

Response to the Committee on Internal Market and Consumer Protection on the Consumer Rights Directive

Who we are

Consumer Focus is a statutory body that champions the needs of consumers across England, Wales, and Scotland and for postal services, Northern Ireland. We operate across the whole of the economy, persuading businesses and public services to put consumers at the heart of what they do. The new organisation was the result of the merger between the National Consumer Councils, energywatch and Postwatch and was formed on 1st October 2008.

Consumer Focus has the power to take action where markets are failing consumers and to ensure a fair deal for all – especially the vulnerable and disadvantaged. We want to see consumers central to business and government decision making, and we work at the European level too, to make sure consumer's needs are heard in Brussels. We don't just draw attention to problems – we use strong evidence base and work with a range of organisations to champion creative solutions that improve consumers' lives.

Evidence of consumer experience

Although there is a strong need for comparative research data and consumer intelligence across Europe, some research can be drawn upon to understand the current consumer climate. Amongst such research is the 2008 UK Consumer Conditions survey¹. The study assesses consumer conditions based on consumer ratings of 45 markets using indicators of confidence and transparency: the ease with which consumers can compare quality and price; the choice available; whether the purchase lived up to expectations; the protection of consumer rights, and the trustworthiness of advertising in each market.

Findings from the survey identified the following markets as those in which consumer confidence are lowest: Gas and electricity, Private pension plans, Home maintenance services, Petrol, diesel or oil, Private sector renting, and Estate agents and house purchasing services all scored very poorly.

¹ Report for BERR, Consumer Conditions Survey, ipsos MORI, 2008.

Consumers also rated the following markets poorly: Mobile phone network services, internet services, Fixed line telephone services, Mortgages, Hire Purchase, TV service providers, vehicle repairs or servicing, professional services loans or credit, betting, gambling, competition, prize draws or lotteries, personal banking. (Report for BERR on the 2008 Consumer Conditions Survey (Ipsos MORI))

Complaints to Consumer Direct UK

Consumer Direct is the UK Government funded first tier advice service for consumers. It has regional based advisers specially trained to give practical advice on all kinds of consumer issues. Data obtained from Consumer Direct in January 2009, showed a breakdown of consumer complaints by markets, most of which correspond with the findings of low consumer confidence in the poor performing markets found in the Consumer Conditions survey above.

Complaints to Consumer Direct in calendar year 2008	2008
Second hand cars purchased from independent dealers	47,019
Mobile Phones (service agreements)	31,267
TVs	20,313
Mobile Phones (hardware)	20,159
Car repairs and servicing from independent garages	16,176
Second hand cars purchased from franchise dealers	15,230
Upholstered furniture	14,530
Women's clothing	14,390
Internet Service Providers	14,246
Leather furniture	12,979

Study by the UK's Office of Fair Trading

In 2007, the UK's Office of Fair Trading market study on internet shopping concluded that delivery and communication with the trader were key contributors to low consumer confidence in cross-border shopping. Similarly, UK businesses were more concerned about delivery costs and product suitability than the regulations they would need to comply in cross-border trade².

The research also found that many businesses did not know their obligations under the Distance Selling Regulations which provide additional protection for shoppers when buying online. Some businesses could also do more to address consumers' concerns about privacy and security.

The fact-finding study identified some areas where more could be done to ensure people get the most from buying online, and how they can feel confident and protected when doing so. The findings include:

- awareness of online shoppers' rights is low for businesses and consumers
- the anonymity, speed of change and borderless nature of the internet, can pose particular challenges for the enforcers of shoppers' rights
- shoppers have significant fears about security and privacy, which put some off buying online altogether.

Studies commissioned by the Committee on Internal Market and Consumer Protection

In addition, studies commissioned by IMCO on cross-border e-commerce demonstrate that divergent national regulations are only one amongst many barriers to cross-border trade such as language, local brand preferences, payment security & fraud, transport costs, redress and alternative dispute resolutions³.

The various research referred to above highlights current consumer concerns, concerns which we believe a Consumer Rights Directive should (but does not) address. The Directive's failure to tackle consumer concerns is further compounded by provisions which lower consumer protection. As it stands, the proposals are likely to have staggering effects beyond the Directive and cross border selling. Contract and Common law in various jurisdictions stand to be weakened at consumer's expense, without any evidence to suggest that the objectives of the Directive would indeed be met.

Fundamental flaws in the proposals

For consumers to be able to participate in the European Single Market, we believe that consumers should (i) be able to buy goods and services under an appropriate EU wide consumer protection framework with effective enforcement, and (ii) have their reasonable expectations of product and service quality, as well as how they will be treated when things go wrong, met. Where there is a mismatch between consumer expectations of what happens in practice and what the law provides, consumer confidence suffers.

² Internet Shopping. An OFT Market Study, 2007

³ IMCO Briefing Note on Consumer Confidence in the Digital Environment, 2007; IMCO Briefing note on Refusal to serve consumers because of nationality and residence – Distortions in the Internal Market for the e-commerce transactions, 2007; IMCO Briefing Note on Redress & Alternative Dispute Resolutions in Cross- Border E-commerce Transactions, 2007).

