



Response of ECC Ireland to the Department of Jobs, Enterprise and Innovation on the Consultation on the Implementation of Directive 2011/83/EU on Consumer Rights

The European Consumer Centre in Ireland (ECC Ireland) is part of a network of 30 centres (ECC-Net) across Europe. Co-funded by the European Commission and the National Consumer Agency (NCA), ECC-Net provides information and advice to the public on their rights as consumers, as well as assistance in the resolution of cross-border consumer disputes.

Despite previous legislative attempts to rectify the matter, empirical data from the European Commission's identified several major obstacles preventing consumers from cross-border shopping. According to this data, 62% of consumers who had not made a cross-border distance purchase cited fear of fraud as a factor, whilst 59% cited concerns and what to do if a problem arose, 49% were concerned about delivery or lack thereof and 44% stated that being uncertain about their rights discouraged them from buying goods or services from sellers in other EU countries.¹

All of these factors together with many others such as the fact that many online traders may not be prepared to sell to consumers from other countries has likely contributed to the state of play in which one sees an increase in domestic online e-commerce, but not at a pan-European, cross-border level.²

Meanwhile, research from the NCA indicated that 40% of consumers have experienced someone calling to their door to sell them a product or service in the past twelve months.³

In this context, ECC Ireland welcomes the opportunity to respond to the Department's consultation on transposing certain provisions of the Consumer Right's Directive - which will see the consolidation and replacement of Directive 1985/577/EEC on Contracts Negotiated Away From Business Premises and Directive 1997/7/EC on the the Protection of Consumers in Respect of Distance Contracts. Below are ECC Ireland's submissions for the Department's call for responses.

Question 1: Should the implementing Regulations avail of the option to exempt off-premises contracts with a value of less than €50 from the Directive's provisions on consumer information and the right of the consumer to withdraw from the contract? If not, should there be (a) no threshold or (b) a threshold set at an amount less than €50. If the latter, please state the threshold that should apply in your view.

¹ European Commission, *Consumer Conditions Scoreboard, Consumers at Home in the Single Market*, 5th Edition (March, 2011)

² Roxana, A. *The New Consumer Rights Directive: A comparative Law and Economic Analysis of the Maximum Harmonisation Effects on Consumers and Businesses*, Aarhus University, Spring 2012

³ See: National Consumer Agency, *Market Research Findings: Consumer Experience with Direct Selling*, August 2011.

ECC Ireland considers that whilst there may be a case to be made for an exemption in terms of information requirements, given the informal nature of some of the transactions of this type, it is difficult to support such a contention with regards to that information which is so basic that it would not be onerous for traders to provide, yet which is vital consumer protection and recourse if needed. In particular, it is submitted that traders should be required, at a minimum, to provide details pertaining to their legal identity and geographical address as these details would be required if the consumer attempted to bring a Small Claims action etc.

This is particularly the case given that vulnerable groups of consumers such as the elderly may be more prone into entering this form of contract, as opposed to distance contracts, perhaps due to a lack of technological know-how and the convenience of dealing with a trader face-to-face in their own home.

Question 2: Should the implementing Regulation exempt on-premises contracts of a day-to-day kind that are performed immediately from the information requirements of Article 5 of the Directive? If not, why not?

Whilst the meaning of “day-to-day transactions” which are performed immediately is somewhat ambiguous, if one considers the wording of Article 5(4) of the French text of the Directive which uses the phrase “*transactions intéressant la vie quotidienne*”⁴ or everyday transactions, it would appear that the intention is to exclude routine transactions.

Proceeding on this basis, ECC Ireland supports the decision to exclude such transactions from the information requirements of Article 5 of the Directive.

Question 3: Please give details of any mandatory pre-contractual information requirements of which you are aware (other than those indicated in paragraph 29) that apply to on-premises transactions and which require traders to provide information additional to that required by Article 5 of the Consumers Rights Directive.

Similar, to Article 6(e) of the Consumer Rights Directive, it is submitted that where the contracts involved are for those of indefinite duration or for a subscription, pre-contractual information regarding the total price should also include the total costs per billing or subscription period, as well as the conditions for renewal on an opt-in basis.

Whilst not mandatory as of yet, the Directive 2013/11/EU on Alternative Dispute Resolution in consumer disputes will require that traders “inform consumers about the ADR entity or entities” by which they are covered, as well as “when those traders commit or are obliged to use those entities to resolve disputes with consumers”. The introduction of this information at the pre-contractual stage would also bring Article 5 in line with Article 6(1)(t).

