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# THE DISTANCE SELLING DIRECTIVE: CONSUMER CHAMPION OR COMPLETE IRRELEVANCE?

## ABSTRACT

This paper investigates the origins, significant content, UK and EU implementation and outcomes of Directive 97/7/EC on distance selling, hereafter referred to as the Distance Selling Directive (DSD). The DSD has been implemented in national legislation by all EU Member States. In the UK this legislation was the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000 No. 2334), hereafter referred to as the CPDSR.

**KEYWORDS** Distance Selling Directive, consumer protection.

**INTRODUCTION** This paper discusses the implementation of the Distance Selling Directive (DSD) and questions whether the legislation affords consumers any protection when buying goods or services on-line. The paper discusses the origins of the DSD, illustrates some of the problems of implementation by presenting some recent "cases" involving the DSD. Conclusions question the validity of the DSD in actually protecting consumers on-line.

## 1. THE ORIGIN OF THE DSD; MAIL ORDER SHOPPING.

Although the DSD was adopted in May 1997, the initial European Commission proposal for it dates back to 1992 and this in turn stemmed from the Commission's response to a 1989 Council Resolution on consumer protection policy. The consumer protection issues of the time related to mail-shops and telephone shopping performed at a distance. During its genesis, the substance of the DSD was not altered in relation to concurrent technical developments on the Internet that gave birth to e-commerce.

### 1.1 Coverage & Exemptions

The DSD does not define distance communications by their technical forms, but in terms of their general principles:

“any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties” (Article 2.4).

The DSD gives only what it calls an “indicative list” of distance communications technologies in Annex 1. This list is unchanged from that originally proposed by the Commission in 1992. It includes electronic mail, but this is probably because private e-mail providers (like AOL, CompuServe and Genie) pre-date Internet-based email by many years. There is no mention of Internet-based technologies like World Wide Web etc. The rest are predominantly traditional technologies, paper and telephony-based. The list does include two extinct technological fossils, the “videophone (telephone with screen)” and “videotext (microcomputer and television screen)”. As Recital 9 wisely states, “the constant development of those means of communication does not allow an exhaustive list to be compiled”.

This technological blind spot is causing problems for some new areas. For example:

“The Distance Selling Directive and other regulations must be tailored for m-commerce, as the notices needed by such directives will eat into the storage facilities of mobiles and make 'frictionless' m-commerce almost impossible.” (Naylor 2002)

while the mobile network operator Orange described the DSD as:

"failing to be adaptable and suitable for a range of different means of conducting sales" (McRobb 2000)

It may well be that the first generation of Internet-enabled WAP mobile phones falls foul of DSD because of their small screens, inability to display graphics, slow data transfer speed and miniscule data storage capacity. However this is at worst a temporary problem as the ever-developing capacity of mobile phones (faster GPRS/EDGE/UMTS connections, bigger colour screens, more memory etc.) will eventually allow them to fulfil the requirements of the DSD. Ironically, not defining technologies seems like a lucky windfall when technologies are changing so fast.

There is certainly a problem in the definition of transactions the DSD covers. It does not cover business to business distance transactions. Article 2.2 defines a consumer as a person “acting...outside his trade, business or profession” while Article 2.3 defines a supplier as a person “acting in his commercial or professional capacity”. As Chissick and Kelman 2002 state:

“the implications from early documentation and debate behind the legislation is that a consumer is a non-specialist dealing with an undertaking in a superior bargaining position”

However one recalls the caption on Peter Steiner’s infamous cartoon in *The New Yorker*, “On the Internet, no one knows that you are a dog”. While dogs engaging in distance selling is unlikely, identity on the Internet is uncertain and thus capability to fulfil defined consumer/supplier roles must also be suspect. In some situations the ‘consumer’ may well be more expert than the ‘supplier’. Commentators on the DSD agree that owners of B2B sites should be careful to not allow their customers (other companies) to be ‘consumers’ under the definition in the DSD, since this will allow them rights that they should not warrant. However the definitions of ‘consumer’ and ‘supplier’ can affect the fundamental supply/demand chain operation of e-commerce:

”A big point relates to the co-ordination of the contracts between the site, customers and suppliers. The sale on site is B2C and subject to the customer’s increased rights to cancel [under the DSD] but the sale from supplier to the site is B2B, in which you have no such cancellation rights. So its vital to ensure traders do not have to return monies and yet not get reimbursement from their suppliers.” (Richardson 2002)

## 1.2 Important exemptions

While most exemptions in the DSD are unremarkable, two need comment. The first is that contracts for the “supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home of the consumer, to his residence or to his workplace by regular roundsmen” are excluded. The use of the phrase “regular roundsmen” was clearly intended to limit application to a local grocer in his van, but in an era of Tesco Direct and other online supermarket services, an exemption from the provisions of DSD seems unnecessary and inappropriate. The DTI in their guide for business (Department of Trade and Industry 2000a), however, say that in relation to supermarket deliveries:

“This exemption [from the DSD] will not generally apply to the growing market for home deliveries by supermarkets. Such deliveries are normally ordered specifically on each occasion by telephone, on the Internet or by fax.” However there appears to be nothing in the CPDSR which enforces this suggestion.

