

Brussels, - 9 OCT. 2009
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Dear Lord Roper,

Thank you for sending us your Report "EU Consumer Rights Directive: getting it right".

In line with the Commission's decision to encourage National Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's reply 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

Lord Roper
Chairman of the European Union Select Committee
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EUROPEAN COMMISSION

Brussels, October 2009

COMMENTS OF THE EUROPEAN COMMISSION ON THE REPORT OF THE HOUSE OF LORDS ON THE PROPOSAL FOR A DIRECTIVE ON CONSUMER RIGHTS COM(2008)614

The Commission thanks the European Union Committee of the House of Lords for its detailed and valuable contribution on the proposal for a Directive on Consumer Rights.

Without prejudice to the current negotiations in the European Parliament and the Council of the European Union, the Commission can respond to the conclusions and recommendations of the Committee as follows:

Chapter 2 of the report – Overall objective

The Commission welcomes the Committee's support to **update the existing directives**, with a view to removing the inconsistencies between them and the fragmentation of the business to consumer internal market that has resulted from minimum harmonisation.

The Commission takes note of the fact that the Committee sees the need for a more detailed Impact Assessment and to revisit certain aspects of the proposal. The Commission wishes to address the Committee's concerns by clarifying certain aspects of the proposal and providing detailed comments on the remarks expressed in the Opinion.

The Commission's **impact assessment** accompanying the proposal is based on multidisciplinary research spanning a number of academic disciplines (e.g. law, economics and psychology), as well as specific evidence-gathering activities undertaken to establish the knowledge- and evidence-base for the impact assessment.

Among other sources, the observations made in the impact assessment have been drawn from consumer focus groups, examining legal issues such as the length and modalities of the cooling-off period and practical problems such as language, delivery and tax regimes. Furthermore the Commission held dedicated workshops with consumers and business representatives as well as several individual interviews with key businesses and business organisations. The Commission was assisted by an expert panel on selected, more controversial legislative proposals; this panel included academic and legal experts.

The Commission analysed, as far as possible, the existing consumer protection in the Member States. For this purpose, it used, amongst other sources, the Consumer Rights Compendium (Annotated Compendium including a comparative analysis of the Community consumer

acquis) and the preparatory work on the draft Common Frame of Reference. The comparative analysis in the Compendium included a complete description of the transposition of the relevant consumer protection directives in all the Member States and showed in particular where Member States had made use of the right to adopt stricter rules. Any deviations in the proposal from the existing four Directives were preceded by careful analysis in the impact assessment.

The Commission has made use of research into consumer behaviour in the impact assessment. The proposal is indeed one of the first examples of use by the Commission of the results of behavioural economics in its policy work. This resulted, e.g., in the proposed ban on pre-ticked boxes in Article 31 of the proposal.

Furthermore, during the initial stages of the legislative process, it appeared that further evidence and more insights on consumer behaviour and preferences in relation to sales remedies were needed. The Commission has therefore launched a qualitative study on this matter, with the view of gathering evidence as a result of in-depth interviews with consumers and traders. The results of the study should be available in the course of 2009.

In addition, the Commission services will issue a document explaining the impact of the proposal on the national level of consumer protection and its relationship with national general contract law as well as with other Community legislation. This document will list the most relevant issues addressed in the proposal and illustrate their impact on the existing levels of consumer protection across the EU. It must however be borne in mind that Member States, and not the Commission, are most competent for screening their legislation in order to check its compatibility with the Directive. The Commission considers that the above-mentioned documentation will complement the existing Impact Assessment.

The Committee considers it of utmost importance that the **overall level of protection** afforded to consumers should not be reduced.

The Commission attaches high importance to ensuring a high level of consumer protection and an effective enforcement of consumer rights. At the same time, the Commission seeks to find an **appropriate balance between a high level of consumer protection and a competitive market for businesses** in order to enhance consumer confidence in the internal market and to reduce businesses' reluctance to engage in cross-border trade. The proposal aims to unlock the potential of cross-border trade within the internal market for the benefit of consumers.

As suggested by the Committee, the Commission took the **existing Directives** as the base upon which to build. In the Commission's view, the proposal enshrines a high level of consumer protection which compares favourably with the existing directives. Compared to their minimum harmonisation standards, the Commission has aimed to maintain the level of consumer protection or to increase it by adding new provisions such as the ban on hidden charges and default pre-ticked boxes, the prolongation of the cooling-off period for off-premises sales or the widening of the definition of off-premises and distance sales.

