



Department for
Business, Energy
& Industrial Strategy

Kelly Tolhurst MP

Department for Business, Energy & Industrial Strategy

1 Victoria Street
London
SW1H 0ET

Lord Boswell of Aynho
Chair, European Union Committee,
House of Lords
London, SW1A 0AA

31 January 2019

Dear Lord Boswell,

7876/18: Proposal for a Directive amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules (the “Omnibus Directive”)

Thank you for your letter dated 19 December 2018, in reply to my letter of 6 November 2018. I am writing to request that the Committee considers granting a waiver for this dossier from scrutiny.

Since my last letter the Romanian Presidency has begun its tenure and set out an ambitious timeline on the legislative file which proposes making targeted amendments to key EU consumer legislation with the intention of modernising rules and improving enforcement (the “Omnibus Directive”). They have scheduled working groups throughout January and are aiming to have a General Approach cleared at a Competitiveness Council on 18 February. I expect the proposal to also be tabled at a COREPER meeting the week prior to this.

As you may recall, the Omnibus Directive is part of the New Deal for Consumers package which also contains a proposal regarding representative actions in the collective interest of consumers (the Collective Redress Directive). I have previously written on the two legislative proposals together even though they have been progressing at different speeds. Since the Romanian Presidency has clearly indicated that they are prioritising the Omnibus Directive for the time being I have decided to write to you separately on this file. I will however write to you at a later date on the draft Collective Redress Directive which the Romanian Presidency are aiming to secure a General Approach on by May.

Regarding the Omnibus Directive, we would be in a position to vote in favour of a General Approach only if the UK’s objectives below can be achieved, which are currently undergoing Cabinet Committee approval. These objectives are anchored by a desire not to see UK consumer protection reduced or limited by the proposals and concern the changes proposed which are most relevant to this desire.

- i) *Preserving UK consumers existing right to withdraw from a contract*

A key UK negotiating objective is to protect existing rights enjoyed by UK consumers. This includes the existing EU right of withdrawal within the Consumer Rights Directive that allows consumers to cancel a distance (including online) or off-premises contract within 14 days, without having to give a reason. Regarding contracts for sale of goods, the trader must reimburse the consumer within 14 days once the consumer has given evidence of sending the good back if this is earlier than when the trader actually receives the goods back; however, the consumer is liable for any diminished value as a result of handling the product more than necessary to inspect the good. The rationale is that a consumer should have the same opportunity to inspect a good bought at a distance as they would get if they bought it in a shop. The right of withdrawal is an important source of consumer and business confidence. It is one of the best-known consumer rights in the UK, with 78% of consumers being aware of it¹.

The European Commission has argued that the right of withdrawal puts disproportionate burdens on business and is open to abuse (e.g. a consumer purchases a dress online and uses it before sending it back and asking for a refund). As was outlined in the Explanatory Memorandum sent to your Committee on 4th May 2018, they therefore proposed to amend this right in two ways:

1. Removing the obligation for the trader to accept the right of withdrawal when a consumer has 'handled' a good more than necessary.
2. Removing the obligation for the trader to reimburse the consumer before they have received the returned goods and have had a chance to inspect them (e.g. for overuse).

While I am generally supportive of simplifying burdens on business I feel that these amendments unfairly shift the burden on to the consumer. Firstly, there is likely to be a difference between how a consumer 'handles' a product before purchase in a shop compared to following an online purchase. The consumer may have to unwrap and assemble a good bought online in order to properly inspect it.

Secondly, in reality, many traders offer the consumer a pre-paid envelope or courier collection rather than collecting the goods themselves. However, this results in a gap between the goods leaving the consumer and reaching the trader, with the consumer losing control once they have posted or handed the good over. I am concerned that under this proposal traders could refuse to reimburse consumers for non-return of goods even where this is due to factors outside the consumer's control. In my opinion the status quo where the consumer is liable for any diminished value is sufficient to safeguard abuse from consumers. In addition, the European Commission has not provided enough evidence to justify this change. The documents published show a small sample size of businesses (99 SMEs, 17 large companies) were consulted and a lack of monetized evidence of detriment to traders themselves.

This position has generally been shared by other Member States during working groups apart from a group of Nordic Member States who support the amendment. Consequently, the amendment has been deleted in the most recent compromise text from the Romanian Presidency. In addition, the European Parliament has also expressed a desire to maintain the existing right of withdrawal. I am therefore confident that this negotiating objective will be achieved.

¹ EU Consumer Conditions Scoreboard 2017 – Consumers at home in the Single Market

ii) *Preserving the UK's existing rules on secondary ticketing*

The draft Directive contains amendments to the Consumer Rights Directive that would require online marketplaces to provide information to consumers on the main parameters determining the ranking of offers on the marketplace, whether the third party selling through the marketplace is a trader or private individual, whether EU consumer law rights will apply to the contract as a result and if so, how the trader and the online marketplace will share responsibility for enforcing them. Efforts to make online platforms more transparent are welcome and consumer protections should evolve to meet consumer needs in new online environments. The Consumer Green Paper launched by the Government last Spring looks at this area, amongst others, to ensure that modern consumer markets work for all.

