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European Union Committee

18th Report of Session 2008–09

EU Consumer Rights Directive: getting it right

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The European Union Committee

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Summary

The strengthening of consumer protection and the promotion of an internal market are core objectives of the European Union (EU). Both are crucial and should not be seen as alternatives, but as complementary.

A review of the existing body of EU consumer law (known as the consumer *acquis*) culminated in the European Commission's publication of a draft Directive on consumer rights, proposing to replace four of the existing Directives making up the consumer *acquis*. The draft Directive's aim is to simplify the existing regulatory framework and provide for a real business-to-consumer internal market, balancing a high level of consumer protection with the competitiveness of enterprises. This draft Directive is the subject of our Report.

We consider that the Government should withhold agreement from the proposal as drafted. We are unconvinced that it will deliver the desired boost in trade across borders and we fear that, in some instances, it may reduce the overall level of protection currently afforded to consumers. The proposal should not be abandoned, but some of the issues as highlighted in this report must be revisited. That being so, we will continue to monitor progress on this dossier to try to ensure that the potential benefits, for both business and consumers, are realised.

Above all, further progress on the Directive should await a more complete Impact Assessment, addressing issues such as the lack of concrete statistics underpinning this proposal and the exclusion of digital goods and pure services from its scope.

We agree that there is a need to update the existing Directives. This is not least due to inconsistencies between them over key definitions and the fragmentation of the business-to-consumer internal market that has resulted from Member States being able to introduce provisions that go beyond the minimum set down in the Directives. The Commission's solution is to apply the principle of "full harmonisation", whereby Member States' national rules will no longer diverge from those set at the EU level. We acknowledge that this could increase legal certainty for both consumers and businesses. Nevertheless, we would prefer to see a more targeted use of this principle, harmonising certain aspects but allowing Member States room for manoeuvre in other areas.

Negotiations on the proposal are still at an early stage and there is thus ample time to address these concerns. We firmly believe that benefits will accrue to business from legislation which genuinely has the consumer at its heart.

EU Consumer Rights Directive: getting it right

CHAPTER 1: INTRODUCTION

Background

1. The Commission's proposal for a Consumer Rights Directive, [1] published on 8 October 2008, marked the culmination of the review of existing EU consumer law, known as the "consumer *acquis*". Launched in 2004 as part of a broader European Contract law agenda[2] and developed in the Green Paper on the Review of the Consumer Acquis in 2007,[3] the review aimed to simplify and complete the existing regulatory framework. It was hoped that the end product would be a real "business-to-consumer" internal market, striking the right balance between a high level of consumer protection and the competitiveness of enterprises. The consumer *acquis* was defined in the Green Paper as encompassing eight Directives:[4] Sale of Consumer Goods and Guarantees; Unfair Contract Terms; Distance Selling; Doorstep Selling; Price Indication; Injunctions; Package Travel; and Timeshare.[5]

The Commission's proposal

2. The draft Directive is summarised in Box 1. The Commission proposes that the Directives on Doorstep Selling, Unfair Contract Terms, Distance Selling and Sale of Consumer Goods and Guarantees be merged into a single "horizontal" directive that regulates the common aspects in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps. The Commission intends that these changes should enhance consumer confidence and reduce business reluctance to trade across borders.[6]

BOX 1

Summary of the Commission's proposal

Full harmonisation: The proposal moves away from the minimum harmonisation approach followed in the four existing Directives (i.e. Member States may maintain or adopt stricter national rules than those laid down in the Directive) to embrace a full harmonisation approach (i.e. Member States cannot maintain or adopt provisions diverging from those laid down in the Directive). (See chapter three)

1 COM(2008) 614, 8.10.2008, Proposal for a Directive on consumer rights

2 COM(2004) 651, 11.10.2004 European Contract Law and the revision of the *acquis*: the way forward

3 COM(2006) 744, 8.2.2007 Green Paper on the Review of the Consumer *Acquis*

4 See Appendix 4 for references

5 The Timeshare Directive was revised in 2008 and was the subject of a Report by this Committee: 3rd Report (2007–08): *Protecting the consumers of timeshare products* (HL 18)

6 COM(2008) 614 p2

Scope: The proposed Directive would apply to sales and service contracts concluded between the trader and consumers, although it would have limited application to financial service contracts. Chapter 4 (sales contracts), however, applies only to contracts for the sale of goods concluded between a trader and a consumer and to the goods element of mixed contracts comprising both goods and a service. Digital products and pure services are excluded from the scope of the proposal. (See chapter four)

Consumer information: Traders are required to provide the consumer with certain types of information, such as arrangements for delivery, if necessary and if the information is not already apparent from the context. Remedies for failing to provide the information are a matter for national law. (See chapter five)

The right of withdrawal for distance and off-premises contracts: Consumers have up to 14 calendar days to withdraw from such contracts.[7] The trader must be informed of the decision to withdraw on a durable medium in either the consumer's own words or using a standard withdrawal form. (See chapter six)

Non-conformity of goods: The proposal includes provisions to cover instances where the goods are not in conformity with the contract and the lack of conformity becomes apparent within two years. There is a two-tier remedies regime. In the first instance, repair or replacement is envisaged, and in contrast to the existing *acquis*, the trader rather than the consumer has the right to choose between those two remedies. The consumer may be able to go on and seek price reduction or rescission (termination). The right to damages is also mentioned. The consumer must notify the trader of any lack of conformity within two months. (See chapter seven)

Unfair contract terms: A "black list" of terms always considered to be unfair and a "grey list" of terms deemed unfair unless the trader proves otherwise are proposed. (See chapter eight)

3. The Commission's proposal is the subject of discussions in Brussels among Member States and in the European Parliament. Before rising for the election, the European Parliament's Committee on Internal Market and Consumer Protection produced a Working Document on the proposal,[8] as did the Parliament's Legal Affairs Committee.[9] Work on the proposal will resume once those Committees have been reappointed. A likely timetable for agreement is not known.

Our inquiry

4. Our inquiry had a number of aims. First, we sought to establish whether witnesses accepted the Commission's justifications for the legislation. Second, we considered whether full harmonisation would be likely to deliver the desired result. Third, we examined some of the specific policy proposals with a view to assessing their viability. Finally, we sought to highlight some of the issues and tensions that might be considered by decision makers in the months to come.

5. We are aware that the development of EU consumer policy is closely intertwined with a parallel discussion on the evolution of contract law in the

7 For a definition of these contracts, see Box 5 in Chapter 6.

8 DT\782960EN.doc PE 423.778v02–00 4.5.2009

9 DT\780948EN.doc PE 423.804v01–00 15.4.2009

EU. The 2004 Communication (see paragraph 1) pursued the idea that a "Common Frame of Reference" (CFR) for contract law terminology might be developed to improve consistency of contract law across the EU. There is currently a draft "academic" CFR and the Commission is due to publish its own view by the end of 2009. The draft CFR was the subject of a recent Report by this Committee.[10] We heard that the Commission had not waited for the CFR to be completed before reforming the consumer *acquis* and, although drafts were available, the Commission's approach had been to view it as "an authoritative but non-binding statement".[11] While our inquiry on the draft Directive did not focus on the CFR, we have taken it into account and it is referred to in the course of the report.

6. In the course of our inquiry, it has become clear that swift agreement on the proposal is unlikely and that significant changes to the draft may be required before adoption is possible. Against that background, we have drawn a number of conclusions and made some recommendations but we will wish to re-examine the proposal should its content change significantly in the course of negotiations. One possible development in July 2009, which may affect those negotiations and which relates to some of our conclusions and recommendations, is the publication by the Commission of information comparing existing legislation across Member States. We will therefore retain the proposal under scrutiny.

7. The Members of our Social Policy and Consumer Affairs Sub-Committee (Sub-Committee G) who conducted the inquiry are listed in Appendix 1.

8. We are most grateful for the written and oral evidence that we received for our inquiry; the witnesses who provided it are listed in Appendix 2. In particular, we thank those witnesses who gave evidence in person. The Call for Evidence we issued is shown in Appendix 3, and the evidence we received in response is printed in a companion volume to this report.

9. We acknowledge with thanks the expertise and hard work of our Specialist Adviser for the inquiry—Professor Geraint Howells[12], Professor of Law at the University of Manchester.

10. **We make this report to the House for debate and retain the proposal under scrutiny.**

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[10] 12th Report (2008–09): *Draft Common Frame of Reference* (HL 95)

[11] *ibid.* (paragraph 67)

[12] Professor Howells is a barrister, Law Professor, member of the Acquis Group and has done work on the CLEF (Consumer Law Enforcement Forum).

CHAPTER 2: OVERALL OBJECTIVE

The issue

11. In this chapter, we discuss the case for action to simplify the consumer *acquis* and for the replacement of the four Directives (see paragraph 2) with a new Consumer Rights Directive. We consider the extent to which the problem to be overcome by this proposal has been sufficiently established by the Commission. We also discuss what our witnesses felt the underlying principles of action at EU level should be and consider whether the action proposed will achieve both these and the Commission's stated objectives.

Contents of the proposal

12. Article 1 of the draft Directive identifies the objective of the proposal as "to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts between consumers and traders."[13]

13. The Commission asserts that such action is needed due to the fragmented nature of the regulatory framework across the Community,[14] identified in the Commission's Impact Assessment as "the incomplete business to consumer (B2C) internal market."[15] Barriers to the proper functioning of the business to consumer internal market are identified in three main categories: linguistic, logistical and regulatory.[16]

14. The Commission highlights significant compliance costs for businesses wishing to engage in cross-border retail activity as a problem associated with the fragmentation of the market. The Commission states that these costs have led to reluctance amongst businesses to trade cross-border and suggests that this, in turn, reduces consumer welfare, as consumers are not benefiting as much as they might from a fully integrated retail market, for example through increased choice and lower prices. Furthermore, the Commission blames the fragmentation of the current *acquis* for the low level of consumer confidence in cross-border shopping.[17]

Need for action?

15. Many of our witnesses, whether they were content with the proposal as currently drafted or not, agreed that there was a need to update EU consumer rights legislation (QQ 253, 360, p 56). The reasons identified for such action included: the existence of discrepancies and fragmentation across the EU, particularly due to the minimum harmonisation basis of the existing Directives (QQ 123, 313, 360, pp 67, 96, 175); the lack of consistency of definitions across the consumer *acquis* (QQ 4, 315, p 175); the existence of regulatory gaps between those Directives (Q 4); the need to simplify the law for the benefit of consumers and business alike (QQ 46, 48, 314, pp 56, 131,

13 COM (2008) 614 Article 1

14 COM (2008) 614 page 2

15 SEC (2008) 2544 page 2

16 *ibid.*

17 *ibid.*

167); complications of differing contract laws in different Member States (these are discussed in more detail in Chapter three) (Q 123, p 68); and finally, that smaller enterprises in particular are discouraged from trading cross-border under the existing regimes (QQ 124, 168).

16. Malcolm Harbour, an MEP and member of the Internal Market and Consumer Protection Committee (IMCO),[18] thought that the Commission was right to take stock of the current consumer legislation. Diana Wallis, an MEP and member of the Legal Affairs Committee, was of the view that something must be done as the present situation did not best serve either business or consumer interests (Q 178). However, Mr Harbour foresaw difficulties in persuading Member States to make potentially complex and resource-consuming changes that would affect all their domestic consumer law, on the basis that it would improve cross-border trade (Q 168).

17. Meglena Kuneva, the European Commissioner for Consumer Affairs, discussed the need for action in terms of the low levels of consumers currently engaging in cross-border trade (only six per cent) and the hurdle of different and segmented legislation for businesses wishing to trade cross-border (Q 218). She suggested that "If we have comparable rules we can help each other much more" (Q 237).

Impact Assessment and research base

18. While there is general recognition of the need to update EU consumer law, the Commission's Impact Assessment and research base for the proposal were criticised by many witnesses. Some linked this criticism to their concerns about the effectiveness of the draft Directive in addressing the problem of business reluctance to trade across borders, and to the related lack of consumer confidence in cross-border shopping (QQ 43, 47, 53–58, 76, pp 31–32).

19. EuroCommerce identified a lack of preparatory work undertaken by the Commission in formulating the Directive, while Consumer Focus suggested the proposal was ill-informed, and drew our attention to the lack of consumer research undertaken in the Impact Assessment to identify the issues facing consumers in the internal market (QQ 165, 43, 47, 57). These concerns were shared by most of the Member State representatives we heard from, with Ms Knoblochova from the Czech Republic describing the Impact Assessment as "confusing", "with no real data", and unlikely to answer all the questions of those involved (QQ 116, 76, 85, see also Q 165).

20. The then Minister, Gareth Thomas MP, acknowledged that the Government had some concerns about the Impact Assessment and informed us that they had supported the European Parliament's request that the Commission carry out more work on the document. In particular, the Minister highlighted the lack of a statistical framework in which to ground the Commission's proposal (QQ 313, 337).

21. The criticism that the Impact Assessment was inadequate in addressing issues such as consumer behaviour and shopping patterns, and the impact of the Directive on national regimes in the Member States, was widespread. EuroCommerce suggested that the Commission did not assess what they did not want to assess and thought that impact assessments were mainly there "to justify the position of the Commission" (Q 136).

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[18] This Committee has lead responsibility for the Directive in the European Parliament.

22. Bureau Européen des Unions de Consommateurs (BEUC) and the Association of British Insurers (ABI) were concerned that there had been no assessment of what would need to be changed or repealed in each Member State. The ABI thought that "it would have been extremely helpful if there had perhaps been something like a table that compared the impact of the Directive across each Member State" (QQ 255–256, 365).

23. While the French government recognised that it was not the impact assessment tradition to make an exact legal impact study in each of the Member States, they felt that it was crucial in this case. However, they were keen to recognise that such a task would be a huge undertaking for the Commission, and that it should therefore be for each Member State to compose its own list of how the Directive would affect its existing provisions (QQ 85, 117).

