



The Advertising Association

7th Floor North, Artillery House, 11-19 Artillery Row,
London SW1P 1RT

Telephone: +44 (0) 20 7340 1100 Fax: +44 (0) 20 7222 1504
e-mail: aa@adassoc.org.uk web: <http://www.adassoc.org.uk>

RESPONSE OF THE ADVERTISING ASSOCIATION TO THE CONSULTATION BY THE DEPARTMENT FOR BUSINESS, ENTERPRISE & REGULATORY REFORM ON ITS PROPOSED “CANCELLATION OF CONTRACTS MADE IN A CONSUMER’S HOME OR PLACE OF WORK ETC REGULATIONS 2008”

1. Preamble

1.1. The Advertising Association (AA) is a federation of 30 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 over £19 billion in 2006. Further information about the AA, its membership and remit, can be found at the following location:
<http://www.adassoc.org.uk/>

2. Introduction & Summary

2.1. The AA welcomes this opportunity to respond to this consultation (URN 08/579) by the Department for Business, Enterprise & Regulatory Reform (DBERR) on its draft Statutory Instrument “The Cancellation of Contracts made in a Consumer’s Home or Place of Work etc Regulations 2008”.

2.2. The secondary legislation being proposed would replace the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (as amended), which implement Directive 85/577/EEC “to protect the consumer in respect of contracts negotiated away from business premises”. The draft Regulations would extend the cooling off period and cancellation rights which currently apply to contracts made during unsolicited visits by traders to those made during solicited visits and will require the inclusion of a clear and prominent notice of the right to cancel the contract, where that document is completed wholly or partly in writing.

2.3 It is notable that Directive 85/577/EEC “to protect the consumer in respect of contracts negotiated away from business premises” is one of the eight laws that the European Commission (EC) is considering currently as part of its Review of the Consumer Acquis. The AA has been actively engaged in the Review of the Consumer Acquis and indeed responded to the specific consultation that the EC conducted in relation to Directive 85/577/EEC in late 2007, which the Association shared with officials within the DBERR. The AA makes a number of references to the Review of the Consumer Acquis process within this submission – including a recommendation that any action in respect of solicited visits here in the UK be deferred until such time as the deliberations of the EC have reached their conclusion.

2.4. The AA notes that at present the DBERR intends publishing a summary of the views expressed to it as a consequence of URN 08/579 (presumably accompanied by a Government response) twelve weeks after the deadline of 22 April 2008 it has set for receipt of submissions (i.e. on 15 July 2008). Elsewhere, however, the DBERR states that, subject to Ministerial approval new Regulations will be made and laid before Parliament using the positive resolution procedure by June 2008 with a planned commencement date of 1

October 2008. The AA is concerned therefore that the Regulations may be made and laid before the DBERR has properly set out, in the form of a Government response, the conclusions of its own consultative exercise, particularly given that URN 08/579 incorporates a question on the timing of the draft Regulations being proposed in light of the ongoing review by the EC of Directive 85/577/EEC.

2.5. The AA has limited its response to answering those questions posed by the DBERR where it has competence to do so. In practice these are Questions 1, 3, 7, 9-13, 16, 23-25, 43 and 44.