⁴ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:FR:PDF>

Question 4: Should the implementing Regulations avail of the option to provide for lighter information regime for off-premises contracts for immediate repair and maintenance work costing less than €200? If not, why not?

Overall, ECC Ireland submits that whilst there may be a case to be made for an exemption in terms of information requirements with regards to these types of contract, it is difficult to support such a contention with regards to that information which is so basic that it would not be onerous for traders to provide, yet which is vital consumer protection and recourse, when required. As previously noted, this information would comprise of basic details such as the legal identity of the trader and their geographical location – details which are vital if the consumer wishes to pursue the matter via a legal action and which, for instance, could very easily be provided by way of a business card etc.

It is submitted that at least these two informational requirements should be required given that the costs to traders will be minimal (to non-existent), €200 is a reasonably high monetary threshold - so the detriment suffered could be quite substantial for some consumers, and finally vulnerable consumers such as the elderly or those with mobility issues tend to represent a rather substantial part of this market,

As such, ECC Ireland submits that the Department should consider requiring these particular details to be provided.

Question 5: Should the implementing Regulation require the consumer's written consent to the traders offer and/or the trader's confirmation of that offer on a durable medium?

- 1. In all distance contracts to be concluded by phone**
- 2. In all distance contracts to be concluded by telephone where the telephone contact leading to the contract was made by the trader, or**
- 3. In no distance contracts to be concluded by telephone**

ECC Ireland submits that Article 8(6) of the Directive should apply to Option 2, i.e. all those contracts concluded by telephone where the telephone contact leading to the contract was made by the trader. The rationale behind such a decision is that some less scrupulous traders may contact consumers directly with the intent of using aggressive selling techniques over the telephone, with the result that consumers may enter into transactions which upon reflection they may wish they had not entered into. In those instances, where the consumer has a right to a withdrawal period the detriment suffered in such instances would be less, however, as noted in the Consultation Paper such a requirement would prove very beneficial in those areas where no withdrawal period exists e.g. car rental or other leisure services with specified dates or periods for performance.

Whilst it may appear obvious, for practicalities sake, perhaps some guidance could be provided as to the circumstances in which the telephone contact leading up to the contract can be deemed to have been made by the trader". For instance, if a consumer contacts the trader requesting information, but no one is available and, subsequently, the trader contacts the consumer back, would it be the consumer's or the trader's call that could be considered to have led to the contract.

Furthermore, it is submitted that clarification pertaining to the meaning of the phraseology "the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or

has sent his written consent” would be welcome. For instance, would an electronic signature or other means of electronic communication be sufficient and what would the concept of “written consent” involve. For instance, should certain wording be used or are there requirements that the consent could not be deemed valid unless stated in a particular manner, e.g. plain, intelligible and unambiguous manner?

Regarding Option 1, ECC Ireland can see merit in the suggestion but envisage some difficulties regarding the implementation of the scheme.

The advantages to the proposal is that it would ensure that the consumer has a written copy of the trader’s/intermediary’s offer made over the telephone and in this way disputes regarding discrepancies over the specifics of what was to be included or what was involved in the transaction can be avoided. This would represent an improvement on the current situation where, in the absence of a written record, it is essentially one person’s word as against the other. Also, as the rule would apply to all distance contracts concluded in this manner it would be easy for consumers to understand.

On the other hand, it is likely that the proposal would require follow-up measures to be adopted by traders which may be burdensome. Whilst obtaining the confirmation of the consumer to the offer may not be particularly difficult if the consumer has access to e-mail etc., it may be more difficult to implement if the consumer is unable to use such technology or does not have access to it. For instance, in those instances would the offer be on out via post? What would happen if the price increased in the meantime – would it be possible to state that the offer was valid for a certain period of time, for example, 48 or 72hours? What would happen if the consumer’s consent to the offer was lost in transit?

For these reasons, ECC Ireland submits that any implementation of Option 1 would require detailed consideration beforehand, whilst at a minimum the approach as advocated in Option 2 should be adopted.

Question 6: Should the implementing Regulations avail of the option to extend the Directive’s consumer information provisions to off-premises and distance contracts for social services? If not, why not?

And:

Question 7: Should the implementing Regulations avail of the option to extend the Directive’s consumer information provisions to off-premises and distance contracts for healthcare? If not, why not?