The second, and perhaps the most glaring omission is for auctions. While the unique nature of their traditional small-scale specialist role might have warranted exclusion, one of the great e-commerce success stories has been in the area of online auctions, evidenced by companies such as eBay and QXL, who have created vibrant, easy to use auction sites which bring millions of buyers and sellers together. These sites have completely redefined the role of the auction in commerce and massively increased its market share of transactions: in 2000 eBay Inc’s net income rose to \$6.3 million from \$3.8 million a year earlier while sales rose to \$85.8 million from \$42.8 million, exceeding the \$80.2 million forecast (USA Today 2000). Such a large slice of online transactions (for those parts of Ebay based in Europe) ought to come under the DSD:

“in terms of consumer disputes, the credit card company Visa reported in 1999 that one of the major grounds for disputed payments in Europe concerned goods bought through Internet-based auction services.” (Hornle, Sutter and Walden 2002)

## **2. THE MISSION OF THE DSD: CONSUMER EMPOWERMENT**

### **2.1 Prior Information**

At a distance consumers do not have the same opportunity to assess a good/service as they would in a shop. Therefore the DSD requires that certain elements of “prior information” be provided for a would-be purchaser before a contract is entered into. Most of the prior information requirements are uncontroversial and are in essence no more than a sensible trader would wish to provide anyway. The burden of proof concerning delivery of this information (and other DSD supplier information requirements covered later) is on the supplier rather than the consumer. The reason for this provision can be found in Recital 22: “the use of the means of communication is not under the consumer's control, therefore the supplier should prove that the communication has 'reached' the consumer.” The point that has to be made is that the range of distance communication technologies deliver different types of information (text, numbers, still images, audio and video) in different quantities, qualities and speeds to consumers who may be using a variety of different ‘receiving devices’ which may themselves have dampening ‘features’ such as time-charges, unfamiliarity, poor ease of use. Thus while it is possible to legislate what information is provided there cannot be any guarantee that different consumers using the same supplier via the same medium for the same good/service will receive the ‘same’ information. For example, an online shop catalogue just before Christmas might be much slower in sending out an image of a product than at quieter times. Some distance communication methods (e.g. a web site) will have richer information provision capabilities than others (e.g. a small newspaper advert). Of course there will be exceptions: one incompetent would-be e-trader produced an appallingly bad web site for his car sales business by simply scanning in printed adverts for his cars! (Handley 2000). Perhaps the only guaranteed advantage of prior information supplied via distance communications is that the pushy presence of a sales person is absent.

#### **2.1.2 Prior Information: taxation issues**

There is one major problem for suppliers with the prior information requirement and that is for the inclusion of “the price of goods or services including all taxes”: “Does this mean an e-trader, who may take in orders from anywhere in the world, must calculate taxes local to the buyer?” (Walton 2000) Unfortunately the answer according to the DSD must be ‘yes’ if a good comes from an EU Member State, as extra charges from local taxes can make an appealing price offered by an online supplier much less appealing. This problem first came to light in the run up to Christmas 1999, which has the reputation of being the first “e-Christmas” online shopping experience for many consumers: “Alan Stevens, editor of Which? Online, the Internet wing of the Consumers Association, said: “People are shocked when they discover they are going to have to pay up to 33 per cent more than the advertised web site price.” Mr Stevens said he did not believe customs recognised all the taxable goods. “At the moment it is a lottery whether Customs and Excise picks up on your parcel. If a package looks as if it is coming from a book retailer, but actually contains videos, customs may not realise this. As part of an EU directive on distance selling, the Department of Trade & Industry proposes making inclusive prices compulsory. Consumers will have the legal right to refuse payment if extra charges are not disclosed. The problem has arisen because most online retailers ship to markets worldwide from a centralised warehouse” (Grande 1999) As the quote notes, the DSD then had only just been passed by the Commission, and was not yet implemented in the UK in the CPDSR.

#### **2.1.3 Providing Prior Information**

Article 4.2 requires that prior information must be “provided in a clear and comprehensible manner.” This would obviously exclude information in a very small font hidden linked deep inside a web site. Furthermore, its “commercial purpose...must be made clear” and must be provided in a “way appropriate to the means of distance communication used”. This provision means that the information should be given in the same manner as the distance communication method used, i.e. in the case of a phone call, orally and in the case of a web site, by text and images. However, comprehensibility does not affect the language used, since “the languages used for distance contracts are a matter for the Member States” (Recital 8): “The original draft [of the DSD] did at least require contract information supplied to the consumer to be in the same language as the as the contract solicitation. This may be a minor point, however, since it is to be hoped that it would be regarded as a breach of good faith for a supplier to supply contract information in a language which he knows the consumer will not understand. This would not necessarily mean that the supplier should translate the terms, but might well mean that, say, an English company receiving an order in French from a French consumer should supply information in French, whereas it might quite fairly supply the information in English if the order were in English”. (Bradgate 1997)

## **2.2 The Right of Withdrawal: "Cooling off Period"**

The most controversial consumer empowerment issue raised by the DSD stems from its longest Article, Article 6, on the consumer’s right to withdraw without giving a reason from a distance contract within a seven working day “cooling off” period starting after the receipt of ordered goods/services. Article 6.4 places an obligation upon all Member States to ensure that their legislation provides that any “credit agreement shall be cancelled, without penalty, if the consumer exercises his right to withdraw” which is significant for Internet e-commerce which depends on credit cards, there being no digital cash alternative. Recital 10 limits right of withdrawal to the first contract only. This is unfortunate as this right could usefully apply to successive individual transactions entered into by the parties, as for example in the case of a book club. Note that the right of withdrawal should be seen in addition to existing statutory rights to a full refund of goods are sold faulty or a service is not carried out to a reasonable standard or within a reasonable time frame.

