

BERR

Department for Business
Enterprise & Regulatory Reform

**CONSULTATION ON EU
PROPOSALS FOR A CONSUMER
RIGHTS DIRECTIVE**

NOVEMBER 2008

PROPOSED CONSUMER RIGHTS DIRECTIVE – A CONSULTATION

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Foreword

We are all consumers and the way we all shop is changing.

Every day we form contracts with traders. Whether we're buying a newspaper, a sandwich, a mobile phone or an insurance policy we are entering into a contractual relationship with a business, and they with us.

In the vast majority of cases, these contracts are successful and we get what we pay for with no problems. There are occasions though when things go wrong and as consumers we have important protections to ensure that we are treated fairly. We also have important duties to be responsible consumers and to act reasonably. These rights and responsibilities form part of our legislative framework and need to be fit for purpose.

In the last decade we have seen a revolution in how many of us shop and the way we purchase goods and services is constantly evolving.

The growth of the Internet and new technology has seen exciting opportunities for business to reach new markets and for consumers to access a greater choice of products at different prices. Purchasing online has increased dramatically and so has the chance to buy from traders in other countries. In the European Union, alone, we are part of a retail market of nearly 500 million consumers.

Our consumer protection legislation has sometimes struggled to keep track with this constantly developing marketplace; and that is why we launched our own review of the domestic consumer regime in 2007.

While in the UK our rules can sometimes be complex we have a strong and effective consumer protection regime. Our consumer contract rules are not however identical to those of our European neighbours and across the EU there are dozens of different laws.

This makes it difficult for those traders who wish to sell cross-border to know what contract rules apply where. This was less of a problem when purchases were mostly made face-to-face. Now we can shop online, however, many consumers are frustrated when they spot bargains but are unable to buy them because the trader may not want to deal with so many different laws.

Greater ease of cross-border shopping offers many potential gains for consumers and businesses in terms of economies of scale, more competition and lower prices.

The European Commission has concluded that by creating simple and consistent consumer contract rules across the 27 Member States we can begin to break down the barriers and is therefore seeking a substantial degree of harmonisation of consumer contract law across the EU. Over the last few years, the Commission has reviewed a number of pieces of EC legislation that provide protection for consumers and on 8 October they published a draft proposal for a new framework Directive on consumer rights.

This proposal brings together four existing Directives¹. These Directives establish a floor of protection for consumers purchasing at a distance or away from business premises, requiring information and rights of withdrawal for consumers. They ensure that unfair contract terms are not binding on consumers and they provide for remedies where goods are faulty.

As well as updating and clarifying the rights consumers enjoy, the draft Directive proposes to fully harmonise these rules across the EU. Full harmonisation means that no Member State will be able to prescribe stronger rules of protection in the areas covered by the Directive. Business will be free to offer more to consumers in terms of commercial guarantees just as they do now, but for traders selling armchairs in Athens, lampshades in Lisbon, or sofas in Stockholm, a uniform set of consumer rights should increase their willingness to sell cross-border.

I welcome this proposal from the European Commission as a positive step in opening up the Internal Market. Expanding the choice and boosting the confidence of consumers, as well as reducing burdens on business, is crucial to the success of our European economy. But this is a complex area of law and we need to hear your views.

We need to ensure that the EU legal framework will match the reality of our consumer experience. Increasingly we are purchasing more and more services as well as buying traditional goods. Consumers are also embracing the digital economy, downloading music and buying software. In our own review of domestic legislation, we identified these new areas as important but the new Directive only provides remedies for faulty 'tangible' goods. While we have no easy answers to these issues we believe that they would be best considered in a review of the European consumer framework.

We are also working with the Law Commission on their current review of consumer remedies. This important work will feed into the development of our negotiating strategy and we encourage you to respond to their detailed consultation which is published alongside this paper.

I am determined to ensure that we retain a strong level of consumer protection that is fair on business; unnecessary costs on business are inevitably passed on to the consumer. The Directive would see some significant changes in the rights that consumers in the UK currently enjoy and we will be interested in hearing your views about what impact this will have on consumers, retailers, manufacturers and law enforcers.

I look forward to your responses and thank you for taking the time to respond to this consultation.



GARETH THOMAS
MINISTER FOR CONSUMER AFFAIRS

¹ Doorstep selling 85/577/EEC, Unfair Contract Terms 93/13/EEC, Distance Selling 97/7/EC and Sale of Goods and Associated Guarantees 99/44/EC.

SECTION A: GENERAL INFORMATION

Executive summary

1. **Purpose** – This consultation document seeks your comments on the European Commission’s (‘the Commission’) proposal for a Consumer Rights Directive, including the likely costs and benefits of the Directive indicated in our Impact Assessment. Your views will inform the UK Government’s ongoing negotiation.
2. In 2004 the Commission launched a review of consumer protection Directives - the ‘Consumer Acquis’. The objective of the Review was to simplify and complete the existing regulatory framework to improve the functioning of the Internal Market and strike the right balance between a high level of consumer protection and the competitiveness of business.
3. Currently eight Directives make up the EU Consumer Acquis. These are:
 - Doorstep selling 85/577/EEC
 - Package Travel 90/314/EEC
 - Unfair Contract Terms 93/13/EEC
 - Timeshare 94/47/EC
 - Distance Selling 97/7/EC
 - Unit Prices 98/6/EC
 - Injunctions 98/27/EC
 - Sale of Goods and Associated Guarantees 99/44/EC
4. These Directives have been adopted over a lengthy period of time. It is acknowledged that the existing legislative framework does not adequately reflect new market developments such as the rapid growth in e-commerce and mobile commerce (m-commerce) in recent years. There are also inconsistencies between the Directives, for example in their definitions of key terms. Furthermore, the minimum harmonisation approach adopted in these Directives has resulted in differences in the rules between Member States. This can reduce confidence in cross-border shopping and create unreasonable costs for businesses wishing to trade in other Member States.
5. On 8 February 2007, the Commission launched a public consultation on the Review of the Consumer Acquis. The UK Government’s response to the Green Paper can be found at <http://www.berr.gov.uk/files/file39758.pdf>. The results of the consultation are available at: http://ec.europa.eu/consumers/rights/cons_acquis_en.htm. The Commission also held a conference and consulted businesses and consumer stakeholders through questionnaires and workshops. The Commission identified six options for change which were subject to an Impact Assessment (which can also be found at: http://ec.europa.eu/consumers/rights/cons_acquis_en.htm).
6. The European Parliament, in its Resolution of 16 July 2007 recommended that legislative action is taken and expressed its preference for a horizontal Directive based on full targeted harmonisation.

7. The Commission's proposal for a Consumer Rights Directive was published on 8 October 2008. The Directive is available at:
http://ec.europa.eu/consumers/rights/docs/Directive_final_EN.pdf
8. The Commission proposes bringing together the Doorstep Selling, Unfair Contract Terms, Distance Selling and Sale of Goods and Associated Guarantees Directives in a single horizontal Directive. Timeshare and Package Travel will continue to be covered by separate vertical Directives as they deal with specific issues. The Injunctions and Unit Prices Directives are not included in the proposed new Directive as they are not concerned with consumer contract law.
9. The proposed new Directive is a full harmonisation measure and covers the provision of pre-contractual information to consumers, information and withdrawal rights for distance and off-premises contracts, sales contracts and unfair terms in consumer contracts. It also provides definitions of key terms.

How to respond

10. When responding please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.
11. The consultation was published on 10 November. The consultation will run for 12 weeks and the closing date for responses is 2 February 2009. However, we would welcome early initial responses from consultees to inform our initial negotiating strategy. A list of consultation questions can be found on pages 8 to 11.
12. For clarity and ease of reference, we have prepared two sets of **Impact Assessments**. The first one covers distance and off-premises selling and the second one covers consumer remedies for faulty goods.
13. A response can be submitted by letter, fax or email to:

Guy Horsington or Katherine Stoate
EU Consumer Policy
Department for Business, Enterprise & Regulatory Reform
1 Victoria Street
London
SW1H 0ET

Fax: 020 7215 0130

Email: euconsumerdirective@berr.gsi.gov.uk

14. This consultation will be of interest to: business (particularly those businesses that are trading or considering trading in other EU Member States and businesses who use distance or off-premises selling); consumer organisations and advisers; consumer enforcement bodies; and individual consumers.

Additional copies

15. This consultation can be found at: <http://www.berr.gov.uk/consultations/index.html> and is also available from BERR Publications Orderline, ADMAIL 528, London SW1W 8YT, Tel: 0845 015 0010, Fax: 0845 015 0020, Minicom: 0845 015 0030. You may make additional copies without seeking permission.

Confidentiality and data protection

16. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004. If you want information, including personal data that you provide to be treated as

confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things with obligations of confidence.

17. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not, of itself, be binding on the Department.

Help with queries

18. Questions about the policy issues raised in the document can be addressed to Guy Horsington or Katherine Storate, Department for Business, Enterprise and Regulatory Reform (contact details as above).
19. If you have any comments or complaints about the way this consultation has been conducted, these should be sent to:

Tunde Idowu
Consultation Co-ordinator
Department Of Business, Enterprise and Regulatory Reform
Better Regulation Team
1 Victoria Street
London SW1H 0ET
E-mail: babatunde.idowu@berr.gsi.gov.uk
Tel: 020 7215 0412
Fax: 020 7215 0235

20. A copy of the Government's Code of Practice on Consultation is attached at Annex A.

What happens next?

21. The UK Government will use the responses received to help form its negotiating position during discussions on the draft Directive. The text of the proposed Directive can undergo major changes during negotiations and the timetable and progress of discussion can change very quickly.
22. Decisions taken in light of the consultation will be publicised along with a summary of the responses received.
23. Stakeholders will be able to follow developments on this Directive following the consultation on the BERR website at www.berr.gov.uk.
24. As negotiations on the Directive progress, it may be necessary to hold a further consultation. This may be done via a similarly wide exercise or using a more targeted approach.

Consultation questions

Key Issues

Q1: Do you consider that the scope of the Directive should be widened?

Q2: What do you consider to be the benefits and risks of a full harmonisation approach?

Q3: What do you consider to be the implications of the changes proposed to consumer remedies on the UK consumer regime?

Chapter 1: Subject Matter, Definitions and Scope

Q4: What are your views on the definition of 'trader'? Do you believe that it could be problematic?

Q5: What are your views on the exception of the supply of water and gas and electricity from the definition of 'goods' used in the Directive?

Q6: Do you have comments on the proposed new definition of 'distance contract'?

Q7: What are your views on the definition of the 'means of distance communication'?

Q8: Do you think it would be useful to provide an indicative list of means of distance communication?

Q9: Do you agree that the definition of an off-premises contract should include contracts which are negotiated away from business premises and then concluded on business premises? Please explain your reasons.

Q10: Do you have any other comments on the proposed new definition of 'off-premises contract'?

