

**WORKING DOCUMENT OF THE COMMISSION**

**Responses to the consultation on the Council Directive 85/577/EEC of 20 December  
1985  
to protect the consumer in respect of contracts negotiated away from business  
premises**

**SUMMARY OF RESPONSES**

**The Commission services have prepared this summary on the basis of the contributions to the Working document that was published on the SANCO web page on 9 October 2007. All replies sent in until the beginning of January 2008 have been considered in this summary.**

## **1. General**

Respondents widely endorse the need to revise Directive 85/577/EEC (the "Directive") which was adopted more than twenty years ago. They equally recognise the issues which the Commission has raised and support a legislative initiative at EU level in order to deal with current problems and adapt the legislation to the changes in the market where consumers are increasingly purchasing away from business premises. The majority of respondents call for a consistent approach with the Review of the Consumer Acquis and the implementation of the Unfair Commercial Practices Directive. 17 Member States, 21 business stakeholders (mainly business associations), 19 consumer organisations and 5 other contributors such as lawyers, notaries or academics responded to the consultation.

## **2. Definitions**

### 2.1 Definitions of "consumer" and "trader"

The great majority of stakeholders are in favour of common definitions of "consumer" and "trader" throughout the acquis including the Unfair Commercial Practices Directive. Only three Member States and some consumer organisations call for an extension of the definition of "consumer" to include legal persons or to cover cases where it is not always clear whether a person acts for business purposes or for other purposes (e.g. small traders who sell the same products they consume). Two Member States and consumer organisations call for the inclusion of charities or "fake" traders (i.e. persons who present themselves as skilled craftsmen although they are not qualified) within the definition of traders. One European federation underlines the fact that part-time or occasional workers selling products away from business premises are in most cases not comparable to "professionals" and should merely be called "sellers" and defined differently from "traders".

### 2.2 Other definitions

Some Member States call for a definition of "excursions" and "visit to the consumer's home", should these notions be kept in a future legislative proposal. A few Member States also request other new definitions related to the current exemptions from the scope of the Directive (see paragraph 5 below).

## **3. Scope: situations in which products or services may be sold away from business premises**

What emerges from the consultation is that direct sellers have considerably diversified their business since the adoption of the Directive. In the 1980s excursions organised by traders and door-to-door solicitations were the most common practices. Therefore, the European legislator's priority at the time was to protect the consumer on such occasions when he was taken by surprise. Nowadays, off-premises transactions take place in a completely different context, mainly because the mentality and the life-style of European consumers have changed.

Firstly, more and more consumers look for entertainment opportunities and social events, which explains why "home parties" or workshops have become so popular. Secondly, most consumers prefer to make an appointment in advance with traders. This has led traders to use means of distance communication (e.g. telephone or the Internet) to schedule demonstrations of products or develop customer loyalty. Some direct sellers who first rely on a face-to-face contact with the consumer may then use means of distance communication to foster and maintain this relationship, mainly for inexpensive products sold recurrently.

Another significant change from the 1980's is the growing trend of selling goods and services away from business premises on other occasions than on an "excursion" or a trader's unsolicited visit: conferences or seminars, informal discussions with colleagues, friends or relatives ("social networking") and solicitations in public places.

The product range has also expanded. Almost everything is sold nowadays away from business premises, not only cosmetics or household electrical appliances but also services, notably in the area of renovation works (e.g. double glazing, roof repair or any other home improvement services) or in the utilities sector (energy, telecommunications).

Therefore, as business stakeholders point out, the recurrently-used expressions "doorstep selling contracts" or "door-to-door contracts" are outdated. The broader concepts of contracts negotiated or concluded away from business premises ("off-premises contracts") or "direct selling" are probably more appropriate. Indeed the common feature of such contracts is the simultaneous physical presence of a trader and a consumer away from permanent business premises.

In the light of these major changes in the marketplace, most stakeholders conclude that the scope of the Directive is no longer appropriate.

In a nutshell, today the Directive applies to contracts concluded and to binding and non-binding offers made in two situations: (i) during an excursion organised by the trader away from his business premises or (ii) during an unsolicited visit by the trader to the consumer's home or to that of another consumer or to the consumer's place of work. When the goods or services for which the visit was requested by the consumer are not those eventually sold, the Directive only applies if the consumer did not know or could not reasonably have known that the supply of those other goods or services formed part of the trader's activities, unless the goods or services eventually sold have a direct connection with the goods or services concerning which the consumer requested the visit of the trader.

