



House of Commons
Regulatory Reform Committee

**Proposal for the
Regulatory Reform
(Unsolicited Goods and
Services Act 1971)
(Directory Entries and
Demands for Payment)
Order 2004**

Twelfth Report of Session 2003–04



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*Report, together with formal minutes and
written evidence*

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The Regulatory Reform Committee

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/regrefcom

A list of Reports of the Committee in the present Session of Parliament is at the back of this volume.

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Summary

The purpose of the proposal is to amend the legislation governing the processes of authorization by advertisers of entries in directories for which demands for payment can legitimately be issued.

The Government proposes to relax the existing requirements where clients renew or extend existing contracts for entries in a directory, to allow in specified circumstances contracts for directory entries to be agreed over the telephone, and to simplify requirements as to the form and content of certain documents relating to contracts for directory entries. Its aim is to remove provisions it believes are burdensome and unnecessary, to remove anomalies and to ensure the compatibility of UK law with obligations arising from membership of the European Union, while continuing safeguards for business against certain deceptions practised in relation to the publication of real or pretended directory products.

The Committee considers that those elements of the proposal relating to i) the possible authorization of directory entries by telephone call and ii) giving directory publishers discretion over the wording of mandatory declarations to be made on invoices and other documents in circumstances where no right to payment may be claimed fail adequately to protect business from the risk of deception. It therefore recommends that these elements be excluded from the proposal before a draft Regulatory Reform Order is laid before the House.

1 Report under Standing Order No. 141

1. The Regulatory Reform Committee has examined the proposal for the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004 in accordance with Standing Order No. 141. We have concluded that the proposal should be amended before a draft order is laid before the House.

2 Introduction

2. On 26 May 2004 the Government laid before Parliament a proposal for the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004 in the form of a draft of the Order and an explanatory memorandum from the Department of Trade and Industry (the Department).¹

3. The proposed Order contains three connected proposals, which make substantive changes to the requirements on directory publishers under the Unsolicited Goods and Services Act 1971. It would also effect a number of related consequential amendments to other legislation.

4. **Proposal A** is to relax requirements imposed by section 3 of the Unsolicited Goods and Services Act 1971 (which specifies the procedures to be complied with before a person, usually a business, may be bound to pay for the publication of an entry in a directory) where a contract is renewed or extended.

5. **Proposal B** is to allow agreement to the publication of directory entries to be given over the telephone, provided certain information has first been provided to the purchaser and he pays for the entry by means of a debit or credit card.

6. **Proposal C** is to repeal section 3A of the Unsolicited Goods and Services Act 1971, which gives the Secretary of State power to make Regulations to govern the form and content of invoices and other related documents in relation to the publication of directory entries and to specify a simplified set of provisions which will, for the first time, be capable of being satisfied by electronic documents.

7. Our discussion of matters arising from our examination is set out below. Where a criterion specified in Standing Order No. 141(6) is not discussed in the report, this indicates that we have no concerns to raise about that criterion.

3 Background

8. The Department has described the background to its proposals in paragraphs 4 to 19 of the explanatory statement laid with the draft Order. As the Department records, the

¹ Copies of the proposal are available to Members of Parliament from the Vote Office and to members of the public from the Department. The proposal is also available on the Cabinet Office website:

Unsolicited Goods and Services Act 1971 (the 1971 Act) was passed, amongst other reasons, to control the circumstances in which businesses could be charged for the publication of entries about them in directories. It had been the case prior to the 1971 Act that unwary businesses could be tricked by various sharp practices into paying for directory entries for which they had not asked and which they did not want. Unscrupulous directory publishers would accomplish this by sending companies a document in the form of a statement of address, telephone details etc. with a request that the information be checked and confirmed. A statement to the effect that the company concerned consented to the publication of this information in a directory and to pay the associated charges was included amongst various 'small print' located elsewhere on the document. By responding to confirm matters such as its address, the publisher could therefore claim that the business concerned had consented to publication. Directories produced by means of misleading transactions of this kind were generally of no informational or commercial value and were no more than devices by which charges could be imposed on unwary businesses.

9. Another dishonest practice noted by the Department was for individuals, who may not have been publishers at all but confidence tricksters, simply to issue invoices for entries in directories which were entirely fictitious. Some of the companies who received such invoices would go on to pay them, particularly where the 'publisher' made repeated demands for settlement and perhaps made suggestions of legal action. These were, of course, never techniques associated with the bona fide directory publishing industry.

10. The 1971 Act outlawed these dishonest practices by specifying detailed requirements which must be met before an advertiser can be liable for payment for a directory entry. The Act also makes it an offence to claim payment for a directory entry without knowing or having reasonable cause to believe that the entry has been authorized in one of the ways prescribed by the Act.

11. The three ways permitted by the 1971 Act by which a specified business may authorize a directory publisher to submit an invoice for a directory entry about that business are as follows:

1. The issuing of a signed order by the purchaser or someone acting on his behalf on the advertiser's stationery.
2. The signing of a note of agreement. Such a note must be supplied by the publisher to the purchaser, with a further copy for him to retain for his records. The note itself must specify:
 - i. The amount of the charge for the directory entry directly above the place for signature;
 - ii. The name of the directory;
 - iii. the date of publication of the directory or of the issue of the directory in which the entry is to be included;
 - iv. the name and address of the publisher;
 - v. the price at which the directory is to be put on sale;

- vi. the minimum number of copies of the directory to be made available for sale or, where the directory is supplied free of charge, the minimum number of copies to be distributed free; and
 - vii. reasonable particulars of the entry itself.²
3. Since 2001, the purchaser has also been permitted to transmit an electronic communication which specifies that he agrees to be charged for the directory entry. Before agreement can be given in this electronic form, the purchaser must first have received from the directory publisher the details specified in points i-vii above, with details of how any electronic directory which may be published can be accessed. This procedure has been introduced by amendment to the 1971 Act through the Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001, made under Section 8 of the Electronic Communications Act 2000.

12. The Department record that directory publishers have lobbied them for changes to the 1971 Act.³ They consider that it has had the effect of reducing their competitiveness with respect to other advertising media and with directory publishers based in other EU countries, who do not have to comply with the requirements of the 1971 Act and can therefore offer less onerous and expensive means of advertising and directory publication to UK businesses. The July 1999 consumer white paper *Modern Markets: Confident Consumers* contained a commitment from the Government to simplify the requirements of the 1971 Act with respect to the making of charges for directories. A consultation paper was published in December 1999: *Simplification of the Unsolicited Goods and Services Act 1971 (as amended)*. Responses to this consultation paper have informed the preparation of the current proposals and also led to the making of the Order made under the Electronic Communication Act 2000 mentioned in paragraph 11 above.

4 Purpose of the proposal

13. The general purpose of each of the proposals is to make the process of making legitimate contracts for directory entries less onerous for the directory publishing industry and their customers, whilst at the same time continuing safeguards and protections for actual and potential advertisers in directories against rogue publishers.

Proposal A: repeat or renewed entries in directories

14. Proposal A would disapply the present requirements in section 3 of the 1971 Act so as to permit renewed and repeat directory entries to be agreed more easily in circumstances where various specified conditions apply. These conditions are:

² Under the Unsolicited Goods and Services Act 1975, these requirements are replaced by a requirement to comply with requirements made in Regulations made under section 3A of the Act (also added by the 1975 Act). As the Department has indicated, it is not clear that these amendments were ever brought into force. See explanatory statement paragraphs 38-39.

³ Explanatory statement, paragraphs 21-27.

a. Restrictions on parties to the publishing contract

Where the identity of the publisher of the directory concerned has changed, the publisher and advertiser must either have entered into a novation agreement⁴ updating the original contract, or the new publisher must have supplied the advertiser with notice of the following:

- i. His name
- ii. The fact that the directory will be published henceforward by him
- iii. The fact that the previous and new contracts are made between different parties.

b. Time intervals between the publication of directories

If the directory is paper-based, the previous edition in which the purchaser's entry appeared must be either the last edition of the directory or the last edition but one and the interval between publication of the two editions in which the entries appear for this purpose must be no more than 13 months.

If the directory is published in electronic form, the renewed contract must require first publication of the later directory entry not more than i) 13 months after the publication date of the previous entry of the directory or ii) the period during which the earlier contract subsisted (whichever is shorter). Electronic directories are continually updated as they operate and therefore the concept of the 'edition' of the directory is adapted to refer to the duration of the contract for displaying the directory entry.

For both paper-based and electronic directories the proposal therefore limits the use of the simpler renewal procedure to no later than 13 months after the fulfilment of the earlier contract.

c. Restriction on detrimental alterations to the directory

The form, content or distribution of the new directory must either be materially the same as the earlier version or be an improvement on it, as a reasonable person would judge it.

d. Restriction on detrimental changes to the entry

The form and content of the advertiser's entry in the directory must be materially the same or an improvement on the previous entry, as a reasonable person would judge it. The Department notes that this would prevent such undesirable changes as, for instance, reducing the size of the typeface in the entry.⁵

4 Novation occurs where the parties to the original contract agree with each other and a third person that the latter will replace one of the original parties.

5 Explanatory statement, paragraph 31

e. Procedure for seeking approval to the publication of renewed directory entries where this was provided for in the original contract

An agreement to purchase a directory entry may provide that the advertiser will agree to the publication of a further directory entry. In that situation the directory publisher may only use the repeat procedure where i) he has first written to the advertiser giving notice of the cost of the new entry, the date on which the new contract will come into force and the fact that the advertiser has 21 days within which to withdraw his consent to the renewal ii) the advertiser does not withdraw within 21 days.

Proposal B: telephone authorisation for directory entries

15. The second element of the proposal addresses the issue of the authorisation of entries in directories over the telephone. This is not presently permitted under the 1971 Act. The Department considers that the law should be changed for the reason that in modern business it is quite normal for contracts for many services to be agreed over the telephone and, provided the customer is supplied with all the information necessary to make an informed decision and feels happy to proceed to payment via his debit or credit card, there is no reason why this option should not be available to directory publishers and their clients, as it is in respect of the purchase of other goods and services. Providing that contracts of this kind can be concluded over the telephone is seen by the Department as removing unnecessary regulatory burdens from both directory publishers and advertisers.⁶

16. Under the proposal, the making of an agreement to publication of a directory entry by telephone is conditional on i) the advertiser or his representative being provided, during one or more telephone conversations, with the information specified in paragraph 11 above and ii) the entry being paid for by means of a credit or debit card. The information which it is proposed the publisher must provide to the purchaser in the course of telephone discussions is the same as that which the 1971 Act presently requires a publisher to provide in the context of electronic communications for a directory entry.⁷

17. The Department indicates that there is some uncertainty as to what provisions lay down the information requirements for notes of agreement to publish directory entries. Section 3(3) of the 1971 Act was amended by the Unsolicited Goods and Services (Amendment) Act 1975 which provided for those details to be laid down in Regulations. This was done in the Unsolicited Goods and Services (Invoices etc) Regulations 1975 but there is doubt whether these amending provisions ever came into force.⁸ The proposal would have the effect of clarifying the law and establishing without ambiguity the requirements for the form and content of notes of agreement.

