EUROCHAMBRES

Connecting business to Europe

Position Paper

September 2009

CONSUMER RIGHTS

PROPOSAL OF DIRECTIVE COM(2008), 614 FINAL

SUMMARY OF EUROCHAMBRES' POSITION

EUROCHAMBRES support the full harmonisation approach proposed by the European Commission.

Consumers' as well as traders' interests must be equally considered and protected with the objective to continuously improve the functioning of the retail internal market. Through all the articles of the directive, this balance must be achieved. This would particularly be unfair:

- To impose withdrawal rights to a number of proximity service providers.
- To extend the defects liability periods over 2 years.
- To impose unnecessary information requirements.

The definition for "off-premises contract" and for "distance contracts" as proposed is much too wide at the detriment of a number of professions that enjoy good reputation and should not be considered as potentially abusive. This must be absolutely amended.

EUROCHAMBRES, the Association of European Chambers of Commerce, is the legal European representative of the 2000 Chambers of Commerce and represents some 20 million member companies drawn from all sectors of the economy. Over 90% of our members are SMEs.

EUROCHAMBRES has analysed the proposal for a Directive on Consumer Rights presented by the European Commission in October 2008 and addresses the following recommendations with the objective to support the adoption of a Directive based on the following two main principles:

- Full harmonisation is required.
- Consumers' as well as traders' interests must be equally considered and protected with the objective to continuously improve the functioning of the retail internal market.

1. DEFINITIONS AND SCOPE

The proposed **definition for 'off-premises contract'** is much too wide. The proposed definition of these contracts will extend the scope of application to SMEs from the crafts sector such as plumbers but also companies that usually act off-premises such as nursing home barbers, foot care specialists or coiffeurs providing services at home or at hospitals, taxi companies, carnies…

Consequences of such extension for these companies are highly damaging their business, among others:

- Craftsmen usually negotiate in situ because of the need to take measurements at the consumer's home (on the consumer's initiative). In this case, the right of withdrawal within 14 days is not justified and would cause huge difficulties. The craftsmen starting work within the withdrawal period would not even be allowed to claim for remuneration (as proposed by Art 17 par 2). This would lead to a situation in the crafts sector where no craftsman would start to work within the withdrawal period which is in the interest of no one.
- The use of an order form is not appropriate. The sanction is also inappropriate (invalidity of the contract). This would be the end of verbal contract agreements which is widely used for example when a consumer orders a taxi.
- The companies that usually act off-premises (taxi, carnies…) do often not have the chance to postpone the provision of their services until the end of the withdrawal period, as their services

have to be performed immediately. This is also valid for buying tickets on trains or busses (considered as off-premises contracts as proposed by recital 15).

Recommendations:
- **Article 2 par 8** must exclude from the definition contracts concluded at the consumer's initiative. This means when the consumer requests a visit of the entrepreneurs, the specifics provision on off-premises contracts must not be applied.
- **Article 2 par 8** must exclude businesses that usually provide products or services off-premises.
- **Article 2 par 8** lit b must be dropped.
- We agree on the provision **art 2 par 9 lit b** clarifying that business on fairs and markets is not subject to the rules on off-premises contracts.

The proposed **definition for 'distance contract'** is inappropriate as it deletes the current criteria of "an organized distance sales or service-provision scheme run by the supplier". The EC proposal extends the scope of application of distance selling provisions to inter alia every single order by telephone to companies that are usually not active in distance selling.

Furthermore, a huge number of contracts with craftsmen would become distance contracts in the future, if the criteria of "an existing distribution and service system" is dropped. This would be the case for craftsmen that are taking measurements at the consumer's home, send an offer or an estimate of costs per e-mail or post to customers, who again confirm the order by e-mail, post or phone. Indeed the exclusive use of one or more means of distance communication is made.

Consequences of such extension for these companies are seriously complicating traditional business practices:
- The information requirements and right of withdrawal would be applicable to costumers that regularly repeat orders by phone in the framework of permanent contractual relationships. This is neither appropriate nor customer friendly.
- The majority of contracts concluded by craftsmen would be subject to the distance contract regime with a right of withdrawal during 14 days which would be totally inappropriate.

