"*DISCLAIMER - The European Consumer Consultative Group (ECCG) is a consultative group set up by the Commission, entrusted to represent the interests of consumers at the Commission and to give opinions on issues relating to the conception and implementation of policy and action on the subject of protection and information of consumers. The opinion of the ECCG does not reflect the opinion of the Commission or one of its Services".*

CONTEXT

- *The ECCG discussed the Commission Proposal for a Directive on Consumer Rights at its meeting of 7 July 2009 and in previous meetings with the Commission lead services responsible for this issue.*
- *An ECCG sub-group was created in order to prepare an ECCG Opinion on this Proposal and met for this purpose on 7 September 2009.*
- *Following these discussions, the members of the ECCG have adopted the Opinion stated below.*
- *The Commission chairs the meetings of the ECCG. However, the Commission does not interfere with the drafting or adoption of ECCG Opinions.*

Opinion of the European Consumer Consultative Group (ECCG) on the Commission Proposal for a Directive on Consumer Rights[1] – adopted on 6 October 2009

The ECCG is the Commission advisory group on consumer issues. It is composed of national and European consumer organisations.

This is a preliminary and non-comprehensive opinion on only some of the key provisions of the proposal. ECCG expects this opinion will evolve and be completed along with the institutional process. It does not embrace all problematic points in the proposal which vary in terms of relevance from country to country depending on the level of national standards which are affected.

1. On 8 October 2008 the European Commission put forward a proposal to replace four existing directives[2] concerning consumer contract law by one common text laying down full harmonisation. Its objective is to contribute to the better functioning of the business-to-consumer internal market by enhancing consumer confidence and reducing business reluctance to trade cross-border.

2. However, ECCG does not believe the minimum harmonisation approach of the current directives has genuinely created barriers to cross-border trade. ECCG does not believe the Commission has provided adequate evidence to the contrary [3] - indeed *Eurobarometer* surveys show that other reasons such as differences in language, tax regimes, the lack of redress systems are much more relevant in this context and that most traders will not increase their cross border sales even if consumer laws are

[1] COM(2008) 614/3

[2] Directives 85/577 on contracts negotiated away from business premises, 93/13 on unfair terms in consumer contracts, 97/7 on distance contracts and 1999/44 on consumer sales and guarantees

[3] The synthesis report on consumer and business attitudes to cross-border sales and consumer protection in the internal market (October 2008) concludes that « the views of retailers who are selling cross-border suggest that many consumers and non-cross-border retailers may be overly concerned » (page 15)

harmonized across the EU.[4] The necessity of the proposal has not been proven, therefore, and the impact on national consumer protection levels has been insufficiently examined. The Commission's draft table on the impact on national legislation is a good starting point but needs to be improved and extended as currently some of the most important provisions (information requirements, unfair contract terms) are not covered. Member States should review the impact and fill in the gaps. Otherwise the table will be but illustrative and not meet its objective. On several points, the ECCG disagrees with the Commission's explanatory note, more particularly on the relationship with the Services directive.

The European Parliament has requested further analysis and believes further impact assessments (especially regarding the impact on national legislation) are required to support the approach taken the proposal. ECCG agrees and believes a comprehensive response from the Commission is of paramount importance.

3. The ECCG supports the following fundamental criticism : " *European consumers should not be seen solely in terms of the internal market or be viewed as rational market players, aware and well-informed, taking decisions purely on the basis of competition, with consumer protection amounting simply to providing more and better information* " (European Economic and Social Committee).

4. The ECCG regrets that the proposal:

- does not provide for a high level of consumer protection, but rather requires Member States to *reduce* well-established consumer protection levels, including in some cases, to levels below those provided in the current directives. In addition, ECCG is concerned that Member States will be prevented from increasing these levels in future;
- includes only a few laudable improvements such as a common 14 days cooling-off period and the regime for the passing of risks;
- fails to introduce the promised clarifications and coherence of the *consumer acquis*, not least because it is limited to just four directives only;
- is unclear on a series of key issues such as the relationship with national general contract law and other relevant EU legislation;
- fails to respond adequately to the challenges of modern markets and new technologies and in fact may prevent national developments to address these concerns – especially those related to digital content.