The Commission is of the opinion that the proposal will contribute considerably to boosting cross-border retail trade. The wide-ranging impact assessment has demonstrated that **legal fragmentation** results in low level of consumer confidence in shopping cross-border. There are a number of reasons for low consumer confidence, including an insufficient knowledge by consumers of their rights; their perception that they are less protected if they buy from foreign traders and that enforcement and mediation are more difficult to carry out abroad. The

problem of consumer perception is difficult to tackle. Indeed, legal fragmentation and the consequent uneven level of consumer protection across the EU make it difficult to conduct pan-European education campaigns on consumer rights, or to carry out mediation or other alternative-dispute resolution (ADR) mechanisms. Introducing a set of harmonised contractual rights valid across the EU will contribute to remedying this problem.

Furthermore, the effects of the fragmentation are felt by business because of the conflict-of-law rules, and, in particular, the Regulation on the law applicable to contractual obligations (Rome I – No. 593/2008), which obliges traders not to go below the level of protection afforded to foreign consumers in the consumer's home country. Traders wishing to sell cross-border into another Member State will incur legal and other compliance costs to make sure that they are respecting the level of consumer protection in that country. Such costs are either passed on to consumers or, worse, businesses refuse to sell cross-border. In both cases consumer welfare is below the optimum level.

In sum, the fragmentation of national laws hinders businesses from selling across borders and considerably increases the costs of such cross-border sales. It restricts the development of enterprises which would like to expand their business across the EU, especially small and medium enterprises. Consequently, this deprives consumers from reaping the benefits of the internal market, such as increased choice and better price competition from cross-border offers.

Chapter 3: Full Harmonisation

The Commission welcomes the view of the Committee that full harmonisation could increase legal certainty for both consumers and business. It shares the view that a "differentiated" or, in Commission terms, a "targeted" full harmonisation has the best prospect of success.

In this sense, the proposal is limited to harmonising certain aspects of consumer protection law in contracts between businesses and consumers (B2C). These aspects concern mainly the trader's obligation to provide the consumer with (pre-contractual) information, the right of withdrawal for distance and off-premises contracts, the legal rights and guarantees for sales contracts and the unfair terms in consumer contracts. The proposal 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 impact assessment and the thorough consultation of stakeholders have shown that the above mentioned aspects – and only these aspects - are crucial to improve the functioning of the Internal Market in the interests of consumers and businesses. Their positive impact on the retail market would be considerable. The savings in terms of administrative burden on business wishing to sell cross-border would be high. The Commission has refrained from regulating any other aspect, even to the detriment of greater uniformity of European Consumer Law. On the other hand, limiting full harmonisation to issues of a technical nature would not achieve the intended improvements for the retail internal market.

Full harmonisation is the only regulatory option satisfying the dual objectives of the review i.e. the improvement of consumer confidence in cross-border shopping and the reduction of compliance costs for businesses wishing to sell cross-border. Minimum harmonisation in combination with the applicable private international law (Article 6 of the Rome I Regulation) and (positive) competition between national consumer laws might at the first sight favour consumers. However, as explained above, it would hinder the development of competitive

businesses which wish to expand their business across the EU, thus resulting in less choice and higher prices for consumers.

The legal fragmentation problem cannot be solved by the Member States individually since it is the very same uncoordinated use by the Member States of the minimum harmonisation clauses contained in the existing Directives that is at the root of the problem. The proposal's objectives cannot therefore be sufficiently achieved by the Member States.

As explained in the Impact Assessment Report, the Commission has observed the principle of proportionality in pursuing the objectives under the EC Treaty in the field of consumer protection. The Commission's goal was to propose a legal instrument that strikes the right balance between business' interests and consumer rights, on the basis of a high level of consumer protection.

However, the Commission agrees with the Committee that clarity is needed about the extent of full harmonisation.

For this purpose, as explained above, the Commission will issue a note explaining the impact of the proposal on the national level of consumer protection and its relationship with national general contract law as well as with other Community legislation. This document will list the most relevant issues addressed in the proposal and illustrate their impact of on the existing levels of consumer protection across the EU.

The Commission agrees with the Committee that the relationship between the Directive and national contract law should be resolved in the text of the Directive itself.

Concerning the "blue button" optional instrument, the Commission shares the concern of the Committee that such a system will not adequately address the needs of both consumers and traders.