### **2.2.1 Who Benefits?**

The right of withdrawal enables the consumer to make a fully informed choice before the contract is regarded as completely finalised and binding upon the consumer. It provides the consumer who purchases goods or services at a distance the same opportunity to inspect what is on offer that a consumer making such a purchase in a traditional shopping environment will have. Although consumers will receive prior information, it may not adequately ‘describe’ a product (does a picture show how well a pair of shoes will fit?). This right is also intended to entice new consumers into the advantages of shopping at a distance (lower prices, wider choice, home delivery etc.). Suppliers stand to benefit as well as the right of withdrawal should reduce consumer reluctance to buy unfamiliar products or services and/or use suppliers that might be previously unknown to them. Of course there are possible drawbacks: “What effect will this [right of withdrawal] have on (e.g.) niche-market products shipped halfway round the world? A potential supplier considering selling via e-commerce will realise that the returned goods may not be re-sellable. They will certainly raise the selling price to compensate. They might even decidethat e-commerce is altogether too risky - why not let retailers and distributors carry the risks of fickle customers instead?” (Brooks 2000)“Cooling off” periods are calculated differently for goods and services. The “cooling off” period for the former begins when goods are received but for the from the day of the conclusion of the contract. This is not a problem except where it is unclear whether a specific contract is a contract for goods or a contract for services. For example, it is unclear whether software which is purchased online and downloaded is to be treated as goods or services. Clearly the same software purchased on a physical medium is classified as goods. The OECD has argued that for purposes of VAT and customs duties, software delivered via download should be treated as services (Hornle, Sutter and Walden 2002). However software designed on a bespoke

basis to fulfil the needs of a specific consumer would qualify as a service, but it seems odd that a standard software application should be classified differently purely on the basis of the means of delivery employed. The same uncertainty will affect the streamed delivery of pay per use music and video.

## **2.2.2 Exemptions from the Right of Withdrawal**

Certain goods and services are exempted from the right of withdrawal (Article 6.3). A minor anomaly is that “newspapers, periodicals and magazines” are exempt but not books. It seems an unscrupulous fast-reading bibliophile could order books, read them and then return them within the “cooling off” period. Presumably books, being browsable in libraries, bookstores and on people’s shelves, have always run this risk. A similar exemption applies to “audio/video recordings or computer software which were unsealed by the consumer”. It has become the norm for film, music and computer software sold on storage media to be sold shrink-wrapped which must be opened in order to access the content contained on the storage medium. This is a simple but nonetheless effective means of ensuring that a consumer cannot take a copy of the content and return the original, thereby acquiring the content without paying for it. However content like music, software etc can be sold directly over the Internet by download and in this situation it appears as though the DSD does not protect suppliers against consumers copying said content, and then exercising their right of withdrawal. This is a weakness with the DSD that needs addressing. To a large extent however, the Napster case has already persuaded most suppliers to eschew offering content for download, because of the risks of losing control of copyrighted content to consumers who then make it freely available via the Internet.

Another worrying anomaly relates to the exemption for goods “made to the consumer’s specification or clearly personalised”. It seems sensible that, where there is no question that quality is in any way substandard, a consumer should not be able to reject goods made to their own specification. However, where does “clearly personalised” stop and customised through choice of standard options begin:

“For example, if a consumer purchases a car online, requesting a specific colour, this will clearly be a standard product. But what if a custom colour, to be mixed to the individual consumer’s specification, is offered, along with other significant cosmetic and/or other alterations to the standard model, many of which will not be reversible without considerable expenditure? Is this enough to qualify for the exception? In most cases it is likely that the line between stock options and personalised will be obvious, but there are potential grey areas that will fall to be decided by the courts.” (Hornle, Sutter and Walden 2002)

Finally it should be noted that there is no right of withdrawal from contracted services “if performance has begun, with the consumer’s agreement, before the end of the seven working day [“cooling off”] period”. There is intended to be a balance between the consumer’s interests and those of the supplier who may have provided the consumer with benefits from service before withdrawal, but a better approach would surely be to allow the consumer to withdraw but require the consumer to pay for any benefit received. This is a useful exemption for those esteemed professions that make their meagre honest living through vital services: “Many solicitors with consumer clients served by e-mail, fax and telephone only, have already altered their terms and conditions. The Regulations apply and, in many cases, unless conditions are not altered, the consumer could instruct the lawyer, who does the work and then finds the consumer cancels the contract and does not have to pay for the work done. This is reason enough for conditions to be altered now.” (Singleton 2001)

## **2.2.3 Refunds and Reclaiming of Goods**

While the right of withdrawal is clear, the actual mechanisms to be used are not. If prior information not fully provided the right to withdraw becomes a period of three months. How is the consumer supposed to be aware that the supplier has “failed to fulfil Article 5”? They cannot check for the absence of “prior information” when they do not know what they should have received. How precisely is the consumer to exercise their right of withdrawal? Will an email suffice or must written notification be given? However the biggest implementation problems revolve around two vital components of withdrawal: the consumer’s right to a refund and the supplier’s right to reclaim goods.