Q11: Do you have any comments on the proposed definition of 'business premises'?

Q12: We would welcome your views on the definition of 'durable medium'.

Q13: Do you have any views on any of the definitions listed in paragraph 46?

Q14: Are there any terms used in the Directive which you think require further definition and clarification? If so please state which ones.

Chapter 2: Consumer Information

Q15: What are your views on the new general information requirements and their potential implications for business and consumers?

Q16: Do you think that information on costs of means of distance communication should be required?

Chapter 3: Consumer Information and Withdrawal Right for Distance and Off-premises Contracts

Q17: What are your views on the information requirements, including the requirement for traders to provide information about codes of conduct and amicable dispute resolution?

Q18: What are your views on the introduction of a standard withdrawal form?

Q19: Do you have any views on the format of the form provided at Annex 1 of the Directive?

Q20: We would welcome views on the likely costs and benefits of introducing a standard withdrawal form.

Q21: Do you think that there should be a requirement that information on withdrawal rights is prominent, or do you think the requirements set out in the Directive are adequate?

Q22: Do you have any comments on Article 11?

Q23: Do you think that it should be clarified in the Directive itself that all periods referred to in the Directive should be measured in calendar days?

Q24: What are your views on the extension of the withdrawal period for distance and off-premises sales to 14 calendar days?

Q25: What would be the likely costs and benefits of an extended withdrawal period?

Q26: We would appreciate your views on this approach to future-proofing the right of withdrawal in distance selling.

Q27: What are your views on the proposed starting points for the withdrawal period for:

- a). Off-premises contracts;
- b). Distance contracts for goods; and
- c). Distance contracts for services?

Q28: What are your views on the consequences of failure to provide information on the right of withdrawal?

Q29: Do you have any comments on the requirements for exercising the right of withdrawal in Article 14?

Q30: We would welcome your views on the requirement for the consumer to return goods at their own cost within 14 calendar days.

Q31: What are your views on the proposal to allow traders to hold consumers liable for diminished value in these circumstances?

Q32: Do you think that if consumers agree to performance during the withdrawal period they should be liable to pay for any services or non-returnable goods provided?

Q33: What do you consider to be the most effective mechanism by which a consumer can agree to receive services or goods which it is not possible to return before the end of the cooling off period, whilst protecting the trader against non payment?

Q34: Do you think that Articles 16 and 17, when considered alongside the extension of the withdrawal period, provide the right balance between the rights of consumers and traders?

Q35: What would be the likely costs and benefits to traders and consumers of the provisions set out in Articles 16 and 17?

Q36: Do you agree that these distance contracts should not give rise to the right to withdraw?

Q37: Are there are other distance contracts which you think should not give rise to the right of withdrawal?

Q38: What are your views on the exemption of these off-premises contracts, in particular the issues we have raised?

Q39: Are there are other off-premises contracts which you think should not give rise to the right of withdrawal?

Q40: Do you agree that rental and works contracts should be covered by the distance and off-premises selling provisions? Please give your reasons.

Q41: Do you agree that low-value off-premises contracts should be excluded from the information and withdrawal rights requirements?

Q42: What do you think will be the costs and benefits of removing the £35 threshold? Please provide evidence.

Chapter 4: Other Consumer Rights Specific to Sales Contracts

Q43: Please provide comments on the scope of Chapter 4.

Q44: What are your views on the definition of and time limits for delivery?

Q45: What are your views on the provisions on passing of risk?

Q46: Do you foresee any difficulties in separating the passage of risk from delivery?

Q47: What are your views on the definition of conformity?

Q48: Do you think the existing 'right to reject' should be retained?

Q49: Do you think the trader or the consumer should be given the choice of first-tier remedies (repair or replacement)?

Q50: How many times do you think that the same fault should have to occur within a short period of time before the remedies of price reduction or rescission are available?

Q51: Please provide any views or evidence on the costs and benefits to businesses and consumers of both the existing 'right to reject' and the proposed new approach to remedies.

Q52: Do you agree that a trader should not be entitled to reduce the level of refund to reflect the fact that the consumer has had use of the goods?

Q53: Please provide any comments on the provisions of Article 27.

Q54: What are your views on the likely effects of the two year fixed period of liability for traders?

Q55: What are your views on this proposal on second-hand goods?

Q56: Do you think 'second-hand goods' should be defined in the Directive?

Chapter 5: Consumer Rights Concerning Unfair Contract Terms

Q57: What are your views on the introduction of 'black' and 'grey' lists?

Q58: We would welcome your views on the scope of Chapter 5.

Q59: What are your views on Articles 31 to 33?

Q60: Do you have any comments on the terms included in Annex 2 of the Directive?

Q61: Could a black list be too inflexible – might there be some circumstances where clauses on the black list are fair?

Q62: Do you have any comments on the terms included in Annex 3 of the Directive?

Q63: Please provide any further comments on Chapter 5.

Chapter 6: General Provisions:

Q64: We would welcome your views on this provision on inertia selling.

Q65: Please provide comments on the provisions contained in Chapter 6.

Annex B: Impact Assessment

Q66: Do you agree with the assumptions, figures and impact assessments made in the Impact Assessments that are attached? These Impact Assessments are based on initial consideration of the key issues for the UK of the draft EU Consumer Rights Directive. Please provide as much supporting evidence as possible.

SECTION B: THE PROPOSAL

KEY ISSUES

25. The Government has identified three key issues on which we would particularly welcome your views.

Scope

26. The scope of the draft directive only offers a partial simplification of consumer sales law; focusing on the sale of 'tangible, moveable' consumer goods but not simplifying remedies for all consumer sales e.g. services, goods/services 'mixed products' and digital downloads/software. In our response to the Commission's Green Paper we argued for a bolder and more ambitious approach that would meet the actual consumer experience (for example, when a consumer buys a washing machine this is often a 'mixed contract' including both goods and services). We are concerned that the draft Directive is restricted to simply merging four current Directives and does not address the benefits of a bold measure covering all consumer sales.

Q1: Do you consider that the scope of the Directive should be widened?

Full harmonisation

27. Complex and different rules across Member States are barriers that impede business from selling cross-border and reduce consumer access to choice and lower prices. These barriers block the further development of the Single Market and the Citizens Agenda. The Government strongly supports the European Single Market and has supported the proposal to introduce a full harmonisation measure where there is evidence that minimum harmonisation and the resulting divergence in laws create barriers to trade. We will need to consider whether the benefits that will be brought about by full harmonisation outweigh the re-balancing of rights and responsibilities of businesses and consumers in the Directive which may lead to a possible reduction in consumer protection in some areas and potential increased costs to business in others.

Q2: What do you consider to be the benefits and risks of a full harmonisation approach?

Consumer remedies

28. One key area of concern is the proposed change to the remedies available to consumers when they purchase faulty goods. The new Directive would allow the trader to choose between repair and replacement where there is a lack of conformity in a good bought by a consumer. This is a change from the original Consumer Sales Directive that gave the consumer the right to choose between repair and replacement. This will mean that UK consumers would lose their 'right to reject' faulty goods – as opposed to choosing repair or replacement – in the first instance. Evidence has shown that this right is highly valued by consumers. We will carefully consider what practical effect any proposal on the 'right to reject' would have on UK consumers. The Law Commission is also looking at

how to simplify the rules in this area and we will consider their findings in assessing the impact of any change.

Q3: What do you consider to be the implications of the changes proposed to consumer remedies on the UK consumer regime?

CHAPTER 1: SUBJECT MATTER, DEFINITIONS AND SCOPE

29. Chapter 1 sets out the purpose and scope of the Directive and defines some key terms used in the Directive. It also lays down the principle of full harmonisation.

Article 1 – Subject Matter

30. The purpose of this Directive is to harmonise certain aspects of the laws of the Member States concerning business-to-consumer contracts. It aims to improve the functioning of the internal market and achieve a high level of consumer protection.
31. The UK Government welcomes these intentions. In principle, we support the harmonisation and simplification of consumer law and believe that this has the potential to be an effective good Better Regulation measure bringing benefits for consumers, businesses and law enforcers.

Article 2 – Definitions

32. We welcome the proposal to introduce definitions of key terms which will remove the existing inconsistencies and provide clarification and increased certainty. However, we wish to seek views on the precise wording of the definitions. We call on the Commission to ensure that these definitions are used in any future Directives with a consumer focus to create consistency and legal certainty.
33. **‘Trader’** is defined to cover any natural or legal person who, in contracts covered by the Directive, is acting for purposes relating to his trade, business, craft or profession. It includes ‘anyone acting in the name of or on behalf of the trader’. This may have the effect that employees could be under the Directive as well as their employer and could have significant consequences for consumer contract law.

Q4: What are your views on the definition of ‘trader’? Do you believe that it could be problematic?

34. **‘Goods’** are defined to include ‘any tangible moveable item’ with the exception of goods sold by way of execution or otherwise by authority of the law; water and gas where they are not sold in a limited volume or set quantity; and electricity. We would like the Commission to clarify how water, gas and electricity are to be included under different parts of the Directive, particularly in relation to distance and doorstep selling.

Q5: What are your views on the exception of the supply of water and gas and electricity from the definition of ‘goods’ used in the Directive?

35. **‘Distance contract’**. The new definition of ‘distance contract’ includes any sales or services contract where, the trader *for the conclusion of the contract* makes exclusive use of one or more means of distance communication (e.g. mail order, internet, telephone or fax). This would broaden the scope of the existing Distance Selling Directive which requires exclusive use of distance means *up to*

and including the conclusion of the contract. The proposal will increase the level of protection for consumers as well as providing greater legal certainty. The new definition will mean that where a transaction is negotiated face-to-face between the trader and the consumer but is then concluded by means of distance communication (e.g. by phone or internet) the contract will be covered by the distance selling provisions.

36. The Commission proposes to remove the current requirement that distance selling be part of an organised distance selling scheme run by the trader in order for the provisions to apply. The Commission's view is that the fact that the trader is an occasional distance seller or that he or she uses an organised scheme run by a third party, should not deprive consumers of protection.

Q6. Do you have comments on the proposed new definition of 'distance contract'?

37. **'Means of distance communication'**. The Directive defines 'means of distance communication' as 'any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the conclusion of a contract between those parties'. This would include the internet, telephones (including mobile phones) and mail order. The Directive does not provide an exhaustive list of means of distance communication in order to ensure that any new methods of distance communication which may be used as a means of conducting business in the future will be covered by the provisions without the need to amend the legislation. We welcome this 'future-proofing' approach. However, the existing Distance Selling Directive contains an indicative list of means of distance communication to provide clarification and certainty. There may be value in retaining an indicative list for these reasons.

Q7: What are your views on the definition of the 'means of distance communication'?

Q8. Do you think it would be useful to provide an indicative list of means of distance communication?

