

WORKING DOCUMENT OF THE COMMISSION
RESPONSES TO THE CONSULTATION ON DISTANCE SELLING
DIRECTIVE 97/7/EC¹ CONTAINED IN COMMUNICATION
2006/514/EC

SUMMARY OF RESPONSES

The Commission has prepared this summary on the basis of those contributions for which translations were available. A number of contributions have therefore not been taken into account at this stage. The Commission will however update this summary once it has translated the remaining contributions.

1. Are the current definitions of “consumer” and “supplier” adequate for the purposes of the field regulated by Directive 97/7/EC? (this issue will also be considered in the broader consumer acquis review work)

The responses to the consultation on the adequacy of the definition of "consumer" for the purposes of the field regulated by Directive 97/7/EC indicate that overall stakeholders are satisfied with the current state of play. Many contributions call for the adoption of a consistent approach to this definition across the consumer acquis. In order to achieve this consistency, some stakeholders suggest an alignment of the definition of consumer with the definition contained in Directive 2005/29/EC² on Unfair Commercial Practices, by the introduction of an express reference to the average consumer. One Member State suggests the definition of Directive 93/13/EEC³ on Unfair Contract Terms should be followed.

The definition of supplier raises more comments. Again consistency is widely supported. Broadening of the scope of the definition is also mentioned in a number of responses. In particular, there are calls to include semi-professionals and intermediaries, to respond to recent developments in the markets e.g. online auctions. Another request made by a number of stakeholders is the inclusion of an express exclusion of B2B contracts. One stakeholder suggests that it is not always clear that C2C transactions are excluded.

¹ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19.

² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”), OJ L 149, 11.6.2005 p. 22.

³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29.

2. Is the current definition of a “*distance contract*” clear enough? In particular, is the term “*organised distance sales or service provision scheme*” clear or should consumer protection be extended to all distance contracts regardless of whether the supplier usually trades at a distance?

The responses to this question do not point to one specific direction. There is support for different scenarios, regardless of whether the responses emanate from consumer or business stakeholders or Member States. Some stakeholders are happy with the definition as it stands, others request a clarification of the term “organised distance sales or service provision scheme”, whilst others would like the definition to extend to all distance sales. Overall, it could be said that business stakeholders favour the status quo, whereas consumer stakeholders call for further clarity and in a majority of cases for all distance contracts to be covered, irrespective of an organised scheme being in place. Member States are evenly split on this matter.

Few stakeholders ask for a clarification of “exclusive use” of means of distance communication.

3. Is the current definition of “*means of distance communication*” clear enough?

Overall, the responses to the clarity of the definition of “means of distance communication” are positive. A number of stakeholders ask for Annex 1 to be updated to include e.g. SMS and/or other new technologies such as message services on the Internet. This applies to both consumer and business representatives. The need for a flexible and future proof definition is highlighted by some stakeholders and implicitly supported by many. Member States seem content with the definition.

Some business stakeholders ask for the definition to exclude contracts which are conducted at a distance at the consumer’s request. This issue may best be dealt with when considering the definition of “distance contract”.

4. Is there any added value to “*operator of means of distance communication*” being defined?

This question has not generated much interest from stakeholders indicating that there are no strong feelings about this issue, which seems to be mainly of a drafting nature. All Member States but two agree that there is no added value to it.

Consumer stakeholders who answered this question are satisfied with it or ask for it to be broadened.

On the business side, the answers are more fragmented. A number of respondents do not feel that it needs defining. A few ask for the Directive to specify that the network operator is not liable for transactions conducted over the operator’s network, an argument which is also echoed in the answers to some subsequent questions of the consultation. A couple find the definition unclear and request a clarification.

5. Are definitions unclear in relation to any other concept, or are there other concepts relating to distance selling in need of definition?

The vast majority of answers to this Question will be considered later in this document since they often relate to Questions 9 (auctions), 12 (durable medium) and 14 (working days vs. calendar days).

Worth mentioning, is a contribution which stresses the importance of considering the revision of this Directive in the light of international instruments such as the OECD guidelines on e-commerce of 1999 and the UN Communication on the use of e-communications in international contracts of 2005, as well as the rest of the Community acquis, including Directive 2000/31/EC⁴ on E-Commerce. This stakeholder calls for a consistent use of terminology beyond Europe, as far as possible. Although the international approach to terminology has only been argued for by one respondent, many stakeholders argue in favour of an EU approach.

