



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 CALL FOR EVIDENCE BY THE BETTER REGULATION EXECUTIVE AND CONSUMER & COMPETITION POLICY DIRECTORATE OF THE DEPARTMENT FOR BUSINESS, ENTERPRISE & REGULATORY REFORM AS PART OF ITS CONSUMER LAW REVIEW

1. Preamble

1.1. The Advertising Association is a federation of 30 trade bodies and organisations representing the advertising and promotional marketing industries including advertisers, agencies, media and support services. It is the only body that speaks for all sides of an industry that was worth over £19 billion in 2007. More information about the Advertising Association and its members can be found at: <http://www.adassoc.org.uk/>

2. Introduction & Summary

2.1. The Advertising Association welcomes the opportunity to respond to this call for evidence (URN 08/624) by the Better Regulation Executive (BRE) and the Consumer & Competition Policy Directorate (CCPD) of the Department for Business, Enterprise & Regulatory Reform (DBERR) as part of its Consumer Law Review (CLR).

2.2. The Advertising Association responded in January 2008 to the preliminary review of the consumer protection regime conducted by DBERR, which informed the content of the present call for evidence. A copy of that earlier Advertising Association response can be downloaded from the following location:

<http://www.adassoc.org.uk/jr-03-01-08-consumerprotectionreviewdberr.pdf>

2.3. The Advertising Association shares the view of DBERR that the UK has one of the most effective systems of consumer protection in the world and would note that the framework for this is made up of both statutory and non-statutory mechanisms. However, a complex and sometimes inflexible web of legislation has accumulated over several decades. This creates unnecessary burdens for business that are not in the interests of consumers, given that it is likely that the detriment will be passed on to them in the form of higher prices or reduced choice.

2.4. In summary, in this response, the Advertising Association sets out:

- (a) that mandatory information requirements in advertising are rarely of value to consumers, whilst burdensome for businesses;
- (b) that legislative protections recently afforded to vulnerable consumers should be allowed to establish themselves, before their efficacy is assessed;
- (c) that enforcement arrangements could be rendered less burdensome for businesses through greater consistency on the part of regulatory authorities;

- (d) how, in the context of the Review of the Consumer Acquis¹, the legislation governing distance selling could be rendered more proportionate to certain advertising media, without impacting detrimentally on consumers, by adopting an approach contained in the so-called Unfair Commercial Practices Directive (UCPD)²;
- (e) its recommendation that full advantage be taken of the implementation of the so-called Consumer Credit Directive (CCD)³ to consider how existing burdens in the field of consumer credit regulation might be reduced, particularly in respect of advertising;
- (f) its call for the scheduled (but now overdue) review of a particular consumer protection measure relating to extended warranties offered alongside domestic electrical goods, which has implications for advertising, to be conducted;
- (g) its support for simplifying the body of consumer law in the UK through codifying primary legislation and consolidating secondary legislation (rather than through the creation of some sort of overarching consumer code);
- (h) that DBERR should not act precipitately in making amendments to UK law without full regard to the scope and timing of the ongoing Review of the Consumer Acquis process;
- (i) its favouring of principles-based law over prescriptive legislation; and,
- (j) its over-riding preference for alternatives to statutory regulation altogether.

2.5. On completion of its CLR, the Advertising Association would recommend that DBERR shares the conclusions it draws from this consultative exercise with statutory regulators, such as the Financial Services Authority (FSA). This is because the conclusions drawn may have implications from a better regulation perspective that have applicability across the regulatory spectrum, even if the regulators in question are not strictly speaking themselves operating in the field of consumer law.

2.6. The Advertising Association is not seeking for any part of this submission to be treated as confidential. The Advertising Association is grateful to DBERR for the extension granted it by the Department to the original deadline of 31 July 2008 for receipt of this response.

3. Response of the Advertising Association to specific questions posed by DBERR

Question 4: How burdensome are current information provision requirements? What value do they bring?

3.1. The Advertising Association regards the provision of mandatory information in advertising as a burden on businesses, whilst rarely, if ever, of value to consumers, but that, nonetheless, draws on the finite resources of those responsible for enforcement.

