

## BERR consultation on **EU proposals** for a **Consumer Rights Directive** & Law Commission paper on **Consumer** **Remedies for Faulty Goods**

**A response from Citizens Advice**

**February 2009**

## Introduction

Citizens Advice welcomes the opportunity to respond to the BERR consultation on EU proposals for a Consumer Rights Directive and the Law Commission's paper on Consumer Remedies for Faulty Goods. We believe that the range of consumer protection legislation included in this EU proposal is vital to consumer protection. Consumer redress needs to be seen in the context of both the current financial downturn and future consumer needs. A fair balance of rights and responsibilities between consumers and businesses traders can, we believe, help to strengthen consumer confidence. These proposals for a new Directive have the potential to cover a consumer's rights in relation to the wide range of purchases and purchase methods in use today. They will also need to be future-proof, so that future developments in consumer purchasing in the future are covered.

The current draft covers doorstep and distance sales, sale of goods and unfair terms. We have lobbied for changes in Doorstep Selling law since 2002<sup>2</sup>, culminating in the new UK Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations. We have also sought more unified cancellation rights.<sup>3</sup> In addition we have responded to EU and UK consultations relevant to the proposed Consumer Rights Directive, relating to the Consumer Acquis project, including those on doorstep and on distance selling and the EU Green Paper.

The Citizens Advice Bureaux (CAB) Service has two equal aims:

- to provide the advice people need for the problems they face; and
- to improve the policies and practices that affect people's lives.

The CAB service in England and Wales provides free, independent and impartial information and advice from over 3,000 outlets, including GP surgeries, courts, community centres and, by phone, email, online and through kiosks. In 2007/8, bureaux in England and Wales dealt with over 5.5 million enquiries. These included 296,000 consumer and 95,433 utilities enquiries, which included distance, doorstep and shop sales.

## General comments

Citizens Advice has actively supported the adoption and transposition of the Unfair Commercial Practices Directive (UCPD). We believe that fair trading is the cornerstone for all business to consumer transactions. It is essential that this proposed Directive on Consumer Rights works with the UCPD and complements it. To achieve this it will need to:

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<sup>2</sup> *Door to Door – CAB clients' experience of doorstep selling published September 2002.*

<sup>3</sup> *Can You Cancel It? – CAB and ECC clients' experience of cancellation rights in consumer contracts published December 2005*

- **cover all consumer rights for redress** for all different methods of purchase. This would make it easier for consumers to access and understand their rights.
- **include credit, financial services, package holidays and timeshare Directives.** This would appear rational since the unfair terms provisions in this Directive are generally within scope across these areas of EU consumer protection. As drafted, all other provisions in these sectors are outside the proposed Consumer Rights Directive;
- **cover all services** - all products including services are currently included in Directives 97/13/EC and 85/577/ EEC on distance and doorstep sales but not in Directive 1999/44/EC which is limited to sale of goods;
- **fill current gaps** in EU consumer rights provision such as:
  - ❖ the protection of consumer deposits;
  - ❖ redress where the UCPD is breached; and
  - ❖ access to a consumer ombudsman or similar ADR provision;
- **complement the UCPD, including the use of same definitions** - for example by using the word 'product' to cover goods, services and intellectual property rights such as use of downloads;
- **learn from transposition of the relevant existing Directives**, using the experiences of what went well and what failed in the Member States' use of minimum harmonisation, so that these proposed new versions provide the very best of Europe's consumer protection;
- **be fair and clear**, so that consumers and traders can understand consumer protection rights for all transactions and methods of purchase;
- **ensure that redress and enforcement are linked**, so that breaches are both stopped for future consumers and redressed for those consumers who have suffered detriment from the breach. Issues such as unfair terms not being enforceable against consumers fails this test because it provides a defence, but no active means to gain redress.

To achieve these objectives, the proposed Directive will need considerable amendment and redrafting. We believe that the additional work would be worthwhile. Citizens Advice recommends that the overarching objective should be a Consumer Rights Directive to complement the UCPD.

## **Response to questions posed in the consultation**

In this section we have commented on the current draft for the new Directive. As suggested, we have sought to respond to the questions raised in both the BERR and the Law Commission consultation.

## Key Issues

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

Yes, the proposal as drafted only contains four existing Directives. We agree with the concerns on scope expressed in the consultations for inclusion of sale of services as well as goods, but do not think that is enough.

There is a real opportunity for this Directive to deliver better regulation by providing a single piece of legislation with common rights and responsibilities for all consumer purchases.

Citizens Advice would expect a Directive with the title: 'Consumer Redress' to also provide redress where it is missing in existing EU consumer protection law, such as for unfair commercial practices. It should include redress for all that consumers normally might buy, rather than only what the four existing Directives on doorstep, distance, unfair terms and sale of goods cover. It needs to extend the scope to include:

- **all products** as defined under UCPD, so that services, mixed goods & services contracts and non goods and services products such as digital downloads are included, at the very least across the four Directives. At the moment it is confusing in that all products bought by distance and doorstep methods are covered but not the full range of those bought in shops where provision is restricted to goods; and
- **gaps in redress.** The Directive could provide redress for consumers who experience unfair commercial practices by providing for a private right of redress.

Further, the EU Commission has sought to encourage the use of Alternative Dispute Resolution (ADR), for example through EEJNet, as has the UK Government, for example through the Consumer, Estate Agents and Redress Act. At present there are some purchases where ADR is sometimes available via self regulation, and others where it is a statutory requirement, such as for telecoms, fuel and estate agency businesses in the UK. For consumers this means that the ADR provision is uncertain. For government, it does not fit with the Macrory concept of freeing up the courts or the Commission's objective to make cross-border buying easier.

This proposed Directive could include ADR in the form of consumer ombudsman provision. It would then assist in the objective for maximizing cross-border purchasing since consumers could tackle problems through ADR, rather than through the courts. Citizens Advice has long advocated the provision of an overarching consumer ombudsman service, which could both combine existing ombudsman services and fill the gaps in provision.

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

On paper, the benefits of full harmonization are that there would be no confusion as to what consumers, business, enforcers and advisers would expect. The objective of simplicity would be met. In practice, however, there is a real danger of reducing necessary levels of consumer protection across many EU States, as detailed in the Law Commission Paper. For full harmonization to be of benefit to consumers and to businesses that trade fairly, the proposed Directive would need to be changed to incorporate the highest level of redress currently available in EU Member States. This would bring the standard up across the EU. As drafted, the standard for sale of goods is reduced to what appears to be the lowest potential standard.

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

We are concerned that the proposals for sale of goods redress are extremely limited and that the business who has breached their contractual obligations will decide what redress to offer. This creates an imbalance between the contracting parties and could result in the consumer being denied any real access to redress.