Recommendations:
Article 2 par 6 must include the criteria of an organized distance sales or service-provision scheme run by the supplier.

2. FULL HARMONISATION

EUROCHAMBRES fully supports the full harmonization of consumer rights called for in Article 4 of the proposed Directive. The current system, which involves minimal harmonization, has resulted in a fragmented legal situation and tangible competitive distortions as businesses marketing to consumers Europe-wide repeatedly encounter surprising laws and regulations in other EU member states.

Developing and maintaining general terms and conditions, disclosures and withdrawal instructions which would be valid in all 27 EU member states requires an enormous amount of consulting and controlling work and small and medium-sized enterprises, at least, cannot afford the expense.

We therefore believe that the harmonization of consumer rights as they relate to cross-border trade is long overdue, as this would make it much easier for businesses to market their products Europe-wide.

This would ultimately benefit consumers by allowing them to fully exploit the advantages of the internal market: larger selection and lower prices. The EU has released impressive data showing that foreign online sales volume has reached EUR 24 billion, even though only one in five online buyers does his shopping in Europe, demonstrating the potential in this distribution channel. This potential cannot be fully exploited without thorough harmonization.

Recommendations:
Article 4 is fully supported by the European Chambers of Commerce and Industry.

3. INFORMATION REQUIREMENTS

The information requirements called for in Article 5 et al of the Directive Proposal is excessive. The disclosure of a small quantity of clear and vital information is more consistent with the ideal of the well-informed consumer than a flood of information which is beyond the capacity of the individual consumer to process.

In addition we observe that there is already an almost unmanageable number of directives containing information requirements (e.g. e-commerce-directive, unfair commercial practices directive, services-directive). Regulating general pre-contractual information requirements globally for all sales and services contracts is a too ambitious undertaking though. There is no evidence that such rules would contribute to a better functioning of the internal market. Moreover, it is not the role of SMEs to educate consumers on their rights. It is a public task. The obligation of informing the consumer is tricky, can be interpreted and any slight error has a sever impact on the trader (provided that omission or mistake is consider to be a misleading commercial practice, art 7 par 5).

In the interests of small and medium-sized enterprises and especially for distance and off-premises contracts, information requirements should concentrate on essential aspects following the model of the mature and responsible consumer (Art 9). For instance:

- It makes no sense to tell consumers about the existence of codes of conduct and how they can be obtained, especially since the meaning of such codes is unclear.
- It is inappropriate to require businesses, particularly small and medium-sized enterprises, to comply with general requirements regarding instructions on legal remedies, such as disclosing the fact that a contract was concluded with a trader and that the consumer therefore "will benefit from the protection afforded by" the Directive.
- Information requirement on the complaint handling policy is inappropriate. Particularly small and medium sized enterprises do not dispose of a special complaint management system and must not be obliged to create one either.
- The duty established in Annex I No. 3 for the trader to notify the consumer of time limits and modalities for returning the merchandise and the terms and conditions for obtaining a refund is also excessive.
- The obligation for entrepreneurs to provide consumers with a standard withdrawal form (Art 9 lit b, Art 10 par 1, annex I A par 5) is excessive. While the introduction of a standard withdrawal form may make it easier for consumers to exercise their rights of withdrawal, the provision of such a form must not be mandatory, as this would unnecessarily limit the flexibility of traders. Rather than a standard withdrawal form, we support the introduction of a single model for withdrawal instructions, or better yet, various models suitable for different situations, e.g. for online merchandise sales, services purchased through distance selling and associated transactions.

Recommendations:
- **Article 5** must simplify the obligation or must be deleted.
- **Article 9 lit d** must be deleted
- **Article 9 lit e** must be deleted
- **Article 9 lit f** must be deleted
- **Art 10 par 1**, the provision that "the order form shall include the standard withdrawal form set out in **Annex I B**" must be deleted.
- **Annex I A par 3** must be deleted.
- **Annex I A par 5** and **Annex I B** must be deleted.