Proposal C: simplification and extension of documentary requirements

18. The Department at paragraphs 41 to 45 of the explanatory statement describes how the proposed Order contains a third supplementary aspect which continues in amended form some of the provisions contained in the 1975 Regulations. The purpose of these

6 Explanatory statement, paragraph 36

7 Explanatory statement, paragraph 58

8 Explanatory statement, paragraph 39

Regulations is to specify the form in which invoices or related documents must be produced if they are not to be regarded as asserting a right to payment under the 1971 Act. As has been discussed at paragraph 10 above, it is an offence under the 1971 Act without reasonable cause (i.e. without good reason to believe that the authorization requirements of the 1971 Act have been met) to assert a right to payment for an entry in a directory. In order that confusion be avoided and that directory publishers will not through inadvertence commit these offences, the Regulations require that all communications specifying the cost of potential directory entries bear the statements “THIS IS NOT A DEMAND FOR PAYMENT THERE IS NO OBLIGATION TO PAY. THIS IS NOT A BILL”.

19. The Regulations presently exclude the possibility of providing information about the cost of a contract for a directory entry by means of electronic documents because the relevant specifications are ones which can only be met by paper documents (such as the specification of the permitted distances in millimetres between the text of the document and the edge of the paper on which it is printed). The substance of the third aspect of the proposal is therefore to modernize and simplify requirements presently in the 1975 Regulations so that electronic documents may be used and can comply with the requirements to avoid being regarded as asserting a right to payment.

20. The third element of the proposal is therefore to repeal Section 3A of the 1971 Act and to provide in the Schedule to the Order a simplified and modernised provision to govern the form of documents sent to their customers by directory publishers.

5 Extent of the proposal’s application

21. The 1971 Act applies to England and Wales and to Scotland. The subject matter of the proposal is reserved under section C7 of Schedule 5 to the Scotland Act 1998. The Proposal therefore applies to Great Britain; Northern Ireland is not covered by the 1971 Act and is therefore excluded from the proposal. The Secretary of State has consulted the National Assembly for Wales about the proposal and the Assembly has given its support.

6 Assessment against Standing Order No. 141(6) criteria

Inappropriate use of delegated legislation

22. The proposal appears to be appropriate for delegated legislation.

Removal and reduction of burdens

23. The Department has described the burdens presently imposed by the 1971 Act as burdens of compliance with detailed rules for the authorisation of entries in directories and concerning the form and content of invoices and other documentation relating to the cost to be paid for directory advertising. These burdens bear directly on the publishers of directories; they also bear more indirectly on directory advertisers. The Department

considers the proposed Order would have the effect of reducing burdens under the present law by:-

- i. **Proposal A** - Creating a facility whereby entries in directories can be repeated or renewed in subsequent editions of those publications without publisher and client going through the full authorization process under Section 3 of the 1971 Act. The introduction of a simplified system for the agreement of sequential directory entries reduces the burden of administration procedures on directory publishers (and, indirectly, on their clients).
- ii. **Proposal B** – Creating a facility for the authorization of directory entries over the telephone. The Department anticipates that the ability to discuss the form of an entry and associated publication and pricing matters orally will benefit both publishers and their clients through the reduction of “paperwork and chase-up telephone calls”.⁹

24. The Department implicitly argues that the third aspect of its proposal will remove burdens by replacing the present, very prescriptive regulations for the form and content of invoices and other documents pertaining to directory entries with provisions which perform the same functions but which are less detailed and which will allow for the specified material exchanges between publishers and their clients to take place in the form of electronic documents.

25. We conclude that the first and second proposals would reduce the burdens of disentitlement to payment for a directory entry (contained in section 3(1) of the 1971 Act) and the offence (contained in section 3(2)) by adding new ways of authorising a directory entry. We consider that the third proposal would remove the burden in section 3A of the 1971 Act, which authorises the making of regulations imposing requirements as to the form and content of invoices and other documents.

New burdens

26. The Department considers that it is arguable whether conditions attached to new procedures for the authorization of directory entries will amount to new burdens and that they might be viewed as the limits or conditions within which the present burdens are relaxed.¹⁰ It has nonetheless analysed its proposal in terms of new burdens, and we consider that it is helpful for it to have done so.

27. The burdens of Proposal A take the form of revised conditions applied to the circumstances in which repeat entries in directories may be authorized using the proposed simplified procedure.¹¹ This procedure would be created by the provisions of Article 2(8) of the proposed Order. The Department has summarized the effect of these provisions in paragraph 57 of the explanatory statement.

9 Explanatory statement, paragraph 36

10 Explanatory statement, paragraph 57

11 These are rehearsed at paragraph 11 of this report.

28. The burdens of proposal B – the terms within which it is proposed to permit agreement for the publication of directory entries on the telephone - are described by the Department at paragraph 58 of the explanatory statement. As the Department notes, a new burden arises where publishers using a written note of authorisation to conclude an agreement with a client for the publication of a directory entry will be required to inform that client how they will be able to access any on-line directory in which the entry concerned will appear.

29. The burden of the supplementary third element of the proposal is analyzed at paragraphs 59 and 60 of the explanatory statement. The Department considers that this supplementary proposal does have the effect of imposing new burdens. The proposed subordinate provisions under this heading would impose requirements on the form of invoices and notes of agreement necessary to prevent them from being taken as asserting a right to payment. These are also described as re-enactments of the existing burdens in the 1975 Regulations, but we consider that they are correctly to be regarded as new burdens.

Necessary Protection

30. The Department has argued that all necessary protections would be maintained by its proposal. We consider the issue of necessary protection in relation to each of the three elements of the proposal below.

Proposal A: repeat or renewed entries in directories

31. The proposal provides that, where an entry in a directory has been purchased, a simplified procedure may be used to authorize further entries, provided certain specified conditions are met. These are set out in paragraph 14 above.

32. The Department considers that necessary protection will be maintained by virtue of the carefully defined circumstances in which the repeat procedure may be used and outside of which the authorization procedures laid down in the 1971 Act will continue to apply. In order to make use of the renewal procedure, the publisher of a directory must either have been in an existing relationship with the client business or will be required to have provided it with sufficient information as will give that client a basis on which either to proceed to request publication, decide to withhold agreement to publication or to make further enquiries about the directory service concerned. The provisions concerning the elapse of time permitted between successive publications or contracts and the inability to introduce any deleterious change affecting a directory mean that client businesses will always be assured about the standards to which directories they patronize are produced.

33. The Department points to two particular kinds of deceptive practice which the passage of the 1971 Act was intended to prevent. The simplest was where invoices were issued for unsolicited directory entries with the aim of gaining payment (the directories concerned often being of little or no value or in some instances not existing at all). The proposal would create new methods for authorizing directory entries, but it would not change the provision in section 3(2) of the 1971 Act which makes it illegal to solicit payment for directory entries which have not been authorized by the recipient of an invoice in one of the prescribed ways.

34. The second form of deception took the form of rogue ‘publishers’ writing to businesses with the ostensible purpose of seeking verification of contact details etc. Such letters also contained a carefully obscured statement to the effect that signing and returning the document as requested would signify consent to pay for a directory entry. The Department argues that this practice could now be subject to restraint by the courts where the Office of Fair Trading applies for an injunction under the Control of Misleading Advertisements Regulations 1988.¹² This is on the basis that an invoice or other document would fall within the definition of an advertisement in those Regulations and that an advertisement is deemed misleading where “if in any way, including its presentation, it deceives or is likely to deceive the person to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour.....”. The Department therefore reasons that the 1988 Regulations provide an additional protection against the use of the specified sharp practice in situations where publishers are seeking to renew or repeat business from their clients.¹³

35. We are satisfied that this element of the proposal would continue all necessary protection.

Proposal B: telephone authorization for directory entries

36. The Department’s purpose in this element of its proposal is to permit contracts for the publication of directory entries to be established over the telephone, while at the same time providing that any potential purchaser in telephone discussion with a directory publisher will have sufficient information to take an informed decision on the value to him of the service he is being offered. This element of the proposal is therefore to permit that publication may be agreed on the telephone in the course of one or more conversations providing i) the publisher provides the purchaser with the information specified at paragraph 11 above and ii) the purchaser makes payment for the entry by means of a debit or credit card. The purpose of imposing these conditions on telephone contracting is to ensure that any potential purchaser has sufficient information to decide to proceed, refuse publication of an entry about his business or to seek further information. Providing that directory entries negotiated over the telephone must be paid for by giving debit or credit card details is seen by the Department as ensuring that payment will only be made where a business has a high degree of confidence in the quality of the service being offered and the good faith of the publisher concerned. If a business has any concerns about a publisher or his product he would choose not to contract with him in this way, as they would in relation to any other product or service which might be paid for over the telephone.¹⁴

37. We have had concerns about this element of the Department’s proposal. The Department itself conceded at the time of laying its proposal that permitting telephone authorisation in this way might make it possible for rogue publishers to operate telephone-based deceptions relating to directories of no value, or which may not actually exist.¹⁵ It did not feel that the degree of risk from telephone-based deceptions associated with

12 Explanatory statement , paragraph 67

13 Explanatory statement, paragraph 67

14 Explanatory statement, paragraph 70

15 Explanatory statement, paragraph 72

directory publishing was any greater than that which might affect any other area of business. It also argued that bogus directory publishers based outside the UK were not prevented from practising deceptions on UK businesses over the telephone by the 1971 Act. This may be true but we do not consider that it is relevant.

38. This element of the proposal received general support at the time of the Department's consultation exercise, including the support of the Trading Standards Institute. The Office of Fair Trading did not support Proposal B because it believed it could allow too much scope for deceptions to be practised and because there would, in its view, be difficulties in determining whether the prescribed information had in fact been provided during a telephone call if this was subsequently disputed by the advertiser. This could also mean that enforcement action against possible misrepresentations made over the telephone under the Control of Misleading Advertising Regulations 1988 might be more difficult than the Department supposes, and more difficult than in respect of similar misrepresentations made in writing.