24. When we put these issues to Commissioner Kuneva, she acknowledged that the Commission did not have sufficient data from the consumer's point of view about the market, but reassured us that the Commission had already committed itself to a more in-depth analysis of the impact of the Directive on the national legal systems and stated that this would be made available to the European Parliament, the Council, and on the Commission's website in due course (QQ 236, 240).[19]

25. Nevertheless, so concerned were Consumer Focus about the existing Impact Assessment and what they identified as a lack of research into consumer behaviour, that they suggested, "Perhaps this proposal should be withdrawn and re-thought on the basis of a better impact assessment" (Q 56). A similar view was expressed by Dr Twigg-Flesner, Reader in Law at the University of Hull, who suggested that if the choice was between introducing the proposal as it stands and waiting, "we are probably better off waiting" (QQ 8–9, 23).

26. In terms of moving forward, EuroCommerce thought that the best thing would be to put on paper what was essential for consumers, and to proceed with discussions based on that list; while both of the witnesses from BEUC stated that, if they were given charge of the proposal, they would tear it up and start again from scratch (QQ 158, 282). The Trading Standards Institute (TSI) also thought that there was a case to restart the review process (p 106). By contrast, the Minister and the Office of Fair Trading (OFT) made it clear that they were not calling for such a move, and nor did any other of our witnesses explicitly call for the proposal to be scrapped. Indeed, the CBI "was reasonably content with this Impact Assessment" (QQ 336, 288, 298, 365).

Overall objective and underlying principles of action

27. Our witnesses expressed numerous views about what the overall objective and underlying principles of this Directive should be. These can be reconciled into three categories: the need to have consumers at the heart of the proposal; the importance of benefits for business; and the need to simplify and provide greater coherence for the business-to-consumer internal market. In addition, many witnesses stressed the need to strike a balance between the different interests involved.

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[19] Though it was not available at the time of agreement to this report, we were informed that this table would be available in mid-July 2009.

28. Many witnesses, including the Portuguese government and trading standards bodies, expressed the view that an underlying principle should be to have the consumer at the very heart of the proposal: "it is a proposal on the rights of consumers, not a proposal on the rights of traders". A significant number of those who expressed this view did not think that the proposal as it stood satisfied this criterion (QQ 46, 98, 253, 260, 264, 285, 305, pp 19, 184).

29. *Which?* was concerned that the proposal was not drafted with consumers at its heart—a point that the TSI made rather more forcefully, suggesting that the Directive was in fact an internal market directive, rather than a consumer rights directive as the title would suggest. They told us that "It will make it easy for business for goods to fly across borders but it does nothing for consumers whatsoever" (QQ 46, 305). This point was echoed by Dr Twigg-Flesner who thought that the consumer voice had been lost slightly in the proposal (Q 9).

30. The British Retail Consortium (BRC) was also keen to see businesses' needs taken into account in the main objectives and underlying principles of action for the proposal, stating that they wanted greater protection for business (p 155). Other witnesses recognised the need for legislation to strike a balance between the different interests involved (QQ 23, 164, 168, 283, 285). Commissioner Kuneva agreed that benefits for businesses should form one of the objectives for action, highlighting the need for reduced compliance costs for businesses wishing to trade cross-border (Q 217). The OFT, which had highlighted the need to have consumers' interests addressed in the proposal, suggested that consumers would benefit from increased competition if the proposal encouraged businesses to trade more across borders (Q 285).

31. Finally, there was widespread agreement amongst witnesses that the proposal should aim to streamline the consumer *acquis* (Q 285, pp 167, 175). For example, we heard from Germany's permanent representation to the EU that they thought the proposal should aim to do away with discrepancies in the existing Directives and introduce a greater level of coherence (Q 77). Similarly, BEUC suggested that there should be simplification, greater coherence (for example with definitions), and updating of the Directives (Q 257). The Minister supported this objective, and told us that the United Kingdom Government wanted "to push for as much simplification as we can" (Q 323).

Appropriate action?

32. While much of the evidence recognised a need to act and proposed objectives and underlying principles for such action, many were unsure that the proposal as drafted constituted the appropriate action. They questioned the extent to which the Directive's efforts to harmonise consumer law across the EU would deliver on the key objectives and sufficiently address the problems identified (QQ 5, 17–18, 43, 53–55, 62, 76, 123, 305, pp 25, 150).

33. Diana Wallis told us that she thought going ahead with the draft Directive in its current form would make life more complicated for traders and consumers, thus undermining one of the Commission's stated objectives (Q 187). In response, because of her experience in this area, Malcolm Harbour outlined that Ms Wallis' view made him "sit up and listen". Commenting further on her opinion that the proposal would make life more complicated for business, he stated that "the Commission's justification for this whole proposal … is basically exploded by that" (Q 193).

34. Dr Twigg-Flesner was unconvinced that traders were discouraged from trading across borders by the different local regimes and suggested that they "would still be reluctant even if the laws were the same" (QQ 17–18). Instead, there might be other factors at play such as language, culture, and having to deal with cross-border complaints—a point that was echoed in much of the evidence we took (QQ 17, 53–55, p 25).

35. *Which?* was similarly sceptical that an increase in cross-border trade would be realised under this Directive, suggesting that there was likely always to be some segmentation within the internal market because this benefited businesses (QQ 55, 62).

36. Having suggested that the proposal should strike a balance between the different interests involved, many of our witnesses did not believe that it had managed to properly reconcile the competing interests of consumers and business (QQ 23,164, 168, 283, 285–286). Citizens Advice was concerned that the proposal did not provide a balance between the rights and responsibilities of consumers and businesses and suggested that it risked the reduction of levels of consumer protection across the EU. Above all, Citizens Advice stressed that "existing consumer protections must not be lost in a harmonised Directive" (p 167). From a business perspective however, we heard from the CBI that, despite some penalties for business in the Directive, it felt a balance had been achieved (Q 365).

37. For BEUC, "there was a need to update existing rules, existing rights, but the Directive has not achieved that aim." Nor had a high level of consumer protection been achieved in the draft Directive (Q 253). Similarly, the TSI questioned the detail of the Directive in relation to improving consumer protection (Q 286).

Conclusions and recommendations

38. **We agree that there is a need to update the existing Directives**, not least due to inconsistencies between them over key definitions and the fragmentation of the business to consumer internal market that has resulted from their minimum harmonisation basis.

39. **However, we consider that the Government should withhold agreement from the proposal as drafted. We recommend that further progress on the Directive should await a more complete Impact Assessment. We believe that this could usefully include: a full analysis of existing consumer protection in all 27 Member States; the problems encountered; the differences between the proposal, the existing minimum harmonisation Directives and national provisions; better statistics on cross-border trade; and possible interaction with the Common Frame of Reference for contract law.**

40. We recognise the importance that the Directive should reflect the interests of both business and consumers, which are not alternatives but complementary, and **we believe that consumers and their interests must be kept at the heart of this proposal.** We therefore recommend that any revised or updated Impact Assessment should include greater research into consumer behaviour and the level of desire and demand for cross-border shopping, as well as the extent to which legal harmonisation can foster active use of the internal market by consumers.

41. We also note Article 95(3) TEC, which requires that any internal market legislation concerning consumer protection should have as its base a high level of protection. We therefore recommend that the protection offered by the existing Directives covered in this proposal should be taken as the base upon which to build. **We consider it of utmost importance that the overall level of protection afforded to consumers should not be reduced.**

42. **Finally, we are not convinced that by itself the action proposed by the Commission (that is, harmonisation of consumer law across the EU) will necessarily boost cross-border retail trade as the Commission desires. We recommend that the Commission gives further consideration to other factors, such as language, culture, distance of delivery and handling of cross-border complaints, and the extent to which these may also be responsible for current low levels of cross-border retail trade.**

CHAPTER 3: FULL HARMONISATION

The issue

43. In this chapter, we consider views on the principle of full harmonisation, which underpins the proposed Directive and has proved controversial. As the principle pertains to the whole of the Directive, we refer out of necessity to some concepts that are explored more comprehensively later in the report.

Contents of the proposal

44. The principle of full harmonisation is laid down in Article 4 of the draft Directive. It states that, "Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection."

45. In justifying the use of the principle, Recital 8 of the draft Directive indicates that "full harmonisation of some key regulatory aspects will considerably increase legal certainty for both consumers and business", the effect of which it concludes "will be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area."

46. The policy of applying a full, rather than minimum, harmonisation model is not unprecedented in EU consumer law. It was evident in both the 2005 Unfair Commercial Practices Directive[20] and in the 2008 Timeshare Directive.[21] Interestingly, the principle of full harmonisation is recited to be "without prejudice to the application of the Rome I Regulation" (see Box 2). However, in reality full harmonisation could reduce the protection available for consumers in some countries while increasing it in others.

BOX 2

Rome I

Choice of law for contracts including consumer contracts is regulated by Regulation (EC) 593/2008 on the law applicable to contractual obligations (otherwise known as "Rome I"). The general principle behind the Regulation is party autonomy to choose the applicable law. However, in the case of certain types of consumer contracts the law of the country where the consumer has his habitual residence applies. This is the case so long as the professional either (i) pursues his commercial or professional activities in that country, or (ii) by any means directs such activities to that country or to several countries including that country (e.g. direct mail shots, internet sites).

The trader and consumer can choose another applicable law as long as this would not deprive the consumer of the mandatory consumer protection rules available under the consumer's "home law". In practice, if a consumer travels to another Member State of his own volition, the applicable law would tend to be that of the seller's Member State, but if the seller targets a consumer from another Member State, the applicable law would generally be that of the consumer's Member State.

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20 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

21 Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

The principle of full harmonisation

47. Explaining the principle of full harmonisation, Commissioner Kuneva described it as "a horizontal safety net, a basic and good ground for further development". She recognised that it did not amount to a full harmonisation of consumer law but to full harmonisation of certain concepts in a limited number of areas. As she said, "even a long journey starts with the first step. We keep walking" (Q 229).

48. Our other witnesses were split on the merits of full harmonisation. The business community from which we heard was broadly supportive of the principle. The Association of British Insurers (ABI) believed that full harmonisation would go "a substantial way to decreasing the fragmented and inconsistent framework of consumer protection rules operating across Europe" (p 132). Both the ABI and the British Retail Consortium (BRC) emphasised that the benefits of full harmonisation would outweigh any costs (pp 132, 156). EuroCommerce noted that the shift to full harmonisation would prevent Member States from "gold plating"[22] EU consumer legislation (p 56). The CBI argued that full harmonisation must be adopted if the Directive was to work from a business perspective. Full harmonisation would be good for consumers as it would deliver consumer choice and competitive pricing (QQ 365, 393).

49. The BRC's support stemmed also from the view that the principle of full harmonisation would reduce the negative effects of Rome I (see Box 2) for business without undermining the claimed benefits of Rome I for consumer protection (p 156). EuroCommerce was highly critical of Rome I, noting that no assessment of its impact had been undertaken and that the introduction of full harmonisation in the proposed Directive represented the Commission's way of overcoming perceived problems relating to Rome I (Q 137). Malcolm Harbour pointed to the Commission's acknowledgement in the Impact Assessment that Rome I had caused problems for business in determining the appropriate level of consumer protection that needed to be respected in each transaction (Q 168).

50. Other witnesses were more guarded in their support for the Directive, taking a favourable approach in principle but with some reservations. The United Kingdom's Office of Fair Trading (OFT) supported full harmonisation as an overall goal, but contended that the Commission proposal would not only reduce consumer protection but that it would, in some cases, reduce consumer protection to a level lower than currently provided in the minimum harmonisation Directives (Q 285). The United Kingdom's Trading Standards Institute (TSI) declared that full harmonisation was, in principle "the way forward" but argued that the proposal as drafted would drag consumer protection down to the lowest common denominator (Q 296, p 104).

51. The European People's Party believed that full harmonisation would overcome the legal barriers that have been encountered as long as it was "at the correct and balanced level" (p 68). The Bar Council described the aims of maximum harmonisation as "laudable" but asserted that it should not be applied too widely as it risked harming both consumer protection and business confidence. It was questionable whether full harmonisation would be sufficiently responsive to cope with the need for rapid reform (p 151).

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22 "Gold plating" refers to the practice of introducing national laws which go beyond the requirements of an EU Directive.

52. A number of witnesses referred to the Unfair Commercial Practices Directive (UCPD) as a first example of the application of the full harmonisation principle. The OFT and Malcolm Harbour commended the UCPD, acknowledging that it had created a good level of consumer protection in an area that was previously either poorly regulated or not regulated at all and that it was well understood by consumers and businesses (QQ 168, 291).

53. On the other hand, the French government warned that recent European Court of Justice case law (see Box 3) on implementation of the UCPD demonstrated that "the potential of full harmonisation, if you are not clear exactly what it is you are covering, can be very serious and very dangerous" (Q 84). The European Commission noted that the Belgian rule found to be incompatible with the UCPD had already been the focus of attention in Belgium but accepted that there was a challenge with full harmonisation "to make the language as clear as possible" (QQ 244–46). The French government pointed out that some of the lessons of the UCPD informed the negotiation of the Timeshare Directive, and that the result was the inclusion of a high level of detail in the Recitals of that Directive (Q 122).

BOX 3

Full harmonisation case law[23]

On 23 April 2009, the European Court of Justice found that a Belgian law prohibiting "combined offers" (i.e. making the acquisition of one product or service conditional on the acquisition of another product or service, even if both are identical) was incompatible with the Unfair Commercial Practices Directive as such offers constituted permissible commercial practices within the meaning of the Directive. It was concluded that Member States may not adopt measures that are more restrictive than those defined in the Directive, even in order to ensure a higher level of consumer protection.

54. A third group of witnesses was highly critical of the full harmonisation principle, arguing that its impact would be to reduce consumer rights. BEUC, representing consumers across the EU, commented: "full harmonisation as such is not necessarily an instrument in favour of consumers if it is not at a high level of consumer protection" (Q 265). Consumer Focus took the view that full harmonisation was inappropriate, particularly for sections covering unfair contract terms and consumer remedies. It would lead to the loss for United Kingdom consumers of the right to reject faulty goods, which was a recurring concern among our United Kingdom witnesses and is explored comprehensively in chapter seven (Q 45). *Which?* believed that most of the Directive's objectives could be achieved with minimum harmonisation at a high level. Such an approach would both deliver a high level of consumer protection and maintain flexibility to adjust to unforeseen circumstances (Q 51). The German government was also concerned that full harmonisation would result in a loss of flexibility (Q 86).