3.2. The findings of a study published by the BRE and the National Consumer Council (NCC) in November 2007 entitled *Warning: Too much information can harm* are of interest in this context. Essentially the study concluded that many of the pieces of information that businesses are mandated to supply to consumers as a consequence of statutory requirements (such as in respect of the supply of extended warranties on domestic electrical goods) were simply not having the impact on consumer behaviour originally envisaged for them. Indeed consumers often simply felt “overloaded” by the additional information. The study also found that information requirements often placed a compliance burden on businesses. As DBERR itself notes, the information that businesses are required by statute to provide to consumers and third parties as a consequence of various elements of

¹ This is the name of the process being pursued by the European Commission of reviewing the eight directives that form the so-called *Consumer Acquis* of European law with a view to updating and potentially rationalising those legislative instruments.

² Directive 2005/29/EC “on unfair business-to-consumer commercial practices”

³ Directive 2008/48/EC “on credit agreements for consumers”

consumer law also frequently incur external costs (e.g. the purchase of legal advice) specifically to fulfil the obligations of a particular statutory requirement.

3.3. The joint BRE / NCC study does not consider advertising specifically. The Advertising Association, however, considers that where the law specifies that information requirements be carried in advertising, they impose particular costs and administrative burdens on businesses, whilst being of questionable value to consumers. This is because for low-value products, consumers are likely simply to ignore such detailed information in advertising, whilst for higher value products, consumers will ordinarily conduct further research (including increasingly via the internet) at a point later in their pre-purchase decision-making processes. With regards to high-value products in particular, the provision of better and more targeted information at those later decision-making junctures empowers consumers to make reasoned comparisons between the options available to them, whilst avoiding the imposition of unnecessary burdens on businesses in respect of advertising.

3.4. DBERR correctly identifies a dual problem with mandatory information requirements for businesses. In the first place, businesses must decide what information their customer base wants and in the second, how they can dovetail this material with what the Government mandates. This dilemma is particularly problematic in advertising, given that advertisements are generally designed to contain as few messages as possible in order to maximise the impact of each individual one. As DBERR also identifies, certain businesses frequently opt to create quite complex monitoring systems to ensure that their advertisements are compliant – one such area is those businesses involved in the field of consumer credit advertising (see Paragraphs 3.19 to 3.21 below).

3.5. The Advertising Association would request that whenever Government Departments and statutory regulators consider mandating information requirements in advertising, such proposals are evaluated on the basis of the likelihood of their achieving the outcomes originally envisaged for them. Equally the impact on businesses should be considered in each case. Where information requirements are, nevertheless, ultimately introduced they should be kept under review. Where they are failing to achieve the purpose originally envisaged for them, the conclusion to draw ordinarily should be that mandated information requirements are generally not effective in advertising. All too frequently the opposite and somewhat counter-evidential one that the right solution is to expand the information requirements in a specific case to address that failure is drawn. To draw such a counter-evidential conclusion would amount to the regulatory equivalent of ‘throwing good money after bad’.

3.6. A further detrimental impact that is often overlooked is that on the non-broadcast and broadcast media in which the advertising is carried. Whilst the detrimental impacts of mandatory information requirements can be identified across all media, those on the linear audio one of radio are particularly problematic as that medium is unable to deliver multiple messages simultaneously (even if this were desirable). Where information requirements are mandated across advertising media, it is always most damaging to radio in competitive terms, as advertisers would need to buy additional airtime in order that the mandated information requirements might be read out on air.

3.7. The Advertising Association is encouraged by the reference DBERR makes to those principles of better regulation that require statutory intervention to be both proportionate and targeted and based on an understanding of how interventions will affect those upon whom a burden is imposed. The UK Government should also use its influence in Brussels to ensure the same rigour is applied to policy-making in Europe. For example, the current review by

the European Commission of the so-called Car Labelling Directive⁴ may see new information requirements imposed in respect of advertising. There is a strong risk that such a policy initiative will be pursued despite the existence of any evidence to suggest that consumers make use of detailed information about fuel economy and carbon dioxide emissions in advertising. Indeed the available evidence indicates that the reverse is true. (See Appendix "Inclusion of mandatory information in advertisements: relevant research findings".)

Question 5: How well do the current legal protections serve vulnerable consumers?

3.8. The Advertising Association considers that whilst Question 5 is a valid one for DBERR to pose, it is not the moment to judge the efficacy of the law in this particular field, given very recent legislative developments that serve to protect vulnerable consumers.

3.9. As DBERR will be aware, there have been two recent legislative developments – one European in origin, the other domestic - with implications for the legal protections afforded to vulnerable consumers that have come into force since the CLR was launched on 8 May 2008. Both of these legislative developments have enhanced the protection afforded to vulnerable consumers.

