



*** Check against delivery ***

13 March 2009

10TH ANNIVERSARY EUROPEAN CONSUMER DAY “THE CONSUMER RIGHTS DIRECTIVE” EUROPEAN ECONOMIC AND SOCIAL COMMITTEE BRUSSELS, 13 MARCH 2009

WORKSHOP 3 – CONSUMER SALES AND GUARANTEES

BUSINESSEUROPE’S VIEWS BY CARLOS ALMARAZ

Good afternoon Members of the Economic and Social Committee, Ladies and Gentlemen.

First I would like to thank the European Economic and Social Committee, the European Commission and the Czech Presidency for having organised this event on the special occasion of the 10th European Consumer Day, and for inviting BUSINESSEUROPE to convey its views on the proposed directive particularly on the issue of consumer sales and guarantees.

Before addressing those particular aspects of the proposal, I would like to comment on the opportunity that the proposal represents for consumers and businesses in Europe.

The Single Market is not delivering as much as it could for companies and consumers in the business-to-consumer marketplace. The rate of cross-border commercial transactions between companies and consumers is growing at a very slow pace. According to a Commission's Eurobarometer published in October 2008, the proportion of people carrying out cross-border transactions has not increased on the side of either citizens or retailers since 2006 and remains around 25%.

Numerous factors play a role in the decision to engage in cross-border commerce ranging from regulatory obligations to linguistic and geographical convenience considerations. Among those factors, the need to comply with various divergent national laws is ranked by retailers as one of the main barriers to cross-border trade as illustrated in the above-mentioned Eurobarometer.

One of the sources of this regulatory fragmentation is the divergences between national consumer protection rules, especially those deriving from the transposition of the EU consumer protection directive. Most of these directives are based on minimum harmonisation leaving the possibility to Member States to adopt stricter and more protective provisions.



Some companies, especially small ones, are more reluctant to offer their products in other countries due to the legal uncertainty about foreign rules or simply do not do it because it is too costly to conform to the various laws.

Consumers are also losing from this situation, as they have less choice and access to goods and services from other Member States and face uncertainty about their rights and obligations in foreign markets.

BUSINESSEUROPE therefore supports the Commission's proposed directive and its aim to reduce national regulatory divergences by harmonising certain aspects dealing with business-to-consumer contracts. We also agree that the proposal must ensure an adequate common level of consumer protection across Europe.

To achieve the objectives of increased legal certainty, less regulatory fragmentation and a more common level of consumer protection, we strongly believe that a proposal based on targeted full harmonisation that applies to both domestic and cross-border sales is the right choice.

We acknowledge that there is still uncertainty and concerns about the consequences of this proposal on national systems and particularly about the impact on the levels of protection provided by the relevant national consumer laws.

These concerns need to be addressed. In particular, clarification is necessary on the scope of the directive, the precise effects of full harmonisation and interaction with existing Community legislation (e.g. the unfair commercial practices directive, e-commerce directive, Rome I regulation, etc).

Concerning the scope of the directive, it should concentrate on areas on which national divergences create barriers to the Single Market. We are of the opinion that the proposal already covers key areas such as definitions, consumer information, right of withdrawal for distance and off-premises contracts including an EU wide length, a model withdrawal form, conditions for its exercise, delivery conditions or legal guarantees in case of defective products.

In respect of the specific provisions on consumer sales and associated guarantees, we support harmonisation of these aspects. National divergences regulating these aspects are particularly burdensome and we believe that EU harmonisation providing an appropriate level of consumer protection, could generate added-value to cross-border trade and increase confidence of consumers who shop across frontiers.

However, some modifications to the proposal are needed to adapt some of its provisions to the variety of products and contracts they would apply to and to take account of the responsibilities and obligations of the consumer in a contractual relation.

On the issue of delivery, article 22 provides that the trader shall deliver the goods within a maximum of 30 days. This provision is too rigid. It should be possible going beyond the maximum deadline of thirty days if agreed by the parties, to take account of the various types of contracts, e.g. goods specially prepared for that specific consumer.



Also, the start of the delivery period should be suspended in the event of “force majeure”.

In the case of late delivery, article 22.2 creates the right for the consumer to ask for a refund of any sums already paid within seven days. This means that the consumer would rescind the contracts as a consequence of exercising that refund right.

This provision is too stringent. It should be modified so as to avoid every late delivery resulting automatically in refund and rescission of the contract. In the case of goods specifically prepared for a consumer, cancellation of the contract is rarely in the interest of the consumer or the trader. A better option would be that the parties are able to agree on an extension of the time for delivery.

Also, the right of refund should not apply when the delay is caused by the consumer, e.g. by failure to collect the goods as agreed.