55. With reference to the U.S. approach to consumer law, Professor James P. Nehf, Professor of Law at Indiana University, argued that full harmonisation was neither necessary nor desirable. He explained that consumer legislation in the U.S. varied across the states and, while there were occasional calls for

[23] Joined Cases C-261/07 and C-299/07 VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV, 23 April 2009

uniformity or a more national and harmonised approach, these had not gained widespread support. The consensus among consumer representatives was that a state-by-state approach was preferred unless there was a strong need for uniformity in a particular area of commerce. This, he argued, allowed for a healthy degree of experimentation and an evolutionary approach to consumer protection nationwide. State legislatures had been able to react more quickly to emerging consumer problems than the U.S. Congress. In most areas of commerce, the differences among state consumer laws created few obstacles to cross-border transactions (pp 182–83).

56. In response to the argument that the Directive would reduce consumer rights, the CBI and the BRC both argued that it was in the commercial interests of traders to offer a high level of consumer protection that went well beyond the law. The CBI stated that "a commitment to customer-friendly policies was a significant part of their [companies'] brand value and they will wish to continue to retain existing, high levels of protection". If they did not deliver customer satisfaction, they would not survive very long, and it was only likely to be "the rogue end of the operation" which acted in that way. Furthermore, the possibility of gaining commercial advantage would be lost from the introduction of a very high level of consumer protection applicable to all businesses (p 135, QQ 386, 394, 396).

57. Commissioner Kuneva was keen to explain how United Kingdom and other consumers would derive benefit from the principle of full harmonisation. She drew the Committee's attention to a number of benefits, including: the 14-day withdrawal period (see chapter 6); improved information for consumers (see chapter 5); the tackling of "pressure selling" in face-to-face transactions away from business premises (see chapter 6); and specific information requirements for intermediaries (see chapter 5) (Q 218).

Alternatives to full harmonisation

58. The political imperative of establishing an alternative to full harmonisation was put to us starkly by a number of witnesses. The Czech government noted that many Member States had gone beyond the levels of protection laid down in the current minimum harmonisation Directives and would therefore be obliged to decrease the level of protection in some fields. As a result, the negotiations would be "complicated" and "lively" (Q 76). BEUC noted that it would be politically challenging to remove rights from consumers, an analysis accepted by the Portuguese government (QQ 273, 98).

59. A number of witnesses favoured differentiated harmonisation or alternatively "targeted full harmonisation" or "non-exhaustive full harmonisation". The French government, for example, supported full harmonisation which was unambiguous, targeted at areas of agreement among Member States and which would deliver a high level of consumer protection (Q 84). A similar approach was adopted by other Member State representatives, with a particular focus on ensuring that the sales chapter did not result in a reduction of consumer protection. The United Kingdom Minister, Gareth Thomas MP, would like to "push for as much harmonisation as possible", but he acknowledged that it would be difficult to get agreement and that the United Kingdom itself was treating the protection of the right to reject faulty

goods[24] as a red line (QQ 319, 322, 345). The Portuguese government emphasised that it would not accept the lowering of standards in relation to guarantees (Q 92).

60. Acknowledging the differentiated harmonisation debate, the German government suggested that areas that might be included within full harmonisation would be the right of withdrawal and information duties, a view shared by Dr Twigg-Flesner (QQ 91, 27). BEUC agreed that the rules on the right of withdrawal might usefully be harmonised and added that common definitions would also be useful (Q 265). More specifically, Consumer Focus and *Which?* pointed to definitions of terms such as "consumer", "trader", "good" and "service" (QQ 48–49). The Minister, Gareth Thomas MP, concurred that a common understanding of the meaning of key terms would be useful (Q 315). BEUC was cautious about the application of full harmonisation to the information provisions because of the obligation on Member States to repeal their existing legislation on the delivery of information to consumers, and was firm that the provisions on sales (including the right to reject) and on unfair contract terms should not be subject to full harmonisation (QQ 265, 279).

61. It was suggested that problems raised by application of full harmonisation could be tackled by recourse to national contract law. Speaking in the European Parliament on 4 May 2009, Commissioner Kuneva indicated that, under the proposal, Member States would be able to retain general contract law provisions, such as remedies for faulty goods, "provided that the legal requirements which apply to the remedies differ from the requirements which apply to the remedies regulated in the proposal".[25] This would mean, she stated, that the United Kingdom "right to reject" and the French guarantee for latent defect system could be maintained. On the other hand, she recognised that the interaction between the proposal and national general contract law could be clearer and stated that she would also be prepared to integrate some of the national provisions into the proposal. Diana Wallis was of a similar opinion and thought that the link between the Directive and national contract law was not at all clear at present (Q 180).[26] Consumer Focus criticised the suggestion that problems identified in the proposal could be tackled by recourse to national contract law, asking "If that is the case then what are we achieving?" (Q 48)

62. Other witnesses supported the so-called "blue button" approach, under which an optional European law on consumer transactions would be offered as an alternative to national law. Dr Christian Twigg-Flesner considered this idea attractive because "you could almost avoid having to further harmonise national laws purely applicable to national transactions because it would create a proper European alternative." In his view, it would thus allow for one coherent set of rules available to those who wished to shop across borders, whereas the vast majority of national and local transactions need not be affected (Q 19). Diana Wallis described the approach as developing a

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[24] Under United Kingdom law, where there is a breach of the implied conditions that goods comply with their description and be of satisfactory quality or fitness for purpose, the goods can be rejected and the contract brought to an end. See also paragraphs 161–164.

[25] Oral question with debate O-0076/09; Debate: CRE 04/05/2009 – 24.

[26] By way of example, the rights under the Directive would in principle accrue only to those natural persons falling within the Directive's definition of a "consumer" but Member States may be able, under national contract law, to extend the provisions to others, including corporations.

"28th regime" (on top of the systems of the 27 Member States), which would over time become an attractive option for consumers (Q 191). She considered that the Common Frame of Reference (see paragraph 5) could serve as a useful basis for the development of such a 28th regime which would be less invasive of national contract law (Q 178).

63. The Minister, Gareth Thomas MP, acknowledged that the "blue button" approach appeared attractive but he considered the practical problems associated with it to be "considerable". He recalled that businesses and consumers alike would still need to know the different sets of rules (QQ 320–321). Responding to Diana Wallis' suggestion that the Common Frame of Reference should serve as a basis for the future development of work in consumer law, Malcolm Harbour warned that work on the CFR had developed slowly thus far and therefore efforts should be made "to move forward as quickly as we can here but not close any avenues for the Common Frame of Reference to be integrated into this at a later date" (Q 179).

64. Some witnesses were categorical in rejecting any derogations, opt-outs or recourse to general contract law. The BRC rejected calls for opt-outs and derogations and the ABI described the Directive as a "package" from which it should not be possible to "cherry pick bits". It was a package that the CBI considered to be "a fair outcome" (p 156, QQ 365, 391). The CBI explained that it was very opposed to the Commission's suggestion that national contract law remedies might be retained alongside those provided by the Directive, describing it as "a fudge in order to get the Directive to the endpoint" (Q 424).

Conclusions and recommendations

65. We note that the principle of full harmonisation has already been applied in European Union consumer protection legislation—namely in the Unfair Commercial Practices Directive and in the recent Timeshare Directive. **One notable lesson to be learned from the former is the need for clarity in the Directive about the extent of full harmonisation.**

66. **On that basis, and like many of our witnesses, we acknowledge that full harmonisation, where justified, could increase legal certainty for both consumers and business. But further work is required to clarify the benefits of full harmonisation, taking into account concerns that consumer protection could be reduced but also the view of the business community that profitable businesses will in any case seek to deliver a high level of consumer protection.**

67. Full harmonisation as proposed by the Commission is likely to be politically impossible for Member States and the European Parliament to support, but we also detect little enthusiasm to abandon the full harmonisation principle entirely. **In that case, we consider that a "differentiated harmonisation" model may be workable, harmonising aspects such as definitions, the right of withdrawal and the provision of information but allowing Member States room for manoeuvre in other areas.** Such flexibility could facilitate swift responses to future challenges.

68. The relationship between the relevant provisions contained in national law and those in the Directive is unclear and if there is a conflict between them, which of them takes priority. It is also unclear as to how national contract law might impact on the way in which the proposed Directive will take effect,

once it has been transposed. **We urge the Commission to clarify these matters. Our preference would be to see the relationship between the Directive and national contract law resolved in the text of the Directive itself.** We fear that, otherwise, confusion will reign.

69. We note the "blue button" optional instrument suggestion, allowing Member States to retain their own models of consumer protection based on national contract law but allowing consumers to opt into a harmonised system. **We recognise some theoretical benefits may be offered by this option but we are concerned that such a system may be excessively complex for the consumer and trader alike. Further work might usefully be done to assess its practicality.**

CHAPTER 4: SCOPE OF THE DIRECTIVE

The issue

70. In this chapter, we examine the scope of the proposal. Specifically, we consider witnesses' suggestions that this Directive might be usefully extended to cover other EU legislation comprising the consumer *acquis* and services and digital products. We consider issues relating to mixed contracts containing both goods and service elements, and those relating to business-to-business transactions. Finally, we explore the application of the Directive to financial services.

Contents of the proposal

71. Article 3 of the Directive states that it shall apply "under the conditions and to the extent set out in its provisions, to sales and services contracts concluded between the trader and the consumer."

72. Chapter IV of the proposal applies only to sales contracts and provides that "where the contract is a mixed-purpose contract having as its object both goods and services, this Chapter shall only apply to the goods."[27]

73. The Directive applies to financial services only as regards certain off-premises contracts (see Box 5), unfair contract terms and general provisions.[28]

74. Article 2(4) of the proposal defines goods as "any tangible movable item". Such items sold digitally over the internet would therefore be included but items sold over the internet and downloaded onto a computer would be excluded, such as computer software and music.

General comments

75. Concerns about the scope of the Directive were put to us from many different quarters, with several witnesses counting these amongst their biggest worries in relation to the proposal (QQ 44, 49, 285). We heard that the scope was "very confused", "wide and unclear", and one of the main obstacles in relation to the Directive. The Minister recognised that there were issues in terms of the scope of the Directive and EuroCommerce told us that together with BEUC, BUSINESSEUROPE and UEAPME it had written to the Commissioner seeking clarification of the exact scope of the Directive (QQ 44, 81, 258, 126, 318, 159, pp 25, 27–8, 68–9).

76. BEUC stressed that thanks to the full harmonisation approach of the Directive, the scope "must be crystal clear because anything which falls into the scope of the Directive but would go beyond what is allowed according to the Directive would have to be repealed by the Member States" (Q 261). Diana Wallis said her view would be to "go for a wider, more coherent scope" (Q 184). Malcolm Harbour believed the Commission had to justify having gone for a more limited scope (QQ 212–213).

77. However, not all of our witnesses were unhappy with the scope, with the BRC considering it satisfactory (p 156). Commissioner Kuneva highlighted the fact that "this Directive is not inventing something out of the blue" and

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27 COM(2008)614 Article 21

28 COM(2008)614 Article 3(2)

that it was based on four of the eight existing Directives that make up the consumer *acquis*. She therefore felt that the scope was properly circumscribed. She emphasised that the European Parliament had confirmed the scope of the Directive (Q 229).

Application to existing Directives

78. A further four Directives making up the consumer *acquis* would not be covered by this proposal. Dr Twigg-Flesner stated that "we are achieving greater coherence but we are not achieving full coherence." He recognised that incorporating more Directives into the proposal would complicate matters further but considered that "the end result would be a much more complete and coherent picture at the European level than we have now" (QQ 5, 7).

79. Malcolm Harbour considered that the Package Travel Directive might be included within the scope of the proposal. For example, he identified "a complete anomaly" whereby in the event of an airline going out of business, "if you assemble your own package … you find that you are not covered", while those consumers "who have bought a package from a travel agent with all the same things in it" would be covered (Q 181, p 69). "It does not seem to me to be sensible to introduce one Directive which is essentially just covering goods as a fairly targeted segment of the market and then come back later to have to deal with those other issues". It would not require much extra effort to cover package travel in the new Directive (QQ 168, 181).

80. Citizens Advice went further than this, suggesting that the proposal should also incorporate the Credit, Financial Services and Timeshare Directives (pp 168–69).

Services and digital products

81. The Minister informed us that the Government "have expressed to the Commission disappointment that the remedies for poor services and digital products are not covered within the scope of the Directive thus far." He suggested that if it were possible to extend the scope of the proposal it would be helpful in terms of simplicity for business and consumers alike. He reported that a number of Member States shared this concern, as did consumer bodies, and indicated that the Government had made some progress in their discussions with the Commission (Q 334).

Services

82. The draft Directive does not apply in its entirety to services (see paragraphs 71–74). This was criticised by many of our witnesses, who felt that services should be included throughout. Consumer Focus and *Which?* commented that poor quality services were a large area of consumer detriment and therefore it would be beneficial to extend the scope to cover services (Q 47, pp 27–8). Malcolm Harbour agreed, suggesting that a more sensible approach would be to include services within the Directive as these were pre-eminently the area where a substantial increase in cross-border provision was desired (Q 181).

83. BEUC recognised that services were covered in principle by the Directive, but suggested that the different levels of scope in different Chapters created confusion and that it would like to see services included in all Chapters of the Directive (Q 259). The OFT thought it would be an odd situation for consumers if they had harmonised rights on goods but not on services, particularly as many transactions included both goods and services (see

paragraphs 91–93). The OFT cited data from Consumer Direct showing that during 2008 the number of complaints about defective goods numbered 290,000, while those about sub-standard services amounted to 230,000. As they pointed out, "the detriment levels for consumers are closely aligned when it comes to goods and services" (Q 285, 287).

84. The CBI stressed that the Directive focused on goods and suggested that "the remedies that are in it do not easily fit all of the sorts of services that you are talking about." It was not against extending the scope to services in principle, but it did not think this Directive was the right solution for that problem. Instead, the CBI suggested that services should be addressed by a separate proposal (Q 379, p 136).

85. The Minister reported that the Government were pushing hard to include services within the scope of the Directive, particularly in view of changes in the consumption of services by United Kingdom consumers in the last ten to 20 years. The main problem he cited was that the provisions for remedies in the Directive did not apply to services (Q 339).

