



# EU Burden Tracker 2016

## The Consumer Rights Directive



EUROCHAMBRES

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## Executive Summary

### Main findings:

- Under the Consumer Rights Directive (CRD), the most burdensome provisions for businesses, especially SMEs, are those regulating pre-contractual information requirements and formal requirements for off-premises and distance contracts.
- The scope of the definition of “off-premises contract” is excessively broad, as it covers not only unsolicited orders but also cases where, at the consumer’s initiative, a trader is called into the consumer’s home and the contract is concluded there.
- Legal uncertainty caused by the Directive is a major problem as it hampers the affected companies’ capacity to correctly fulfill the relevant requirements, thereby triggering additional issues.
- Difficulties in distinguishing between sales and service contracts in the case of mixed purpose contracts are particularly problematic for traders, who risk to provide wrong information and to consequently suffer economic losses.

### Main recommendations:

- Contracts negotiated away from business premises, when the consumer establishes contact with the trader for the purpose of concluding a contract, should be exempted from the scope of the provisions on off-premises contracts and be subject to the requirements set for on-premises contracts.
- Amendments to the CRD to increase legal certainty, with more precision in the wording and content of the relevant provisions.
- Amendments to the CRD to eliminate any room for misuse from the consumer’s side to the detriment of businesses (e.g. in relation to the right of withdrawal).
- A better balance between the need to protect consumers and the need to avoid that businesses, particularly SMEs, are subject to excessive and unnecessary burdens.

EUROCHAMBRES invites the Commission to take on board the recommendations made in this paper when evaluating the Consumer Rights Directive.

# Introduction

In the framework of its commitment to better law-making, the improvement of EU legislation and the reduction of unnecessary administrative and regulatory burdens, EUROCHAMBRES launched the EU Burden Tracker.

In line with the Juncker Commission's efforts to make EU law lighter, simpler and less costly, the main objective of this initiative is to cut red tape and to reduce excessive regulatory burdens stemming from existing EU legislation.

This exercise is articulated in the following phases:

## 1. Pre-identification and selection of problematic EU legislation

The first step consisted in identifying specific pieces of EU legislation that create significant burdens for businesses, with a particular focus on SMEs. This was done using existing information collected by Chambers of Commerce and Industry in the framework of their own activities (e.g. previous surveys, Enterprise Europe Network feedback mechanism, regular dialogue with entrepreneurs, Chambers' experts from various fields, etc.). Other European sources were also screened (e.g. REFIT actions in the Commission Work Programme, results of the public consultation on the top 10 most burdensome pieces of legislation for SMEs, etc.). On top of that, a call for input was sent to the members of the Better Regulation committee, currently composed of 21 experts and 19 observers from national chambers, as well as to the Secretary Generals of Chambers of Commerce and Industry outside the committee.

According to the input received from Chambers, one of the most problematic pieces of EU legislation for businesses, and especially SMEs, is the **Directive on Consumer Rights (2011/83/EU)**. This was selected as the subject of the first round of the EU Burden Tracker.

## 2. Gathering of data and anecdotal evidence

Chambers of Commerce and Industries were invited to gather evidence and data on the impact that the Consumer Rights Directive has on businesses, and particularly SMEs, by consulting them.

## 3. Analysis of the material collected

The material gathered was analysed by EUROCHAMBRES.

#### **4. Presentation of the results**

This paper presents the results of the first round of the EU Burden Tracker on the Consumer Rights Directive. It illustrates which elements of the CRD are particularly problematic to (small) businesses on the basis of the evidence collected and why.

With this, EUROCHAMBRES aims to contribute to the evaluation of the Consumer Rights Directive and to draw attention to the provisions which should be amended in order to address legal uncertainty and excessive and unnecessary burdens on SMEs.

# Results and recommendations

## 1. Why the Consumer Rights Directive is problematic

The Consumer Rights Directive (CRD) was identified by EUROCHAMBRES' members as particularly problematic as it has created massive legal uncertainty, enormous bureaucracy as well as excessive and unnecessary regulatory burdens for the affected businesses, leading to the need to amend it.

The Directive applies to business-to-consumer (B2C) transactions and regulates some aspects of:

**Distance contracts:** defined in Art. 2(7) as contracts concluded using distance communication (internet, telephone, etc.) without the simultaneous physical presence of the trader and the consumer.

