POSITION PAPER

13 March 2009

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CONSUMER RIGHTS [COM (2008) 614/3]

SUMMARY

A more harmonised European regulatory framework governing business-to-consumer contractual relations can contribute to a better functioning Single Market and implementation of the better regulation agenda.

The fragmented national regulatory environment in this field makes it difficult, especially for SMEs, to operate across national frontiers. Companies are more reluctant to engage in cross-border trade and this results in fewer cross-border offerings, less competition and narrower choice, particularly from other Member States, for consumers.

BUSINESSEUROPE therefore supports the proposed directive and its aim to remove obstacles caused by fragmentation of national consumer contract rules while ensuring an appropriate common level of consumer protection across Europe.

This directive can create direct benefits for all, for businesses in the form of less regulatory compliance costs and legal certainty, and for consumers with increased competition, a more common level of consumer protection and easier access to products and services.

We strongly believe that those benefits will be best achieved through targeted full harmonisation of certain aspects regulating contractual relations between companies and individual consumers. It should result in simplification of existing rules and apply to both national and cross-border sales.

The full harmonisation character of the directive is of crucial importance to help to reduce the regulatory divergences and create a more harmonised and clear legal environment and should not be diluted during the legislative process. Equally important is that the directive does not undermine parties' freedom of contract which is a central principle in contractual relations in all EU legal orders.

The proposal needs some amendments as well as substantive clarification particularly regarding its scope, relationship with other Community legislation and impact on national legal orders.

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GENERAL COMMENTS

BUSINESSEUROPE welcomes the proposed directive and agrees with its objectives of facilitating a well-functioning single market through further harmonisation of national rules.

This directive is intended to improve the quality and consistency of part of the EU *consumer acquis* so that consumers are more evenly protected and businesses operate on a level playing-field with lower regulatory compliance costs.

We strongly believe that those objectives will be best achieved through targeted full harmonisation of certain aspects regulating contractual relations between companies and individual consumers.

The fragmented national regulatory environment in this field makes it difficult, especially for SMEs, to operate across national frontiers. As a result they are more reluctant to engage in cross-border trade. This results in less cross-border offerings, less competition and narrower choice, particularly from other Member States, for consumers.

This situation of legal uncertainty and regulatory fragmentation will be further complicated with the application of the Rome I Regulation on the applicable law to contractual obligations. This text indeed provides that the mandatory requirements of the legislation of the country where the consumer resides will apply whatever law may have been chosen by the parties. This scenario and the current difficult economic crisis call for urgent action to correct the situation.

The proposed directive will help to reduce the regulatory divergences and create a more harmonised and clear legal environment facilitating cross-border transactions between businesses and consumers.

We are also pleased that the proposal applies to domestic and cross-border transactions and seeks to remove bottlenecks to the functioning of the Single Market that are caused by the disparity of national rules. For this, it is essential not to decouple the legal environment from practical reality and the operation of the market.

The directive must truly improve the single market, increase legal certainty and result in genuine harmonisation of the aspects of national laws targeted in the proposal. In this context, the full harmonisation character of the directive is of crucial importance and should not be diluted during the legislative process.

Regarding simplification, BUSINESSEUROPE would like to reiterate the importance of ensuring that legislative simplification results in real cost savings for businesses. Changes to legislation could mean costs for companies as they have to invest in transitioning to a new system, or by having to comply with new requirements added as a result of the legislative process. The Commission must guard against such an outcome and ensure that the gains of change outweigh such costs.

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An important question will be to strike the right balance between the interests of companies and those of consumers. Even more crucial is to set an appropriate common level of consumer protection across Europe which will be the common denominator in the subsequent national transposition laws. Neither the most protective models nor the most fragile should be chosen as the pattern at EU level.

The level of protection should be construed on pragmatic basis and decided by a political process in consultation with representative stakeholders. It should be based on sound and objective research providing empirical hard data. It should also be borne in mind that the proposal, in addition to the responsibilities and obligations of traders, must also embrace both the rights and obligations that a consumer bears.