The Law Commission's paper looks in detail at consumers' rights for redress in cases of breach of contract. This involves the ability to reject/rescind, whether the breach is a minor or a major one, and the ability to claim damages where additional loss is suffered as a result of the contractual breach. Where goods are faulty, unsatisfactory, misdescribed or not supplied, it is the consumer who has suffered loss, so it seems only fair and reasonable that the consumer should have some say in the redress on offer. If the right to reject/ rescind is lost, then the back-stop for a legal expectation that consumers have a right to have what they paid for is lost. Many consumers are happy with repairs, replacements or a reduced price but still need to be able to choose the most appropriate method of redress for that breach of contract. For example, a reduced price will not be acceptable where the goods supplied cannot be used in the situation for which they were bought; such as a fitted kitchen where wall units do not match base units or a washing machine that does not have the very programme the consumer would use most. Similarly, a repair may be feasible for the trader, but may not be acceptable if the faulty item bought is a gift. If a faulty washing machine is delivered and a plumber fits it, the consumer will have to pay for re-fitting any repaired or replacement machine and should be entitled to claim that cost back, as damages.

If the consumer does not know there was a problem with the item they are buying and how the trader might respond, then they make the contractual decision to buy without the material information. We consider they are entitled to know what to expect under the UCPD (the UK Consumer Protection from Unfair Trading Regulations or CPRs).

In addition we see unforeseen consequences of the proposals to limit consumer choice on sale of goods redress:

- wider use of extended warranties purchased to fill the gaps in legal provision. This might include businesses offering consumers what is currently a right but only if they pay extra for a warranty;
- more use of credit to buy goods, in order to gain equal liability by the creditor for a breach of contract by the supplier under section 75 of the Consumer Credit Act 1974;
- consumers might make wider use of distance and doorstep sales to gain access to cancellation rights which entitle them to a no quibble refund. Businesses that trade via shops as a venue would be disadvantaged, as would those consumers who are only comfortable with face-to-face shopping; and
- Consumers could blame the EU as being responsible for reducing consumers' rights.
- In relation to distance sales, there might be a reduction in cross-border sales due to the cost of using cancellation rights where consumers are likely to have to pay for returning products.

## **Chapter 1: Subject Matter, Definitions and Scope**

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

An objective of the proposed Directive at the Green Paper stage was clarity and continuity of definitions across Directives. We would therefore be very concerned if this proposed Directive were to use definitions that differ from those in the UCPD.

The BERR consultation raises the concern that there may be scope for employees, as well as the business for whom they work, to be individually liable for legislative breaches. This is raised in connection with the inclusion in Article 2 of the wording: 'anyone acting in the name of or on behalf of the trader.' We believe that the intention of this wording is that traders are also responsible for the personnel a consumer might reasonably assume is speaking/ acting as the trader. So, for example, if a sales agent for a double glazing firm calls at a consumer's home and says: 'I am from x company' the consumer can take what they say and do as the company's actions/ assurances. This is welcome since we are aware that, in the past, some businesses have sought to divorce themselves from what their sales people say and do. It was a specific problem with utility sales people employed via agencies and on commission, who were not traceable and would not be around when their promises failed to materialize. Perhaps the Commission can clarify this.

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

We support the BERR consultation proposal that the Commission will need to clarify how water, gas and electricity are covered under the rest of the proposed Directive, since they are excluded from the definition of 'goods' in Article 4 (4) (b & c).

In the energy market, many companies do not appear to have adhered to current requirements for doorstep and distance sales of supplies. We strongly recommend that there is no reduction in consumer protection for utilities. Although there is a range of sector specific regulatory and self-regulatory requirements to tackle this area of consumer detriment, none of them have managed to eradicate it. Whilst the numbers have reduced in line with the settling down of the initial market competition and race for customers, bureaux continue to report mis-selling in the sector.

A CAB in Leicestershire reported that an elderly woman agreed to switch fuel suppliers after seeing a stand in the local shopping precinct. She was attracted by the green credentials being claimed by the fuel company and agreed to switch away from her current supplier. The client changed her mind inside the 12 day cooling off period but the company insisted she had a valid contract with them. The client's deal with her previous supplier was a special tariff for vulnerable people and she only paid £13.41 per week for all of her fuel. The CAB undertook a number of checks which showed that she would end up paying about £45 or £50 per week unless she could return to the special tariff provided by her previous supplier. The CAB had to contact the company twice before they agreed the sale was an erroneous transfer. As the client's income was limited, £45 per week was a lot of money which she could not afford.

A CAB in London reported that an energy company sales person visited their client's house when she was out and convinced her 19 year old son who spoke and understood very limited English, to tell them his name. They used his name in order to open a new account and change the client's energy supplier. It took the client three months to change back to her original supplier.

Exactly the same problems are still being experienced in telecoms and we have no reason to believe that the same mis-selling will not emerge in the water sector should competition be introduced.

A CAB in Staffordshire report that when a telesales agent rang their client he specifically told them he wanted to stay with his current provider but agreed to be sent details of their telecoms offer. Instead he received a bill from the company who then wanted a £150 cancellation fee. The bureau obtained a copy of the phone conversation, proving the client had not

agreed to transfer, and had the bill cancelled and the client transferred back to their original provider.

The utilities have illustrated the huge imbalance between the powers of suppliers and consumers in a market where the products are essential. Our evidence shows that mis-selling leads on to a wide range of problems later in the relationship between customer and provider, including billing. For example:

A CAB in Northamptonshire reported that a single woman who had stayed with the same supplier for nine years paying for her supply by a pre-payment meter, switched supplier in late 2007 to get supermarket loyalty points. In January 2008, she switched back to her original supplier. In December 2008 she was shocked to receive a bill for over £400 from the supplier she had briefly switched to, which was subsequently passed to debt collectors. When the bureau contacted the company, it transpired that they had no note of the client having a prepayment meter for her electricity.

Citizens Advice is firmly of the view that utilities such as water, gas and electricity need to be included under all the provisions of the proposed Directive. If there is any possibility that utilities could be exempt from the distance, doorstep and unfair terms sections of the proposed Directive we would expect the UK Government to raise the issues above and to vote against such an exemption.

We have a further concern relating to the part of the proposed Directive that deals with goods. Utilities are sometimes bundled, for example a sales person might sell gas, electricity, central heating and a boiler warranty agreement during one sale. Clearly the boiler is a good as are materials for the central heating, but the fitting and the warranty are not. We understand that insurance will be subject to the Directive, but that other financial services will not. This in itself is confusing. Consumers will find it difficult to understand why one part of a transaction is covered in relation to faults, whilst another is not. It should also be borne in mind that the cancellation rights in doorstep and distance purchasing will have elapsed before the consumer becomes aware of most problems in a transaction of this type.

