

**CONSULTATION ON THE EARLY
IMPLEMENTATION OF A BAN ON
ABOVE COST PAYMENT
SURCHARGES**

SEPTEMBER 2012

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Payment Surcharges

Some businesses add a charge to the price of goods or services when the consumer chooses to pay by a particular method, for example by using a credit card or a debit card. These additional charges are known as payment surcharges.

In December 2011, the Government announced plans to ban businesses from charging consumers excessive payment surcharges. This announcement was made in response to recommendations from the Office of Fair Trading (OFT) and is intended to complement enforcement and compliance work by the OFT to ensure that add-on charges generally are transparent and consumers are able to compare prices more effectively.

This consultation sets out the Government's proposal for introducing this ban through early implementation of a provision of the European Union's Consumer Rights Directive¹. This will put in place legislation to ban businesses from imposing excessive payment surcharges on consumers. Businesses will remain able to add a charge only so far as it covers the actual costs of processing any particular form of payment. The consultation seeks views on the timing of the implementation of this legislation and how best to define the scope and application of the provision.

Consultation responses will help shape the Government's policy on implementation of the ban on excessive payment surcharges and inform the content of guidance for businesses to assist them in complying with the new provision; and in doing so protect consumers from excessive payment surcharges.

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This consultation is relevant to: consumers, consumer organisations, businesses who apply or are considering applying payment surcharges, the payment services industry, card providers and consumer enforcement bodies.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>

Foreword

**By Norman Lamb MP, Minister for Employment Relations,
Consumer and Postal Affairs**



The coalition Government is committed to helping consumers find the best deals in these difficult economic times. This means being able to identify the true cost of a product without being hit with a sometimes hidden and often excessive payment surcharge. Many consumers have expressed concerns that payment surcharges are too high and are becoming more widespread. In particular, Which?, has been instrumental in highlighting the issue. The Government shares these concerns and supported a new EU law that bans excessive payment surcharges.

Which?'s super-complaint to the Office of Fair Trading further highlighted the scale of the problem. The super-complaint related specifically to airlines, where the practice is perhaps most noticeable. It has already led to positive action by the OFT through securing agreements with a number of airlines to remove debit card charges and to be upfront about credit card charges. This is to be welcomed, but the issue also needs to be addressed across a broader range of sectors. That is why, in December last year, the Financial Secretary to the Treasury and my predecessor promised to take early action to implement the new EU law to limit excessive payment surcharges on all payment methods ahead of the EU deadline.

This will ensure that consumers are only charged reasonable fees for paying by all methods. In addition to a reduction in the amount businesses can surcharge, I believe that greater transparency in pricing will allow consumers to make more informed decisions as to which payment method to use. I want consumers to be able to trust advertisements, fairly compare prices and find goods and services that are honestly labelled. Consumers who can fully understand the final price they will pay for a product are more empowered to make better purchasing decisions and this leads to a more competitive market where businesses truly compete on the value of a product rather than artificial prices which consumers will in reality find hard to obtain.

At the same time we want to ensure that businesses, particularly small businesses, are not unfairly penalised by these measures and are still able to apply transparent and cost reflective payment surcharges, if they wish to do so.

This consultation sets out our plans and seeks your views on how we should bring forward legislation to ban excessively high payment surcharges early.

A handwritten signature in black ink, appearing to read 'Norman Lamb', with a horizontal line underneath.

Norman Lamb MP: Minister for Employment Relations, Consumer and Postal Affairs

Executive Summary

1. In December 2011, the Government announced its intention to ban businesses from charging consumers excessive payment surcharges. Excessive payment surcharges, which bear no relation to the cost the trader incurs in accepting the payment, can cause consumer detriment as consumers are often not aware of them until they reach the end of a transaction and they can add a significant amount to the total price of the transaction. Consumers are often unable accurately to calculate the final price they will pay, making it difficult to compare offers and make informed purchasing decisions. Consumers purchasing online from some businesses often have no realistic way to avoid paying these payment surcharges.
2. The Government announcement followed recommendations from the Office of Fair Trading (OFT)² which were themselves in response to a super-complaint³ from the consumer body Which?⁴ The super-complaint focused on the passenger transport industry where payment surcharging was found to be wide-spread and often excessive, while the OFT looked at payment surcharging across a range of sectors focusing in particular on online retail. The Which? super-complaint was supported by a campaign backed by over 42,000 consumers who called for a ban on excessive payment surcharges.
3. The OFT concluded that, while enforcement and compliance work would improve transparency, Government action was necessary to support the work it is doing to ensure that businesses adopt fairer pricing practices. The OFT put in place its own programme to improve transparency which resulted in an announcement on 5 July that it had secured agreements with a number of airlines on how they addressed payment surcharges⁵. The OFT also recommended that the Government introduce legislation to prohibit retailers from imposing any surcharges for payments made by debit card. Alternatively, it said that a ban on excessive surcharges across all forms of payments, contained in forthcoming European legislation (the Consumer Rights Directive), would also address its concerns.
4. The Government believes it is necessary to tackle payment surcharges applied to all forms of payment, where they are excessive and this includes local councils. We believe that businesses should be entitled to recover the costs they incur in accepting all forms of payment (including debit cards) through a fair and transparent surcharge. However, it is important to note that there are instances where Councils should not issue any surcharge. A complete ban on debit card surcharges alone could create distortions in the payments market and would prevent businesses from flagging to consumers the genuine costs they incur from processing debit card payments. A more general ban, but focused only on excessive payment surcharges,

² OFT response to Which? super-complaint:

http://www.oft.gov.uk/shared_ofi/super-complaints/OFT1349resp.pdf

³ Under section 11 of the Enterprise Act 2002

⁴ Which? super-complaint:

<http://www.which.co.uk/documents/pdf/payment-method-surcharges-which-super-complaint-249225.pdf>

⁵ <http://www.oft.gov.uk/news-and-updates/press/2012/58-12>

can be achieved by early implementation of a provision in the Consumer Rights Directive which will protect consumers across the EU from above cost charges on all payment methods, not just cards. It does not ban payment surcharges but limits them to the costs borne by the business for the use of a particular payment method.

5. The Council of the European Union adopted the Consumer Rights Directive (CRD) in October 2011, with UK Government support. Member States are legally bound to transpose its provisions by December 2013 with a requirement for the provisions to take effect in national law from June 2014. Notwithstanding the Government's general policy of implementing EU law on the transposition deadline,⁶ the Government has decided to consult on the early implementation of the payment surcharges provision in the CRD because of the concern that consumers are suffering significant financial detriment from the imposition of excessive payment surcharges. The Government is committed to protecting the rights of consumers and has vowed to end unfair financial transaction charges in the 'coalition program for government'⁷. Implementation of the payment surcharges provision would likely be through secondary legislation.

6. In accordance with the Government's usual policy presumption on transposition of EU Directives, and taking into account the range of costs that a business may incur in offering different means of payment and the other particular circumstances of this provision, the Government intends to use "copy-out" to implement this provision. It is intended that the principal text of the prohibition will be drawn directly from the Directive. We therefore do not regard it as necessary to include draft regulations as part of this consultation. However, we are, in particular, interested to understand views on the types of costs that businesses incur by using particular means of payment as these may inform the guidance which the Government intends to publish on the prohibition. The Government's preferred option is to implement the payment surcharges provision early by way of new regulations made under section 2(2) of the European Communities Act 1972.

7. The key issues we are seeking views on are:
 - Do you agree that the payment surcharges provision of the Consumer Rights Directive should be implemented so as to come into force before June 2014?
 - What costs should a trader be allowed to pass on through a payment surcharge, that is, what costs constitute "the costs borne by the trader for the use of a means of payment"?
 - Which types of contracts and business sectors should be subject to the ban?