3.10. As DBERR identifies, the UCPD has introduced the concept that there can be clearly identifiable groups who may be particularly vulnerable to certain activities by traders. The UCPD was implemented in the UK by The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)⁵, which came into force on 26 May 2008. (The Advertising Association notes that the first court ruling following a prosecution brought under the CPRs was made on 31 July 2008, resulting in the award of an Enforcement Order against two traders.)

3.11. DBERR also identifies that the legislative framework around direct selling – in the form of the so-called Doorstep Selling Regulations⁶, which grant a cancellation right to consumers within a specified period following the agreement of a contract - serves to protect the vulnerable. It is noteworthy in this context, however, that on 8 July 2008, The Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008⁷ were made. This new Statutory Instrument will shortly supersede the 1987 Regulations (as amended), when it enters into force on 1 October 2008. The new Direct Selling Regulations will, for example, continue to provide consumers with a seven day cancellation right in respect of contracts entered into following an unsolicited visit, but additionally (from 1 October 2008) visits by traders that are solicited will be treated in the same way. A motivating factor behind the extension of these rights to solicited visits was a view within DBERR that certain, perhaps more vulnerable, consumers might feel intimidated by the physical presence of a trader in their home. (Although this measure aimed at protecting consumers who feel vulnerable in their own homes may be welcome, the Advertising Association has expressed concern to DBERR about the decision to amend the UK legislative framework around direct selling now, given that it may be changed again shortly as a result of the Review of the Consumer Acquis. See also Paragraph 3.34 below.)

3.12. To sum up, the Advertising Association considers that it would be better to allow the two Statutory Instruments described above time to take effect and then (only in due course) gauge the extent to which they are achieving their objective of protecting vulnerable

⁴ Directive 1999/94/EC "relating to the availability of consumer information on fuel economy and CO₂ emissions in respect of the marketing of new passenger cars"

⁵ Statutory Instrument No. 2008/1277

⁶ The Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (Statutory Instrument No. 1987/2117), as amended

⁷ Statutory Instrument No. 2008/1816

consumers. DBERR might otherwise receive judgements from respondents on the adequacy of current legal protections in respect of vulnerable consumers before the efficacy of key new laws in this area (and whether they had achieved their objectives) have had time to be properly assessed. Clearly it is important that the legal framework strikes the right balance between ensuring vulnerable people are suitably protected without stifling the ability of businesses to innovate and grow as a consequence of being confronted with an onrush of new legislation, which may as it turns out be unnecessary from a consumer perspective.

Question 6: Can the enforcement arrangements be made less burdensome for complying businesses?

3.13. Yes. The Advertising Association considers that enforcement arrangements could be rendered less burdensome in the field of consumer credit advertising (and potentially other areas) through enhancing consistency between trading standards in that sphere or, perhaps, through adopting a more centralised approach. (The Advertising Association comments in more detail on the current regulatory regime for consumer credit advertising in response to Question 10 below.) More generally, the Advertising Association considers that enforcement authorities should seek to secure conformity by businesses with the law in the first instance through assisting them to achieve compliance rather than for enforcement to be their first resort in the event of evidence of non-compliant behaviour emerging.

Question 8: Given the increase in online transactions, are the cancellation and information rights currently provided in distance selling regulations appropriate? How significant are the benefits to consumers and how much does it cost business to provide these?

3.14. The Advertising Association considers that the legislative framework for online transactions, provided by the so-called Distance Selling Regulations (DSRs)⁸, strike broadly the right balance by providing the appropriate level of protection to consumers, thereby underpinning their confidence in the process, without stifling the development of online trade. The Advertising Association considers, however, that there is a particular cost to business resulting from the DSRs, which could be mitigated.

3.15. Consumers in the UK are certainly increasingly purchasing products at a distance - the growth of trading over the internet in particular is considerable. Electronic commerce has succeeded in offering more choice to consumers and facilitated easier access by them to sellers, often resulting in lower prices being paid – with, in the process, barriers to trade being broken down and new markets created. The Advertising Association is currently leading a self-regulatory initiative through its Digital Media Group (DMG) to extend the high standards of consumer protection in the field of advertising to an even wider range of new media (see Paragraphs 4.8 and 4.9 below). The Advertising Association raises the work of the DMG in the context of Question 8 because effective self-regulation of the promotional activities of companies online should serve to instil further confidence amongst consumers when conducting transactions via digital media.

3.16. Under the DSRs, certain information must be provided in advance to consumers including: the identity of the trader; a description of the product; the price; and, the availability to them of a right to cancel within seven days. The DSRs are, however, themselves derived from the so-called Distance Selling Directive⁹ and subject to the constraints which that European legislation sets.