The aim of a Consumer Rights Directive, which puts consumers at the heart of its consideration, should therefore be to:

- Put consumers at the heart of the EU by simplifying and improving 'the Acquis', making it easier for consumers and businesses to understand consumers' legal rights;
- Empower consumers to play a pivotal role in driving the supply side of the EU Single Market;
- Establish a high level of consumer protection; identifying gaps in the scope of 'the Acquis' and developing strengthened rights under the CRD where appropriate;
- Achieve the right level of harmonisation. Any case for maximum harmonisation should be supported by evidence that protection at national level will not be reduced; and
- Future proof consumer protection legislation so that it is enduring and capable of dealing with situations in the long term.

Unfortunately, however, the CRD appears wholly counter intuitive to these principles. We are particularly perplexed by the form and function of the Directive and simply disheartened by many of its substantive provisions. It is our view that the CRD is poorly constructed making it difficult for consumers and businesses alike to understand their legal rights. We do not believe that the proposals are capable of delivering an appropriate framework of consumer protection across the EU. Indeed the proposals perversely lower the protection currently available to consumers in the UK and in other Member States. As it stands consumers in the UK will lose

- the right to reject faulty goods and obtain a full refund; and
- the proposal to reduce the period during which a seller is liable for faulty goods from 6 years (5 in Scotland) to only two years.

More thought and careful consideration should be given to how the CRD will work in practice, as well as the likelihood for unintended consequences before any substantive changes are made to the existing regime.

Maximum Harmonisation

We do not believe that it is desirable or feasible to impose maximum harmonisation across the entire package. The difficulties are particularly acute for unfair contract terms, which are based on principles, not prescriptive definitions. In the UK there are a number of regulatory bodies such as the Office of Fair Trading and the regulators for communications, energy, water and financial services, who have powers to decide whether contract terms are unfair and have taken action against industry practices. Examples include: mortgage exit administration fees; and the bank default fees cases that have now been found to be unfair by the UK courts. It is difficult to see how maximum harmonisation can work here or in member states with common law jurisdiction and developed case law, even with the introduction of Comitology procedures.

In addition, the proposal to fully harmonise would only result in member states scrambling to preserve existing consumer protection in their countries, resulting in even more fragmentation and defeating one of the alleged key objectives. We consider this to be an unfortunate development particularly as one of the premise of this Directive is to strengthen protection across Member States. It also goes without saying that Maximum harmonisation limits the scope of Member States to provide additional protection where appropriate or indeed in new and developing markets.

Moreover, and perhaps more importantly, there has been lack of evidence to convince or even to suggest to Member States that maximum harmonisation will make it easier for businesses to sell cross

border or enhance consumer confidence when shopping cross border. For example, there is weak and insufficient evidence to show that businesses will increase cross border trade if the cost of compliance decreases, nor is there evidence to suggest that an increase in cross border trade will deliver consumer benefits in terms of greater choice, improved quality and reduced prices. Put simply, the case has not been made for full harmonisation. Consumers are however being asked to take a leap of faith at what can only be described as potential consumer benefit. In contrast, there are real, actual and tangible threats to the rights of consumers under this proposal.

The proposal is not future proof

It is disappointing to see that Digital goods and services are inadequately covered in the Directive. Evidence suggests that digital goods and services are one of the most likely products to be traded cross border; such products are also likely to grow in the coming years. The huge growth in digital technologies and consumers' increasing reliance on computers in their daily lives gives rise to a growing and acute need for consumers to have remedies for digital or technological contracts; including software downloads, made available to them in the same way they are for goods. This will help boost innovation and for consumer confidence in new technologies to remain strong.

Alternative approaches

A useful approach would have been a Directive that started from the premise of understanding what the current gaps in existing consumer protections are, one that addressed these concerns and mitigates against future developments. Unfortunately, what we have is an amalgamation of four Directives with limited comparison between the proposal and the merged EU directives. It would have been useful if an initial draft provisions was rigorously analysed against legal provisions in Member States; particularly important where maximum harmonisation is being proposed.

An alternative approach would therefore start by addressing current consumer concerns; it would utilize and commission research on consumer detriments, better redress and enforcement issues. It would fully cover digital goods and services and would as far as possible be future proof. It would also consider in detail the feasibility of full harmonisation in this area.

With regards to specific measures, the CRD should certainly extend to services, particularly if the service constitutes the predominant part of the contract. It should not lower consumer protection by reversing existing legislation which gives the consumer the right to choose the remedy when he/she receives a faulty good. It should not limit the guarantee period to 2 years and neither should it add complicated layers to an already complicated field, the Directive introduces a subjective concept called 'minor defects', which makes it harder for consumers to exercise their rights where such 'minor defects' are concerned and it allows the trader to determine what is 'minor'.

Conclusion

It is unfortunate that the Directive as drafted has not sought to redress current consumer concerns as highlighted above. It is even more perplexing that the Directive is not based on evidence. Therefore, as it stands, Consumer Focus is unable to support the Directive, and would urge IMCO to thoroughly consider the collective effects of such a Directive on consumer protection across Member States.