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

We agree that the proposed new definition would provide additional consumer protection where the contract is concluded by distance means, even where another means was used up to the conclusion, for example during the provision of an estimate costed in the consumer's home. We are concerned, however, that a trader could arrange everything up to but not including the conclusion of the contract to be at a distance, in order to avoid distance selling rules. Purchasing by internet and then collecting from a shop is already common, so if the conclusion of such a distance contact was delayed until that collection, would the purchase then fail to be a distance sale? We would be interested to know

whether BERR consider that a purchase made over the internet where goods are collected are caught by current distance selling regulation.

In addition, we feel that there is room for confusion as to whether the distance selling or sale of goods rights would apply and thus whether cancellation rights applied to the transaction. Consumers and traders will need to have a very clear understanding of the proposed definition, if it is to enhance consumer rights. This seems particularly unlikely in the case of a one off sale by a business that does not usually undertake distance selling, as indicated in paragraph 36 of the BERR consultation.

***Q7: What are your views on the definition of the ‘means of distance communication’?  
and***

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

We agree that future-proofing is sensible for such a definition, but have no objection to an indicative list to assist clarification. Mobile phones are increasingly being used as a means for payment for products. It would be possible to begin a transaction on the phone and conclude it by computer. Thus any list could be out of date quickly if it were more than indicative.

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

Yes, because this practice has been used to evade doorstep selling legislation and thus the provision of cancellation rights. We suspect that this happens where it is likely that consumers will not want to go ahead with the transaction once they have had time to reconsider. In particular, this practice was seen in timeshare-like sales because doorstep selling rules were helping consumers to cancel where timeshare rules did not apply. Whilst the new Timeshare Directive covers timeshare-like agreements, it is vital to protect consumers adequately in a market with such a poor reputation such as timeshare. Citizens Advice believes that traders who are trading fairly have nothing to fear from cancellation rights.

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

The widening of the scope for doorstep selling to provide consumer protection whether the visit is solicited or unsolicited is most welcome. We agree that the psychological pressure on consumers is the same.

However, it is unclear from the new definition whether contracts that are only partly negotiated away from business premises and then further negotiated and concluded on business premises would be covered. This leads us to wonder whether the definition here is becoming potentially confusing. Further, in our responses to doorstep selling consultations, we have sought a wider definition of

'off trade premises'. We have commented further on this in our response to chapter three of the BERR consultation.

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

We have raised the issue of what might constitute 'business premises' in previous consultations. We think that business premises should be confined to permanent physical premises and should not include the following:

- where a trader hires the same venue for a season but has no ongoing point of contact there, such as a hotel venue;
- where an accommodation address is used;
- where a trader trades from a stand in a shopping centre that is not a permanent venue and has no identifiable address;
- where sales staff approach consumers in a public place, such as on the street, in a shopping centre or at a station or airport.

Consumers will not necessarily be able to find traders they encounter in these circumstances. We think that the current draft definition for seasonal and temporary premises to be business premises might allow a loophole for unscrupulous traders. We are aware of the intention in the recitals that public places and public transport will not be defined as business premises but remain concerned that this does not appear in the text of the draft Directive's definitions.

In addition, more generally than just in the context of doorstep selling, the Directive needs to deal with the issue of businesses that have no business premises. Internet and telecoms only firms will need to be located physically by consumers for redress purposes.

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

Receiving information and cancellation rights in a durable form is essential if consumers and their advisers are to have access to these details at a future date. The inclusion in this definition of: 'information addressed personally..' and 'unchanged reproduction' of the information are, we believe, vital. Paragraph 16 of the preamble to the draft Directive spells out what might constitute durable means. This is an area of concern for Citizens Advice. Bureaux report that the terms of mobile phone contracts, sometimes concluded over the phone, have not always been available. Advisers have been referred to the terms on the supplier's web site, which could have been changed since the purchase was made, as could tariffs.

A Sussex CAB reported that a 45 year old Iranian man was sold a mobile phone contract by a shop in Eastbourne. There was no written contract, but the client verbally agreed to an 18 month contract. He was told by the salesperson that he would be able to change to a lower tariff after 6 months but this was wrong. The shop has since ceased trading. The

client, who was a student, could not afford to pay the current tariff and had been cut-off as a result of non-payment.

At paragraph 41 of the BERR consultation the issue of voice mails is raised. We suggest that these messages are far too easily deleted; indeed message space is likely to be too small for their retention. With the huge growth in technology we appreciate it would be naive to require paper versions in all cases but the problem remains that electronic means are readily deleted and we wonder whether traders will always retain copies of old contract terms themselves. Our view is that the words: 'accessible for future reference' are essential, so that the information cannot be changed and will last.

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

We agree that the remaining definitions are quite clear but have two queries:

- at paragraph (17) of Article 2 'producer' is defined as manufacturer, imported or person purporting to be a producer. It is unclear how own brands will be viewed under this definition; and
- we suggest that the word 'product' is used throughout the proposed Directive as it is in the UCPD, rather than 'goods and services' e.g. in paragraph (20) of the definitions. It is wider and provides continuity with UCPD.

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

We are not aware of any at present.

## **Chapter 2: Consumer Information**

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

It is welcome that the information requirements in Article 5 appear to match with those of the UCPD. We believe that it is important for consumers to be given this information to help them understand where any key information points are missed.

The further comments below are from a consumer perspective.

We remain concerned that the provision for this vital information is subject to the space available for that medium of sale. In these circumstances, we are concerned that consumers may not receive the information they need where the medium is restrictive, such as on a mobile phone.

Paragraph 1(b) in Article 5 on identity of the trader is familiar under EU legislation. We have an ongoing concern that the information consumers need is

that required to take legal action. In the UK the registered office address would be required for a limited company, but for sole traders and most partnerships there is no register to assist should the business disappear where the only address is that of the shop.

Article 5.1 at (l) on deposits may provide an opportunity to highlight to the consumer whether their deposit is protected, should the trader fail. Citizens Advice is lobbying for consumer deposit protection. We believe that such protection is vital to consumer confidence, particularly in the current financial climate. As a minimum, we would want this clause in the proposed Directive to include that consumers must be informed that their deposit is not protected if that is the case.

Where consumers are not provided with the information listed at Article 5.1 (c) on prices/ costs, Article 6 says that the consumer shall not pay. We are unsure as to how the consumer will know that they do not have to pay in this circumstance and, further, how they will prove whether they were given the information verbally or not. The same concern on how to evidence a failure to inform applies to Article 7, on the requirement for traders to tell consumers they will not be covered by the proposed Directive where that trader or intermediary acts for a consumer and creates a consumer to consumer contract. We suggest a requirement that this information be provided in a durable means.

Citizens Advice believes that it is essential for the contractual remedy provision in Article 6.2 to be clearly linked to enforcement, so that enforcement acts as a trigger for redress. We believe that enforcers should include requirements that a trader will provide redress for customers affected by the breach, as part of any undertaking or injunction.

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

Yes, over time CAB have reported a range of scams where consumers have been tricked into using premium rate lines and have only become aware of the costs on receipt of the bill.