⁸ The Consumer Protection (Distance Selling) Regulations 2000 (Statutory Instrument No. 2000/2334), as amended

⁹ Directive 97/7/EC “on the protection of consumers in respect of distance contracts”

3.17. As part of the Review of the Consumer Acquis process, (and as DBERR is aware¹⁰) the Advertising Association has requested that consideration be given to rationalising the information requirements contained within Directive 97/7/EC when a distance selling mechanism is incorporated within a commercial communication in certain media. Such a rationalisation could be achieved by aligning how the information requirements specified by the Distance Selling Directive may be presented with those contained in Article 7(3)¹¹ of the UCPD.

3.18. The Advertising Association considers that, if the proposal set out in Paragraph 3.17 above were adopted, an administrative burden imposed on commercial communications would be mitigated at no cost to consumers. The Advertising Association would ask that the UK Government continue to call for this rationalisation in the context of the Review of the Consumer Acquis process.

Question 10: Would there be value in a reconsideration of consumer credit regulation, within the constraints of the new Directive, and if so over what timescale?
 - Are any aspects causing particular difficulty or cost?
 - How could information be presented to consumers in a more user friendly way (consistent with the new Directive)?

3.19. Yes. The Advertising Association considers that there would be value in looking afresh at the options for regulating consumer credit, particularly in respect of advertising, as part of the CLR, albeit conscious of the constraints imposed by the so-called CCD, which clearly limits the latitude for action available to DBERR. In terms of timescales, the Advertising Association considers it relevant to note that the CCD must have been transposed into UK law by 12 May 2010. It is also surely helpful in respect of reviewing the consumer credit regime in the UK that it is officials within the CCPD (which is jointly responsible with the BRE for conducting the current CLR) that are themselves taking the lead on implementing the CCD into domestic law. This should ensure that Government thinking in this area is entirely joined-up.

3.20. The regulation of consumer credit is an area of considerable complexity, not least because responsibility for enforcement is divided between all the trading standards services operating in the UK - including in respect of the so-called Consumer Credit Advertising Regulations (CCARs)¹² and the information requirements they mandate in advertisements falling within their scope. Notwithstanding the concerns expressed in Paragraphs 3.1 to 3.7 above, the Advertising Association recognises that the CCD will largely carry the existing information requirements forward¹³.

¹⁰ The Advertising Association has shared all its submissions to the European Commission as part of the Review of the Consumer Acquis process with DBERR (and previously the Department of Trade & Industry).

¹¹ Article 7(3) of the UCPD states that: "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."

¹² The Consumer Credit (Advertisements) Regulations 2004 (Statutory Instrument No. 2004/1484), as amended

¹³ DBERR states that it estimates that existing consumer credit legislation imposes costs on the credit industry of about £250m per annum. It is not clear, however, whether this figure takes into account the secondary effects of the burdens that are also imposed on the media businesses that service the advertising requirements of the credit industry.

3.21. The Advertising Association considers that there are four improvements that could be made to the way in which advertisements for consumer credit are regulated in the UK. These are set out in sub-paragraphs (a) to (b) below:

(a) To investigate, if permitted by the CCD, the case for reducing the amount of information that the CCARs currently specify must be incorporated into consumer credit advertisements for the reasons set out in Paragraphs 3.1 to 3.7 of this submission above. This would serve to minimise the sense of information overload experienced by consumers, whilst reducing a burden on businesses.

(b) To provide businesses with the maximum amount of flexibility in terms of how they may deliver mandated information. For example, the CCARs are so prescriptive as to require certain mandatory text appears in capital letters. By way of contrast, and although the approach of the FSA towards regulating advertising is still far from perfect, it is interesting to note the more flexible approach that the FSA has adopted in the not dissimilar field of financial promotions following implementation in the UK of the so-called Markets in Financial Instruments Directive (MiFID)¹⁴, which is a principles-based measure. Indeed, certain products fall under the regulatory remit of both local trading standards services and the FSA - such dual regulation is clearly not ideal. Until relatively recently, one practical example in the field of advertising of this dual regulation was that where the product advertised was subject to both regimes, advertisements had to carry two sets of identical text, once in capital letters, once in lower case. This undermined the internal coherence of the advertising and detrimentally impacted on media businesses. Fortunately, the FSA was able to amend its rules, given their greater flexibility (even prior to the implementation of MiFID), such that it was possible to avoid this particular situation remaining ongoing.