⁶ Transposition Guidance: How to implement European Directives effectively:

<http://www.bis.gov.uk/assets/biscore/better-regulation/docs/t/11-775-transposition-guidance.pdf>

⁷ The Coalition program for Government can be found online here:

http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf

- The enforcement and applicable penalties for breach of the proposed law.
 - The potential costs to traders of implementing this provision of the Consumer Rights Directive sooner than required by the Directive.
8. The CRD will apply UK-wide and the Government intends that provisions implemented early will also apply in the same manner. This will ensure that all consumers in the United Kingdom enjoy the same high levels of protection.
 9. Consumer protection is reserved to Westminster for Wales and Scotland. Northern Ireland has a devolved power to legislate in the area of consumer protection, but it is our intention that, with the agreement of Northern Ireland Ministers, the legislation implementing the CRD will apply across the whole of the UK.
 10. This consultation will run for 6 weeks until 15 October, in line with new Cabinet Office guidance on shorter consultations, and is seeking views from businesses, consumers, consumer and business representative organisations, consumer law enforcers and the payment services industry to help form the legislation and the guidance we produce to aid traders with the interpretation of the provision.

How to Respond

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.

A copy of the Consultation Response form is available electronically at:

<http://www.bis.gov.uk/Consultations>

For your ease, you can reply to this Consultation online at:

https://www.surveymonkey.com/s/payment_surcharges

Responses to this consultation must be received **by 15 October 2012** and can be submitted via letter or preferably by email to:

Email: paymentsurcharges@bis.gsi.gov.uk

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A list of those organisations and individuals consulted is in Annex 2. We would welcome suggestions of others who may wish to be involved in this consultation process.

Additional copies

This consultation can be found at: <http://www.bis.gov.uk/consultations> and is also available from:

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In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries

Questions about the policy issues raised in the document can be addressed to Tony Metcalfe or Hannah Donaghey (contact details as above).

If you have any comments or complaints about the way this consultation has been conducted, these should be sent to:

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A copy of the Government's Code of Practice on Consultation is in Annex 1.

What happens next?

Following the close of the consultation period, the Government will publish all of the responses received, unless specifically notified otherwise (see data protection section above for full details).

The Government will, within 3 months of the close of the consultation, publish the consultation response. This response will take the form of decisions made in light of the consultation, a summary of the views expressed and reasons given for decisions finally taken. This document will be published on the BIS website with paper copies available on request.

The proposals

A. The issue

11. Payment surcharging is the term used to describe the practice of businesses adding extra fees or charges to the price of a purchase based on a method of payment, most commonly a debit or credit card. This can take the form of a fixed fee per transaction, a percentage of the transaction value or a fee per item purchased. Payment surcharging is used in a number of business sectors and it has been especially prevalent in the passenger transport sector. The Office of Fair Trading (OFT) estimates that in 2010 UK consumers spent around £300 million on payment surcharges in the airline sector alone.⁸
12. Surcharging is unusual on payment methods such as cash, cheque or credit transfer, although businesses incur costs in handling these forms of payment. Surcharging is more likely to be attached to payments made by plastic cards; usually debit or credit. Given the high percentage of transactions concluded online in the UK,⁹ consumers are finding it harder to avoid paying payment surcharges because their payment method is often limited to using a card. The increase in the number of unavoidable payment surcharges and the high charges levied by some businesses have caused widespread consumer dissatisfaction and led to the consumer group Which? launching a super-complaint¹⁰ to require the OFT to investigate what Which? describes as 'rip-off' charges.
13. The Which? super-complaint focused on payment surcharging within the passenger travel service industry¹¹ and concluded that detriment to consumers was caused by a combination of three practices adopted by some traders:
 - Advertising incomplete or partial prices by omitting to show the additional payment surcharge
 - A lack of reasonable practicable available alternatives to avoid paying the surcharge
 - The addition of a surcharge that exceeds a reasonable estimate of the costs for processing the consumer's payment.
14. The OFT supported these findings in their response by reporting on the lack of transparency and reasonable alternatives to paying a surcharge, in addition to the excessive nature of payment surcharges in some industries.

⁸ OFT response to Which? super-complaint:

http://www.oft.gov.uk/shared_of/super-complaints/OFT1349resp.pdf

⁹ In 2010, about 62% of adults (or 31 million people) bought goods or services online- Checklist for analysis on EU proposals on Common European Sales Law (page 17) :

<https://consult.justice.gov.uk/digital-communications/common-european-sales-law>

¹⁰ Online copy of Which super complaint found at:

<http://www.which.co.uk/documents/pdf/payment-method-surcharges-which-super-complaint-249225.pdf>

¹¹ Concentrating on passenger airline, ferry, rail, bus and coach services.

15. The first practice used by some traders creates a lack of transparency in advertised prices. Often a consumer will be drawn to a product based on the headline price they have seen advertised. In many cases this does not include the additional surcharge for paying by a certain method. This practice makes it harder for consumers to compare prices accurately because it is very difficult to discover the true price they will pay until they reach the end of the transaction.
16. The strategy of adding to the original price of a product as the consumer goes through the buying process is known as “drip pricing”. The OFT evidence suggests that consumers will often continue with a purchase in these situations because of the time and effort they have already invested in getting to that point in the transaction even though this may result in them paying a higher final price than they expected to based on the headline price and in comparison to what competitors are offering.¹²
17. The second practice causing consumer detriment is when traders do not offer a reasonable alternative to paying the payment surcharge (no surcharge-free method). Which? claim that coupled with the lack of transparent pricing, this practice means that businesses are in effect misleading consumers by advertising a price which is unachievable to most or all consumers. In such cases the payment surcharge is effectively compulsory. It is argued that these two practices distort competition between businesses and leave consumers confused and unable to compare prices effectively to make informed purchasing decisions.
18. The third practice that leads to consumer detriment is that in some business sectors the payment surcharges exceed the reasonable costs of processing the payment. The Government believes that it is legitimate for businesses to recover reasonable costs for processing payment transactions. However, payment surcharges must be proportionate and fair to consumers.

The OFT’s response and recommendation

19. The OFT responded to the Which? super-complaint in a report published on the 28th June 2011.¹³ The OFT recommended a two-part strategy to tackle the problem of excessive payment surcharging.
20. Firstly, it recommended that the Government take action to prohibit traders from imposing surcharges on all payments made using debit cards, in order to tackle the problem of a lack of reasonable surcharge-free alternatives. This would lead to the creation of a standard payment mechanism that would not incur a surcharge even for online transactions so consumers with debit cards would always have a fee-free option. The OFT left open how this might be achieved. It recognised that one option was offered by the forthcoming ban on excessive surcharges contained in the Consumer Rights Directive.

