

AA Response to European Commission's "Consumer Acquis" Consultation

Preamble

- 1.1. The AA welcomes the opportunity of responding to the Commission's consultation. The Advertising Association (AA) is a federation of 31 trade bodies and organizations representing the advertising and promotional marketing industries, including advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry that was worth almost £19 billion in 2005. Further information about the AA, its membership and remit, can be found at the following location: <http://www.adassoc.org.uk/>
- 1.2. The Consumer Acquis is particularly important for the AA's members who are involved in direct marketing and direct selling activities by online and traditional methods, as well as the media that carry such commercial communications.
- 1.3. This response is limited to points of principle about the Acquis review that affect cross-border advertising and marketing as a whole. We have left it to AA members with a more direct interest in this issue to respond in detail to the questions about contractual remedies.

Summary of AA Position

- 1.4. The consultation sets out three options (the vertical approach, the mixed approach with a horizontal instrument combined with vertical action, or no legislative action at all). However, the Commission clearly has an ambitious vision for the review of the Acquis and favours the mixed approach with full harmonisation wherever practicable.
- 1.5. The AA agrees with a proportionate and targeted "mixed approach" (horizontal instrument combined with vertical Directives). However, Better Regulation principles need to be applied. As part of the next stage, the Commission should set out how it might rationalise existing Directives, and what might be repealed.
- 1.6. The Acquis should be driven by the need to increase trade and promote economic integration for the benefit of consumers in the EU. High penetration of broadband in the UK means that the conditions exist for e-commerce to grow. Consumers need to be encouraged to buy from online businesses based in other countries, not just their own. This will create momentum and provide opportunities for traders who do not have a high street presence or brand to enter the marketplace. In this way, consumer choice will be increased.
- 1.7. Thus the Acquis should deliver a clear set of rules covering consumer protection (counter-balancing the business-facing Unfair Commercial Practices Directive (UCPD)), both complementing each other to provide legal certainty to consumers and to businesses trading across borders.
- 1.8. The Acquis should not be used as a means to develop a wide range of new consumer protection principles encapsulated in a European civil code that overrides common law. Such an approach would be burdensome for business, and therefore counter-productive to promoting consumer confidence in cross-border trade.

- 1.9. The Commission bases its case for new legislation on Eurobarometer, a consumer attitudes survey, to demonstrate that a majority of consumers do not tend to make online purchases from other countries because they lack confidence in the level of consumer protection. This is insufficiently robust evidence on which to base new harmonisation proposals and the Commission should carry out more detailed impact assessments for further consultation before progressing to proposals for legislation.
- 1.10. A new horizontal instrument should provide clear and transparent rules to promote consumer confidence that adequate recourse exists, should things go wrong when they are buying goods and services online from another country. It should cover all consumer contracts, but should be limited to harmonisation of existing definitions (eg “consumer”, “trader”), in line with the Unfair Commercial Practices Directive (UCPD). UCPD already addresses a number of issues raised in this consultation, for example :
- the definitions of consumer and trader,
 - the question relating to a clause on fairness/good faith
 - the question of individually negotiated terms.
- 1.11. For aspects that cannot be fully harmonised, the legal instrument should be complemented by a mutual recognition clause, based on the country of origin principle. The AA would be opposed to any attempt to apply a “country of reception” approach (such as that being taken in Rome I and II) in the Consumer Acquis. This would threaten free circulation of the advertising-funded media and create obstacles to the internal market, thus discouraging the development of an online cross-border market.
- 1.12. For this reason, the AA welcomes the Commission's commitment that the Consumer Acquis Green Paper should not prejudice the operation of the internal market clause of the e-commerce Directive (2.2). The success of this Directive in providing legal certainty to electronic traders should be recognised.
- 1.13. In applying Better Regulation principles, consideration should be given to whether there should be any rationalisation of the information requirements in the Distance Selling Directive). This could be amended to bring it in line with the information requirements in UCPD. Article 7(3) states: « Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted ».
- 1.14. A case by case approach may need to be considered. For example, the status quo in Article 6.3 of the Distance Selling Directive, allowing that, as regards subscriptions to the printed press, the cancellation rules within the Directive do not apply, should be retained, as it makes no sense for a consumer to place a subscription order to acquire a free gift, and then to keep the gift but be able to cancel the subscription.

Answers to consultation questions

General Legislative Approach

A1: In your opinion, which is the best approach to the review of the consumer legislation:

Option 1: a vertical approach consisting of the revision of the individual directives

Option 2: a mixed approach combining the adoption of a framework instrument addressing horizontal issues that are of relevance for all consumer contracts with revisions of existing sectoral directives whenever necessary.

Option 3: status quo: no revision?

The AA supports **Option 2: a mixed approach** to ensure the removal of discrepancies and to achieve greater clarity and legal certainty. However, a horizontal instrument should be limited in content and not extend scope beyond the current vertical instruments. The AA believes that a common approach is possible for standard definitions such as “a consumer” or “the cooling off period” but it should not try and regulate matters that are better taken care of by the sectoral instruments.