One Member State also refers to the lack of regulation of premium rate services in this context. Other Member States have raised premium rate services in their responses to subsequent questions. The Commission takes note of the interest in this type of service. It has also been pointed out during the consultation that the concept "leisure services" may need to be clarified.

A majority of the Member States do not find that there is a need of definitions of other concepts relating to distance selling.

Article 3 – Exemptions

6. Do the current exemptions need to be revised, expanded or repealed in the light of new market developments (e.g. downloading of music or other services) and/or technologies (e.g. emergence of m-commerce) or interpretation problems (e.g. European Court of Justice ruling on the Easycar case in which it was decided that car hire amounts to a “transport service” and is as a consequence excluded from the scope of the Directive; use of broad terminology such as “leisure services”)?

This question on the exemptions to all or part of the Directive has unsurprisingly generated many responses. This document will categorise the comments most frequently encountered. Some of the comments made here may also be taken up elsewhere in this document, in particular in the context of Question 16 on the exemptions to the right of withdrawal. One Member State emphasizes in relation to this question the need for clear information requirements so that consumers easier than today know when they are covered or not by the provisions in the directive for example when it comes to the right of withdrawal.

Foodstuffs, goods intended for daily consumption etc

Industry calls for a clarification of the term regular rounds men, whereas other stakeholders would like the position concerning online supermarket shopping to be clarified.

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, p. 1.

M-commerce and other forms of new technologies

A number of business stakeholders calls for an exemption from all the provisions of the Directive for m-commerce, especially for services delivered directly to and for immediate consumption on mobile handsets (including news services and gaming) because of the low value of the transaction and the fact that the consumer will have had the opportunity to copy or use the service. One stakeholder warns against the development of rules for m-commerce before this relatively new form of marketing has fully matured. A Member State and a public body are in favour of the development of such rules but stress the importance of bearing in mind the specificities of new technologies, particularly when looking at the provision of prior information. A few other Member States and one business organisation agrees that the particular conditions of new technologies distribution channels, such as m-commerce, must be taken into account, although by that not meaning that general exemptions should be made. Generally speaking, consumer representatives are in favour of m-commerce being covered by the Directive but some are prepared to make concessions on the applicability of the right of withdrawal.

One contribution suggests exempting telephone sales from the scope of the Directive.

Downloads will be considered in the context of Article 16.

Transport

Some business stakeholders would like to see an express exclusion of car hire in the Directive in accordance with the decision of the European Court of Justice in the EasyCar case. Consumer organisations disagree with this and would like all forms of transport, including car hire, to be covered by the Directive.

Exemptions related to tourism/catering

On the one hand, industry calls upon maintaining the exemption at Article 3(2) second indent as it currently stands and points out to the need to bring the Directive in line with European Court of Justice rulings, made in the context of this Directive and other consumer Directives, especially Directive 90/314/EC⁵ on Package Travel. On the other hand, consumer representatives feel this provision and Article 3(2) first indent lack clarity. A couple of Member State support this view but contrary to consumer organisations resist the broadening of the scope of these exemptions. Several consumer representatives indeed favour the inclusion of most services requiring reservations, including hotel bookings, but acknowledge that under certain circumstances these could be exempted from the right of withdrawal e.g. where the supplier cannot find a replacement for the consumer. Others deem the right of withdrawal unreasonable in cases where reservations have been made. One stakeholder asks for the introduction of a duty on the supplier to inform the consumer of the cancellation of an outdoor leisure event and the inclusion of holiday clubs in the scope of the Directive.

⁵ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, p. 59

Vins en primeur

Industry feels vins en primeur should be excluded from the scope of the Directive, or at least the right of withdrawal, because of the speculative nature of the transaction where wine is ordered two years prior to delivery. They argue that the right of withdrawal which runs from delivery allows consumers to desist from the contract should the wine not be of the quality or value expected at the time the contract was concluded. One Member State supports these views.

7. Has the insertion of a definition of financial services by Article 18 of Directive 2002/65/EC⁶ in the Directive) solved any transposition problems Member States may have originally encountered when transposing the Directive? (*this issue will be considered in more detail in the course of the review of Directive 2002/65/EC*)

A handful of stakeholders have answered this question. The few responses the Commission has received indicate that overall stakeholders and Member States are satisfied with the current situation. Two contributions are worth mentioning. One stakeholder suggests that micro-payment services should be less regulated in the Member States to allow mobile micro-payment services to develop. Another stakeholder argues further coherence is needed and suggests a distance sales common frame of reference should be envisaged.