Digital products

86. Numerous criticisms centred around the exclusion of digital products from the scope of the draft Directive. Consumer Focus thought this was a very important area for cross-border trade and was therefore critical that the proposal did not address the digital economy or digital products (Q 47). The BRC was also supportive, in principle, of extending the scope to cover digital products, as was the Law Society which encouraged further consideration of including digital downloads or software within the scope by widening the definition of "goods" (pp 156, 180).

87. *Which?* also thought the scope should be extended to cover digital goods, recognising that these were easily tradable across borders, and that there was an increasing market for them. They pointed to the anomaly whereby a consumer might purchase a CD from a website and be provided with one set of rights, while if that same consumer downloaded their music from a website, they would have a completely different set of rights. *Which?* thought this was confusing for the consumer as they might not appreciate the difference between the two purchases (Q 49, pp 27–8).

88. Malcolm Harbour thought that the problems associated with digital products ought to be tackled, as did BEUC, which felt that new technologies should be taken into account in the proposal. BEUC did not believe that this had been achieved in the current text (QQ 181, 253, 257).

89. The OFT told us "we are disappointed that they are not in there and we welcome the Commission's further study in this area." It wanted to see a clear definition in the Directive of what was meant by digital products, and the extent to which they were covered. However, it stressed that it would not want to rush into this (Q 287).

90. Some of our witnesses were not convinced that it would be possible to include digital products within the scope of this Directive. When we heard from Commissioner Kuneva about digital issues, she concluded that more investigation, more hard data and more co-operation was needed (Q 227). Portugal, while not opposed to the inclusion of digital goods, foresaw significant doubts and problems in their inclusion, and the CBI argued that "the scope of the proposed Directive should not be extended to include

digital services, which are altogether different in nature from tangible goods and are subject to intellectual property rights." On the other hand, the CBI was less forthright when we spoke to its representatives in person; they said that they would not necessarily always be against digital goods being included (QQ 81–2, 381–83, p 136).

Mixed contracts

91. The majority of our witnesses did not support the provision that remedies should only be available under the draft Directive in respect of the goods part of mixed contracts (which contain both goods and services); some were doubtful that the Directive had adequately addressed such contracts (QQ 47, 131). Many of our witnesses gave the example of a mobile phone, which is often bought with airtime, and therefore constitutes a mixed contract (QQ 47, 49, 63, 131, 289). *Which?* suggested that "if, a few months down the track, you find you are not getting very good signal coverage, it is very difficult to know as a consumer whether that is due to a faulty phone or a faulty service provider for the airtime … you can be pushed from pillar to post and it is very difficult for the consumer to get redress unless it is all tied together." It recommended bringing services within the scope for remedies, in order that it would not matter from the consumer's perspective where the fault lay, they would be able to get a remedy (Q 49).

92. The OFT called for greater consideration of the scope in relation to mixed contracts and cited the installation of a kitchen as an example where "the Directive is deficient in dealing with the real situation of shopping in all situations in the United Kingdom" (Q 287). The Law Society suggested it might be helpful to extend the scope to cover the goods and services aspects of mixed contracts (p 179).

93. Mr Harrie Temmink, a member of Commissioner Kuneva's Cabinet, recognised mixed agreements as "one of the issues where the Directive may need some clarification." He stated that these were a subject for debate in the Council and that the Commission "are looking into it and … listening to Member States and to stakeholders to see to what extent we should put them into the scope of the Directive and to what extent the present text still needs to be clarified" (Q 225).

Hire purchase

94. Several witnesses were wary about the lack of inclusion of hire purchase within the scope of the proposal. Consumer Focus told us that, from a consumer's point of view, "it is very unlikely that they will make a distinction between the goods that they buy outright and the goods that they purchase on hire purchase, so we do not really see any tangible rationale for hire purchase being removed from this Directive" (Q 49).

95. The TSI was similarly critical, suggesting that hire purchase remaining outside the regime was an anomaly (QQ 286, 290). The OFT recognised that hire purchase was legally very different from an ordinary purchase, but repeated Consumer Focus' point that for consumers, the legal differences would not translate. The OFT argued that the consumer view point should determine policy on this issue (Q 287, p 97).

96. The Consumer Credit Association (CCA) expressed concern about the possible interaction between the Consumer Rights Directive and the Consumer Credit

Directive (CCD), which was adopted in 2008. The CCA was clear that credit contracts regulated by the CCD are outside the scope of the proposal. Nevertheless, not all credit formats are covered by the CCD, for example: credit of less than €200; hire purchase; "0%" credit; pawnbroking; and bank overdrafts—all of which are excluded (p 171). The CCA stated that "there is no obvious reason for these exemptions" and told us that "they prevent a smooth, seamless 'fit'" between the two Directives. It therefore proposed an amendment to the text to ensure that the Consumer Rights Directive could be disapplied wherever the CCD principles were applied to a product (pp 171–72).

Business-to-business

97. We heard from Consumer Focus that business had also called for clarification about whether the proposal extended to business-to-business transactions (Q 49). CBI acknowledged that the issue around business-to-consumer and business-to-business transactions had always been a challenge, the difficulty being that business-to-business arrangements are dependent upon the contract between the trading parties. They acknowledged that there were also some difficult issues about the balance of power between small and large enterprises and the right to return goods (Q 385). EuroCommerce however was clear that these transactions were not covered (QQ 146–47, 152).

98. Diana Wallis questioned why small businesses, when dealing with larger enterprises, should not have similar protection to that enjoyed by consumers. She found it difficult that all business-to-consumer transactions were covered but that others who were not in an equal bargaining position were left outside the scope of the Directive. Ms Wallis suggested that this was an arbitrary distinction which required reconsideration, a point with which Malcolm Harbour agreed (QQ 195–96).

Financial services and insurance

99. The CBI called for clarity about the impact of the Directive for financial services, a point echoed by Consumer Focus (QQ 378, 63).

100. On the other hand, the ABI were "comfortable that the scope does rightly exclude financial services and insurance to a large extent." From an insurance perspective, they were happy with the clarity of the scope and the limited application to financial services and insurance (QQ 359, 367). However, they had specific concerns about the prohibition in the Directive on inertia selling (see Box 4) (QQ 359, 367, 369–70, pp 131, 134).

BOX 4

Inertia selling and auto-enrolling

Inertia selling involves the unsolicited supply of a product to a consumer. Article 45 of the proposal, on inertia selling, states that: "The consumer shall be exempted from the provision of any consideration in cases of unsolicited supply of a product … The absence of a response from the consumer following such an unsolicited supply shall not constitute consent."

Auto-enrolling is automatically enrolling somebody into something, for example a pension scheme, while providing them with the ability to opt out of that scheme, should they so wish. An example of this would be an employer offering a pension scheme to its employees and automatically bringing them into that scheme, while recognising their right to opt out if they did not want to be brought into the scheme.

101. The ABI was worried that the Directive could prevent employers from auto-enrolling employees (see Box 4) into their workforce pension schemes if this was viewed as inertia selling and suggested that this could lead to employees losing out on employer contributions (QQ 367, 369–70, pp 131, 134). Another concern of the ABI centred around the tacit renewal of insurance contracts, whereby insurance contracts are automatically renewed upon expiry, without the consumer playing an active part in the transaction. It was the ABI's view that people could inadvertently break the law by finding themselves uninsured if this was not allowed under the Directive (QQ 370–76, p 134).

102. Finally, the ABI thought it "very important that the insurers retain the right to vary contract terms where there is a valid reason." Its concern was that the Directive could mean varying the contract would be deemed unfair and thus give the consumer a right to cancel (Q 420).

Conclusions and recommendations

103. We note the view expressed by some of our witnesses that the coverage of the Directive should be widened, particularly to include the Package Travel Directive. **We recommend that consideration of including other Directives within the scope of this proposal should be revisited following the extended Impact Assessment we have recommended in paragraph 39**.

104. We support the idea that there is room to expand the scope of the Directive and **recommend that it should extend to digital products**. We consider the application to digital products particularly important given the proposal's aim to future-proof consumer law and update the existing *acquis*, which has been introduced over three decades and thus does not sufficiently address issues specific to the digital era.

105. **Related to this, we recommend that Chapter IV of the Directive should apply to both the goods and the services elements of mixed contracts. We further recommend that services should be covered by the Directive in its entirety. We recognise that such extensions to the scope will require significant work but consider that there will be few opportunities to reform consumer law and that it is therefore worth spending the time now to produce a future-proofed Directive with clear application.**

106. We note our witnesses' concerns about the exclusion of hire purchase from the scope of the Directive and **urge the Commission to reconsider the rationale for this exclusion**. This should include consideration of the possibility to disapply the draft Directive where a trader has voluntarily chosen to comply with the Consumer Credit Directive.

107. While we consider that this Directive should embrace services generally, we recognise financial services as separate and distinct from this category given the specialist nature of these products. We recognise the concerns of the financial services industry about the application of this Directive to the sector. In particular, we note the industry's concern that the ban on inertia selling could prohibit the auto-enrolling of pensions. **We therefore recommend that it is made clear in the proposal that the provisions on inertia selling do not apply to pension schemes offered by an employer.**

108. We note that the ban on inertia selling would also prevent the tacit renewal of contracts, including insurance policies, and variation of terms without the consent of the consumer. **These matters are contentious and we are not convinced that they should be similarly excluded from the scope of the Directive.** At the very least, we consider that the possibility of such changes should be mentioned in the contract, and clear notice must be given in advance of the insurance premium being levied upon renewal.

CHAPTER 5: CLARITY FOR CONSUMERS AND PROVISION OF INFORMATION

The issue

109. In this chapter we consider the extent to which the text of the Directive is sufficiently clear for consumers; and how successful the provisions on general information requirements are and whether they could lead to an overload of information for the consumer. We conclude by discussing the concern that harmonisation of the consumer information requirements could lead to less mandatory information needing to be given when financial products are sold over the telephone, or by other means of distance selling.

Contents of the proposal on information

110. In the recitals to the Directive, the Commission asserts that consumers should be entitled to receive information before the contract is entered into and states that it will look into the most appropriate way to ensure that all consumers are made aware of their rights at the point of sale.[29]

111. Article 5 sets out the general information requirements in greater detail, listing the type of information to be provided to the consumer prior to entering into any sales or service contract. This includes: the main characteristics of the product; the price, inclusive of any taxes (or the manner in which the price is to be calculated where it is not possible to calculate this in advance); arrangements for payment and delivery; and the complaint handling policy. As the proposal makes clear, such information only needs to be provided if it is not already apparent from the context.

112. The Directive provides that consumers need not pay additional charges they have not been informed of[30] and sets out specific rules in relation to the failure of intermediaries to disclose that they are acting for a consumer (and therefore that the contract concluded will be regarded as a contract between two consumers, falling outside the scope of the Directive)[31] and failure to provide information on the right of withdrawal.[32] Otherwise, breaches of these information requirements will be handled in accordance with the applicable national law, as detailed in Article 6(2) of the proposal.

113. For distance and off-premises contracts, the Directive states that if the contract is entered into through a medium which allows limited space or time to display the information (such as over the telephone), the trader shall provide at least the information about the main characteristics and the total price of the product in that particular medium prior to entering into such a contract. The other information set out at Article 5 must follow in a "reasonable time" after any distance contract has been entered into.[33]

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29 COM(2008) 614 Recitals 17, 60

30 COM (2008) 614 Article 6(1)

31 COM (2008) 614 Article 7

32 COM (2008) 614 Article 13

33 COM(2008) 614 Article 11(3) and (4)

Clarity of the proposal for the consumer

114. Many of our witnesses thought that the whole text as drafted was insufficiently clear (QQ 22, 43, pp 19, 21–2). Diana Wallis considered that the proposal would make life more complicated for consumers, while Dr Twigg-Flesner told us that "the clarity in the text from a consumer point of view is not there" (QQ 187, 20). He thought that "the consumer will need legal advice from a fairly authoritative source to actually make sense of their legal rights", a view also held by BEUC, which warned that "the Directive is not clear for lawyers, so do not even think about consumers' rights" (QQ 20, 258).

115. The TSI thought it important that "a consumer rights directive should be readily understood by consumers … it should be straightforward enough to be understood by the people it most affects." Similarly, it was suggested by one of our witnesses that a clearer, more accessible Directive would be particularly helpful when consumers try to solve things informally with traders—a scenario which he suggested was fairly common (QQ 296, 20).

116. Nevertheless, there was recognition from some that "the Directive is there to be interpreted by lawyers and experts". The OFT was particularly clear that it was not aiming for a directive from which the average consumer could gain an immediate understanding of their rights. Instead, it suggested that a Directive which was clear and capable of being explained to consumers should be the main goal (QQ 63, 292, 298).

General consumer information provisions

117. The provisions in the Directive about general information for the consumer were one of the more widely supported and accepted aspects of the proposal amongst the witnesses that we heard from (QQ 28, 65, 102, 161, 205, 208, 277, 279, 299, 324, pp 57, 107). The attempt to give more structure to consumer information was welcomed, and the information included was considered to be of the kind a consumer would require to make an enlightened choice (QQ 28, 161).

118. The clarification in the Directive that the information provided for in Article 5 would only have to be provided "if not already apparent from the context" was cited as a key point by EuroCommerce, the CBI and by BEUC, which identified it as a "safeguard clause". The example was given of a hairdresser with the prices displayed at the front door, where it would be unnecessary to tell the customer when they came in how much it would cost for a haircut as it was already apparent from the context. The CBI believed that this "gave us sufficient flexibility to deliver this [information]", though they admitted that they would have serious concerns if the statement "if not already apparent from the context" was interpreted differently and required them to give all of this information every time a transaction took place (QQ 161, 414–16, 279).

Room for improvement

119. Nevertheless, several witnesses were critical of certain aspects of the provisions. These included: that consumers might be overloaded by information; that there was a lack of guidance for traders about how best to arrange the information; the possible deterrent to traders of information duties and the consequences of not providing information; the provision for breaches of these requirements to be dealt with by the Member State concerned; insufficient clarity in Article 5 (1)(b) to ensure third party trader

information would be given immediately to the consumer; and the potential implications of the proposal for foodstuffs and medicines, labelling of which is covered in other existing legislation (QQ 28, 29, 65, 299, pp 2–3, 97, 184–85).