In the absence of sector specific legislation offering consumer protection in these areas, it is ECC Ireland’s strong submission that the implementing Regulations should avail of the option to extend the Directive’s consumer information provisions to off-premises and distance contracts for both contracts for social services and for healthcare.

Firstly, both sectors were previously covered by the information and withdrawal provisions of the existing Directives such that by not availing of the option consumers would suffer a diminution in

protection previously afforded to them and there may be confusion amongst the public as to why this is the case now.

Secondly, when one considers the consumer market that such contracts may have it is often the case that such consumers are more vulnerable than the “average consumer” and the purchases involved are often made urgently (e.g. due to a pressing medical need) or during period of high stress (e.g. social services such as home care assistance).

Simplicity of rights (where possible) is crucial, especially in sectors where consumers may be more vulnerable, so that consumers can be confident in their rights and how to assert them. This may be particularly pertinent, in the case of healthcare contracts, where consumers may be unaware of whether they are purchasing from a “healthcare professional” or a commercial trader.

Question 8: Should the implementing Regulations avail of the option to extend the Directive’s consumer information provisions to gambling contracts? If not, why not?

The stated rationale for excluding gambling contracts was that “Member States should be able to, adopt other, including more stringent, consumer protection measures in relation to such activities”.⁵ This is despite the fact that previously such contracts were covered by both the existing Directives on off-premises and distance contracts.

Currently, gambling is regulated in Ireland by Gaming and Lotteries Act of 1956,⁶ legislation which is considered to be out of pace with other countries and developments in the industry. In addition, on 19 July 2012, the Irish Government published in draft the long-awaited Betting (Amendment) Bill 2012 which aims to regulate on-line bookmakers and betting exchanges.⁷

It is understood, however, that a comprehensive package of proposals to address on-line gambling is at an advanced stage – with publication expected in 2014.

In the past there was, and likely there will continue to be, a tension between the social policy rights such as containment of such activities and consumer protection as against the potential revenue generation that this sector of the economy could provide.⁸

In this context, it is difficult to ascertain whether the regulation of the sector in the interests of consumer is better reserved to this legislation, given that it has not yet been published, or whether the Consumer Rights Directive represents a more suitable avenue for consumer protection.

What is clear, however, is that this area is one which requires stringent consumer legislation given the very substantial risks that such activities can pose to some vulnerable consumers and that the removal of such contracts from the scope of the Directive represents a diminution of the current consumer protection in a sector with potential for substantial consumer detriment.

⁵ Recital 31 of Directive 2011/83/EU on consumer rights

⁶ Available at: <http://www.irishstatutebook.ie/1956/en/act/pub/0002/>

⁷ See: <http://www.oireachtas.ie/documents/bills28/bills/2012/6812/b6812d.pdf>

⁸ See: Report of the Interdepartmental Review Group, *Review of the Gaming and Lotteries Act 1956-1986*, June 2000. Available at: <http://www.justice.ie/en/JELR/GamingLotteriesActs.pdf/Files/GamingLotteriesActs.pdf>

Bearing that in mind, it is possible (although as of yet unknown) that if the exemption pertaining to gambling contracts is merely copied out some form of contracts may be considered to be within the exemption but outside the scope of the new legislation resulting in no protection being offered.

Finally, it is submitted that any domestic legislation should offer the same – if not higher - level of consumer protection as would be offered if the provisions regarding gambling contracts were transposed into Irish law.

Question 9: (a) Are the proposed rules relating to the cancellation of ancillary contracts clear and fair? (b) Do they need to be supplemented in general or in respect of particular types of ancillary contracts?

In general, ECC Ireland supports the rules relating to the cancellation of ancillary contracts. Some issues do appear to arise however.

There exists the potential for confusion where consumers may have “overlapping” cancellation rights. For example, under Directive 2008/48/EC on Credit Agreements for Consumers Consumer Credit Directive,⁹ as transposed in Ireland via the European Communities (Consumer Credit Agreements) Regulations 2010,¹⁰ consumers have a fourteen day withdrawal period from credit agreements.¹¹ As per section 17(3)(b) if the right of withdrawal is exercised by the consumer in these circumstances the consumer “shall pay to the creditor the capital and the interest accrued on it (at the agreed borrowing rate) from the date the credit was drawn down until the date the capital is repaid, without any undue delay and no later than 30 calendar days after the dispatch of the notification of the withdrawal”.¹²

However, if the consumer cancels under the Consumer Rights Directive any ancillary agreement, including potentially any credit agreement, “shall be automatically terminated without any costs for the consumer.”