A CAB in Lincolnshire reported that a man received a text message that appeared to come from his current mobile airtime provider. As phone calls to his airtime provider were free, he rang it. It was a sex line and he spoke directly to a person. He did not realise this was a sex line number, as these are usually 09 numbers and premium rate. After nearly three minutes, he decided he did not want to be part of this conversation and hung up. The client told the CAB that he would not have rung, had he known. A few days later someone rang and said that as he had used their service, could he provide his name and address. The client provided these details, which resulted in a phone bill for over £40 from the sex line provider.

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

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

These information requirements seem appropriate, but we believe that Article 9(f) should go further to include a requirement to tell consumers what the key elements of these rights are. This would be of great value in educating both consumers and the employees of traders. Then, by extending the requirements of Article 9 (d) to tell consumers about any self-regulatory code relevant to the purchase, the key code elements providing additional rights could be listed.

We also welcome the information on the possibility of ADR provision at Article 9 (e). We see great value in the development of a consumer ombudsman and see this provision as a potential move in that direction. This could fill gaps in redress where no ADR is available through a trader's voluntary code or through legislation. In addition to informing consumers where there is an ADR provision, the clause should require traders to say that there is no ADR provision where this is the case. This would help consumer awareness of ADR as a feature that might influence their decision to purchase.

We also welcome that off-premises (doorstep) sales require a signature and receipt by consumers of the required information in a durable form. However it is unclear whether consumers' right to redress applies where this type of sale is not valid, under Article 10.2, because there is no signature or provision of durable information.

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

We support this and have sought this through our report on cancellation rights<sup>4</sup> and throughout discussions on the new UK doorstep selling regulations. We see a common cancellation form as a tool for consumer education and as an aid to reducing costs for business too.

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

We repeat suggestions from our work on the new UK doorstep selling regulations, where we sought a requirement that the trader should fill in as much information as possible, rather than leaving the consumer to do this. We believe that trader should provide sufficient detail for the consumers to exercise their cancellation rights, including their address for receipt of the form and with the relevant reference details for that contract.

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<sup>4</sup>Can You Cancel it? December 2005 Citizens Advice

We also suggest that the form in Annex 1 should include a note as to how consumers can evidence return of goods. This would help consumers meet the requirement at Article 16 where traders can seek proof of return.

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

For consumers we see this as an opportunity for increasing their knowledge of with consumer rights.

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

We believe that prominence is essential. We lobbied for the new UK doorstep selling regulations to use a box with the heading as described in paragraph 66 of the BERR consultation, including the requirement for prominence.

***Q22: Do you have any comments on Article 11?***

We are unclear as to the sanction for consumers where there is a failure to provide the information in Article 11 for distance contracts.

At Article 11.4, the latest time for provision of the information is when performance of a service has begun. We believe that this needs to be expressed in more concrete terms. Should the information come before the service starts or can it be delayed so that the cancellation period has elapsed?

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

This proposal seems sensible, since many people looking at the proposed Directive will not also read the recitals and the Council Regulation in paragraph 73 of the BERR consultation.

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

Citizens Advice supports the extension of cancellation rights to 14 days. This should mean that there is no reduction in the period that was available under a seven working days rule, even where a bank holiday is involved. We have only been able to calculate one instance where seven working days could amount to 15 calendar days. When Easter falls in the second half of April, the cancellation period would cover Good Friday and Easter Monday and the Mayday bank holiday.

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

The benefit for consumers would be clarity across legislation and provision of sufficient time to cancel.

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

We do not support the proposal to have a sunset clause in distance selling regulation on the suggested grounds that familiarity with internet buying would mean that cancellation right were no longer relevant. Firstly, this fails to take account of the variation between different consumers' familiarity with internet buying. Secondly, it fails to take account of other distance buying methods. Thirdly, it loses sight of the basic idea that distance purchases are not seen and cannot be properly assessed until received. Loss of this cancellation right would adversely affect consumers' ability to make informed transactional decisions.

Further, there is no suggestion of sunset clauses for other purchase methods. Should the sale of goods provisions go ahead as drafted, with the trader choosing the form of redress available, we expect that distance sales will grow as a means of accessing sensible redress rights.

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

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

- a) We agree that consumers would benefit from a cancellation period starting from receipt of the product.
- b) For distance sales of goods and for doorstep sales, we agree that the proposed Directive should include that consumers can cancel at any time up to the end of the cancellation period, including the period before goods are received.
- c) For distance sales of services, we feel the position remains a confusing one. Article 12.2 at the third paragraph says cancellation begins: 'from the day of the conclusion of the contract'. This could mean the point of signing, but this paragraph uses different language from that in the first paragraph for off-trade purchases. This needs to be linguistically clear.

A vital element is that receipt of the information in a durable form, including the new notice, should trigger the start of the cancellation period, as indicated in the first paragraph of Article 12.2. Article 11 refers to this for a service as being required; 'when the performance of the service has begun', but fails to indicate the time line clearly.

We are not clear as to whether it would be possible for a consumer to cancel once a service has begun or when a product, such as solar heating, has begun to be installed. Article 12.4 says the parties cannot be prohibited from starting their contract whilst the cancellation period is running, but does not appear to cover whether starting the contract prohibits cancellation. This is of concern to Citizens Advice as bureaux report that items such as alarm systems are being installed the day after the sale where clients wanted time to consider the purchase and to cancel.

A CAB in North Yorkshire reported that an elderly man was cold-called by a company about buying a security system. They sent someone round the same day who took £3,000 in cash from the client. This was all his savings. The following day, the system was fitted. The system comprised a burglar alarm and a 'lifeline' type emergency call button. The contract that the client signed stated that CCTV and a smoke alarm would also be fitted, but this was not done. Since then the client had had several visits from the man who took the money in the first place, now trying to get cash off him for fitting windows and a boiler which he did not want to have done and could not afford. The client went to the police about the salesman pestering him, only to be told it was not a criminal offence. When the client came to the CAB, it was clear that he was not aware that he had cancellation rights. The CAB contacted Trading Standards about the company, and contacted the company directly to cancel the agreement on behalf of the client.

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

We believe that failure to provide this information will need to be considered as both an offence and an opportunity for redress. Thus, the failure can be tackled by enforcement to stop future breaches and those consumers affected by the breach can be compensated. We believe that one remedy alone will limit the effectiveness of the measure.

Whilst we see a value in extending the cancellation period in a situation where cancellation information had not been provided, we believe that the link to provision of the correct information needs to be retained. Cancellation rights should extend until 14 days have elapsed from the date when the correct information is provided. Consumers who are not aware of their cancellation rights will still be unaware of them when the three months have elapsed.

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

Article 2 definitions deal with what constitutes durable means. Traders are required to provide information using durable means. We see no reason why consumers cannot, by the same token, use any durable means to cancel. Article

14 says a trader 'may' allow an on line cancellation, so there is no right for consumers to use that mechanism. This seems unfair.