The UK has already legislated to make online marketplaces liable for providing material information to consumers buying tickets that are re-sold online through the marketplace ('secondary ticketing'). This rule is important in ensuring that these marketplaces are themselves responsible for enabling material information such as seat location and face value to be provided to the purchaser. Since their introduction there have been improvements in the information available to consumers, who as a consequence have been more empowered to interact with the market. For example, on 27 November 2018 the Competition and Markets Authority secured a court order against one website which compels it to overhaul its business practices in relation to selling event tickets. The legally binding court order requires the website to comply with consumer protection legislation on a number of areas.

I am supportive of the principles behind the requirements on online marketplaces in the draft Directive. However, as currently drafted they would be set at maximum harmonisation allowing no flexibility for Member States to go beyond these requirements. There is a high risk this would require the UK to scale back or remove our existing rule on the information required from marketplaces about tickets re-sold online and limit the scope for the UK to take further action domestically to protect consumers in this area. I am therefore seeking an amendment to the draft Directive to allow Member States discretion to make national laws that go beyond the requirements of this Directive regarding the information that must be given to consumers on online marketplaces.

Although my officials have repeatedly raised the UK's concerns at meetings in Brussels, the European Commission has been reluctant to consider changing the level of harmonisation of this provision or consider alternative drafting solutions. Our position has been supported by France and Finland however other Member States have not shared our concerns. France are similarly concerned about having to scale back on existing domestic legislation they have implemented regarding online marketplaces. The most recent compromise text from the Romanian Presidency has not taken our concerns into account and it is unclear at this stage whether we will be able to achieve any concessions.

iii) *Allowing flexibility on penalties for breaches of consumer law*

Through the draft proposal the European Commission intends to improve traders' compliance with EU consumer law by adding to rules on penalties. The draft Directive would entail amendments to existing, less detailed provisions in the Price Indication Directive, the Unfair

Commercial Practices Directive, the Consumer Rights Directive and the Unfair Contract Terms Directive. The proposed provisions are identical across the four directives and include:

1. A general discretion for Member States to set national rules on penalties that are effective, proportionate and dissuasive;
2. An obligation on Member States to ensure that courts or authorities, when deciding whether to impose penalties, have due regard to a list of non-exhaustive criteria;
3. An obligation to ensure that penalties for widespread infringements (including those with a Union dimension) include the possibility to impose a fine, the maximum amount of which must be set at a maximum of at least 4% of trader's annual turnover; i.e. any cap on fines should not be set at less than 4%.

The Government has already signalled its intention in the Consumer Green Paper, independent of actions in Brussels, to bring forward domestic legislation to give civil courts the power to impose financial penalties on traders for breaches of consumer protection laws. The Consumer Green Paper proposes that the financial penalty would be subject to a total cap of 10% of a firm's worldwide turnover, in line with the limits for fines in some of the regulated markets, which is why I am in favour of maintaining the current proposal to cap fines at a minimum of 4% of annual turnover, but with discretion for Member States to go beyond this. In addition, I am in favour of giving courts the flexibility to consider other relevant factors when deciding whether to impose a penalty which would be permitted if the criteria remain non-exhaustive. I therefore do not have any issue with the proposal as originally drafted but will resist any move towards maximum harmonisation in this respect. In other words, I am content as long as the fine is a maximum of *at least* 4%, and the criteria remain *non-exhaustive*.

Most Member States have shared the UK's desire for the rules on penalties to be clearly set at minimum harmonisation. In particular, there has been a strong push from Member States (including the UK) to make it clear that the list of criteria to be considered is only indicative and non-exhaustive. This has been reflected in the most recent compromise text from the Romanian Presidency. Although the European Parliament appears to be in favour of capping fines at 4% of annual turnover, this position has so far not been shared by Member States and the European Commission. I am therefore reasonably confident that this negotiating objective can be achieved.

Alongside the negotiating objectives I have highlighted above, it is also worth noting that the most recent compromise text produced by the Romanian Presidency has proposed extending the transposition deadline from 18 to 24 months. It is unclear at this stage whether this proposal will be accepted as the European Commission has expressed reservations however, if accepted, the transposition deadline would fall beyond the Implementation Period that has been provisionally agreed with the EU. This would reduce the likelihood that the UK would be required to implement the Directive.

I will continue to keep the Committee updated regularly on the progress of the negotiations and the UK's objectives. I am copying this letter to Sir William Cash, Chair of the House of Commons European Scrutiny Committee, Les Saunders (DExEU), and Callum Gray (BEIS Scrutiny Coordinator).

yours ever

A handwritten signature in blue ink, appearing to read 'Kelly', written in a cursive style.

Kelly Tolhurst MP

Minister for Small Business, Consumers & Corporate Responsibility