From a commercial perspective, an e-business will want to limit the amount to a refund as far as is legally possible in its returns policy. It is worth considering a typical situation whereby an e-business states

in its terms and conditions that it will refund the "price of the goods" following cancellation. Is this allowed? The DSD states that the supplier should "reimburse the sums paid by the consumer free of charge". Regulation 14 of the CPDSR provides that, "on the cancellation of a contract under regulation 10, the supplier shall reimburse any sum paid by or on behalf of the consumer under or in relation to the contract to the person by whom it was made free of any charge" In both there is no guidance on what is meant by "sums paid" or "any sum". However, since the whole rationale for the DSD and the CDPSR is to provide maximum protection to consumers where they enter into a distance contract it would be contrary to their spirit to penalise consumers by not allowing them a full refund.

This is confirmed by Section 12 of the DTI Guide for Business which states:

"When a consumer cancels the order all money paid must be returned within 30 days of the date the notice of cancellation is given... If goods have been delivered and the consumer has paid a separate charge for delivery, the supplier must also return the delivery charge unless it was provided under a separate contract." (Department of Trade and Industry 2000a)

There does not appear to be any scope for arguing that the supplier is only obliged to refund the price of the goods themselves. Nevertheless, it appears that many e-businesses are not refunding delivery or shipping charges in breach of the Regulations. For example, Amazon.co.uk and BOL.com were forced by the Office of Fair Trading to refund delivery charges when people return goods:

"Amazon.co.uk is a tad peeved at the decision claiming it's based on the OFT's "interpretation" of Distance Selling Regulations. It seems Amazon.co.uk doesn't share the OFT's view. "It is not settled law," said Amazon.co.uk in a statement. It went on: "The OFT's [press] release implies we've been brought into line - we haven't - we will always act in the best interests of consumers (as we always do) and we will always work with government to drive clarity for customers and industry." (Richardson 2002)

The DSD requires that reimbursement takes place as soon as possible, at the latest within 30 days. Here there is an argument for a stronger form of enforcement since the supplier has the consumer's money. The main objective of any enforcement mechanism or sanction should be the return of the consumer's money rather than punishing the supplier. However there is evidence that consumers are generally reluctant to use the Small Claims Court, especially for items of modest value and even less likely to pursue options including criminal sanctions enforced by Trading Standards Officers.

Finally with regard to recovering returned goods, the DSD is clear that "the only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods". Under the CDPSR, the recovery charge must not exceed "the direct costs of recovering any goods supplied under the contract". The DTI Guidance for Business interprets this requirement as follows:

"The business must not charge more than the direct costs of recovery of the goods, such as the cost of postage or, for larger items, the cost of a van making a routine trip to the consumer consumer's home, nor can the business charge for any consequential loss." (Department of Trade and Industry 2000a)

Suppliers will therefore have to accept that it is not possible to build any profit element into the recovery charge in order to make up for having to refund the delivery charge to the consumer.

### **3. A SIDE EFFECT OF THE DSD: CONTRACT LAW REDEFINED?**

Article 7 has been seen as raising problems with contract law. Article 7.1 states that "unless the parties agree otherwise, the supplier must execute the order within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier":

"Does the word 'must' impose a mandatory duty on the supplier to accept all offers?... What if the consumer responds to an advertisement offering to supply goods but stating that offers may take 60 days to fulfil? In order to accommodate the wording of the Directive the advertisement must be read as an offer, accepted by the order, but the common law has been reluctant to interpret advertisements of goods for sale as offers to supply... The Directive may thus require some reconsideration of traditional common law rules of contract formation" (Bradgate 1997)

E-commerce definitely wants to make payment authorisation and the sales transaction one and the same thing, as this makes it as easy as possible for the consumer to purchase – Amazon.com recently

acquired a patent on its 'one-click technique' whereby customer data and bought goods are combined and validated in one transaction (Oakes 2000). It ran into a furore of abuse because all the other Internet retailers wanted to use this technique as well and did not want to licence it from Amazon. But the real danger here is in conflating the advertising of an item and the sales transaction so that they seem to be part of the same activity. Amazon, and other Internet retailers have run into problems when pricing glitches meant their 'one-click' purchasing plan enabled consumers to get 'mispriced' goods. For example, Kodak's web site recently advertised digital cameras at the price of £100 instead of £329. Not surprisingly they got lots of orders and their system duly sent customers an automatic email response to say that their order had been accepted. Realising the error, Kodak refused to supply and a lawsuit was filed:

"One argument [Kodak used] is that no contract was formed because the website constituted an "invitation to treat". As such, a would-be purchaser's order was an "offer". However, Kodak's confirmation of that order was not...an acceptance of the offer because it included terms and conditions which the customer may not have seen at the time of making the offer. Instead, it was a counter-offer which in turn would need to be accepted by the consumer. If it was not accepted there was no binding contract." (Foxwilliams 2001b)

This argument fails under the DSD as it stands. Kodak could have tried the argument that a visitor to its web site could be expected to know that the price of £100 for the camera was a mistake but it was advertised as a special offer and it is common knowledge that Internet retailers need to undercut 'bricks and mortar' retailers to get custom. This problem has been addressed by the German legislature when they implanted the DSD as they added a prior information requirement on the supplier to clarify to the customer which act will constitute the (legal) acceptance of an offer, that is at what point a contract would be executed (Steins 2000). This might be a pointer to follow in a general revision of the DSD.