38. **'Off-premises contract'**. The definition covers sales and services contracts concluded away from business premises with the simultaneous physical presence of the trader and the consumer, or where an offer is made by the consumer in the same circumstances. The definition includes contracts which are negotiated away from business premises with the simultaneous physical presence of the trader and the consumer and then concluded on business premises. The inclusion of contracts that are negotiated away from business premises but then concluded on business premises will prevent circumventions of the rules by businesses that approach consumers off-premises but then conclude the contract at their business premises.

Q9: Do you agree that the definition of an off-premises contract should include contracts which are negotiated away from business premises and then concluded on business premises? Please explain your reasons.

39. In contrast to the current Directive, there is no requirement that visits be unsolicited. We support the Commission's proposal to include solicited visits within the definition of 'off-premises contracts'. This is the approach we have taken in the 'Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations 2008' which came into force on 1 October 2008. Evidence shows that consumers can be placed under psychological pressure whether the trader's visit is solicited or unsolicited.

Q10. Do you have any other comments on the proposed new definition of 'off-premises contract'?

40. **'Business premises'**. The definition of business premises covers immovable or moveable retail premises, including seasonal retail premises, where the trader carries on his activity on a permanent basis or market stalls and fair stands where the trader carries on his activity on a regular or temporary basis. Other premises rented for only a short time where the trader is not established, including hotel rooms, conference centres, cinemas or restaurants, would not be regarded as business premises. Public spaces, public transport, private homes or workplaces would also not be regarded as business premises. Contracts formed on non-business premises would be subject to the information and withdrawal right requirements of the 'off-premises' selling provisions in this Directive.

Q11: Do you have any comments on the proposed definition of 'business premises'?

41. **'Durable medium'**. It is important that the definitions used in this Directive are flexible enough to meet new innovations, technologies and selling practices whilst providing a sufficient level of legal certainty as to what is within scope. The Recital makes clear that USB sticks, CD-ROMs, DVDs, memory cards and the hard drive of a computer where emails or pdf files are stored are durable mediums. It is our view that emails, letters, and SMS text messages would also be covered by this definition. However, there is still some uncertainty as to precisely what would constitute a 'durable medium', for example it is unclear whether a voice mail message would be regarded as a 'durable medium'.

Q12. We would welcome your views on the definition of 'durable medium'.

42. **'Professional diligence'** is a term that is also used in the Unfair Commercial Practices Directive² and has been transposed into UK law by the Consumer Protection from Unfair Trading Regulations 2008. Professional diligence is an objective standard which will vary according to the context. The use of the word 'special' in the definition is not intended to require more than would reasonably be expected of a trader in their field of activity. However, poor current practice that is widespread in an industry/sector cannot amount to an acceptable objective standard. A simple way of understanding professional diligence would be to ask: 'Is the trader acting to a standard that a reasonable person would expect?'

² Directive 2005/29/EC

43. **'Auction', Public auction'**. We welcome the introduction of definitions of 'auctions' and 'public auctions'. The Commission states that the increase in the popularity of on-line auctions in recent years has led to a significant rise in consumer complaints. The Distance Selling Directive pre-dates this expansion and therefore it has not been clear whether online auctions fall within the definition of auctions and would therefore be excluded from the right of withdrawal. The new definition clarifies this point.
44. The new definition of 'auction' makes clear that only methods of sale where goods or services are offered by a trader through a competitive bidding procedure (where the highest bidder is bound to purchase the goods or services) constitutes an auction for the purposes of the Directive. This would include online auctions. Transactions concluded on the basis of a fixed-price offer, despite the option for the consumer to enter into a bidding procedure are not regarded as auctions for the purposes of this Directive. Our initial view is that this is the correct position.
45. 'Public auctions' are auctions with a competitive bidding procedure run by an independent auctioneer where the consumer attends or is given the opportunity to attend in person.
46. Article 2 also provides definitions of **'consumer', 'sales contract', 'product', 'financial service', 'producer', 'commercial guarantee', 'order form', 'ancillary contract'** and **'intermediary'**. These definitions appear clear and easy to understand but we welcome views on any of these definitions.

Q13: Do you have any views on any of the definitions listed in paragraph 46?

47. There are a number of other terms, such as 'works', which are used in the Directive for which it is essential to have a clear definition. These are not defined in Article 2.

Q14: Are there any terms used in the Directive which you think require further definition and clarification? If so please state which ones.

Article 3 –Scope

48. The Directive as a whole will apply to business-to-consumer sales and services contracts to the extent set out in the Directive. Articles 8 to 20 apply to distance and off-premises contracts. Articles 21 to 29 cover sales contracts. Articles 30 to 39 deal with unfair contract terms and cover all contracts which fall within the scope of this Directive as well as those covered by the Timeshare and Package Travel Directives. The Directive will only apply to financial services in relation to certain off-premises contracts as provided for by Articles 8 to 20, the provisions on unfair contract terms (Articles 30 to 39) and the general provisions as provided for by Articles 40 to 46. Articles 5, 7, 9 and 11 are without prejudice to the information requirements in the E-commerce and Services Directives.
49. Chapter 4 of the Directive only covers sales of goods contracts and does not cover digital downloads, services or the service aspect of mixed goods and services contracts. We question whether the scope of this Directive should be

extended to include rules dealing with these types of contracts in order to address the reality of the consumer experience.

Article 4 – Full Harmonisation

50. Article 4 provides that within the scope of the Directive, Member States may not maintain or adopt provisions diverging from those laid down by the Directive. This will mean that Member States in implementing the Directive will have to repeal any existing legislation which exceeds, or falls below, the level of protection provided by the Directive in the areas within its scope. This should increase legal certainty and confidence for both consumers and business when contracting cross-border as they will know that, within the scope of the Directive, the same provisions will apply in all Member States. Member States will be able to adopt or maintain their own national provisions covering aspects of business to consumer contracts outside the scope of the Directive.
51. Traders will continue to be able to offer consumers a level of protection and services which goes beyond the protection required by this Directive if they so wish.

CHAPTER 2: CONSUMER INFORMATION

52. Chapter 2 sets out general pre-contractual information requirements, the consequences of failing to provide that information and also places specific requirements on intermediaries.

Article 5 – General Information Requirements

53. Article 5 requires traders to provide general pre-contractual information to consumers. The information required includes the main characteristics of the product, the price, the address and identify of the trader and the existence of any withdrawal right. The Directive would not require traders to provide the information when already apparent from the context. We consider this to mean that, for example, when a consumer is buying goods from a shop the characteristics of the product, the identity of the trader and the arrangements for delivery are likely to be apparent from the context and the trader would not be required to provide this information. In distance and off-premises contracts the trader should provide information on the arrangements for payment, delivery, performance and the complaint handling policy as these are unlikely to be apparent from the context. The information provided by the trader under this article will form an integral part of the contract.
54. The general information requirements will also apply to goods and services bought at auctions, although information on the geographical address and identity of the trader may be replaced by the geographical address and identity of the auctioneer in the case of public auctions.
55. We will need to consider the full implications of the general information requirements to identify whether there are any areas of concern. For example, this is an across the board requirement applying to any sale or service contract and it may be difficult to identify what are the main characteristics of complex products or to determine whether certain information is apparent from the context.

Q15: What are your views on the new general information requirements and their potential implications for business and consumers?

56. We are concerned that the new Directive no longer contains an explicit requirement for traders to provide information on the cost of using a means of distance communication where it is calculated other than at the basic rate (for example the cost of calls to a premium rate phone line). The current Distance Selling Directive requires that this information is provided to the consumer and we wish to seek views on whether this requirement should be retained. Removing this obligation could lead to a reduction in consumer protection and be a potential cause of consumer detriment. As drafted, section (c) requires information on all additional freight, delivery or postal charges to be provided to the consumer.

Q16: Do you think that information on costs of means of distance communication should be required?

Article 6 – Failure to provide information

57. If a trader fails to provide information on additional charges as required under Article 5 the consumer will not have to pay these additional charges. The remedies for a breach of Article 5 shall be determined in accordance with the applicable national law, subject to the requirement that there shall be effective contract law remedies. This requirement as to remedies is without prejudice to the provisions for failure to comply with the intermediary requirements in Article 7(2), failure to provide information on the right of withdrawal under Article 13 or the provisions on penalties under Article 42.

Article 7 – Specific information requirements for intermediaries

58. Intermediaries (except in the case of public auctions) are required to inform the consumer that they are acting as an intermediary prior to the conclusion of the contract. They will need to inform the consumer that any contract will be a contract between two consumers and will not benefit from the protection provided by this Directive. If this requirement is not met the intermediary will be deemed to have concluded the contract in his or her own name and the contract will be a business-to-consumer contract to which the Directive will apply. The notion of intermediary would not include online trading platforms which do not conclude the contract in the name or on behalf of a third party.
59. It is important for consumers to be aware when they are contracting with another consumer as the protections provided by the law on business-to-consumer contracts will not apply. We think it is right that intermediaries who fail to provide this information should be deemed to have concluded the contract in their own name so consumers will have a right of action against the intermediary if the contract obligations are not fulfilled. Consumers may have entered into the contract with the belief that they are contracting with a trader.

CHAPTER 3 – CONSUMER INFORMATION AND THE RIGHT OF WITHDRAWAL FOR DISTANCE AND OFF-PREMISES CONTRACTS

60. Chapter 3 sets out requirements for the provision of information in distance and off-premises contracts and provides the right to withdraw from such contracts. The Directive would provide for a withdrawal period of 14 calendar days for both distance and off-premises contracts. It also balances the rights and responsibilities of both the trader and the consumer during the exercise of a right of withdrawal. The Chapter sets out the conditions and procedures for exercising the right of withdrawal including a standard EU withdrawal form provided in Annex 1. Certain contracts are exempted from the right of withdrawal.

Article 8 – Scope

61. Chapter 3 applies to distance and off-premises (doorstep) selling.

Article 9 – Information requirements for distance and off-premises contracts

62. Article 9 sets out the information which must be provided by the trader in distance and off-premises contracts. This information will form an integral part of the contract. The Directive will introduce a requirement that traders inform consumers, where applicable, of the existence of codes of conduct and how they can be obtained. We believe that where traders sign up to a code of conduct they are likely to want to bring this to the attention of consumers because of the business advantage it may bring. Traders will also be required to inform consumers of the possibility of having recourse to an amicable dispute settlement. We believe that this could raise awareness of the existence of Alternative Dispute Resolution procedures and may aid the resolution of disputes without resort to the courts. The information must also include the fact that the contract will be concluded with a trader and as a result the consumer will benefit from the protection afforded by the Directive.

Q17: What are your views on the information requirements, including the requirement for traders to provide information about codes of conduct and amicable dispute resolution?

