Optical Confederation Response to BIS 'Enhancing Consumer Confidence by Modernising Consumer Law'

The Optical Confederation welcomes the opportunity to submit views to BIS on the implementation of the Consumer Rights Directive.

The Optical Confederation represents the 12,000 optometrists, 6,000 dispensing opticians, 7,000 optical businesses and 45,000 ancillary staff in the UK, who provide high quality and accessible eye care services to the whole population. The Confederation is a coalition of five optical representative bodies: the Association of British Dispensing Opticians (ABDO), the Association of Contact Lens Manufacturers (ACLM), the Association of Optometrists (AOP), the Federation of Manufacturing Opticians (FMO) and the Federation of (Ophthalmic and Dispensing) Opticians (FODO). As a Confederation we work with others to improve eye health for the public good.

Introduction

As a Confederation, we are committed to the highest clinical and retail standards and consumer rights. As a sector we provide over 21 million sight tests a year[1] with very few clinical or service complaints and, on the rare occasions when something does go wrong, most issues are resolved immediately at practice level. Nevertheless, as this legislation recognises, inevitably consumers can change their mind or things can at times go wrong. This is why, in 1992 the optical sector, under the auspices of the General Optical Council, established the Optical Consumer Complaints Service in to ensure that the small number of consumer complaints about optical products which could not be resolved at practice level, were dealt with fairly and rapidly by an independent body. The OCCS continues to fulfil this function.

As you would expect, therefore, we fully support the broad aims of this review: to simplify and streamline consumer rights, improve transparency, reduce the potential for disputes and improve consumer confidence and welcome the introduction of a clearer and fairer resolution mechanism for both consumers and providers.

While we support the spirit of the Consumer Rights Directive (CRD), healthcare must be exempted due to the complexity of provision and alternative means of redress. As a sector we are already heavily regulated and feel that several aspects of these regulations are duplicatory and therefore add unnecessarily to the burden on optical business – principally in respect of the sight testing service which is already doubly regulated by the General Optical Council and the NHS – or where the proposals do not make sense and are unworkable in the context of optical care.

[1] Optical Confereration (2011) Optics at a Glance

Our experience with the existing regulatory regime (for purchases in the home or place of work) has been that it introduced a series of duplicatory, bureaucratic and costly requirements but led to no change in the cancellation patterns for optical products purchased in the home or place of work. This is doubly unfortunate for our members as according to the BIS consultation document healthcare providers should have been exempted last time round.

Consumer Rights Directive 2011

The CRD clearly outlines that regulated healthcare professions should not be included within the scope of the Directive, and we strongly oppose the UK Government bringing us within their scope.

According to Paragraph (30) of 2011/83/EU (the Consumer Rights Directive),

"Healthcare requires special regulations because of its technical complexity, its importance as a service of general interest as well as its extensive public funding. Healthcare is defined in Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross- border healthcare (1) as 'health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices'. Health professional is defined in that Directive as a doctor of medicine, a nurse responsible for general care, a dental practitioner, a midwife or a pharmacist within the meaning of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (2) or another professional exercising activities in the healthcare sector which are restricted to a regulated profession as defined in point (a) of Article 3 (1) of Directive 2005/36/EC, or a person considered to be a health professional according to the legislation of the Member State of treatment. The provisions of this Directive are not appropriate to healthcare which should be therefore excluded from its scope."[2]

The same logic must apply to healthcare delivered in the UK and therefore the provision of optical services and products must be exempted from UK implementation of the Consumer Rights Directive as we are already sufficiently regulated by other means which offer patients as consumers a means of redress.

Competitive Optical Market

By way of background, as a sector, we operate in an open market with freedom of entry and exit, through which our patients as consumers exercise choice and providers compete for each and every patient on grounds of quality, outcomes, accessibility and cost. This has delivered a range of business models which serve eye care patients and consumers well. The majority of services and products that we provide are delivered through fixed-premises models. However, with an ageing population, an increasing number of patients now seek care in their homes through domiciliary provision. Domiciliary providers perform sight tests at home for eligible patients (those who cannot leave home unattended) of which over 450,000 were provided by the NHS across the UK in 2009/10.

[2] Directive 2011/83/EU or 'Consumer Rights Directive'

Experience with Current Distance and Off-Premises Regulations (2008 Regulations)

Given this open market in which consumers can easily and readily exercise choice, powerful incentives to offer a refund to dissatisfied patients were already in place prior to the regulations governing cancellation rights for distance and off-premises (the 2008 Regulations) coming into force.[3]

As a more general point, before responding on the specific consultation questions, we would like to add that as a sector we found the 2008 Regulations particularly confusing for patients and cumbersome for businesses to implement. By way of an example, the previous regulations were particularly confusing for sight testing and vision screening services delivered in a place of work (often called VDU screening and funded by employers) as it is difficult to determine whether the patient actually falls within the definition of a 'consumer' under the 2008 Regulations.

Other cumbersome aspects are the rigid wording and format in which the rights and cancellation should be communicated and the prescriptive nature of the seven day period i.e. when and how it commenced.