**Off-premises contracts:** defined in Art. 2(8) as contracts concluded in the simultaneous physical presence of the trader and the consumer outside the business premises of the trader (including cases when an offer was made by the consumer) as well as contracts concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer. Also contracts concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer fall under this category.

**On premises contracts** are contracts other than distance and off-premises contracts.

The most problematic aspects for businesses were found to be in relation to **off-premises** and **distance contracts**.

The following sections analyse the main issues related to these two types of contracts: information and formal requirements<sup>1</sup>, the complexity surrounding the so called "mixed purpose contracts" and specific aspects of the right of withdrawal. The evidence provided shows the extent to which the provisions in question are problematic for businesses and highlights the need to increase legal certainty, reduce the burdens on the affected companies and pursue the objective of a high level of consumer protection in a more efficient way. All of this is necessary in order to achieve the Directive's goals to contribute to the proper functioning of the internal market, stimulate cross border competition and reduce business reluctance to trade cross-border.

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<sup>1</sup> In the evaluation of the Consumer Rights Directive roadmap, pre-contractual information requirements and formal requirements for distance and off-premises contracts are listed among the issues to be examined (section C.2) at the points b. and d. respectively.

## 1.1. Information and formal requirements for off-premises and distance contracts

According to Art. 6(1), before the consumer is bound by an off-premises or distance contract, the trader – often a micro or small company – has to provide the consumer with a substantial amount of detailed information, including:

- the main characteristics of the goods or services (Art. 6(1)(a));
- the identity of the trader (Art. 6(1)(b));
- the address at which the trader is established and, if different, that of the place of business of the trader, as well as his e-mail, fax and telephone number (Art. 6(1)(c) and (d));
- the total price of the goods or services inclusive of taxes, or when the nature of the goods or services cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or the fact that such additional charges may be payable in case they cannot be calculated in advance (Art. 6(1)(e));
- the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate (Art. 6(1)(f));
- the arrangements for payment, delivery and performance, the time by which the trader undertakes to deliver the goods or perform the services and, where applicable, the trader's compliant handling policy (Art. 6(1)(g));
- a reminder of the existence of a legal guarantee of conformity of goods (Art. 6(1)(l));
- where applicable, the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees (Art. 6(1)(m));
- the existence of relevant codes of conduct (Art. 6(1)(n));
- the duration of the contract or, if the contract is of indeterminate duration or to be extended automatically, the conditions for terminating it (Art. 6(1)(o));
- the minimum duration of the consumer's obligation under the contract, where applicable (Art. 6(1)(p));
- the existence and conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader, where applicable (Art. 6(1)(q));
- the functionality of digital content, where applicable (Art. 6(1)(r));
- any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to be aware of, where applicable (Art. 6(1)(s));
- the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it, where applicable (Art. 6(1)(t)).

Art. 6(1) also lays down the **pre-contractual information requirements regarding the right of withdrawal for off-premises and distance contracts**, which is one of the most problematic aspects for traders. To this regards, the trader has to provide the consumer with the following information before a contract is signed:

- where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Art. 11(1)<sup>2</sup>, as well as the model withdrawal form set out in Annex I (B) (Art. 6(1)(h));
- where applicable, that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods (Art. 6(1)(i));
- that, if the consumer exercises the right of withdrawal after having made a request, the consumer shall be liable to pay the trader reasonable costs (Art. 6(1)(j));
- where a right of withdrawal is not provided for, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal (Art. 6(1)(k)).

It should be considered that every new information requirement involves additional efforts on the side of the affected companies. The information requirement relating to the conditions of the commercial guarantees (Art. 6(1)(m)), in particular, entails an enormous strain for traders offering a wide range of products, without necessarily resulting in the consumer being provided with appropriate information.

With regards to Art. 6(1)(a), it has been reported that it is often very difficult for a trader to assess what the “main characteristics” of each good are. For example, what are the main characteristics of a sun umbrella? Size, shape, weight, colour, material of the frame, material of the cover<sup>3</sup>? Every trader has a strong interest in describing the products offered in a way that allows the consumer to get a good idea of it, not least with a view to avoiding high return rates. Uncertainty related to this provision is a serious problem, especially for small online traders.