¹² Evidence found in OFT report on advertising:
http://www.of.gov.uk/shared_of/market-studies/AoP/OFT1291.pdf

¹³ OFT response to Which? Super-complaint:
http://www.of.gov.uk/shared_of/super-complaints/OFT1349resp.pdf

21. Secondly, and in conjunction with this regulatory approach, the OFT proposed to increase transparency of payment surcharges by ensuring that businesses comply with the Consumer Protection from Unfair Trading Regulations 2008 (CPRs.)
22. The CPRs¹⁴ came into force in May 2008 and implemented the European Union Unfair Commercial Practices Directive (UCPD) in the UK. The CPRs prohibit unfair, misleading and aggressive practices in business-to-consumer transactions.
23. The OFT found that the combination of practices highlighted in the Which? super-complaint could amount to a breach of Regulation 5 (misleading actions) or Regulation 6 (misleading omissions) of the CPRs. A breach of Regulation 5 would occur if the overall presentation of the price in any way deceives the average consumer and causes the average consumer to take a transactional decision he would not have taken otherwise. A breach of Regulation 6 would occur if information the consumer needs to take an informed decision (which could include information about charges) is omitted, hidden or presented unclearly and this causes the average consumer to make a transactional decision he would not otherwise have taken. For this purpose transactional decisions can include decisions to make further enquiries or other steps towards a purchase and are not limited to purchase decisions. In certain situations where a hidden fee is exposed at the end of a long online process, the consumer may continue to purchase the product or service even though he may not have done so if he had been given the full charge at the beginning of the process. In this way, the practice of surcharging may breach the CPRs.
24. The OFT concluded that the solution to improving pricing transparency already exists through the CPRs and took immediate action by securing voluntary agreements with a number of passenger travel companies to comply with the relevant provisions of the CPRs. In July 2012, the OFT announced that it had managed to secure further agreements with 12 airlines to scrap debit card surcharges. In addition, the 12 airlines have also agreed with the OFT to improve the transparency of charges for paying by credit card so that the charges are clearly visible to consumers before they begin their purchase.¹⁵ Increased price transparency will go a long way to tackle the first issue raised by the Which? super-complaint, namely hidden payment surcharges.
25. There is also other European legislation that regulates the advertising of prices within the airline industry, which should work in conjunction with the CPRs to protect airline passengers from hidden payment surcharges. Article 23 of the Air Services Regulations (ASR) (EC Regulation No 1008 / 2008) includes the requirement that:

¹⁴ <http://www.legislation.gov.uk/ukxi/2008/1277/contents/made>

¹⁵ More information on the agreements secured by the OFT can be found in their press release: <http://www.of.gov.uk/news-and-updates/press/2012/58-12>

'The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication.'

26. The Department for Transport has consulted on draft regulations which will provide enforcement powers to the Civil Aviation Authority and the OFT which would enable much closer monitoring of airline advertising in this respect.¹⁶

The Government's response

27. The Government's view is that it is necessary to tackle surcharges applied to all forms of payment, rather than simply ban debit card surcharges, in order not to create distortions in the payments market and to enable businesses to signal to consumers the genuine costs they incur from the use of debit cards through payment surcharges, should they wish to do so. Furthermore, a total ban on debit card surcharges would not be compatible with the CRD's requirements. Nor would it be sensible to legislate for such a ban, only to revise it almost immediately in 2014 in line with the requirements of the Consumer Rights Directive. Citizens/consumers should not be facing any charge for paying for services from public authorities by debit card - where e-payment facilities are offered.
28. The Government's favoured approach to addressing this issue is therefore through the early implementation of the payment surcharges provision in Article 19 of the Consumer Rights Directive, through regulations made under section 2(2) of the European Communities Act 1972. This consultation will be open for 6 weeks. Following consideration of the responses the Government will take a decision on the timing of the implementation of this provision. If we proceed with our plans for early implementation we propose to lay the order before Parliament before the end of 2012 and we will ensure that guidance for businesses is produced in good time so that businesses who apply payment surcharges have sufficient time to amend their practices to comply with the new provision before it comes into effect.

The Consumer Rights Directive

29. The Consumer Rights Directive¹⁷ (2011/83/EU) was adopted by the European Union in October 2011. It applies to contracts concluded after the 13th June 2014 and so the measures in the Directive must come into force in national laws by that date. Under the Government's transposition guidance,¹⁸ EU measures should come into force on (rather than before) the transposition deadline specified in the directive, unless there are compelling reasons for earlier implementation. The principle behind this is to ensure that UK businesses are not put at a competitive disadvantage compared to their European counterparts by being subject to regulation early. In the Government's view there are, however, compelling consumer protection and economic reasons for implementing Article 19 CRD early in this case. Payment

¹⁶ <http://webarchive.nationalarchives.gov.uk/tna/20100927131008/http://www.dft.gov.uk/consultations/closed/2010-16/>

¹⁷ <http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF>

¹⁸ <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/t/11-775-transposition-guidance.pdf>

surcharges have already been addressed in many European countries and not only do excessive payment surcharges impose costs on consumers in the UK, but the indirect harm – in terms of longer search times and complexity in obtaining and understanding prices - can damage consumer confidence and lead to sub-optimal decision-making. This in turn impacts on the normal operation of competition in the relevant markets and online sales channels in particular, which can have a wider chilling effect on the economy. This is supported by evidence provided in both the Which? super-complaint and the OFT’s report.

30. Article 19 CRD reads as follows:

‘Member States shall prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.’

31. Article 19 CRD prohibits traders from charging consumers fees that exceed the costs incurred by them for the use of the given payment method. Effectively this provision will ban excessive payment surcharges being charged to consumers whilst allowing traders to recover the costs of processing payments. Implementing this provision early would mean that consumers would benefit from this ban before June 2014. Article 19 is a provision of the CRD which requires maximum harmonisation. This means that Member States are not permitted to make or maintain national measures which provide either a greater or lesser level of consumer protection than Article 19.

32. The CRD provision only applies to payment surcharges. It does not apply to other forms of surcharges used by businesses. However, if the amount of any such other surcharge varied based on the method of payment used, it would, in our view, fall within the scope of Article 19. For example, an administration fee related to payment method would be caught. Other surcharges will continue to be subject to rules in other consumer protection legislation including the CPRs. They must therefore be presented clearly and fairly to consumers.

33. All EU member states are bound to implement Article 19 so as to apply to contracts concluded after the 13th June 2014. This means that by then, all businesses transacting in the EU within the scope of the Directive will be prohibited from charging excessive payment surcharges. Many Member States already have laws in place that restrict payment surcharges.

Question 1: ***Do you agree that we should implement the ban on above cost surcharges before the EU transposition deadline?***

B. Coverage of the Provision

Scope of the provision

34. The Consumer Rights Directive applies generally to business to consumer contracts, but with specified exemptions, including for particular sectors. The scope is

defined within the directive and we propose that the payment surcharges legislation will broadly follow the scope of the CRD in accordance with Government policy on implementation of EU directives but with one possible extension.

Business to consumer contracts

35. The CRD applies to contracts concluded between a trader and a consumer.¹⁹ A consumer is defined as ‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.’²⁰
36. A trader is ‘any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive.’²¹
37. Therefore, third sector and public bodies providing goods and services to consumers on a contractual basis will be covered by the legislation. For example services, such as use of local authority sports facilities, where supplied on a contractual basis, would fall within scope.

Types of transaction

38. The Consumer Rights Directive stipulates that Article 19 applies to sale of goods and supply of services contracts and to contracts for the supply of water, gas, electricity, district heating or digital content (all as further defined in the directive).²²

Method of sale

39. Article 19 applies to all sales and service contracts regardless of the method of sale.²³ For example, contracts concluded on or away from business premises (off-premises) or at a distance are all covered by Article 19 CRD.
40. Most of the provisions of the CRD concern distance contracts and off-premises contracts. But Article 19 also applies to business to consumer contracts that do not fall within the definitions of distance and off-premises contracts. In the main this would cover on-premises (shop) sales but would also capture other contracts that do not fall within the definition of distance contracts in the CRD such as occasional distance selling and contracts which are negotiated at the business premises of the trader and finally concluded by means of distance communication.