We observe legal inconsistencies in article 7. The violation of the "Specific information requirements for intermediaries" (Art 7 par 1) sanctions the conclusion of the contract as being made in the own name of the intermediary. However, by nature an intermediary is not the owner of the good that is to be sold and can not be in the legal position of transferring the ownership to the buyer.

Recommendations:
Art 7 par 2 must be deleted. The consequence of violating specific information requirements for intermediaries cannot be fulfilled as proposed.

The information about the existence of a right of withdrawal, the conditions and procedures for exercising that right leaves wide room for diversity in interpretation and can therefore be seen as a source of legal uncertainty (extension of time for the right of withdrawal; risk to be faced with an action to cease and desist). To make it easier for companies and more transparent for consumers, a Europe-wide standardised model for information on the right of withdrawal would be of great help.

Recommendations:
An **annex** should be add to the Directive providing such standardised model for information on the right of withdrawal taking into account the various scenarios.

4. RIGHT OF WITHDRAWWAL

We welcome full harmonization of the **length of the withdrawal period**. As granting a right of withdrawal represents a serious interference into one of the most important principles of civil law (pacta sunt servanda), in any case a sense of proportion regarding the length of the withdrawal period is necessary. It is not appropriate to give consumers an additional 14 days to return the merchandise on top of the 14-day withdrawal period (Articles 12 and 17), so that the consumer would be able to hold onto the merchandise for a total of 28 days. We do not see why the consumer should not have to return the merchandise immediately if the right of withdrawal is exercised. The longer the good is in the consumer's possession, the greater the risk of this good being damaged. The trader is also unable to use/sell the good in this time period, which generate costs.

The provision that for service contracts subject to a right of withdrawal consumers should bear no costs for services performed, in full or in part, during the withdrawal period is absolutely inadequate (Art 17 par 2). As mentioned above when referring to the scope of application the consequence of this provision in the crafts and handicrafts sector would be dramatic. E.g. paintwork or joinery that would start work during the withdrawal period would face the risk of never being paid and consequently would probably not begin any work before the end of the withdrawal period. There is also a problem for contracts concluded for an

indefinite time (e.g. energy delivery contracts, contracts on banking accounts) because withdrawal periods would become unlimited during the whole term of contract.

In case of failure to inform about the right of withdrawal, the deadline would extend to three months after the trader has fully performed his other contractual obligations. Negligible defects for instance would cause an excessive and objectively not justified extension of the withdrawal period.

Some have expressed the view that, in doorstop selling, the withdrawal period should begin upon receipt of the merchandise. This would not be appropriate. In doorstop sales, like on-premises sales, consumers are given the opportunity to closely inspect a sample product. There is no reason why the withdrawal period should not begin on the closing date of the contract, as is now the case in the Directive Proposal.

Recommendations:
Article 17 must foresee that the consumer will exercise a duty of care and will send back the good within the withdrawal period.
Article 17 par 2 last sentence must be deleted and has to be replaced by a provision on the appropriate remuneration for traders if goods were used or services unsuitable for returning were consumed.

The **exceptions to the right of withdrawal** stated in Article 19 do not go far enough. The exception made in the current Distance Selling Directive for supplying goods "which by reason of their nature cannot be returned" must absolutely be maintained. The right of withdrawal must be excluded to products such as floral ornaments, used underwear or hygiene products, opened contact lenses, opened perfume bottles, medicinal products, food (regardless of the expiration date) and piercing jewellery. Exceptions must also be made for books, newspapers and scripts, given the repeated abuses in that regard.

Otherwise, the trader would have no alternative in the aforementioned cases but to demand compensation for use of the product, which the Directive expressly allows. In cases where the merchandise cannot be returned, this charge may be as high as the full sale price of the item in many cases, since e.g. hygiene products cannot be resold once they are used. The result would be a truly absurd situation: the seller would have to take back the merchandise and then charge a fee as compensation for the lost sale price. Meanwhile, the ultimate victim of this back and forth would be the consumer, who would have to pay the full price and would not even keep the merchandise in the end.

The proposal directive foresees that the right of withdrawal shall not apply in case of the consumer's prior "express" consent. This criteria is not contained in the current distance selling directive and would cause legal uncertainty.