The limited positive effects of applying this non-legislative tool would be diminished by the remaining regulatory fragmentation and the negative effects of legal fragmentation would not be remedied.

Chapter 4: Scope of the Directive

The scope of the Directive has been thoroughly analysed in the preparatory phase of the proposal. In view of the findings of the Impact Assessment, the Commission decided to limit the scope of the proposal to four Directives from the existing consumer acquis.

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 addresses 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 provisions on information requirements and unfair contract terms (chapters II and V) are applicable in their entirety to **services**, including **digital services** (i.e. software, downloaded music, etc). As regards the rules on distance selling, the proposal retains the derogation from the right of withdrawal in the existing Distance Selling Directive for services where performance has begun with the prior consent of the consumer. It follows that the consumer is no longer able to withdraw once he/she has started downloading the digital service. Conversely, the rules on sales in chapter IV only apply to "tangible movable items"; pure services or digital services are not covered by these rules. In fact, the remedies foreseen in chapter IV are not suitable for services. Furthermore, the Commission is not aware of any evidence that fragmentation of the rules on remedies and guarantees for services create problems for cross-border trade. Concerning software and data, the public consultation in the Green Paper on the Review of the Consumer Acquis has shown that it will require further data gathering in order to extend or adapt the liability for lack of conformity to them. The Commission will study this matter carefully, in particular by carrying out a comprehensive study, which the Commission recently launched with a call for tender (see http://ec.europa.eu/eahc/consumers/consumers_tenders.html). In addition, the Swedish Council Presidency will hold a European conference on 3 and 4 November 2009 which will in particular focus on consumer policy in relation to digital services, including software and data, and will tackle market developments, consumer habits and problems in relation to digital services. This preparatory work has to be finalised before it will be possible to propose any new legislation on digital services.

Mixed-purpose contracts, i.e. contracts having as their object both goods and services are treated as sales contracts under the proposal by virtue of the definition in Article 2(3). This means that all chapters of the proposal may apply to such contracts. E.g., if a mixed-purpose contract is concluded at a distance, the consumer will be protected by the rules on distance contracts for the whole contract (i.e. he will be able to withdraw from the mixed-purpose contract). Chapter IV, however, applies only to goods supplied under the mixed-purpose contract and not to the service element (Article 21(1)). In the case of a contract for the purchase of a mobile phone combined with a subscription to mobile phone services, it is clear that the rules on delivery and remedies for lack of conformity apply only to the mobile phone itself and not to the mobile phone services to be supplied. The Swedish Presidency and the Commission currently work on to improve the text of the proposal with a view to the negotiations in the Council Working Party.

The Commission can give the following clarification on the extent to which **financial services** are covered by the proposal. Chapter V on unfair contract terms applies to financial services in general. Chapter III on consumer information and right of withdrawal for distance and off-premises contracts only applies to some specific financial services contracts concluded off-premises (insurance contracts, financial services whose price depends on

fluctuations in the financial market and consumer credit covered by the Consumer Credit Directive 2008/48/EC are not covered by Chapter III). In practice the most important financial services contracts that will be covered are mortgage credit contracts and consumer credit contracts for less than EUR 200 or more than EUR 75,000. For these financial services contracts, the information requirements in Chapter II Article 5 and 7 will apply by virtue of the reference in Article 9.

The Commission will encourage and support the discussion and clarification of provisions related to financial services. However, in the Commission's opinion, the solution of the Committee not to apply the proposal where a trader has voluntarily chosen to comply with the Consumer Credit Directive would not lead to legal certainty. As to hire purchase or other combinations of sale, hire and financial service elements (e.g. leasing), the Commission considers that the qualification of such contract should be left to national law, due to the complexity and the diversity of such forms of contracts. Furthermore, the Commission cannot follow the reasoning of the Association of British Insurers on inertia selling: It is clear that if a trader engages in inertia selling, which is an unfair commercial practice banned by Annex I no. 29 of the Unfair Commercial Practices Directive (unsolicited supply of a product), he may not request any consideration. Automatic renewal of contracts, including insurance policies, would be possible under the proposal if the contract terms governing the renewal are deemed to be fair (respecting, e.g., the presumption of unfairness in Annex III (1) (f) of the proposal).