Having general horizontal principles to protect consumers’ interests, backed up by codes of practice for specific issues, seems a good solution. This way there would be a high level of consumer protection and confidence and empower consumers whilst at the same time boosting the internal market because consumers will be more confident to shop across borders, leading to more competition, innovation, lower prices, and dynamic economic gains.

Scope of a Horizontal Instrument

A2: What should be the scope of a possible horizontal instrument?

Option 1: It would apply to all consumer contracts whether they concern domestic or cross-border transactions.

Option 2: It would apply to cross-border contracts only.

Option 3: It would apply to distance contracts only whether they are concluded cross-border or domestically.

The scope of a (limited) horizontal instrument should cover all consumer contracts (**Option 1**). This would provide more clarity for businesses if they can deal with both national and cross-border contracts in the same way. This will stimulate cross-border trade and reduce legal fragmentation.

Degree of Harmonisation

A3: What would be the level of harmonisation of the revised directives/the new instrument?

- Option 1:** The revised legislation would be based on full harmonisation complemented on issues not fully harmonised with a mutual recognition clause.
- Option 2:** The revised legislation would be based on minimum harmonisation combined with a mutual recognition clause or with the country of origin principle.

The degree of harmonisation is a difficult issue as it is still not clear today if the UCP Directive, currently still to be implemented, has been successful with its maximum harmonisation approach. However, the AA supports **Option 1 (full harmonisation)** where practicable, in order to create legal certainty for businesses and consumers by removing the fragmented approach that currently exists (for example in cooling off periods across Europe because of different interpretations of “calendar days”). But this approach should only be taken where demonstrably needed to address clear barriers to trade. It should not be interpreted as support for the highest levels of protection and harmonisation across Europe because this could place undue and inhibiting burdens on businesses.

The danger of minimum harmonisation is that Member States tend to adopt unnecessary strict rules in order to protect their national markets.

Horizontal Issues

B1: How should the notions of consumer and professional be defined:

- Option 1:** An alignment of existing definitions in the *acquis*, without changing their scope. Consumers would be defined as natural persons acting for purposes which are outside their trade, business or professions. Professionals would be defined as persons (legal or natural) acting for purposes relating to their trade, business and profession.
- Option 2:** The notions of consumer and professional would be widened to include natural persons acting for purposes falling *primarily* outside (consumer) or *primarily* within (professional) their trade, business and profession.

The AA supports **Option 1: (alignment of existing definitions)**.

The definitions of the UCP Directive for consumer and trader should be used in order to have legal certainty. We see no reason to change the status quo and widen the definitions, but some uniformity would be helpful both to consumers and businesses. We agree that the role of intermediaries in electronic commerce should remain within the scope of the E-Commerce Directive, rather than being included in this review.

Concepts of good faith and fair dealing

- C:** Should a horizontal instrument include an overarching duty for professionals to act in accordance with the principles of good faith and fair dealing?
- Option 1:** The horizontal instrument would provide that under EU consumer contract law, professionals are expected to act in good faith.
- Option 2:** The status quo would be maintained: There would be no general clause.
- Option 3:** A general clause would be added which would apply both to professionals and consumers.

The AA supports **Option 2 – status quo**.

The UCPD should form the basis of concepts in Consumer Acquis, so that there are no discrepancies. The UCPD already contains provisions requiring professionals not to act in an unfair manner, and the AA sees no need to impose new duties and new burdens on industry, particularly when there is no clear evidence given of the need to do so.

Scope of application on unfair terms

D1: To what extent should the discipline of unfair contract terms also cover individually negotiated terms?

Option 1: The scope of application of the Directive on Unfair Terms would be expanded to individually negotiated items.

Option 2: Only the list of terms annexed to the Directive would be made applicable to individually negotiated terms.

Option 3: Status quo – Community rules would continue to apply exclusively to non-negotiated or pre-formulated terms.

The AA supports **Option 3: application of EU rules exclusively to non-negotiated/pre-formulated terms.**

There is no evidence of consumer detriment caused by the current situation. It would be unacceptable to widen the scope of application to include individually-negotiated terms (as proposed in Option 1), in other words “add on” options selected by the consumer. This would create too much legal uncertainty for traders, and open up issues of how to define a “vulnerable” consumer. The “buyer beware” principle is important to retain.

List of unfair terms

D2: What should be the status of any list of unfair contract terms to be included in a horizontal instrument?

Option 1: Status quo: to maintain the current indicative list.

Option 2: A rebuttable presumption of unfairness (grey list) would be established for some contractual terms. This option would combine guidance with flexibility as to the assessment of fairness.

Option 3: A list of terms – shorter than the existing list – which are considered to be unfair in all circumstances (black list) would be established.

Option 4: A combination of options 2 and 3: some terms would be banned completely, while a rebuttable presumption of unfairness would apply to the others.

The AA supports **Option 1: status quo**. The Commission has not made the case for opening up or re-negotiating the list of unfair contract terms, or for drawing up a black list. To proceed down this route, the Commission would need to do more research to demonstrate that a black list was needed, and that it could work in practice.