120. One widely shared criticism was the apparent lack of guidance for the trader about how best to arrange information for the consumer (QQ 28, 65, 299, 325). The OFT stated: "It is much easier in legislation to say that this information should be given than to say how it should be given." They suggested that Member States should be encouraged or required to issue guidelines to traders as to how best to provide such information to ensure that consumers would be well-informed and not bombarded with information that they were unable to digest (Q 299). This concern was also raised by Consumer Focus, which suggested that summary boxes, as used with financial services, could be used to ensure that consumers could get the information they really needed to know quickly and easily without having it "drowned in a lot of legalese" (QQ 65–66). Another suggestion was that there could be a more coherent template across the board, possibly as an annex to the Directive, which might help traders on how to present information to consumers (Q 30). The Minister acknowledged concerns over how best to convey information to the consumer and stressed the need for common sense (Q 325).

Interaction with existing Directives

121. A number of witnesses questioned the interaction between the information requirements in this and other Directives. EuroCommerce noted that pre-contract information requirements are dealt with in the Unfair Commercial Practices Directive, and the BRC questioned whether there was an unnecessary duplication between the two (Q 162, p 161). Dr Twigg-Flesner agreed that the UCPD "already contains very extensive information obligations" (Q 29).

122. BEUC highlighted an additional issue with the Services Directive: "this Directive says that its information requirements are full harmonisation but it is without prejudice to the Services Directive" and asked "how can you get out of this jungle?" It suggested that there was no clarity for consumers and that this did not represent an exercise of clarification and simplification. Consumer Focus thought that the provisions were in many ways a repetition of the provisions in the Unfair Contract Terms Directive (QQ 258, 67 see also Q 162, p 161).

Information overload?

123. As we have noted, a significant concern was the potential for a situation where the consumer was overloaded with information (QQ 65, 99, pp 28, 152). The TSI considered that the public just needed to know where they could get the right information when they needed it (Q 302). BEUC expressed the views of many of our witnesses when it told us of its concerns that too much information would mean that none of it could be managed by consumers. Furthermore, BEUC was adamant that informing consumers should not be an alternative to having rules to protect them (Q 277).

124. The Minister recognised that there was a risk of overloading consumers with information, but described the general information provisions as a welcome aspect of the proposal (QQ 324–25). He also noted that the information provisions could overload businesses, and stressed that a balance had to be

struck between giving the consumer the information they needed to protect themselves and the placing of requirements on businesses in terms of the information they would have to provide (Q 328).

125. However, other witnesses were not persuaded of information overload for consumers. For the OFT, "there is no such thing as an over-informed consumer" and it stated that it believed in the consumer having as much information as possible (QQ 299–300). Even BEUC, which was concerned about the potential for overload, conceded that it was important to make the information at Article 5 available for the consumer, "even if he does not read it." (Q 277) A similar point was made by the French government, which emphasised that when a consumer is provided with information, even if they do not read that information at the time of entering into the contract, they will often need to refer to it later during the life of the contract; for example, when something goes wrong and they need to know how to get redress (QQ 102, 105). Diana Wallis acknowledged that while the information as it was presented in the Directive looked rather detailed and cumbersome, most of the provisions were things that ordinary people would want to know if something went wrong. She stated that if "the right information is given at the outset we might have a lot more happy consumers and a lot more happy enterprises" (Q 205).

Information requirements for financial services and products

126. The Financial Services Authority (FSA) highlighted concerns that the Directive might lead to a lower level of protection being provided for off-premises sales of financial services.[34] In particular, it warned that consumers who bought face to face or at a distance would be better informed than those who bought off-premises, and suggested that it might create an incentive for providers to sell products off-premises in order to avoid more detailed information requirements (pp 173–74). (See Box 5 for definitions of distance and off-premises contracts)

127. As an example, the FSA stated that "for mortgages sold off-premises the FSA will no longer be able to require lenders to give out the Key Facts Illustration which contains key product features and risks that we require to be given to the customer before they make a purchasing decision." Similarly, the FSA would no longer be able to require firms to give out a Key Facts Document in relation to personal pensions (pp 173–74).

128. The ABI agreed that "In the way the Directive is framed, it could require less information for off-premises contracts to be provided to customers than is currently required by the FSA" (Q 400).

129. When we put this issue to the Minister, he told us that he shared the concern that the Directive might reduce the level of mandatory information to consumers of financial services products and that this was an intense concern across the EU in general. He suggested that the risk was that the information would not be provided and stated that the Government were discussing this issue with the Commission. When we spoke to the Commissioner about financial services, she told us "the requirement for information on such kinds

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[34] The FSA informed us that the information provisions would apply to mortgages, non-insurance based pensions, certain investments, banking and payment services.

of financial services and financial contracts is the same, the principle is the same" (QQ 329–30, 226).

130. In terms of providing a solution to the problem, the Minister stated that "we would specifically prefer that financial services were not included in the scope of the off-premises provisions that are in Chapter 3 of the Directive" (Q 329).

Conclusions and recommendations

131. We recognise the importance of consumers' awareness of their rights and consider that a clear and comprehensible Directive is an important part of informing the consumer. However, there is an inherent tension in providing a legal text that is clear to lawyers and is also accessible to all consumers. We recognise that the transposition of the Directive into national laws will provide an opportunity to improve accessibility of the Directive. In the first instance, **we consider it essential that the Directive should be sufficiently legally robust and clear for those explaining the provisions to consumers, so that they can do so accurately.** We believe it would also be helpful for national authorities to produce comprehensive guidance documents for consumers on their rights.

132. We note and support the permissive nature of the provisions on general consumer information. **We agree that, where already apparent from the context, the trader should not be obliged to furnish the consumer with such information.** Nevertheless, we are concerned about how that might be adjudicated should a dispute arise between the trader and consumer as to whether or not something is "apparent from the context". **We recommend that clear guidelines covering this area are drawn up.**

133. We consider that **attention should be paid to the need for guidance on how information should be communicated** to provide certainty to businesses and to highlight key information for consumers, possibly through the use of summary boxes.

134. **We are not convinced by the argument that these provisions will overload the consumer with information**, though this is conditional on information being deployed sensibly, in line with the requirements set out in Article 5. **We consider it important that consumers are given this information, regardless of whether they read it at the time of purchase or not, so that they have access to it in the future, should the need arise.**

135. **We are concerned about the possibility created in this Directive for a reduced level of mandatory information to be provided to consumers of financial services products.** We note that this is a concern shared across the EU and warn about the potential impact of this on consumers who are sold such products off-premises. We are concerned that this could create an added incentive for businesses to sell financial products off-premises, thus multiplying the adverse effect on consumers. **We recommend that financial services are excluded from this part of the Directive.**

CHAPTER 6: RIGHT OF WITHDRAWAL FOR DISTANCE AND OFF-PREMISES CONTRACTS

The issue

136. In this chapter, we discuss the provision for a right of withdrawal in respect of distance and off-premises contracts. We consider how this might affect existing provisions, such as the 45-day cooling-off period for extended warranties in the United Kingdom, and discuss the merit of the right of withdrawal form and the extent to which requirements on exercising the right of withdrawal might restrict consumers' other options.

Contents of the proposal

137. In the recitals to the Directive, the Commission asserts that differences in the ways in which the right of withdrawal is exercised in the Member States have resulted in costs for businesses selling cross-border. In addition, it suggests that the introduction of a harmonised standard withdrawal form to be used by the consumer should simplify the process and bring legal certainty.[35]

138. If consumers have used goods to an extent more than necessary to ascertain their nature and functioning and then attempt to exercise their right of withdrawal, the Directive provides that they should be liable for any diminished value of the goods occurring as a result.[36]

139. Under Article 12, the consumer is given 14 days to withdraw from a distance or an off-premises contract (see Box 5), without having to give any reason to the trader. For off-premises contracts, the withdrawal period begins from the day when the consumer signs the order form; for distance contracts it starts from the day the consumer (or a nominated third party) acquires material possession of each of the goods ordered; and for services from the day of entry into force of the contract.

140. Article 14 states that in order for a consumer to exercise their right of withdrawal, this must be done on a durable medium, either in their own words, or using the standard withdrawal form annexed to the Directive. A durable medium is defined as any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.[37]

141. Under the right of withdrawal, responsibilities are placed on both the trader and the consumer (see Articles 16 and 17). For example, the trader has to reimburse any payment received from the consumer within 30 days from the day on which he receives the communication of withdrawal; while the consumer has to return the goods to the trader (or an authorised third party) within 14 days from the day on which he communicates his withdrawal to the trader (unless the trader has offered to collect the goods himself).

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35 COM(2008)614 Recital 28

36 COM(2008)614 Article 17(2)

37 COM(2008)614 Article 2(10)

BOX 5

Distance and off-premises contracts

Under this Directive, a *distance contract* is defined as any sales or service contract where the trader, in order to enter into the contract, makes exclusive use of one or more means of distance communication. Distance communication covers telephone calls, communication over the internet, written communication—any means which, without the simultaneous physical presence of the trader and the consumer, can be used for the entry into force of a contract between them.

An *off-premises contract* meanwhile is any sales or service contract concluded away from business premises with the simultaneous physical presence of the trader and the consumer, or any such contract for which an offer was made by the consumer in the same circumstances. Doorstep selling is an example of an off-premises contract. Also covered under this provision are contracts entered into on business premises but negotiated away from them, with the simultaneous presence of the trader and the consumer. Business premises are defined as immovable or movable 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.

Harmonisation of the withdrawal period

142. The majority of witnesses we heard from were supportive of the provisions within the Directive to harmonise the withdrawal period at 14 calendar days. We heard that the varying lengths of withdrawal periods across the EU and between existing Directives in the *acquis* caused confusion for traders in cross-border transactions and increased transaction costs. EuroCommerce believed that it was particularly onerous for small companies wanting to trade cross-border to ascertain the situation across the Member States in relation to the varying rights of withdrawal (QQ 4, 31, 63, 77, 97, 123–24, 218, 265, 285, 339, 365, pp 23, 26, 28–9, 97–8, 106, 107, 155, 156–57, 176).

143. The support among our witnesses for harmonisation of the right of withdrawal was underscored by Commissioner Kuneva, who considered the right essential in distance and off-premises contracts and was keen to emphasise that in the United Kingdom the withdrawal period would be improved under the Directive, extending from seven to 14 days (Q 218).

144. However, many witnesses felt these proposals could be improved. *Which?* identified the right of withdrawal as an area where the Commission could go further in increasing clarity, pointing to the fact that the end point would differ depending on whether a consumer was buying goods or a service and depending upon the method of purchase (i.e. distance or off-premises). It stressed that consumers would need to be confident that they knew when the period of withdrawal would start and when it would finish, a concern that was also raised by Consumer Focus (Q 63, p 23). Dr Twigg-Flesner also thought there was room for greater clarity on withdrawal rights, highlighting that a harmonised right of withdrawal was already made available at the EU level in five other Directives and that this Directive would not encompass those Directives. Consequently, he suggested that the right of withdrawal was an area "where it might make sense to have one coherent, standardised

European set of rules to help the creation of contracts", the scope of which would extend beyond this Directive (QQ 24–5, 27).

145. The OFT was supportive of the harmonisation of withdrawal rights across the EU but criticised what it saw as the transfer of risk from the trader to the consumer for distance and off-premises contracts. It cited the duty upon the consumer to return goods within 14 days at their own expense and the provision for the trader to reduce the money refunded in the case of diminished value as a result of excessive handling and suggested that this would open up a "new potential for dispute and mistrust" (Q 285, p 97). *Which?* was also cautious about the latter provision and did not think traders should be entitled to pay a reduced refund as compensation for any reduction in the retail value of cancelled goods (p 28). By contrast, the CBI were pleased that the Directive would give business the right to ensure that consumers did not use goods and then send them back for a refund, something which it cited as "a current problem" (Q 365).

146. Other complaints arose from the choice of 14 calendar days for the withdrawal period. We heard from the Association of British Insurers (ABI) that, under current FSA rules, many insurance contracts (including life insurance) are subject to a 30-day cancellation notice period for the consumer, which under the Directive would be reduced to 14 days. The ABI explained that some of these contracts were quite complex and therefore considered it appropriate to give the consumer 30 days to withdraw from the contract (QQ 401–402). Several other witnesses highlighted the lack of evidence presented by the Commission to justify a 14 day right of withdrawal, and EuroCommerce suggested that such a justification should be based on the consumer need (pp 57, 181).

147. There were further concerns about which contracts should be subject to a right of withdrawal. For example, the FSA thought that this would prevent providers from setting up a product before the withdrawal period had expired and could therefore complicate the situation for consumers in relation to distance pensions contracts (p 174).

148. Finally, Dr Twigg-Flesner told us that there was some concern that the provisions might actually take away the freedom of national law to regulate differently when there was a real need. In relation to United Kingdom law, this worry centred around the 45-day cooling-off period for extended warranties and electrical goods, which the OFT stated "is considered in all the circumstances to be necessary and highly desirable in relation to those products". It thought there should be the ability for Member States to be able to deal with specific problems in specific areas, without maximum harmonisation impinging upon that (QQ 25, 295).

Exercising the right of withdrawal

149. Some witnesses were critical of the provisions for the consumer to exercise their right of withdrawal, questioning whether returning the goods to the trader or providing the trader with notice of withdrawal over the telephone would suffice as withdrawal from the contract. Dr Twigg-Flesner was not convinced that the provisions would be workable in practice and suggested that consumers "might well not bother exercising their right of withdrawal" (p 23, Q 31). Contrary to this, the BRC was concerned that traders' obligations as set out in Article 16 could be "wrongly interpreted" as standing independently of the consumer's obligations as set out in Article 17,

thus creating an absolute right to a refund whether or not the goods had been returned to the trader (pp 156–57).

150. Our witnesses were split on the notice of withdrawal form set out in the Directive. The OFT supported the introduction of the optional form, whereas the BRC did not think the purpose of the form and how it should be used had been made totally apparent in the text of the Directive. For the BRC, a preferable approach would be to require the trader to indicate the basic information that the consumer needed to provide if they wished to withdraw. It suggested that such a requirement should be laid down in the Directive as this would ensure that if a consumer provided this information, the trader would have to accept it as a notice of withdrawal (pp 97, 162).

151. In relation to the practicalities of exercising the right of withdrawal, there was some support for the duty on the consumer to return goods at their own expense within 14 days, but this was not universal (Q 285, p 156). The Bar Council of England and Wales suggested that the requirement could be problematic in relation to large items, and believed that the current requirement that consumers make goods available for collection was preferable (p 153).