8. Does the exemption covering the construction and sale of immovable property or rights related to immovable property cause any interpretation problem e.g. interaction of this Directive with the Timeshare Directive⁷?

Few stakeholders have commented on this exemption. For Member States, the exemption is clear. The only concern raised by three Member States relates to timeshare like products. This issue is not to be considered in this summary. However, the Commission will take these comments into account in the course of its work on timeshare.

The Commission has received demands for clarifications from a few consumer stakeholders concerning this Directive's interaction with the Timeshare Directive 94/47/EC⁸. One consumer organisation also specifically raises the question of holiday clubs.

On the business side, the vast majority of stakeholders who have commented on this question believe the Directive is clear. One stakeholder asks for a clarification of the distinction between "immovable property" at Article 3(1) and "accommodation" at Article 3(2) second indent, whereas another asks for timeshare to be included in the scope of the Directive.

⁶ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9.10.2002, p. 16

⁷ Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, p. 83

⁸ Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, p. 83

9. Should auctions or specific types of auctions be covered by the Directive?

This question concerning auctions has generated a lot of attention from stakeholders, with some suggesting possible alternative drafting.

Amongst consumer stakeholders, there is a consensus that the current state of affairs is not satisfactory. Different propositions are put forward but generally speaking the emphasis seems to be on the need to cover auctions conducted on so called online auction platforms. One consumer stakeholder also suggests that auctions should be covered unless the item up for sale is second hand. Another suggests online and television auctions need to be covered by the Directive, a view supported by at least one academic.

Overall, it seems as most Member States feel at least online auction platform should be covered. One Member State argues that only auctions where all consumers bid at a distance should be covered to ensure that there is no discrepancy in protection depending on whether one bids in person or at a distance. A public body argues that expanding the scope of the Directive to cover auctions, or at least specific auctions, may not in itself increase consumer protection since some businesses do not portray themselves as such when selling on the internet.

The answers of the business community vary a lot more. Several stakeholders argue adamantly that auctions should be covered by the Directive to guarantee a level playing field. Others feel an inclusion of auctions in the scope of the Directive would severely affect this sector of activity. In particular, the application of the right of withdrawal to transactions is particularly criticised. Stakeholders argue that if consumers were to be granted a right of withdrawal when purchasing by auction, then abuses will ensue and the value of the item sold will be severely affected. Certain prior information requirements are also deemed to be contrary to the way auctions have been traditionally conducted. For instance, the disclosure of the name and address of the person putting an item up for auction would go against the spirit of auctions, where confidentiality can be guaranteed if requested.

From the responses received, it is clear that the definition of auctions causes problems. A distinction has been drawn by many stakeholders between traditional auctions, generally conducted by auction houses both in a physical location and at a distance, and online auction platforms. Recurring arguments supporting this distinction include: the lack of an auctioneer who takes possession of the item for sale, values it and guarantees it in online auction platforms and the fact that the platform does not act as agent for the “supplier”; the fact that in traditional auctions, the auctioneer acts as agent for the “supplier” and bidders are invited to attend auctions in person and have the opportunity to inspect the item for sale. The responses to the consultation in respect of auctions also make it clear that different business models exist for online auction platforms. A distinction based purely on traditional style auctions and online auction platforms may therefore not be sufficient. The Commission has nevertheless received several calls to differentiate traditional auctions conducted in the physical and/or virtual world from online competitive bidding processes.

The issue of auctions is clearly a complex one and further work is required by the Commission.

Article 4 – Prior information

10. Can Article 4 be improved (e.g. clearer provisions concerning timing and/or format of the prior information; introduction of additional requirements or repeal of certain requirements)?

The answers to this question on prior information have generated many different responses with calls on the side of consumers to clarify and/or add to the list of required information. A number of consumer representatives suggest that suppliers should provide consumers with their address in all cases, whether or not payment in advance is requested. They also argue in favour of the addition of an obligation to indicate to consumers when the right of withdrawal does not exist, in line with the implementation of a number of Member States. The interpretation of “price” at Article 4(1)(c) is cited as an example of a prior information requirement which has caused problems in practice. Language requirements are deemed necessary by some consumer stakeholders and at least two Member States.

Generally speaking, business favours a reduction of the amount of information to be given before the contract. It calls for further harmonisation in this area in order to abolish barriers to trade and further the Internal Market objectives of the EU. Article 4(1)(h) regarding the period of validity of the offer or price causes specific concerns with arguments indicating that such a requirement is not adapted to the online market.