39. The Office of Fair Trading also believed there was evidence that the kinds of fraud which the 1971 Act was passed to prevent occur with increasing frequency; the fact that most of the 1,000 complaints it has received from UK businesses in the last two to three years concern foreign-based rogue traders is viewed by the Office as evidence that the 1971 Act currently operates successfully to discourage these abuses within the UK's domestic directory publishing market. The Office also informed the Department that it had been aware of 150 approaches to UK companies which were telephone-based. The Department nevertheless considered that the risk that credit card payment for directory entries authorized by telephone would be exploited for sharp practices was not great and not more significant than risks from card payment in other areas of publishing not covered by the 1971 Act. It therefore argued that it would be anomalous to impose different regulatory standards on advertising businesses operating directories from those which apply to, for example, newspaper advertising.

40. It was not clear to us, on the evidence of the explanatory statement, that the Department had adequately addressed the concerns expressed by the Office of Fair Trading about the apparently increasing risk of telephone-based deceptions or the difficulties of enforcement to which the proposal might give rise.

41. In view of the clear evidence that rogue publishers were active in other EU countries and that UK businesses were the subject of attempted deceptions from this quarter, we asked the Department whether any consideration had been given to comparative levels of telephone-based deceptions in these other jurisdictions and the effect that differing regulatory regimes may have on the incidence of these deceptions. In asking this, we were concerned to know whether there was any evidence for the Department's claim that removing the present restriction on telephone contracting for directory products in the UK would not affect the level of attempted or actual fraud.

42. The Department informed us that some attention had been given to this question and that it had not found any legislation comparable in rigour to the 1971 Act within other EU member states.¹⁶ The Department was also aware from the evidence submitted by the

Office of Fair Trading that telephone based-deceptions targeted at UK businesses were originating from elsewhere within the EU. It also noted similar deceptions were reported originating from Canada. In both instances, it believed the deceptions concerned involved an initial contact made by telephone which then led on to the submission of written demands for payment. Any demands for payment made in such circumstances would continue to be illegal within the UK under the Department's proposal. Where telephone deceptions might be practised by traders based in other jurisdictions, such activities would be subject to the laws of the country concerned.

43. The Department also believed, on the evidence of its consultations, that there was little knowledge of the 1971 Act within the UK, particularly amongst smaller directory publishers. Together with a low level of prosecutions for offences against the Act, and the fact that most deceptions originate outside the UK, this led it to conclude that "the 1971 Act was not itself acting as much of a deterrent".¹⁷ We question the validity of this conclusion: it seems to us that the evidence of comparisons between the strength of the UK law compared with that overseas is that the 1971 Act has been effective in suppressing undesirable sales practices in relation to directory advertising within the UK's domestic publishing market.

44. In view of the concerns of the Office of Fair Trading, which we shared, we asked the Department to consider whether UK businesses might not be better protected if instead of allowing for the possibility of instant payment by credit or debit card in the context of telephone discussions, payment could only be required after information about the directory and the entry had been supplied in writing. The Department noted in response that such a provision would effectively be identical with the note of agreement method of authorization, as the present law does not mean that publishers may not discuss proposed directory entries with their clients.¹⁸ In response to the issue of the difficulties enforcement authorities might face in the absence of any conclusive evidence as to what may have been said in a telephone conversation, the Department argued again that, under its proposal, telephone contracts could only be established where the purchaser felt sufficiently sure of the publisher and the product he was purchasing as to offer credit or debit card details. We take this to mean that the Department believes it to be most unlikely that contracts established and paid for in the way they propose would later be subject to dispute, as such contracts would only be established where the purchaser was entirely content with what was being offered. We do not find this reasoning persuasive, as disputes of this kind would occur precisely in situations where a purchaser found a product to be other than he believed he had previously been promised, whether as a result of fraud or a possible misapprehension on the part of himself or the publisher. Whatever the reason might be, the dispute would indeed be more difficult to resolve in the absence of any written record of the agreement.

45. In addition to our questions to the Department, we also sought comments about the proposal from the membership of the Local Authority Co-ordinators of Regulatory Services (LACORS). The Trading Standards Division of Wirral Borough Council indicated that they were aware of a number of traders who operate telephone-based

17 Appendix C, paragraph 10

18 Appendix C, paragraph 21

deceptions from within their own borough in relation to products such as diaries, wall planners and calendars. Often these are purportedly publications with a charitable purpose. Such products fall outside the scope of the 1971 Act for the reason they are not directories. Approaches made by these rogue publishers are often received by junior members of staff who may be tricked into consenting to pay for their products, and the firm concerned then is subjected to pressure to pay by threats of court action.

46. The Department considers it very significant that its proposal requires telephone-based contracts to be paid for by credit or debit card. It might on this basis be argued that junior staff would not have access to company credit cards or that anyone receiving an unsolicited approach from a publisher by telephone would not be prepared to pay in this way unless they were sure it was the right course of action to take in the circumstances.

47. We accept that some people who might receive telephone calls offering to sell directory entries would be wary of making instant payment for such a service and would prefer to receive written particulars of what is proposed before they agree to proceed. It does nevertheless appear to us that inducing individuals to exercise caution in their own defence by deliberately exposing them and their employers to potential risk of fraud is a questionable method of ensuring protection. It seems to us that what the Department proposes is that businesses depend not on the law for protection in this instance but on their own wariness of being deceived.

48. We further consider that the evidence suggests there is a very active and continuing risk from fraudulent publishers and that allowing telephone authorization and payment for directory products would certainly lead to such fraudsters endeavouring to exploit this new facility for financial gain. While we understand that some directory advertisers might find it convenient to settle and pay for a contract for an entry in the context of a telephone call, we believe on the evidence we have seen that most would in any event wish to continue to see written particulars of the directory and entry first. In view of the risk of fraud which we believe would arise from proposal B, including the difficulties which it could create for enforcement action and the encouragement that such difficulties might give to those intent on practising deceptions, we consider that it fails to continue necessary protection.

49. In the light of these considerations, we recommend that Proposal B be omitted from the draft Regulatory Reform Order.

Proposal C: simplification and extension of documentary requirements

50. The third element of the proposal is to repeal section 3A of the 1971 Act (and with it the 1975 Regulations) and to impose requirements as to the form and content of invoices and other documents related to directory entries which are less prescriptive and which, in particular, allow for the use of electronic documents as invoices. If it is the case that these regulations are not in force no existing protection can be derived from them.¹⁹

51. Proposal C would be less prescriptive of the form of documents which may be sent to prospective clients, without amounting to a claim for payment. The proposal is simply that the publisher must include on any such document a statement to the effect that he asserts

¹⁹ The reasons for this uncertainty are described at paragraph 17 above.

no right to payment, framed in such a way that this is made readily apparent to any reasonable person reading the document. The 1975 Regulations presently require that such a document bear the statements “THIS IS NOT A DEMAND FOR PAYMENT. THERE IS NO OBLIGATION TO PAY. THIS IS NOT A BILL”. Importantly, proposal C would also, for the first time, apply to an invoice or other document sent electronically.

52. We asked the Department to consider whether it might not be clearer simply to continue to require the inclusion of the presently prescribed forms of words in invoices issued in these circumstances, on the basis that these do make quite clear that those who receive them are not required to pay them. The Department believed that the essential point was that a given invoice or other document would still make clear that no payment was being demanded, but that the requirement would take a less prescriptive form. This amounted in its view to a fully adequate continuation of protection for directory advertisers.

53. We accept that proposal C would continue a requirement on directory publishers to make clear to their prospective clients that no payment is due, where a directory entry has not previously been authorized in one of the prescribed ways. However, we are not persuaded that the degree of latitude in framing the declaration that the proposal would give to directory publishers is in any way necessary. This is not to suggest that legitimate directory publishers have any intention of issuing deceptive invoices. However, the virtue of the present requirements is that they are wholly unambiguous and leave no room for the exercise of judgement and we consider that to be wholly beneficial in this instance. It seems to us that it would be quite reasonable to continue to require the inclusion of the current statements, that there is no difficulty in an electronic document reproducing the statements equally as well as a paper document and that to continue this requirement would be beneficial, in terms of clarity and simplicity, both for client businesses and directory publishers themselves. **We therefore recommend that proposal C be amended to provide a requirement that invoices and similar documents must continue to bear the statements presently prescribed in the 1975 Regulations, in order not to assert a right to payment under the 1971 Act.**

Exercise of rights and freedoms

Proposal A – Repeat or renewed entries

54. The Department considers that the proposal for a repeat or renewed directory entry would (except in the case of orders on the advertiser’s own stationery) remove a right to receive ‘specified’ information before entering into a contract for a renewed or extended entry.²⁰ The Department considers that the right is not necessary to advertisers, arguing that, where a business wishes to receive detailed information before agreeing to a repeat entry, this can, as a matter of negotiation, be required before a contract is entered into. We doubt whether the passive receipt of information from another party who is statutorily obliged to supply it amounts to the exercise of a right for the purposes of the Regulatory Reform Act. In so far as it might be thought to do so, the exercise of the right would cease

20 Explanatory statement, paragraph 77

under the proposal but, as noted above, this will not in practice affect the position of directory advertisers, who will retain their freedom to demand such information.

55. The 1971 Act provides directory entry purchasers with an effective right to withhold payment, or to require reimbursement, where directory publishers have failed to comply with the authorisation procedures for directory entries which are prescribed in the Act. This effectively disables any consent to a renewal contained in the initial contract. The Department states that this freedom is protected by the proposed requirements for the provision of information and the clients opportunity to withdraw his agreement during the following 21 days in such cases. **We are satisfied that no reasonable rights or freedoms will be lost through this aspect of the proposal.**

Proposal B – telephone authorization of directory entries

56. Under this aspect of the proposal publishers and their clients would gain a capacity to agree contracts on the telephone. **No existing rights or freedoms are affected.**

Proposal C – repeal of Section 3A and replacement of the 1975 Regulations

57. The third element of the proposal would repeal the power of the Secretary of State in section 3A of the 1971 Act to make regulations as to the form and content of invoices and other documents concerning the publication of directory entries and, as a consequence, the 1975 Regulations, and enable electronic documents to be used for these purposes. **We consider that no rights or freedoms are affected.**

Proportionality and fair balance tests

58. As noted at paragraph 26 above, the Department is itself unclear whether new burdens are imposed by its proposal or whether the new procedures for authorising directory entries which the proposal would impose should be considered as the terms within which the burdens of the 1971 Act would be relaxed by the proposed Order. In their explanatory statement they have nevertheless laid before Parliament an analysis each of the restrictions in the proposal in the way required of new burdens with respect to the proportionality test.

59. With respect to Proposal A, the Department recognises the following burdens, which take the form of conditions which must apply in order for a publisher to make use of the proposed simplified renewal procedure for repeat directory entries:

Requirement that form, content and distribution of the directory must remain unchanged or change for the better.