Conclusions and recommendations

152. **We welcome the introduction of a harmonised withdrawal period for the majority of business-to-consumer contracts** and consider that this will help to address the problems associated with the varying lengths of withdrawal period which currently exist across the EU. Nevertheless, we note that many of our witnesses were concerned about the detail of the provisions in the Directive on the right of withdrawal and **we are concerned that a uniform approach will not work for all situations, such as complex insurance contracts. We therefore consider that the Commission must revisit this chapter, providing in particular greater justification of the choice of a uniform 14 calendar day withdrawal period.**

153. **We are concerned about how the right of withdrawal might affect existing provisions such as the 45-day cooling-off period for warranties in the United Kingdom and call for this to be preserved under the Directive.**

154. We can see the benefit of a harmonised right of withdrawal form such as that included in the Directive, but the use of such a form should constitute only one of several options for the consumer. **The Directive should make it clear that the simple act of returning the goods to the trader satisfies the criteria for exercising withdrawal**, in addition to the option of notifying the trader in writing on a durable medium (see paragraph 140). **We are not convinced that notifying the trader over the telephone of an intention to withdraw from the contract should be similarly accepted as satisfying the criteria for withdrawal,** as we do not consider that it would be possible to prove that a telephone call had or had not been made.

CHAPTER 7: SALES CONTRACTS

The issue

155. In this chapter, we consider witnesses' views on Chapter IV of the Directive relating to consumer rights that are specific to sales contracts.[38] This includes discussion of the United Kingdom "right to reject", which has been a source of particular concern among United Kingdom stakeholders, and other issues relating to consumer rights in the case of non-conformity with the contract. The question of the application of this section of the Directive to mixed contracts (involving goods and services) was covered in chapter four of our report.

Contents of the proposal

156. Goods should normally be delivered within 30 days of conclusion of the contract, failing which the consumer is entitled to refund, within seven days, of any sums paid. Once the goods have been received, the risk of loss or damage to the goods passes to the consumer.[39]

157. Goods should be delivered "in conformity with the contract", which requires that: they comply with the description given; they are fit for purpose; and they show the quality and performance that can be reasonably expected. The trader is liable for any lack of conformity which exists at the time the risk passes to the consumer.[40]

158. Under Article 26, should the goods fail to conform with the sales contract, the consumer is entitled to: a) repair or replacement; b) a price reduction; or c) rescission (termination) of the contract. In the first instance, the trader has the choice of remedying the problem by either repair or replacement, which means that the consumer does not have the automatic right to reject the goods and claim a refund. Should neither repair nor replacement be possible, the consumer may then choose between price reduction and rescission, although rescission is not an option for minor defects.

159. Under a "second tier" of remedies, the consumer may resort to repair, replacement, price reduction or rescission if the trader: a) refuses to remedy the problem; b) fails to remedy the problem within a "reasonable time"; c) has tried to remedy the problem, causing "significant inconvenience" to the consumer; or if d) the same defect has reappeared more than once within a short period of time.

160. The trader is liable for any lack of conformity with the contract for a period of two years after the consumer has received the goods. A shorter liability period, of not less than one year, may be agreed for second hand goods. A consumer must notify the trader of any lack of conformity within two months from the date that the problem was detected.[41]

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38 Any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services.

39 COM(2008)614 Articles 22–23

40 COM(2008)614 Article 24

41 COM(2008)614 Article 28

The right to reject

161. The impact of Article 26 (on remedies for lack of conformity) was the focus of much of our evidence in relation to both sales and the principle of full harmonisation. This is not least because, under United Kingdom law, where there is a breach of the implied conditions that goods comply with their description and be of satisfactory quality or fitness for purpose,[42] the goods can be rejected and the contract brought to an end. Article 26 would remove this right for consumers as it would, in the first instance, give the trader the choice to try to remedy non-conformity by repair or replacement. Unlike under the existing Sale of Goods Directive the trader would even have the choice between repair or replacement.

162. The Law Commission expressed concern that this loss of the "right to reject" would reduce consumer confidence. Under the European Commission's proposal, the consumer would not be entitled to a refund unless the retailer failed to either repair or replace a faulty good within a reasonable time or without significant inconvenience, or if the same fault reappeared more than once within a short period. According to the Law Commission, its own market research indicated that 94% of consumers considered the right to return faulty goods and receive a refund important. The Law Commission added that there appeared to be a cultural tradition across Europe in favour of refunds, either through a statutory right[43] or voluntarily due to consumer demand (p 178). According to the Government, though, there were other countries, such as Germany, who saw the "right to reject" as perhaps a rejection too far (Q 332). The Law Commission has proposed a short-term right to reject limited to 30 days, with some flexibility, as a compromise in the context of discussions in the United Kingdom and at the EU level.[44]

163. Consumer Focus noted that the simple existence of the "right to reject" helped consumers' bargaining positions, and should affect a retailer's policies (Q 69). Various other witnesses believed that the lack of conformity rules in the proposal were now too heavily weighted in favour of the trader (pp 98, 108, 167, 177, 181). *Which?* wanted to see the consumer have the free choice between a repair, a replacement or a refund (Q 68). As we have seen, protection of the "right to reject" is one of the United Kingdom Government's "red lines" in negotiations on this Directive (Q 345).

164. Others were less concerned about the right to reject. EuroCommerce noted that the Commission had clearly stated that the Directive would be without prejudice to the United Kingdom "right to reject" and the regime of guarantee for latent defect in France (Q 131). The European People's Party thought it quite probable that manufacturers in the United Kingdom would continue to apply the "right to reject" under their own company policy. The CBI supported this, describing the right to a refund as "natural", although they also welcomed the opportunity to prevent consumers from using goods and then sending them back for a refund (p 69, QQ 365, 388).

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42 Sale of Goods Act 1979

43 The Law Commission indicated that at least eight European jurisdictions currently recognise an initial right to a refund for faulty goods: United Kingdom, France, Ireland, Greece, Portugal, Latvia, Lithuania and Slovenia.

44 Paragraph 8.75, Joint Consultation Paper *Consumer Remedies for Faulty Goods* (Law Commission Consultation Paper No 188 and The Scottish Law Commission Discussion Paper No 139)

Time limits

165. Some witnesses considered the proposal that consumers be obliged to notify the trader of a defect within two months of detection to be an unnecessary hurdle which would make it more difficult for consumers to enforce their rights (Q 20). *Which?* and the OFT suggested that it would allow traders to contest whether the problem had in fact occurred within two months, which was described by the OFT as an "arbitrary period" (QQ 68, 304). Dr Christian Twigg-Flesner noted that, in practical terms, it may be problematic for a consumer who had purchased goods in one Member State and then travelled home: "by the time you go back it is going to be very difficult to overcome the two month notification problem". He added that the provision was included in the original Sale of Consumer Goods and Guarantees Directive but there was not "overwhelming support" among Member States for this rule (Q 34).

166. Substantial concern was also expressed about the proposal to limit the availability of remedies to those defects which appear within two years of delivery (QQ 68, 285, 304, pp 20, 176, 179, 181). In some countries there is no limit, and for the United Kingdom, this would differ from the six years in the Limitation Act (Q 271). The Law Commission posited the example of a steel joist which might collapse after 26 months, or water pipes which burst during the first hard frost (p 179). *Which?* agreed that there are a number of purchases which have a lifespan far exceeding two years, such as cars, motorbikes, boats and large electrical items (Q 68). The Trading Standards Institute questioned why a supplier of double glazing products would produce something that was going to last 15–20 years if they knew that liability would only last for two years (Q 290).

167. The Minister, Gareth Thomas MP, was sympathetic to the concerns expressed in this regard. He noted that while a two year limit would be reasonable for most goods, there are a number of goods, such as boilers, which would be expected to last much longer than two years. He confirmed that the Government were alert to the matter (Q 318).

Other restrictions

168. There was some concern among witnesses about the restriction on rescission of contracts for minor defects (pp 108, 177). The Law Commission and Law Society argued that the proposal not to allow rescission for minor defects would lead to unnecessary disputes as to whether a defect or defects were minor (pp 178, 181). Dr Christian Twigg-Flesner revealed the uncertainties surrounding the concept of a minor defect—a defective car windscreen wiper, for example, would not be considered by the Commission to be a minor defect (Q 20). *Which?* was similarly concerned about this uncertainty, and suggested that the easiest solution would be to exclude that exemption from the proposal (Q 64).

169. Dr Twigg-Flesner also referred to the conditions in which a consumer may resort to any of the remedies (a "second-tier remedy"), and was particularly critical of the terms "reasonable time" and "significant inconvenience", which would seem to require the consumer to wait until the trader had failed to act. He suggested that the text of the Directive could benefit from clarification on these points, and on whether it is only on the third appearance of a defect that the consumer is able to move to a different remedy (Q 34). The Law Commission proposed that consumers should be

able to move to the second tier after two failed repairs or one failed replacement and where goods proved to be dangerous or where the retailer had behaved so unreasonably as to undermine trust between the parties (p 178).

Conclusions and recommendations

170. Earlier in this Report we discussed the principle of full harmonisation, which would have a significant impact on sales contracts. **We conclude that the Sales chapter is not fit for purpose in its current form if intended as a full harmonisation measure.**

171. We observed little appetite among our United Kingdom witnesses to see the United Kingdom's "right to reject" removed and, furthermore, we note that this statutory right, or similar, is not exclusive to the United Kingdom. **For the sake of clarity, we recommend that these concerns be addressed through an amendment to Article 26 of the Directive. This amendment may need to be flexible, perhaps giving a specific time-limited right to reject, such as the 30 days proposed by the Law Commission, in order to take into account the concerns of Member States which do not currently support the right to reject.**

172. The requirement that a consumer must inform the trader of a defect within two months of detection appears arbitrary and we are concerned that it may not always be practicable to notify the trader within two months. **As we do not consider the case has been made for the restriction, and as we are concerned at its impact, we recommend deletion of the two month limit as a mandatory requirement.**

173. The two year limit on a trader's liability for faulty goods could be problematic in relation to the purchase of a range of goods which could reasonably be expected to last longer than two years. **We therefore recommend reconsideration of the two year limit, with a view to either extending the period or allowing some flexibility in its application.**

174. The proposal to exclude rescission of contracts in cases of minor defects appears to be fraught with uncertainty and a lack of clarity, which would not assist the trader or consumer. **We recommend that this exclusion either be removed or that clarification of what is considered a "minor defect" be included in the Directive.**

175. We are concerned that the circumstances under which the consumer might resort to the second tier of remedies are unclear. The lack of clarity stems from the use of terms such as "reasonable time" and "significant inconvenience", which could favour the trader over the consumer. **For the purposes of the consumer, we recommend that the circumstances under which he may resort to the second tier of remedies be made more explicit in the text.**

CHAPTER 8: UNFAIR CONTRACT TERMS

The issue

176. In this chapter we consider the section of the proposed Directive (Chapter V) dealing with consumer rights concerning contract terms. We examine: the exclusion of negotiated terms from the scope of the provisions; the introduction and content of the proposed "black" and "grey" lists of unfair contract terms; and finally a general review of terms, including the procedure for amending the lists.

Contents of the proposal

177. Under Article 30 of the draft Directive, the provisions on contract terms do not apply to "negotiated" terms (i.e. those terms which the consumer has had the opportunity to influence). Article 33 provides that it is the duty of the trader to prove that a contract term has been individually negotiated.

178. Chapter V of the draft Directive provides for a "black list" of "terms considered unfair in all circumstances" (Annex II) and a "grey list" of "terms presumed to be unfair" (Annex III). An example of a "black" list term is any contract term which has the object or effect of "excluding or limiting the liability of the trader for death or personal injury caused to the consumer through an act or omission of that trader" (Annex II (a)). An example of a "grey" list term is any contract term which has the object or effect of "allowing the trader to retain a payment by the consumer where the latter fails to conclude or perform the contract, without giving the consumer the right to be compensated of the same amount if the trader fails to conclude or perform the contract" (Annex III (1)(b)). Practical examples are given in Box 6.

BOX 6

Examples of possible unfair contract terms[45]

Black list (terms considered to be unfair in all circumstances):

A hotel stating "no liability can be accepted for personal injury incurred on the premises under any circumstances" might fall within Annex II (a) of the Directive.

Grey list (terms which might be considered to be unfair):

A contract to install a kitchen including the following wording might fall within Annex III (1)(b): "The customer must pay a £300 non-returnable deposit. The kitchen will then be measured, designed and a quotation provided".

179. Under Article 32 of the draft Directive, a term which is not included in either of the lists should be regarded by national authorities as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the rights and obligations arising under the contract, to the detriment of the consumer. When such terms come to light, and should it be decided that they ought to be added to one of the lists in the Directive, the draft Directive delegates this

[45] Please note that these are included as hypothetical examples to assist the reader and should not therefore be considered as legally binding.

amending power to the Commission under the Regulatory Committees with Scrutiny Procedure,[46] a form of "comitology" (see Box 7 below).

Negotiated terms

180. Views differ on the exclusion of negotiated terms from the Directive. Indeed, Dr Christian Twigg-Flesner noted that this issue was the only area on which the academics drafting the Common Frame of Reference for contract law had failed to agree a position. Dr Twigg-Flesner did not consider it to be a big issue as "the vast majority of consumer contracts will still be based on standard form contracts" but he nevertheless considered that negotiated terms should be included as this would rule out attempts by traders to "create negotiation" in order to evade implementation (Q 38).

181. *Which?* agreed that, in practice, even in contracts which are drafted after a degree of negotiation, there was not an equal bargaining position and the Law Society was similarly concerned about the lack of protection in the case of negotiated terms (Q 73, p 182). An example was given by the Law Society of a cancer patient who may have negotiated to exempt a pharmaceutical company from liability in order to gain access to an innovative drug and may find that the company has been absolved from all contractual liability for death or personal injury even if the original clinical trials conducted had been flawed (p 182).

182. The Financial Services Authority, on the other hand, did not consider the exclusion of negotiated terms from the scope of the Directive to be inappropriate (p 174). Along the same lines, the Bar Council stated that the exclusion of negotiated terms was consistent with the application of the principle of freedom of contract. The Bar Council's view was rather nuanced, though, in that it considered it highly unlikely that any consumer would negotiate the inclusion of any term on the "black" list. It also added that Article 33 on proving that a term was negotiated was heavily weighted in favour of the consumer (p 154).

