



CONSULTATION ON THE IMPLEMENTATION OF DIRECTIVE  
2011/83/EU ON CONSUMER RIGHTS

AIRTRICITY RESPONSE TO  
THE DEPARTMENT OF JOBS, ENTERPRISE AND  
INNOVATION

JULY 2013

## INTRODUCTION & GENERAL COMMENTS

Airtricity welcomes the consultation on the implementation of Directive 2011/83/EU.

Airtricity, an energy supply business, has been steadily growing in respect of domestic and commercial electricity and gas customers, and currently serves over 820,000 customers. In response to the energy efficiency targets set for energy suppliers as part of the Better Energy scheme managed by SEAI, Airtricity Energy Services provides energy efficiency measures and has carried out over 50,000 boiler services to date. Airtricity is part of the SSE group which is also involved in the operation and development of wind and thermal electricity generation stations in Ireland.

Airtricity notes that much of the Directive has a maximum harmonisation character. As an electricity and gas supplier we are bound by our licence and the CER's Supplier Handbook which also govern our interactions with customers. We believe that existing requirements must be reviewed for consistency with the Directive once it has been transposed to ensure that Ireland has not imposed higher or conflicting standards than those in the relevant provisions of the Directive. In addition, where obligations under the Directive and the regulatory regime overlap, a clear understanding of enforcement process and responsibility must be identified to avoid duplication of role and resource requirements. The problem of double regulation is likely to cause confusion for customers with respect to which body they should refer their issue, and the potential for different enforcement procedures exposes industry to additional costs and risk in terms of ensuring compliance.

SSE agrees that, in the interest of clarity, the wording of the Directive should be adhered to in the Statutory Instrument. Whilst we hope and expect that there would not be conflicts or inconsistencies, we note the footnoted quotation from *Nathan v Bailey Gibson* but point out that superimposing the wording of the Directive where there is a clear conflict or inconsistency creates legal uncertainty and risk for traders, who are bound by Irish law and do not have control over the transposing Statutory Instrument. It would therefore be unfair to punish a trader who has adhered to the terms of the Statutory Instrument.

## RESPONSES TO SPECIFIC QUESTIONS

**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.**

SSE agrees with a €50 exemption threshold as a pragmatic measure.

**2. Should the implementing Regulations 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?**

SSE is in agreement with the exemption from Article 5 of on-premises contracts of a day-to-day kind which are performed immediately, again with a view to achieving a pragmatic balance.

**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 Consumer Rights Directive.**

As stated in the paper, electricity and gas suppliers are required to provide set information to customers and undertake a mandatory checklist to ensure the customer is aware of key information prior to entering a contract under the terms of the CER's licence and Supplier Handbook. Airtricity recognises the benefit of ensuring customers are fully aware of what they are contracting for, however we believe that all of the provisions of the handbook should be reviewed to ensure that none breach the maximum harmonisation elements of the Directive.

Another facet of Airtricity's business is the provision of energy efficiency measures; work in this area is under review as part of the Better Energy Project, which involves the Department of Communications, Energy and Natural Resources and the Sustainable Energy Authority of Ireland. It is likely that there will be a number of pre-contractual information requirements under that programme and we would submit that this area should be kept under review in line with the Directive. There are probably some cases where the exemption regarding the substantial conversion of existing buildings exemption would apply to energy efficiency retrofit work, this area will require further examination by providers.

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

Airtricity believes that this exemption should be availed of and that Ireland should implement the minimum information requirements as this provides adequate safeguard for consumers whilst reducing the burden and costs of compliance for traders.

**5. Should the implementing Regulations require the consumer's written consent to the trader's offer and/or the trader's confirmation of that offer on a durable medium?**

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

Airtricity believes that Ireland should avail of Option 3, that the customer's written consent to the trader's offer should not be required in any distance contracts concluded by telephone. We consider that where the trader is obliged to provide confirmation of the contract after it has been concluded, and where the customer has a right to a withdrawal period of 14 days, the customer is sufficiently protected. Indeed the rationale for the right of withdrawal is said to be to protect customers who may be 'caught off guard' by a trader and not in a position to compare other offerings at the time of agreeing to the contract.

