

**BERR Department for Business, Enterprise & Regulatory Reform**

**CONSULTATION ON EU PROPOSALS FOR A CONSUMER  
RIGHTS DIRECTIVE**



**A response by the Association of Personal Injury Lawyers  
Dated 8 April 2009**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Stephen Lawson, Forshaws Davies Ridgway Solicitors and APIL secretary;

Gary Barker, Rodney Warren & Co and APIL costs special interest group co-ordinator;

Brett Dixon, Smith Jones Solicitors and APIL costs special interest group secretary.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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## **Executive summary**

- APIL believes that the scope of the draft directive goes far enough and should not be broadened as is suggested by BERR in this consultation paper.
- The definition of trader is currently very wide. APIL is concerned that the use of the word 'profession' would encompass legal professionals such as solicitors and legal executives which is currently not the intention of the proposed Directive.
- The definition of 'distance contract' broadens the scope of the current Distance Selling Directive and would include solicitors who have advised clients in their offices but who then send out the legal retainer / conditional fee agreement to the client's home for signature. APIL believes that it was not the intention of the EU to include such transactions when proposing this Directive.
- Legal professional services, defined as those activities conducted by those who are regulated by the Law Society of England and Wales, the Solicitors Regulation Authority, and/or the Institute of Legal Executives, should be exempted from the scope of these provisions.

- Based on our experience of the satellite litigation created as a result of prescribed wording required by statute for conditional fee agreements, APIL would urge that no standard format of form should be introduced. It would be an invitation for parties linked to the contract to attempt to avoid the terms of the contract by contrived and technical means.
- The proposed consequences for omission of information on the right of withdrawal differ from the current UK approach under the Cancellation of Contracts Made in a Consumers' Home or Place of Work etc Regulations 2008. APIL supports the consequences as proposed in Article 13.
- Contracts for such legal professional services should be exempted from the scope of these provisions, as they are already regulated by The Solicitors Regulation Authority, The Solicitors Code of Conduct 2007, The Legal Services Act, Solicitors Act 1974, The Law Society of England and Wales, the Financial Services and Markets Act 2000, The Financial Services Authority and the Courts and Legal Services Act 1990.

## **Key Issues**

### **Q1: Do you consider that the scope of the Directive should be widened?**

The scope of the draft directive offers a simplification of consumer sales law, focusing on the sale of 'tangible, moveable' consumer goods. It does not extend to providing alternative remedies for all consumer sales such as services, goods/services 'mixed products' and digital downloads/software, for example.

APIL believes that the scope of the draft directive goes far enough. The proposal to widen the scope of the Directive to include all consumer sales, including service only contracts would lead to the inclusion of legal professional services. APIL is of the view that this is not the intention of Europe for this Directive to regulate legal services which are already regulated by the Law Society, the Solicitors Regulation Authority and the Financial Services Authority.

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

APIL has no firm views on harmonisation in general in relation to the particular issues to be addressed by this Directive. APIL's members' clients (consumers) currently enjoy a good level of protection which may be diluted in the event of harmonisation with other existing systems across Europe, but it is open to the UK Government to ensure that current levels of protection are maintained in this country.

**Q3: What do you consider to be the implications of the changes proposed to consumer remedies on the UK consumer regime?**

The consultations suggest that the proposed Directive will focus on the sale of tangible, movable goods and not services. APIL supports this focus for the directive.

## **Chapter 1: Subject matter, definitions and scope**

**Q4: What are your views on the definition of 'trader'? Do you believe that it could be problematic?**

The definition of trader is currently very wide. APIL is concerned that the use of the word 'profession' would encompass legal professionals such as solicitors and legal executives which is currently not the intention of the proposed Directive. APIL's position is that legal professionals, defined as those whose activities are regulated by the Law Society of England and Wales, the Solicitors Regulation Authority, and/or the Institute of Legal Executives, should be exempted from the scope of this definition.

In addition, 'trader' is defined to include 'any natural or legal person.' APIL is concerned that by including individuals (the natural person) that will, as currently drafted, include employees of bodies corporate. There are many employees who will have no influence on how the firm they work for reacts to the duties imposed upon it by law. It is our view that this definition is too wide and should be limited to the 'legal person.'

**Q5: What are your views on the exception of the supply of water and gas and electricity from the definition of 'goods' used in the Directive?**

No comments.

**Q6. Do you have comments on the proposed new definition of ‘distance contract’?**

As currently drafted, the definition of ‘distance contract’ broadens the scope of the current Distance Selling Directive to include contracts which are concluded at a distance even where the earlier contact has been in person. APIL is concerned that this would mean that solicitors or other legal advisers who saw clients in their offices who then sent out the legal retainer / conditional fee agreement to the client’s home for signature would be caught by this definition. APIL believes that it was not the intention of the EU to include legal professional transactions of this nature when proposing this Directive. As already indicated earlier in this response, such transactions are already regulated by the Law Society, the Solicitors Regulation Authority and the Financial Services Authority as appropriate.