2.6. In summary, in this response the AA has:

- (a) called for the retention (or even expansion) of the current list of 'excepted contracts' within the draft Regulations;
- (b) requested the exclusion from the draft Regulations of all credit agreements regulated under the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006), pending transposition of the Consumer Credit Directive (and made the wider case that credit agreements should not be cancelable under both any new Statutory Instrument and the earlier statute);
- (c) argued for the adoption of the same cooling off period for contracts made as a consequence of both solicited and unsolicited visits;
- (d) established the additional costs that businesses are likely to incur as a result of incorporating the written Notice of a Right to Cancel into the contract document, before detailing how these outlays might best be mitigated;
- (e) contended that it would not be proportionate to require the incorporation of any additional information requirements within the Notice of the Right to Cancel in the draft Regulations over and above those that currently appear within them;
- (f) asserted that the wording on the cancellation notice would make it straightforward for a consumer to exercise their right to cancel in the event that they wanted to do so;
- (g) expressed the view that the guidance for consumers on how to complete the cancellation notice, should they want to exercise their rights to cancel, is clear;
- (h) observed that the requirements contained within the draft Regulations on the prominence of the Notice of the Right to Cancel will be sufficient to draw the attention of a consumer to it;
- (i) made the case that the types of contract contained within the draft Regulations under which consumers would have a duty to pay in accordance with the reasonable requirements of the cancelled contract for any goods, services or both supplied before they were cancelled should be retained;
- (j) averred that the £35 contractual value threshold should be retained for unsolicited visits, until such time as Directive 85/577/EEC might allow a higher threshold to be adopted, and in these circumstances (whilst a common threshold would be ideal) has held that a substantially higher limit should be adopted for solicited visits;
- (k) proposed that the introduction of new domestic legislation relating to solicited visits be postponed until such time as the Review of the Consumer Acquis being conducted by the EC has been completed;
- (l) requested the inclusion of a qualifying phrase within the draft Regulations in order to remove any possible interpretation that there is a requirement on traders to be in possession of an electronic address; and,
- (m) drawn the attention of the DBERR to two minor typographical errors contained within the draft Regulations.

2.7. The AA is not seeking for any part of this submission to be treated as confidential.

3. Responses of the AA to specific questions posed by the DBERR

Question 1: Do you think that any of the ‘excepted contracts’ listed in Schedule 3 should be removed or limited so that the Regulations apply to that kind of contract? If so, please state which kind of contract you feel should be removed or limited, and explain your reasons.

Response to Question 1: The AA considers that none of the ‘excepted contracts’ contained within Schedule 3 should be removed or limited. Indeed, if Directive 85/577/EEC permits it, the AA is of the view that repeat orders for consumer goods from previous customers should be added to the ‘excepted contracts’ contained within Schedule 3.

Question 3: Do you agree that all credit agreements regulated under the Consumer Credit Act should be excluded from these Regulations pending transposition of the Consumer Credit Directive? If not, please explain your reasons.

Response to Question 3: The AA agrees that all credit agreements regulated under the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) should certainly be excluded from the Regulations that the DBERR is proposing in URN 08/579 at least until such time as the recently adopted Consumer Credit Directive has been transposed and implemented into UK law. Given that the Consumer Credit Directive contains provisions on cancellation rights, introducing new rights that may be supplanted in a relatively short timeframe would create a significant regulatory burden for businesses and undoubtedly confuse consumers – a risk that the DBERR has identified. (The AA comments further on credit agreements in its response to Question 44 of this consultation below.)

Question 7: Do you agree that the length of the cooling off period should be the same for contracts made as a result of unsolicited visits by a trader and for contracts made as a result of solicited visits by a trader? If not, please state what you think the cooling off periods should be in each case, and where possible provide supporting evidence including quantified costs and benefits for you preference.

Response to Question 7: The AA considers that it would be sensible for any cooling off period for contracts made as a result of unsolicited visits by a trader and for contracts made as a result of solicited visits by a trader to be the same.

Question 9: What would be the additional cost to business of incorporating the written notice of the right to cancel in the contract document? If possible, please provide details of the quantified costs.

Response to Question 9: The additional cost of incorporating the written notice of a right to cancel will be insignificant in respect of high value transactions, but the relative cost will increase where lower value transactions are concerned.

Furthermore, there will be a significant non-recurring cost for most businesses when any new regulations came into force. This non-recurring cost will be that associated with creating new legally compliant contract forms. Clearly, it will not be possible for businesses to recover the costs associated with those forms that will have become obsolete.