The "black" and "grey" lists

183. The majority of witnesses supported the introduction of "black" and "grey" lists (pp 29, 98, 133, 174). The Financial Services Authority found the presumption of unfairness for "grey" list terms very helpful rather than the current "indication of unfairness" (p 174). Consumer Focus considered that the introduction of the "black" list would improve legal certainty and saw merit in a "grey" list (p 24). The Bar Council, on the other hand, did not consider that a "black" list of unfair contract terms was necessary for the United Kingdom as the Office of Fair Trading had demonstrated its willingness to treat "grey" list terms as being of significant concern (p 154).

184. As regards the "grey" list specifically, Dr Twigg-Flesner noted that, in most cases, terms on the "grey" list would be unfair but that it did open up room for manoeuvre to permit such terms in situations where a consumer has the benefit of legal advice. He gave the example of a major home refurbishment project, undertaken with the assistance of an architect, whose own lawyer

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[46] See Articles 5a (parts 1–4), 7 and 8 of Council Decision 1999/468/EC as amended by Council Decision 2006/512/EC

might be able to talk the consumer through terms that may be presumed to be unfair (Q 38).

185. There was less consensus on the content of the lists, not least among representatives of Member States. The Government confirmed that they were relatively content with the provisions on contract terms but reported that it was a part of the Directive that was particularly difficult for some other Member States (Q 347). This was confirmed by evidence from German, French and Portuguese government representatives. The French and German governments were worried that the provisions would impact upon the application of domestic law in this area and that this would cause serious uncertainty for the business community (QQ 111–12). In Portugal there are currently four lists with more than 20 contractual terms and there was therefore a concern that the lists proposed in the Directive (five in the black list and 12 in the grey list) were insufficient (Q 112).

186. One of the terms on the "grey" list was the focus of disagreement between two of our witnesses. The Association of British Insurers (ABI) wished to exclude Item 1(g) (terms allowing a trader to increase the price agreed with the consumer when the contract was concluded without giving the consumer the right to terminate the contract). It was worried that this would prevent insurers from being able to take changes of risk into account. In its view, insurance companies should retain the ability to vary contracts for valid reasons without giving the consumer a right to terminate the contract (Q 420). Dr Christian Twigg-Flesner, on the other hand, considered that this term should be moved to the "black" list as he believed that any term that might allow consumers who were locked into a 12 month contract to suffer an increase in charges after two months would always be unfair (Q 38).

187. The idea of moving some terms from the "grey" list to the "black" list was proposed by other witnesses. The French government could not imagine in what situations it would be legitimate to use some of the terms on the grey list. The Financial Services Authority believed that point 1(c) on the "grey" list might be better placed on the "black" list. (Point 1(c) refers to any term which would require a consumer who fails to fulfil his obligation to pay damages which significantly exceed the harm suffered by the trader.) The FSA was also worried that point 2 would allow financial service suppliers to terminate an open-ended contract unilaterally without notice and with no valid reason (Q 111, p 175).

Review of terms and revision of the lists

188. The European Commission emphasised that the general unfairness clause (see paragraph 179 above) would allow Member States and their national regulators to retain their existing rights to declare terms unfair unilaterally (Q 242). Clarity on this matter was demanded by *Which?* in the light of the bank charges litigation case currently making its way through the United Kingdom's judicial system.[47] It was pointed out that some of the terms under scrutiny in that case were not included in either the proposed "black" or "grey" lists (Q 73).

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[47] Office of Fair Trading (OFT) v Abbey National plc and others. This case relates to the question of whether the OFT has the power to declare bank charges unfair. It was brought because a large number of United Kingdom consumers have argued that charges imposed on them by banks in cases of unauthorised overdrafts have been unfair.

189. The Government appeared to be content that the Directive would not affect the role of national regulators. They pointed to the Office of Fair Trading's retention of the ability to publish "non-binding guidance" on unfair contract terms and they noted that their initial concerns about potential restrictions on the activities of the Financial Services Ombudsman had reduced (Q 347).

190. There was a general concern about the proposed method of reviewing the content of the lists, which would delegate this power to the Commission under the Regulatory Committee with Scrutiny procedure (see Box 7 below). A number of witnesses were concerned that stakeholders would be insufficiently consulted (pp 24, 58, 157). The CBI wanted to ensure that the process was "a very open and transparent process with stakeholder involvement", allowing the time and opportunity to comment and to be engaged (QQ 421, 423).

BOX 7

Regulatory Committee with Scrutiny

Delegation of power to the Commission allows for greater flexibility in the decision making procedure. Rather than requiring full consideration by both the European Parliament and the Council of Ministers, the legislation can be adopted by a group of Member State experts, chaired by the Commission. The Council and the European Parliament must be allowed to carry out a check prior to the adoption of these measures, which should only amend technical ("non-essential") elements of an Act adopted by codecision. In the event of clear opposition on the part of one of these institutions (absolute majority of MEPs or qualified majority at the Council), the Commission must either amend the proposed measure or present a legislative proposal to be submitted for the full codecision procedure. Delegated powers of this sort are known as "comitology".

191. We received a varied response to the procedure from representatives of the European Parliament and Member States. Malcolm Harbour noted that the Regulatory Procedure with Scrutiny allowed European Parliamentary committees "a right of call-back if we see that the Commission's implementation moves outside the scope of what we have agreed." He emphasised, though, that this Procedure is relatively new and has not yet been fully tested (QQ 201, 202). The Portuguese and French governments were concerned that Member States would have insufficient involvement, and the United Kingdom Government sought similar reassurance (QQ 112, 113, 352). Commissioner Kuneva urged stakeholders and institutions not to be afraid of the procedure and to "give it a chance" (Q 242).

192. On the other hand, Consumer Focus feared that the process of reviewing the lists in this way would cause delay, thus undermining the rationale for a principle-based piece of legislation that enabled regulators to move quickly (Q 71). The Trading Standards Institute was also worried that it would not be possible to review the lists with sufficient speed (p 108).

Conclusions and recommendations

193. We note that the exclusion of negotiated terms from the content of the provisions on contract terms has the potential to place consumers at a disadvantage. **We accept, though, that Article 33 making it incumbent on traders to prove that a term has been individually negotiated is weighted in favour of the consumer. Consideration might usefully be**

given to strengthening this Article further, but we do not consider that the case has been made to bring negotiated terms within the scope of the Directive.

194. We welcome the introduction of "black" and "grey" lists but the devil lies in the detail of their content. We have heard various specific suggestions as to how the lists might be amended, including opposing views. **At this stage, we draw no conclusions on the content of the lists but we note that there is substantial concern on this matter. If agreement is to be reached, it will be essential that every term on each of the lists is fully justified, with due regard to current practice in each Member State and to the views of stakeholders.**

195. We were relieved to hear the assurances from both the Commission and the Government that the role of national regulators with regard to unfair terms would be largely preserved under the Directive. **We would hope that other Member States might be similarly reassured by clarifications to the Directive. The general principles on assessing the fairness of contract terms might benefit from some clarification in order to provide this reassurance.**

196. Substantial concern was expressed about the use of delegated legislative powers ("comitology") to amend the lists. It was felt that the process could be opaque, excluding stakeholders, and even Member States, from considering the full implications of proposals. **Like the Commission, we consider that this process ought to be given a chance to prove itself as it could be a more efficient method of taking these decisions than a full legislative procedure. Its legitimacy will be dependent on a commitment to full transparency by the Commission and by national governments, which should include consultation as appropriate.**

CHAPTER 9: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Chapter 2: Overall objective

197. We agree that there is a need to update the existing Directives, not least due to inconsistencies between them over key definitions and the fragmentation of the business to consumer internal market that has resulted from their minimum harmonisation basis.

198. However, we consider that the Government should withhold agreement from the proposal as drafted. We recommend that further progress on the Directive should await a more complete Impact Assessment. We believe that this could usefully include: a full analysis of existing consumer protection in all 27 Member States; the problems encountered; the differences between the proposal, the existing minimum harmonisation Directives and national provisions; better statistics on cross-border trade; and possible interaction with the Common Frame of Reference for contract law.

199. We recognise the importance of the Directive reflecting both the interests of business and consumers, which are not alternatives but complementary, and we believe that consumers and their interests must be kept at the heart of this proposal. We therefore recommend that any revised or updated Impact Assessment should include greater research into consumer behaviour and the level of desire and demand for cross-border shopping, as well as the extent to which legal harmonisation can foster active use of the internal market by consumers.

200. We also note Article 95(3) TEC, which requires that any internal market legislation concerning consumer protection should have as its base a high level of protection. We therefore recommend that the protection offered by the existing Directives covered in this proposal should be taken as the base upon which to build. We consider it of utmost importance that the overall level of protection afforded to consumers should not be reduced.

201. Finally, we are not convinced that by itself the action proposed by the Commission (that is, harmonisation of consumer law across the EU) will necessarily boost cross-border retail trade as the Commission desires. We recommend that the Commission gives further consideration to other factors, such as language, culture, distance of delivery and handling of cross-border complaints, and the extent to which these may also be responsible for current low levels of cross-border retail trade.

Chapter 3: Full harmonisation

202. We note that the principle of full harmonisation has already been applied in European Union consumer protection legislation—namely in the Unfair Commercial Practices Directive and in the recent Timeshare Directive. One notable lesson to be learned from the former is the need for clarity in the Directive about the extent of full harmonisation.

203. On that basis, and like many of our witnesses, we acknowledge that full harmonisation, where justified, could increase legal certainty for both consumers and business. But further work is required to clarify the benefits of full harmonisation, taking into account concerns that consumer protection

could be reduced but also the view of the business community that profitable businesses will in any case seek to deliver a high level of consumer protection.

204. Full harmonisation as proposed by the Commission is likely to be politically impossible for Member States and the European Parliament to support, but we also detect little enthusiasm to abandon the full harmonisation principle entirely. In that case, we consider that a "differentiated harmonisation" model may be workable, harmonising aspects such as definitions, the right of withdrawal and the provision of information but allowing Member States room for manoeuvre in other areas. Such flexibility could facilitate swift responses to future challenges.

205. The relationship between the relevant provisions contained in national law and those in the Directive is unclear and if there is a conflict between them, which of them takes priority. It is also unclear as to how national contract law might impact on the way in which the proposed Directive will take effect, once it has been transposed. We urge the Commission to clarify these matters. Our preference would be to see the relationship between the Directive and national contract law resolved in the text of the Directive itself. We fear that, otherwise, confusion will reign.

206. We note the "blue button" optional instrument suggestion, allowing Member States to retain their own models of consumer protection based on national contract law but allowing consumers to opt into a harmonised system. We recognise some theoretical benefits may be offered by this option but we are concerned that such a system may be excessively complex for the consumer and trader alike. Further work might usefully be done to assess its practicality.

Chapter 4: Scope of the Directive

207. We note the view expressed by some of our witnesses that the coverage of the Directive should be widened, particularly to include the Package Travel Directive. We recommend that consideration of including other Directives within the scope of this proposal should be revisited following the extended Impact Assessment we have recommended in paragraph 39.

208. We support the idea that there is room to expand the scope of the Directive and recommend that it should extend to digital products. We consider the application to digital products particularly important given the proposal's aim to future-proof consumer law and update the existing *acquis*, which has been introduced over three decades and thus does not sufficiently address issues specific to the digital era.

209. Related to this, we recommend that Chapter IV of the Directive should apply to both the goods and the services elements of mixed contracts. We further recommend that services should be covered by the Directive in its entirety. We recognise that such extensions to the scope will require significant work but consider that there will be few opportunities to reform consumer law and that it is therefore worth spending the time now to produce a future-proofed Directive with clear application.

210. We note our witnesses' concerns about the exclusion of hire purchase from the scope of the Directive and urge the Commission to reconsider the rationale for this exclusion. This should include consideration of the possibility to disapply the draft Directive where a trader has voluntarily chosen to comply with the Consumer Credit Directive.

211. While we consider that this Directive should embrace services generally, we recognise financial services as separate and distinct from this category given the specialist nature of these products. We recognise the concerns of the financial services industry about the application of this Directive to the sector. In particular, we note the industry's concern that the ban on inertia selling could prohibit the auto-enrolling of pensions. We therefore recommend that it is made clear in the proposal that the provisions on inertia selling do not apply to pension schemes offered by an employer.

212. We note that the ban on inertia selling would also prevent the tacit renewal of contracts, including insurance policies, and variation of terms without the consent of the consumer. These matters are contentious and we are not convinced that they should be similarly excluded from the scope of the Directive. At the very least, we consider that the possibility of such changes should be mentioned in the contract, and clear notice must be given in advance of the insurance premium being levied upon renewal.

Chapter 5: Clarity for consumers and provision of information

213. We recognise the importance of consumers' awareness of their rights and consider that a clear and comprehensible Directive is an important part of informing the consumer. However, there is an inherent tension in providing a legal text that is clear to lawyers and is also accessible to all consumers. We recognise that the transposition of the Directive into national laws will provide an opportunity to improve accessibility of the Directive. In the first instance, we consider it essential that the Directive should be sufficiently legally robust and clear for those explaining the provisions to consumers, so that they can do so accurately. We believe it would also be helpful for national authorities to produce comprehensive guidance documents for consumers on their rights.

214. We note and support the permissive nature of the provisions on general consumer information. We agree that, where already apparent from the context, the trader should not be obliged to furnish the consumer with such information. Nevertheless, we are concerned about how that might be adjudicated should a dispute arise between the trader and consumer as to whether or not something is "apparent from the context". We recommend that clear guidelines covering this area are drawn up.

215. We consider that attention should be paid to the need for guidance on how information should be communicated to provide certainty to businesses and to highlight key information for consumers, possibly through the use of summary boxes.

216. We are not convinced by the argument that these provisions will overload the consumer with information, though this is conditional on information being deployed sensibly, in line with the requirements set out in Article 5. We consider it important that consumers are given this information, regardless of whether they read it at the time of purchase or not, so that they have access to it in the future, should the need arise.