In addition and prior to the execution of the refund, the consumer should inform the trader by means of a formal communication (email, letter, fax, etc) that he wishes to be refunded.

On the consumer legal guarantees, we believe that article 26 offers a balanced and pragmatic approach and therefore we support the hierarchy of remedies for lack of conformity proposed which is more adapted to the reality of the markets.

Granting to the trader the choice between repair and replacement in the first instance when a product is defective is reasonable and in line with current practice. This would avoid situations where in cases of an easily repairable defect, the consumer would be able to opt for direct replacement or reimbursement. This is particularly important for products of high-value, personalised products or those that would lose substantial value if returned or resold.

We have however some concerns in respect of paragraphs 2 and 3 of article 26:

In article 26.3 the consumer may only seek the rescission of the contract if the lack of conformity is not minor. We believe that this provision should be applicable, not only in the cases referred to in paragraph 3 but also in all cases referred to in paragraph 4 in which the consumer may resort to any remedy provided in article 26. This issue is extremely important in the cases of high-value goods that must be resold at a substantial discount after being returned.

According to article 26.4, the consumer may exercise any of the remedies listed in paragraph 1, including repair or replacement, where one of the situations listed therein exists. We believe that this paragraph is too stringent and disproportionate.

In particular, paragraph 4 d) provides that if the same defect has reappeared more than once within a short period of time, the consumer would be entitled to directly seek a reduction of the price or the rescission of the contract, without being required to seek the repair or replacement of the good. This provision would be too cumbersome for complex and high-value products that would have to be sold at a substantial discount



after being returned, especially because no difference is made between major defects and minor defects.

We therefore ask for deletion of letter d) in paragraph 4. The other provisions in paragraph 4 already offer sufficient protection to consumers in cases where the trader fails to remedy the lack of conformity.

Finally, when calculating the sums to reimburse to the consumer in the event of a rescission of the contract, the proposal should be revised so as to ensure that the impairment of the product due to the use and possession of this product by the consumer is taken into account.

Concerning costs and damages, we agree with article 27.1 that the consumer should not bear any costs related to remedying lack of conformity. However, the consumer should bear the relevant costs for usage, depreciation and unjust enrichment including in the case of replacement as determined by national laws. This is particularly important for certain goods such as cars or high-tech products that will lose substantial value after use.

It is unacceptable that article 27.2 provides that “the consumer may claim damages for any loss not remedied in accordance with Article 26” without defining the relevant preconditions. This would lead to a liability regardless of negligence without giving the opportunity for rectification of defects.

BUSINESSEUROPE strongly opposes such an open-ended right to damages and asks for its deletion. These matters should be decided at national level.

With regard to article 28 on time limits and burden of proof, we are concerned about the cases where defective goods are replaced by the trader. Article 28.2 stipulates an extra period of two years applicable to the replaced goods.

We believe this provision would give rise to situations which place disproportionate burden on the trader. In particular, cases of repeatedly renewing the 2-year period (“follow-on guarantee”) for high-value products are of special concern. Article 28 should therefore be revised so as to place limitations on renewal of the 2-year period including, under certain circumstances, instead of renewal, suspension of the ongoing existing period that resulted from the sales agreement.

Finally regarding the provisions on commercial guarantees, as a principle we consider that legislation particularly on the content of this type of guarantees should be limited to what is strictly necessary. Commercial guarantees are voluntary, an additional service provided by the trader and constitute an important instrument of companies’ commercial policies.

This is why we believe that regulation would have a chilling effect and reduce incentives to offer commercial guarantees, to the detriment of companies and consumers alike.



In our opinion, Article 29 goes too far in prescribing the content of commercial communications.

Article 29.2 a) seems to imply that Article 26 of the directive on the remedies for lack of conformity should be reproduced in full in the text of the commercial guarantees. Such an obligation would only create unnecessary burden on the trader as it will not make any legal difference to the consumer.

BUSINESSEUROPE would prefer the status quo which only imposes the obligation on the trader to indicate to the consumer that he also has statutory rights and that they are not affected by the commercial guarantee, without detailing the said rights.

Regarding transferability of commercial guarantees, article 29.2 c) and Annex III j) are too prescriptive and should be deleted. There is no justification for EU harmonisation in this respect and the status quo should be maintained. The trader should decide whether he is in a position to offer such guarantees and freedom to contract should be fully respected.

To conclude, we want to reiterate that it is in the high interest of companies that this directive provides a sufficient level of protection so European consumers feel confident in cross-border transactions. But it is equally important that it ensures legal certainty and results in real harmonisation of national laws removing the barriers caused by the divergences in consumer protection rules.

BUSINESSEUROPE and its national member federations remain open to discuss well-evidenced proposals for changes to the proposal but recall the importance of respecting its full harmonisation character.

I thank you for your attention!