Article 10 – Formal requirements for off-premises contracts

63. The Directive will prescribe that the information required under Article 9 must be provided on the order form in plain, intelligible language and be legible. An off-premises contract will only be valid if the consumer signs an order form. In cases where the order form is not on paper the consumer must receive a copy of the order form on another durable medium. We believe this measure is likely to be beneficial as it recognises that due to technological advances alternatives to paper order forms are increasingly being used by traders. It is important that traders are required to give consumers a copy of the order form, and this requirement should apply to paper order forms as well.
64. Importantly, the order form must contain the standard withdrawal form provided at Annex 1(B). Member States may not impose any additional formal requirements, such as font size. We welcome the requirement for a withdrawal

form that may be used by consumers to withdraw from the contract. Alternatively consumers may inform the trader that they are exercising their right to withdraw through any durable medium. This provides an appropriate degree of flexibility. Our view is that the introduction of a requirement to provide a standard form is likely to be beneficial but requiring the use of the standard form by the consumer would be too prescriptive.

Q18: What are your views on the introduction of a standard withdrawal form?

Q19: Do you have any views on the format of the form provided at Annex 1 of the Directive?

Q20: We would welcome views on the likely costs and benefits of introducing a standard withdrawal form.

65. We are concerned that the Directive does not require that the withdrawal information be prominent in the contract, as is currently required under UK law. We would like to consider further whether the Directive should be amended to include a requirement that the information on withdrawal rights is prominent. However, Regulation 6(4)(g) and 6(1)(b) of the Consumer Protection from Unfair Trading Regulations require traders not to hide material information in commercial practices and specifically requires information on right of withdrawal to be provided in invitations to purchase.
66. The UK Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations 2008 require that where the 'notice of the right to cancel' the contract is incorporated in the contract document itself the notice must:
- be set out in a separate box with the heading 'Notice of the Right to Cancel'; and
 - have as much prominence as any other information in the contract or document apart from the heading and the names of the parties to the contract and any information inserted in handwriting

Q21: Do you think that there should be a requirement that information on withdrawal rights is prominent, or do you think the requirements set out in the Directive are adequate?

Article 11 – Formal requirements for distance contracts

67. The information required in Article 9(a) must be given or made available (for example by providing a link to a website or a free phone number where the full terms and conditions are available) to the consumer prior to the conclusion of the contract. It must be provided in a way appropriate to the means of distance communication used, be in plain and intelligible language and be legible. Again we would like to consider whether a requirement that information on the right of withdrawal is prominent should be included.
68. Article 11 addresses the technical constraints of certain forms of distance communication where contracts are concluded through a medium which allows

limited time or space to display information (such as m-commerce and television sales). If the medium used to conclude the contract allows limited time or space the trader must at the very least provide information regarding the main characteristics of the product and the total price on that medium prior to the conclusion of the contract. The other information referred to in Articles 5 and 7 must be made available prior to the conclusion of the contract in accordance with paragraph 1. The information required by Article 9 (a) – (f) must be provided on a durable medium in reasonable time after the conclusion of the contract. It must be provided, at the latest, at the time of delivery of the goods or when the service has begun (unless the information has already been given to the consumer prior to the conclusion of the contract on a durable medium).

69. In addition, Article 11 requires that if a trader makes a telephone call to a consumer with a view to concluding a distance contract, he or she must disclose his or her identity and the commercial purpose of the call at the beginning of any conversation with the consumer. This appears to be a good consumer protection measure. It will enable consumers to decide whether or not they wish to continue with the call and should prevent consumers from being misled as to the nature of the call. It builds on what is already provided in regulation 6(1)(d) Consumer Protection from Unfair Trading Regulations which prohibits the failure of a commercial practice to identify its commercial intent.

Q22: Do you have any comments on Article 11?

Article 12 – Length and starting point of the withdrawal period

70. One of the major changes that the Directive proposes is changing the withdrawal period for distance and off-premises contracts to 14 calendar days. This improves consumer protection by extending the current seven days minimum harmonisation requirement and brings the withdrawal in to line with timeshare contracts under the proposed new Timeshare Directive. Many Member States already require a withdrawal period of longer than seven days.
71. The current Directives do not specify whether working or calendar days should be used. This requirement has been implemented differently in Member States with some opting for working days and other calendar days
72. These differences of approach can create uncertainty and confusion for traders and consumers who wish to trade or shop cross-border. We agree with the Commission that harmonising the withdrawal period across the EU will provide greater certainty for both traders and consumers.
73. Article 12 of the new Directive provides for a withdrawal period of 14 days, but does not specify whether this is calendar days. However, the Recital to the Directive states that in order to ensure legal certainty, Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time should apply to the Directive. Therefore, all periods contained in the Directive should be understood to be expressed in calendar days. We welcome the clarification that calendar days should be used. However, we question whether it should be clearly stated in the Directive itself that the period must be measured in calendar days.

Q23: Do you think that it should be clarified in the Directive itself that all periods referred to in the Directive should be measured in calendar days?

74. We would welcome your views on the extension of the withdrawal period to 14 days. The recent Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations 2008 retain the withdrawal period at 7 days as consultation responses did not provide sufficient evidence to justify a longer period. However, the 14 calendar day period proposed by the Commission will harmonise the withdrawal period across the EU for both distance and doorstep selling. This will increase certainty for both consumers and traders. Many Member States already have a 14 day withdrawal period and we are not aware that this has created any significant problems for businesses. Importantly, the Directive will introduce a provision that will allow traders to reduce the amount of refund to reflect any diminished value of the goods resulting from them being handled other than as necessary to ascertain the nature and functioning of the goods during the withdrawal period. This will provide some additional protection for traders who may fear that a longer withdrawal period may increase the likelihood of damage to goods making them impossible to resale.

Q24: What are your views on the extension of the withdrawal period for distance and off-premises sales to 14 calendar days?

Q25: What would be the likely costs and benefits of an extended withdrawal period?

75. The UK Consumer Law Review Call for Evidence published in May 2008 asked whether the rights currently provided in distance selling regulations are appropriate and how significant the benefits are to consumers given the increase in online transactions and the familiarity with internet shopping. It has been suggested that the withdrawal right for distance selling could be time limited through a sunset clause because as consumers increasingly shop online and gain more experience and confidence in doing so one of the rationale for providing a right of withdrawal may lose its relevance. Such a clause could provide that the right of withdrawal for online purchases would cease to exist after a period of ten years from the implementation of the Directive.

Q26: We would appreciate your views on this approach to future-proofing the right of withdrawal in distance selling.

76. Article 12 sets out when withdrawal periods will commence. In the case of off-premises contracts, the period starts when the order form is signed. Where the order form is not on paper the period starts when the consumer receives a copy of the order form on a durable medium. In our response to the Commission's discussion paper on the Doorstep Selling Directive (December 2007) we suggested that the Commission might carry out further research to establish the viability of amending the start of the cooling off period for off premises contracts for the supply of goods to the date of receipt of the goods. Otherwise, in some cases the cooling off period may have expired by the time the consumer receives the goods.

77. In the case of distance contracts for the sale of goods, the period will commence when the consumer acquires material possession of the goods (as he or she would not have had a chance to inspect the goods prior to this). In the case of distance contracts for the provision of services, the withdrawal period will begin at the conclusion of the contract.
78. Under the current UK Distance Selling Regulations, the consumer has the right to cancel distance selling contracts for goods before the goods are received, with the formal withdrawal period commencing when the goods are received. We suggest that it would be helpful for the Directive to clarify that consumers do not have to wait for the goods to be delivered and the formal withdrawal period to commence before they can exercise the right of withdrawal. There may be circumstances where the consumer changes their mind about the purchase before the goods are delivered. It would save time and effort for both the consumer and trader if they were able to withdraw from the contract at this point. Although in practice the majority of traders are likely to accept the notice of withdrawal prior to the goods being delivered it may still be helpful if the Directive makes it explicit that this should be permitted.

Q27: What are your views on the proposed starting points for the withdrawal period for:

- a). Off-premises contracts;**
- b). Distance contracts for goods; and**
- c). Distance contracts for services?**

79. The Recital to the Directive makes clear that where a consumer orders more than one good from the same trader the consumer is entitled to exercise the right of withdrawal in respect of each of these goods. Where the goods are delivered separately the withdrawal period should start when the consumer acquires material possession of each individual good. Where a good is delivered in different lots or pieces, the withdrawal period will commence when the consumer has material possession of the last lot or piece. This approach appears sensible as to provide otherwise would be to the detriment of the consumer's right to withdraw. We would welcome views on whether a right of withdrawal is necessary for repeat transactions of identical goods.
80. The Directive makes clear that a consumer can be considered to have withdrawn from the contract if the consumer exercises the right of withdrawal before the deadline; even if the notice of withdrawal is not received by the trader before the deadline. This carries forward the existing UK position.
81. Member States will not be able to prohibit the parties from performing their contractual obligations during the withdrawal period. We welcome this provision. Consumers and traders should be free to agree to immediate performance if they so wish. For example, a consumer may require a service to be performed immediately or to be sent a good ordered online within a short period.

Article 13 – Omission of information on the right of withdrawal

82. Article 13 provides that if a trader fails to provide the consumer with the information on withdrawal rights in breach of Articles 9(b), 10(1) and 11(4), the

withdrawal period will be extended so that it shall expire three months after the trader has fully performed his or her other contractual obligations. This will allow a consumer who is not informed of his or her withdrawal rights but subsequently becomes aware of them to withdraw from the contract after the standard withdrawal period has expired, up to three months after the trader has fully performed their other obligations.

83. The proposed consequences for omission of information on the right of withdrawal differ from the current UK approach. Under the Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations 2008 failure to provide information on the right of withdrawal renders the contract unenforceable against the consumer and the trader may be fined. Under the Distance Selling Regulations where the trader fails to provide written confirmation of pre-contractual information the cancellation period ends three months and seven working days after the consumer receives the goods or three months and seven working days from the day after the day on which the contract was concluded for services contracts.

Q28: What are your views on the consequences of failure to provide information on the right of withdrawal?

Article 14 – Exercise of the right of withdrawal

84. The Directive sets out requirements for the exercise of the right of withdrawal. Currently requirements differ between Member States which can create uncertainty for traders and consumers when trading or shopping cross-border. Under the Directive consumers will be required to inform the trader of their decision to withdraw by durable medium before the withdrawal period expires. The consumer may choose to use the standard withdrawal form contained at Annex 1(B), but this is not mandatory and consumers can alternatively choose to send a statement to the trader.
85. For distance contracts concluded online the trader may give the consumer the option to fill in and submit an electronic version of the standard form on the trader's website. The trader must acknowledge receipt of the withdrawal to the consumer by email without delay. The option to withdraw via the trader's website must be in addition to the option of withdrawal by durable medium or using a hard copy of the standard form.
86. Traders would be able to offer the option of withdrawing online without a specific provision being included in this Directive. The Directive binds Member States not traders and does not stop traders offering additional withdrawal mechanisms. However, setting this out in the Directive makes it clear that withdrawal in this way meets the requirements of the Directive and the additional requirement that the trader must acknowledge receipt of withdrawal by email without delay will provide extra protection for consumers in that they will have certainty and proof that their withdrawal notice has been received.
87. Our initial view is that it is reasonable to require consumers to withdraw via durable medium. Using the term 'durable medium' provides an appropriate degree of flexibility. The introduction of a standard withdrawal form is likely to

simplify the process of withdrawal, and may be particularly beneficial for vulnerable consumers. However, we are pleased that use of the standard form is not mandatory for consumers as this provides flexibility for consumers and will prevent unscrupulous traders from deliberately omitting to provide the form in order to prevent consumers from exercising their right of withdrawal.