The difference in cancellation rights may then be compounded if the trader involved failed to notify the consumer of their withdrawal rights such that the period of withdrawal is extended to twelve months under Article 10 of the Consumer Rights Directive – during which time interest would assumedly accrue. Would all of this interest also be forgone by the trader? Clarity on this issue is required.

It may also be necessary to consider what would occur if, for instance, either the trader to the principal contract or the trader party to the ancillary contract were not in a position to return any “property provided as security” back to the consumer. Could the consumer then seek a sum equal to the value of the property held as security? Similarly, what would occur if the property was returned back to the consumer party but the consumer disputed the condition in which the property was returned?

⁹ Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDF>

¹⁰ Available at: <http://finance.gov.ie/documents/publications/statutoryinstruments/2010/si2812010.pdf>

¹¹ Ibid. As per section 17(1).

¹² Ibid.

Question 9: (c) Is requiring the trader party to the ancillary contract to reimburse the consumer the best way to proceed, or should the trader party to the principal contract be responsible for reimbursements arising from the ancillary contract?

It is submitted that potentially the method which consumers would most likely understand is that the funds be reimbursed back to them from whomever they paid the money to.

For example, the consumer purchases a sofa and an extended guarantee with an insurance company – all of the monies of which are paid to the trader. In this instance, then the trader of the principal contract should refund the monies back.

Or the consumer purchases a sofa from a trader, but then needs to organise an ancillary contract for the items delivery and pays both parties separately. The consumer should then be reimbursed by both parties for the respective monies paid.

Legislative guidance regarding both the length of time that the trader of the principal contract has to notify the trader of the ancillary contract of the consumer's cancellation and the length of time within which the funds for such ancillary contracts should be reimbursed should be provided. It is submitted that the wording used should be akin to that in Article 13(1) i.e. "without undue delay and in any event not later than 14 days".

Question 10: Should the implementing Regulations avail of the option to extend the right of withdrawal to off-premises and distance contracts for social services? If not, why not?

And:

Question 11: Should the implementing Regulations avail of the option to extend the right of withdrawal to off-premises and distance contracts for healthcare? If not, why not?

In the absence of sector-specific legislation in this area, ECC Ireland submits that the implementing Regulations should avail of the option to extend the right of withdrawal to off-premises and distance contracts for both contracts for social services and for healthcare.

Of particular consideration is that two broad factors influence a consumer decision to buy. The first is an objective factor, what one may consider to be *the ability to buy*. The second, and more pertinent factor in these situations, is a subjective factor that Katona termed a *willingness to buy*.¹³

As discussed in response to questions 6 and 7, consumers who may be entering into such contracts are given the nature of such contracts more likely to be entering into such contracts at a time of high stress or may need to acquire the product or service urgently given their circumstances. In such instances, it is arguable that there should be more statutory protection not less – especially with regards to a right such as the right of withdrawal.

For instance, an Office of Fair Trading Market study into Mobility Study found unfair sales practises targeted at elderly and other vulnerable consumers particularly prevalent in doorstep sales.¹⁴

¹³ See: Katona, G. (1975) *Psychological Economics*, Elsevier Scientific Publishing Company, New York.

¹⁴ See: *Mobility Aids: An OFT Market Study* (OFT 1374). Available at: www.offt.gov.uk/OFTwork/markets-work/mobility-aids

Whilst, a NCA Study conducted in August 2011 did not indicate that the area of healthcare or social services was a major target area in doorstep sales - just under three in five (57%) respondents who experienced door-to-door selling in the past 12 months were informed of their right to cancel any purchase made and just under two in five (39%) received written information on the product before signing up indicating the need for strong consumer legislation and enforcement in this area.¹⁵

Question 12: Should Article 21 of the Directive on Communication by Telephone apply to all consumer contracts for goods, services or digital content. If not, what exceptions should apply and why?

In terms of those contracts which are currently exempted from the scope of the Consumers Rights Directive as provided for under Article 3(a)-(m), it is considered that Article 21 on the costs of communicating by telephone should not apply to Article 3(c) – (f) and (j).

Reason for Exemption:

These provisions would either not be appropriate given the nature of the contracts themselves or the sectors would be better served through sector specific legislation.

Question 13: Should the National Consumer Agency be empowered to apply for a court order in respect of a breach of the Directive’s provisions in the District as well as the Circuit Order? If not, why not?