Further, in our report *Can You Cancel It?* referred to above, we said that consumers expect to be able to cancel using the same mechanism they used to buy. Thus, where a consumer buys during a phone call they often expect to be able to cancel by phone too.

A CAB client from Lancashire accepted a distance sale offer for two mobile phones, but then decided to cancel. On phoning the company to cancel, the client was assured everything would be taken care of. The phones were then delivered so she contacted the provider for collection, which never happened. Some 14 months later, debt collectors threatened her with court action.

However, since we see value in the requirement for information from the trader in a durable form, it seems proportionate for the same to apply to consumers.

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

Consumers will need to be made aware that they will need to pay the cost of returning cancelled items. This should be included in the information the trader is required to provide at Article 5.1, perhaps at (c). In addition we suggest this is included in the information on the cancellation form at Annex 1.

We agree with paragraph 94 of the BERR consultation which states that the responsibilities of traders and consumers should be balanced. The obligation for consumers to return their purchase within 14 days from the date they cancelled should be matched by a trader obligation to refund money within 14 days of receiving the item back or evidence of its return. If the current 30 day allowance reflects business requirements, the consumer's time limit for returns should also be 30 days.

Since some traders may wish to collect cancelled items we suggest that Article 16 includes the consumer's offer of reasonable access for that collection.

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

Our concern in respect of diminished value is that consumers may find it difficult to prove the condition of the item they returned, so that it could be open to traders to unfairly claim a diminished value. It would appear to be up to the trader to decide by how much the item's value has diminished. Since this will reduce the sum being repaid to the consumer, the consumer should have some means of challenging the trader's view or be able to demand evidence of lost value. It would also seem valuable for ADR provisions and self-regulatory codes to consider how this issue can be decided fairly.

It is welcome that consumers cannot be charged for any diminished value where the trader failed to provide cancellation rights. We agree with paragraph 96 of the BERR consultation.

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

We share the concerns expressed in paragraph 98 about pressure selling of home repairs services with immediate performance, which thus avoids cancellation rights. We also see the fairness in consumers having to pay for services provided where the consumer instigates this during the cancellation period. On balance, we think that the provisions at Article 19.2(a) provide for better consumer protection than an open possibility for requesting non-emergency performance of services. It is vital that off-premises sales law can adequately tackle rogue traders, particularly in the home repairs sector. We suspect that such traders will require cash payment and will prove very difficult to trace for redress purposes, but at least enforcement tools will be available. We are not aware of situations where 14 days is too long a waiting period for consumers in respect of non-emergencies and the alternative provides an easy means for rogues to exploit vulnerable consumers.

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

It is important that consumers are aware of the consequences of opting for performance of their contract during the normal cancellation period. An oral agreement would be too difficult to disprove. We do have concerns that written authority for early performance could allow traders who want to avoid cancellation rights to hide this in the small print of their contract. In the UK Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations, we strongly supported the warning of the consequences of this being included in the cancellation rights notice. We also raised concerns about hidden consent clauses with BERR on these Regulations. Trading Standards Institute also raised this point in press releases following the implementation of the new UK Regulations.

We suggest that written consent is required, that warnings about the effect of the written consent is included adjacent to the position of the consumer's signature and displayed so that this information is bold and compelling.

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

Please see comments at questions 30 and 31 above.

In addition, we support the provision for consumers not to bear the cost of services performed during the cancellation period at Article 17.2, in light of the Article 19.2(b) provisions on emergency works.

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

We believe that specifying time limits in these Articles is important. It allows the parties to determine exactly when their rights can be expected to have been delivered across distance and off-premises sales.

Please see comments under questions 30 and 31 too.

We have a concern in relation to **Article 18** on ancillary contracts.

We strongly support the provision that exercise of cancellation rights will cancel ancillary contracts too. But we are unsure as to how this is compatible with the exclusion of insurance contracts at Article 20.2(a). Insurance is commonly sold with products to which the proposed Directive applies. Some warranty agreements are insurance products, including that provided under the TrustMark scheme.

We are also concerned that, if utilities are outside the provisions of this Directive, a consumer buying central heating, a warranty for servicing and also changing their fuel supplier, all through one doorstep or distance sales person, could find the cancellation information misleading. The issue here is whether bundled products will be seen as ancillary contracts under Article 18.

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

In relation to Article 19 1(a) we question the reference to a service that has begun and wonder if this should read: 'has been performed' i.e. finished being supplied. We see no reason why a service that has started should not attract cancellation rights, provided that the consumer pays for what they have received.

At Article 19.1(g) gaming and lottery services are excluded. Clearly consumers should pay for the services they have used or participated in, but we see no reason why the cancellation rights should be lost. Cancellation rights in this sector would help people tackling a gambling addiction by giving a period for reflection on the decision to sign up to an ongoing service.

We would be grateful to receive the results of the query to the Commission in respect of auctions, at paragraph 108 in the BERR consultation.

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

We are not aware of any.

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

We see an unintended consequence that may arise. We appreciate that internet supermarket food shopping has been an area for confusion under existing legislation and that the wider description at Article 19.2(a) on for foodstuffs and goods intended for current consumption is designed to clarify the position. However, a wide range of products are sold through supermarkets and we are concerned that this exemption may be interpreted to include products outside the intended definition. For example, would a grocery delivery purchased with clothing or electrical items be likely to attract the information and cancellation requirements for the non-food part to which the exemption should not apply?

In relation to those products that are not required for an immediate emergency or for the requested repair or maintenance at Article 18.2 (b and c), we support the provision that cancellation rights will remain. We think that this could be an important tool in helping to tackle some of the UCPD's banned unfair commercial practices.

We agree with the concern raised by BERR at paragraph 115 of their consultation, that consumers who invite a salesman to their home may still be subject to pressure selling. This is dealt with under the UCPD. We are keen that the proposed Directive on consumer rights works with UCPD but whilst UCPD has no provision for redress cancellation rights are vital where pressure selling has occurred.

We do not share BERR's concerns about trader reluctance to start non-emergency contact performance at paragraph 114. The consumer protection given by Article 20.2(b) is important and we feel that consumers will not suffer from the need to delay for a short time. Further, interpretation of the word 'emergency' and how subjective that may be in practice will determine whether BERR concerns materialize or not.

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

We are not aware of any and believe it is important that exceptions are kept to a minimum.

**Additional issues**

**In Article 19** we are concerned that the parties can agree not to apply the exemptions and again fear this could be a provision hidden in the small print.

On **Article 20.3** we suggest that excluding accommodation and transport fails to take account of the Acquis project's objective for a joined up approach to rights under the various consumer protection Directives. Under the Package Holiday Directive a package can effectively be sold to another person, for example where

the consumer finds they can no longer go on a purchased holiday. We see no reason why accommodation and transport could not attract the same provision.