There are a significant number of customers with communication requirements who prefer or may need to have contracts explained and completed by phone. For example, customers with vision impairments and those with literacy issues would often avail of this method. We are concerned that a written requirement would restrict the ability of some customers to avail of the benefits of competition and defeat the purpose of the Directive.

Separately, requiring written consent by the customer imposes an administrative burden on the customer and may result in customers inadvertently failing to complete contracts (as they believe they've already completed them) or deliberately where a customer decides that it is too onerous to complete the contract. This would have significant impact on contracts involving utilities which ordinarily commence after a set period of the contract being concluded. Where a customer is required to complete the contract in writing, delays in initiating supply of the utility may occur. This would create problems, for example, where a customer moves into a property where the electricity has been disconnected. A supplier would usually open an account and arrange for the property to be reconnected immediately by phone. The reconnection request would be delayed until such time as written confirmation is received which would not be in the consumer's best interest.

Requiring customers to consent to the trader's offer in writing could generally have an anti-competitive impact by creating a barrier to new entrants securing new customers; we would note that switching among energy suppliers has been healthy and has delivered benefits to customers in terms of choice and innovation.

**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?**

No comment.

**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?**

No comment.

**8. Should the implementing Regulations avail of the option to extend the Directive's consumer information provisions to gambling contracts? If not, why not.**

No comment.

**9. Are the proposed rules relating to the cancellation of ancillary contracts clear and fair? Do they need to be supplemented in general or in respect of particular types of ancillary contract?**

**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?**

Airtricity submits that the 14 day deadline to reimburse customers where a customer has exercised his right of withdrawal is demanding on traders due to administrative and banking procedures and timelines. We would advocate that a standard of 21 days be adopted.

Regarding the points made on page 46 of the paper we note that:

- The customer and ancillary trader may have contractual arrangements in place regarding the cancellation of the contract and if so the principal trader should not be obliged to inform the ancillary trader.
- We agree that 30 days should be sufficient for the ancillary trader to return the relevant payments or deposits made to the customer.
- We understand that the specified period is as determined in the credit agreement itself and believe that this should be the case, otherwise interest payments may have accrued and will have to be paid for.

On the question of whether the ancillary party or the principal trader should be required to reimburse the customer, Airtricity would argue that the ancillary trader is best placed to meet the reimbursement deadline where the payment has been transferred to them as an extra transfer (to the principal trader) will have been avoided.

**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.**

No comment.

**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.**

No comment.

**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?**

No comment.

**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?**

Airtricity is concerned that a number of bodies will now be monitoring compliance and enforcing consumer protection rules, with different enforcement powers and penalties, in respect of the supply of electricity and gas, namely the Commission for Energy Regulation and the Consumer Agency. For the purposes of clarity and transparency we submit that one body should be responsible for this task, or alternatively that responsibilities be separated and clearly set out. Otherwise the burden, risks and costs of compliance for electricity and gas suppliers will be increased, which will result in increased costs for customers.

Airtricity would agree with the proposal that it be possible for the Agency to apply to the District Court and Circuit Court for orders. We would emphasise that traders must be given the opportunity to consider any complaints and to resolve them before legal proceedings are initiated and that this procedure should be the formalised policy of the Agency.

**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?**

Airtricity submits that a voluntary compliance approach, with scope for parties to seek redress if necessary, is preferable as it allows the Agency, consumer and trader the flexibility to remedy the situation quickly and we would like to see this approach formalised in any event.

Any sanctions must be proportionate and we submit that they should only apply where the trader has been given to remedy the breach and where an order prohibiting the trader from breaching the Directive has not been acted upon within a reasonable timeframe.

**15. 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?**

**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?**

Airtricity considers that there should be a cheap and easy way for customers and traders to pursue claims for redress in these circumstances. Preferably this would be through an Ombudsman type body or through the relevant court, eg the Small Claims Court.