ECC Ireland submits that it should be possible for the NCA to apply for a court order in the District Court as given the nature of District Court proceedings, as against Circuit Court and especially High Court proceedings, it would be more cost efficient and expedient.

Issues worthy of consideration, however, would be the perception of bringing an enforcement action via the District Court e.g. Does this appear to diminish the gravity of the offence? Also, it is pertinent to remember that if the NCA were looking for some form of additional ancillary relief such as a fine that the threshold for District Court applications is €6,348.69 – although this may increase to €15,000 if the relevant provisions of the Courts Bill 2013 are commenced.¹⁶

In any case, ECC Ireland opines that providing the NCA with a wide and flexible range of options with which to respond to infringements of the Regulations would be a welcomed development.

Question 14: Should breaches of all of the Directive’s provisions other than Articles 18 and 20 on delivery and the passing of risk be subject to criminal law proceedings? If not, which provisions of the Directive are inappropriate for criminal law enforcement and why?

Under Article 23 Member States are obliged to ensure that “adequate and effective means exist to ensure compliance with the Directive”. To this end, Article 24 states that the penalties provided must be “effective, proportionate and dissuasive”.

As the ability to prosecute a rogue trader can provide a significant deterrent factor, and is therefore arguably also effective, the question arises as to whether criminal sanctions are “proportionate”. It

¹⁵ Supra note 3.

¹⁶ The Bill is available at: <http://www.oireachtas.ie/documents/bills28/bills/2013/3013/b3013s.pdf>

may be desirable that the NCA's powers are aligned with those conferred by the Consumer Protection Act 2007.

In those instances deemed appropriate for criminal prosecution, for example, failure to rectify breaches pointed out to them, substantial consumer detriment etc., criminal prosecutions may be deemed appropriate especially in the context of information requirements (whether off-premises or distance contracts) and withdrawal rights.

However given Article 5's rather vague wording, which states that the trader shall provide the consumer with information in a "clear and comprehensible manner, if that information is not already apparent from the context", it is easy to see difficulties which may arise in attempting to successfully bring a criminal prosecution in these instances.

Finally, it might be added that education of traders as to their rights is also an effective and undoubtedly more proportionate manner in ensuring that breaches do not occur in the first place.

Question 15: (a) What form should the consumer's right of redress take in cases where he or she seeks to recover payments made to the trader that the trader is obliged to return under the Directive?

ECC Ireland believes that in addition to the above avenues of enforcement/public redress consumers should as a matter of principle should also have a right to private redress.

In those instances, where the consumer has made payments to the trader and the trader is obliged to return the funds, a right of redress should exist under contract law for breach of contract. ECC Ireland favours such an approach based on contract law principles, in this instance, as this is likely to be quite intuitive for consumers who appear to be broadly familiar with the principles.

Where the failure to comply with the obligation to reimburse payments is following on from the cancellation by the consumer, it is submitted that the trader's obligation to repay should survive the cancellation of the contract.

In addition, it is submitted that matters pertaining to the non-compliance with pre-contractual information could be actionable via a breach of statutory duty, with an attached right to compensation.

Question 15: (b) What form should the trader's right of redress take in the event of a failure by consumers to return goods in accordance with their obligations under the Directive?

In this instance, it is submitted that a private right of redress for breach of contract represents the simplest method. The contract should set out what the consumer must do in order to return the goods in plain intelligible language.

It is noted, however, that the reason why a consumer may not be returning the goods is likely to be because of a dispute in relation to the goods/services provided, for example, because the goods are allegedly not in conformity or the amount of the refund is in dispute etc. It may be helpful then if guidance was provided as to when it may be considered to appropriate for a trader to exercise its rights.

Other Matters

All traders within the scope of the Consumer Rights Directive, regardless of the method of sale, will generally be expected to deliver goods to consumers within 30 days of an order being placed, unless otherwise agreed. If the trader does not deliver on time, consumers will be entitled to terminate the contract and receive a refund if the business does not deliver the goods during "an additional period of time appropriate to the circumstances".

ECC Ireland submits that guidance should be provided as to how long this period of time is expected to be.

Conclusion

In conclusion, therefore, ECC Ireland welcomes the introduction of the Consumer's Rights Directive and is appreciative for the opportunity to comment on the above proposals for the transposition of the Directive.

Contact

Lynnsey Delaney
Assistant-Legal Advisor
European Consumer Centre,
The MACRO Centre,
1 Green Street,
Dublin 07.
ldelaney@eccireland.ie
01-8797641