

Financial Services Consumer Panel

AN INDEPENDENT VOICE FOR CONSUMERS OF FINANCIAL SERVICES

Telephone: 020 7066 9346

Email: enquiries@fs-cp.org.uk

Guy Horsington
EU Consumer Policy
Department for Business, Enterprise &
Regulatory Reform
1 Victoria Street
London
SW1H 0ET

6 February 2009
Our ref: BERR/Consumer Rights

Dear Mr Horsington

Consultation on EU Proposals for a Consumer Rights Directive

This is the Financial Services Consumer Panel's response to the BERR Consultation Paper on EU Proposals for a Consumer Rights Directive. The Panel's role relates specifically to certain areas of financial services, so we have provided comments only on those proposals that fall within our remit. Our understanding is that the revision of the Unfair Contract Terms Directive and the Doorstop Selling Directive has the greatest impact in this area.

Overview

The Panel has always promoted a high level of consumer protection across the board and we welcome the Commission's work in this area. We recognise that replacing four existing Directives with a single horizontal Directive to provide common definitions could have some advantages for consumers. However, as we said in our response to the Commission's Green Paper on the Review of the Consumer Acquis, there will always be particular aspects of financial services that can only be regulated effectively on a sectoral basis and having seen these detailed proposals, our view remains unchanged.

We do not support full harmonisation in this area. As well as having an unintended adverse impact on existing consumer protection measures, such as pre-contractual disclosure requirements for particular financial products, maximum harmonisation could also discourage innovation in the longer term. There is insufficient information available about the comitology process for developing the 'black' and 'grey' lists of unfair contract terms for us to assess the likely impact on enforcement work carried out by regulators and on Ombudsman and Court decisions.

We have set out below our response to the specific questions set out in the Paper that relate to financial services.

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

In theory there are could be advantages in a full harmonisation approach provided that it is limited to the area of definitions. There are unhelpful inconsistencies within the Directives covered by the proposal that should be removed, such as definitions of key terms. The number of Directives that exist – each of which was put in place to tackle specific issues at a particular time – has resulted in a fragmented and confusing picture overall. However, in practice many of the recommendations are detrimental to consumer interests in that they undermine existing levels of consumer protection. For example, in the area of disclosure.

It is often said that minimum harmonisation leads to variance at national level that effectively creates a barrier to the development of the single market. A fair and effectively functioning single market could have many advantages for consumers in terms of choice and competitive pricing, but it would be wrong for the single market to be developed at the expense of existing consumer protection. Consumers would not be encouraged to engage in a single market where they are provided with less information – or less clear information – than they previously enjoyed in the national market.

The Panel does not support a full harmonisation approach for the Consumer Rights Directive other than in the area of definitions, as we believe the disadvantages far outweigh the advantages. We strongly favour a minimum directive which would set a welcome and consistent basic level of consumer protection on which individual Member States could build, but still allowing scope for additional measures to address particular situations and developments at a sectoral and national level.

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

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?

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

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

Article 5 of the proposed Directive requires traders to provide general pre-contractual information to consumers “if not already apparent from the context” covering, broadly, the price; main characteristics of the product; identity of the trader; and withdrawal rights. Our understanding is that these requirements would apply to banking, mortgages, certain personal pensions and investments, and payments. These can be complex products and there could be real practical difficulties in identifying their main characteristics and assessing what information is already “apparent from the context”. The information requirements could be unworkable here. It is not clear how work currently underway on a revised simplified prospectus for UCITS products would impact on the information disclosure requirements in the Directive.

As a general principle we support the requirement for traders to inform consumers of the existence of relevant Codes of Conduct and Alternative Dispute Resolution Services and how they can be accessed.

The pre-contractual disclosure requirements already in place in financial services are specifically tailored to the risks posed by different products and have been the subject of open consultation and debate. Key Features and Key Facts Documents have been carefully developed and reviewed over time in the light of consumer experience. They have been specifically designed for particular sectors of the market which are both diverse and sometimes very complex. Consumers of financial services stand to lose much of the protection provided by this highly developed regulatory regime by the imposition of the general, and untested, information requirements set out in the proposed Directive.

Article 9 sets out the information which must be included in off-premises contracts and imposes a 14-day right of withdrawal on products which are sold off-premises. Again, the FSA Handbook contains specific requirements covering important aspects of financial services contracts which are relevant to particular products and services. Some personal pension products have a cancellation period of 30 days, rather than 14, which would be removed under a maximum harmonisation Directive.

We have no objection to the introduction of an appropriately worded and flexible withdrawal form for use as a guide by consumers.

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?

As a general principle we would like to see an additional requirement that information on withdrawal rights is prominent.

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 would be helpful as consumers shopping cross-border cannot reasonably be expected to be familiar with the public holidays taking place in other Member States.

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

We strongly support the introduction of lists of 'black' and 'grey' contract terms where the black list sets out those terms automatically considered unfair, and the grey list those terms deemed unfair unless the trader proves otherwise. The lists will bring a greater degree of legal certainty in this area and their introduction is a welcome development for consumers. We do have some concerns, however, about the practical impact of the comitology procedure, which we have set out in our answer to question 63.

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

As is noted in the Consultation Paper, the proposed Directive would apply to contract terms which the consumer did not have the possibility of influencing. We agree that traders should not be able to effectively bypass the Directive by offering the

consumer a choice between pre-drafted contract terms. It is important too that even if a contract contains terms that are negotiated with/influenced by the consumer, the remaining terms will be covered by the Directive. We agree that there should be clarity about whether contract terms which the consumer had an opportunity to influence, or where he or she tried to do so but failed, are covered by the Directive.

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

We support the new requirement for express consent to be given by the consumer to any payment in addition to the principal contractual obligation. Where consent is inferred rather than explicitly given, the consumer will be entitled to reimbursement. In the case of financial services contracts, this will cover additional charges applied to the product or products involved and will provide a helpful level of protection in this area. We welcome too the requirement that all contract terms should be made available to consumers in a way that enables them to read them prior to the conclusion of the contract, even where the contract has been concluded by telephone or online. It is entirely appropriate that the burden of proof rests with the trader in cases where a trader is claiming that a contract term has been individually negotiated.

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

We have no comments on the terms included in the 'black' list.

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

It is difficult to envisage any circumstances where, for example, a term restricting a consumer's right to take legal action or exercise any other legal remedy, could possibly be fair. We do not think that a black list would be too inflexible.

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

We support the black and grey lists, but we are not in a position to comment on the terms themselves.

Q63: Please provide any further comments on Chapter 5.

As we understand it, the black and grey lists will be updated and developed using the comitology process. The draft Directive does not set out, however, how any bodies set up to deal with unfair contract terms under this system will operate in practice and we would like to see more information about the comitology procedure.

In the financial services market both the Financial Services Authority and the Office of Fair Trading exercise powers under the Unfair Contract Terms Directive and both have undertaken valuable enforcement action in areas such as mortgage exit administration fees and bank charges. It is unclear how the comitology procedure will interact with this work and more generally, how the outcomes will be applied on a full harmonisation basis. In addition, financial services consumers with unresolved complaints against firms have access to both the Financial Ombudsman Service and

to the Courts. Again, we are unsure of the impact of comitology and of the full harmonisation status of the Directive on the rights of individual consumers in terms of compensation and redress. This is a complex area which requires greater development and clarity.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Adam Phillips', with a long horizontal flourish extending to the right.

Adam Phillips
Acting Chairman
Financial Services Consumer Panel