Q29: Do you have any comments on the requirements for exercising the right of withdrawal in Article 14?

Article 15 – Effects of the exercise of the right of withdrawal

88. The exercise of the right of withdrawal will terminate the obligations of both parties to perform the contract, or in the case of off-premises contracts where an offer has been made by the consumer, will terminate the requirement for the parties to conclude the contract.

Article 16 – Obligations of the trader in case of withdrawal

89. The trader must reimburse any payments received from the consumer within 30 days from the day on which the trader receives the communication of withdrawal. The Recital makes it clear that the refund must include any delivery costs.
90. In order to avoid the trader having to reimburse a consumer who has not returned goods which have been delivered, the trader may withhold repayment until he receives the goods or the consumer supplies evidence of having sent them (whichever is earliest). This provides protection to traders from some consumers who abuse the current Regulations (which require the trader to reimburse the consumer regardless of whether the goods have been returned) by claiming refunds and then not returning the goods. There is, however, a risk of increased consumer detriment at the hands of rogue traders who could receive the returned goods back and then not reimburse consumers.

Article 17 – Obligations on the consumer in case of withdrawal

91. Where goods have already been received by the consumer (or by a third party at the consumers request), he or she will be required to send back the goods or hand them over to the trader within 14 days from the day on which the consumer communicated their withdrawal to the trader, unless the trader has offered to collect the goods. The consumer will be liable to pay the direct cost of returning the goods (i.e. the consumer would be liable for the cost of postage but not any administrative costs incurred by the trader in processing the return), unless the trader has agreed to bear the cost. Currently the onus is on the trader to cover the costs unless their terms and conditions require the consumer to bear the cost.
92. The requirement for the consumer to send back or hand over the goods to the trader at their own cost would be a new requirement in the UK. In the UK, for doorstep sales, the consumer is only required to make goods available for collection by the trader. There is no obligation for the consumer to actually return the goods to the trader at their own expense. In the case of distance selling,

there is no obligation on the consumer to pay the cost of return unless there is a contract term to that effect. The trader must inform the consumer whether they require goods to be returned and if so who will pay for the return. If these details are not provided to the consumer the trader must bear the cost of return. Where a contractual term provides that the consumer should return the goods, if he cancels the contract and fails to return the goods, or does so at the supplier's expense, the supplier can charge the consumer for the direct costs of returning the goods.

93. This provision raises a number of questions. Although in principle it is reasonable that the consumer should return the goods to the trader where this is practicable it may not be reasonable to expect a consumer to send back larger, higher value goods such as washing machines or large items of furniture. In such cases most traders would collect the goods themselves but would be entitled to charge the consumer for the direct cost of return. However, there is nothing in the Directive to require traders to offer such a service and so a consumer could be required to send the goods themselves.
94. The requirement that consumers must return goods within 14 days of sending the notice of withdrawal while traders have 30 days to deliver the goods and 30 days following the withdraw to reimburse the money may be seen as leading to a lack of balance between the obligations of traders and consumers.

Q30: We would welcome your views on the requirement for the consumer to return goods at their own cost within 14 calendar days.

95. The Directive also proposes to introduce a new provision whereby consumers will be liable for any diminished value to goods they are returning where it results from handling the goods other than is necessary to ascertain the nature and the functioning of the goods (e.g. diminished value as a result of wearing clothes rather than just trying them on to check the fit). This would mean that a trader is entitled to deduct an amount when reimbursing money to the consumer following withdrawal from the contract to cover the decrease in value. Business representatives have expressed concern that a longer withdrawal period will result in more goods being returned in a condition which makes them unfit for resale. This provision is designed to provide some protection to traders but there must be means to ensure that unscrupulous traders do not unfairly deduct money.
96. If a trader fails to notify the consumer of the right to withdrawal in accordance with Article 9(b) the consumer could not be held liable for any diminished value. We agree that this is the correct approach. Where a consumer is unaware of the right to reject he or she may use the goods in a way which would diminish their value in the belief that they cannot be returned. It would therefore be unfair to deduct an amount for diminished value if the consumer later became aware of and exercised the right to withdraw.

Q31: What are your views on the proposal to allow traders to hold consumers liable for diminished value in these circumstances?

97. For service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period. There is no right of withdrawal where the consumer has requested immediate performance of off-premises contracts in emergency situations or has expressly consented to immediate performance of distance contracts for services in any circumstances.
98. This means that where there is immediate performance of an off-premises contract in a non-emergency situation the consumer shall not bear the costs for services performed during the withdrawal period, even if they have requested the performance of the contract. The intention is to address situations in which consumers may be subject to high pressure selling in their homes followed by immediate performance of the service during the withdrawal period. This is seen to be a particular problem in the home renovations sector. Although we recognise that such high pressure sales followed by immediate performance do cause consumer detriment we would not wish to prevent consumers from requesting immediate performance if they so wished and had not been pressured into taking that decision. As the provision stands, it is unlikely that traders would agree to immediate performance as they could not recover any costs if the consumer then withdraws from the contract.
99. The Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations 2008 require the consumer to give express written agreement if he or she wants immediate performance of certain specified contracts. The consequences of that decision must be made clear to the consumer by the trader in the 'notice of the right to cancel'. In such circumstances, the consumer retains the withdrawal right but would be liable to pay the reasonable cost of any goods used or services provided during the withdrawal period if they subsequently withdraw from the contract. Where there is no express written agreement to immediate performance, the withdrawal period would apply and the consumer would not be required to meet any costs of immediate performance.
100. The Government believes that a consumer should be able to agree to receive goods or the provision of services before the end of the cooling off period if that is what he or she wants. In some circumstances, for example in the case of an emergency (e.g. burst water pipe) or in the case of some funerals, it is imperative that the consumer should be given this choice. In other cases, the argument is essentially one of consumer convenience. The Government also wishes to avoid imposing an unfair disadvantage on those companies which market their goods by direct selling to consumers on their doorsteps.
101. However, if withdrawal periods are to be effective they need to be consistently applied and it is important that they are not undermined. The Directive must achieve a balance of rights and responsibilities on the part of consumers as well as traders. It would not be fair for a consumer to ask for performance before the expiry of the withdrawal period, and then cancel the contract either without reimbursing the trader for services provided or for goods, which by their nature it is not possible or commercially realistic to return. It is important not to create a situation where traders are reluctant to provide goods and services within the

cooling off period for fear of subsequent cancellation of the contract, and non payment by the consumer.

102. We suggest that it may be preferable to require the consumer to give express written agreement to immediate performance with the consequences of that decision made clear to the consumer in writing. The consumer would then retain the withdrawal right but would be liable to pay the cost of any goods used or services provided during the withdrawal period if they subsequently withdraw from the contract. Where there is no express written agreement to immediate performance the withdrawal period would apply and the consumer would not be required to meet any costs of immediate performance.

Q32: Do you think that if consumers agree to performance during the withdrawal period they should be liable to pay for any services or non-returnable goods provided?

Q33: What do you consider to be the most effective mechanism by which a consumer can agree to receive services or goods which it is not possible to return before the end of the cooling off period, whilst protecting the trader against non payment?

Q34: Do you think that Articles 16 and 17, when considered alongside the extension of the withdrawal period, provide the right balance between the rights of consumers and traders?

Q35: What would be the likely costs and benefits to traders and consumers of the provisions set out in Article 16 and 17?

Article 18 – Effects of the exercise of the right of withdrawal on ancillary contracts

103. If a consumer exercises their right to withdraw any ancillary contracts will also be terminated without any costs to the consumer. This would mean that where a consumer enters into a distance or off-premises contract and also an ancillary credit agreement to meet the costs of the goods or services, this ancillary credit agreement would automatically be cancelled if the consumer withdraws from the main contract. This would also apply to other forms of ancillary contracts such as servicing agreements. Where a consumer purchases a good and an ancillary contract for that good to be serviced, say on an annual basis, the service contract would automatically be cancelled if the consumer exercised the right of withdrawal from the contract for the goods. This is a sensible approach which provides certainty for both consumers and traders and will prevent consumers from being obliged to continue with an ancillary contract which is rendered unnecessary or useless by their withdrawal from the main contract.

Article 19 – Exceptions from the right of withdrawal

104. Article 19 lists various types of distance and off-premises contracts to which the right of withdrawal will not apply as it would be inappropriate given the nature of the product (the information requirements for distance and off-premises sales will apply to these contracts). The parties to the contract will, however, be free

to agree not to apply the provisions of this Article, meaning that the right of withdrawal would apply.

105. Paragraph 1 lists **distance contracts** where withdrawal rights will not apply. It carries forward the exclusions under the existing Distance Selling Directive and as such we are generally happy with the provisions.
106. Contracts for the provision of services would not give rise to the right to withdraw where the performance of the contract has begun, with the consumer's prior express agreement, before the end of the 14 day withdrawal period. The Commission's view is that it would be unfair to allow the consumer to withdraw after the service has been enjoyed by the consumer in full or in part. The Recital gives the example of data files downloaded by the consumer during the withdrawal period. In such cases consumers will have enjoyed the use of the service, and furthermore, there would be a risk of piracy and the impracticalities of withdrawal. Please see comments in paragraphs 97 to 102 on withdrawal following immediate performance.
107. The Directive also proposes a new exception for the supply of wine, the price of which has been agreed at the time of conclusion of the contract, but where delivery can only take place well beyond the 30 calendar day time limit referred to in Article 20(3). This is because actual value of the wine is dependent upon fluctuations in the market which can not be controlled by the trader e.g. vin en primeur sales. This seems a reasonable exception as a right of withdrawal is inappropriate given the speculative nature of the product.
108. The Directive places a new obligation on auctioneers to comply with the general information requirement but the right of withdrawal does not apply to auctions as it would be impractical and inappropriate given their nature. We will seek clarification as to whether public auctions are included under the "auctions" exclusion. We believe that they should be.

Q36: Do you agree that these distance contracts should not give rise to the right to withdraw?

Q37: Are there are other distance contracts which you think should not give rise to the right of withdrawal?