60. This restriction would mean that a directory publisher would be prevented from using the renewal procedure for a contract to provide a purchaser with a directory product which was inferior in the specified ways. The Department argues that this restriction is proportionate on the basis that it acts to protect the interests of purchasers. **We agree.**

Requirement that the form and content of a directory entry must be maintained or change for the better.

61. The Department again believes that this restriction protects purchasers from being sold directory entries through the repeat procedure where quality has been reduced in the specified ways, and that it is thereby proportionate. **We agree.**

Restrictions on the period of time which may elapse between earlier and later publication of contracts for directories without full authorization procedures being required.

62. The Department believes this restriction is proportionate because it protects purchasers by ensuring that the repeat procedure may only be used where there is a reasonable continuity of business relationship between publishers and their customers. **We agree.**

Requirement that, in contracts for ongoing publication of directory entries, publishers must serve notice on their customers when the time for renewal/re-publication falls due, allowing a period of 21 days in which the customer may withdraw from the contract.

63. This restriction has the effect of preventing any publishers who might wish to from using small print to trick purchasers into signing contracts for successive directory entries. It therefore ensures that an abuse which the 1971 Act was passed to prevent remains illegal. It provides for a periodic notification to purchasers about the continuation of contracts to which they are a party, without imposing an undue or unreasonable burden on directory publishers. **We agree that the restriction is proportionate.**

Restrictions on use of the repeat/renewal procedure where the identity of the publishers has changed.

64. The restriction requires that, where a publisher takes over the publication of a directory with respect to which one or more purchasers have contracted for sequential entries, the publisher may only use the shortened renewal procedure if the original publication contract has been the subject of a novation agreement with the purchaser or if the publisher has otherwise taken steps to ensure the purchaser is aware that he will now be publishing the directory. The Department considers that the effect of the restriction is proportionate on the basis that no burden falls on publishers who are reputable, as they will always wish to identify themselves to their customers. The does not appear to us to be relevant. The restriction bears on any person who takes over publication of a directory and with that directory 'inherits' customers who wish to have successive entries published. Its incidence has nothing to do with the bona fides or otherwise of those whose actions it affects. **What makes the restriction proportionate is not that it has no effect on publishers whose intentions are honourable, but that it ensures that no purchaser can be required to do business with a publisher merely because that publisher takes over a directory in which it has been that purchaser's practice to buy an entry and a contract for further entries is extant.**

65. Concerning Proposal B, which allows for contracts for the publication of entries in directories to be agreed on the telephone, the following considerations arise under the proportionality test:

The publisher must provide the purchaser with certain specified information concerning the entry the directory and its publisher before an agreement to publish an entry may be concluded.

66. The proposed restriction will mean that the information required to be provided before an agreement to publish a directory entry is entered into will be the same for written, telephone and electronic communications. The Department consider the restriction to be proportionate on the basis that it retains a balance between the interests of publishers and purchasers in the same way as in the 1971 Act. **We agree.**

An agreement for the publication of a directory entry concluded on the telephone must be paid for using a debit or credit card.

67. The Department considers that the requirement is proportionate for the reason that purchasers will only be prepared to disclose credit/debit card details in situations where they have confidence in the service they are buying. It will therefore be in the publisher's interest to ensure that his customer is sufficiently confident in him and his directory that the purchaser is willing to make an agreement and pay for it by providing this sensitive information as a means of payment. Requiring payment in this way in the context of a telephone conversation is seen as a method of ensuring that purchasers will exercise a degree of wariness, such that they are in effect being induced to exercise caution against inappropriate directory services or the approaches of disreputable traders. Purchasers are thereby encouraged to look to their own protection.

68. We do not consider the requirement that payment for telephone contracts by credit or debit card is disproportionate, in the sense of unduly burdensome. On the contrary, as we have said above, we consider this requirement is insufficient to maintain existing protections for advertisers.

Harmonisation of information particulars

69. The requirement is that the information to be supplied to a purchaser before a contract can be agreed by telephone must be the same as is provided in respect of agreement of a similar contract where information is provided in the form of electronic documents. The Department believes this is proportionate. **We agree.**

70. Proposal C simplifies the requirements with respect to statements which must be included in invoices or other documents relating to the publication of directory entries if they are not to be taken as asserting a right to payment and takes account of the nature of modern communications. The restriction as drawn under this element of the proposal is less prescriptive than in the 1975 Regulations, requiring no specific forms of words save that the relevant documents must be clear, legible and comprehensible and include a statement to the effect that they do not assert a right to payment.

71. We agree that publishers gain a valuable freedom in being able to make use of electronic communication for the purpose of communicating information about their products, including about their cost, to potential clients. We accept that the burden imposed on directory publishers by the proposal is proportionate. We are not, however, persuaded that the liberalisation it would bring will be beneficial for those receiving unsolicited communications or ultimately for publishers themselves. We discuss this question further at paragraphs 50 to 53.

72. The Department has provided Parliament with a commentary on the fair balance test which applies that test sequentially to each of the burdens it identifies in its proposal. This is a misapplication of the test; the Regulatory Reform Act requires that the Minister must be satisfied that the provisions of the Order *as a whole* strike a fair balance between the public interest and the interests of the persons affected by the burdens which the proposal creates.

73. The Department consistently argues that its proposal has the effect of freeing directory publishers and their clients from unnecessarily burdensome procedures under the 1971 Act whilst maintaining protection for those buying directory entries against sharp and dishonest trading practices. To the extent that new burdens are imposed, it believes that these take the form of regulatory limitations necessary to restrain dishonest publishers within the context of removing larger, more restrictive and unnecessary burdens.

74. We consider that the proposal does have the effect of reducing the overall weight of regulatory burden on directory publishers and, indirectly, on their clients. We accept that where new burdens are created, they will affect the entire directory publishing industry but are likely to obstruct the business only of those whose intention is actually to profit from deception. Nonetheless, we are concerned about the extent to which the effect of elements B and C of the proposal may prejudice the public interest in ensuring the effective prevention of deceptive trade and we do not believe that the Department has made a convincing justification of these reforms in terms of the real value they might achieve for directory publishers and their clients.

75. For these reasons, we do not believe that the Order as currently drafted strikes a fair balance between the public interest and the interests of those affected by the burdens created thereunder.

Desirability

76. The Department believes that its proposal is desirable in terms of the test in the Regulatory Reform Act on the basis that it will introduce beneficial reductions in regulatory burdens on both directory publishers and their clients, thus saving both money and time for UK businesses. We have recommended two amendments to the proposal at paragraphs 49 and 53 above.

77. We are satisfied that the proposal, with these amendments, meets the test of desirability.

Subordinate provisions

78. The Schedule to the draft Order specifies the information to be provided in the written note and telephone procedures for authorising a directory entry, the information to be provided to renew or extend an existing contract and the conditions an unsolicited document must meet in order not to be regarded as asserting a right to payment under the 1971 Act. It is proposed to designate these provisions as subordinate provisions amendable by order and subject to annulment by a resolution of either House of Parliament. This is seen as providing an appropriate means to make variations in the designated provisions without recourse to the Regulatory Reform procedure should amendment of the provisions in the schedule be needed.

79. We agree that this designation is appropriate and the negative resolution procedure would be appropriate in this instance.

Consultation

80. The proposal was the subject of a formal consultation process, carried out in accordance with Cabinet Office Code of Practice on Written Consultation between 28 March and 27 June 2003. 56 organizations received a copy of the consultation document direct from the Department, and it was made available on three Government websites.²¹ The Department states that 14 responses were received – from five directory publishers, eight ‘business and professional groups’ and from the Office of Fair Trading. The list of those bodies who were consulted is reproduced as Annex A to the explanatory statement; the list of those who responded is included as Annex B. Annex C to the statement provides a detailed analysis of submissions received during the consultation period.

81. The Department considers that there were six instances in which respondents to the consultation expressed general support for the proposed Order, while recommending changes to the detail of it.²² In three cases the Department revised its proposals as a consequence and in the other three decided that its original proposals should stand unamended.

82. The elements of the Department’s current proposals which were introduced as a result of suggestions made during the consultation process are:

- i. The provision that renewals and extensions to directory publishing contracts should be allowed where an advertiser misses one issue of a directory, or where no more than 13 months or the length of the publishing contract elapses (which ever is the greater) in relation to electronically published directories. These changes were made in response to suggestions from the directory publishing industry, who were concerned that it was common for advertisers to place entries in alternate editions of a directory.

21 www.dti.gov.uk/ccp/consultations.htm
www.cabinet-office.gov.uk/regulations/act/condocs.htm
www.ukonline.gov.uk

22 Explanatory statement, paragraph 105

- ii. The provision that the publisher of a directory may change while the repeat or renewal procedure may still be used, provided that the relevant parties have entered into a novation agreement with respect to the earlier contract or the new publisher has supplied the purchaser with information specified in the subordinate provisions to the Order before the new contract is agreed. This is a response to the concerns raised by one publisher concerning the burdensome situation which would otherwise apply if a publishing company was the subject of a merger or was otherwise restructured in a way which meant that its legal identity was changed.
- iii. The provision that directory publishers may only use the repeat/renewal procedure if they write to purchasers notifying them that renewal of their entry falls due and giving a period of 21 days in which the purchaser may give notice of their wish to withdraw from the contract in writing. This protects against unwary purchasers contracting for successive directory entries on a single occasion through terms which might be obscured by being presented in small print.

83. The Department resolved not to make these changes requested by respondents:

- i. That the sections of the 1971 Act bearing upon the directory publishing industry should simply be repealed on the grounds that it they unfairly restrict the operation of directory publishers in comparison with competing kinds of advertising provider, such as newspaper advertising. This was argued by some sections of the directory publishing industry. The Department considered that, in the context of the continued operation of bogus directory publishers elsewhere in Europe, this would remove too much of the present protection against the deceptive practices which the 1971 Act was passed to restrain.
- ii. That the proposal should not provide that specific information must be provided before a contract for a directory entry can be agreed on the telephone. This was the view of the Directory and Database Publishers Association and some individual directory publishers. The Department, however, considered that such a requirement would provide a useful protection and notes that the proposed requirements are parallel with the information required to be supplied before contracts can be agreed in writing. It therefore saw no reason why the same protections should not be applied in this case.
- iii. That the renewal procedure in the proposal should also apply in instances where a purchaser agrees to buy a new or similar directory product. The Department considered that this would not be appropriate on the basis that this would not give a purchaser the benefit of a period of experience of the directory product in question before they decided to buy an entry in it. It would also make it possible for contracts for other directory products to be dishonestly obtained at the time contracts were renewed through the use of terms inserted in small print.