(c) To render it entirely clear in any new legislation governing consumer credit advertising that the responsibility for ensuring compliance lies with the advertiser and not the media businesses that may subsequently carry an advertisement for a relevant product on behalf of the former, thereby avoiding the risk of compliance mechanisms being duplicated.

(d) To develop a less fragmented approach towards the regulation of consumer credit advertising. The Advertising Association considers that the introduction of the Regulators' Compliance Code and the Regulatory Enforcement & Sanctions Act 2008 should serve partially to achieve that outcome, which is encouraging. Nevertheless, despite the placing by the 2008 Act of the existing home authority principle on a statutory footing (as the "Primary Authority Principle"), it will still be the case that different approaches will be adopted by trading standards towards the regulation of consumer credit advertising, even if individual companies no longer suffer in quite the same way as previously. In addition to encouraging more consistent enforcement from a business perspective, a less decentralised approach towards advertising regulation would mean consumers had a more straightforward means of complaining about advertisements that failed to abide by the legislation governing consumer credit advertising. A less decentralised approach might also allow for the development of systems aimed at assisting businesses achieve compliance – for example, if some form of non-binding pre-publication advice to advertisers of consumer credit was offered that was "without prejudice" to the ability of enforcement action being taken against them subsequently, if necessary.

¹⁴ Directive 2004/39/EC of the European Parliament and the Council "on markets in financial instruments" (as implemented by Commission Directive 2006/73/EC "as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive")

Question 12: Which areas of detailed regulation could be removed, simplified or rationalised, for example through greater use of high level principles? Are there other significant costs for business which could be reduced?

3.22. The Supply of Extended Warranties on Domestic Electrical Goods Order 2005¹⁵ contains provisions relating to advertising. The 2005 Order is not European in origin and therefore any provisions contained within it can be readily revoked at the discretion of the UK Government.

3.23. The Regulatory Impact Assessment appended to the Explanatory Memorandum that accompanies the 2005 Order sets out that the Office of Fair Trading (OFT) should review the efficacy and benefits of the Statutory Instrument two years after its coming into force, with a view to revoking or varying it, as necessary. The Advertising Association is unaware of any such review having taken place.

3.24. If the OFT did conduct such a review, the Advertising Association anticipates that the Office would find that the provisions the Order contains in respect of advertising did not have the impact on consumer behaviour originally envisaged for them, whilst imposing an unnecessary administrative burden on the media falling within its scope (see also Paragraphs 3.1 to 3.7 above). Consequently, the advertising provisions contained within the Order should be early candidates for DBERR to consider revoking as part of its CLR.

Question 13: What would be the advantages and disadvantages of simplifying the structure of consumer law, for example by consolidating it into a consumer code?

3.25. The Advertising Association considers that there would be considerable advantages to simplifying the framework of consumer law in the UK. The recent Administrative Burdens Measurement Exercise commissioned by the BRE and published in June 2006 identified over one hundred pieces of primary and secondary legislation relating to consumer protection in the UK. Such a large amount of legislation, due at least in part to the significant number of amending regulations, renders the system overly complex and can pose difficulties for small and medium sized enterprises in particular as they strive to ensure they are compliant with that body of law of relevance to their businesses.

3.26. The Advertising Association would support a programme of simplification and rationalisation of the current legislative framework for consumer protection. The objective of this process should be the delivery of better outcomes for consumers and fewer burdens for businesses through the creation of a clearer, simpler, more flexible and thus less costly legal regime. Having a legislative framework that is flexible enough to keep pace with dynamic products, services and markets driven in large part by technological and social changes is not only attractive but essential. Indeed, in many such cases, the Advertising Association considers that self-regulatory solutions rather than legislative interventions should be the departure point (see Paragraphs 4.5 to 4.9 below). Where legislation is required, the Advertising Association agrees with the overall objective of DBERR to simplify the structure of consumer law - albeit not necessarily through the construction of a legislative code.

Question 13(d) What would be the implications of separating elements of business-to-consumer and consumer-to-consumer law from business-to-business across the board?