Moreover, uncertainty about the pre-information requirement concerning the legal guarantee (Art. 6(1)(l)) was reported: whereas Art. 6(1)(l) requires “a reminder of the existence of a legal guarantee of conformity of goods”, according to DG Justice’s guidance document “the seller should specify that, under EU law, he

<sup>2</sup> Art. 11(1) regulates the exercise of the right of withdrawal. According to it, before the expiry of the withdrawal period, the consumer shall inform the trader of his decision to withdraw from the contract by either using the withdrawal form as set out in Annex I(B) or making any other unequivocal statement setting out his decision to withdraw from the contract.

<sup>3</sup> This was the subject of a sentence ruled by the OLG Hamburg (Urteil vom 13.08.2014, Az. 5 W14/14).

is liable for any lack of conformity that becomes apparent within a minimum of two years from delivery of the goods and that national laws may give the consumer additional rights”<sup>4</sup>.

As can also be seen in the section on “off-premises contacts” below, a sense of proportion is highly needed when it comes to information requirements.

## Off-premises contracts

The information requirements for off-premises and distance contracts laid down in the Consumer Rights Directive were reported to create significant burdens on the trader not only because of their substantial increase and high level of detail, but also because of the way in which they must be fulfilled. This is particularly the case for off-premises contracts, where information must be provided on paper or, if the consumer agrees, on another durable medium (Art. 7(1)). “Durable medium” is defined in Art. 2(10) as “any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored”. It is thus safe to say that information will be provided principally on paper.

In addition, the trader has to provide the consumer with a copy of the signed contract or the confirmation of the contract on paper or on another durable medium if the consumer agrees (Art. 7(2)).

If there are no exceptions to the right of withdrawal, the consumer has a period of 14 calendar days to withdraw from an off-premise or distance contract (Art. 9). According to Art. 7(3), if a consumer wants the performance of services to begin during the withdrawal period, the trader shall require that the consumer makes such an express request on a durable medium<sup>5</sup>.

Where applicable, the consumer’s express consent and acknowledgement that he will lose his right of withdrawal once the contract has been fully performed is also required (Art. 7(2)).

All of this, along with the fact that the burden of proof that information has been provided falls on the trader (Art. 6(9)), leaves the latter no option but to make the consumer sign enormous contract forms (including every information declaration, confirmation, request and consent form) in duplicate<sup>6</sup>. It thus appears that

<sup>4</sup> pp. 27-28.

<sup>5</sup> For distance contract it is not specified that the consumer’s request is to be made on a durable medium (Art. 8(8)).

<sup>6</sup> Although there is no specific provision requesting to provide the forms above in a specific order, this appears to be necessary from the interplay of the relevant provisions coupled with the burden of proof borne by the trader. For example, Art. 16(a) stipulates that the right of withdrawal cannot be exercised on service contracts after the service has been fully performed only if the performance has begun with the consumer’s prior express consent and with the

the Consumer Rights Directive generates burdens not only for the trader but also for the consumer, who finds himself overwhelmed by forms to fill and papers to sign (e.g. before the work begins during the withdrawal period) and – it has been reported – often becomes wary, if not angry.

The issues relating to the burdensome pre-contractual information requirements are exacerbated by the **excessively broad scope of the definition of “off-premises contract”**. Indeed, the provisions regulating such contracts do not only apply if a business is collecting unsolicited orders, e.g. by doorstep selling, where a consumer might be taken by surprise. They also apply if, at the consumer’s initiative, a trader is called into a customer’s home (for example for paintwork, electrical installations, manufacturing of a cupboard, etc.) and the contract is concluded there. In the latter case, which does not represent a threat to the consumer, the pre-contractual information requirements represent a significant burden for the affected businesses and entail a considerable bureaucratic effort from their side. It thus appears that the competitiveness of businesses, which is an element the Directive should pay more attention to if it is to stimulate sales and the provision of services B2C within the Internal Market, is overlooked in the pursuit of consumer protection. This goal, however, does not seem to be pursued in the most effective way, as consumers are often confronted with the problem of “information overload”, which does not mean additional protection.

In light of this, contracts negotiated away from business premises, in the cases where the consumer establishes contact with the trader (e.g. when he requests his visit) for the purpose of concluding a contract, should be exempted from the scope of the provisions on off-premises contracts and be subject to the requirements set for on-premises contracts.

## Distance contracts

Pre-contractual information requirements represent an issue also in relation to distance contracts.