84. The Department records that there were also three respondents with significant concerns about aspects of the proposal: Harrogate Chamber of Commerce, the Office of Fair Trading and Matthews and Wilson (who are a small business).

85. The Harrogate Chamber of Commerce and Matthews and Wilson were opposed to the first and second elements of the proposal for the reason that these did not address the risk

they felt could be posed by rogue publishers. The Chamber of Commerce argued that the protections currently in the 1971 Act should be extended to mailing services and to various other kinds of sub-contractors and agents who might act in the UK on behalf of foreign directory publishers, so that intermediaries could not be used as a means whereby the requirements of the 1971 Act could be avoided.

86. The Department has acknowledged that deceptive trading practices related to the selling of directory advertising continue to be used by businesses operating from mainland Europe but argues that this cannot be tackled by domestic legislation.²³ In this context, it notes that the European Commission has proposed a directive on Unfair Commercial Practices which may offer some protection against misleading or aggressive trading practices used by businesses operating across national boundaries.²⁴ We accept that the Department is correct that this is likely to prove a more appropriate mechanism for the tracking of cross-border deceptions of these kinds, in addition to legislation and enforcement within EU member states themselves.

87. The Office of Fair Trading expressed strong concern at Proposal B. It felt that the proposal would expose business to an unjustified degree of risk from rogue directory publishers, particularly those presently based overseas. It considered that the proposed lack of any requirement to confirm agreements made on the telephone in writing could cause problems in determining exactly what information had been provided in the context of a telephone call, with resulting difficulties with enforcement action. We discuss these issues in further detail at paragraphs 37 to 49 of this report.

88. Subject to our recommendations in paragraph 49 in relation to the concerns about proposal B expressed by the Office of Fair Trading, we are satisfied that the proposal has been the subject of, and has taken appropriate account of, adequate consultation.

Savings and costs

89. The Department has addressed the issue of possible savings and costs from its proposal in the Regulatory Impact Assessment.²⁵ Savings likely to be achieved by directory publishing in the UK are estimated at around £1 million per annum, as a result of reduced need for following-up orders for directory entries, simplified printing and stationery requirements and smaller postage bills. The annual turnover of the UK directory publishing industry is estimated at £1,500 million, and possible savings as a result of this proposal are therefore likely to be very marginal in terms of the industry's overall costs.

90. The Department considers that it is not possible to set an amount on the cost of not proceeding with the proposal. This is because there is no data on the cost to business, prior to 1971, of the forms of abuse which it has been the purpose of the 1971 Act to prevent.²⁶ This does not seem to us to be relevant to the question of the costs of not carrying the proposed Order into effect, as the status quo is the 1971 Act, not the situation which prevailed prior to 1971. We consider it would therefore be reasonable to conclude that the

23 Explanatory statement Annex C, paragraphs 48-49

24 Explanatory statement Annex C, paragraphs 48-49

25 Explanatory statement, Annex D

26 Explanatory statement, Annex D, Paragraph 42

costs of not proceeding as proposed would be the continuation of the expenditures discussed in the preceding paragraph.

91. On the basis of the Regulatory Impact Assessment, we are satisfied that the proposal has been the subject of, and taken appropriate account of, estimates of increases or reductions in costs and other benefits which result from its implementation.

Compatibility with obligations arising from membership of the European Union

92. The European Union E-Commerce Directive was adopted by the European Parliament and Council on 8 June 2000 and was implemented (except for Article 9) by the UK by the Electronic Commerce (EC Directive) Regulations 2002.²⁷ The purpose of this Directive is to create a free market in electronic commerce by removing restrictions on the freedom of service providers based in other EU member states to provide “Information Society” services in the UK. Information Society services are defined as being any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service. Directory publishers who make use of electronic communications to agree entries in directories with clients will be covered by this definition. The 2002 Regulations disapply the 1971 Act with respect to directory publishers based elsewhere in the EU who use websites and e-mail to make contracts with UK businesses. Such publishers will, of course, instead be subject to the domestic law of the country in which they operate. The Department’s belief, based on its consultations on the current proposal, is that this will often be less stringent than the 1971 Act in the UK.

93. The Department furthermore considers that the 1971 Act is currently incompatible with Article 9 of the E-Commerce Directive, which requires of member states that their laws do not create any obstacles to electronic contracting. The Department believes that the 1971 Act may contravene Article 9 by:

- a) Creating a requirement for the prior provision of detailed information concerning directories and the form of entries to be published in them where the order for an entry is subsequently sent electronically whereas no equivalent requirements apply if an order in writing is sent on the purchaser’s own stationery.
- b) Creating a series of requirements, through the 1975 Regulations, which cannot be satisfied by an electronic document.
- c) Creating a requirement that publishers of on-line directories must provide more information if they contract for business electronically than if written notes of agreement are used.

94. The Department believes that its present Regulatory Reform Order proposal will resolve the incompatibility issue with respect to points b. and c. above, but not with respect to a., and we share this view. This is because the 1971 Act (in its current, amended form) requires that the purchaser of a directory entry must be supplied with certain specified

information before an order may be sent as an electronic document. (The specified information in this case is identical with that recorded at paragraph 11 of this report). The Department states that the different arrangement for electronic contracting was made as result of the belief, at the time electronic ordering was authorised in the Unsolicited Goods and Services Act 1971 (Electronic Communications) Order 2001, that there might be particular difficulties in determining the authenticity and true origin of electronically produced business orders.²⁸ Modern communications technology makes it possible for a person fraudulently to amend information contained in an electronic document. Requiring the prior provision of the specified information to purchasers was therefore seen as a means of preventing e-mail based fraud.

95. The Department's intention is to resolve the remaining incompatibility through an Order to be made under section 2(2) of the European Communities Act 1972, stating that the purpose of this will be to allow orders on a business' own letterhead to be sent electronically.²⁹ Annex E to the explanatory statement comprises a separate consultation document concerning this intended section 2(2) Order. The consultation period expired on 18 June 2004.

96. We asked the Department why it planned to proceed in this way, rather than including all of its proposed reforms to the 1971 Act in the present Regulatory Reform Order proposal. It indicated that the issue of the outstanding incompatibility with Article 9 of the E-commerce Directive was not apparent until after its consultations on the Regulatory Order proposal were complete, hence to address the matter in the Order would have required further consultations and a delay in proceeding with it. It was to avoid this delay in view of the fact that a commitment to reform the 1971 Act was made in the 1998 White Paper "Modern Markets, Confident Consumers" and it was felt that not to proceed at this stage might give rise to negative reactions from the directory publishing industry.³⁰

97. The Department has informed us that it has received 7 responses to its consultations from 58 organisations which it approached. Bodies representing directory publishers and related sections of the advertising industry did not consider that the proposal would have a significant effect at the level of business practice, as few of their clients made use of unsolicited business orders to establish publishing contracts. These bodies were nevertheless anxious that the eventual section 2(2) Order should not create difficulties for publishers through technical requirements concerning devices such as electronic letterheads and watermarks, which might be intended to make electronic orders harder to forge.

98. We understand that the Department intends fully to analyse and respond to the consultation responses which it has received and if the present Regulatory Reform Order is approved, the Minister will sign and lay before each House of Parliament the section 2(2) Order, which will be subject to the negative resolution procedure.

99. We are satisfied that no incompatibility exists between the proposal and obligations arising from membership of the European Union. In this instance, we also note that

28 Explanatory statement, Annex E, paragraphs 9.3 and 9.4

29 Explanatory statement, paragraph 18

30 Appendix C, paragraph 43

the Government has in hand plans to resolve a related incompatibility between present UK law and such an obligation.

7 Conclusion

100. We consider that a draft order amended as described at paragraphs 49 and 53 should be laid before the House.

Formal minutes

Tuesday 14 September 2004

Members present:

Mr Peter Pike, in the Chair

Mr Dai Havard

Dr Doug Naysmith

Mr John MacDougall

Brian White

The Committee deliberated.

Draft Report [Proposal for the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 100 read and agreed to.

Resolved, That the Report be the Twelfth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Report.

Ordered, That the Appendices to the Report be reported to the House.

[Adjourned till Tuesday 12 October at 9.30 am.]

List of written evidence

A Letter from the Committee Specialist to the Department of Trade and Industry dated 25 June 2004	30
B Letter from the Committee Specialist to the Local Authority Co-ordinators of Regulatory Services dated 29 June 2004	32
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D Letter from the Trading Standards Division of Wirral Borough Council to the Committee Specialist dated 9 July 2004	41

Appendix A

Letter from the Committee Specialist to the Department of Trade and Industry

Proposal for the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004: request for information

Thank you for the presentation which you made on 22 June on the subject of the unsolicited goods and services proposal.

The Committee considered the proposal at its subsequent meeting and resolved to seek your further comments on a number of additional points and questions. The issues which concern the Committee are set out below, under the relevant categories for consideration in the Regulatory Reform Act and the Committee's Standing Order.

Whether the proposal has the effect of continuing any necessary protection as required in Section 3 (1)(a) of the Regulatory Reform Act 2001 (S.O. No 141(6)(c))

Whether the proposal has been the subject of, and takes appropriate account of, adequate consultation (S.O. No. 141(6)(d))

1. The Committee is concerned that the proposal may reduce burdens on directory publishers and their clients without adequately protecting businesses from the approaches of rogue traders. The Committee believes there is evidence of an active risk from dishonest traders acting as real or pretended directory publishers, both on the basis of the submission made in response to the Department's consultation on the proposal by the Office of Fair Trading and from experience of Members' own constituents. It is not clear how necessary protection would be maintained against rogue traders by the proposal, particularly in relation to the proposal to allow authorization of directory entries on the telephone where there is payment for that entry in the context of the call using a credit or debit card.

- Q 1** Has the Department given any consideration to the comparative levels of telephone based deceptions in connection with the directory publishing industry in other EU member states and the effect that the various regulatory regimes of member states may have on the incidence of deceptions of these kinds?
- Q 2** Please indicate whether any consideration was given to permitting contracts for directory entries to be agreed in the context of face to face discussions between publishers and advertisers (or their respective representatives and agents), as permitting the agreement of oral contracts by telephone call but not in person appears to create an anomaly.
- Q 3** Given the concerns expressed by the OFT and in particular the difficulties likely to arise for advertisers or enforcing authorities from the absence of any requirement for a record of the telephone conversation(s), does the Department consider it might be preferable to protect UK businesses against telephone-based deceptions by excluding the possibility of instant payment for proposed directory entries by credit or debit card in the context of telephone discussions and requiring that payment may only be sought when written particulars of the directory and entry have first been supplied to the purchaser in writing?