Chapter 5: Clarity for consumers and provision of information

The Commission agrees with the Committee that efforts should be made to explain the Directive to consumers and traders once it has been approved. This could be through information campaigns, guidance documents or other means of information. In this context it should be noted that the Commission has introduced an optional standard withdrawal form for consumers (see Article 14 (1) and Annex 1 of the proposal). During negotiations in the European Parliament and the Council of the European Union, the Commission will encourage any useful further clarification in the recitals or the text of the proposal itself.

Chapter 6: Right of withdrawal for distance and off-premises contracts

For the purpose of simplification and legal certainty for consumers, the length of the withdrawal period should be uniform; the Council Working Party is discussing a common starting point of the period for both distance and off-premises contracts. The 14 day period has been found by the EU legislator to be appropriate in the case of two recent directives – the Consumer Credit Directive and the Timeshare Directive. There would be therefore strong reasons to apply the same period in the present Directive. In the light of full harmonisation, Member States would not be able to keep longer periods for certain products, but traders would be free to grant a longer period.

In its proposal, the Commission suggested to exclude insurance contracts concluded off-premises from the scope of chapter III, see Article 20(2)(a). However, Member States seem to be opting for generally excluding financial services from the scope of chapters II and III (see above).

The Commission agrees with the Committee that it is important for both consumers and traders to have a clear and unequivocal proof of the withdrawal from the contract. Therefore, the proposal requires that the withdrawal be made on a durable medium, the withdrawal form being one option amongst others. Simply sending back a good may not be considered as unequivocal; this could also be interpreted as request of repair or replacement.

Chapter 7: Sales contract

The Committee expresses its concern about the **relationship between the consumer sales remedies** referred to in Article 26 and **the traditional contract law remedies** of the Member States, such as the right to reject in the UK.

In the course of the negotiations in the Council Working Party, some Member States expressed their wish to include further remedies in the proposal, such as a right to reject. The Commission is not opposed to the idea of expanding consumer rights with regards to faulty goods.

However, should the right to reject not be included, the Commission would support the insertion of a provision in the proposal unequivocally confirming that the UK would be able to retain its right to reject.

The Commission considers that the **duty to notify the lack of conformity** does not necessarily lead to lowering the level of consumer protection. On the one hand, a duty to notify brings legal certainty for both consumers and business and prompting the consumer to notify shortly after the discovery of the defect may protect consumers from possible damages. On the other hand, the Commission acknowledges that a duty to notify is an additional burden for consumers. Similarly, the Commission recognises that several Member States would prefer a longer **liability period of the trader** for certain products or increase the flexibility in the application of this provision. The Commission will not object to other solutions on which the Member States agree, provided that sales remedies are fully harmonised and an adequate balance between traders' and consumers' interests is achieved.

Concerning the exclusion of rescission in cases of minor defects, the Commission notes that a majority of Member States currently apply this provision and lack of clarity or uncertainty do not seem to be an issue. The same applies to the terms "within reasonable time" or "significant inconvenience". The Commission is aware that this legal term might be interpreted differently between or within Member States. However, this applies to all abstract legal terms and only abstract terms give sufficient discretion to do justice to the individual case.

Chapter 8: Unfair contract terms

The Commission agrees with the Committee that **negotiated terms** should not be included in the scope of the Directive. When transposing the Directive, Member States will not be precluded from extending the scope of their national law to negotiated terms.

The Commission wishes to reassure the Committee that the content of "**grey**" and "**black**" **list** will be meticulously examined within the Council Working Party. The screening of Member States' national lists may lead to the inclusion of additional terms or a transfer between the grey and black list in the course of the negotiations.

The Commission shares the opinion of the Committee that the process of **comitology** should be given a chance to prove itself. Indeed, the Commission considers it to be the most efficient method of amending the grey and black list.

In conclusion, the Commission wishes to reiterate its commitment to maintaining a constructive and open discussion on the proposal. It remains open to clarifying, improving and strengthening the provisions of the proposal. In the course of the negotiations in the European Parliament and the Council of the European Union, concerns and suggestions such

as the ones brought forward by the Committee will be discussed and evaluated. The Commission assures the Committee that, insofar as the Commission can influence the negotiations, sufficient time will be allocated to discuss these issues in detail. Finally, the Commission wishes to stress that the proposal offers a unique opportunity to create a single set of rules which will apply across the board to all businesses and all European consumers. In this light, the Commission trusts that the explanations provided above will clarify the main concerns highlighted in the Opinion and will enable the Committee to extend its support to the proposal.