Recommendations:
Article 19 par 1, a literal should be provided to except from the right of withdrawal the supplying of goods which by reason of their nature cannot be returned. It should include books, newspapers and scripts, given the repeated abuses in that regard.
Article 19 par 1 lit a, the criteria "express" consent should be deleted.

The **scope of the right of withdrawal** must not be extended to include consumer-ordered off-premises sales, since the sale was made at the consumer's initiative. In doorstop selling, a right of withdrawal is justified only in particularly surprising situations. Under the formulation of Article 2 par 8, businesses such as taxi companies, fairground entertainers with no offices of their own and hospital and nursing home barbers and foot care specialists would be subject to the 14-day right of withdrawal (rescission). As a

result, the trader would have no right to compensation. Under the Proposal (Article 17 Par.2), consumers cannot be charged for services which are provided during the withdrawal period whenever the contract is subject to a right of withdrawal. We strongly oppose this extension of the right of withdrawal.

The exception in Art 19 par 2 lit a, for contracts on the supply of food etc. is too narrow. It is neither clear nor comprehensible why this exception should only apply if products have been "selected in advance by the consumer by means of distance communication" and if the trader "usually sells such goods on his own business premises". These constraints should be deleted. The exception according to paragraph 2 lit b for a remedy to "immediate emergency" is also both too narrow and too casuistic. In addition the restriction according to paragraph 2 lit c concerning repair- and maintenance work upon the "property" of the consumer is arbitrary.

Again we cannot understand why this exception from the right of withdrawal should be linked to an order of the consumer to the trader "by means of distance communication". The casuistic exceptions in Art 19 par 2 lit b and c clearly show that already the underlying excessively broad approach of the scope of application for off-premises contracts is completely inadequate. Cases where entrepreneurs attend the consumer on his own initiative have to be excluded from the scope of application in general. In any case an exception is required for off-premises contracts in those cases where a consumer has given his consent to begin the performance of the service within the period of withdrawal, just as it is the case with distance contracts.

Recommendations:
Article 19 par 2 must exclude the right of withdrawal for off-premises contracts made at the consumer's initiative.
Article 19 par 2 lit a must be less restrictive and delete the words "selected in advance by the consumer by means of distance communication" and "usually sells such goods on his own business premises".
Article 19 par 2 lit b must be less restrictive and delete the words "immediate emergency".
Article 19 par 2 lit c must be improved.

The **definition of "excluded distance and off-premises contracts"** is lacking legal certainty. This is particularly the case for Art 20 par 1 lit d that foresees the criteria "in the neighbourhood of his business premises" and "frequency". EUROCHAMBRES consider that criteria uncertain and inappropriate. These criteria should be dropped in the interest of guaranteeing local supply by mobile grocers. Tenancy contracts and their associated intermediary services as well as intermediary services for insurance and financial services should be also excluded.

If the definition for off-premises contracts is not limited, the necessary exceptions for contracts initiated by consumers should be provided here. There is also the urgent need for an exception for entrepreneurial activities and contracts that are usually and by their nature performed off-premises and for contracts with immediate mutual performance. This is absolutely necessary as otherwise everyday business – like going by taxi, riding merry-go-rounds, buying tickets on trains or busses or buying newspapers on the street - would be subject to the provisions on off-premises contracts.

Recommendations:
Article 20 should be revised if the definition for off-premises contracts is not limited in **article 2**.
Article 20 par 1 lit d, criteria "in the neighbourhood of his business premises" and "frequency" must be deleted.

5. SALES CONTRACTS

It is not appropriate to regulate the passing of risk in general at the expense of entrepreneurs. When a commonly accepted mode of dispatch (e.g. post, railway) is used, the risk of the delivery should pass to the transporter.

Recommendations:
Article 23 par 2, must foresee that the risks related to delivery pass to the delivery service provider if a commonly accepted mode of dispatch is used
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We welcome the proposal that it is the trader's **right to choose between repair and replacement** according to Art 26 par 2. This principle is very important because businesses are far better equipped than consumers to decide how defects can best be remedied. Withdrawal should always be the last resort. If the consumer's claims can be satisfied through subsequent performance, the consumer is placed in the position he would have occupied if the contract had been duly performed from the start.