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

Yes. We also believe that the UK's original Doorstep Selling Regulations did cover conservatories etc.

In relation to rental contracts CAB have reported the rental of household appliances being sold at the door by businesses that then collect the payments through slot meters attached to television sets:

A CAB in the West Midlands reported that an elderly woman on guarantee pension credit sought to hire a TV from a company. When the TV was delivered she was invited to sign the agreement by the delivery van driver and supplied with the TV and a copy of the agreement. The client did not check the small print before doing so and found that she did in fact sign a HP agreement. This was not fully explained to her at the time the set was delivered. The client had made two payments in the slot meter within the TV to purchase it but she was not satisfied with the TV and was seeking advice on how to terminate the agreement. This could only be done if she paid the amount of £253.38 first.

CAB also report accommodation rental distance sales problems:

A CAB in North London reported that a black woman found a flat to rent through a website. She viewed the flat with the landlord and paid a deposit of £100 cash and £235 by cheque. She returned a week later to move in. However, the landlord failed to turn up. When the client phoned her, the landlord insisted that she handed over one month's rent in advance in cash to the landlord's friend in the flat. There was no lease, the client did not see the room in the flat, and the landlord's friend spoke no English. The client decided to ask for deposit back. After trying to telephone and write there has been no response from the landlord and the cheque has been cashed.

We see value in these areas being covered, in order to help tackle consumer detriment. In the accommodation cases the information as well as the cancellation requirements would be valuable.

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

The current Directive on doorstep selling's exclusion for contracts with a value of below €60 may need to be reconsidered in light of the current financial climate. Where UK regulation used the sum of £35, the €60 limit would now be nearer to £60. And for consumers on low incomes, this is a substantial sum.

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

Whilst we appreciate that it would be unreasonable to make information provision demands where a purchase has a very limited value, we do not support a raising of the exemption line above £35 for the reasons given in response to question 41 above.

## **Chapter 4: Other Consumer Rights Specific to Sales Contracts**

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

As detailed in our general comments section above, Citizens Advice is very disappointed with the proposed scope of this proposed Directive. We have major concerns in relation to this chapter:

- The failure to include services must be addressed if consumer protection across the EU is to provide clarity. Including services for installations under Article 24 (5) but not in other sections, such as at Article 21.1 circumstances, is confusing. It appears to us to acknowledge the necessity to cover services whilst failing to do so.
- Hire and hire purchase must be addressed by the EU. The new Credit Directive does not deal with hire. It falls within scope for UCPD where once again the failure to adopt provision for consumer redress means that this will be likely to be a transaction method favoured by rogue traders. The Law Commission consultation does not address hire purchase. It is naive to ignore it and to claim an objective of a high level of consumer protection.
- For goods consumer protection has been severely diminished. Consumers must be able to reject products that are unsatisfactory due to matters such as faults and mis-description, otherwise breach of contract by the trader is being sanctioned.
- The right to reject or rescind is a back stop provision, as acknowledged in the Law Commission paper issued with this consultation. Without this, consumers cannot expect to get what they pay for. We see no reason for not providing this fundamental right for both major and minor breaches.
- A right to replacements and repairs as well as refunds is valuable for consumers. However, we see no justification in the trader who is in breach of contract having the choice as to what redress is available. The consumer must be free to choose.
- We agree that the failure to apply this chapter to spare parts used to repair faulty goods, at Article 26, is not sensible or just.

- The limitation on legally required provision of redress to a two year period is an important reduction in protection for UK consumers. It also fails to take account of the many products with a far longer life expectancy in a time when planned obsolescence goes against EU pollution and rubbish disposal objectives. We expect that sales of warranties will boom as a result, thus passing rights with goods into the services area that this Directive fails to address.
- We do, however see that there is a need to clarify the passing of risk issue.
- Second hand products and internet auctions are also necessary inclusions.

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

Citizens Advice believes that it is useful to set some limit on the time expected for delivery. We welcomed it under distance selling law and felt it was a missing element in doorstep sales law. The right to a refund within seven days of the proposed delivery date is also welcome. It recognises that consumers who have not received what they bought will need to buy elsewhere and may need to do so quickly.

A CAB in Surrey reported their client's problems in getting a refund following a distance purchase. The order was cancelled because stocks were not available but the refund took over a month, despite repeated contacts by phone and email. The client could not afford to buy elsewhere before the money was returned.

On points of clarification:

- We agree that clarification as to the meaning of 'material possession' in relation to delivery following a distance purchase would be useful, since it constitutes the passing of risk.
- In relation to the Sale of Goods Act 1979's provision for delivery at a reasonable hour, perhaps the same timeframe as that considered reasonable for marketing sales phone calls could be adopted, provided the parties have the scope to agree different times.
- On the issue of the right to a refund for non-delivery, at paragraph 132 of the BERR consultation, we also agree that clarification would be helpful. We suggest that consumers should be able to choose to receive the refund and stop the delivery or to agree to a later delivery date because they still want the item and are prepared to wait.

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

We believe that the right to check goods when they are delivered, to ensure they conform to the contract, is very important. The Law Commission paper looks at the right and we agree this is important. This is, we believe, an issue that BERR should raise within the debate on the right to reject. We would like clarification as to whether the passing of risk indicate acceptance or is only an indication that the item arrived?

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

We can see that disputes might be averted if the onus is on the trader to evidence that delivery happened in accordance with the consumer's directions. This seems to us to be balanced since traders can require consumers to evidence the return of cancelled purchases. It is not clear, however, whether the passing of risk could act as accepting the item as undamaged. Article 25 makes the trader liable for lack of conformity with the contract when risk passes but we not certain this is sufficient.

A disabled CAB client from Shropshire in receipt of benefits sought help with a £104 debt claimed by a book club. The client lived in a flat with security doors and no outside post box, so parcels of books were being left near the bins by the unsecured back gates. The client had no idea whether parcels had been stolen. In addition, one book cost £2.49 second class post to return and £3.08 first class post which the client suspected was more than they were worth.

Please also see our response to question 45.

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

We agree that the list indicating conformity with the contract in Article 24.2 should be changed so that the 'or' at the end of (c) reads 'and'. It makes no sense that consumers could expect any one but not all these requirements to be satisfied. We also agree that a term needs to be added in relation to the seller having good title. Without these changes the draft Directive constitutes a huge reduction in consumer rights.

In the main Article 24 appears to reproduce UK sale of goods expectations. We have two queries. Firstly at 2(d) we are not sure whether reference to 'his representative' refers to the producer or to the trader as well. It needs to refer to the trader as mis-information from sales representatives is commonly reported by bureaux:

A CAB in Surrey reported that an elderly disabled woman was contacted as a result of entering a competition for a 'mobility scooter' by a representative who subsequently visited her and sold her a scooter on the

pavement outside her home. The client felt pressured to buy the scooter because of the 'good price', though subsequently the paperwork did not bear any relationship to the price she thought was agreed. The client told the CAB that she trusted the salesman to do the right thing and felt humiliation because she felt she had been 'tricked' into buying the machine.