109. Paragraph 2 lists the types of **off-premises contracts** which do not give rise to the right to withdraw. These are:
 - a). contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household which are selected in advance by the consumer by means of distance communication and delivered to the consumer by a trader who usually sells such goods on his own business premises (this would exempt supermarket deliveries);
 - b). where the consumer requests immediate performance of the contract in order to respond to an immediate emergency;
 - c). where the consumer has taken the initiative, by means of distance

communication, to specifically request the trader to visit his or her home for the purposes of repairing or performing maintenance on the property.

110. Under (b) the exemption from the right to withdraw does not apply to services or goods additional to those needed to meet the immediate emergency and under (c) the exception does not apply to goods or services which are provided in addition to those specifically requested by the consumer.
111. The UK Government has some questions and concerns about these exceptions.
112. First, although we generally agree with the exception under part (a) as it is designed to cover the delivery by supermarkets of inexpensive items which are bought regularly for everyday consumption or use. It is not clear why the exception under (a) is restricted to traders who usually sell goods in their own business premises and we will seek clarification on this point.
113. Secondly, we have concerns about (b). While it is important that consumers are able to request immediate performance in emergency situations we question whether this should prevent them from exercising a right to withdraw as consumers may still be pressured into entering into a contract. An alternative would be to retain the right to withdraw where immediate performance is requested in an emergency, but require the consumer to pay for any goods used or services provided prior to the right of withdrawal being exercised. We believe that this provides an appropriate balance between the interests of the trader and consumer.
114. The same principle could apply in non-emergency situations. In such circumstances the request for immediate performance should be given in writing with the consumer being made aware of the consequences of that request with regards to the right to withdrawal. This is the current situation under the UK Regulations. As drafted, the Directive will not provide a right of withdrawal if immediate performance is requested in an emergency situation but will provide a right of withdrawal in a non-emergency situation, with no requirement for the consumer to pay for any goods or services provided before withdrawal. This is likely to have the effect that traders will refuse to perform their obligations in non-emergency situations until the withdrawal period has expired. This is likely to be detrimental to consumers who desire immediate performance.
115. We also question whether the right of withdrawal should exist in the circumstances outlined in (c) as consumers may still be subject to high pressure sales tactics when they have invited the trader into their home.

Q38: What are your views on the exemption of these off-premises contracts, in particular the issues we have raised?

Q39: Are there are other off-premises contracts which you think should not give rise to the right of withdrawal?

Article 20 – Excluded distance and off-premises contracts

116. Article 20 provides that Chapter 3 does not apply to certain distance and off-premises contracts. This article largely replicates the provisions in the existing Directives.
117. Contracts for the sale of immovable property or relating to other immovable property rights (e.g. buying a house) are excluded but contracts for rental or works are covered by the Directive. The Commission has found evidence of consumer detriment in the home improvement sector where consumers may come under pressure to agree to expensive maintenance or repair works. They have therefore decided that only contracts for the conveyance of interests in real property should be excluded from the scope of the rules on distance and off-premises contracts.
118. The Distance Selling Directive does not apply to contracts for the construction and sale of immovable property or relating to other immovable property rights except for rental. The UK Distance Selling Regulations which implement the Directive do not apply to the sale or other disposition of land (that is, the sale of leasehold or freehold interests in land), although they can apply to rental agreements. The Regulations also do not cover contracts for the construction of a building where the contract also provides for a sale or other transfer of interest in the land on which the building is constructed. The Regulations do, however, apply where a consumer already has rights over the land and subsequently enters into a distance contract for a building to be constructed on that land. Home improvements, in terms of maintenance or repair works would be covered by the existing provisions.
119. The Doorstep Selling Directive does not apply to contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property. Contracts for the supply of goods and for their incorporation in immovable property or contracts for repairing immovable property fall within the scope of this Directive. The new UK Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations 2008 extend the scope of the original Regulations to apply to the construction of extensions, conservatories, patios and driveways. We will seek confirmation from the Commission that the definition of 'works' will cover construction of these items.

Q40: Do you agree that rental and works contracts should be covered by the distance and off-premises selling provisions? Please give your reasons.

120. Distance contracts for all financial services are excluded under Article 3 (Scope). Off-premises contracts for insurance, credit which falls within the scope of the Consumer Credit Directive and for financial services whose price depends on fluctuations in the financial market which may occur during the withdrawal period and are outside the trader's control are also excluded. The existing EU legislation on consumer financial services contains numerous rules on consumer protection. Therefore the provisions of this Directive only cover financial services insofar as is necessary to close regulatory gaps.

121. Chapter 3 will also not apply to distance contracts for the provision of accommodation, transport (including car rental services), catering or leisure services, where these will be provided on a specific date or period of performance. This carries forward the existing position and as such is welcomed. Such contracts imply the setting aside of capacity, which in the case of withdrawal, the trader may find difficult to fill.
122. The current off-premises selling Directive allows Member States to exclude contracts with a total value of less than 60 Euros. The UK has used this provision to exclude contracts worth less than £35 from the scope of the Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations 2008. Imposing information and withdrawal requirements for low value contracts places an unreasonable burden on business and there is no evidence of significant consumer detriment arising from the exclusion of these low value contracts. The majority of responses to the recent UK Government consultation on the new Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations 2008 opposed the removal of the £35 threshold, and in fact, many business representatives argued for the threshold to be raised. Evidence from enforcement bodies showed that the number of complaints relating to contracts with a value of less than £35 is low and there is little evidence of consumer detriment from contracts below this limit. We therefore propose to attempt to persuade the Commission to include provisions which will allow the exemption of low value off-premises contracts.

Q41: Do you agree that low-value off-premises contracts should be excluded from the information and withdrawal rights requirements?

Q42: What do you think will be the costs and benefits of removing the £35 threshold? Please provide evidence.

CHAPTER 4: OTHER CONSUMER RIGHTS SPECIFIC TO SALES CONTRACTS

123. Chapter 4 deals with sale of goods contracts and will replace the provisions in the Sale of Goods and Associated Goods Directive (99/44/EC). It sets out new definitions of delivery and passing of risk. It also provides that the trader is liable to the consumer if goods are not in conformity with the contract within a period of two years from when the consumer receives the goods. The remedies for non-conformity are also prescribed in this Chapter. This will require amendment to existing UK law on the Sale of Goods.

Article 21 – Scope

124. This Chapter applies to sales contracts for goods (including those to be manufactured or produced). It does not apply to services contracts or other types of supply such as hire or hire purchase. Where a contract is a mixed purpose contract for goods and services the provisions of this Chapter will only apply to the goods aspect. The Chapter will, however, apply in relation to installation as set out in Article 24(5).

125. Member States may provide that this Chapter does not apply to the sale of second hand goods sold at public auctions. Currently UK consumers have protections under Part 5A of the Sale of Goods Act 1979 when buying second hand goods sold at auction.

126. The provisions of this Chapter will not apply to the spare parts replaced by the trader when he repairs faulty goods under Article 26. We are not clear as to the purpose and effect of this provision and will be seeking clarification from the Commission.

Q43: Please provide comments on the scope of Chapter 4.

Article 22 – Delivery

127. The Recital to the Directive states that the main difficulties for consumers and sources of dispute with traders are about delivery of goods, including goods being lost or damaged during transit and late or partial delivery. For this reason the Commission proposes to clarify and harmonise the rules on delivery and passing of risk.

128. The previous Directives have not defined delivery and this has led to uncertainty and confusion. Under the Directive unless the parties agree otherwise, the obligation to deliver is fulfilled when the consumer (or a third party indicated by the consumer) has material possession of the goods. However, it is not made clear what constitutes 'material possession'. It could mean having physical possession of the goods or alternatively, the goods being under the consumer's (or nominated third party) control or delivered into his or her care. We will seek clarification on this point.

129. The Directive introduces a time limit for delivery. Unless agreed otherwise, delivery must be within 30 days of conclusion of the contract. Currently in the

UK, section 29(3) of the Sale of Goods Act 1979 requires delivery in a reasonable time unless otherwise agreed.

130. We can see potential benefits of a definition of delivery which will provide certainty for both consumers and traders but also provides the flexibility for the parties to agree a shorter or longer period. This will be important in relation to contracts where goods are required urgently or where, for example, items are being manufactured to the consumer's specification and this will take longer than 30 days. However, we wonder if provisions should be included to require delivery to be made at a reasonable hour as is currently the case under section 29(5) of the Sale of Goods Act 1979.
131. Where a trader has failed to meet the obligations to deliver, the consumer will be entitled to a full refund within seven calendar days from the date of delivery provided for in paragraph 1 (i.e. 30 days from the conclusion of the contract or the period agreed between the parties).
132. As currently drafted it is not clear from the Article whether the trader is still required to deliver the goods in addition to providing a refund or whether the consumer would have to return a good received after the agreed delivery period had expired in order to receive a refund. In such circumstances it may be seen as unreasonable to expect the trader to refund sums paid and still be obliged to deliver the goods or to allow the consumer to retain any goods received late in addition to receiving a refund. We will seek clarification on this point.

Q44: What are your views on the definition of and time limits for delivery?

Article 23 – Passing of risk

133. Risk will not pass to the consumer until the consumer (or a third party indicated by them, other than the carrier) has material possession of the goods. This will mean that the consumer is protected against any loss or damage to the goods during transit. Where the consumer fails to take reasonable steps to acquire material possession of the goods the risk will pass on delivery as agreed by the parties. For example, where a consumer unreasonably fails to collect goods which have been left for the consumer's collection from a post office within the time limit set by the post office the risk will be deemed to have passed on the time of delivery as agreed by the parties. We will seek further clarification of when delivery will be regarded as having occurred.
134. We would particularly welcome views on whether any difficulties or unintended consequences might arise from the possibility of the separation of the passage of risk from the transfer of material possession, which under the draft Directive is not necessarily when delivery takes place (if there is agreement to this effect). The Sale of Goods Act 1979 provides a right for the consumer to check that the goods conform to contract when they are tendered for delivery. We would therefore welcome your views on whether the new provision could lead to a reduction in consumer rights by not expressly providing a right to inspect the goods.

Q45: What are your views on the provisions on passing of risk?

Q46: Do you foresee any difficulties in separating the passage of risk from delivery?