In contrast we do not understand why under paragraph 4, in certain situations the consumer may resort to any remedy (e.g. if the trader has failed to remedy the lack of conformity within a reasonable time). It does not make sense that the consumer can suddenly ask for repair or replacement in cases where these remedies are impossible or disproportional. It is exceptionally inadequate, to give the consumer the right to rescind the contract in cases of insignificant lack of conformity. The concept of a hierarchy of remedies, which foresees to rescind a contract only at a second stage, should be kept including in the cases foreseen in par 4.

It should be assured that the priority of repair cannot be undermined by the consumer having the repair done by third parties and afterwards asking the entrepreneur who is obliged to remedy to pay for the costs. Therefore it has to be made clear that, if the entrepreneur has no opportunity to repair because the consumer has made an execution by substitution without authorization, the latter will lose all his rights to remedy and cannot claim the costs of the execution by substitution in particular.

Recommendations:
Article 26 par 4 must respect the concept of a hierarchy of remedies (as foreseen by par 1).
Article 26 must foresee additional rule on the repair. It must foresee that in case of repair done by the consumer without agreement of the trader, the consumer will lose his rights to remedy.

Recital 15 of the current consumer sales and guarantees directive contains a clarification, that any reimbursement to the consumer may be reduced to take account of the use the consumer has had of the goods since they were delivered to him. This clarification is now missing in the proposal for a directive which we consider unfair.

On the issue of compensatory damages, it is particularly evident that the Proposal is not fully developed, even from a technical perspective. Article 27 states merely that the buyer may seek damages if material defects are not remedied, but the Proposal does not define what "damages" are. This raises the question as to whether these damages include lost profit (which we oppose) and non-material damages and whether damages are to be awarded even if the business is not at fault. Will these questions be left to

the member states? Will they be conclusively decided by the ECJ? This raises the question of horizontal obstacles to full harmonization. We suggest to leave the aspects of damages out of the directive.

Recommendations:
Article 27 par 1, must states that any reimbursement to the consumer, in case the contract is rescinded, can be reduced to take account of the use the consumer has had of the goods during a period that might last up to two years.
Article 27 par 2 needs to be thoroughly revised either by specifying the powers of the member states in greater detail or by formulating a more complete set of rules so as to conclusively regulate cases within their scope. The latter course appears preferable to us.

The actual **time limit for the assertion of remedies** – ultimately via legal proceedings - is according to this proposal open as the 2 years period is not a limitation period. In the interest of legal certainty, it is necessary to clarify that remedies have to be judicially claimed within 2 years. With regard to Art 28 par 2 it needs furthermore to be clarified that in case of replacement of a good, the liability period does not start anew except for those elements (or parts) of the product that have been defective in the product originally delivered.

Whereas the EC proposed to maintain the defects liability period of 2 years, the Council working group currently discusses the extension up to 10 years. This proposal neglects the fact that such a legal intrusion would have sever effects on the daily practices of European businesses. General terms and conditions would have to be adapted, the liability of suppliers has to be newly negotiated, quality management systems have to be adapted and the accrued liabilities and the insurance coverage has to be reviewed. This would cause tremendous transaction cost and red tape in a time of economic crises. The arbitrariness of the proposed prolongation of the defects liability period cannot be accounted for and would cause severe damage to the European competitiveness.

We welcome that Art 28 par 4 provides information duties for consumers about a lack of conformity within 2 months from the date on which he detected the lack of conformity. However such provision leaves the very difficult burden of proof of when exactly the consumer has really detected the lack of conformity to the trader. There is also no clear sanction foreseen if the consumer fails to inform the trader. Therefore we suggest an amendment.

Recommendations:
Article 28 par 1 must state that remedies have to be claimed within the 2 years period (or less in case of application of paragraph 3).
Article 28 par 2 must clarify that, in cases where a replacement is delivered, the warranty period only begins anew with respect to the characteristics which were defective in the original product.
Article 28 par 4 must foresee an obligation of information within two months from the date on which he detects the lack of conformity or should have been able to detect it. The sanction of the omission of the notice should be the loss of all remedies.