For the majority of Member States who have responded to the consultation (11), some business stakeholders (i.e. the largest off-premises selling company headquartered in the EU, the French and Italian direct selling federations) and all consumer organisations as well as academics, the extension of the scope of the Directive to all solicited visits or at least to certain types of solicited visits, is needed in order to take into account the changes in the marketplace. Indeed, it is argued that it is often difficult to find out whether or not the consumer knew or should have known that certain products formed part of the trader's commercial activities or to establish the "direct connection" between the goods requested and those eventually sold. Protecting the consumer only in the case of "unsolicited" transactions may lead to circumventions, as evidenced in a number of Member States.

There is evidence from those Member States where "solicited" transactions are exempted from consumer protection legislation, that vulnerable consumers are unreasonably denied a right of withdrawal, because "unsolicited" visits of sellers have been converted into "solicited" visits (e.g. in the UK).

The findings from the UK Office of Fair Trading's (OFT) 2004 report suggest that there is no difference between unsolicited and solicited visits in terms of the need for a withdrawal period as it is the "in home" situation that affects the psychology of the consumer. Data from the OFT's Consumer Direct complaints database show that between February 2007 and October 2007 there were 6800 complaints relating to unsolicited off-premises transactions, and 32,000 complaints relating to solicited transactions. These figures suggest that solicited visits result in a proportionately larger number of complaints compared to unsolicited visits because of the lack of withdrawal rights for consumers. According to the UK, having the same rights for both unsolicited and solicited transactions would prevent rogue traders exploiting the different treatment to avoid the need to provide a withdrawal period. It would also keep the law simple for consumers, business and enforcement agencies by minimising the need to differentiate between unsolicited and solicited transactions

The distinction between "solicited" and "unsolicited sales" and the related exemptions have also led to diverging implementations at national level. Five Member States have extended the application of the Directive to all solicited visits. If the goods for which the visit was requested by the consumer are not those eventually sold, Member States' laws can be divided into four categories: in 5 Member States, the Directive applies without further conditions; in 5 other Member States, the Directive does not apply and in 10 Member States, the Directive does not apply if the consumer should have known that the goods eventually sold were likely to be offered by the trader; finally in 3 Member States, the Directive does not apply if the goods sold have a direct connection with the goods for which the visit was requested.

A majority of Member States, consumer organisations and some business stakeholders are in favour of a broad definition of off-premises contracts. This definition should cover solicited visits, sales on temporary premises (such as hotels rented by traders), sales negotiated away from business premises but concluded on-premises, sales on the occasion of a home party or during excursions and sales in public places and public transport.

However, the views are split on whether the definition should also cover fairs and markets. Business stakeholders are all opposed to such an extension, while 4 Member States and consumer organisations would agree to an extension to fairs and 2 Member States to an extension to markets.

It emerges from the consultation that many companies selling off-premises products in the EU already grant consumers a withdrawal right in all cases, whether the visit is "solicited" or "unsolicited". They are indeed signatories to FEDSA's European Codes of Conduct for Direct Selling (last amended in 2004) and/or to codes of conduct of national direct selling associations implementing FEDSA's European codes at national level and/or to the ICC International Code of Direct Selling (2007 Edition). All these codes of conduct provide that "companies and direct sellers shall make sure that any order form contains, whether it is a legal requirement or not, a cooling-off clause permitting the consumer to withdraw from the order" (see e.g. Article 2.6 of FEDSA Codes and Article B15 of the ICC Code).

Despite this commercial practice reflected by the industry's codes of conduct, the position expressed by other business stakeholders is negative towards the extension of the Directive to solicited visits and other situations in which products or services may be sold away from business premises. They argue that the rationale for consumer protection in this area remains the surprise element. It should be noted, however, that one of the European federations would be ready to accept an extension to solicited visits if all the rules were fully harmonised and a number of exemptions similar to those applicable to distance selling were introduced.

#### **4. Possible exclusions from the scope: low-value contracts?**

Currently, the Directive provides for a regulatory option whereby the Member States may exclude contracts of a value of less than €60 from the scope of the Directive.

The consultation has confirmed that 10 Member States have not made use of this regulatory option and apply the Directive to all off-premises contracts whatever their amount. Among the 17 Member States who have introduced an exemption for low-value contracts, only two Member States have fixed the maximum threshold authorised by the Directive, one of these two Member States applying the threshold only for detailed information requirements. In the other 15 Member States, the threshold varies between approximately €10 and €58 and the average threshold for the 27 Member States (including those having a €0 threshold) amounts to approximately €22.