Furthermore, in relation to this category of contracts there are several burdensome formal requirements for businesses, and especially SMEs. For example, Art. 8(2) stipulates that the **buttons to be used for placing orders** “shall be labelled in an easily legible manner only with the words ‘order with obligation to pay’ or a corresponding unambiguous formulation indicating that placing the order entails an obligation to

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acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader. The consumer’s acknowledgement that he will lose his right of withdrawal is only possible if the consumer is prior informed of his right of withdrawal. On the contrary, asking the consumer to sign e.g. the prior consent before providing him the information on the right of withdrawal would not fulfil the conditions to constitute an exception to the right of withdrawal. In case of dispute, in order to prove that the information on the right of withdrawal was provided before the consumer’s consent, it is necessary to use a contract document where the information on the right of withdrawal is provided before the section on the consent to be signed by the consumer. Hence, the provision of every information declaration, confirmation, request and consent form in the right order is crucial.

pay the trader". The same applies if instead of a button a similar function is to be activated. It is also stipulated that in case the trader has not complied with this provision, the consumer shall not be bound by the contract or order.

Besides the necessary changes in terms of website's layout, the introduction of a button (or similar function) that includes the acceptance of one or more conditions, such as the obligation to pay, requires to add a new code and therefore to introduce a change in the programming. This results in an additional cost for the trader. Moreover, when the button entails one or more conditions, the consumer's reply (e.g. the acceptance of the conditions) has to be saved in a database both for logistics purposes and as evidence in the event of a dispute (it should not be forgotten that the burden of proof falls on the trader). Overall, the provisions laid down in Art. 8(2) imply a significant intervention in the database and in the management of the purchasing process and therefore **additional burdens on the trader**.

In addition, severe **legal uncertainty** was reported in the framework of distance contracts with regards to the extent to which the main characteristics of a good or a service shall be outlined before placing an order in accordance to Art. 8(2). If according to this provision, the information on the main characteristics of a good or service must be repeated to the same extent and in the same way as according to Art. 6(1)(a), to which Art. 8(2) refers, the "order overview" that should make the consumer aware in a clear and prominent manner and directly before the consumer places his order (i.e. activates the order button) becomes extremely confusing, especially when the consumer orders several products. Instead of merely referring to Art. 6(1)(a), Art 8(2) should state that the trader should make the consumer aware of the clearly identifiable product chosen by the consumer.

With regards to **contracts concluded by telephone**, which fall into distance contracts, it has been highlighted that fulfilling the pre-contractual information requirements by illustrating the relevant elements, such as the information on the right of withdrawal and the content of the withdrawal form, over the phone is extremely complex. Connected to this, the difficulty in providing evidence that the information requirements have been correctly fulfilled has been reported. This is crucial in case of a complaint from a consumer, as the burden of proof falls on the trader and his failure to prove the above leads to severe sanctions.

Furthermore, the **model instructions** are found to be unsuitable in many cases. For example, when multiple goods are ordered by the consumer in a single order but are delivered separately, Art. 9(2)(b) stipulates that the withdrawal period for all goods starts the day on which the consumer acquires physical possession of the last good. However, the trader cannot know in advance which and how many products will be ordered and whether a single or a separate delivery will be made. For this reason, the model

instructions on withdrawal cannot be used. To cover all the arising possibilities, different model instructions on withdrawal should be provided on the website and this would represent a bureaucratic burden for businesses. In the attempt to overcome this problem, with a view to cover all possible cases, the Commission's document recommends to the trader to inform the consumer that the withdrawal period would expire after 14 days from the day after<sup>7</sup> the consumer acquires physical possession of the last good or lot of the order. Nevertheless, doubts remain as to whether this solution is compatible with the wording of the Directive. Given the dramatic consequences for traders in case of incorrect information on the right of withdrawal (e.g. 12-month extension of the withdrawal period and no liability of the consumer for diminished value at all), a recommendation in the guidance document does not provide the legal certainty that traders need.

In light of this, EUROCHAMBRES recommends the revision of the model instructions with a view to enabling the trader to use the model instruction as such, without being burdened with the difficult task to select the correct ones out of many different options. An all-encompassing model instruction covering all of the possible aspects could be designed for example with the support of the European Law Institute.

## **1.2. *Mixed purpose contracts***

Evidence gathered from Chambers shows how difficult it can be for a trader to distinguish between service and sales contracts in case of the so called "mixed purpose contracts", which contain both goods and services. Operating such a distinction is found to be particularly tricky when the main purpose of the contract cannot easily be identified. An example is the construction of a partition to divide a room where a door is also installed. Or, in the funeral industry, a contract including the sale of a coffin and the transfer of the deceased<sup>8</sup>. In these and similar cases, the trader, who usually does not have a legal background, has to assess the main purpose of the contract in order to determine whether it is a sales or service contract.