Article 24 – Conformity with the contract

135. Goods must be in conformity with the contract when they are delivered, if they are not, the trader will be held liable to the consumer. Goods will be presumed to be in conformity if they meet a number of conditions set out in paragraph 2 which are concerned mainly with the qualities of the goods. These include a requirement that goods comply with the description given by the trader, are fit for purpose and show a quality and performance that the consumer can reasonably expect. Goods will be deemed to be in conformity if the consumer was aware, or should have been aware, at the time of the conclusion of the contract that there was a lack of conformity or if the lack of conformity has its origins in materials supplied by the consumer.
136. As currently drafted, paragraph 2 of Article 24 provides that goods shall be presumed to be in conformity with the contract if they satisfy any one of the listed conditions. We think that the 'or' after subsection (c) may have been added in error as we believe that the goods should comply with all the conditions in order to be regarded as conforming to the contract. We will seek clarification on this point.
137. Traders will not be bound by any public statements about the nature of the goods where the conditions set out in paragraph 4 are met. This carries forward an existing requirement.
138. Where installation of the goods forms part of the sales contract and they are installed by the trader or under his responsibility, any lack of conformity resulting from their incorrect installation will be deemed as equivalent to the lack of conformity of the goods. Similarly, if goods intended to be installed by the consumers are installed by the consumer and a shortcoming in the installation instructions results in incorrect installation this will also be deemed as equivalent to the lack of conformity of the goods.
139. The provisions on conformity with contract may displace the provisions on implied terms in section 13-15 of the Sale of Goods Act 1979 including the provisions on implied terms as to fitness and quality. The Directive contains a presumption of conformity where certain conditions are satisfied. This implies that the goods might still conform to the contract where the conditions are not satisfied. This would appear to operate in a different manner to the current provisions which imply terms into the contract as to matters such as fitness and quality. We would welcome your views on whether this could have adverse affects. The quality and performance which consumers can reasonably expect will depend *inter alia* on whether the goods are new or second hand and the expected life-span of the goods. There are no terms as to title (that the seller has the right to sell the goods) which are currently implied by the Sale of Goods Act in the UK. It is not clear whether this is intended to be covered by the Directive.

Q47: What are your views on the definition of conformity?

Article 25 – Legal rights – Liability for lack of conformity

140. Article 25 makes clear that the trader is liable for any lack of conformity existing at the time risk passes to the consumer, although Article 28 provides that the trader shall only be held liable for where the lack of conformity becomes apparent within two years from the time the risk passed to the consumer.

Article 26 – Remedies for lack of conformity

141. We recognise there will be concerns that Article 26 will reduce consumer rights in the UK. Currently consumers in the UK have the right to reject goods that are not of a satisfactory quality within a reasonable time under the Sale of Goods Act 1979 (i.e. a consumer can return faulty goods and receive a full refund). Consumers may reject goods even if the fault is minor. Evidence shows that this is a right that UK consumers value highly. Many businesses trading in the UK go beyond the minimum required by the law and offer a full refund for faulty goods even if the consumer does not return the goods within a short period or even where the goods are not faulty but the consumer has merely changed his or her mind about the purchase. We would expect many traders to continue to operate such policies even if there is a change in the legal requirements because of the commercial advantage in doing so.
142. In contrast, the European approach is to provide a hierarchy of rights whereby in the first instance there is a choice of repair or replacement. In circumstances where these are not suitable or are not provided by the trader, the consumer may then demand price reduction or, as long as the non-conformity is not minor, rescission of the contract (which is roughly equivalent to rejecting the contract).
143. When implementing the current Consumer Sales Directive the UK introduced these remedies into UK law but retained the existing remedies available under UK law, to the effect that consumers can choose between exercising the UK or European remedies.
144. However, as this Directive requires full harmonisation the UK would not be able to retain measures which diverge from the Directive and would be required to remove the existing initial 'right to reject' in relation to consumers. Only the remedies provided under the Directive would be available. This would mean that in the first instance the trader would have the choice of repair or replacement (this is a change from the existing Directive which gives this choice to the consumer, and thus appears to be a reduction in consumer rights). If repair or replacement are unlawful, impossible, will cause the trader disproportionate effort, or where the trader fails more than once to provide repair or replacement or fails to do so within a reasonable time or without significant inconvenience to the consumer, or if the defect reappears more than once within a short period of time, the consumer may choose any of the four remedies (repair, replacement, price reduction or rescission). However, rescission would only be available if the non-conformity was not minor. Again this would be a reduction in rights for UK consumers who can currently reject goods where the fault is only minor. It is not clear what would constitute a minor non-conformity and this could potentially lead to disputes between traders and consumers.

145. In December 2007 the Department for Business, Enterprise and Regulatory Reform asked the Law Commission and Scottish Law Commission to undertake a review, and report on, the possibilities for simplification of the law in relation to consumer remedies for goods which do not conform to contract. The Law Commission and Scottish Law Commission have published a consultation on their recommendations for reform of the law on consumer remedies. The findings from their work will inform and influence the UK's negotiating position and we encourage interested stakeholders to respond to their consultation, copying their response to euconsumerdirective@berr.gsi.gov.uk.
146. The Directive requires the same fault to reappear more than once within a short period of time before the remedies of price reduction or rescission are available. We would welcome your views on this requirement and whether you consider that it would be more appropriate for the same fault to **appear**, rather than to **reappear**, more than once before the remedies of price reduction or rescission are available.
147. As currently drafted the Directive requires the trader to have failed to remedy the conformity within a reasonable time or to have tried to remedy the non-conformity but in doing so caused significant inconvenience to the consumer before recourse to the second-tier remedies are available to the consumer. However, there may be cases in which it will be clear that a repair will take an unreasonable amount of time or will cause significant inconvenience to the consumer in advance of that repair being attempted. In such circumstances we suggest that it may be reasonable to allow the consumer to opt for rescission or price reduction at that point, rather than being required to wait for the trader to attempt a repair which it is known will take a long time or cause significant inconvenience to the consumer.

Q48: Do you think the existing 'right to reject' should be retained?

Q49: Do you think the trader or the consumer should be given the choice of first-tier remedies (repair or replacement)?

Q50: How many times do you think that the same fault should have to occur within a short period of time before the remedies of price reduction or rescission are available?

Q51: Please provide any views or evidence on the costs and benefits to businesses and consumers of both the existing 'right to reject' and the proposed new approach to remedies.

Article 27 – Costs and damages

148. Lack of conformity must be remedied at no cost to the consumer. This includes postage costs, labour and materials. The Recital to the Directive makes clear that consumers should not be required to compensate the trader for any use of the defective goods. This would mean that where a contract is rescinded the trader would not be able to reduce the level of refund to reflect the fact that the consumer has had use of the goods.

Q52: Do you agree that a trader should not be entitled to reduce the level of refund to reflect the fact that the consumer has had use of the goods?

149. Article 27 also provides that consumers shall be able to claim damages for any loss not remedied in accordance with Article 26. Such loss might be the cost of using substitute goods while the goods in question are being repaired.

Q53: Please provide any comments on the provisions of Article 27.

Article 28 – Time limits and burden of proof

150. The trader is to be held liable under Article 28 where the lack of conformity becomes apparent within 2 years from the time risk passed to the consumer. Where the trader has remedied the lack of conformity by replacement he is to be held liable under Article 28 where the lack of conformity becomes apparent within 2 years from the time of acquisition of material possession of the replaced goods. Unless proved otherwise, any lack of conformity which becomes apparent within 6 months of the time when risk passed shall be presumed to have existed at that time subject to certain exceptions.

151. The Directive will require the fixing of the length of time in which traders in the UK are held liable for non-conformity at two years from the date that risk passed to the consumer. This carries forward a provision in the existing Sale of Goods Directive. However, this was not transposed into UK law as this was a minimum harmonisation clause and our existing provisions on limitation were more generous to consumers. Currently the limitation period in England, Wales and Northern Ireland is six years from the date of purchase. In Scotland it is five years from the discovery of a fault. There is no requirement that the defect has to become apparent within a set time limit within the limitation period.

152. Under the new proposals if a defect became apparent within two years from the passing of risk a consumer would then have six years in which to bring the case to court. If the defect only became apparent more than two years from the passing of risk there would be no right of action as the trader would not be liable even if the fault had existed at the time risk passed.

153. This may amount to a reduction in protection for consumers but in practice it may not result in significant detriment as in most cases where lack of conformity becomes apparent after two years it is likely to be very difficult for the consumer to prove that the defect existed when risk passed.

Q54: What are your views on the likely effects of the two year fixed period of liability for traders?

154. In the case of second-hand goods the Directive provides that the trader and consumer may agree a shorter liability period. This contrasts with the current UK position which provides the same liability period for new and second-hand goods. Under the proposals consumers may be persuaded to agree to a shorter period resulting in a reduction of the protection they currently enjoy.

Q55: What are your views on this proposal on second-hand goods?

Q56: Do you think 'second-hand goods' should be defined in the Directive?

155. The existing Sale of Goods Directive allowed Member States to opt to set a period of at least two months from discovery of a defect during which the consumer must inform the trader of the lack of conformity. This has not been transposed into UK law. The Commission has argued that the diverging transposition of this provision has created barriers to trade and therefore proposes, through this Directive, to require consumers to inform the trader of the lack of conformity within two months from the date of detection.
156. In our response to the Commission's Green Paper on the Review of the Consumer Acquis we opposed this measure as in our view it would be unworkable. It would be extremely difficult in the majority of cases for the trader to know when the consumer first became aware of the defect and therefore whether they had complied with the two month limit. Regardless of any formal requirements consumers will generally notify the trader of lack of conformity within a short period as they will see it as being in their best interests to get the lack of conformity remedied swiftly. However, there may be some instances where a consumer does not notify a trader of a defect immediately because they do not realise there is a defect or believe that it will remedy itself.
157. For these reasons we do not support a requirement that consumers must notify the trader of a defect within two months of it occurring. Although in practice, the negative impact on consumers may be small as it would not be easy for traders to prove when the fault occurred. Therefore enforcement of this requirement would be difficult.

Article 29 – Commercial guarantees

158. Commercial guarantees will be legally binding on the guarantor. The Directive will require that guarantees must be drafted in plain, intelligible language and be legible. Guarantee statements must contain the information required under paragraph two of Article 29. This includes information on the duration, territorial scope and a statement of the consumer's legal rights as provided by Article 24, stating that these rights are not affected by the guarantee. Where the guarantee cannot be passed on to any subsequent buyers a statement to this effect must be included in the guarantee. Traders will only be able to prevent consumers from transferring the guarantee where this is lawful under the unfair consumer contract terms provisions. Where the consumer requests it, the commercial guarantee must be made available on a durable medium. Failure to comply with the information requirements will not affect the validity of the guarantee and it will still be legally binding. These measures should increase certainty for consumers and traders.
159. We think that there is a case for including an additional requirement that the guarantee must be made available in the language in which the contract was concluded, and will ask the Commission to consider this further.

CHAPTER 5: CONSUMER RIGHTS CONCERNING UNFAIR CONTRACT TERMS

160. Chapter 5 broadly reflects the provisions of the current Unfair Terms in Consumer Contracts Directive (93/13/EC). It applies to unfair contract terms which have not been individually negotiated. Unfair terms are those creating significant imbalances in the rights and obligations of consumers and traders. Unfair terms will not be binding on consumers. In order to ensure legal certainty the Directive introduces for the first time two lists of unfair terms. Annex 2 contains a 'black list' of terms which in all circumstances will be considered unfair. Annex 3 contains a 'grey list' of terms which are deemed unfair unless the trader proves otherwise. These lists must be adopted by all Member States and may only be amended by the Commission in accordance with the comitology procedure set out in the Directive.