5. The ECCG is pleased to see that the discussions held so far within the other EU institutions[5] support the unanimous criticism by national / European consumer organisations.

6. Given the effect of full harmonisation –which prevents Member States (including national parliaments and courts) from maintaining or introducing more protective measures - national scrutiny of the proposal deserves prime attention. A number of parliamentary bodies have already taken a position which supports the consumer view

[4] According to Flash Eurobarometer 224 of 2008 (Graph 33), 71% of traders say that their cross-border sales would "not change" or "increase a little".

[5] Opinions by the Committee of the Regions and European Economic and Social Committee, hearing and questions to the Commission by the competent committee of the European Parliament based on a call for evidence from stakeholders.

that the proposal acts against the consumer interest and questions the competence for full harmonisation under the subsidiarity principle. We refer more particularly to :

(a) The UK House of Lords report [6] : " … *we believe that consumers and their interests must be kept at the heart of this proposal…the existing directives covered in this proposal should be taken as the base upon which to build. We consider it of utmost importance that the overall level of protection afforded to consumers should not be reduced…*"

(b) The French Senate's resolution[7] : " *..believes that the whole of the French legislative provisions guarantee French consumers an efficient protection which should not be diminished for reasons of improving the retail internal market…requests Government to oppose all measures leading to a reduction of the protection of the French consumer…*"

(c) The German Bundesrat decision [8] : "*.... The proposal would force Germany to reduce its comparatively very high protection standards. It is questionable, therefore, whether the proposal lives up to its prime objective, namely to strengthen consumer confidence….*"[9]

Other parliamentary bodies have expressed strong reservations such as the Greek parliament which voted unanimously against the proposal or the objections raised in the Netherlands and Finland.

7. This directive is a *co-decision act* of the European Parliament and the Council. While Parliament is only starting its preparatory work for first reading, the Swedish Council Presidency [10] is already negotiating detailed amendments with the Commission. It is vital that the final text is the result of well thought through and mature positions by the two Institutions, and so ECCG is concerned that the Council is pressing ahead while the fundamental questions raised by Parliament on 4 May 2009[11] have yet to be answered by the Commission. At a hearing on 2 March Members of Parliament insisted that the proposal would only be appropriate if it provides practical added-value for consumers and business and Commissioner Kuneva conceded at that occasion that " in some Member States there are understandable and legitimate concerns about crucial issues" and that " it may be that certain consumer rights need to be reinforced."

8. In its opinion on the Green Paper, Parliament warned that full harmonisation should be pursued restrictively. The opinions on the proposal by the Committee of the Regions and European Economic and Social Committee – supported by national bodies such as the UK House of Lords, German Bundesrat and Hellenic Parliament – also defend the view that

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[6] Report " EU Consumer Rights Directive : getting it right " (15 July 2009) available on http://www.parliament.uk/parliamentary_committees/leuscommg.cfm

[7] Résolution Européenne N° 130 du Sénat (29 juillet 2009) available on http://www.senat.fr/leg/tas08-130.html

[8] Beschluss des Bundesrates, Drucksache 765/08 (06.03.09) available on http://www.bundesrat.de

[9] Bundesrat press release 43/2009 (06.03.09)

[10] July – December 2009

[11] Working document by the Committee on the Internal Market and Consumer Protection

"*full harmonisation should be considered selectively for provisions of a more technical nature*".[12]

9. The claim that full harmonisation would solve the "*fragmented regulatory framework across the Community* "[13] is misleading. The proposed rules cannot be applied in isolation but will operate within non-harmonised national legal regimes (e.g. *general contract law, case law and general interpretation of the rules)*. The recent ECJ judgment in Case C-489/07 Pia Messner concerning the right of withdrawal and the relation with principles of civil law such as those of good faith or unjust enrichment, is a perfect illustration. Differences will remain between national procedures (e.g. different statutory limits) and penalties for non-compliance (for instance right to cancel a contract and compensation rules) and these are often more significant causes of consumer frustration in cross-border cases than differences in the provisions targeted by the proposal. These limits of full harmonisation have been exposed by the European Economic and Social Committee.[14].