In this regard, we believe the proposal needs some amendments as well as clarification particularly regarding its scope, relationship with other Community legislation and impact on national legal orders. BUSINESSEUROPE urges that amendments to the proposal take into account the following specific comments:

Subject matter and scope: limited to business-to-consumer contracts

The directive clearly indicates that it applies only to contracts between consumers, as natural persons, and traders. This means that the proposed directive has not been conceived to apply to contracts among traders themselves.

It is essential to note that the content and level of protection of the directive respond and are justified in the light of the specificities and the needs of the parties concerned in the contractual relation which are a consumer, as a natural person, and a trader. Indeed, rules concerning the protection of consumers are highly specific, as they aim at maintaining a balance between the parties. The logic governing the rules applicable to relationships between traders is fundamentally different.

BUSINESSEUROPE would therefore oppose any future proposal for an automatic extension of the directive's provisions to contracts between companies or traders themselves, in particular we are against extension of the definition of consumer in article 2.1 to legal persons including SMEs. This would impose unreasonable burdens on traders and run counter to the fundamental principle of freedom of contract.

Relationship with other Community legislation

It is not clear how the proposed directive will interact with other existing Community legislation dealing with consumer protection aspects and that do not fall entirely or partially within the scope of the directive. It is therefore necessary to clarify, particularly in article 3 of the directive and its relevant recitals, the directive's link with the directive on unfair commercial practices, the Services Directive, the Rome I Regulation, the e-commerce directive or existing Community legislation on financial services.

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Article 2 on Definitions

BUSINESSEUROPE emphasises the importance of the definitions for the proper and uniform implementation of the directive. This importance should be underscored in the recitals of the directive.

"Consumer":

The notion of consumer plays a crucial role and must be used in the same way as provided in the directive throughout the EU. We fully support the definition of consumer in the directive which applies exclusively to individual natural persons and not to small businesses or other legal persons.

"Off-premises contracts":

The proposed definition goes beyond the existing definition provided in Directive 85/577/EEC on contracts negotiated away from business premises and we consider it to be too broad. The definition should not cover contracts concluded off-premises (e.g. renovation work, rental agreements, etc) at the consumer's express request. There are no reasons for extending the Community rules to the cases where only the offer or negotiation of the contract, but not the conclusion of the contract, are made on the customer's premises. Indeed, the customer has full freedom to ponder the advisability of entering into the contract, as the customer does not execute the contract at home, but travels to that end to the seller's premises. Application of the withdrawal right is not appropriate in these situations.

Article 2 provides a definition of "goods", "trader" or "service contract". A definition of "service" and "service provider" would also be helpful. To that end, the definitions of "service" and "service provider" provided in the directive on services in the internal market should be used.

Article 4 on full harmonisation

The proposed full harmonisation approach is an important step in the right direction. Harmonisation of certain aspects of national laws will result in more legal certainty and less regulatory fragmentation which are primary objectives of the directive.

This is crucial for traders who will benefit from lower compliance costs and a level playing-field, and for consumers who will enjoy a more even protection across Europe. The market and the economy in general will also gain in increased competition, more cross-border offers and more competitive prices.

In this regard, we regret that the proposed directive does not include an internal market clause based on mutual recognition.

The absence of an internal market clause makes the need to respect the full harmonisation character of the proposal for all the provisions therein ever more important. It has to be made explicitly clear in the proposal that for aspects falling within the scope of the directive Member States cannot introduce other regulations. We therefore propose the following amendment:

New article 4.2:

"(2) Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field harmonised by this Directive."

Article 5 on General information requirements

It is in the interest of traders to provide consumers with sound information on goods and services on sale. However, too much information creates unnecessary administrative burden on traders and may confuse consumers. This is the case in some parts of article 5.

In particular, article 5 c) on obligations concerning price specification are too prescriptive. We agree that when possible the final price of the product should be set and made visible for consumers and that when this is not feasible, the trader should be able to provide an estimate of the price. However, the obligation to display the manner in which the price is calculated where the price cannot be set in advance is disproportionate and should be deleted. The trader should not be obliged to display the method for price calculation and should be given the possibility to provide an estimate. This is all the more relevant in cases where missing information could lead to liability claims against the trader.