2. The Committee notes that it is proposed to allow the simplified repeat/renewal procedure to be used in circumstances where (amongst other conditions) the form and content of the individual directory entry and the directory itself are materially the same as in the previous edition. The 'test of materiality' in the proposal is

satisfied in circumstances where a reasonable person would consider the earlier and later versions of the directory/entry as being either the same or the later version an improvement on the earlier version.

Q 4 Can the Department please provide a more detailed analysis of how the test of materiality would operate in practice and whether the effect of the proposed provision would be to require directory publishers to notify their clients of all changes in the form and content of directories and of individual entries in them before repeat/renewed business could be charged for?

3. It seems to the Committee that, under the proposal, a publisher could substitute a larger or enhanced directory entry and impose a correspondingly higher charge for it, on the basis that a reasonable person would regard this as an improvement.

Q 5 Does the Department consider that the proposal creates adequate requirements in respect of the notification of increases in the price of directory entries in such situations, given that the publisher will not be required to make the amount of the charge explicit in the ways currently prescribed in the 1971 Act?

4. The Committee notes that the third element of the Department's proposal will permit publishers to submit invoices for directory entries with greater freedom as to their form and content but that, where authorization procedures as provided elsewhere under the proposal have not been completed, invoices must 1) be clear, legible and comprehensible and 2) contain a statement to the effect that no right to payment is asserted, displayed in such a manner that makes that statement readily apparent to a reasonable person reading that invoice. The law would no longer prescribe that unsolicited invoices and other documents issued in the relevant circumstances bear either of the statements "THIS IS NOT A DEMAND FOR PAYMENT. THERE IS NO OBLIGATION TO PAY" or "THIS IS NOT A BILL".

Q 6 Please explain why it is thought desirable to remove the requirement that these statements must be included on invoices not asserting rights to payment, given that they appear unambiguously to establish the status of those invoices in a way which is beneficial for those who receive them?

Whether the proposal appears to be incompatible with any obligation arising from membership of the European Union (S.O. 141(6)(i))

5. The Committee notes that the consultation period for proposed further amendments to the 1971 Act to be made by regulations under section 2(2) of the European Communities Act 1972 in order to ensure compatibility with Article 9 of the E-Commerce Directive closed on 18 June 2004.

Q 7 Can the Department indicate why it decided to make this amendment to the 1971 Act by regulations under the European Communities Act 1972, rather than delaying the laying before Parliament of the present RRO proposal and (if appropriate) including this point in the proposal?

Q 8 Can the Department indicate the nature of the responses received to the consultation exercise and, to the extent that these have been decided, state its plans for giving effect to the additional reforms to the 1971 Act it believes are required to ensure compliance with the E-Commerce Directive?

Other matters arising from the Committee's consideration of the proposal (S.O. 141(5))

6. The Committee has noted that a number of amendments have been made to the 1971 Act since its introduction; the current Regulatory Reform Order proposal would make three further substantial amendments to the Act and it is also proposed to make a further amendment to it by regulations under section 2(2) of the European Communities Act 1972.

Q 9 Given the number of existing and proposed amendments to the 1971 Act, can the Department indicate whether it has any plans to consolidate the legislation relating to the publication of directory entries?

Q 10 Please indicate why the Department considers there has been a very low level of prosecutions for offences under the 1971 Act, despite the continued existence of the deceptive practices prohibited by the 1971 Act?

I would be grateful to receive your response to these questions, together with any further information which the Department believes would be helpful to the Committee not later than Friday, 9 July.

Appendix B

Letter from the Committee Specialist to the Local Authority Co-ordinators of Regulatory Services

Proposal for the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004: request for information

I am writing on behalf of the Regulatory Reform Committee to seek your views on this proposal for a Regulatory Reform Order, which was laid before Parliament on 26 May 2004. As you may know, the function of the Committee is to examine and report to the House of Commons on Government proposals for regulatory reform orders such as this.

The Committee is aware from explanatory materials submitted with the draft Order by the Department of Trade and Industry that LACORS was consulted about the proposal through the circulation of the Department's consultation document issued on 28 March 2003. We understand that LACORS informed the Department that it did not wish to make any comment on the proposal.

The Committee has been concerned in particular at this stage about two matters. These are, firstly, the extent to which the Unsolicited Goods and Services Act 1971 is effective in preventing the deceptive practices with respect to directory publishing which Parliament legislated to restrain in the 1971 Act. Officials in the Department have informed the Committee that, to their knowledge, there has only ever been one prosecution for an offence under the 1971 Act committed in relation to directory publishing. It seems to the Committee that those deceptive practices which are made illegal in the 1971 Act have by no means disappeared. They would therefore be interested in any comments which the local authority trading standards members of LACORS might wish to make as to the current extent of these deceptive practices in the UK and the effectiveness of the mechanisms under the 1971 Act for dealing with them.

Secondly, the Committee is required under its Standing Order to consider whether the proposed Regulatory Reform Order would continue all necessary protections. At this stage, the Committee would therefore be interested to know whether the local authority trading standards members of LACORS consider that the law reformed in the way the Department proposes would continue to provide sufficient protection for UK businesses against deceptive or misleading approaches from real or pretended directory publishers.

I should be grateful for any comments you may wish to make in relation to these or any other points concerning the Department's proposal.

Appendix C

Letter from the Department of Trade and Industry to the Committee Specialist

Proposal for the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004: reply to request for information

Thank you for your letter of 29 June requesting further comments on this proposal. I am pleased to provide the Department's response that is attached. I am copying this letter to Christine Salmon, Clerk to the House of Lords Select Committee on Delegated Powers and Regulatory Reform, as requested.

I should be happy to assist if any further information is required.

DTI response to questions on the proposed Regulatory Reform (Unsolicited Goods and Services) (Directory Entries and Demands for Payment) Order 2004

Introduction

1. It may assist to summarise the main changes being advanced by the Order upfront. The Act prescribes three methods of authorising an entry in a directory, and these are

- **Business Order Method**, where an advertiser requests an entry on a document with their letter-head
- **Note of Agreement**, where the publisher sends the advertiser a Note, which they sign, return, and retain a copy for themselves, and
- **Electronic Communication**, where the publisher send an electronic communication, which the advertiser acknowledges receipt of and agreement with the terms of.

2. The proposals in this RRO are to add two additional methods of authorising an entry, being

- **A simplified procedure for renewals and extensions**, which disappplies the authorisation procedures set out above where extending or renewing and existing entry.
- **Telephone authorisation**, where certain prescribed information is given verbally and the advertiser pays by debit/credit card.

3. We are also updating the provisions in the Unsolicited Goods and Services (Invoices etc.) 1975 regulations so that an invoice or similar documents which states the amount of any payment must include a statement that no claim is made to payment if it is not to be construed as asserting a right to payment.

4. We spoke to the Local Authority Co-ordinators of Regulatory Services (LACORS) in preparing these responses, as well as the consumer regulation enforcement division of the Office of Fair Trading (OFT).

Whether the proposal has the effect of continuing any necessary protection as required in Section 3 (1)(a) of the Regulatory Reform Act 2001 (S.O. No 141(6)(c))

Whether the proposal has been the subject of, and takes appropriate account of, adequate consultation (S.O. No. 141(6)(d))

Q 1 Has the Department given any consideration to the comparative levels of telephone based deceptions in connection with the directory publishing industry in other EU member states and the effect that the various regulatory regimes of member states may have on the incidence of deceptions of these kinds?

5. The starting point for the Department in developing this Regulatory Reform Order was to determine the level of protection that the 1971 Act provided to advertisers within the UK. We examined whether there was scope for reducing the burdens placed on legitimate publishers (and also advertisers) while maintaining the level of protection for businesses generally against scam publishers.

6. The Department gave some consideration to the regulatory regimes in other EU states in light of the protections that they offered British advertisers being targeted by scams from those countries. We considered the options available for enforcement of United Kingdom law and for the prosecution in the UK of scams perpetuated from other EU states.

7. The OFT informed us of a number of scams operating from Europe and abroad which make use of the telephone. The most common scams operating from Europe, however, tend to be paper-based. The European City Guide (ECG) scam operating from Barcelona was an invoice-based scam, which fraudulently signed up businesses to a directory entry in fine-print, then when payment was not forthcoming phoned up businesses to threaten them with debt-collectors. There have been instances of scams from Europe where the first contact has been made by phone. However, this contact is then followed by the issuing of an invoice demanding payment for an entry it was claimed was agreed over the telephone. The most common telemarketing scams of this nature are based in Canada. In none of these scams, however, has there been a practice of demanding credit or debit card details over the telephone.

8. The types of scams the OFT refer to would continue to be illegal within Great Britain under the changes that the Department envisages making to the 1971 Act. They are also almost certainly illegal in their countries of origin. European Member States tend to rely on principled rules to ensure that businesses adhere to good marketing practices, or a cooperative approach to contract law requiring the parties to contract in good faith, before, during and after the contract.³¹

9. We are unaware of any comparable legislation as focused or prescriptive as the 1971 Act within other European Union Member States. There are difficulties using the Act to prosecute scams operated by people based in other countries. Where electronic means are used by persons based in other EU countries, the activity would be subject to the laws of that country, as a result of the E-Commerce Directive. The 1971 Act might be applicable where the scams from Europe are paper-based, or use the telephone or a mix of both mediums. However, there are practical difficulties in prosecuting entities based overseas.

10. The consultation for this RRO suggested there was widespread ignorance of the Act within the United Kingdom, and that a number of small or occasional directory publishers were probably breaking the law without realising it. The feedback from this, and the low level of prosecutions suggested that the 1971 Act was not itself acting as much of a deterrent. The reasons for this, as noted in our response to Question 10, is because most such scams originate from Europe, and there are difficulties in enforcing this piece of domestic UK legislation in respect of such scams.

11. The best way to deter scams of the type referred to by the OFT, and which the Committee has particular concerns about, is through co-operation with the enforcement authorities of the European State concerned.

³¹ The view we received from the consultation responses was that the laws in other EU states are "frequently less restrictive than UK law".

In relation to the ECG scam, the OFT sought the co-operation of the Catalan authority, under Catalan law on misleading advertising. The court ruled that ECG was to be temporarily shut down for one year and fined €300,000 (over £200,000) for its deceitful advertising. In another case, the Liechtenstein authority shut down the Tour and Travel Guide because its business practices were injurious to the state in accordance with its laws.

12. The prosecution of these cases indicate that the lack of a prescriptive law targeting directory publishing in these countries does not necessarily prevent action being taken against such scams.

Q 2 Please indicate whether any consideration was given to permitting contracts for directory entries to be agreed in the context of face to face discussions between publishers and advertisers (or their respective representatives and agents), as permitting the agreement of oral contracts by telephone call but not in person appears to create an anomaly.

