

**Public consultation for the Fitness Check of EU consumer and
marketing law**

European Commission

Chartered Trading Standards Institute covering
policy document

2nd September 2016

About The Chartered Trading Standards Institute

The Chartered Trading Standards Institute (CTSI) is a professional membership association founded in 1881. It represents trading standards officers and associated personnel working in the UK and also overseas – in the business and consumer sectors as well as in local and central government.

The Institute aims to promote and protect the success of a modern vibrant economy and to safeguard the health, safety and wellbeing of citizens by empowering consumers, encouraging honest business, and targeting rogue traders.

We provide information, evidence, and policy advice to support local and national stakeholders.

We have also, as part of our recently revised remit, taken over responsibility for business advice and education concerning trading standards and consumer protection legislation. To this end, we have developed the Business Companion website (www.businesscompanion.info).

The CTSI Consumer Codes Approval Scheme was launched in 2013, superseding the OFT scheme (www.tradingstandards.uk/advice/ConsumerCodes.cfm).

CTSI is a member of the Consumer Protection Partnership, set up by central government to bring about better coordination, intelligence sharing and identification of future consumer issues within the consumer protection arena.

We run events for both the trading standards profession and a growing number of external organisations. We also provide accredited courses on regulations and enforcement.

A key concern for CTSI is that of resources. UK local authority trading standards services enforce over 250 pieces of legislation in a wide variety of areas. They have suffered an average reduction of 46% in their budgets since 2010 and staff numbers have fallen by 53% in the same period.

This covering response has been composed by **Campaigns and Policy Executive, Ben Richards**, and **CTSI Lead Officer for Crime and Disorder, Brian Smith**.

Our questionnaire was compiled with the assistance of **CTSI Lead Officers for Civil Law, Jemma Robinson and David Sanders**

Should you have any queries or wish to discuss the response please do not hesitate to contact policy@tsi.org.uk We have a number of experts who would be able to assist with any queries or follow up.

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Introduction

We welcome the ambition of the consultation to assess where directives overlap, could be clarified, or are in need of revision to focus on the impact that they have on consumers and businesses. This supporting policy document provides further depth to the observations we have made in the main questionnaire.

Our primary concern is that market surveillance, carried out by trading standards, is under resourced to the point where it lessens the effectiveness of the directives. Further we feel the definitions of 'vulnerability' and of an 'average consumer' are re-drafted to reflect revised thinking on both of these terms.

Trading Standards Landscape

Background

Unlike many equivalent European market-surveillance bodies, trading standards in the UK is based in 200 local authorities, each with their own distinctive priorities and funding structure.

Resources

A common theme running through our response is that the resources for market surveillance and consumer protection are limiting the effectiveness of what CTSI believe to be useful legal provisions.

Between 2009 and 2014 trading standards saw officer numbers fall by half and funding drop by 40%. In 2014 there were services reporting that they had less than one full-time-equivalent staff member. To put this into perspective, an Audit Scotland report in 2011 outlined that to be resilient, and able to cover the wide range of obligations expected of a trading standards department, there should be more than 8 members of staff in a department.

In our most recent update to this survey, officer numbers have fallen by a further 12%, 59% of services have six or fewer qualified staff and the total national spending on trading standards in the UK has fallen to around £124m from £213m in 2009. This equates to £1.99 spend on trading standards services per head of the population. Some departments are now operating with budgets of under £200k which means that they would struggle to conduct a singular prosecution, let alone support a wide range of civil actions.

Impact on Consumer Protection

The knock on impact of these shifts in resources has been a strict prioritisation towards only the most urgent work, such as protecting the most vulnerable consumers. Consumer redress, outside of criminal activity, is something that many departments are unable to focus on in these circumstances regardless of the powers available.

The ability of departments to utilise the nuances of some consumer redress instruments is also diminished due to the loss of experienced officers and the lack of new trainees to take their place, as shown by the reduced uptake of our qualifications. This has a knock on impact on how officers can effectively use new legislative instruments for example injunctive actions. Newer, and more pressured officers are unlikely to have the time and experience required to use these new powers. Compounding this, councils are naturally risk adverse and are more likely to use criminal sanctions as they have a similar upfront cost and leave councils less exposed to legal liabilities.

It is not just our research which highlights these issues. Lynn Faulds Wood, a consumer advocate, carried out a report on product recall which was published this spring. Her work highlighted the resourcing and training issues that trading standards face noting -

'There is an urgent need to improve funding, training, resources and procedures for Market Surveillance - the enforcement authorities whose job it is to make the system work effectively'¹

It is our concern that despite the objectives of this consultation, the lack of scrutiny on enforcement capacity means judging the success of the directives in this consultation is undermined.

Issues of 'Vulnerability' and the 'Average Consumer'

The main definition of vulnerability at EU level has its source in the Unfair Commercial Practices Directive: vulnerability may arise out of the consumers' "mental or physical infirmity, age or credulity". This is to be distinguished from the notion of the 'average consumer', which in the Directive is understood as a consumer "who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors". Both of these definitions contain serious flaws as they do not reflect current thinking or lived consumer experiences.

CTSI would like to see a **definition of vulnerability which reflects the transient nature of vulnerability**. Whilst some individuals are more likely to be vulnerable for longer periods, all consumers have the potential to become vulnerable at any time. Stress, family tragedy, depression, or simple lack of knowledge on a particular issue are all factors that can lead a consumer to become vulnerable, even if just for a short period. The revised definition should reflect this. CTSI would like to highlight the work of the [Financial Conduct Authority](#) on this issue.

The current definition of **average consumer needs to be redefined to reflect that consumers do not in many cases have full information**, especially relating to products which are complex and require professional assistance, which may be administered by a sales or marketing professional who has an interest in misconstruing the details. Looking to case law from France and Norway we can see situations where consumers are judged as being in a disadvantaged position, especially when dealing with technical products.

Beyond case law, the existing notions of 'vulnerability' and 'average consumer' are challenged in the legal literature. Incardona and Poncibo (2007) argue that the existing notion of an average consumer neither reflects human behaviour, nor constitutes an appropriate basis for judicial decisions. Lennard (2009) draws a similar conclusion about the concept of vulnerability in the Unfair Commercial Practices Directive, arguing that the approach based on the notions of age, credulity, and infirmity is an out-dated and an overly static one. Lennard suggests this approach can lead to stereotyping of particular groups and proposes an alternative risk factor-based approach, where particular characteristics can be seen as risk factors potentially contributing to vulnerability.

The improvement of the definition of both vulnerable and average consumers would be an important step in improving the overall protections that legislation can provide consumers.

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¹ <https://www.gov.uk/government/publications/consumer-product-recall-review>