217. We are concerned about the possibility created in this Directive for a reduced level of mandatory information to be provided to consumers of financial services products. We note that this is a concern shared across the EU and warn about the potential impact of this on consumers who are sold such products off-premises. We are concerned that this could create an added

incentive for businesses to sell financial products off-premises, thus multiplying the adverse effect on consumers. We recommend that financial services are excluded from this part of the Directive.

Chapter 6: Right of withdrawal for distance and off-premises contracts

218. We welcome the introduction of a harmonised withdrawal period for the majority of business-to-consumer contracts and consider that this will help to address the problems associated with the varying lengths of withdrawal period which currently exist across the EU. Nevertheless, we note that many of our witnesses were concerned about the detail of the provisions in the Directive on the right of withdrawal and we are concerned that a uniform approach will not work for all situations, such as complex insurance contracts. We therefore consider that the Commission must revisit this chapter, providing in particular greater justification of the choice of a uniform 14 calendar day withdrawal period.

219. We are concerned about how the right of withdrawal might affect existing provisions such as the 45-day cooling-off period for warranties in the United Kingdom and call for this to be preserved under the Directive.

220. We can see the benefit of a harmonised right of withdrawal form such as that included in the Directive, but the use of such a form should constitute only one of several options for the consumer. The Directive should make it clear that the simple act of returning the goods to the trader satisfies the criteria for exercising withdrawal, in addition to the option of notifying the trader in writing on a durable medium (see paragraph 140). We are not convinced that notifying the trader over the telephone of an intention to withdraw from the contract should be similarly accepted as satisfying the criteria for withdrawal, as we do not consider that it would be possible to prove that a telephone call had or had not been made.

Chapter 7: Sales contracts

221. Earlier in this Report we discussed the principle of full harmonisation, which would have a significant impact on sales contracts. We conclude that the Sales chapter is not fit for purpose in its current form if intended as a full harmonisation measure.

222. We observed little appetite among our United Kingdom witnesses to see the United Kingdom's "right to reject" removed and, furthermore, we note that this statutory right, or similar, is not exclusive to the United Kingdom. For the sake of clarity, we recommend that these concerns be addressed through an amendment to Article 26 of the Directive. This amendment may need to be flexible, perhaps giving a specific time-limited right to reject, such as the 30 days proposed by the Law Commission, in order to take into account the concerns of Member States which do not currently support the right to reject.

223. The requirement that a consumer must inform the trader of a defect within two months of detection appears arbitrary and we are concerned that it may not always be practicable to notify the trader within two months. As we do not consider the case has been made for the restriction, and as we are concerned at its impact, we recommend deletion of the two month limit as a mandatory requirement.

224. The two year limit on a trader's liability for faulty goods could be problematic in relation to the purchase of a range of goods which could reasonably be expected to last longer than two years. We therefore recommend reconsideration of the two year limit, with a view to either extending the period or allowing some flexibility in its application.

225. The proposal to exclude rescission of contracts in cases of minor defects appears to be fraught with uncertainty and a lack of clarity, which would not assist the trader or consumer. We recommend that this exclusion either be removed or that clarification of what is considered a "minor defect" be included in the Directive.

226. We are concerned that the circumstances under which the consumer might resort to the second tier of remedies are unclear. The lack of clarity stems from the use of terms such as "reasonable time" and "significant inconvenience", which could favour the trader over the consumer. For the purposes of the consumer, we recommend that the circumstances under which he may resort to the second tier of remedies be made more explicit in the text.

Chapter 8: Unfair contract terms

227. We note that the exclusion of negotiated terms from the content of the provisions on contract terms has the potential to place consumers at a disadvantage. We accept, though, that Article 33 making it incumbent on traders to prove that a term has been individually negotiated is weighted in favour of the consumer. Consideration might usefully be given to strengthening this Article further, but we do not consider that the case has been made to bring negotiated terms within the scope of the Directive.

228. We welcome the introduction of "black" and "grey" lists but the devil lies in the detail of their content. We have heard various specific suggestions as to how the lists might be amended, including opposing views. At this stage, we draw no conclusions on the content of the lists but we note that there is substantial concern on this matter. If agreement is to be reached, it will be essential that every term on each of the lists is fully justified, with due regard to current practice in each Member State and to the views of stakeholders.

229. We were relieved to hear the assurances from both the Commission and the Government that the role of national regulators with regard to unfair terms would be largely preserved under the Directive. We would hope that other Member States might be similarly reassured by clarifications to the Directive. The general principles on assessing the fairness of contract terms might benefit from some clarification in order to provide this reassurance.

230. Substantial concern was expressed about the use of delegated legislative powers ("comitology") to amend the lists. It was felt that the process could be opaque, excluding stakeholders, and even Member States, from considering the full implications of proposals. Like the Commission, we consider that this process ought to be given a chance to prove itself as it could be a more efficient method of taking these decisions than a full legislative procedure. Its legitimacy will be dependent on a commitment to full transparency by the Commission and by national governments, which should include consultation as appropriate.

APPENDIX 1: SUB-COMMITTEE G (SOCIAL POLICY AND CONSUMER AFFAIRS)

The Members of the Sub-Committee which conducted this inquiry were:

Lord Cotter
Lord Eames
Baroness Gale
Baroness Howarth of Breckland (Chairman)
Lord Inglewood
Lord Kirkwood of Kirkhope
Lord Lea of Crondall
Baroness Morgan of Huyton
Baroness Perry of Southwark
Lord Wade of Chorlton
Baroness Young of Hornsey

Declarations of Interest

Lord Cotter
Patron of SURF
Liberal Democrat Spokesman for Small Business in the Lords

Lord Eames
No relevant interests

Baroness Gale
Commissioner for Wales, Women's National Commission
Patron, Kidney Wales Foundation
Chair of the APPG on Parkinson's disease

Baroness Howarth of Breckland
Patron and Trustee, Little Hearts Matter
Chair, CAFCASS (Children and Families Court Advisory and Support Service)
President and Trustee, Liveability (Chair)
Secretary, All Party Parliamentary Group for Children
Member, British Association of Social Workers
Associate, Association of Directors of Adult Social Services

Lord Inglewood
Political Adviser, House of Lords for the Estates Business Group
Chairman, CN Group (Media)
Chairman, Carr's Milling Industries plc (food and agriculture)
Director, Pheasant Inn (Bassenthwaite Lake) Ltd (hotel)
Membership of public bodies:
Chairman, Reviewing Committee on the Export of Works of Art
Friends of the Lake District (nominated by the Committee for the National Consultative Council)
President, Cumbria Tourist Board
Member, Historic Houses Association Finance & Policy Committee
Chairman of the Carlisle Cathedral Development Trust Project
Trustee, Elton Estate, Cambridgeshire
Trustee, Raby Estates, Co Durham and Shropshire
Trustee, Thoresby Estate, Nottinghamshire
Trustee, Calvert Trust

Trustee, Settle-Carlisle Railway Trust
Trustee, Whitehaven Community Trust Ltd
Member, Bar
Member, Royal Institution of Chartered Surveyors
Fellow, Society of Antiquaries of London

Lord Kirkwood of Kirkhope
No relevant interests

Lord Lea of Crondall
No relevant interests

Baroness Morgan of Huyton
Non-Executive Board Member of Southern Cross Healthcare PLC
Member, Advisory Panel Lloyds Pharmacy
Board Member, Olympic Delivery Authority
Non-Executive Board Member of Carphone Warehouse PLC
Advisor to Board of a charity (ARK) (one of whose areas of work is deinstitutionalisation in Romania and Bulgaria)
Board Member, Mayor's fund (charity)

Baroness Perry of Southwark
No relevant interests

Lord Wade of Chorlton
Member, Nuffield Hospital Trust
Director, Midas Capital plc
Director, RockTron Ltd

Baroness Young of Hornsey
Setting up APPG on Ethical Fashion
Part-way through Industry and Parliament Trust Fellowship—placed with Cadburys and Unilever

A full list of registered interests of Members of the House of Lords can be found at http://pubs1.tso.parliament.uk/pa/ld/ldreg/reg01.htm

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked with * gave oral evidence.

* Association of British Insurers
  Bar Council of England and Wales
* BEUC
  British Retail Consortium
  Citizens Advice
* CBI
  Consumer Credit Association
* Consumer Focus
* Mr Guillaume Delvallée, French Permanent Representation
* Department for Business Innovation and Skills
* EuroCommerce
  European People's Party-European Democrats Group for the Internal Market and Consumer Protection Committee
* Ms Fernanda Ferreira Dias, Portuguese Permanent Representation
  Financial Services Authority
* Mr Malcolm Harbour MEP
* Ms Vera Knoblochova, Czech Republic Permanent Representation
* Commissioner Kuneva, European Commissioner for Consumer Affairs
  LACORS
  Law Commission
  Law Society
  Professor James P Nehf, Associate Dean for Graduate Studies, Indiana University School of Law
* Office of Fair Trading
  Slough Borough Council
* Ms Bettina von Teichman und Logischen, German Permanent Representation
* Mr Harrie Temmink, Member of Commissioner Kuneva's Cabinet
* Mr Gareth Thomas MP, the then Minister of State, BERR (now BIS)
* Trading Standards Institute
* Dr Christian Twigg-Flesner, Reader in Law, University of Hull
* Ms Diana Wallis MEP
* *Which?*

APPENDIX 3: CALL FOR EVIDENCE

EU Sub-Committee G (Social Policy and Consumer Affairs) is conducting an Inquiry into the issues raised by the European Commission's proposal for a Directive on consumer rights. This was adopted by the Commission on 8 October 2008. The relevant Commission document COM(2008) 614 final, together with an associated Impact assessment and other relevant documents, is accessible on the Commission website.[48]

The Commission's Proposal would merge the Directives on Unfair contract terms (93/13/EC), Sales and Guarantees (99/44/EC), Distance Selling (97/7/EC) and Doorstep selling (85/577/EC) into a single "horizontal" Directive which aims to regulate the common aspects in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps. These changes should, in the Commission's view, enhance consumer confidence and reduce business reluctance to trade across borders.

The aim of our inquiry is to provide an opinion on the Commission's Proposal, with a view to informing the debate surrounding the Directive within the United Kingdom Government and the EU institutions.

Particular questions raised by the Commission's draft directive to which we invite you to respond are as follows:

The overall objectives and underlying principles

(1) To what extent is it necessary to update and simplify the existing rules and, if so, why should this be achieved through the replacement of four Directives by a single Directive?

(2) Should a single horizontal Directive be desirable, what should its objective be? Where should the balance between a high level of consumer protection and the functioning of the internal market (for both companies and consumers) lie?

(3) How consistent is the draft Directive with the Commission's broader work on contract law such as the Common Frame of Reference?[49]

(4) To what extent does the draft Directive succeed in providing a clear indication of the rights of consumers? How might the accessibility of the information contained in the Directive be improved?

Full harmonisation

(5) To what extent do you consider the introduction of the principle of full harmonisation to be welcome? With reference where possible to practical examples, what do you consider its strengths and weaknesses to be?

Scope

(6) Do you consider the scope of the Directive to be appropriate and do you consider it to be sufficiently clear? To what extent should the provisions apply more broadly to other consumer legislation, such as the timeshare (94/47/EC) and package travel (90/314/EC) Directives?

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48 http://ec.europa.eu/consumers/rights/cons_acquis_en.htm

49 http://ec.europa.eu/consumers/rights/contract_law_en.htm

General consumer information provisions

(7) Articles 5–7 of the draft Directive include a number of provisions on consumer information. What are your views on the general information requirements, the provision on the failure to provide information and the specific information requirements for intermediaries? What is your view on the application of the full harmonisation principle on the information requirements?

Consumer information and withdrawal right for distance and off-premises contracts

(8) What are your views on the provisions regarding consumer information and the right of withdrawal for distance and off-premises contracts including: the information requirements; the length of the withdrawal period; the modalities for exercising the right of withdrawal and associated obligations; the exceptions from the right of withdrawal; and the overall exceptions from the provisions?

Lack of conformity

(9) What do you consider to be the rationale behind the rules governing the lack of conformity of goods, including the proposed new hierarchy of remedies? What are their implications? How might they be applied practically? If necessary, how might they be amended?

Unfair contract terms

(10) To what extent is it appropriate to exclude negotiated terms even if any of those terms appear on the "black list" of terms always considered to be unfair?

(11) To what extent are the lists as proposed suitably comprehensive and are the general principles for additional terms robust enough?

(12) Is the procedure for determining when a "grey list" term (those "presumed to be unfair") can be used sufficiently clear?

Enforcement and penalties

(13) In the light of your experience with the existing Directives, do the provisions on enforcement and penalties raise any particular issues?

We also would welcome your views on any other aspect of the Commission's draft directive. Written submissions need not address all questions

Interested parties are invited to submit a concise statement of written evidence to this inquiry by Friday, 3 April 2009.

APPENDIX 4: REFERENCES TO OTHER PIECES OF EU LEGISLATION

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, pp 31–33)

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6,1990, pp 59–64)

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, pp 29–34)

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 the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, pp 83–87)

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, pp 19–27)

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ L 80, 18.3.1998, pp 27–31)

Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166, 11.6.1998, pp 51–55)

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999, pp 12–16)

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 (OJ L 149, 11.6.2005, pp 22–39)

Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L 33, 3.2.2009, pp 10–30)

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, pp 6–16)

APPENDIX 5: RECENT REPORTS

Recent Reports from the EU Select Committee

Procedural rights in EU criminal proceedings-an update (9th Report session 2008–2009, HL Paper 84)

Priorities of the European Union: evidence from the Ambassador of the Czech Republic and the Minister for Europe (8th Report session 2008–2009, HL Paper 76)

The United Kingdom opt-in: problems with amendment and codification (7th Report session 2008–2009, HL Paper 55)

Civil Protection and Crisis Management in the European Union (6th Report session 2008–2009, HL Paper 43)

Mobile Phone Charges in the EU: Follow-up Report (5th Report session 2008–2009, HL Paper 42)

Recent Reports prepared by Sub-Committee G (Social Policy and Consumer Affairs)

Session 2008–09

Healthcare across EU borders: a safe framework (4th Report, HL Paper 30)

Session 2007–08

Increasing the supply of donor organs within the European Union (17th Report, HL Paper 123)

Protecting the consumers of timeshare products (3rd Report, HL Paper 18)