10. ECCG believes that a dogmatic insistence on broad scale full harmonisation is ill-placed. Instead the ECCG supports the *mixed approach* (full/minimum harmonisation) advocated by the above EU and national institutions, where it has been proposed that full harmonisation is restricted to certain issues such as definitions, information duties and right of withdrawal. On these points, the ECCG insists on the following:

(a) Definition of "consumer" : It should be defined as a "*natural person who acts primarily for purposes outside his trade, business craft or profession*." In addition, Member States should be entitled to extend the definition to other persons and groups.

(b) Pre-contractual information obligations :

- For reasons of coherence and transparency, the general information obligations applicable to goods and services should apply, in principle, to all consumer contracts including those falling under the E-commerce[15] and Services directives [16]. However, given the proposed full harmonisation approach, this rule must be mitigated by a provision stipulating that it is without prejudice to:

* additional and/or specific rules fixed in other Community texts such as the Services directive[17] or regulations on dangerous goods; and does not affect the minimum harmonisation character of any such measures ;
* Member States' right to adopt or maintain rules in non harmonised areas, especially specific service contracts.

- The ECCG insists that *national language requirements* for providing the pre-

[12] Committee of the Regions
[13] Commission explanatory memorandum in COM(2008) 614/3
[14] Point 5.2. of the Opinion
[15] Directive 2000/31/EC (OJ L 178, 17.7.2000)
[16] Directive 2006/123/EC (OJ L 376, 27.12.2006)
[17] see in particular Art. 22 (5) " The information requirements laid down in this Chapter.. do not prevent Member States from imposing additional information requirements applicable to providers established in their territory."

contractual and contractual information remain unaffected (outside the harmonisation scope [18]).

(c) Right of withdrawal :

- The starting point of the cooling-off period should be linked with the trader's compliance with the information duty. The ECCG supports the following rule : " *The withdrawal period ends 14 days after the latest of the following : (a) the conclusion of the contract, (b) the moment at which the consumer is properly informed about his right of withdrawal, (c) the moment when the goods are in the physical possession of the consumer*."

- Omission of information on this right: In this case, the withdrawal period should continue for a much longer period, based on the experience of those Member States in which longer withdrawal periods are presently in force.

- Exceptions to the right of withdrawal: Consideration needs to be given to whether the exceptions foreseen by the existing directives are still justified today. A long list of general exceptions should be avoided. Exceptions should be limited to strictly justified circumstances and not to, for example, long-term bookings for accommodation, transport, car rental, catering and leisure services.

- Exercise of the right: The ECCG supports the view that " *it should be informal and returning the subject-matter of the contract constitutes a withdrawal* " (recommendation by the draft Common Frame of Reference on Contract Law). Similarly, the House of Lords concluded that : " *The Directive should make it clear that the simple act of returning the goods to the trader satisfies the criteria for exercising withdrawal*."
In several countries, this is the rule already today.

11. The ECCG strongly regrets that on the key issue of consumer sales remedies, the Commission's proposal does not even provide the level of protection offered by the 1999 Consumer Sales Directive. The ECCG opposes, in particular, the Commission's intention to deprive the consumer from his/her current right to choose the remedy in case of a faulty product, instead giving, in the future, the trader the right to choose. Discussions of the proposal at EU and national level have shown that common rules in this area are one of the most controversial issues. In particular, the delimitation between the proposed fully harmonised guarantee rules and national contract law on remedies remains unclear. The ECCG notes, however, the Commission's efforts to show that " *full harmonisation will not exhaust the remedies for defective goods available to consumers on condition that the legal requirements for the exercise of these general remedies are different from those applying to the consumer sales remedies*." [19] According to the Commission's interpretation of its own proposal, the UK and Irish right to reject (an immediate option for consumers in these countries) and the French, Belgian and Luxembourg civil code rules on " vices cachés " (hidden defects) would remain unaffected by full harmonisation.