¹⁹ Article 3(1) of the Consumer Rights Directive

²⁰ Article 2(1) of the Consumer Rights Directive

²¹ Article 2(2) of the Consumer Rights Directive

²² Article 17(2) of the Consumer Rights Directive

²³ Article 17(2) of the Consumer Rights Directive

41. A distance contract is a sales contract that is concluded without the simultaneous physical presence of both the trader and the consumer.²⁴ Examples of distance contracts include those concluded by mail order, internet, telephone or fax. It is important that the payment surcharging provision applies to these types of transactions because the evidence presented by the OFT response to the Which? super-complaint suggests that payment surcharges are applied more frequently to online purchases than off-line. Consumers in distance contracts are also more limited as to their choice of payment method so cannot easily avoid any payment surcharges levied on card payments. The Government's understanding is that payment surcharging is less prevalent for contracts concluded at retail premises or in doorstep and other off-premises contracts. However, we believe that it is important that (as the Directive requires) all trading circumstances are covered by the payment surcharging rule to ensure consistency and certainty for consumers and businesses.
42. Contracts concluded in shops are less likely to attract payment surcharges because the customer usually has the option to switch to cash and avoid the charge. In a study conducted of the UK retail sector, almost a quarter of retailers surveyed added a payment surcharge for online transactions but almost none surcharged in-store transactions. Only one retailer out of the 50 surveyed charged an in-store surcharge on credit cards.²⁵ Smaller shops, pubs and off licenses may, however, decline payment by card for low value transactions or impose a flat fee on low value transactions. Article 19 of the CRD will not prevent businesses from declining payment by card but will prohibit such flat fees if they exceed the cost to the trader of offering that means of payment.
43. An off-premises contract is defined as a contract concluded with the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader.²⁶ Examples of off-premises contracts include sales at the consumer's home or workplace. Off-premises contracts are also often known as doorstep selling, but are not limited to this method of sale.
44. The CRD allows member states to exempt low-value, off-premises transactions from the scope of the directive.²⁷ Member States can set this threshold at a value up to 50 Euros. If we were to apply this derogation in relation to payment surcharges, the effect would be that off-premises sellers would be able to charge excessive payment surcharges on low value purchases. This would detract from the objective of protecting consumers from excess payment surcharges. It could be suggested that it is even more undesirable for a trader to apply high payment surcharges to low value transactions so exempting these transactions could be detrimental to consumers. It is therefore our intention that off-premises contracts of all values will be covered by the legislation on excessive payment surcharges.

²⁴ Article 2(7) of the Consumer Rights Directive

²⁵ Edgar, Dunn & Company- Potential introduction of surcharging in France, impact study, March 2010

²⁶ Article 2(8) of the Consumer Rights Directive

²⁷ Article 3(4) of the Consumer Rights Directive

Question 2: ***Do you agree that the exemption for low value, off-premises transactions should not be applied to the payment surcharges provision?***

Means of payment

45. Article 19 refers to a 'given means of payment'. It does not specifically refer to any particular method of payment such as credit or debit cards. Therefore the provision will apply to all means of payment. This would include (but is not limited to), cash, cheques, credit cards, debit cards, prepaid cards, charge cards, credit transfers and direct debits. This will also mean that as the technology relating to payments develops, the new methods of paying will also be subject to the provision, without changes being required to the legislation.

Exempted Sectors

46. The Consumer Rights Directive lists certain sectors which are not covered by the directive. These are contracts:

- (a) for social services, including social housing, childcare and support of families and persons permanently or temporarily in need, including long-term care;
- (b) for healthcare as defined in point (a) of Article 3 of Directive 2011/24/EU, whether or not they are provided via healthcare facilities;
- (c) for gambling, which involves wagering a stake with pecuniary value in games of chance, including lotteries, casino games and betting transactions;
- (d) for financial services;
- (e) for the creation, acquisition or transfer of immovable property or of rights in immovable property;
- (f) for the construction of new buildings, the substantial conversion of existing buildings and for rental of accommodation for residential purposes;
- (g) which fall within the scope of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours ;
- (h) which fall within the scope of Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts;
- (i) which, in accordance with the laws of Member States, are established by a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope;
- (j) for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;

(k) for passenger transport services, with the exception of Article 8(2) and Articles 19 (the article dealing with payment surcharges) and 22;²⁸

(l) concluded by means of automatic vending machines or automated commercial premises;

(m) concluded with telecommunications operators through public payphones for their use or concluded for the use of one single connection by telephone, internet or fax established by a consumer.

47. The Government proposes to exempt these sectors from its implementation of Article 19 with the possible exception of contracts for package travel (see below.) (Please note also that Article 19 does apply to passenger transport services, as stated above.) Implementing Article 19 in line with the scope of the CRD is in accordance with the Government's presumption that generally it should not "gold-plate" EU law by extending the scope of EU legislation beyond what is required to meet our EU obligations. In addition, we do not believe that payment surcharging is common in the majority of these excluded sectors.

Question 3: ***Do you agree that these sectors should be outside the scope of the payment surcharging provision? Please give reasons and provide evidence if possible.***

Passenger Transport and Package Travel

48. Passenger transport services are excluded from the scope of most of the CRD because they are already regulated by EU legislation or national law. However, passenger transport services are not excluded from the payment surcharging provision of the CRD because payment surcharging is prevalent in the passenger transport industry and there is no equivalent EU provision which would otherwise apply.
49. Excluded entirely from the scope of the CRD are contracts which fall within the scope of the Package Travel Directive (90/314/EEC). However, the Government is minded to extend the application of the payment surcharges provision to the sale of package travel, as defined by the Package Travel Directive.
50. The Package Travel Directive covers those who organise "packages" (other than occasionally). A package is defined as something which:
- is a pre-arranged combination of at least two of the following components: transport, accommodation or other significant tourist services (not ancillary to transport or accommodation), and
 - is sold or offered for sale at an inclusive price, and

²⁸ See section below on passenger transport and package travel

- covers a period of more than twenty-four hours or includes overnight accommodation.
51. The Package Travel Directive (implemented into UK law through the Package Travel, Package Holidays and Package Tours Regulations 1992)²⁹ provides a regime of regulation to protect consumers purchasing package travel arrangements. However, while the Package Travel Directive does regulate the circumstances under which the price of a package might vary once a contract is agreed, it does not regulate payment surcharges. The use of such surcharges was not widespread when the Package Travel Directive was adopted in 1990.
52. The Government is concerned that if companies that sell packages to travellers are excluded from the new surcharging provision there will be an obvious inconsistency in protection for those passengers booking separate accommodation and flights, where the protection would apply, and those booking package holidays, where organisers would remain free to levy higher payment surcharges (provided they did not attempt to hide those charges or mislead consumers about them). The Government believes that consistency on this point is essential to provide uniform protection for consumers and clarity for business. We believe that those organising and selling package travel should be subject to the same rules on excessive payment surcharges as those in other sectors, including those selling passenger transport. This is especially so given that consumers buying a package would be likely, on the whole, to expect a higher level of protection than those not buying a package given the history of the specific regulation of package travel. Additionally, there is often an element of competition and price comparison between people considering package travel and similar holidays with the individual components purchased separately.
53. The European Commission is currently reviewing the scope of the Package Travel Directive. It seems likely that the Commission will propose a provision similar to the CRD requirement on payment surcharges. In the light of the UK's support for the provision in the CRD we would be very likely to support such a provision in a new Package Travel Directive. A proposal from the Commission is expected by early 2013 so it is unlikely that a new regime will be in place before the end of 2015 at the earliest, allowing for the negotiation process and the implementation period. We believe this is too long for a disparity between requirements on payment surcharges to exist in such closely related and competing industries. The Government therefore proposes to act now by including payment surcharges applied to sales of package travel in the regulation implementing the surcharges restriction in the CRD.
54. We plan to use the power conferred by section 2(2) of the European Communities Act 1972, to include package travel contracts within the scope of the regulation.