A Staffordshire CAB reported that a woman was approached by a double glazing firm. When they attended the appointment she was pressured in to buying £2,000 worth of goods. She felt she was a level headed person, but the sales man pressured her into this sale and she regretted it as soon as he left. He also covered parts of the contract with pieces of paper which she later read and did not appear to be as he had said. The client was worried that she would have to continue with this contract that she did not want and could not afford.

Secondly, at 4(b) we believe that it needs to be reasonable that the consumer would have known about the correction of incorrect advertising material. The current draft requires that the correction has been made by the time the contract is concluded. We see no reason why the trader should not be responsible for advising the consumer about the mistake and the correction. Otherwise consumers will not know of the correct information unless they chance on a further advert to the one that attracted the purchase.

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

Yes. It is vital that consumers, as the innocent party, retain the right to chose from options of rejection and refund or reduced price; repair; or replacement.

Article 26.2 should be amended to remove the words: 'by either repair or replacement' and: 'his choice' should be replaced by: 'the consumer's choice'. At Article 26.3, the second paragraph that states that rescission is only available if the lack of conformity is not minor, should be removed. The right to reject is a vital back-stop in consumer rights, as acknowledged in both consultations. In practice, consumers often accept what the trader offers. The Law Commission paper notes that people chose their preferred retailer on grounds of refund policies. Bureaux often report that there is another side to this coin. Consumers are told that they cannot have what they are in fact legally entitled to because the business's policy offers only a lesser solution, such as limiting refunds to returns within 28 days, even for faulty goods.

A CAB client from Tyne and Wear was told the TV they had bought some four weeks earlier from a high street chain was not their responsibility when it broke down. They told the client that as it was outside their 28 day returns policy, it was now the manufacturer's responsibility.

Please see our comments in point fourth of the response to question 43.

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

The consumer should be given the choice of first tier remedies. Making the choice of remedial action a trader choice is completely imbalanced. In a contract we think it could constitute an unfair term.

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

In practice we expect that consumers' views will vary from case to case. We do not see that consumers should have to accept more than one attempt to repair a fault. However, we do not see how a consumer can evidence that the cause of a recurring fault was the same.

Article 26.5 on the assessment of 'significant inconvenience' and 'reasonable time' is helpful in assessing remedies offered at Article 26.4, since it looks at the consumer's viewpoint.

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

We believe that the right to reject is vital. It allows consumers a legal right to get their money back when the trader has broken the contract, for example, by supplying faulty goods. As discussed in the Law Commission paper, there are times when a consumer will have lost confidence in the product or finds it is faulty immediately. But having the right to reject does not necessarily ensure a refund, even when the business agrees the right to reject is valid, as in this case:

A CAB client from Kent had bought a stairlift for their 94 year old mother. It broke down almost immediately and attempt to repair it had failed. The client rejected it and the company collected the lift but the client had to take court action for the refund that was due.

Bureaux also report cases where traders have already assumed they can choose the redress they offer:

A Lincolnshire CAB client found the high street shop where they had bought a £300 TV refused to replace it. A fault became evident and the client returned the set to the shop 27 days after the purchase. The shop has insisted on sending it away, which would take 16 working days. The bureau commented on their failure to provide the client's statutory rights.

An unemployed CAB client from Northumberland accepted a repair to the mobile phone she had bought two months earlier. Within weeks of receiving it back it was faulty again so she asked for a refund but the shop was adamant that they only could offer another repair or a refurbished

phone. The bureau commented on the lack of shop staff training as to consumers' rights. The client's partner was severely disabled and needed the phone for contact with his GP.

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

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

The provision at Article 27.1 for remedies to be free of cost to the consumer is potentially very valuable and may settle disputes as to who is responsible for returning the item to the supplier for repair or inspection. We are interested in how this will affect call out charges, taking account of the reverse burden of proof at Article 28.

Article 27.2 provides for damages to be claimed by consumers where additional loss is suffered. This is a vital right, but we would expect that such claims would take usage of the product into account. In practice we expect that where a product is faulty or otherwise breaches Article 24 soon after purchase, the damages the consumer suffers will often offset usage. In relation to question 52, we see this as linked to the two year limitation on claims at Article 28.1. We wonder if this is the balance for traders potentially making repairs expensive for items over two years old or failing to make parts for more than two years.

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

We agree that in many cases the change to a two year limit will have a limited effect. We do not think that the statutory limit in place in the UK is well known by consumers or used in relation to everyday purchases.

We do see, however, that for some purchases the reduction in time limit to two years will be important. In particular, as cited by the Law Commission, major renovation or repairs to a consumer's home may take far longer to come to light. In the following example the fault occurred three years from purchase but well within the life expectancy of the cooker and the rest of the kitchen which had been bought as one package:

A Lincolnshire CAB client sought advice about the cost of replacing a fitted oven and fridge-freezer. They bought a new fitted kitchen three years earlier. The cooker door seal had failed and been unsuccessfully repaired. As a result the fridge-freezer next to it was now peeling. Neither the firm they bought the kitchen from, the cooker manufacturer or the guarantee provider who attempted the repair would accept responsibility and the client was being passed back and forth between them. They told the bureau they had completely lost confidence in the product.

Article 28.5 carries forward the reversed burden of proof for the first six months. This proposed Directive provides the opportunity for this to be lengthened to the

at least the two years at Article 28.1. This would be far easier for consumers and for traders and advisers to understand and to use.

Please also see the point raised under the seventh bullet in our response to question 47.

In practice, we think that there will be a growth in the provision of insurances and extended warranties. For purchases with a long life expectancy such as double-glazing, extensions and damp and wood-worm treatments, long guarantees are often offered. Products are also sold to guarantee the guarantee in situations where the original provider may no longer be in business. We are not sure how frequently claims are made but, where these products are valuable, they would need to be transferable on sale of the property.

On the requirement at Article 28.4 for consumers to inform traders of defects within two months, we agree with the argument raised in the BERR consultation at paragraphs 155-157, that there are practical problems for the evidencing of this requirement.

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

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

We are not sure how the cap for the minimum length of the trader's liability for second hand goods at one year will affect the second hand goods market. We believe that second hand items should be included in the provisions for consumer redress. We are interested in the view of enforcers who police safety standards and thus inspect second hand goods premises.

We also wondered whether returned goods that are then re-sold would be considered second hand.

### **Article 29 on commercial guarantees**

Article 29.4 says that the validity of guarantees is not affected by failure to provide the required information in the way detailed. It is not clear what redress is available for consumers where this article is breached.