Member States and consumer organisations underline the different living standards between Member States and therefore the difficulty to harmonise the threshold for 27 Member States. Consumer organisations and 3 Member States support a total removal of the threshold. They argue that it can easily work as an incentive for traders to circumvent withdrawal rights by offering products or services for less than the minimum threshold or to split an offer into several offers to remain under the threshold; consumer organisations further state that the new Member States' buying power is lower than that of the old Member States in 1985 (in Romania the net income today is approximately €251 per month).

None of the Member States who have responded to the consultation support an increased and harmonised threshold. Only one Member State is in favour of harmonising the threshold at this stage but recognises the difficulty resulting from different living standards and therefore would accept the status quo as a second best option. 3 Member States support a reduced but harmonised threshold and 3 Member States support the removal of the threshold. One Member State takes the view that setting a threshold would be an appropriate issue for consideration by individual Member States: although there would be benefits to both cross-border trader and consumer confidence of having a common monetary threshold across the Single Market, meanwhile a 60 euro limit could be quite high in some countries and yet quite low in others. The other Member States support the status quo (i.e. the threshold being a regulatory option for Member States) or a mere reduction of the threshold.

While business views are divided, the majority call for an increase in the threshold which, in their opinion, should also be harmonised. Indeed one European Federation advocates a substantial increase of the threshold up to €400. Another European Federation recommends

adjusting the threshold to account for economic and monetary inflation in the Community. Two national business associations in the same Member State propose respectively a 500 euro and 1,000 euro threshold. However, the largest off-premises selling company headquartered in the EU, while acknowledging that the adjustment to inflation would result in an increase of the threshold to €103 in 2007, does not see how the threshold can legally be harmonised by the Directive, since below-threshold contracts would fall outside the scope of the Directive. The French Federation is opposed to any threshold since the experience of French legislation which applies no threshold, has proved to work effectively.

One business stakeholder points out to the fact that the industry's codes of conduct do not apply any threshold.

## **5. Other possible exclusions from the scope**

### 5.1 Real estate contracts

4 Member States and some consumer organisations call for the removal of the real estate exclusion while 4 others suggest a clarification of the exclusion, stating in particular that renovation works should not be covered by this exclusion. Some business stakeholders call for keeping the exclusion, explaining that this aspect is already regulated at national level, while other business stakeholders - who are not involved in this kind of transactions - call for the removal of the exclusion.

### 5.2 Foodstuffs, beverages and goods for current consumption supplied by regular roundsmen

In general, all stakeholders are in favour of keeping but clarifying the derogation which currently excludes contracts for the supply of foodstuffs or beverages or other goods intended for current consumption in the household and supplied by regular roundsmen.

### 5.3 Financial services

The current Directive excludes certain financial services from its scope, i.e. insurance contracts and contracts for securities (which are not defined). Furthermore, the right of withdrawal provided for in the new Consumer Credit Directive will also apply to consumer credit agreements in an off-premises context.

A few Member States, business and consumer organisations call for a clarification of this exemption but no evidence proves that it currently poses a problem in terms of consumer protection.

Business stakeholders in the financial services area insist on maintaining the status quo and therefore are opposed to including more financial services within the scope of the Directive. The European Federation of insurance intermediaries recalls that the Community acquis in the field of insurance already provides for consumer protection, in particular the Life Insurance Directive (Directive 2002/83/EC) which in its Article 35 provides for a right of withdrawal. Furthermore, it is argued that it is always more appropriate to treat insurance separately given its complexity and specific nature. Finally, in many Member States, insurance contracts concluded at home are regulated by special provisions (Germany, Italy, the Netherlands, Spain and the UK). In other countries where

it is quite unusual to market insurance contracts on a door to door basis, the practical relevance of the exemption would be very small.

#### 5.4 Derogations taken from the Distance Selling Directive

One European Federation and UK business associations, while suggesting that the withdrawal period in off-premises contracts should start when the order form is signed, call for the duplication of the exemptions to the right of withdrawal contained in the Distance Selling Directive (e.g. for the supply of goods made to the consumer's specifications, clearly personalised or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly). However, such derogations are justified by the fact that the starting point of the withdrawal period in distance selling is the receipt of the goods.