²⁹ <http://www.legislation.gov.uk/uksi/1992/3288/contents/made>

Question 4 (i) *To what extent are payment surcharges applied to bookings for package travel? Please provide evidence of the extent and level of surcharging if possible.*

Question 4 (ii) *Do you agree that the scope of the payment surcharges regulation should cover package travel sales? If you disagree, please explain your reasoning.*

Micro-enterprise exemption

55. In the April 2011 Budget,³⁰ HM Treasury announced a moratorium exempting micro-enterprises and start-ups from new domestic regulation.³¹ The objective of this policy is to minimise disproportionate burdens on the smallest businesses (10 or fewer employees) and new businesses that are trying to establish themselves in difficult economic times.³²

56. In line with this policy, the Government intends to exempt micro-enterprises from the scope of the payment surcharging provision. However the CRD does not provide for such an exemption, so the Government will be obliged to end this exemption on the transposition deadline. The ban on above cost payment surcharges will therefore apply to micro-enterprises from 13 June 2014.

57. Despite the short-term application of this exemption, the Government believes that it is beneficial to apply the exemption until June 2014 to provide micro-enterprises with additional time to adjust their pricing strategies to the new requirements.

Question 5: *Do you agree that micro-enterprises should be exempt from any ban on excessive payment surcharges until June 2014? Please provide evidence if possible.*

C. The costs borne by the trader

58. The principle that a payment surcharge must not exceed the cost to the trader of offering the relevant means of payment is clear, but the types and amounts of those costs will vary considerably with the nature and size of the business, the particular means of payment and the contractual arrangements on which the business relies to offer those means. The Government believes that a “copy out” approach to our implementation of Article 19 has the benefit of stating clearly the prohibition imposed on businesses whilst leaving the flexibility for each business which wants to impose

³⁰ The Budget 2011: http://cdn.hm-treasury.gov.uk/2011budget_complete.pdf

³¹ There has been no indication that the micro-business moratorium is to end after its original three year time-period. Therefore we assume that it will continue beyond April 2014.

³² Micro businesses and start-ups are defined in the Government’s *Plan for Growth* which was published alongside the Budget in March 2011. http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf

See paragraphs 2.47- 2.50 for definitions and guidance.

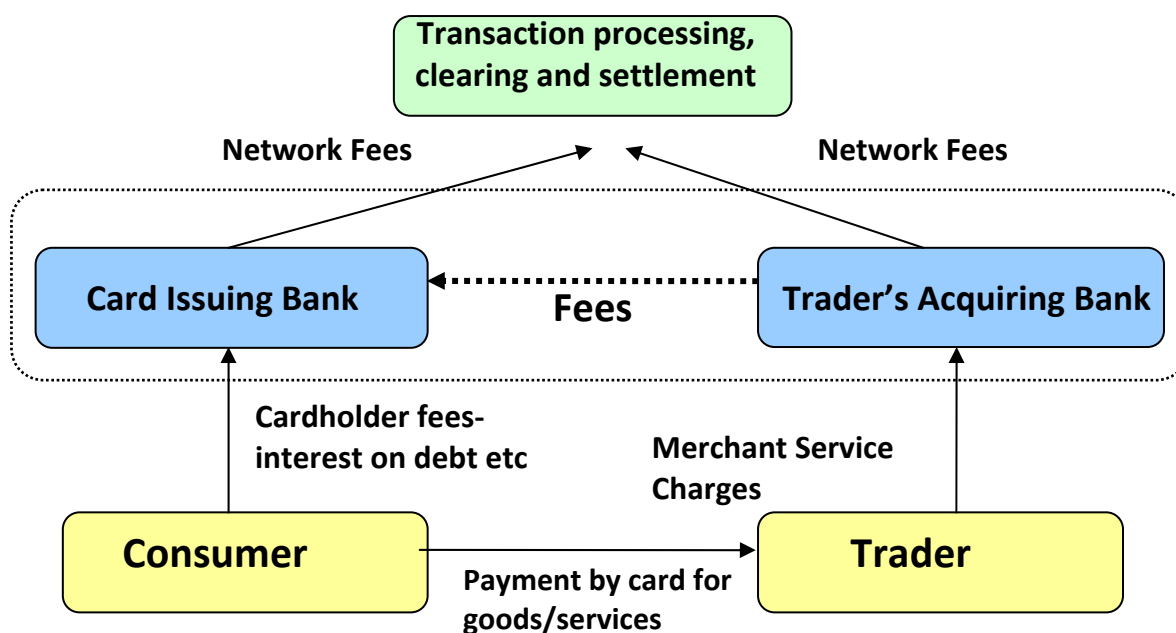
payment surcharges to consider (with the benefit of guidance) what are the costs which it incurs for using a particular means of payment. Those costs will set the threshold for any permitted surcharge. The approach of not attempting in the legislation to define the detail of what costs are permitted to be reflected in any payment surcharge also has the benefits of making it more likely that the legislation will apply effectively to new payment methods and technological developments which cannot be predicted in advance and of being more likely to be consistent with the approach taken by other EU Member States when they implement the provision. For those reasons, we intend to copy out the Article 19 CRD provision. Our consultation on the issue of costs is intended to inform our guidance to traders rather than the drafting of the law itself. The guidance is intended to assist businesses and will not have legal force but guidance may be taken into account by the courts.

59. Article 19 prohibits traders from charging consumers fees (payment surcharges) that exceed the cost borne by the trader for the use of that means of payment.
60. The Directive does not define “cost borne by the trader”; nor does it stipulate what costs can be taken into account when making the calculation. The consultation considers below whether costs should be assessed on a “per transaction” or aggregate basis and shared across transactions. However, in either case, traders will need to identify the specific costs attributable to specific types of payments, if they wish to pass these on to consumers, in order to comply with the Directive’s requirements.
61. The Government believes that only the direct costs to a trader of using a means of payment will be surchargeable. It does not envisage that indirect costs, such as general administrative overheads or staff training, should be included in the calculation of costs borne to the trader. Indirect costs should be reflected in the headline price of goods and services, as they are for any general cost categories.

Card payments

The structure of card costs

62. The two most widely used card schemes in the UK are Mastercard and Visa. Each runs a payment scheme that sets the rules of that scheme and offers transaction processing and clearing and settlement services. A typical payment transaction under the scheme rules, illustrated below, involves four parties: the consumer, the bank that issues the consumer’s card (issuing bank), the trader and the trader’s bank (acquiring bank). There can also be intermediaries such as payment service providers (PSPs) who are employed by the trader to process card payments and online transactions:



63. When a trader accepts a card payment, it requests authorisation of the payment from its acquiring bank. The trader's acquiring bank routes a request for authorisation, via the relevant card scheme, to the bank that issued the consumer's card (issuing bank). The issuing bank checks the cardholder's identity, that the account has sufficient funds and that the card has not been reported lost or stolen. The issuing bank can then authorise the amount requested and reserves those funds. Once the payment transaction is complete, the issuing and acquiring banks settle accounts between themselves through the card scheme's clearing and settlement mechanism (or an independent clearing house). At the end of the process the value of the transaction is credited to the trader's bank, less any fees that may be payable. The trader's bank then transfers the value of the payment to the trader, less fees, according to the conditions of its service contract with the trader.

A typical card transaction

64. The four party model describes the main parties in the card transaction only. The exchange of transaction details and/or money transfer between the card issuer and the acquiring bank can take place through a clearing house (either the card scheme such as Visa or MasterCard or another party). Especially for on-line card payments, the structure can be further extended by the PSPs (such as PayPal) who serve as intermediaries between the trader and their bank.

Traders' cost structures

65. There are several types of cost borne by traders when accepting a card payment. These include:

(i) Merchant Service Charge

The merchant service charge (MSC) is charged to traders by their acquiring bank and is generally representative of the various fees they incur for offering the relevant payment service. The merchant service charge is a direct, unavoidable cost to traders resulting from the customer choosing to pay by card. Merchant service charges can be evidenced by invoices. They can account for 80-85% of the retailer's costs of accepting card payments.³³

(ii) IT Costs

IT infrastructure such as card terminals, for example point of sale (POS) devices may represent 8 - 12% of the costs of a card transaction.