### **Further comments on consumer remedies**

CAB often report that traders fail to deliver existing sale of goods rights and try to pass on these responsibilities to the manufacturer, for example:

A CAB client in Warwickshire sought advice when a well known high street chain wanted to charge £250 for the manufacturers to undertake repairs to the screen of a laptop, which had developed a fault, despite it still being under guarantee. The shop claimed it was not their responsibility.

A Merseyside CAB reported the effects of a change in company policy by a well known DIY shop. Their client bought a heat gun which they later

found kept cutting out. This was eight months after the purchase and it was replaced. The client was concerned the same fault might recur but was assured by staff at the shop that they would replace it again should that happen. It did, but when she returned to the shop they said the policy had changed and gave her a phone number to contact the manufacturers who they said would send someone out to look at it. The client was worried about incurring call out charges for a £30 appliance.

## **Chapter 5: Consumer Rights Concerning Unfair Contract Terms**

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

The provisions in chapter 5 protecting consumers from unfair terms set out the principles for judging terms in consumer contracts. The lists are more specific. This follows the same pattern used in UCPD. We think that including both list is useful as is the subject specific and general guidance published by the OFT. In many of the reports we have published on consumer issues, we have noted the use of unfair terms and believe that greater enforcement is needed in this area. The lists seem likely to be valuable to traders and enforcers, as well as consumers and advisers.

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

The areas covered by the current unfair terms in consumer contracts Directive and by this chapter, including the need for a fair balance between the parties, transparency and the burden of proof, are hugely valuable consumer protection measures. Unfair terms are a major cause of consumer detriment reported by bureaux and we believe that consumers normally see written terms as something that cannot be challenged. They can be used by traders to excuse unfair commercial practices.

We believe that the wide application across contracts, including financial services, is important. Our general comment section made reference to the value of the proposed Consumer Rights Directive being extended more widely across consumer transactions.

In terms of the effects on the UK Unfair Contract Terms Act, a particular asset of the Act is in its provisions for consumer redress. Article 37 says that unfair terms are not binding on the consumer, but fails to provide any active avenue for redress where they have already been relied on. Where terms are unfair consumers should be entitled to redress for any resulting loss suffered. Further, the penalties provision at Article 42 will need to include compensating consumers for contract terms found to be unfair if the penalties are to achieve their objective to be effective, proportionate and dissuasive. We see no reason why undertakings and injunctions should not include provision for redress for those consumers who have suffered detriment as a result of unfair contract terms.

We agree with paragraph 161 of the BERR consultation that it may be valuable to clarify that the scope of this chapter includes terms a consumer could have influenced but did not do so or failed to do so.

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

The 'real opportunity of becoming acquainted' with contract terms whether written or in another form, in the transparency requirements at Article 31 is very, very welcome. The BERR consultation refers at paragraph 163 to referring consumers to web access to terms. For those without web access another format would be needed. Further, where web access is available, terms will need to be restricted in length for any realistic engagement with consumers to be achieved.

We strongly support the reimbursement to consumers of payments that were made in addition to those of the main contract and were not expressly agreed in Article 31.3. This reimbursement should apply to consumer detriment from unfair terms, as expressed in our response to question to question 58. It is clearly seen as feasible.

Replication of the language of the UCPD is welcome. We also welcome that this chapter does appear to seek to improve consumer protection and to do so using lessons from the experiences of applying the existing directive on unfair terms. Perhaps the Commission has gained from the CLAB reporting system. As there is a five year revisit to the proposed Directive, we are pleased that Member States will continue to report cases as indicated in paragraph 177 of the BERR consultation.

We agree with the continued requirement for traders to prove their case in relation to individually negotiated terms at Article 33.

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

No, we think they are all justified as unfair in all circumstances.

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

We are not aware of any circumstances where black list terms that would be fair to consumers.

We support the Annex 11 term at (e) acting against giving the trader the right to determine conformity with the contract. We wonder whether the provisions on sale of goods are effectively doing this, where it is up to the trader rather than the consumer to decide on redress.

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

We believe that it is reasonable for traders to be required to prove a contract term of the type listed is fair.

***Q63: Please provide any further comments on Chapter 5.***

We see the value of continuing to allow wide enforcement of the rules for unfair terms, at Article 38. We have seen this provision used well, for example by OFCOM,

We also seek clarification in respect of penalties for infringements that are happening in more than one Member State. This proposed Directive is an opportunity to ensure that where unfair terms are the subject of an enforcement action in one member State, the results should be applicable across the EU, so that cases do not need to be repeated against the same firm or sector in each State.

We have no further comment at this time but will continue to engage with BERR during the passage of this proposed Directive.

**Chapter 6: General Provisions:**

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

Article 45 on inertia selling is very welcome. Consumers should continue to have the right not to pay for unsolicited products, as a basic right in choosing what to buy. Without this traders could decide to supply what they wanted and force consumers to pay. No consent should be assumed by a failure to respond since the consumer did not ask for the product and should not have to resolve the matter.

A CAB client in Yorkshire received an unsolicited parcel containing four books. As the client was in hospital they were left with a neighbour. The book club appears to have assumed membership on the grounds the books were not returned promptly and to have billed the client, despite the provisions of the Consumer Protection from Unfair Trading Regulations.

An Essex CAB reported a client having difficulty proving that she had not made a purchase. She is being chased to pay by a business the bureau has discovered are based in San Francisco who buy up UK debts. The client had a letter from solicitors about a mobile phone debt, threatening court action. She only has a phone from a completely different supplier and could not resolve the matter. The police referred her to the CAB.

Whilst this access to redress on a UCPD issue is welcome, as BERR concede in paragraph 187, it is based on distance selling rights. There remains a need to ensure that consumers can access redress for all unfair commercial practices.

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

On penalties, under Article 42, we are particularly interested in ensuring that enforcement and redress work together to tackle legislative breaches. Despite the name of this proposed directive, some opportunities for redress have not been taken up. We want to see the scope of the Directive widened so that, for example, services, hire and hire-purchase are included and there is one place for consumers to find their rights across markets and transactions.

The Directive should be the opportunity to give consumers a right to redress for unfair commercial practices and for breaches across EU consumer law. For enforcement to work fairly, consumers who suffer detriment as a result of a breach of consumer protection laws need access to redress. Without this consumers have little investment in engaging with enforcers who need their evidence to secure legislative compliance. Further, for traders who seek to evade consumer protection laws, there is every incentive to carry on poor and illegal practices until enforcement stops them. Having to compensate consumers for the detriment caused through breaking the rules is a real incentive for trading within the law. As we have said throughout this response, undertakings and injunctions need to include provision to compensate consumer detriment. This, together with redress rights and a consumer ombudsman would truly provide a level playing field between within business to consumer contracts.

## **Annex B: Impact Assessment**

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

Please note the case evidence provided throughout this response.

We could not find reference to any cost implications for consumers or for advice bodies in the assessment to comment on, though familiarization costs for business were included.