13. The 1971 Act does not prevent an advertiser agreeing to an entry in a face-to-face discussion with a publisher or publisher's representative, and the Department does not propose to change this in these proposals. The requirements for authorising an entry in section 3 or in the new section 3B can be met during a face-to-face meeting.

14. The 1971 Act sets out three methods of authorising a directory entry – being the Business Order Method, the Note of Agreement Method and the Electronic Communication Method. The Department proposes to add another two methods of authorising a directory entry, being the Telephone Authorisation Method and the simplified procedure for renewals and extensions.

15. A face-to-face meeting could be used by an advertiser or publisher to authorise an entry in either of the first two methods of agreeing a directory entry. The advertiser could use a face-to-face meeting to place a Business Order for an initial entry, which complies with section 3(1)(a) of the Act (an order signed by the purchaser or on his behalf complying with section 3). The Publisher could also use a face-to-face meeting to provide a Note of Agreement to the advertiser for their signature, thus complying with section 3(1)(b). An additional requirement of this method of authorisation is that the Publisher provide the advertiser with a copy of the signed Note for their retention, which could also be done at that meeting.

16. The new section 3B sets out pre-conditions for renewals and extensions. The section does not specify formalities for entering into a new contract. It could be orally in a face-to-face meeting. However, if it is a term of the original contract that the purchaser renew or extend, then the required written notice must be given, and the 21 day period elapse without the purchaser withdrawing his agreement. In any event the Publisher would need to send the advertiser an invoice to obtain payment.

17. The telephone authorisation proposal would work as follows: if there is a telephone call and the advertiser, having been given the required information about the directory entry, agrees to the entry then that does not give rise to a liability to pay. That is, unless the advertiser subsequently provides credit or debit card details to make the payment. As noted in Question 1 above, where a demand for payment is sent out claiming that an entry has been authorised over the telephone that would continue to be illegal under the 1971 Act and under this telephone authorisation proposal.

18. The telephone authorisation proposal is similar to the Business Order method of authorising an entry in a directory, taking account of the uniqueness of the medium of the telephone. The advertiser agrees to the directory entry, having been given the information necessary to make an informed choice. The directory publisher is able to require payment when the advertiser provides credit or debit card details. This is akin to where an advertiser sends an Order on their letterhead paper. That is, they are making a conscious decision to accept the entry by providing credit/debit card details of their own volition.

19. Currently, the telephone can be used as part of the existing three methods of authorising a directory entry. Payments can be made over the phone if a client issues a Business Order, signs a Note of Agreement from the Publisher, or transmits an electronic communication agreeing to the charge. They then must make a subsequent phone call to the publisher's accounts department offering payment by credit or debit card.

20. The Department considers that the telephone authorisation proposal does not, therefore, create an anomaly. The 1971 Act allows directory entries to be authorised in a face-to-face meeting, and as amended would still allow such authorisation, as well as telephone authorisation if advertisers choose this method.

Q 3 Given the concerns expressed by the OFT and in particular the difficulties likely to arise for advertisers or enforcing authorities from the absence of any requirement for a record of the telephone conversation(s), does the Department consider it might be preferable to protect UK businesses against telephone-based deceptions by excluding the possibility of instant payment for proposed directory entries by credit or debit card in the context of telephone discussions and requiring that payment may only be sought when written particulars of the directory and entry have first been supplied to the purchaser in writing?

21. The effect of this suggestion would be that the proposed new telephone authorisation procedure in the new section 3(1)(d) of the Act inserted by the draft Order would effectively become the same as the Note of Agreement method in section 3(1)(b). As explained in our answer to Question 2, face-to-face meetings and telephone calls can be part of the process leading to authorisation of an entry under the Business Order or Note of Agreement Methods of authorisation.

22. If the publisher were required to send paperwork after the phone call to confirm the conversation, then there would also need to be written acknowledgement signed by the advertiser to prove that the details had been received. This is the Note of Agreement Method. In such a case the Publisher could not demand payment until the signed Note of Agreement was received.

23. The OFT suggests that it will be difficult for enforcement authorities to prosecute in the absence of any record of a telephone conversation. However the feature of the telephone authorisation procedure we consider important is that the advertiser must have the confidence to pay by credit or debit card. The contract will only be concluded if the advertiser subsequently pays in this way. If the publisher is not given these details then it will have to seek agreement to an entry using one of the other procedures, e.g. by providing written information to the advertiser.

Q 4 Can the Department please provide a more detailed analysis of how the test of materiality would operate in practice and whether the effect of the proposed provision would be to require directory publishers to notify their clients of all changes in the form and content of directories and of individual entries in them before repeat/renewed business could be charged for?

24. The Department proposes a simplified process for where an advertiser is renewing an entry or extending that entry from one issue of a directory to the next. Essentially, to do away with the current paperwork or exchange of document requirements where there is a “roll over” of an existing entry.

25. The intention is to relax these requirements, because there is an existing business relationship between the advertiser and publisher, which makes it unlikely that the publisher will suddenly start behaving in a disreputable manner. There are also additional protections in that the directory and the entry are required to be “materially the same” as the previous directory and entry or any substantive change must be an improvement. This is to ensure that over time changes to the entry are not made that are disadvantageous to the advertiser and to which they have not consented.

26. The “materially the same” test is whether the form, content or distribution of the new directory or entry is materially the same or an improvement on the original entry. The particular test is “*whether a reasonable person in the position of the purchaser would*

- view the two as being materially the same; or
- view the later directory or the later entry as being an improvement on the earlier directory or earlier entry.”

27. The reason for the “materially the same” test is that certain changes are implicit in the publication of directories or there would be no requirement to produce a new edition. This applies to such matters as addresses, telephone fax and email addresses and other particulars of businesses. Further, some advertisers may cease trading and new ones may enter the field. We consider this would not prevent the directory being “materially the same” or the provision would be of little value. However a significant drop in the number or quality of entries would render the directory not materially the same. The materially the same (or better) test is however needed to protect the advertiser. This accounts for the narrowness of the “materially the same” test.

28. This test would be applied on a case-by-case basis. A number of such cases will be clear-cut as being materially the same (or the change is an improvement to the advertiser). In such cases, publishers will not be required to follow one of the authorisation methods set out in section 3(1)(a) to (d).

29. There will be other cases that will not be so clear-cut. As the Committee notes, the onus will be on the publisher to determine whether the test of materiality is satisfied or not. The publisher will wish to ensure that the test of materiality has been met, or they will be taking the risk that their charges will be unenforceable or recoverable.

30. We were alerted, by the OFT, to a potential scam whereby an advertiser might be signed up at the stage of initial authorisation to multiple entries in a directory. We address this concern by requiring the publisher to provide written notification of the renewals and details on costs, where these are part of the initial contract. The advertiser then has 21 days to withdraw consent. The relaxation of the authorisation procedures therefore has a protection built-in in these cases.

31. The Department believes this proposal will have significant benefit for directory publishers, as one large directory publisher informed us that about 50–60% of renewals and extensions are relatively clear-cut renewals of the “same” entry. The benefits for the industry are not as significant as they would be if the authorisation requirements were relaxed for all renewals and extensions, regardless of materiality. However, we considered this went too far in removing protections against changes that are potentially detrimental, and which the advertiser had not consented to.

Q 5 Does the Department consider that the proposal creates adequate requirements in respect of the notification of increases in the price of directory entries in such situations, given that the publisher will not be required to make the amount of the charge explicit in the ways currently prescribed in the 1971 Act?

32. The Department does consider there are adequate requirements for notifying price increases where an entry is renewed.

33. Where there is a renewal or extension of a contract and the conditions in the new section 3B are satisfied (i.e. the directory and entry are materially the same etc) then the publisher and the customer may contract as they choose. In such a case the publisher will not have to satisfy the formal requirements of section 3(1)(a) to (d) in order that the charge for the entry is enforceable. The normal legal rules for the formation of the contract will apply to the new agreement. The parties will have to agree the terms including price. The publisher cannot unilaterally impose a higher charge on the purchaser – the purchaser will have to agree to it as it is an essential term of the contract.

34. If the earlier contract contains a term that the purchaser renew or extend the contract for the entry then the publisher will be required by the new section 3B(1)(h)(i) to send the purchaser a notice with the information required by Part 3 of the draft Order which includes the cost of the new contract. The advertiser will then have 21 days to withdraw its agreement to continue with the contract.

35. This means that the parties will have to agree the terms including price. The publisher cannot unilaterally impose a higher charge on the advertiser – the advertiser will have to agree to it if there is to be a contract.

Q 6 Please explain why it is thought desirable to remove the requirement that these statements must be included on invoices not asserting rights to payment, given that they appear

unambiguously to establish the status of those invoices in a way which is beneficial for those who receive them?

36. The draft order is updating the requirement that these statements appear unambiguously to establish the status of the invoices, not removing them.

37. The draft order does not remove the requirement that an invoice or similar document which states the amount of any payment must include a statement that no claim is made to payment if it is not to be construed as asserting a right to payment. This is contained in section 6(2) of the Unsolicited Goods and Services Act 1971, which the draft Order amends so that it will refer to Schedule 2 to the RRO instead.

38. The Regulations, which it is proposed to revoke and replace with the provisions in Schedule 2, are highly prescriptive about font size, specific wording, the colour of paper and how far the lettering should be from the margins. The effect of this is to make it impossible for electronic documents to satisfy the requirements of the Act. In relation to margins, for example, it is impossible to determine how a document will display on a particular computer screen, nor prescribe that it should display a certain number of inches from the edge of the screen.

39. The significance of this is that someone who sends an electronic document stating the amount of a payment cannot comply with the requirements of the existing Regulations in order to avoid asserting a right to payment. Therefore the person sending such an invoice or other document electronically may commit an offence under section 3(2) by “asserting a right to payment”.

40. The proposal is to continue the protections contained in the 1975 Regulations, and to allow electronic documents as well as paper documents to satisfy them. This is also required to comply with article 9 of the Electronic Commerce Directive. We are proposing to do this by requiring such documents to contain a statement

“to the effect that it is not asserting a right to payment, displayed in such a manner that makes that statement readily apparent to a reasonable person reading that invoice or similar document”.

41. As a result the same requirements for an invoice or similar document not to assert a right to payment will apply to paper and electronic documents. This would place the two on an equal footing, as the Directive requires and will continue the protections currently in the 1971 regulations.

Whether the proposal appears to be incompatible with any obligation arising from membership of the European Union (S.O. 141(6)(i))

Q 7 Can the Department indicate why it decided to make this amendment to the 1971 Act by regulations under the European Communities Act 1972, rather than delaying the laying before Parliament of the present RRO proposal and (if appropriate) including this point in the proposal?