#### **4. IMPLEMENTATION OF THE DSD IN THE UK: ONLY ONE PROSECUTION**

The Consumer Protection (Distance Selling) Regulations 2000 were made on 31 August 2000 and come into force on 31 October 2000. However the DSD should have been implemented by 4 June 2000 so the UK government was in breach of its obligations. The DTI website in 2000 made clear what issues had caused this delay:

"Q. Will the Regulations be in force on 4 June?

A. No. There are a number of key and complex issues still under consideration. These relate particularly to: The impact of e-commerce on business to consumer sales, which was in its infancy when the Directive was concluded in 1997

The appropriate sanctions to ensure compliance by suppliers

Related to the right to cancel: The proposal in the consultation document for the consumer to hold the goods until a refund is made

An effective approach to tackle spam (Unsolicited Commercial E-mail)

Q. Why the delay?

A. Consumers today are shopping in a rapidly evolving and dynamic marketplace. The consultation earlier this year threw up a raft of new and complex issues that had not previously been raised and were not even imagined in 1997 when the Directive was concluded." (Department of Trade and Industry 2000b)

As a result of the two consultation papers issued by the DTI, the CPDSR gives more detail on restoration of goods by consumer after cancellation (Article 17) and injunctions to secure compliance with these Regulations (Article 2):

"The original draft of the Regulations issued by the DTI provided for the criminalisation of certain failures to comply with the Regulations. However, the Regulations have removed criminal sanctions for non-compliance other than in relation to unsolicited goods and services. The DTI considers that the sanction of an extended period during which the consumer can cancel the contract where the supplier fails to comply with the Regulations...will be sufficient to ensure adequate compliance with the Regulations" (Youngerwood and Mann 2000)



## 4.1 Compliance and Enforcement

Regulations on spam email were left for future legislation. Otherwise CDPSR implements the DSD. Six months after the CDPSR came into force, the Office of Fair Trading carried out a survey of 637 UK websites, checking for their compliance with the CDPSR. It found over 52% in breach of prior information requirements: "the Internet sweep saw the OFT and 28 trading standards authorities join forces with consumer organisations from five continents. Websites selling books, music, toys, software, clothes and electronic goods to consumers were viewed to see what information was given before purchase. Most of the 637 UK sites examined did provide basic business contact details... But they fell short in providing any easily accessible information on both refund and exchange policies and how they would handle customer's personal details" (Office of Fair Trading 2001).

Since data protection is not a requirement of the CDPSR it is odd that it was checked.

Although not included in the OFT survey, contemporaneously it was reported that the Labour Party web site was in breach of the CDPSR (Kelly 2001). A similar picture was reported in 'Shopping Online 2001', a survey funded by the European Commission and produced by Consumers International (Irish Times 2001). It involved 15 consumer organisations in 14 countries using an international team of researchers, acting as internet shoppers, to place more than 400 orders for goods and services with websites globally. Many web sites failed to give a clear total cost or give consumers information about key terms and conditions of the contract. In 9 per cent of cases, retailers failed to send a refund for goods that had been returned to them. Where refunds were sent, many took well over a month to arrive. Fewer than two-thirds of web sites provided a confirmation that an order had been accepted. Less than half of the European-based sites complied with the DSD by providing consumers with information about their seven day "cooling-off" period to withdraw from the contract. Foxwilliams 2001a reports the case of Fiche and Chips, a mail order computer business, about whose poor operation Middlesborough Trading Standards Authority received more than 500 complaints. An injunction forced Fiche and Hobbs to comply with the CDPSR. This so far is the only prosecution to be brought under the CDPSR. However not all enforcers of the CDPSR/DSD understand it fully as the following plea shows:

"I've just received a letter from my local council saying that my website [<http://www.ido.co.uk/tiaras/index.cfm>] does not comply with the "consumer protection distance selling regulations". I design and make tiaras, each one is individually hand made to order and I frequently change the design to suit the customer, whether it's size, shape, colour etc... The book they sent me says that goods that are exempt from the regulations are "goods made to the consumer's specification" but I'm not sure if this applies to me. What do you think, can I argue a case for exemption? (Katyanne 2002)

It seems as though general ignorance of the CPDSR/DSD provisions allied with little regard for the consequences of breaking them are the main causes of their lack of effect as reported by surveys. Although there have been worries of the cost to business of implementing the CPDSR/DSD, it seems as though these have not been onerous: in the second DTI consultation paper for example, only three businesses responded with highly speculative estimates of the cost. If it had been an issue, more would have responded with firmer costings (Department of Trade and Industry 1999):

"In reality the new regulations don't ask retailers to do much more than best practice would urge them to do anyway" (Clearlybusiness.com 2001)

## 4.2 Consumer Awareness

Not only suppliers ignore the CPDSR/DSD: there is no evidence that consumers have been (over)exploiting their rights, for example using incomplete prior information to get a three month withdrawal period for free use of goods in that time. As Walton 2000 notes: "Traders who fail to follow the Regulations to the letter will give customers the opportunity to shop around within the three months after delivery to find the same goods at lower price, cancel the first contract, claim reimbursement from their credit card and then buy at lower price elsewhere. They do not have any obligation to return the goods, just to permit them to be collected".