Article 6.1 on Failure to provide information

As a matter of principle, we believe that the contractual effects of failure to provide information should continue to be regulated differently for different types of contract and should not be harmonised. The contractual effects of the violation against information requirements do not only depend on the character of the information, but also on the specificities and circumstances of the contract.

Article 6.1 refers strictly to article 5.1 (c) and entitles consumers not to pay any additional charges if information on the latter has not been made available prior to the conclusion of the contract. This is disproportionate in cases where those additional charges were caused by circumstances that were not foreseeable at the time when the contract was concluded.

Paragraph 1 of article 6 must therefore deleted or at least modified as follows:

Article 6

Failure to provide information

1. If the trader has not complied with the information requirements on additional charges as referred to in Article 5.1(c), the consumer shall not pay these additional charges "**unless the additional charges were not foreseeable at the time when the information was to be provided."**

Article 9 on Information requirements for distance and off-premises contracts

Article 9 should be amended so that it provides that as in article 5 the trader can refrain from providing the consumer with the information in this article if this information is already apparent from the context. For some contracts concluded over the internet the information referred to in article 9 which refers also to article 5 will be superfluous and/or apparent from the context.

It must be also clarified at what moment of the contractual relation (prior to the conclusion of the contract, after the conclusion of the contract or provided in the content of the contract) the information referred to in article 9(b) to (f) should be given or made available to the consumer.

Article 12 on Length and starting point of the withdrawal period

Although a single EU withdrawal period might not suit adequately the great variety of goods and services covered by the directive, we would be prepared to support the proposed 14-day withdrawal period. However, this article should clearly indicate when the withdrawal period begins in the case of a distance contract having as its object both goods and services (so-called mixed-purpose contracts).

Article 16 on Obligations of the trader in case of withdrawal

According to article 16.1, the trader must reimburse any payment received from the consumer within thirty days from the day on which he receives the communication of withdrawal from the consumer.

It is not clear which payments or sums are covered by the provision. Particularly, situations where consumers explicitly ask for express or special delivery of the goods and/or product installation at home are not well taken into account. In these cases costs are often higher and it is therefore inappropriate to require traders to pay back the additional price difference between express and "standard" delivery, and for the installation.

An amendment is necessary to provide that traders do not to have to reimburse payments received to cover costs for specifically requested product installation and supplements for special delivery modes.

Article 17 on Obligations of the consumer in case of withdrawal

Article 12.3 on the length of the withdrawal period provides that the deadline of the withdrawal period is met if the communication concerning exercise of the withdrawal right is sent by the consumer within the 14-day withdrawal period. In this case and according to article 17 the consumer must return the goods within 14 days from the day on which he communicates his withdrawal to the trader. This may mean in certain cases that the consumer can be in possession of the good for around 28 days (14 days to communicate withdrawal plus 14 extra days to return the goods). This is disproportionate and too burdensome on the trader.

An amendment should be introduced in article 17 providing that if the consumer wishes to withdraw he should be obliged to return the goods to the trader within the 14-day withdrawal period irrespective of the day within that period on which the consumer communicates to the trader his wish to exercise the withdrawal right.

In addition, the consumer during the time of possession of the good and during the withdrawal period should be obliged to treat the good with due care and due diligence and avoid making the normal use that a full owner of the good would do.

According to article 19.1(a) the right of withdrawal does not apply to distance contracts on services where performance has begun, with the consumer's prior consent, before the end of the 14-day period. Article 17.2 stipulates that for service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed during the withdrawal period.

The combination of these two articles is disproportionate on the trader. For instance, if the consumer wants to withdraw from a mixed-purpose contract having as its object both the possession of a mobile telephone and a telephone subscription. If the consumer has used the telephone during the withdrawal period, the consumer should be obliged to pay for this service. Article 19.1(a) and article 17.2 should be revised to address those situations.

