 1968 should be repealed or amended; and why?
50. Do you think the Trade Descriptions (Sealskin Goods)(Information) Order 1980 should be repealed, amended or left unamended; and why?
51. Do you think the Trading Representations (Disabled Persons) Act 1958 should be repealed, amended or left unamended; and why?
52. Do you think the Trading Schemes Regulations 1997 should be amended (and if so, how) or repealed; and why?
53. Do you think sections 29 to 31 of the Weights and Measures Act 1985 should be repealed or amended, and if so, how? Why do you hold this view?

#### **Partial RIA**

- R1. Do you agree with the assessment of overall benefits to business and consumers detailed in the RIA? Do you have any further information to contribute to this assessment?
- R2. Do you agree with the estimate of familiarisation costs to business? Do you agree with the assumptions made?
- R3. Do you agree with the overall assessment of costs? Do you have further evidence to contribute to this assessment?
- R4. Can you give an assessment of the benefits of less consumer legislation to business?
- R5. Do you think new business will benefit from fewer pieces of consumer legislation? If so, can you give an indication of the magnitude of these benefits?
- R6. Can you give an assessment of the costs that might arise from having to consider different sets of legal requirements for business-to-consumer and business-to-business practices?
- R7. What would be the practical implications to your business of a move to general principles-based legislation? Can you provide examples?