The AA expresses the view in its response to Questions 43 and elsewhere in this submission that the introduction of new UK Regulations should await the outcome of the ongoing Review of the Consumer Acquis by the EC, which encompasses Directive

95/577/EEC. Clearly, if such an option were pursued, the above costs could largely be avoided as the lead time would be longer, thereby providing businesses with more time to make preparations for any change.

An alternative (albeit one less preferable than awaiting the outcome of the Review of the Consumer Acquis process) which would address the narrow issue of costs outlined above would be for the Common Commencement Date of 6 April 2009 to apply to the new Regulations (rather than 1 October 2008 as presently envisaged). This would allow businesses to deplete a greater amount of their existing stocks of contractual material than would be the case were the Regulations to come into force on 1 October 2008, as currently proposed.

Question 10: Do you think that the Notice of the Right to Cancel (Part I of Schedule 4) should include any additional information requirements? If so, please state what you think those additional information requirements should be, and explain your reasons.

Response to Question 10: The AA considers that the information requirements contained within the Notice of the Right to Cancel at Part I of Schedule 4 of the Regulations being proposed are sufficient to ensure consumers are suitably protected. The AA is of the view that it would be disproportionate to require the inclusion of information requirements additional to those already contained within the Notice of the Right to Cancel at Schedule 4 of the draft Regulations.

Question 11: Do you think that the wording on the cancellation notice (Part II of Schedule 4) would make it easy for the consumer to exercise his right to cancel the contract? If not, please state what you think the wording of the guidance notes should be and explain your reasons.

Response to Question 11: The AA considers that in the event that a consumer chose for any reason to cancel a contract arrived at in the circumstances foreseen by the Regulations being proposed, the wording on the cancellation notice would make it straightforward for them to do so.

Question 12: Do you agree that the notes included in Part II of Schedule 4, provide the consumer with clear guidance on how to complete the cancellation notice? If not, please state what you think the wording of the guidance notes should be, and explain your reasons.

Response to Question 12: The AA considers that the notes included in Part II of Schedule 4 would achieve the objective of providing a consumer with clear guidance as to how to complete the cancellation notice should they wish to exercise their right to do so for any reason.

Question 13: Do you think that the requirements of Regulation 7(5) are sufficient to ensure that the notice of the right to cancel will be sufficiently prominent within the contract to attract the attention of a consumer? Please explain your reasons, state what (if any) you think the additional requirements should be, and where possible provide supporting evidence including quantified costs and benefits.

Response to Question 13: The AA considers that the requirements of Regulation 7(5) are sufficient to ensure that the notice of the right to cancel would be prominent enough within the contract for it to come to the attention of any consumer reading through the document.

Question 16: Do you think that any kinds of contract should be deleted from the list at 9(1)? If so, please state the kind of contract that you think should be deleted and explain your reasons and provide supporting evidence where possible.

Response to Question 16: The AA considers that all the kinds of contracts currently listed within Regulation 9(1) should be retained.

Question 23: Do you think that we should remove the £35 limit and apply the Regulations to all contracts regardless of value? If so, please explain your reasons and where possible, provide supporting evidence including quantified costs and benefits.

Response to Question 23: The AA would strongly oppose the removal of the £35 limit, with the Regulations applying instead to all contracts regardless of value. Indeed, the AA would argue that officials within the DBERR should rather be pursuing a substantial increase to the contractual value threshold currently contained within Directive 85/577/EEC in their negotiations with EC counterparts as part of the ongoing Review of the Consumer Acquis being conducted by the latter. The AA argued for a substantial increase in the contractual value threshold in its own response to the consultation conducted by the EC last year, which it shared with officials within the DBERR.

Question 24: Do you think that we should retain the £35 limit for contracts made as a result of unsolicited visits, and set a higher limit for contracts made as a result of solicited visits? If so, please state what the limit for solicited visits should be, and where possible provide supporting evidence including quantifiable costs and benefits.