Article 19 on Exceptions from the right of withdrawal

According to article 19.1(a) the right of withdrawal does not apply to distance contracts concerning services where performance has begun, with the consumer's prior express consent, before the expiration of the 14-day period. This exception should also apply to services performed according to a mixed purpose contract having as its object both goods and services. The article should be revised in this respect.

It is not clear how the requirement for the consumer's prior express consent in article 19.1(a) is to be met. It should be made clear in the relevant recital that this does not mean that a compulsory written consent is required.

Regarding article 19.2 (b), we believe that this article should be amended in order to cover all contracts for which the consumer has requested the immediate performance of the contract by the trader, and not only contracts made in order to "respond to an immediate emergency" as provided in the proposal.

Secondly, article 19.2(c) should be amended in order to cover not only situations where the consumer by "means of distance communication" has requested the trader to visit his home, but also situations where the consumer has made such a request by other means, e.g. a request made on the traders business premises with the simultaneous presence of the trader and the consumer.

Article 22 on 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.

Article 26 on Remedies for lack of conformity

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 proposal says that 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. This issue is extremely important in the cases of high-value goods that must be resold at a substantial discount after being returned.

In 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 extremely 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 urge 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. It is up to the enforcer or the judge to assess the circumstances and the merits of the case in question.

Finally, we believe that, in the event of a rescission of the contract, it is necessary to take into account, when calculating the indemnity to be paid to the consumer, the impairment of the property due to the use of such property by the consumer.

Article 27 on 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.

BUSINESSEUROPE strongly opposes an open-ended right to damages as proposed in article 27.2 and asks for its deletion. These matters should be decided at national level.

It is unacceptable 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.

Article 28 on Time limits and burden of proof

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, suspension of the ongoing existing period that resulted from the sales agreement.

Article 29 on Commercial guarantees

As a matter of 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.

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 create unnecessary burden on the trader.

BUSINESSEUROPE supports the status quo which 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.

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 supplier should decide whether he is in a position to offer such guarantees and freedom to contract should be fully respected. It should be up to the producer to decide whether or not the guarantee is transferable.

Article 32 on General principles

Article 32 provides the principles to be considered when assessing contract terms which are not included in Annex II or III of the proposal. It is important to recall that according to existing Community law, neither terms related to the subject matter of the contract nor to the adequacy of the price and remuneration regarding the good or service can be subject to the unfairness assessment.

In this regard, article 32.3 is unclear. It may be understood as if the assessment of the unfairness of a contractual clause, while it does not cover the adequacy of the remuneration provided for in respect of the trader's principal obligation; it would cover the remuneration of incidental services/obligations. This interpretation would not be acceptable and departs from article 4.2 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts that provides that:

"Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language. "

We therefore believe article 32.3 should be clarified and amended accordingly to provide that both types of remuneration are excluded from the assessment of unfairness as provided in the above-mentioned article 4.

Article 39 on Review of the terms in Annexes II and III

In principle, we also support full harmonisation concerning the directive's provisions on unfair contract terms. However, it is unclear how the proposal would work in practice and in particular what effects it will have on national legal orders including existing case law.

We strongly support the Member States' duty to notify to the Commission new unfair terms provided for in article 39.1. In addition and in order to ensure legal certainty and transparency, BUSINESSEUROPE asks for creation of a EU database to serve as a public platform providing information on application of these provisions by the competent national authorities.

As regards article 39.2, BUSINESSEUROPE questions the use of the "Comitology procedure" to revise the content of the lists of contract terms in Annexes II and III of the directive. The content of those lists are of utmost importance and cannot be regarded as non-essential elements of the directive and therefore apt for Comitology.

BUSINESSEUROPE is of the view that any changes to these lists of terms should be made through the ordinary legislative procedure involving the EU legislators and not through Comitology. In any event, representative stakeholders should be consulted before amendments to Annexes II and III are made and the prerogatives on better regulation, particularly regarding impact assessment, should apply for these modifications.

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