One wonders if Article 16 on consumer information has been addressed effectively. Another factor perhaps is the origin of the CDPSR/DSD: it seems like yet more Brussels 'interference and red tape', to be treated with typical offshore disdain.

## **5. IMPLEMENTATION OF THE DSD IN EUROPE: FLOOR AND CEILING**

The original EEC Treaty did not contain any specific provision on consumer protection as it was assumed that the consumer would be one of the main beneficiaries of the Community's trade liberalisation and competition policy provisions as a result of both greater choice and the economic efficiency benefits of an open competitive market. In fact, the risks to the consumer of competitive de-regulation leading to inadequate levels of protection led to the recognition that rules for consumer protection were needed.

### **5.1 EU Rules of Consumer Protection**

To begin with, rules were adopted under the general harmonisation provisions, Article 100 and then Article 100a of the Single European Act. In 1989 the EC formed the Independent Consumer Policy Service, which was followed by Commission action plans. Article 129a, a new Title on Consumer Protection, was added in the Treaty on European Union (Maastricht Treaty) and later amended by the Amsterdam Treaty. Article 129a provides that:

- “1. The Community shall contribute to the attainment of a high level of consumer protection through
- (a) measures adopted pursuant to Article 100a in the context of the completion of the internal market;
  - (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interest of consumers and to provide adequate information to consumers.
2. The Council ... shall adopt the specific action referred to in paragraph 1 (b).
3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.” (European Union 1992)

Article 129a makes it clear that Article 100a and Article 129a(1)(b) itself are alternative legal bases for consumer protection legislation. Community action is seen as additional to, rather than replacing, that of the Member States. The legal basis of the DSD was Article 100a, making it aimed squarely at the consolidation of the internal market and seeing cross-border distance selling as "one of the main tangible results of the completion of the internal market" for consumers (Recital 3). The DSD has its own version of Article 129a(3) in Article 14 allowing member states to “introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection”. As Cremona 1998 notes:

“The case thus illustrates that whereas a harmonising Directive may set minimum standards, leaving to Member States the choice of imposing higher standards in their implementation of the Directive, those higher standards must themselves comply with the fundamental Treaty rules on the freedom of movement of goods and services: they must satisfy the "mandatory requirements" tests of non-discrimination, public interest objective, necessity and proportionality. As is sometimes said, the Directive provides the "floor" and the Treaty rules provide the "ceiling".”

### **5.2 Implementation on the Member States; Is there Consistency?**

While the DSD provide a level floor, the height of the ceiling unfortunately varies by country. Unlike in the DSD (Article 3.1), online auctions are not per se exempted from the German Distance Selling Act, but are exempted only from the customers' right of withdrawal from a distance selling contract. Also in Germany the customer is obliged to pay for the return of goods worth up to 40 Euros, the supplier paying for more expensive items. The customer is furthermore obliged to pay the supplier for the use of the goods or for the received services in the period up to the exercise of his or her right of withdrawal. In France refunds must be paid to the consumer within 15 days rather than 30.

If Article 5 obligations are not met, Article 6 extends the period of withdrawal. In the UK, under the CDPSR the period is three months. Should the information be provided during these three months, then the withdrawal period will end on the expiry of the seven working day period, beginning on the day after the day

on which the consumer receives the information (not the same day as in the DSD). Should the information be given on the last day of the three months, the cancellation period will run for a further seven working days. In Germany, the Distance Selling Act provides that the withdrawal period ends unconditionally with the expiry of the four months which is set as the upper period, irrespective of whether the information has arrived on the last day of that period. The Italian Distance Contracts Decree adopts the same approach as the German Act, the three month upper limit being an absolute cut off point. In Sweden the extension period is one year!

Regarding the right of withdrawal, some member states have implemented the minimum periods given in the DSD whilst others have chosen to extend these periods further. The German Distance Selling Act sets the basic withdrawal period at two weeks, also raising the maximum from the three months in the Directive to four months, while the Italian Distance Contracts Decree 1999 retains the upper limit of three months where the information requirements are not complied with, but sets the standard period at ten working days.

Article 6 does not set out any procedural rules for the valid exercise of the right of withdrawal. The UK CPDSR provides that the contract is cancelled when the consumer provides a notice of cancellation to the supplier (Regulation 10.1). Regulation 17 states this must precede the return of the goods. This notice of cancellation must be "in writing or in another durable medium available and accessible to the supplier" (Regulation 10.3), with letter, fax and email all being sufficient (Regulation 10.4). The Italian Distance Contracts Decree, however, requires a "written notice to the geographical address of the place of business of the supplier by registered post and acknowledged receipt." Thus, while a consumer in the UK can exercise the right of withdrawal in relation to an Internet contract merely by sending an email to "the business electronic mail address last known to the consumer" (Regulation 5.4), a consumer bound by the Italian rules must comply with much stricter regulations.