Strong calls for precision of the way and timing in which prior information is provided can be heard from both sides. One recurrent comment from business concerns the need to take into account the means of distance communication used by the supplier. In particular, the provision of prior information in m-commerce raises concerns because of the size of the screen. Several business stakeholders have argued that part, or all, of the information could best be communicated to the consumer by referring the consumer to a website or a telephone service. In the latter case, some suggest the call charge should be free or at a basic rate. This is supported by one academic. Consumer representatives have found the wording of the Directive and its implementations in the Member States to be at times too vague. Several suggestions are made to tighten the text, including precision on when the information is to be provided and in which format it should be provided.

Rationalisation of prior information requirements with that of other directives, in particular the E-commerce Directive 2000/31/EC, is also a prime concern for stakeholders on all sides, including at least one public body.

One Member State suggests the information requirements should be more complete and in line with Directive 2002/65/EC on the distance Marketing of Financial Services and this is agreed by an academic who however admits that there is justification for the differences because of the specificities of financial services.

Overall, Member States deem Article 4 to be adequate. One Member State raises the issue that although all information in practice may be provided, it is difficult for the consumer to find in the contract. Requirements how to present the information could therefore be considered.

1. Are all groups of consumers (e.g. minors) sufficiently protected by the Directive? If not, how can their protection be improved?

Member States and business stakeholders are mainly satisfied with the current state of affairs concerning the protection of minors. One business stakeholder suggests raising the level of protection to the highest existing level in Europe. A couple of others warn against a replication of the Commission's work on child safety and mobiles phones in this context.

In the view of consumer representatives, children's interests should be paramount to the Commission when revising this Directive. Several suggestions are made including the introduction of standard clauses, bigger print and better communication of commercial aim of the supplier.

One academic points out how self regulation can be of great use in this context.

Article 5 – Written confirmation

12. Can Article 5 be improved e.g. introduction of a definition of “durable medium” as defined in Directive 2002/65/EC; introduction of further information to be confirmed in writing or deletion of some information)

This question has attracted a substantial amount of interest from all stakeholders, in particular with regard to the definition of “durable medium”. A few business stakeholders are opposed to a definition of this term. Most stakeholders however, including Member States and consumer representatives, ask for a re-alignment with existing or proposed legislation. A consumer stakeholder suggests referring to a list of media deemed durable.

Consumer associations have made a number of requests including the introduction of language requirements, the right for the consumer to choose his preferred medium, confirmation of all the prior information in writing and the introduction of further information requirements, for instance on after sales services and the exercise of the right of withdrawal.

The Commission has received a number of submissions from business requesting that websites always be considered a durable medium and that new technologies such as SMS and MMS be included in the definition. The need to provide the geographical address of the supplier in writing is deemed outdated by at least one business stakeholder who suggests e-mail addresses are more appropriate nowadays. Another matter that is addressed concerns the need of clarification whether article 5(2) applies to subscription services such as sport/news alerts delivered by SMS.

Finally, several stakeholders have called for more precise wording regarding the timing for provision of the written confirmation.

13. Would the merger of the information requirements at Article 4(1) and 5(1) simplify these rules for both consumers and suppliers?

Member States and stakeholders views on the merger of the information requirements at Article 4(1) and 5(1) are split fairly evenly. Consumer representatives fear an information overload for the consumer. One consumer representative puts forward the idea of introducing templates for suppliers to ease their task. Both consumer and business representatives argue that different type of information becomes relevant at different times. One public body argues in favour of the merger.

Article 6 – Right of withdrawal

14. Do you think the length of the distance selling cooling off period should be harmonised across the Member States and if, so how long should this period be? (*the issue of whether the length of the cooling off periods in the different consumer directives should be harmonised across the acquis will be considered in the broader consumer acquis review work. However, you may wish to comment here*)?

There is general consensus on the question of the harmonisation of the cooling off period in the context of this Directive across the EU amongst Member States, public bodies and consumer stakeholders. Member States also argue in favour of a cooling off period calculated in calendar days. Consumers' representatives generally prefer a reference to working days. A vast number of business stakeholders are also in favour of harmonisation. There is division over whether calendar days or working days should be used as a basis for calculation.