Scope of unfairness test

D3: Should the scope of the unfairness test of the Directive on unfair terms be extended?

Option 1: The unfairness test would be extended to cover the definition of the main subject matter of the contract and the adequacy of the price.

Option 2: Status quo: the test of unfairness would be kept in its present form.

The AA supports Option 2 - the status quo with regard to the unfairness test in the Directive on Unfair Terms. There have been no demonstrable difficulties and we cannot see any justification for changing the current rules.

Failure to comply with information requirements

E: What contractual effects should be given to the failure to comply with information requirements in the consumer acquis?

Option 1: The cooling-off period, as a uniform remedy for failure to comply with information requirements, would be extended, eg up to 3 months.

Option 2: There would be different remedies for breaching different groups of information obligations: some breaches at the pre-contractual and contractual level would give rise to remedies (eg incorrect information on the price of a product could entitle the consumer to avoid the contract), whilst other failures to inform would be treated differently (eg through an extension of the cooling-off period or with no contractual sanction at all).

Option 3: Status quo. The contractual effects of failure to provide information would continue to be regulated differently for different types of contract.

The AA supports both **options 2 and 3**. There is some scope for harmonisation to level the playing field for businesses, with benefits for both businesses and consumers. But it is important to retain different remedies for different types of contract, rather than extending the cooling-off period to any failure to provide information to consumers in any purchasing situation. There should be at least two categories: one for face-to-face sales, and another for distance selling (which might include doorstep selling). It would not be reasonable to the business concerned to apply a cooling off period to purchases made in shops, where the consumer can see the product being purchased. But in situations where the consumer has not been able to see the product, it is reasonable to have a cooling-off period.

Right of withdrawal – cooling off periods

F1: Should the length of the cooling-off periods be harmonised across the consumer acquis?

Option 1: There would be one cooling-off period for all cases when the consumer directives grant consumers a right to withdraw from the contract, eg 14 calendar days.

Option 2: Two categories of directives would be identified and to each of them a specific cooling-off period would be attached (eg 10 calendar days for door-to-door and distance contracts as opposed to 14 calendar days for timeshare).

Option 3: Status quo: cooling-off periods would not be harmonised in the consumer acquis; they would be regulated in the sectoral legislation.

The AA supports **Option 2 and 3**. It may be possible to identify two categories of directives for specific cooling off periods, but the most important benefit for businesses would be to establish a standard approach across the EU to the definitions so that it is clear in all cases whether “days” is calendar days or working days.

Exercise of right of withdrawal

F2: How should the right of withdrawal be exercised?

- Option 1: Status quo: Member States would be free to determine the form of the notice of withdrawal.**
- Option 2: One uniform procedure for the notice of withdrawal across the Consumer Acquis would be established.**
- Option 3: All formal requirements for the notification of withdrawal would be excluded. A consumer would then be able to withdraw from the contract by any means (including by returning the goods).**

The AA supports **Option 2**. Having one uniform procedure for the notice of withdrawal across the consumer acquis would be helpful as this ensures certainty for business (be it via email, returning the goods, registered mail...). We also propose that notice of cancellations of contracts by consumers should be made in writing, or (in terms of the internet) by the particular medium concerned.

Costs on consumers in event of withdrawal

F3: Which costs should be imposed on consumers in the event of withdrawal?

- Option 1: The current regulatory options would be removed – consumers would then not face any costs whatsoever when exercising their right of cancellation.**
- Option 2: The existing options would be generalised: consumers would then face the same costs when exercising the right of withdrawal irrespective of the type of contract.**
- Option 3: Status quo: the current regulatory options would be maintained.**

F3 Option 3: status quo

The AA believes the status quo for the current regulatory options regarding the costs of withdrawal would be the best option. The Directives cover too great a variety of goods, services and circumstances for a general rule to apply. Sufficient consumer protection is provided in the Distance Selling Directive, in accordance with which, if the company charges the consumer to return the product, this is clearly set out in the pre-sale conditions.

N: Is/are there any other issue(s) or area(s) that requires to be explored further or addressed at EU level in the context of consumer protection?

No.

May 2007

AA MEMBERS

B Sky B	Channel Four Television
Cinema Advertising Association	CAM
Data Publishers Association	Direct Marketing Association
Direct Selling Association	Five
Virgin Media Television	GMTV
Institute of Practitioners in Advertising	Institute of Sales Promotion
International Advertising Association UK	Internet Advertising Bureau
ISBA (The Voice of British Advertisers)	ITV Plc
Mail Order Traders' Association	MCCA
Market Research Society	Marketing Society
Newspaper Publishers Association	Newspaper Society
Outdoor Advertising Association	Periodical Publishers Association
Point-of-Purchase Advertising International Britain	Proprietary Association of Great
RadioCentre	Royal Mail
Satellite and Cable Broadcasters' Group Association	Scottish Newspaper Publishers'
Yell (Yellow Pages)	