3.27. The Advertising Association identifies below one potential detrimental outcome of the above approach being adopted, before setting out how this might be mitigated. If legal provisions concerning business-to-business activity that also at present apply to business-to-

¹⁵ Statutory Instrument No. 2005/37

consumer and consumer-to-consumer transactions - as with the Sale of Goods Act 1979 (as amended) - are separated from the latter, then it will be essential to ensure that the protections currently afforded to businesses remain equivalent to those that apply to consumers. There could otherwise be a significant risk that rogue traders would simply focus their unlawful activities on other businesses, if the sanctions and penalties available to enforcers in that context were of a lower order of magnitude than applied in respect of infringements for business-to-consumer and consumer-to-consumer commercial interactions. Thus, the Advertising Association considers that whilst there may be benefits in separating business-to-consumer and consumer-to-consumer provisions from business-to-business elements, the risks described above need to be mitigated through ensuring that protections are mirrored. As an example of good practice in this regard, the Advertising Association would point to the way in which DBERR dealt with implementation of the UCPD and re-implementation of the Misleading & Comparative Advertising Directive (MCAD)¹⁶ via the CPRs and The Business Protection from Misleading Marketing Regulations 2008¹⁷ to address business-to-consumer and business-to-business commercial activities respectively.

Question 13(e) Which structure (primary or secondary legislation, consolidated together or separate instruments) would be most user-friendly?

3.28. The Advertising Association would oppose the creation of some new form of overarching legislative code. The option for legislative reform preferred by the Advertising Association would be for DBERR to conduct a programme of codifying that primary legislation that already exists, but which has been amended since coming into force, and pursuing a similar programme of consolidating existing secondary legislation (often resulting from the implementation of European Directives) that has been subject to amending regulations. Such an approach would serve to minimise the relatively fragmented nature of domestic consumer law found currently. The Advertising Association also notes that its preferred option is also the one under consideration that could be delivered upon most rapidly according to DBERR.

3.29. It is interesting to note in this context that the Medicines & Healthcare products Regulatory Agency (MHRA) has recently announced a project to review and consolidate current medicines legislation with the objective of bringing together the various provisions that presently exist into a more ordered set. The principal reason the MHRA cites for taking this action is the large number of statutory instruments affecting medicines legislation (of which many themselves have been subject to one or more sets of amending regulations) that serves to render the current legal framework unwieldy.

3.30. The Advertising Association would therefore want to see DBERR follow the example of the MHRA and arrive at a more ordered set of legislative provisions, rather than bring together a wide range of consumer law into a single legal instrument. The Advertising Association is concerned that such an instrument might ultimately prove extremely unwieldy and considers that it could actually make effecting future reforms more challenging.

3.31. The Advertising Association considers that DBERR should also take a lead in encouraging the European Institutions to codify Directives. It is notable, for example, that it was left until 2006 to codify the MCAD. Equally, however, the implementation of European Directives (as DBERR alludes to in respect of Directive 2008/48/EC) also offers an excellent opportunity to rationalise UK consumer law. The process of implementing Directive 2005/29/EC, for example, was used to good effect in that regard.

¹⁶ Directive 84/450/EEC "concerning misleading advertising" (as amended by Directive 97/44/EC to cover comparative advertisements and since codified as Directive 2006/114/EEC)

¹⁷ Statutory Instrument No. 2008/1276

3.32. The Advertising Association notes that its preferred option - that DBERR simplify and update specific areas of consumer law - could be achieved within a one to two year period according to the Department's own calculations. (By contrast, the option of bringing together a range of legislation into a single instrument could take up to three years.) In the view of the Advertising Association the advantage of its preferred option is not only that it can be delivered more quickly, but also that it is inherently less risky given the changes to European legislation (eventually requiring domestic implementation) that may result from the Review of the Consumer Acquis process.

3.33. In parallel with this simplification process, the Advertising Association considers that there may (in due course) be a case for reviewing existing guidance aimed at assisting businesses and others to understand the law, to see if it can be rendered clearer as a consequence of the process of consolidating the legislation. Equally, however, it will be important to ensure that, having achieved the more challenging aspect of rationalising the legislative framework, any revised guidance does not have the effect of inadvertently gold-plating upon legal requirements.

Question 13(f) What would be the appropriate time for this work, given the current changes being considered at a European level?

3.34. The Advertising Association considers that whilst it may be sensible for DBERR to consider restructuring the consumer law regime in the UK, it should take full account - not least in terms of timing - of the Review of the Consumer Acquis process. It will be essential to avoid a situation whereby DBERR initiates changes to the former, only to see it overtaken in short order by legislative changes brought about by the latter. If such a situation is not avoided, unnecessary burdens will be imposed on businesses, enforcement authorities and consumers alike. A current example of where such a situation has not been avoided is the introduction by DBERR of new legislation governing direct selling (see Paragraph 3.11 above), at a time when the so-called Doorstep Selling Directive¹⁸ is being evaluated as part of the Review of the Consumer Acquis. As a consequence, there is a strong likelihood that UK businesses, consumers and enforcement agencies will have to adapt to a series of amendments to domestic law in a relatively short space of time. In the interests of best regulatory practice, it will be important to ensure that such sub-optimal outcomes remain very much the exception.