Given that the seven day period starts when the contract comes into force (in our case when the spectacles or contact lenses are ordered), there is disincentive for providers to process an order immediately, rather to wait seven days first which leads to significant delays in providing vision correction to this vulnerable group.

We welcome the fact that this has been tidied up under the Consumer Rights Directive, in particular the clearer timeframes and that consumers will only be entitled to a refund once the goods are returned or evidence of return is provided.

Fortunately, given the generally high quality of optical services and goods, although implementation of the 2008 Regulations was cumbersome, once in place Optical Confederation members (who provide services and products in the home or place of work) saw no increase in cancellations due to the very good services they provide. We anticipate that the result will be the same with the introduction of a longer cancellation period under these regulations.

Definitions and Interpretation

Q1. Given the copy-out principle [set out above], are there areas, provisions or issues in the Directive which you believe are, or may be, too uncertain or unclear and would benefit from guidance or elaboration on the face of the UK's implementing regulation?

Please refer to our comments above regarding the 2008 Regulations. In our view the revised provisions as set out in the consultation document are an improvement.

[3] *Cancellation of Contracts made in a Consumer's Home or Place of Work Regulations (2008)*

Q2. Are the definitions [in the CRD] clear? Are there areas of potential ambiguity which might benefit from clarification in any guidance to accompany the forthcoming implementing legislation?

Yes. We would highlight that NHS (GOS) sight tests are – rightly – exempt from these regulations as the contract is between the NHS and the provider, therefore the patient is not the 'consumer' under the Consumer Rights Directive. As noted in our introduction above, NHS sight tests are already doubly regulated under the General Optical Council and by the NHS and patients have multiple routes for complains and redress – the NHS complaints procedure, escalation to their NHS primary care organisation, the General Optical Council and the Health Service Ombudsman.

Scope of application of CRD

Q3. Do you agree with our preferred option that information and cancellation rights should continue to apply to all healthcare goods and services, including those provided by healthcare professionals, and to social services, where these are purchased by a consumer by means of an off-premises contract?

No. As noted above, where NHS eye care services are provided, the contract is between the NHS and the service provider. The patient is not the consumer in that contract.

Private eye care services provided in the home and costing above the threshold of £35 were captured by the previous framework. The application of the 2008 Regulations to the private eye care services was especially cumbersome because the service provided by our members is not paid for until after it is consumed. Once delivered or consumed, a private sight test cannot be 'returned' as a prescription will already have been issued for the patient, as required by statute, or he or she will have been referred for further medical investigation, therefore it makes no sense to allow a patient to cancel once the service has been consumed.

Moreover, if a patient is unhappy with the eye care services he or she receives, alternative mechanisms for complaint and redress are already well established and operate effectively – overseen by the General Optical Council (GOC)[4]. Similarly should a patient be unhappy with a product dispensed by an eye care professional, he or she can seek redress from the GOC or Optical Consumer Complaints Service (OCCS)[5] which has many years of experience of mediating disputes to a mutually satisfactory outcome.

Given these long established resolution mechanisms and our experience with implementation of the 2008 Regulations, we strongly oppose the extension of the information and cancellation provisions to healthcare (including eye care services and vision correction appliances) provided to consumers off premises.

[4] http://www.optical.org/
[5] http://www.opticalcomplaints.co.uk/

Q4. Do you agree with our preferred option that information and cancellation rights should continue to apply to all healthcare goods and services, including those provided by healthcare professionals, and to social services, where these are purchased by a consumer by means of a distance contract (e.g. by phone or internet)?

No. For the reasons set out above, patients have well established alternative mechanisms for redress if they are unhappy with a healthcare service. We therefore strongly prefer the alternative proposal to limit the application of these provisions only to sectors within the scope of the directive.

As noted above, implementation of the 2008 Regulations was cumbersome and added to cost for the sector with no significant increase in the numbers of patients choosing to cancel their order spectacles or contact lenses, and in any event, as a regulated sector, there are well established alternative mechanisms for redress.

Q5. Can you offer supporting evidence (market size, degree of detriment, case studies, alternative protections etc.) to help inform our assessment of these issues and of your answers to Q3 and Q4?

We would be happy to arrange a meeting between BIS, the Optical Confederation, GOC and OCCS to discuss the alternative mechanisms for our patients to seek redress.

To demonstrate the difficulties faced during implementation of the 2008 Regulations to community eye care, please refer to the Optical Confederation's 'Cooling Off Period' guidance.[6]

Q6. It is our view that areas such as financial services and gambling, are better covered through existing, sector specific legislation and that, therefore, we should not pursue the option of extending the CRD information and cancellation provisions to these sectors. Do you have any comments on this, or on other areas including any not addressed in the proposals?

N/A

Q7. It is our view that cancellation rights are not appropriate with regard to distance selling of residential letting. Do you have any evidence you wish to present to support or to challenge this view?

N/A

[6] http://www.fodo.com/downloads/Cooling%20off%20Period%20in%20a%20Home%20or%20Place%20of%20Work%20Guidance.pdf

Q8. Do you agree with our preferred option that delivery and passing of risk, express consent for additional payments and basic rate customer helpline provisions should apply to all healthcare goods and services and social services purchased by a consumer and to package travel and timeshare contracts?