The same business stakeholders suggest the introduction of a derogation on services provided in an off-premises situation and performed, with the consumer's agreement, before the end of the withdrawal period. Consumer organisations and some public authorities (Member States and local authorities) disagree. Firstly they underline the development of services provided on the occasion of visits to the consumer's home or in public places (such as roof repair, double-glazing or utilities such as gas, electricity and telecommunications). The UK Office of Fair Trading showed that high pressure selling was the biggest problem identified in the home improvement sector<sup>1</sup>, which is the sector where the highest number of complaints is registered. Secondly, consumer organisations highlight the fact that where the service is provided immediately, at a high or inflated price, the right of withdrawal becomes almost meaningless if the consumer has to pay for the cost of such a service ("lock-in"). Consumer organisations conclude that a ban on performing services and claiming their payment during the withdrawal period is necessary.

### 6. Withdrawal right

All respondents stress the need to ensure consistency throughout the acquis and to regulate the withdrawal right in a future horizontal instrument in the context of the Review of the Consumer Acquis.

All business stakeholders insist on the need to distinguish between distance and off-premises contracts with respect to the starting point of the withdrawal period since the rationale for the withdrawal right differs between these two sales methods. In distance selling, the starting point is the delivery of the goods because the consumer has not seen the product ordered by means of distance communication. However, when the consumer buys off-premises, he has seen a demonstration of the product. The fact that he may be subject to psychological pressure is the rationale for this withdrawal right. Therefore, all business stakeholders propose to have the starting point of the withdrawal period at the time when the order form is signed or the contract is concluded by the consumer.

3 Member States and consumer organisations argue that the withdrawal period should start from the receipt of the goods both for distance and off-premises contracts in order to give consumers the possibility to examine the goods; according to them, it could turn out that the product presented is not the product the consumer thinks he is buying.

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<sup>1</sup> The analysis included double glazing, kitchens, bathrooms, heating systems. Double glazing and conservatories were found to have the largest number of complaints.

## **7. Possible overlaps with distance selling rules? Is there a case for a special regime for "repeat transactions"?**

2 Member States underline the need to clarify the interaction between distance selling and direct selling. One Member State explains in further detail why the current situation is unclear, for example when a contract is negotiated away from business premises and then concluded by means of distance communication. 3 Member States think that there is no clash between the two Directives and that no clarification is needed.

Consumer organisations call for an update of the off-premises regulations to reach the level of consumer protection of the distance selling Directive, particularly with regard to information requirements and the need to provide such information in writing.

Business stakeholders agree that there should be no merger of the two regulations and differences should remain, in particular regarding the modalities to provide information and the start of the withdrawal period.

One European Federation insists on the specific issue of the so-called "repeat transactions", i.e. situations where a consumer has concluded a first contract away from business premises and subsequently reorders the product (e.g. cosmetics or nutritional supplements) from the same trader using exclusively means of distance communication (such as telephone, fax or the Internet). This Federation calls for the inclusion of those repeat transactions within the definition of off-premises contracts, even though the consumer used means of distance communication for the repeated order.

Another European Federation, the French and Italian Federations and the largest off-premises selling company headquartered in the EU take the opposite view that the scopes of the two Directives should be clearly distinguished and that there should be no confusion between sales methods. Therefore, according to these stakeholders, for repeat transactions, the distance selling rules should apply.

## **8. Other possible issues to be regulated at EU level such as restrictions on business hours, bans on payments during the withdrawal period and bans on the direct sales of certain products?**

Only 3 Member States and some of the consumer organisations agree to introduce restrictions at EU level on business hours when traders can visit consumer's homes. The idea is rejected by all business stakeholders and the majority of Member States who also point to the Unfair Commercial Practices Directive which already regulates aggressive practices in particular.

7 Member States and all consumer organisations favour an EU ban on payments during the withdrawal period. Such a ban is however rejected by all business stakeholders, including those companies established in countries (such as France) where this ban has been in force for several years and has created a significant burden on them.

Finally, the introduction of very diverging national bans on direct sales of non hazardous products (e.g. ban on the direct selling of cosmetics in Austria or of semi-precious stones in Belgium and Germany), has been pointed out by a European Federation as one of the most pertinent problems the off-premises distribution channel faces in the competition with other branches of retail trade. This Federation calls for the Community legislator to abolish

such trading restrictions and to abrogate the existing case law of the European Court of Justice on this issue, such as the *Buet* case<sup>2</sup>. However, as the Commission services announced it in their consultation paper of 9 October 2007, this consultation does not tackle this issue, which is being addressed, to a certain extent, in the work on the implementation of the Unfair Commercial Practices Directive. This full harmonisation Directive will have a liberalising effect on the market by creating a level playing field for all actors across the European Union.

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<sup>2</sup> Case C-382/97.