Along with the difficulties strictly related to the distinction between sales and service contracts, further questions arise in relation to mixed purpose contracts. For instance, in the case of a contract including the sale of windows and their installation in the consumer's house, provided in DG Justice's guidance document as an example of mixed purpose contract qualifying as a sales contract, it remains unclear

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<sup>7</sup> The wording of the guidance shows another shortcoming of the model instructions and of Art. 9 itself: according to Art 9(2), the withdrawal period expires after 14 days from the day of the conclusion of the service contract or from the day on which the consumer acquires physical possession of the goods in the case of a sales contract. In fact – as worded by DJ Justice in the guidance - the period expires after 14 days after the day of the relevant event. This aspect is only recognizable when consulting recital 41.

<sup>8</sup> It should be noted that it is a common practice for undertakers to conclude contracts outside their business premises, e.g. in a hospital or in the deceased's apartment. It is also not uncommon for them to be contacted by telephone and asked to pick up and transfer the deceased or to receive orders per email. In these cases, the provisions relative to, respectively, off-premises or distance contracts apply.

whether there should be an explicit request from the consumer before the installation of the windows. Similarly, if an undertaker assesses a contract including the sale of a coffin and the transfer of the deceased as a sales contract, he will still find tricky to determine whether an express request on paper for the performance of the transfer within the withdrawal period is necessary<sup>9</sup>.

Such issues are particularly problematic as service and sales contracts have different provisions regulating the withdrawal period and most importantly because **any mistake**, no matter how small, **in the provision of information about the right of withdrawal are sanctioned with the liberation of the consumer from the duty of payment and the liability to pay for the diminished value if he withdraws from the contract.** The right of withdrawal expires after 14 days from the day of the conclusion of the contract in case of service contracts<sup>10</sup> or from the day on which the consumer acquires physical possession of the good (or of the last good in case of multiple goods) for sales contracts<sup>11</sup>. If a trader mistakes a sales contract for a service contract or vice versa he will provide wrong information on the right of withdrawal. In this case, the withdrawal period will be extended by 12 months<sup>12</sup>. Should the consumer withdraw from the contract, he can either claim his money back or he does not have to pay.

Another problematic aspect in relation to mixed purpose contracts has been found in relation to recital 50. According to this recital, for contracts having as their object both goods and services, the rules on the return of goods provided for in the CRD should apply to the goods aspects and the compensation regime for services should apply to the services aspects. It is however unclear whether this implies that the consumer has to be informed on both regimes.

### 1.3. *Right of withdrawal*

As illustrated in the previous section, mistakes from the trader's side in the provision of information about the right of withdrawal are sanctioned with a 12-month extension of the withdrawal period and with the liberation of the consumer's duty of payment in case he decides to withdraw from the contract. This applies not only in case of a wrong assessment of the nature of mixed purpose contracts, but to any mistake made by the trader in providing information concerning the conditions, time limit and procedures for exercising the right of withdrawal; the circumstances under which the consumer exercising the right of withdrawal is liable to pay the trader reasonable costs and the provision of the model withdrawal form. This also applies if the trader does not ask for an "express request" from the consumer to begin the service within the withdrawal period.

<sup>9</sup> The particular activity and exceptional circumstances under which undertakers operate suggests to consider whether the requirements laid down in the Directive are appropriate for the funeral industry.

<sup>10</sup> Art. 9(2)(a).

<sup>11</sup> Art. 9(2)(b).

<sup>12</sup> Art. 10/1.

Given that in many cases mistakes made on the trader's side are attributable to the tremendous complexity of the relevant provisions and the legal uncertainty surrounding them, untangling these knots is crucial to enable the affected businesses to fully comply with the requirements at issue and avoid that they incur economic losses.

With regards to the economic losses a trader may face, the Austrian Federal Economic Chamber provided EUROCHAMBRES with the example below.

A house-painter was called by a consumer who wanted to have his apartment painted. He negotiated the details of the service in situ because he needed to take some measurements at the consumer's house and the contract was concluded there. In light of the above, off-premises contract provisions apply.

The house-painter thought that the painting was an inseparable mixture with other items and informed the consumer that he had no right of withdrawal.