4. Additional observations by the Advertising Association on regulatory reform

Implications of the Review of the Consumer Acquis

4.1. The Advertising Association notes that the UK Government has already set out its preference for greater simplification and harmonisation between the eight directives that make up the Consumer Acquis through the establishment of a horizontal instrument covering such issues as cancellation rights. The Advertising Association notes that the UK Government also appears to have been successful in resisting, quite properly, the calls by some to include the so-called E-Commerce Directive¹⁹ within the scope of the Review of the Consumer Acquis. It is the view of the Advertising Association that any changes proposed to the E-Commerce Directive should properly be informed by the Second Implementation Report on that legislation (now somewhat overdue) whenever the document is finally published by the European Commission.

¹⁸ Directive 85/577/EEC "to protect the consumer in respect of contracts negotiated away from business premises"

¹⁹ Directive 2000/31/EC "on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market"

4.2. The Advertising Association considers that the responses DBERR receives to the CLR should certainly inform its stance in relation to the ongoing Review of the Consumer Acquis process. It will, however, be essential (for the reasons described in Paragraph 3.34 above) that the UK Government does not propose changes to the domestic legislative framework in those areas where consumer protection is derived from the eight directives being reviewed (and thus subject to potential amendment). The Advertising Association is therefore encouraged by the statement made by DBERR that the timing as well as the substance of any changes proposed as a result of the CLR will be influenced by developments in European discussions.

Prescriptive versus principles-based legislation

4.3. DBERR asks in its call for evidence about the extent to which stakeholders consider the UK Government should push for less prescriptive and more principles-based law at a European level and what the main benefits and risks of each of these approaches are. DBERR goes on to make the observation that, with some notable exceptions, prescriptive approaches are generally associated with older legislation, whilst principles-based approaches are typically associated with more modern legislation – such as the UCPD.

4.4. One particular problem with prescriptive legislation, which by its nature is often complex, is that it can rapidly be rendered obsolete with the attendant risk that consumer protection becomes open to circumvention by rogue operators, whilst imposing undue constraints and costs on legitimate businesses in how they deliver the consumer outcomes desired. In the view of the Advertising Association, where legislation is required it should be rendered future-proof. One difficulty with principles-based legislation of European origin is that it can be vague, particularly when introducing concepts that may be new to domestic law. This was experienced, for example, during the process of transposing the UCPD into UK law. On balance, however, the Advertising Association would express a preference for flexible principles-based laws given the greater latitude they permit to the way in which businesses may comply with them.

Alternatives to statutory regulation

4.5. Whilst the Advertising Association has expressed a preference for principles-based legislation over prescriptive laws, it considers that if intervention is necessary at all, the default position should be the promotion of self-regulatory solutions, given that businesses are often best placed to devise the most efficient routes towards providing the necessary levels of consumer protection. If self-regulation is not possible, then the lightest touch alternative (including co-regulation) should be considered with full statutory intervention resorted to only as a final option – in other words there should be a bias against intervention. This should also inform the position of the UK Government in its negotiations in Europe when discussions of self-, co- and statutory regulation arise. It is notable that self-regulation is inherently more flexible, responsive, cost-effective and swift to put into place than statutory options in particular.

4.6. In addition to the work of the Advertising Association's DMG (referred to in Paragraph 3.15 above and Paragraphs 4.8 and 4.9 below), the organisation is also currently involved in the discussions around the future co-regulation of advertising associated with video-on-demand services resulting from the need to implement the so-called Audio-Visual Media Services Directive (AVMSD)²⁰. Whereas advertising in video-on-demand has until now been

²⁰ Directive 2007/65/EC "amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities"

subject to self-regulation, AVMSD requires the establishment of a co-regulatory structure. It is somewhat disappointing that although AVMSD states its support for a self-regulatory solution, its definition of that concept in fact amounts to co-regulation. (AVMSD requires that any self-regulatory system, as the advertising industry would understand the concept, actually has a statutory partner.)