The length of the cooling off period suggested by most consumer associations is a minimum of 14 days whereas business argues in favour of 7 days (with consumers favouring working days and business being more split over this issue, as mentioned above). One consumer stakeholder volunteers a 14 working day period or 21 calendar days. Member States favour between 7 and 14 calendar days.

Those respondents who have commented on the issue of harmonisation across the acquis are in many cases positive as to such a coordinated approach, though tend to acknowledge that specific sectors or marketing methods need separate periods. Timeshare is cited as needing the longest period.

15. Do the rules concerning the exercise of the right of withdrawal and its consequences need to be clarified?

Stakeholders make diverse requests concerning the exercise of the right of withdrawal, indicating a general will for more precise rules. Of prime concern to business stakeholders is the need to make the refund conditional upon the return of the item ordered, along with its original packaging and ancillary goods in many circumstances. Many also argue in favour of an express imposition of a duty of care on the consumer whilst the goods are in his possession. One business stakeholder feels a clarification of the rules on the burden of proof in the case of damage or loss during transfer to, and from, the consumer is needed.

Consumer stakeholders generally feel the rules are not tight enough, in particular the rules on timing seem to cause problems. They also argue that it is often unclear to the consumer how she or he is to go about withdrawal. Some suggest a model notice of cancellation should be prescribed by law. This is supported by an academic stakeholder. One consumer stakeholder wants the Directive to specify that the consumer is not liable for any loss of value of the item during the cooling off period, a point countered by at least one business. Another would like an express mention to the effect that the right of withdrawal remains valid in case of loss or damage during delivery.

Member States tend to think the rules on the right of withdrawal are sufficiently clear. One however believes modifications are needed, as does one public body who wishes the rules to take account of the media used.

The issue of mix contracts combining both goods and services, of which mobile phones sold as package with airtime are a good example, is also raised by some stakeholders and one Member State, the latter arguing that in such cases the most favourable moment for the consumer as to the starting point of the withdrawal period could be used.

The issue of goods delivered in batches has been raised by a number of stakeholders and one Member State throughout the consultation. Different approaches have been suggested and will be considered further by the Commission.

16. Do the current exemptions to the right of withdrawal need to be revised, expanded or repealed in the light of new market developments and/or technologies?

This question has generated a lot of interest from most stakeholders. This document will summarise the issues most commonly encountered in stakeholders' answers in the same way as Question 6 concerning the exemption to all or part of the Directive does. As a general comment, Member States are generally satisfied with the current exemptions from the right of withdrawal.

Goods which on the grounds of hygiene and/or health and safety cannot be returned

Many businesses argue in favour of the introduction of an exclusion from the Directive on the grounds of hygiene and/or health and safety. This is supported by a couple of Member States. A number of items such as underwear, electrical goods, digital cameras, jewellery are mentioned on several occasions. Some suggest the introduction of such an exemption. Others require a clarification of the exemption for goods which because of their nature cannot be returned (Article 6(3) third indent) because of interpretation problems in some Member States. An introduction of a duty of care on the consumer whilst goods are in her or his possession has been often mentioned in the answers to this question. This issue has already been raised in the context of Question 15.

Goods made to the consumer specifications/personalised

The Commission has received submissions asking for more clarity or a deletion of the exemption at Article 6(3) third indent.

Downloads/digital content/software

These answers should be read in conjunction with the answers on m-commerce at Question 6. Business and consumer stakeholders are divided over the question of the exemption for software/downloads but it seems that for the most part their approaches can be reconciled. In relation to software, both the consumer and business side call for a clarification of the existing exemption. Consumer associations argue that seals are less and less common and the right of withdrawal should, as a consequence, be extended. Concerning downloads and digital content, several consumer representatives are keen to see these included in the scope of all of the Directive but some seem prepared to make some concessions notably concerning the application of the right of withdrawal. Business argues for either full exemption or as a minimum exclusion from the right of withdrawal.

Exemption for low value transactions

The introduction of a monetary threshold has been suggested by a few stakeholders, based on the model set in the Doorstep Selling Directive 8/577/EEC⁹.

Auctions and vins en primeur

See Question 6 and Question 9. There is an opposition by all or part of the industry for the right of withdrawal to apply.

Services where performance has begun with the consumer's consent before the end of the cooling off period

Although not mentioned by many in the context of this question, it would appear from the consultation that the practical application of this provision at Article 6(3) first indent may be difficult.

