



EUROPEAN COMMISSION

Brussels, 01 JUL 2009
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Dear Mr President,

Thank you for the German Bundesrat's contribution, transmitted on 6 March 2009 to the document COM(2008)614 concerning the Directive on Consumers Rights.

In line with the Commission's decision to encourage National Parliaments to react to its proposals in order to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's response and hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

Yours sincerely,

Margot WALLSTRÖM
Vice-President of the European Commission

Mr Peter Müller
President of the
German Bundesrat
D- 11055 Berlin



EUROPEAN COMMISSION

Brussels, June 2009

COMMENTS OF THE EUROPEAN COMMISSION ON AN OPINION FROM THE GERMAN BUNDESRAT

COM(2008)614 – PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CONSUMER RIGHTS

The Commission welcomes the Bundesrat's opinion on the proposal for a Directive on Consumer Rights and thanks for the very detailed and valuable comments. The Commission wishes to thank the Bundesrat for its support to creating a single market for contracts between businesses and consumers and to ensuring an appropriate balance between a high level of consumer protection and a competitive market for businesses.

The Bundesrat points out that more directives should have been included in the new proposal in order to achieve the desired **consistency of consumer law at the European level** and that due to the limited scope of the proposal, fragmentation of consumer law would continue.

The Review of the Consumer Acquis, of which the proposal is the most important outcome, covered eight directives: the Doorstep Selling Directive 85/577/EEC; the Package Travel Directive 90/314/EEC; the Unfair Contract Terms Directive 93/13/EEC; the Timeshare Directive 94/47/EC; the Distance Selling Directive 97/7/EC; the Price Indication Directive 98/6/EC; the Injunctions Directive 98/27; the Consumer Sales Directive 1999/44/EC. However, in line with the bottom-up approach to the policy making, the proposal addressed only issues which are crucial for opening up the EU retail market and which were broadly supported in the public consultation. Therefore, the proposal covers all core issues for cross border B2C sales, which are key elements for the conclusion of a contract and its execution. The Commission has carefully analysed the possible impacts of the various issues on consumers and their relevance for the EU retail internal market. The analysis of the responses to the Green Paper formed an important part of this exercise.

Four directives that deal with horizontal matters were therefore incorporated in the proposal, i.e. the Doorstep Selling Directive, the Unfair Contract Terms Directive, the Distance Selling Directive and the Consumer Sales Directive. The Timeshare Directive as well as the Package Travel Directive deal with very specific products; they require specific vertical regulation (e.g. on information requirements) and for that reason do not fall into the remit of this horizontal instrument. Both the Price Indication Directive and the Directive on Injunctions do not concern contract law but marketing and procedural law. These two directives therefore fall outside the scope of the proposal, which deals with business-to-consumer contract law. Although the scope of the proposal is limited to

four existing directives, it will contribute, in line with the Commission's better regulation objective, to significantly reducing the fragmentation of the European and national consumer law.

The Bundesrat expresses concerns as to the method of **full harmonisation**: it calls into question the **competency** of the European Community and considers full harmonisation not to be in line with the **principles of subsidiarity and proportionality**. It suggests that the current approach of **minimum harmonisation**, allowing Member States to keep or create a high level of consumer protection, should be maintained.

The explanatory memorandum to the proposal (COM (2008)614, see pp. 6-7) and the Report on the Impact Assessment (SEC(2008)2544, see pp. 14-15, and 2547) have demonstrated that the proposal fully respects the Treaty and the principles of subsidiarity and proportionality:

The proposal is limited to harmonising certain aspects of consumer protection law in contracts between businesses and consumers (B2C). These concern mainly the trader's obligation to provide the consumer with (pre-contractual) information, the right to withdrawal for distance and off-premises contracts, the legal rights and guarantees for sales contracts and the unfair terms in consumer contracts. The draft directive is not designed to harmonise the Member States' general contract law nor all aspects of consumer protection. For example, the rules on the conclusion of contracts (offer and acceptance), on invalidity of contracts or on damages for late delivery or for faulty goods will still be regulated by national law. The full harmonisation proposed in the draft is therefore "targeted".

The business-to-consumer internal market remains fragmented along national borders. The impact assessment and the thorough consultation of stakeholders have shown that the above mentioned aspects are crucial to improve the functioning of the Internal Market in the interest of consumers and businesses. Their positive impact on the retail market would be considerable. The proposal for a Directive on Consumer Rights aims to reduce the market fragmentation by enhancing consumer confidence in shopping cross-border and by reducing business reluctance to trade cross-border. The Impact Assessment Report demonstrated that the savings in terms of administrative burden on business wishing to sell cross-border would be high.

In the light of the above, Article 95 of the Treaty constitutes the adequate legal basis for the proposal.

Full harmonisation is the only regulatory option meeting the two-fold objective of the review: increasing consumer confidence in cross-border shopping and ensuring adequate compliance costs for business wishing to sell cross-border. Minimum harmonisation in combination with the applicable private international law (Article 90 Regulation on the law applicable to contractual obligations – Rome I – No. 593/2008) and a (positive) competition between national consumer laws might, at the first sight, favour consumers. But the impact assessment has shown that the fragmentation of law hinders businesses to sell across the borders or increases considerably the costs of cross-border sales. It therefore restricts the development of competitive enterprises which wish to expand their business across the EU, especially the small and medium enterprises (the "Mittelstand" as the "backbone" of the European economy). As a consequence, this prevents consumers from reaping the benefits of the internal market with more choice and better prices from cross-border offers.

The legal fragmentation problem cannot be solved by the Member States individually since it is the uncoordinated use by the Member States of the minimum harmonisation clauses contained in the existing directives that is at the root of the problem.

As to the choice of the legal instrument, the Commission chose a directive rather than a regulation because its transposition will allow a smoother implementation of the EU law into the existing national contract laws. It will give the Member States the necessary margin of appreciation to maintain national legal concepts and basic principles of national contract law and might therefore meet the concerns of the Bundesrat concerning the spill-over effect to the general contract law.

The proposal ensures a high level of consumer protection and improves it significantly compared with the existing directives. This overall improvement of consumer protection applies also to Member States like Germany which already dispose of a high level consumer protection: the German consumers will be able to profit from a broader definition of off-premises contracts and an EU-wide ban on pre-ticked boxes.

The Commission notes that the Bundesrat does not object to the fact that the proposal applies both to domestic and cross-border contracts. The inclusion of domestic transactions within the scope avoids a dual regime which would have created further fragmentation and competitive distortions between businesses trading only domestically and those trading both domestically and cross-border.

The Commission is committed to maintaining a constructive and open discussion on the proposal. The services in charge are preparing a document to illustrate the impact on the existing levels of consumer protection across the EU. The Commission remains in a close dialogue with the European Parliament and the Council on the proposal.