Since the customer wanted the work to be completed before his holidays, the house-painter started to paint during the withdrawal period. However, he did not require an express request on a durable medium from the consumer.

The house-painter completed the work within 14 days from the day of the conclusion of the contract, that is before the expiry of the right of withdrawal. At this point, the consumer, instead of paying the invoice, withdrew from the contract.

It is his right as a consumer not to bear any cost under these circumstances. However, this resulted in the trader losing the money for the service provided.

This example shows in a striking way that a good balance between the aim of protecting consumers and the interests of businesses is missing.

This is of course not the only problematic situation caused by the Consumer Rights Directive in relation to the right of withdrawal. On the contrary, also in the framework of distance contracts, several cases where the trader suffered economic losses were reported, especially in relation to Art. 14(2), according to which "[t]he consumer shall only be liable for any diminished value of the goods other than **what is necessary** to establish the nature, characteristics and functioning of the goods". One of the problematic aspects of this provision is that due to such handlings the value of many goods drastically diminish, resulting in additional burdens for the trader. An example reported to this regard concerns the filling of a waterbed, which was

considered as a necessary handling for the purpose outlined above. Following the return of the good, the trader could only send it for disposal but had to pay back the whole price to the consumer<sup>13</sup>. This highlights that more balanced solutions are needed in order to minimise the negative impact of the CRD on distance selling.

Even more serious is the fact that Art. 14(2) allows room for misuse from the consumer's side at the detriment of businesses, as observed in the tech and fashion retail sector, where consumers order tech or clothing items and, after using or wearing them for a specific event, exercise the right of withdrawal. Using a camera or wearing a suit, differently from simply testing it or trying it on, is not a necessary handling to establish the nature, characteristics and functioning of the good. In this case, according to Art. 14 (2), the consumer is liable for any diminished value of the good. The trader could therefore demand compensation for it. However, proving, determining and enforcing the diminished value of a good is always a difficult, burdensome, costly and time-consuming task, especially for SMEs. Oftentimes, the value of the returned goods drops to zero, which means that the consumer would not be entitled to get the paid price back. As he states his decision to withdraw from the contract, the consumer is obliged to return the good and has to pay for the costs of its returning. On the other hand, the trader is obliged, even in such cases, to reimburse the costs of delivery.

If larger companies might suffer less severely the consequences of the cases mentioned above, as the costs they incur can be neutralised by the "law of large numbers", the impact on SMEs is likely to be much more serious. To this regard, data from the Flash Eurobarometer 413 "Companies engaged in online activities" show that the smaller the company the more likely it is that the costs related to guarantees and returns would be considered a problem. Indeed, whereas "only" 35% of companies with more than 500 employees consider the fact that guarantees and returns are too expensive as a problem, this percentage jumps to 55% and 54% for micro and small business, respectively<sup>14</sup>. Such data, combined with the fact that the option "guarantees and returns are too expensive" has been identified as one of the top three obstacles for companies selling or trying to sell online to other EU countries<sup>15</sup>, highlight the urgent need to amend of the Consumer Rights Directive with a view to eliminating any possibility for the consumer to misuse the relevant provisions to the detriment of businesses, especially the smaller ones. A suggestion to this regards is to exempt from the right of withdrawal the goods that are handled in a way other than what it is necessary to establish their nature, characteristics and functioning.

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<sup>13</sup> See decision of the German High Court, BGH VIII ZR 337/09.

<sup>14</sup> Similar results are shown with regards to the company type: 34% of companies that are part of an international group consider the fact that guarantees and returns are too expensive as a problem whereas 43% of independent businesses do so. Flash Eurobarometer 413, "Companies engaged in online activities", 2015, p. 34; 48.

<sup>15</sup> Flash Eurobarometer 413, "Companies engaged in online activities", 2015, p. 22.

Preventing potential abuse from the consumer's side is of paramount importance not only to reduce the burdens on SMEs but also to encourage cross-border distance selling, which is key to achieve a complete business to consumer internal market. In the context of **exemptions from the right of withdrawal**, issues relating to **legal uncertainty** have been identified. Art. 16(e), referring to "the supply of goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery" does not seem to include certain goods, such as for example nail polish. It is reported that opened nail polish is often returned. In such cases, the trader has to refund the price of the product and its delivery costs. Potentially, he "could" demand compensation for the diminished value of the good, which would entail additional problems and efforts from the trader's side, also in consideration of the low price of the product. In the end an opened nail polish must be disposed of, which is not sustainable. In consideration of the significant effort that the return of this and similar goods falling in the same price range entails, it is suggested to assess the possibility to exempt products below a certain price threshold (e.g. 25 Euros) from the right of withdrawal.