**Q7: What are your views on the definition of the ‘means of distance communication’?**

No comments.

**Q8. Do you think it would be useful to provide an indicative list of means of distance communication?**

Yes, a list of means of distance communication caught by this Directive or an indication that such a list should be included in the regulations which implement it in the domestic jurisdictions would avoid any confusion about interpretation. We appreciate that BERR would like to ‘future proof’ the approach of the directive, but if the implementing legislation contains a definitive list, this can be amended by regulation should new means of communication become apparent.

## **Chapter 2 – consumer information**

APIL has not responded to this section.

## **Chapter 3 – consumer information and the rights of withdrawal for distance and off-premises contracts**

APIL's position on this chapter is that legal professional services, defined as those activities conducted by those who are regulated by the Law Society of England and Wales, the Solicitors Regulation Authority, and/or the Institute of Legal Executives, should be exempted from the scope of these provisions. The scope as proposed would currently encompass such legal professional activities which are already adequately regulated elsewhere and by other means. We have only answered those questions in this section which affect APIL's membership.

**Q18, 19 and 20: What are your views on the introduction of a standard withdrawal form? Do you have any views on the format of the form provided at Annex 1 of the Directive? We would welcome views on the likely costs and benefits of introducing a standard withdrawal form.**

APIL's membership has had personal and costly experience of dealing with statutory wording requirements of The Conditional Fee Agreements Regulations 2000 which led to protracted, expensive and technical satellite litigation, driven in the main by the paying parties to avoid paying the costs of litigation. The so called 'costs war' became an industry, leading to the repeal of the regulations by means of The Conditional Fee Agreements (Revocation) Regulations 2005. Skirmishes continue where litigation is still affected by the original regulations, despite several warnings from the courts. In *King v Halton Borough Council* [2006], the judge's weary comments echoed the thoughts of costs judges across the land in courts of all levels of superiority when he



said, “this case is yet another example of the highly undesirable satellite litigation surrounding conditional fee agreements... there is no suggestion here that anything the claimant’s solicitors ought to have done, on merit, to deprive them of their costs”. Based on this past experience, APIL would urge that no standard format of form should be introduced, as it is an invitation for parties linked to the contract to attempt to avoid the terms of the contract by means of contrived or technical arguments.

**Q28: What are your views on the consequences of failure to provide information on the right of withdrawal?**

The consultation paper notes that the proposed consequences for omission of information on the right of withdrawal differ from the current UK approach under the Cancellation of Contracts Made in a Consumers’ Home or Place of Work etc Regulations 2008. We would support the consequences as proposed in Article 13. We take the view that the current regime contained within the Cancellation of Contracts... etc Regulations is too draconian and will in itself inevitably lead to satellite litigation in connection with the provision of legal professional services (which are currently affected by those regulations).

**Q39: Are there are other off-premises contracts which you think should not give rise to the right of withdrawal?**

APIL notes that all financial services are excluded under Article 3 on the basis that the existing EU legislation on consumer financial services contains numerous rules on consumer protection, rendering further protection under this Directive unnecessary save where there are regulatory gaps

APIL's view is that legal professional contracts or professional retainers (including conditional fee agreements), defined as those contracts or retainers which are regulated by the Law Society of England and Wales, the Solicitors Regulation Authority, and/or the Institute of Legal Executives, should also be exempted from the scope of these provisions.

The scope as proposed would currently encompass such legal professional contracts which are already regulated elsewhere by numerous means. They include:

**The Solicitors Regulation Authority**

The SRA regulates more than 100,000 solicitors in England and Wales. Its purpose is to protect the public by ensuring that solicitors meet high standards, and by acting when risks are identified. It is the independent regulatory body of the Law Society of England and Wales.

**The Solicitors Code of Conduct 2007** is published by the SRA and is the rule book by which the legal profession must abide.

**The Legal Services Act** received Royal Assent on 30 October 2007. The Act has brought in a new framework for the regulation of legal services in England and Wales.

**Solicitors Act 1974** provides the framework within which solicitors are allowed to practice as a solicitor, including training, and powers to suspend, revoke or otherwise impose conditions on solicitors' practising certificates.

**The Courts and Legal Services Act 1990** which is clearly framed to offer consumer protection, in order to protect unsophisticated litigants from entering into complex agreements and insurance arrangements in ignorance of their full effect.

**The Law Society of England and Wales** is a designated professional body for the purposes of the **Financial Services and Markets Act 2000** which includes regulatory provisions relating to the conduct of financial and insurance transactions by solicitors for / on behalf of their clients. The **Financial Services Authority** is the prosecuting authority under the 2000 Act.

All comments and enquiries relating to this briefing note should be directed in the first instance to:

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