The drafting of article 29 related to Commercial guarantees could be improved. It mixes voluntary guarantees information with warranty rights. The intention can only be to confirm that legal warranty rights subsist in the case of a guarantee in their full extent. This should be accordingly clarified.

Recommendations:
Article 26 should include an obligation of providing information on the legal rights of the consumer as provided for in Article 26.
Article 29 par 2 lit a must only confirm that legal warranty rights subsist in their full extent in the case of commercial guarantees.

6. CONTRACT TERMS

Evaluating whether **transparency criteria** have been met depends on a particular consumer model. The model of the mature and responsible consumer should be the benchmark for transparency requirements for contract terms, in the interest of a far reaching harmonization approach,

Recommendations:
Art 31 par 1 should explicitly lay down the model of the mature and responsible, reasonably well informed and circumspect consumer seeking to inform himself as benchmark for this evaluation.

The **lists of unfair contract terms** cause concern. We do not support the proposal to eliminate so-called "abusive" contract terms, which is apparently to be accomplished by means of the committee process, bypassing the national parliaments (Articles 39 and 40). We fear that this will create a non-transparent process during which the list of "unfair" terms will steadily grow, thus gradually reducing traders' flexibility in negotiating contracts with consumers, which is already substantially restricted.

Even now, some formulations in Annexes II and III are cause for concern. For example, Annex II b) should clarify that the trader may withhold final agreement to conclude the contract.

Furthermore, Annex III Par. 1 g) would mean that even objectively justified price increases which are not made at the initiative of the trader (such as changes in the law, official decrees, modification of official tariffs, etc.) would be disallowed, i.e. the consumer would have a right of termination even in those cases. It is also not clear why a trader which gives the consumer a warranty of its own free will should not be able to prevent the consumer from reselling the warranty (Annex III Par. 1 j)). Furthermore, Annex III Par. 3 c) and Par. 4 a) should clarify that indicator-based interest rate changes do not give the consumer a right of termination (analogous to price index clauses).

Recommendations:
Annex II lit b should clarify that the trader may withhold final agreement to conclude the contract.
Annex III par 1 lit g must foresee an exception for objectively justified price increases which are not made at the initiative of the trader.
Annex III par 1 lit j must be deleted.
Annex III par 3 lit c must clarify that interest rate adjustments based on indexation should also be permissible without a right of termination for the consumer.
Annex III par 4 lit a must clarify that interest rate adjustments based on indexation should also be permissible without a right of termination for the consumer.

7. GENERAL PROVISIONS

The call for collective action rights in Article 41 should also be stricken entirely. DG Consumer Affairs is currently conducting a consultation process as part of the Green Paper on Consumer Collective Redress, the results of which are still unclear. The Directive must not anticipate the results of this consultation process.

Recommendations:
Art 41 par 2 must be deleted

Art 45 provides for unsolicited goods that the consumer shall be exempted from the provision of any consideration and that the absence of a response shall not constitute consent. However deliveries in error can happen. Therefore information and return requirements seem appropriate in the case of obvious deliveries in error.

Recommendations:
Art 45 must foresee that in case of obvious deliveries in error, the consumer must inform the trader and return the product to the trader at his demand. The possible return cost will be bear by the trader.

8. INTERNAL MARKET CLAUSE FOR CROSS-BORDER BUSINESS

In order to eliminate barriers to Europe-wide marketing, an internal market clause should be added to the Directive, as called for by the European Parliament. Such a clause would prevent member states from interfering with cross-border transactions e.g. by enacting detailed rules with respect to the letter size or language of general terms and conditions, creating considerable added costs for businesses in other member states which would be forced to comply with these rules and acting as market entry barriers, especially for small and medium-sized enterprises.

Ultimately, it is the consumer who suffers, in the form of reduced selection and higher prices. Such an internal market clause would represent a continuation of past statutory initiatives such as the E-Commerce Directive. If the planned full harmonization in this area is to have its full effect, the rules in this regard must conclusively regulate the entire field of consumer contract law.

Recommendation:
An article should be added to the directive for exempting the application of article 6 Rome I for the contracts covered by the directive.