No. As noted above under Question 3 and 4, we propose that eye care services should to be exempt from the provision. Given the alternative mechanisms for redress for eye care patients, for clarity and consistency, we feel that eye care providers should also be exempt from these provisions.

Q9. Do you have evidence or data you can give us in support of your answer to Q8.

Please refer to the points made above about alternative resolution for patients through the General Optical Council, the Optical Consumer Complaints Service and, for NHS patients, the NHS complaints system.

Q10. We are not aware of problems which would indicate the need to extend these provisions to excluded sectors beyond those set out above (healthcare, social services, package travel and timeshare). Do you have any comments on this or other areas, including any not addressed in the proposals? BIS Consultation – implementing the Consumer Rights Directive 11

N/A

On-premises information requirements

Q11. Do you agree with our preferred option that the information as set out in Article 5 is, together with other existing requirements, sufficient to allow consumers to make an informed choice? If not, what further information do you consider necessary?

Yes. This makes sense for the general provisions however as noted above, we feel that the provision of healthcare by community optical providers whether on or off premises should be exempt due to the existence of alternative dispute resolution mechanisms.

Q12. What are your views on the proposed exclusion of day-to-day transactions performed immediately, from the application of CRD information requirements?

This is sensible. By way of an example, as noted above, once consumed, a sight test cannot be returned as the patient will already have received the results: a prescription or referral for further investigation.

Q13. Can you give any cost data or other evidence to support your views in your response to Q12?

Please refer to the Opticians Act to note the requirements when providing a sight test in the UK. If it would help, we would be willing to meet with BIS, the GOC and OCCS to discuss in more detail.

Off-premises contracts

Q14. What do you consider to be the benefits and/or costs to either consumers or traders in restricting the application of the information and cancellation provisions to off-premises contracts above 50 Euros, or in setting this threshold at a lower level? In your view, what would be the benefits and/or costs of removing the threshold and applying the information and cancellation provisions to all off-premises contracts, in your view?

We do not feel that the information and cancellation provisions should apply to contracts below €50 in value as it would add additional costs to compliance and capture a higher volume of activities within the regulations.

Q15. Do you see any advantage to setting the threshold at a rounded figure of £40 rather than the maximum allowed, which would be in the region of £43?

Yes, it makes sense to choose a round figure, in this case £40.

Q16. Do you agree with our preferred option that immediate home repairs should be subject to the lighter information regime? What cost savings would result from this approach? Do you see risks to business or to the consumer from this approach?

N/A

Ancillary contracts

Q17. Do you agree that the suggested principles regarding the cancellation of ancillary contracts are clear and equitable? What additional/alternative steps or requirements do you think need to be introduced to bring clarity to the process of terminating ancillary contracts?

Yes, however as noted above we feel that healthcare (including optical provision) should be exempt as patient have sufficient means of redress elsewhere.

Q18. Do you think that there are types of ancillary contract which require more detailed rules than the principles here allow?

N/A

Q19. Where the ancillary contract is provided by a third party, what are your views over the respective responsibilities of the trader, consumer and the third party with regard to repayment of any monies once the main contract is cancelled? Should the trader, for instance, be responsible for refunds relating to the ancillary contract, or should the ancillary provider refund direct to the consumer? How best can we achieve a straightforward regime which consumers and business will most easily understand?

N/A

Enforcement

Q20. Do you agree that a specific injunction and interdict regime would be an appropriate supplement to Part 8 Enterprise Act powers?

It makes sense to include the enforcement provisions within an existing framework, however there must be clarity regarding exemptions.

Q21. Do you see any gaps that the combination of Part 8 powers and a specific injunctions regime would not address?

No.

Q22. What other measures do you believe would usefully address gaps, acting as an BIS Consultation – implementing the Consumer Rights Directive 12 appropriate deterrent and sanction for breaches of the CRD?

N/A

Q23. What are your views on the proposal that failure to notify of cancellation rights for off-premises should remain a criminal offence?

Proportionality is key. There are already powerful means of redress in optics (overseen by the GOC as regulator). If healthcare were included (and we have made the strong case above that it should not be), we feel it would not be proportionate for failure to notify of cancellation rights for off premises contracts to be a criminal offence.

Private Redress

Q24. With regard to private redress, do you consider the consequences provided for in the Directive for breaches of certain provisions to be clear and appropriate? Please explain your answer.

N/A

Q25. In your view, should the consumer have a private right of recovery and, if so, what form should that right take where a trader fails to comply with the obligation to reimburse payments following cancellation by the consumer?

N/A

Q26. With regard to private rights of the trader, should a failure by a consumer to return items, in breach of CRD obligations, be actionable as a breach of statutory duty or expressed in another way? What are your views regarding the imposition of penalties for such breaches? Please give your reasons.

N/A

General points

Q27. Are there any other issues or areas on which you would like to comment? If so, we would welcome your views.

We strongly believe that there must be consistency of application of consumer rights (outlined under this consultation) and exemptions across the four UK countries.

This response has been submitted by Mark Nevin on behalf of the Optical Confederation.

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