The uneven ceiling thus presents a potential problem for suppliers of goods and services over the Internet, as they will require to be aware of the requirements of each member state, and ensure that they are in compliance with their corresponding obligations. The harmonisation aims expressed in the preamble to the DSD are certainly not assisted by this state of affairs. And there are some bumps on the floor: the DSD means "working days" to mean all days other than Saturdays, Sundays and public holidays. A supplier will need to take account of the different public holidays in the United Kingdom and in other EU Member States. The question therefore arises about how much harmonisation is possible over consumer protection: "One problem all harmonisation measures face is that the EU remains a collection of independent countries with a perplexing variety not just of laws but also of legal philosophies. Different member states protect their consumers in different ways. Countries such as France and Italy have systems based on the principle of "fair commercial practices". In Scandinavia there is a similar but different principle of "good marketing practices". The UK and Ireland, as one might expect from the pragmatists of Europe, have no general legal standard at all regulating the B2C relationship (although we do still have a high level of consumer protection)." (Swan 2001)

As has been seen, because the German legislature has decided in some respects to provide a higher level of protection in the Distance Selling Act than the minimum standard set by the DSD. These additional requirements not only have an impact on German suppliers, they impact every foreign business executing distance selling contracts with German consumers:

"According to Section 29 of the Introduction to the German Civil Code, which itself implements Article 5 of the Rome Convention on the Law Applicable to Contractual Obligations into German law, contracts executed with consumers are governed by German law if the contract was entered into because of an advertisement made in Germany and if the consumer acted from Germany. Even though no case law exists on the question whether an offer on an English Internet server would be regarded as an advertisement made in Germany, most commentators regard such offers as advertisements made in Germany unless additional aspects exist, such as an explicit refusal to supply goods to Germany. This renders it advisable for foreign e-commerce businesses concluding contracts with German consumers to take the Distance Selling Act into consideration." (Steins 2000)

### **5.3 Modifications**

The EU issued proposals to modify the 1968 Brussels (and Lugano) Conventions dealing with the Jurisdiction and Enforcement issues between those domiciled in EU (and some other European) States. The Conventions were to be amended to allow a consumer to bring proceedings before a court in the country/jurisdiction of the consumer if the transaction resulted from an advertisement and the consumer took steps in that country/jurisdiction necessary for the conclusion of the contract. In response to business concerns that web sites are not directed advertisements, the existing proposals were modified and passed as the Jurisdiction Regulation 44/2001 (in March 2002) making contracts made through websites only be subject to the jurisdiction of an EU country where the website was "directed at" consumers in that country: "It remains unclear as to what exactly constitutes "directing" a website at a particular country, and in particular how a site can definitively not be "directed at" countries in which it may be visible. It might be necessary simply not to ship goods to certain countries, which would clearly not promote an open electronic market in the EU." (Grave 2001) The UK CPDSR states: "These Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a non-Member State if the contract has a close connection with the territory of a Member State." What precisely is a "close connection"? Presumably overseas suppliers could include wording in their contracts to distance the contract from EU states, stating that it is performed abroad, executed abroad or that the customer pays any import duties. Even so it is very likely that UK courts would consider that the CPDSR applies (Singleton 2001).

This raises a further question, as even if a UK court can rule against a foreign-based web site, is a consumer going to make the effort? One major hurdle with the enforcement of consumer rights generally is that often large scale infringement of rights result in a large number of small value claims, where each individual consumer is unable or sufficiently motivated to pursue an individual claim for damages or other remedy. Another factor is as individuals, consumers are often uneasy about resorting to law, because of insufficient information and uncertainty over the duration, cost and effectiveness of legal procedures. To address the first point, the DSD provides for locus standi, public consumer bodies, consumer organisations and professional organisations with a legitimate interest, to take up consumer causes (Article 11.2). Unfortunately not all Member States currently have an independent consumer organisation while a few have too many: in the UK there are 20 different bodies, all of which only cover particular sectors (Hornle, Sutter and Walden 2002). As to the second point, the DSD requires the establishment of out-of-court dispute settlement systems (Article 17). In May 2000, the Commission jointly with the Portuguese Presidency launched a network of national out-of-court settlement schemes called EEJ-Net (European Extra-Judicial Network). Each country has to establish a 'clearing house' for consumer complaints. So far little has come of this initiative. Perhaps the issue needs to be tackled at a higher level than the EU: "The costs of international litigation would probably be prohibitive for the consumer to actually take legal action. If the supplier were based in the US, the consumer would probably not even consider his legal remedies - to say nothing of the uncertainty as to whether the US courts would apply the European cancellation rules. For this and other reasons, the OECD Member States are considering the possibilities of ADR, i.e. Alternative Dispute Resolution, for Internet related disputes; which was the subject of the OECD conference held in The Hague, in December of last year. The E-commerce Directive 2000/31/EC also stipulates that the Member States should encourage out-of-court settlements." (Van Den Brande 2001)