(iii) Risk management

Traders need to take active fraud detection and prevention measures which vary depending on their business and whether transactions take place face to face or remotely. They must also comply with the Payment Card Industry Data Security Standards (PCI DSS), set by the card industry to protect cardholder data. Risk management may represent 1 - 2% of the costs of a card transaction.

(iv) Fraud losses

Fraud losses have declined significantly following the introduction of chip and pin technology. They may represent up to 3% of the costs.

(v) Operations

These may represent up to 3% of the costs and include chargeback processing (returning funds to a consumer when a transaction is reversed), exception handling and reconciliation of card statements.

Fees to intermediaries

66. Some traders may opt to buy in services from their acquiring bank or from intermediaries who provide equipment, fraud detection and processing services (especially for online payments). They typically take the form of: a standing charge, service charges for processing transactions; fees for charge-backs; and fees for card terminals. Some traders buy an all inclusive service in which an intermediary handles all aspects of online payments through its website. Small traders (taking a few hundred payments or less per month) can pay a fixed monthly fee and avoid dealing with acquiring banks directly or paying any per-transaction fees. Larger traders usually pay confidential negotiated rates for anything from fraud management up to full web hosting and transaction processing.

³³ Edgar, Dunn & Company- structure and indicative proportion of the overall cost of acceptance.

67. It seems reasonable that, if traders are allowed to surcharge the invoiced costs paid to intermediaries for carrying out certain directly related functions, then those traders who decide to operate these functions themselves should also be able to surcharge the corresponding amount that they also incur, provided that these internal amounts can be accurately allocated. We do not want to remove the incentive for businesses to carry out card processing in the most cost-efficient way, by allowing those who pay for services to pass on the cost, but not those that can carry out functions more cheaply internally.

Which types of costs should be surchargeable?

68. The Government suggests that only direct costs that can be attributed exclusively to taking a particular form of payment should be capable of being passed on to customers in the form of a payment surcharge.

69. For card payments this would include any direct costs that can be evidenced by invoices from equipment and service providers such as merchant service charges, IT and equipment costs, processing fees, such as charges for reversing or refunding a payment, fraud losses, fines and penalties imposed by card companies (for example for security breaches), together with any operational costs that can be separately identified as internal administrative costs arising from activities dedicated exclusively to card payments.

70. Indirect costs such as website management, staff training, utility bills, and other general overheads that would be incurred in any event, even if card payments were not taken, or which cannot be separately identified as being attributable to the use of cards, should not in the Government's view be surchargeable.

71. Certain costs related to card transactions are to a large extent incurred voluntarily by traders as part of running their business efficiently. Examples of voluntary costs include integrating card acceptance systems with other accounting, till, and invoicing systems. Bespoke systems include self-service terminals, contactless payment capability, payment gateway costs to encrypt information passing between a trader and a customer, and other non-mandatory security modifications. The Government suggests that these too should be regarded as general overheads and should not therefore be surchargeable.

72. Opportunity costs, such as delayed receipt of funds arising from the length of time that card payments take to clear into a trader's account compared to other forms of payment, should be considered as a general cost of doing business and should not in the Government's view be surchargeable.

Question 6: *Please state whether in your opinion each of the following potential costs to businesses of accepting payments should, in the case of card payments, be included within the definition of costs borne to the trader. Please give reasons for your answers:*

a) The merchant service charge

b) IT, risk management, fraud and operational costs

c) Fees to intermediaries

d) Costs to businesses of carrying out intermediary functions internally

e) Any other potential costs – Please identify

Other means of payment

73. The same principles will apply to all means of payment. Surcharges should only reflect the direct costs that can be attributed to taking that form of payment. We are not aware of the widespread use of payment surcharges with respect to other means of payment, but this might emerge in future and the Government expects that the clear principle contained in Article 19 of the CRD should be capable of application to deal with future changes in market practice relating to other means of payment.³⁴

Question 7: *Please give evidence of the use of payment surcharges for means of payment other than credit, debit, prepaid or charge cards.*

Discounts

74. Article 3 of the CRD provides that the Directive applies to contracts for the supply of water, gas, electricity or district heating, to the extent that these commodities are

³⁴ The British Retail Consortium (BRC) has estimated in its cost of collection survey that cash actually costs 2.1 pence per transaction to handle. The BRC Cost of Payment Collection Survey, 2009, covered 53% of total retail sales (circa 21,500 retail outlets).

provided on a contractual basis. Energy companies often offer a discount for those paying their bills by direct debit.

75. Firms, including energy companies, generate cost savings by collecting regular payments by direct debit and the Government believes it is legitimate, and should not be treated as being in breach of Article 19 of the CRD, to pass these savings on to customers. If the discount offered for a particular means of payment reflects the cost savings for the trader, then it should follow that the additional amounts payable by consumers using other means of payment reflect the additional cost borne by the trader for the use of these other means. This principle applies to all sectors, not just utility contracts.
76. In the Government's view, discounts should continue to be permitted based on their substantive effect rather than their wording. A so-called 'discount' will not be valid if in effect it acts as an excessive surcharge on another payment method as a way of avoiding the Article 19 CRD provision.

Quantification of costs

77. One method by which traders could quantify their costs for the purpose of setting a payment surcharge would be to attempt to calculate the precise, transaction by transaction, direct costs the trader incurs on each individual transaction, and to surcharge the precise direct cost of each transaction. However, this approach is likely to be unfeasible for the vast majority of traders. It would be excessively burdensome for businesses and create uncertainty and confusion for consumers. In practice it may be impossible, if fees are derived from transaction volume, since the cost of an individual transaction based on future volumes cannot be known in advance. Customers would not know the full price of a transaction in advance and would not be able to compare prices.
78. It would also be difficult for traders to identify each type of card and calculate the corresponding costs that they incur processing each one. There are hundreds of different types of payment card in the UK market, each attracting a different merchant service charge which is payable by the trader. Therefore the trader's cost of accepting each different type of card will vary.³⁵
79. If the regulations require traders to calculate the precise cost of processing each given card payment the trader would not only have to identify whether the card was a Visa, Mastercard or American express but also whether it was a credit, debit or pre-paid card for example. They would also have to differentiate between corporate cards, platinum cards or business cards and then have to calculate the corresponding cost. Many traders may not have the means to distinguish between card types.

³⁵ The British Retail Consortium (BRC) estimate that there are over 270 levels of interchange fee charged to trader in the UK. This highlights how difficult it would be for traders to identify the specific charge attracted by each card.²⁸

80. It would be time consuming for those taking the payments in store to identify the type of card presented and calculate the corresponding fees that they would incur on that particular transaction. This would result in longer processing times at the point of sale.
81. Therefore the Government proposes that the surchargeable costs borne by the trader should be capable of being aggregated and forecast, so that prices are transparent. The precise level of aggregation would be a matter for each trader, based on its own costs and business mix.
82. The Government believes that traders should be able to reflect their average direct costs for each type of type of payment in a clear upfront surcharge. This may for example be a flat fee per transaction for debit cards and prepaid cards, or a percentage of the transaction value for credit and charge cards.
83. The Government will publish guidance to businesses, based on the findings of this consultation, clarifying its views as to which types of costs a trader can pass on. As mentioned above we understand the relative difference in cost in accepting different types of cards, cash or cheque and we feel that businesses should be allowed to charge consumers the average cost of accepting each payment type. The Government does not propose to identify each category of payment method that traders can differentiate between, to ensure the guidance remains relevant when newly developed payment methods such as mobile payments enter the market.

Illustrative costs, calculated by the OFT, of processing card transactions.