17. Should the provisions concerning the cost of return be harmonised in the field of distance selling and if so, who should pay the cost of return? (*this issue will also be considered in the broader consumer acquis review work*)

Member States are split over the issue of the harmonisation of the cost of return. Most of them however seem to agree in theory that the consumer should be made liable for these costs, except in cases of defective goods or services. Several consumer representatives do not seem to be adverse to this approach. One suggests splitting costs between the business and consumer.

A vast majority of businesses feel it is only fair for the consumer to bear the costs of return in case of withdrawal. This argument is often based on the fact that in the physical world a consumer would have to pay his transport costs. Some specify that this should only be the case where the consumer has been informed of this. Others argue that the consumer should also pay for the initial costs of sending the item to the consumer and/or should not be able to get a refund for these initial costs.

Article 7 - Performance

18. Do the provisions of Article 7 ensure proper performance of distance contracts e.g. are the rules concerning timing and form clear?

Member States are satisfied with the performance provisions at Article 7. Most comments received concern timing, in particular the calculation of days. These have been discussed earlier in this document in Question 14.

Business and consumer stakeholders make representations for a tightening of terminology in this Article, in particular regarding the start of the 30 days period mentioned at Article 7(1) and (2).

⁹ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L 372, 31.12.1985, p. 31.

Mainly consumer stakeholders are concerned that the provisions regarding unavailability and refunds are not strict enough. They suggest that shorter periods for refund and that an obligation to communicate to the consumer the unavailability of the product within a set number of days be introduced. Consumer stakeholders also suggest tackling problems related to delivery in this Article such as the introduction of a duty for the supplier to specify a delivery date. At least one consumer stakeholder feels financial penalties are required for late delivery, which is something business stakeholders oppose.

19. Should the optional provision concerning substitute goods at Article 7(3) be made compulsory to raise the level of consumer protection evenly across the Internal Market?

Unfortunately, there seems to have been a misunderstanding concerning this question which sought views on whether all Member States should introduce the provisions concerning substitute goods contained in the Directive. Clearly, at least one stakeholder read the question as meaning that the Commission was putting forward the suggestion that suppliers should in all circumstances provide consumers with substitute goods, whether or not this was agreed to before conclusion of the contract or in the contract. The Commission fears that other stakeholders may also have interpreted this question in this way but that this has not transpired in their responses. Therefore, the information that follows cannot be entirely relied upon. It should nevertheless give a good overview of the situation

All Member States, except for two, and most business stakeholders are against making the provision for substitute goods compulsory at European level. The few business representatives that agree to the further harmonisation of these rules make it clear that the provision of substitute goods should remain optional.

The consumer side is more divided over this issue. Those who support it, or are not strictly against it, nevertheless point out that the consumer should have a choice whether or not to accept the provision of substitute goods.

Article 10

20. Should Article 10 be expressly repealed to clarify the relationship between Article 10 and the Directive 2002/58/EC¹⁰ on privacy and electronic communications.

Overall a majority of all stakeholders favour a repeal of this Article for the sake of clarity. Member States favour clarification and are happy with the suggestion or have an open view. Consumer representatives are split over this issue. Those who are against tend to be in favour of an opt-in system or broadening of Article 10 e.g. ban on cold calling. A couple of business stakeholders argue that the scope of both Directives is different. The Commission will consider these comments further.

10 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37.

General questions

21. How has the use of the minimal clause i.e. the possibility for Member States to retain or introduce provisions offering a higher standard of consumer protection affected cross border trade and competition e.g. has it constituted a hindrance to cross-border trade or raised obstacles to the exercise of the right of establishment? If so, please give examples.

Most businesses believe the minimum clause has hindered cross border trade. Examples often quoted are the different periods of withdrawal throughout the EU and the different approaches adopted when transposing the exemptions to the Directive. Diverging national interpretations are also a source of concern. Only one Member State expressly agrees with this. This issue will be considered further in the context of the Green Paper on the review of the acquis, to be published shortly. The comments received in the context of the present consultation will be taken into account.

22. Have you encountered any other problem with the regulation of distance selling as it currently stands?

Some business representatives ask for a redress of the balance between the interests of businesses and consumers. They feel consumers are more protected when purchasing at a distance than in a shop. Consumer representatives argue for more clarity for the consumer e.g. more information on after sales services (availability of spare parts), compulsory links to terms and conditions and more information on cancellation of credit agreements.

23. Do you feel that there are other aspects of distance selling that require regulation?

The issues raised in the answers to this question have been to a large extent dealt with throughout the document.