[18] As clarified in the Commission document cited in footnote 13
[19] Commission paper cited under footnote (13)

The ECCG is pleased with Commissioner Kuneva's offer to Parliament to work further on these questions, more particularly :
" - *Is the two years guarantee period long enough* ?
- *Is the six month burden of proof period on the retailers fair for consumers* ?
- *Is the order of the remedies the right one* ?…"[20]

The ECCG is of the opinion that only an *improved minimum harmonisation* should be targeted in this area. It wishes to be consulted on any revised proposals and expresses initial support to the following :

- *Hierarchy of remedies* : The consumer should be entitled from the outset to have the lack of conformity remedied by repair or replacement, the price reduced or the contract rescinded (right to terminate the contract). The immediate right to terminate the contract should be granted for a reasonable period of time after the delivery.

- *Time limits* : The ECCG advocates a general time limit of at least 3 years after delivery and a longer one – as in force already in a number of countries - if the objectively expected life-span of the goods significantly exceeds this basic time limit. Reference is made, for instance, to the UK House of Lords conclusions drawn after extensive consultation of all stakeholders including the Commission : " *The two year limit could be problematic in relation to the purchase of a range of goods which could reasonably be expected to last longer than two years. We therefore recommend reconsideration of the two year limit, with a view to either extending the period or allowing some flexibility in its application*." An extended legal guarantee would be an important benchmark under the Sustainable Consumption and Production agenda which promotes an extended durability of goods.

- *Reversal of the burden of proof* : A reversed burden of proof in favour of the consumer provides real practical value to the legal guarantee**.** The period during which the reversed burden of proof applies should, therefore, be longer than 6 months, as is already the case in some countries[21]. ECCG believes this would greatly enhance consumer confidence, especially for cross-border sales, and would be fair as the trader has much more knowledge about his products than the consumer. The ECCG sees the Council Presidency proposal of 12 months as a positive development without precluding the final position of the ECCG on this point.

12. Discussions on <u>unfair contract terms</u> also show that the proposed full harmonisation with a strictly defined general clause and fully harmonised black and grey lists of unfair contract terms, looks destined to fail. Full harmonisation is particularly risky in this field as "*the issue of unfair terms in contracts is horizontally applicable to <u>all</u> contracts concluded with consumers and also often to those concluded between traders*" (European Economic and Social Committee). Furthermore the proposal will not deliver the solution to legal fragmentation as this field of law "*is essentially characterised by case law*"
(Bundesrat), with the Commission conceding itself "*that the proposal will not call into question the existing national case laws on unfair terms in consumer contracts*."[22] The mixed practical experience with the fully harmonised black lists of

[20] Commissioner Kuneva speech to the EP IMCO hearing of 2 March 2009
[21] In Portugal, for instance, the burden of proof lies with the retailer during the 2 years legal guarantee
[22] Commission paper cited under (13)

prohibited unfair commercial practices should serve as a warning. Fully harmonised but limited black / grey lists preventing national legislators to maintain / introduce further terms will defeat the objective of greater legal certainty within the internal market, because greater reliance will be placed on the general test for fairness. As a result, the opposite will occur: a transfer of power from the legislator to the judge who will rule on a case-by-case basis. [23] Accordingly, ECCG believes the current proposal would lower existing legal standards and give rise to increasing legal uncertainty in all Member States for decades to come. As a consequence, the ECCG regards *minimum harmonisation* as the best option for unfair contract terms.

[23] See mutatis mutandis comment on Cases C-261/07 and C-299/07 concerning the Belgian prohibition of joint offers held as contrary to Directive 2005/29/EC on unfair commercial practices in Journal de droit européen N° 160-juin 2009