Q57: What are your views on the introduction of 'black' and 'grey' lists?

Article 30 – Scope

161. By virtue of Article 3, Chapter 5 will have wider application than the rest of the Directive as it will also apply to contracts which fall within the scope of the Timeshare and Package Travel Directives and will also apply to financial services. The provisions will apply to contract terms which the consumer did not have the possibility of influencing because they were drafted in advance by the trader or a third party acting on behalf of the trader. Being afforded the possibility to choose between different pre-drafted contract terms would not be regarded as negotiation and the provisions of the Directive would therefore apply to the contract. The fact that a consumer had the chance to influence aspects of a contract term or a specified term shall not exclude the rest of the contract from the scope of Chapter 5. This is an important provision that will prevent unscrupulous traders from allowing a consumer to influence one minor term in order to avoid having to comply with the unfair contract terms provisions. We wonder whether there would be any benefit in clarifying the scope to make it clear whether the provisions apply in circumstances where a consumer had a possibility to influencing the content of a term but did not do so or where he or she tried to do so but failed. Contract terms determined by mandatory statutory or regulatory provisions will be exempt from Chapter 5.

162. The scope of Chapter 5 occupies some of the ground covered by the Unfair Contract Terms Act 1977. The Act goes further for example in its application to terms negotiated by consumers. The effect of full harmonisation on the Act will need to be considered

Q58: We would welcome your views on the scope of Chapter 5.

Article 31 – Transparency requirements of contract terms

163. Contract terms must be expressed in plain, intelligible language and must be legible. Contract terms should be made available to the consumer in a manner which gives him or her a real opportunity to become acquainted with them prior to conclusion of the contract, with due regard to the means of communication

used. This would mean, for example, that where a contract has been concluded by mobile phone or online it would be sufficient to direct the consumer to a website containing the full contract terms prior to conclusion of the contract. This provision differs from the current provision in Article 5 of the Directive 93/13 because it does not only apply to written terms. It is unclear how it would operate in relation to oral contracts.

164. Consumers must give express consent to any additional payments on top of payment for the trader's main contractual obligation. Consent may not be inferred by using default options which require the customer to reject the additional payment (e.g. requiring the consumer to opt-out by 'un-ticking' a box). Where consent has been inferred in such a way the consumer will be entitled to reimbursement of the additional payment. We think this measure will provide appropriate protection to consumers and empowers them to make informed choices about whether or not to agree to any additional payments.
165. Member States must refrain from imposing any presentational requirements as to the way the contract terms are expressed or made available to consumers.

Article 32 – General principles

166. The Directive replicates the wording used in the existing Unfair Terms in Consumer Contracts Directive which provides that a contract term will be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. The requirement of good faith may be satisfied by the trader where he deals fairly and equitably with the other party.
167. Paragraph 2 goes on to set out what factors should be taken into account when assessing whether the term is unfair. Again this replicates the existing Directive but also makes clear that competent national authorities must take account of the manner in which the contract was drafted and communicated to the consumer in accordance with the transparency requirements under Article 31. Particular regard should be paid to the strength of the bargaining positions of the parties, whether the consumer was induced to accept the term and whether the goods or services were sold or supplied on the special order of the consumer.
168. As is currently the case, the assessment of the fairness of the terms should not relate to the subject matter or the price provided that the trader complies with the transparency requirements in Article 31. However the main subject matter and the price should be taken into account in assessing the fairness of other terms.

Article 33 – Burden of proof

169. Where a trader is claiming that a contract term has been individually negotiated and therefore is not subject to the provisions of this Chapter, it will be for the trader to prove that this is the case.

Q59: What are your views on Articles 31 to 33?

Article 34 – Terms considered unfair in all circumstances

170. Terms listed in Annex 2 will automatically be considered unfair in all circumstances. The list will apply in all Member States and can only be modified by the Commission.

Q60: Do you have any comments on the terms included in Annex 2 of the Directive?

Q61: Could a black list be too inflexible – might there be some circumstances where clauses on the black list are fair?

Article 35 – Terms presumed to be unfair

171. Contract terms listed in Annex 3 shall be deemed unfair unless the trader proves that the terms are fair in accordance with Article 32 (General principles). The list will apply in all Member States and can only be modified by the Commission.

Q62: Do you have any comments on the terms included in Annex 3 of the Directive?

172. Currently in the UK, it is for the consumer to prove that the term in question is unfair. The Directive reverses this burden of proof in relation to terms on the grey list so that it is the trader who is required to prove that the term is not unfair. This change is proposed as placing the burden of proof on the consumer is likely to be more burdensome than it would be for the trader.

Article 36 – Interpretation of terms

173. As in the current Unfair Terms in Consumer Contracts Directive, where there is doubt about the meaning of a term, the interpretation most favourable to the consumer will prevail, but this shall not apply in proceedings brought by persons or organisations who have powers to take action before the courts or administrative authorities for a decision as to whether terms are unfair (Article 38(2)).

Article 37 – Effects of unfair terms

174. Unfair contract terms will not be binding on the consumer. Where the contract can remain in force without the unfair terms the contract will continue to bind the parties.

Article 38 – Enforcement in relation to unfair contract terms

175. Member States will be required to ensure that adequate and effective means exist to prevent the continued use of unfair terms and that the courts or administrative authorities apply appropriate and effective means to prevent traders from continuing to use terms which have found to be unfair. Member States must enable persons or organisations, having a legitimate interest under national law in protecting consumers, to take action before the courts or administrative authorities for a decision as to whether contract terms drawn up

for general use are unfair. Under the existing UK Regulations the OFT and certain qualifying bodies, including OFCOM, OFWAT and OFGEM, may apply to the courts for an injunction to prevent the continued use of unfair terms.

176. The Directive requires that legal actions under this Article may be directed separately or jointly against a number of traders from the same economic sector or their associations which use or recommend the use of the same general contract terms or similar terms.
177. We intend to seek clarification as to what extent the provisions on unfair contract terms would apply to pre-existing contracts. Directive 93/13/EEC on unfair contract terms (Article 10) only applies to contracts concluded after 31 December 1994.

Article 39 – Review of the terms in Annexes 2 and 3

178. The Commission will be able to amend the lists of 'black' and 'grey' terms in accordance with the procedure set out in Article 40(2). Member States are required to notify the Commission of terms which the competent national authorities have found to be unfair where they believe this will be relevant for the purpose of amending the lists of unfair terms.

Q63: Please provide any further comments on Chapter 5.

CHAPTER 6: GENERAL PROVISIONS

179. Chapter 6 covers a number of issues including enforcement, penalties, inertia selling and transposition.

Article 40 – The Committee

180. The Directive proposes to establish a Committee on unfair terms in consumer contracts to consider the need to amend the lists of unfair contract terms in Annexes 2 and 3. Section 2 sets out the procedural requirements for amending the lists.

Article 41 – Enforcement

181. Persons or organisations regarded under national law as having a legitimate interest in protecting consumer rights must be afforded legal powers to initiate proceedings, either before a court or an administrative authority. This leaves a considerable degree of discretion to Member States to reflect the variety of enforcement and legal systems in existence across the Member States.

Article 42 – Penalties

182. Member States will be required to lay down rules on the penalties applicable to infringements of the national provisions which transpose the Directive and to take all measures necessary to ensure they are implemented. Member States will have discretion as to what penalties to apply but they must be effective, proportionate and dissuasive. Current UK transposition of the existing Directives provides powers for the OFT and sectoral regulators to seek injunctions to prevent traders from breaching the Regulations

Article 43 – Imperative nature of this Directive

183. Article 43 provides that where the law applicable to a contract covered by this Directive is the law of a Member State, consumers may not waive their rights conferred on them by this Directive. This provision is designed to ensure that consumers are not deprived of the rights provided by the Directive.

184. The equivalent provision in the current Unfair Terms in Consumer Contracts Directive appears to offer consumers greater protection in that it places an obligation on Member States to take the necessary measures to ensure that the consumer does not lose the protection granted by that Directive by virtue of the choice of law of a non-Member country if the consumer has a close connection with the territory of the Member States. This is not replicated in the current directive. It is not clear the extent to which specific provision in this Directive is needed to deal with this scenario.

Article 44 – Information

185. Member States will be required to take appropriate measures to inform consumers of the national provisions which transpose this Directive and, where

appropriate, encourage traders and code owners to inform consumers of their codes of conduct.

186. The UK Government, enforcement and advice agencies will publicise new laws which come into effect as a result of this Directive and will encourage traders and code owners to inform consumers of their codes of conduct. Traders who comply with a code of conduct are likely to inform consumers of this fact due of the commercial benefits to their business of being seen as a fair and reputable trader.

Article 45 – Inertia selling

187. Demanding payment for unsolicited goods or services is already prohibited under the Unfair Commercial Practices Directive, transposed into UK law by the Consumer Protection from Unfair Trading Regulations 2008 (Schedule 1, paragraph 29), but no contractual remedy for a breach is currently provided. This Directive will be used to introduce a contractual remedy of exempting the consumer from the provision of any consideration for unsolicited goods or services. Such a provision currently exists in relation to transactions falling within the scope of the Distance Selling Directive. The Article also provides that the absence of a response from the consumer following unsolicited supply shall not constitute consent.

Q64: We would welcome your views on this provision on inertia selling.

Article 46 – Transposition

188. This article sets out the requirements for transposition of the Directive. It will set the date by which the provisions must come into force in the Member States.

Q65: Please provide comments on the provisions contained in Chapter 6.

CHAPTER 7: FINAL PROVISIONS

189. Chapter 7 provides provisions for the repeal of the existing Directives and the entry into force of the new Directive.

Article 47 - Repeals

190. We welcome the Commission's intention to repeal the existing Doorstep Selling, Distance Selling, Unfair Terms in Consumer Contracts and Sale of Goods and Associated Guarantees Directives and replace them with a single framework Directive. This will reduce the volume of the Consumer Acquis and is a good Better Regulation measure.

Article 48 – Review

191. Article 48 requires the Commission to review the Directive and report to the European Parliament and the Council no later than five years after the date of application of the national provisions transposing this Directive. If necessary the Commission may develop proposals to adapt the Directive if it is deemed necessary in order to retain a high, common level of consumer protection. We welcome the commitment to keep the Directive under review in order to monitor its continued effectiveness.

Article 49 – Entry into force

192. This provides for the Directive to enter into force.

Article 50 – Addressees

193. The Directive is addressed to all Member States.

ANNEX A

The Consultation Code of Practice Criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your Department's effectiveness at consultation, including through the use of a designated Consultation Co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

ANNEX B: IMPACT ASSESSMENT

Q66: Do you agree with the assumptions, figures and impact assessments made in the Impact Assessments at Annex B? These Impact Assessments are based on initial consideration of the key issues for the UK of the draft EU Consumer Rights Directive. Please provide as much supporting evidence as possible.