84. The guidance we produce will not specify any figures as to how much the Government believes a trader can surcharge as traders should be able to apply payment surcharges that reflect the actual costs that they incur, case by case. However previous research by the OFT has provided us with an idea of the sort of amounts traders could reasonably claim to represent the costs borne to them.
85. The OFT have compiled a table which shows the estimated costs of accepting payment types within the passenger transport industry. However they caution that these figures may be underestimated, highlighting the difficulty in setting exact figures for payment surcharges across the whole market. In addition it shows how difficult it would be for traders to calculate an accurate cost-reflective payment surcharge on a transaction-by-transaction basis.

Illustrative costs of processing card transactions

Card Type	Transaction size			
	£50	£100	£250	£500

Credit Card	£1.16	£2.10	£4.94	£9.66
	(2.3%)	(2.1%)	(2.0%)	(1.9%)
Charge Card	£1.52	£2.84	£6.77	£13.34
	(3.0%)	(2.8%)	(2.7%)	(2.7%)
Debit Card	£0.53	£0.53	£0.53	£0.53
	(1.1%)	(0.5%)	(0.2%)	(0.1%)

Source: Table C.3, OFT Response to Which? super-complaint.³⁶

Question 8: *Do you agree that ‘costs borne to the trader’ should be an average cost of processing transactions of that type rather than of each individual transaction?*

D Costs and benefits

86. The Government has prepared an Impact Assessment that is available to download separately [here](#), which identifies the potential costs and benefits to consumers and businesses of implementing the payment surcharging provision early.

Question 9: *Do you have any comments on the draft impact assessment? In particular we would welcome additional evidence on likely costs and benefits. Any financial data may be provided separately and will be treated in confidence*

Consumers

87. It is expected that regulation of payment surcharges will benefit some consumers who currently pay excessive payment surcharges on some transactions. In particular we expect payment surcharges to decrease in those sectors where many businesses currently surcharge above the cost of processing the transaction.

³⁶ Based on the data provided by a small number of third parties as part of compiling their response to the Which? super-complaint (which is very time-limited) and is not based on a comprehensive survey of traders.

88. We do anticipate a possible transfer of costs from a payment surcharge to the basic price of the item (so that the price is the same regardless of the means of payment) or even to other forms of fees or charges (where permissible and where not misleading). This will allow businesses to adjust their pricing policies so in most cases there may not be a drop in overall price to the consumer. Other traders may choose to absorb any costs. The rules on price transparency in the CPRs will continue to apply to all forms of charges and fees.
89. However, despite the possible lack of direct financial savings to the consumer, in many cases the restriction of payment surcharges coupled with the OFT's enforcement work on price transparency is expected to increase competition by making it easier for consumers to compare prices accurately and shop around for the best deal. Consumers will have the peace of mind that the price they see advertised will not increase by an unreasonable amount to reflect the means of payment, by the time they have reached the checkout. Therefore consumers will benefit from being able to make fairer comparisons and therefore more cost-efficient purchases. Consumers will also benefit from shorter search times when comparing products.
90. We do not anticipate any additional costs to consumers.

Businesses

91. Increased transparency of payment surcharges and more reasonable costs will allow consumers to compare the cost of using each method of payment more accurately. This may lead to increased competition between payment providers to lower their merchant service charge to attract more customers. It will also create a more level playing field for traders who currently choose not to apply payment surcharges but who include all costs in their headline price. Their competitors will be unable to advertise very low prices with the intention of adding large payment surcharges to the final price which currently distorts the competition in such markets. If traders switch to other forms of surcharging they would still need to meet the CPR requirements on transparency so those businesses including all costs in their headline price should not be disadvantaged and consumers will be able to compare prices.
92. There will be no costs to those businesses who do not currently charge an excessive payment surcharge as they already comply with the requirements of the provision. They may in fact benefit from the provision, as their surcharging competitors may wish to increase their headline price to take into account the lower surcharge.
93. In 2007, a survey conducted by the OFT found that 81 percent of businesses applied no payment surcharge at all, indicating that only a small percentage of businesses will be affected by the provision.³⁷ Not all of these will be surcharging above the cost of processing the payment so they will not all need to make changes to their pricing

³⁷ Conducted as part of a Competition Act investigation into the charges that credit card networks levy on retailers, see: <http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98-current/interchange-fees>

strategy to comply with the new provision, although they may need to check that their charges are truly cost reflective.

94. Retailers that currently charge payment surcharges that exceed the cost of processing the payment will need to adjust their pricing strategies to comply with the new provision. Firms already make frequent updates to their pricing systems so there should be little cost of adjusting the prices to reflect the new provision.
95. It is anticipated that businesses will adjust pricing policies to cover the excess amount they are currently adding as a payment surcharge. This means that overall, the price they charge for a product will remain fairly constant, despite the reduction in the payment surcharge. However, prices overall are more likely to be exposed to normal competitive pressure in the marketplace.
96. The Government aims to mitigate the impact of the provision on micro-enterprises and start-ups by applying the moratorium announced in 2011, which will give micro-enterprises an exemption from the provision until June 2014. This should afford micro-enterprises more time to adjust their pricing strategies to comply with the regulation and reduce the impact on them. We do not believe that payment surcharging is common by small businesses so we do not expect many businesses to be affected when the moratorium ends in June 2014.
97. There would be no direct costs on the card networks, on acquirers or payment service providers or intermediaries.

E Enforcement and penalties, including private remedies for consumers

98. The Consumer Rights Directive requires that Member States effectively enforce the provisions contained within the Directive. This includes a requirement to provide effective and proportionate penalties to deter any breaches of the provisions.
99. We feel it is important to not only deter traders from charging excessive payment surcharges and prevent those that do from continuing to do so, but also to give consumers who have paid excessively high payment surcharges a right to recover the excess that they paid. In this regard, we are proposing civil court orders which can be pursued by consumer law enforcers and private rights of redress for consumers. We do not propose criminal penalties. However, breach of an order of the court may lead to sanctions, including fines, for contempt of court.

No Criminal Penalties

100. The Government considers that it would not be a proportionate and necessary response to impose criminal penalties on those who breach the payment surcharging provision. We believe that civil remedies (backed ultimately by sanctions for

contempt of court) and private actions will provide the necessary dissuasive effect required by the CRD.³⁸

101. In addition, and although Article 19 CRD states a clear principle, we do not consider that a criminal offence is appropriate given the variation which will arise in particular circumstances as to which costs can legitimately be passed on through a surcharge. Furthermore, civil remedies are the norm in relation to similar consumer protection measures, such as the laws on unfair contract terms. Civil remedies will therefore extend current consumer protection law, providing remedies which are consistent with current law, and with the future implementation of the remaining provisions of the CRD, which we expect will largely impose civil remedies.

Question 10: ***Do you agree that it would be inappropriate having regard to principles of proportionality to impose criminal penalties on traders who breach the payment surcharges provision?***

Civil remedies through public enforcement

Part 8 of the Enterprise Act 2002

102. Part 8 of the Enterprise Act 2002 provides a framework for the enforcement of certain consumer legislation. We propose to add the payment surcharges provision to the list of consumer legislation that can be enforced under Part 8.

103. Part 8 gives specified enforcers the power to apply to the courts for enforcement orders if they become aware that the trader has engaged, is engaging or is likely to engage in conduct which constitutes an infringement of Community legislation. A breach of the payment surcharges provision would constitute a Community infringement (as defined in Part 8) because it implements a provision of a European Directive. A Community infringement requires an act or omission which harms the collective interests of consumers and which contravenes a listed Directive or the UK law which implements it (see section 212 Enterprise Act 2002).

104. Case law suggests that collective harm is not to be assessed by reference to percentages of the population, statistics or geography. A limited course of conduct may be enough for an enforcement order to be granted if it potentially affects a wide group of consumers.

105. If an enforcer successfully proves collective harm and breach of the payment surcharges provision, the court can grant an enforcement order. This can require (among other things) that the trader does not continue or repeat the conduct.