42. The requirement to amend the 1971 Act to comply with the requirements of article 9 of the E Commerce Directive was identified after the consultation on the RRO had taken place, and at the time of drafting of the Order. Rather than having to re-consult on the RRO and so delay bringing the Order before Parliament, it was decided to make the amendments under section 2 of the European Communities Act 1972.

43. The reason for this was because of the potential for negative reactions from the Directory Publishing sector to delay. The commitment to simplify the 1971 Act was first made in the 1998 White Paper “Modern Markets, Confident Consumers”. The Department’s first proposal in relation to renewals and extensions came out of the consultation on simplifying the 1971 Act, which was undertaken in 1999. We were concerned that having committed to carrying through this proposal, we would be seen to be delaying the Regulatory Reform Order for no good reason.³²

32 The practical implications of this issue were not clear. That is, whether putting electronic business order forms on an equal footing with their written counterparts would have a significant effect on the business of directory publishing

44. Essentially, we wanted both to meet the expectations of the sector and implement this aspect of the Directive in a timely and transparent manner. We believe we can achieve both by proceeding with the section 2(2) regulations in parallel, in a way that is transparent and avoids further delaying the RRO. The use of section 2(2) powers is also a normal and accepted route for implementing EU obligations. We also chose to consult on these parallel s2(2) regulations, though we are under no legal requirement to do so.

Q 8 Can the Department indicate the nature of the responses received to the consultation exercise and, to the extent that these have been decided, state its plans for giving effect to the additional reforms to the 1971 Act it believes are required to ensure compliance with the E-Commerce Directive?

45. The consultation document on Electronic Business Order Forms for entries in Business Directories was placed on the Department's website in March 2004. 58 organisations were written to and the consultation closed on 18 June. We received 7 responses, five from Directory Publishers, which included the DPA, as well as the Advertisers Association (AA), the Periodical Publishers Association (PPA) and the Trading Standards Institute (TSI).

46. The Directory Publishers generally saw the proposal as not significant, as few advertisers used the Business Order method to authorise entries in business directories. There were concerns that additional burdens not be imposed on directory publishers through requirements such as electronic letterheads, embedded logos and watermarks. However, they noted that publishers did not generally receive unsolicited entries in this way, and would generally confirm them either through a Note of Agreement or an Electronic Communication.³³ Nevertheless, a recurrent theme was that publishers not be put at a disadvantage through burdens such as embedded logos, in comparison to other advertising media or overseas directory publishers.

47. The Advertisers Association and Periodical Publishers Association supported the views of the Directory Publishers. The TSI thought the proposals were more wide-ranging than they were and that they would "make alteration to the 1971 Act such that businesses can enter into contracts for entries into business directories using electronic means". The ability to contract for directory entries using the electronic medium was made law in 2001, and the current proposal only relates to allowing one method of contracting, the "Business Order" method, to be done electronically. TSI noted that the problems the Act was designed to address were UK based, and that with the spread of electronic communication many are based abroad and EU actions for breach need to be conducted cross-border.

48. Once the consultation responses are fully analysed and responded to, the Department will draft the section 2(2) Regulation. If the RRO is approved by each House, then the Minister will sign the Regulation soon after signing the RRO. These will be laid before each House subject to the negative resolution procedure. This approach will ensure that the RRO does not fall foul of section 1(4) of the Regulatory Reform Act.³⁴

49. The commencement dates of the two instruments will be harmonised, so that guidance to business and stakeholder information will cover both sets of changes. The guidance will be sent out to businesses 12 weeks prior to the RRO coming into force. This should be helpful to the sector adapting to both sets of changes, which have also been flagged in advance.

– i.e. by opening up a new and lucrative means to authorise directory entries. As indicated in our response to Question 8 below, the consultation on this has tended to show that most in the industry do not see this proposal as significant, and that the Business Order Form method of contracting is seldom used.

33 The DPA informed us it was industry practice for a publisher receiving an unsolicited order (the Business Order Form method) to contact the advertiser confirming the order and so ensure compliance with the Act through the Business Note or Electronic Communication method.

34 That a RRO may not be used to amend the law contained in any provision of an Act where that provision has been amended ... in the two years before the making of the RRO.

Other matters arising from the Committee's consideration of the proposal (S.O. 141(5))

Q 9 Given the number of existing and proposed amendments to the 1971 Act, can the Department indicate whether it has any plans to consolidate the legislation relating to the publication of directory entries?

50. The Department agrees that consolidation of legislation is in principle desirable when an Act has been amended a number of times. However, there are issues of resources in preparing a consolidation as well as Parliamentary time for its passage. Given that consolidated texts of legislation are available in on-line databases and from commercial publishers, the Department has no plans to consolidate this legislation at the present time.

Q 10 Please indicate why the Department considers there has been a very low level of prosecutions for offences under the 1971 Act, despite the continued existence of the deceptive practices prohibited by the 1971 Act?

51. It is difficult to get precise information on the number of cases that have been taken under the 1971 Act, as the offence under section 3(2) of the Act of demanding payment is only summary. However, Local Authority Co-ordinators of Regulatory Services (LACORS), who are enforcers of the Act, informed us that there were few prosecutions under the Act. During the preparation of the RRO we identified only one appeal against a prosecution under the Act, since the Act came into force in 1971.

52. The main reason for this, we were informed, was that most such scams originate from overseas, and that there are difficulties with using this piece of UK legislation to prosecute them. The Control of Misleading Advertisement Regulations (CMARS) also enables the OFT to bring civil proceedings for an injunction in respect of misleading advertising. The best approach is cross-border co-operation between enforcement agencies, and prosecutions under the laws of the Member State involved.

Concluding comments

53. The Department thanks the Committees for their consideration of this proposed Regulatory Reform Order.

54. It would like to add that the proposals it is advancing concern changes to an existing code governing the authorisation of entries in directories within the UK. The proposals do not, and cannot, seek to regulate the activities of directory publishers (bogus or otherwise) operating from other European countries or overseas. The vast majority of scams in the business directory field are operating from outside the UK.

55. The Department acknowledges the Committees' concerns about the prevalence of these scams. These scams would continue to be illegal under the 1971 Act as the Department proposes to amend it, including in relation to telephone authorisation. Most such scams are also illegal in their country of origins. The changes that the Department is proposing will have neither a positive nor negative effect on these foreign-based scams. We think the best means to combat such scams is through cross-border co-operation between enforcement bodies, and prosecution under the laws of the state concerned.

56. As our answers to a number of the questions indicate, we consider the proposed changes reduce burdens, while retaining adequate protections around both initial entries and the renewal and extensions of those entries. Though a small measure, we do consider that these changes will be beneficial to the UK Directory publishing sector, both publishers and advertisers. We thank you for your consideration.

Appendix D

Letter from the Trading Standards Division of Wirral Borough Council to the Committee Specialist

Proposal for the Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demands for Payment) Order 2004

I write in response to your request for information from local authorities concerning the proposals to reform the Unsolicited Goods and Services Act 1971.

I note the committee's concerns that, whilst there appears to have been only one prosecution (I am aware that colleagues in St Helens unsuccessfully prosecuted in the 1990's) that those deceptive practices which are made illegal in the 1971 Act have by no means disappeared.

I would argue that these deceptive practices have not only not disappeared but have proliferated and, rather than be focused on the mis-selling of 'directories', is now transposed to the sale of 'charitable publications'.

My evidence is as follows:

Wirral acts as originating authority for a number of traders who by means of unsolicited telephone calls seek to sell advertising space in publications (such as diaries, wall planners and calendars) to small businesses by means of a clever play on words either implying that they have charitable or emergency service approval or make a contribution to a charity or an Emergency Service social fund. These phone calls are often received by junior members of staff who may not have the authority to consent to publication or, if they do consent, do not understand to what they have consented. The business (and it is almost exclusively a small business) then receives an invoice and prompt requests for payment which soon escalate into threats of legal action. Whilst there may be no legal basis for such threats a proportion of companies will either pay on the basis of the initial misleading statements or to avoid the risk of legal action.

In the recent case of Supporting Links Alliance Ltd heard at the High Court, Chancery Division on the 19th March, [2004] EWHC523 (ch) (In the matter of the Insolvency Act 1986) the Vice Chancellor considered an application by the Secretary of State that Supporting Link Alliance Ltd be wound up in the public interest. The company were selling advertising space by means of unsolicited phone calls in wall planners etc.

One of the grounds alleging that it was just and equitable that the company should be wound up was its failure to comply with S 3(1) a to (c) of the Unsolicited Goods and Services Act 1971.

At paragraphs 19 – 20 of the Judgement the Vice Chancellor said:

19. The application of those provisions depends on each of the annual Guides being a "directory" within the meaning of that word as used in that Act. I have been referred to the Oxford English Dictionary, Compact and New Shorter Editions. I take the ordinary meaning from the New Shorter Oxford Dictionary as being

"a book containing an alphabetical or classified list of the people in some category, e.g. telephone subscribers or clergy, with information about them."

I have also been referred to passages in Hansard for 4th December 1970 when what became the 1971 Act had its second reading. They do not suggest that the word "directory" was intended to have any meaning other than its normal meaning. Accordingly, as so often, reference to Hansard takes the matter no further.

20. In my judgement the word "directory" must be given its normal meaning. So defined it is clear that the Annual Guides produced by the Company were not directories. The editorial content is not a list of people or things at all. The advertisements are just that. They contain details of the advertisers, including addresses and

telephone numbers, but they are not listed by reference to any category or in any order, alphabetical or otherwise. If these Annual Guides are directories then so are most newspapers and magazines. For these reasons I dismiss this ground as wrong in law.

At paragraph 55 of the Judgement the Vice chancellor referred to another petition to wind a company up in the public interest re Bamford Publishers Ltd (2nd June 1977) which you may find of interest.

The full judgement for Supporting Link Alliance Ltd can be found at:

www.courtservice.gov.uk/judgementsfiles/j2397/supportinglink.htm

I would suggest that the measures to control deceptive statements in relation to directories have been successful, bearing in mind the narrow statutory definition of 'directory' and has led to a reduction in an early 1970s mischief.

However this success has caused the same deceptive practices to be used to mis-sell advertising space in wall-planners etc without any provision for the protection afforded by the Unsolicited Goods and Services Acts.

Whilst not a subject considered by the Regulatory Reform Committee I would point out that the Act does not contain any enforcement powers to allow effective enforcement.

I hope you find this information of assistance and do not hesitate to contact me if I can be of any further help.

9 July 2004

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All reports are available from The Stationery Office.