Response to Question 24: The AA considers that there would be considerable merit in having a common contractual value threshold for both solicited and unsolicited visits.

As set out in the response of the AA to Question 23, however, the Association considers that the contractual value threshold for unsolicited visits should be substantially increased. The AA appreciates that until such time as Directive 85/577/EEC is amended, the £35 limit will continue to apply to unsolicited visits.

In the circumstances, if the Government is to take forward the draft Regulations it is proposing in URN 08/579, then the AA would argue that a substantially higher contractual value threshold should apply for solicited visits than will continue to be the case in respect of unsolicited visits, at least until such time as Directive 85/577/EEC is amended.

Question 25: Do you think that we should retain the £35 limit for contracts made as a result of unsolicited visits and set the same £35 limit to contracts made as a result of solicited visits? If so, please explain your reasons and where possible, providing supporting evidence including quantified costs and benefits.

Response to Question 25: No, for the reasons set out in the response of the AA to Question 24 above.

Question 43: Do you have any views on the timing of the proposed Regulations, bearing in mind the EC Commission's review of Directive 85/577/EEC (Doorstep Selling Directive)?

Response to Question 43: In order to minimize the creation of regulatory burdens the AA would urge the DBERR to await the outcome of the Review of the Consumer Acquis

currently being conducted by the EC and defer the introduction of the proposed Regulations until such time as any successor legislation to Directive 85/577/EEC emerges.

The DBERR correctly identifies in the Impact Assessment that accompanies URN 08/579 that if the Regulations currently being proposed by the Department are taken forward then UK businesses, consumers and enforcement agencies may have to adapt to two series of changes to the law governing direct selling in quick succession. The AA considers that if the DBERR can avoid such a scenario and the unwarranted costs and burdens for UK businesses involved through deferring action on solicited visits then it should.

It is encouraging to know that officials within the DBERR are liaising with their counterparts within the EC in order to establish the timeline for possible review and amendment of Directive 85/577/EEC. Nevertheless, any changes to Directive 85/577/EEC will take place after the commencement date currently being put forward by the DBERR for the proposed UK Regulations extending cancellation rights to solicited visits coming into force here. The AA is conscious that the DBERR may have made a commitment to introduce the legislative changes the draft Regulations proposed would bring about, but on balance considers that this does not outweigh the costs to businesses and enforcement agencies and the likely creation of confusion for consumers of a series of changes to UK law in the direct selling field being effected in quick succession.

Question 44: Do you have any other comments on the proposed Regulations?

Response to Question 44:

Credit agreements

The issue of how credit agreements should be dealt with comes up on a number of occasions within URN 08/579. The AA agrees with the analysis of the DBERR that duplicating cancellation provisions for consumer credit agreements under the Regulations being proposed as well as under the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) would generate both technical problems and confusion and should therefore be avoided. The AA is firmly of the view that credit agreements should not be cancelable under both the Regulations being proposed and the 1974 Act (as amended).

Cancellation notices: provision of electronic addresses

The AA is concerned that, as currently worded, the Regulations being proposed might imply that it is necessary for a trader in the direct selling market to possess an electronic address. The AA doubts that this is the intention of the DBERR given the nature and structure of the direct selling market. This concern arises out of the language contained within Paragraph 4, Part I ("Information to be Contained in Notice of Right to Cancel the Contract") of Schedule 4 ("Cancellation notices"), which states: "The name and address, including any electronic address, of a person to whom a cancellation notice may be given.". In order to avoid any possible interpretation that traders must be in possession of an electronic address, the AA considers that there is a case for qualifying the above sentence by the insertion of "(if applicable)" immediately after the reference to "electronic address".

Excepted contracts

The AA notes that there are two minor typographical errors within Schedule 3 ("Excepted contracts") of the draft Regulations, relating to the punctuation at the end of Paragraph 2 and sub-Paragraph 8(b)(iii) respectively.