³⁸ Article 24(1) of The Consumer Rights Directive

106. These orders are injunctive in nature and prohibit future breaches of the provision rather than penalising previous breaches. The Government considers that enforcement orders are effective, proportionate and dissuasive because breach of an enforcement order could lead to sanctions, including fines for contempt of court.

Enforcers of Part 8

107. The Enterprise Act 2002 and secondary legislation made under it name those bodies that are entitled to apply to the courts for enforcement orders. These include the OFT, trading standards officers and the Department for Enterprise, Trade and Investment in Northern Ireland (DETINI) and others.

Specific regime of injunctions or interdicts

108. In addition to powers under Part 8 Enterprise Act 2002, we are proposing to create a more specific regime of injunctions or, in Scotland, interdicts or orders for specific implement, to be specifically applied to the payment surcharging provision (a similar or combined regime may be applied to other provisions implementing the CRD, and this is the subject of separate consultation).³⁹ This regime would also allow enforcers to apply to the courts for injunctive or, in Scotland, interdictal orders to secure compliance with the payment surcharges provision by a trader. In contrast to the requirements of Part 8, enforcers would not need to show collective harm in order to apply for an enforcement order and the order would simply require compliance with the regulation.

109. We would limit the duty to enforce under this regime to Trading Standards and the DETINI.⁴⁰ These enforcers would have a duty to consider complaints made by consumers within the scope of their respective roles.⁴¹ These complaints could, in suitable cases, then form the basis for an application for an injunction or, in Scotland, an order for interdict/implement. All other enforcers would have the power to enforce under Part 8 (discussed above.)

110. Enforcers under Part 8 and under the specific regime will be able to accept undertakings from traders that they will comply with the regulations rather than applying for enforcement orders in relation to the breaches. Under the specific injunction regime, an enforcer would only be able to apply to the court for an order if there had been a breach of the provision whereas under Part 8, an enforcer can apply if there is likely to be a breach.

³⁹ This would be based on regimes currently used for enforcing the Distance Selling Regulations- regulation 27 and the Unfair Terms in Consumer Contracts Regulations – regulation 12.

⁴⁰ The consumer enforcement landscape is currently undergoing restructuring so amendments to enforcement bodies may be needed in the future to accommodate any potential changes.

⁴¹ More information about the Government's proposals for the roles of the OFT/CMA and Trading Standards in the enforcement of consumer law can be found at :

<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf>

Consumer private remedies

111. In addition to giving enforcers the power to apply for enforcement orders, we also want to ensure that consumers can seek private redress from traders if they have paid above-cost payment surcharges after the legislation has taken effect and can resist enforcement of such surcharges if they have not yet paid them. We propose that an above-cost surcharge will be an unenforceable term of the contract and therefore can be reclaimed by the individual consumer from the trader.

Question 11: ***Do you agree with our proposal to grant Part 8 powers to certain enforcers and to complement these powers with a duty to enforce under the specific injunction regime and consumer private remedies?***

Investigatory powers

112. We would intend that enforcers should benefit from the single generic set of investigatory powers proposed in the March 2012 Consultation on Consolidating and Modernising Consumer Law Enforcement Powers.⁴² Therefore, we would intend that the investigatory powers would be consistent with these anticipated generic powers, which are intended to be included in the proposed Consumer Bill of Rights.

⁴² <http://www.bis.gov.uk/Consultations/consultation-on-consumer-law-enforcement-powers?cat=open>

Consultation questions

Question 1 - Do you agree that we should implement the ban on above cost surcharges before the EU transposition deadline?

Question 2 - Do you agree that the exemption for low value, off-premises transactions should not be applied to the payment surcharges provision?

Question 3 - Do you agree that these sectors should be outside the scope of the payment surcharging provision? Please give reasons and provide evidence if possible.

Question 4 (i) - To what extent are payment surcharges applied to bookings for package travel? Please provide evidence of the extent and level of surcharging if possible.

Question 4 (ii) - Do you agree that the scope of the payment surcharges regulation should cover package travel sales? If you disagree, please explain your reasoning.

Question 5 - Do you agree that micro-enterprises should be exempt from any ban on excessive payment surcharges until June 2014? Please provide evidence if possible.

Question 6 - Please state whether in your opinion each of the following potential costs to businesses of accepting payments should, in the case of card payments, be included within the definition of costs borne to the trader. Please give reasons for your answers:

- a) The merchant service charge
- b) IT, risk management, fraud and operational costs
- c) Fees to intermediaries
- d) Costs to businesses of carrying out intermediary functions internally
- e) Any other potential costs – Please identify

Question 7 - Please give evidence of the use of payment surcharges for means of payment other than credit, debit, prepaid or charge cards.

Question 8 - Do you agree that 'costs borne to the trader' should be an average cost of processing transactions of that type rather than of each individual transaction?

Question 9 - Do you have any comments on the draft impact assessment (Annex 3)? In particular we would welcome additional evidence on likely costs and benefits. Any financial data may be provided separately and will be treated in confidence

Question 10 - Do you agree that it would be inappropriate having regard to principles of proportionality to impose criminal penalties on traders who breach the payment surcharges provision?

Question 11 - Do you agree with our proposal to grant Part 8 powers to certain enforcers and to complement these powers with a duty to enforce under the specific injunction regime and consumer private remedies?

Annex 1: The Consultation Code of Practice Criteria

Formal consultation should take place at a stage when there is scope to influence policy outcome.

Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response. The amount of time required will depend on the nature and impact of the proposal.

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Annex 2: List of Individuals/Organisations consulted

Association of Train Operating Companies
ABTA the travel association
Association of Convenience Stores (ACS)
Association of District judges
Association of Independent tour operators
AIB Merchant Services
Aer Lingus
Air Berlin PLC
Air France
American Express Services Europe LTD
Assertis LTD
BAI (UK) LTD
Barclays Merchant Services
British Airways PLC
Brittany Ferries
British Hospitality Association (BHA)
British Independent Retailers Association (BIRA)
British Midland International LTD
BMIbaby
British Retail Consortium
Chamber of Shipping
Cinema Exhibitors' Association
Citizens Advice
Citizens Advice Scotland
Civil Aviation Authority
Condor Ferries LTD
Confederation of Passenger Transport UK (CPT)
Consumer Council for Northern Ireland
Consumer Focus
Cosla
Deutsche Lufthansa AG
DFDS Seaways PLC
Diners Club UK LTD
Easyjet PLC
Eastern Airways
Edgar, Dunn & Company
Elavon Merchant Services
Eurostar International LTD
Expedia INC
Federation of small businesses
Forum of Private Business
Flybe Group PLC
Gambling Commission
Holiday Travel Watch
HSBC Merchant Services
Iberia Group
IMRG (Interactive Media in Retail Group)
Irish Ferries LTD
Isle of Man Steam Packet Company LTD
Opodo
OFT
Jet2 LTD
Kelkoo.com (UK) LTD
Lastminute.com LTD
Law Commission
Lexington Communications
LD Lines
Lloyds Banking Group
Megatrain (part of Stagecoach)
Mastercard
Monarch Airlines
Office of Rail Regulator
Ofgem
Opodo LTD
P&O Ferries LTD
Passenger Shipping Association
PSA Communications
Quno/Silverrail Technologies
Radio Taxis Group LTD
Rail Easy
Rail Europe LTD
Royal Bank of Scotland PLC
Ryanair Holdings PLC
SAS Scandinavian Airlines
SeaFrance LTD
Silverrail Technologies
Stagecoach Group PLC
Stena Line LTD
The Society of London Theatre
The Trainline LTD
Thomas Cook
Thomson (part of TUI group GmbH)
Trailfinders LTD
Tsol
TUI
Turkish Airlines Plc
UK Cards Association
UK European Consumer Centre
Virgin Atlantic Airways LTD
Which?
Whizz Air

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