## **5.4 Leading the Way: The European Union**

Prior to the DSD, few aspects of distance selling were subject to statutory regulation in the UK (beyond that which applies generally to the sale of goods and services). There was however self-regulation with most significant business types being members of one of the relevant trade associations and abiding by their codes of practice. With the arrival of e-commerce dot.coms were too new to be in trade associations, although TrustE and the Consumers Association run schemes whereby online e-tailers can pay to undertake accreditation tests. The DSD covers resort to trade associations (Article 11.4) as many minor issues (sales promotion techniques such as rebates, gifts, lotteries and competitions for example) are still covered by these self-regulatory arrangements: "This combination of legislative and voluntary (soft-law) techniques is typical of consumer policy within the Community." (Cremona 1998)

Whilst it is easy to criticise the application of the DSD within the floor and ceiling paradigm, European consumers should perhaps be grateful that the Commission has at least attempted to legislate for contracts concluded at a distance:

“No such attempt has been made in the USA. The result of this is that, despite the growing use of telemarketing, television "infomercials" and the Internet, US consumer protection laws, at both federal and state levels, for transactions conducted "at a distance" have not addressed many problems that may arise.” (Sidkin and Elliot 2001)

## 6. CONCLUSION

Many specific points have been raised above to suggest areas of revision for the DSD and also for national legislation that implements the DSD. It is proposed here that the whole question of distance selling and its regulation needs to be considered afresh, for the following reasons.

It is much trumpeted (and with some justification) that e-commerce has changed the face of retailing in general and distance selling in particular and that it will continue to grow:

“For B2C transactions, this is important when the Direct Marketing Association has forecast, in its report entitled "Corporate Intelligence on Retailing Estimates and Forecasts" an increase in such transactions from £199m in 1998 to £719m in 2002. According to The Sunday Times of 11 March 2001 online purchases accounted for only 0.66 per cent of retail sales in 2000 but are estimated to increase to 5 per cent by 2005.” (Sidkin and Elliot 2001)

To a certain extent this growth will not just come from the ‘pull’ of distance selling but the ‘push’ of other retailing options disappearing. Traditional ‘bricks and mortar’ retailing, especially the small general corner shop or the specialist retailer, are closing and being replaced with large shopping centres that may require consumers to travel some distance to reach them. This leaves distance selling (and its associated home delivery mode) as perhaps the only means of purchasing for isolated or ‘transport-poor’ consumers and also as the only way to buy an increasing range of goods and services too ‘niche market’ for the big ‘bricks and mortar’ retailers. Thus the importance of distance selling to consumers can only increase. As the economic and social importance of distance selling increases, so does the need for its regulation.

There is an argument that regulation is unnecessary:

“By allowing businesses to convey large quantities of consumer information to a widespread [online] audience at a low cost," online business activities help to decrease general transaction costs and can thus lower the overall costs of goods and services. . . consumers will have a larger variety of goods to choose from, they will be able to use automated forms of their own and the watchword in e-commerce "is no longer 'consumer protection' but 'consumer empowerment'. Overall...regulatory bodies seem to approach e-commerce very carefully as far as the introduction of a framework of new laws and rules is concerned. Such a "hands-off approach" appears to be reasonable in view of rapidly changing technologies and business schemes because in many instances, technological "developments can protect consumers in more ways than traditional regulation." (Ulrich 2000)

This can be challenged as a ‘rosy’ view of e-commerce. Prices may initially be lower but once, say, Amazon drives out other online book-sellers and destroys all the small specialist ‘bricks and mortar’ bookshops, what is to stop it raising prices on ‘slow’ sellers and just discounting bestsellers? Are online consumers all adept enough and time-rich to be ‘empowered’. Certainly ‘customer power’ can be seen at its most ferocious on the Internet where, for example, ‘sucks’ sites viciously attack companies and brands that consumers have had bad dealings with (Cisneros 2000) but does everyone have the motivation and skill to mount a personal guerrilla campaign?

The overall level of awareness of consumer protection online, especially as expressed through DSD and its national statutes, is too low. To raise its profile a suggestion would be to follow the example of P3P (Platform for Privacy Preferences), a W3C standard for privacy preferences as expressed on supplier web sites. A similar system could be used for consumer protection, i.e. a set of supplier information requirements that had to be encoded in a structured manner (using XML) and be retrievable (using metadata) so that consumers and enforcement agencies could (automatically if needed using special agent software) check that supplier web sites followed a particular set of rules, as expressed by a descendent of DSD. While this proposal to embed legal requirements into the infrastructure of networks might seem bizarre, trends in networked services are heading this way. For example, Microsoft .Net (Microsoft 2002) is a proposal to

create 'web services' from data and software objects distributed across web sites. Web services, which include transactions, will need a global registry to allow them to be published, and then requested and bound to (activated) by clients. Automated service discovery should allow services to be found and switched very quickly so that, for example, if one service fails, another could be used instead.

The real concerns for law in e-commerce relate to the jurisdiction nightmare (already covered above) which is not going to get better, since the increasing inter-connectedness that computer networks bring is never going to respect national (and thus legal) boundaries and to a more subtle dislocation caused by the emergence of new business and service models, some reworked from old ones, others completely original. Most commentators on DSD wrongly focus on its technological naivety. This should be seen as a strength in that technology in itself does not raise new legal issues, but the evolving set of problems that novel or 'mutated from old' business models produce certainly do. The DSD and its offspring have real bite for consumers, but their almost total lack of use must give a lot of doubt as to their effectiveness: a consumer champion in intent but a complete irrelevance in practice.

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