4.7. Moves in the opposite direction, in other words from statutory regulation to co-regulation are always, however, to be welcomed. A project, which was led by the Advertising Association, culminated in 2004 with responsibility for broadcast advertising being transferred from a statutory regulator – Ofcom – to that body becoming jointly responsible with the Advertising Standards Authority (ASA) for this sphere of activity in a new co-regulatory relationship. This has considerable benefits for consumers in that there is now a sole body – the ASA - to which they may complain about commercial communications, be they in broadcast or non-broadcast media. (Non-broadcast advertising is subject to a self-regulatory regime overseen by the ASA, with the OFT acting as a regulatory backstop to the Authority in respect of misleading advertisements specifically.)

4.8. With regards to the online environment, advertising in ‘paid for’ space is already regulated by the ASA. The Advertising Association is, however, leading another industry initiative – the DMG²¹ - to assess the current regulatory remit for advertising to ensure that those types of commercial communication appearing in the dynamic and rapidly evolving environment of digital media that are not presently subject to self-regulation will be. This Advertising Association initiative should serve to ensure that advertising standards are upheld and consequently that consumers are suitably protected. If any changes are made to the ASA system as a result of this initiative it will be proposed by the industry, but include public consultation.

4.9. Thus the Advertising Association’s DMG initiative should be seen as just the latest endeavour in a long series by the advertising industry – since the establishment of the ASA in 1962 - aimed at ensuring consumers are protected through the maintenance of high standards in advertising. In this context, the Advertising Association considers that DBERR should reiterate its continuing support for effective alternatives to statutory regulation in any recommendations coming out of its CLR and consider citing the ASA and current industry initiatives, such as in respect of self-regulation online, as exemplars of this.

28 August 2008

²¹ Further information about the DMG can be found at the following location:
<http://www.digitalmediagroup.co.uk/>

**Inclusion of mandatory information in advertisements:
relevant research findings**

The public's perception of advertising in today's society – report on the findings from a research study

Conducted by: The Thinking Shop

Commissioned by: The Advertising Standards Authority

Published: February 2002

Relevant finding: Consumers tend to regard the inclusion of mandatory statements in advertisements as there to protect the advertiser rather than being of benefit to themselves.

Download from:

http://www.asa.org.uk/NR/rdonlyres/A351FFA3-22D2-4A03-942E-F653A700B6EC/0/ASA_Public_Perception_of_Advertising_Feb_2002.pdf

Radio Commercials and Wealth Warnings

Conducted by: Navigator

Commissioned by: Radio Advertising Bureau

Published: February 2004

Relevant finding: Consumers use advertising to make them aware of the different products available rather than as a useful way to find out detailed information about them. Supplier literature is regarded as the most appropriate means for delivering such information. There is cynicism amongst consumers about the role and usefulness of warnings in advertising and recognition that radio would be most detrimentally affected by their inclusion.

Download from: n/a – not available online

Effects of advertising in respect of compensation claims for personal injury

Conducted by: Millward Brown

Commissioned by: Department for Constitutional Affairs

Published: March 2006

Relevant finding: Relying strongly on either text onscreen or a voiceover to convey a message can prove ineffective (unless the voiceover or text is clearly reinforcing the visuals appearing on screen at the time).

Download from:

<http://www.cap.org.uk/NR/rdonlyres/DC59B829-D6DC-4585-81C7-8A6D7BC5494F/0/ClaimsadvertisingreportFINAL080506.pdf>

Consumer Purchasing Outcomes Survey

Conducted by: BMRB and The Henley Centre

Commissioned by: Financial Services Authority

Published: September 2006

Relevant finding: Advertisements were not deemed to be a useful source of detailed information for house-buyers in their decision-making processes for purchasing mortgage products, despite the data they are required by the regulator to incorporate. (Information provided by financial advisers was considered to be the most useful source of data upon which decisions were made, followed by leaflets and brochures supplied by the financial services companies offering the products.) This finding would appear to underline the fact that advertising by its very nature is aimed at raising awareness of products, rather than acting as a source of detailed information that consumers utilise when making purchasing decisions.

Download from:

http://www.fsa.gov.uk/pubs/other/mortgage_review_outcomes.pdf

Licensing Conditions and Codes of Practice Focus Group Research

Conducted by: Corr Willbourn Research & Development, November 2006

Commissioned by: Gambling Commission

Published: November 2006

Relevant finding: Consumers tend to regard the inclusion of mandatory statements in advertisements as there to protect the advertiser rather than being of benefit to themselves.

Download from:

<http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/Focus%20group%20results.pdf>