Another example of legal uncertainty regards the provision of drinking water pipes that are unsealed by the plumber himself before laying them. Is this case covered by the exemptions laid down in Art 16(e) or (f) or neither of them? Is the deliverance and laying of tiles an inseparable mixture with other items and therefore covered by the exemption of Art 16 (f) or not?

It is necessary that issues related to legal uncertainty are properly addressed in the framework of the evaluation of the Directive.

#### **1.4. Real estate: brokerage contracts**

Particular mention should be made of service contracts with real estate agents (brokerage contracts), which can fall both under off-premises and distance contracts. With this regards, the Consumer Rights Directive's provisions are found to be particularly problematic and unsuitable.

If a real estate agent wants to protect his brokerage, he has no other choice but to overwhelm the consumer with enormous amounts of information material before starting to perform his service. The consumer is thus faced with a raft of papers, whose receipt he must confirm before receiving information on the realty he is interested in.

It should be noted that real estate agents are only rewarded by consumers in case of successful placement of property. Even if a real estate agent fully complies with the obligations foreseen and

successfully intermediates the consumer a property or a rental contract, the latter may exercise the right of withdrawal and will not have to pay for the service provided by the real estate agent.

If the agent wants to fulfill the customer's wishes rapidly and comprehensively, he has to fully inform the customer about his right of withdrawal in advance and to demand an "express request" from the customer. This can lead the customer to think that he is ordering a "full of charge" service, although the service is free until the brokerage is successful.

As a result, it has been reported that consumers often react angrily and refuse to have any further contact with the real estate agent. To this regards, the email below, written by a consumer and addressed to a company, which forwarded it to the Austrian Federal Economic Chamber,<sup>16</sup> is emblematic.

*Hello,*

*... nice of you to send me an e-mail containing contracts, agreements, paragraphs etc. which only waste my time. Nice of you to send me links to more agreements, text and paragraphs. But what you did not send me and I do not even want to know about it anymore... as it is too complicated for me ... are simply some photos and some data regarding an apartment. Doesn't matter, I have to keep this in mind as something like that never happened to me before.*

*I wish you a nice day sending further contracts, paragraphs, links to more agreements and contracts, text on what the law obliges us to do ...*

*Puh ... burdensome ...*

*I quit this little game as I still have some work to do today ...*

*Regards*

The annoyed reaction of the consumer who wrote this email shows that the provisions of the Consumer Rights Directive can harm both the consumer, who ultimately renounces a service or good, and the trader, who loses a business opportunity.

According to data gathered by the Austrian Federal Economic Chamber, companies reported up to 50% less requests from prospects and many severances after the initial contact.

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<sup>16</sup> The email was translated into English by the Austrian Federal Economic Chamber.

## Conclusions

Input and evidence gathered from Chambers of Commerce and Industry in the framework of the EU Burden Tracker show that it is necessary to strike a **better balance between the need to protect consumers and the need to avoid excessive burdens on businesses, especially SMEs.**

**Pre-contractual information requirements for off-premises and distance contracts** are found to be particularly burdensome, especially for SMEs. In this area, the objective of consumer protection must be pursued in a more proportionate way.

In order to alleviate the burden on businesses without compromising the objective of consumer protection, contracts negotiated away from business premises, when the consumer establishes contact with the trader for the purpose of concluding a contract, should be exempted from the provisions on off-premises contracts and only be subject to the requirements set for on-premises contracts.

Traders' difficulties in assessing whether a **mixed purpose contract** is a sales or service contract should be addressed. This is crucial, as mistakes to this regard lead the trader to provide wrong information concerning the right of withdrawal, which in turn can result in the waiving of the consumer's duty of payment and in financial losses for the trader.

Amendments to the Consumer Rights Directive are needed to eliminate any possibility for the consumer to misuse the relevant provisions to the detriment of businesses. This is of paramount importance, not only to reduce the burdens on SMEs, but also to encourage cross-border distance selling, which is key to achieving a complete business-to-consumer internal market.

It is also crucial to address issues of **legal uncertainty** throughout the Consumer Rights Directive. Increasing legal certainty is a pre-condition to enabling businesses and consumers to exploit the potential and reap the benefits of B2C trade within the EU.

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