

EUROPEAN BUSINESS ASSESSMENT AND PRIORITIES FOR THE ADOPTION OF A DIRECTIVE ON CONSUMER RIGHTS

Brussels, 24 February 2011

The business community is highly concerned about the vote of the European Parliament expected in March. The adoption of a directive on consumer rights (CRD) is key to creating a more uniform regulatory framework for business-to-consumer (B2C) contracts and improving cross-border trade.

The European Commission has submitted a proposal for a directive on consumer rights with the intention that it would level the internal market playing field and would enhance consumers' rights. These objectives were broadly respected in the Council agreement of January. However, the Legal Affairs and the Internal Market & Consumer Protection Committees votes jeopardise them.

The upcoming Plenary vote constitutes an opportunity for the European Parliament to improve the internal market environment for consumers and businesses alike.

We therefore urge the European Parliament to support the following top four priorities:

1. Focus efforts on full harmonisation and refrain from adopting any minimum harmonisation provisions. We urge you to reject articles 4.1, 4.1a, 5.3, 12.4 and 13.1a as currently worded in the IMCO report.
2. Carve out chapters IV and V which now contradict the initial purpose of reducing legal fragmentation in the internal market. Even with a reduced scope (limited to distance and off-premises contracts), this directive will bring down important barriers to trade across borders and will further develop the single market.
3. Avoid adding information requirements for on-premises contracts by deleting articles 5 and 6.
4. We request amendment of article 2.8 to exclude solicited visits for off-premises contracts of the scope of application of the Directive

To help you reach your decision, please find attached a further detailed analysis of the impact of the Council and the Parliament approach.

PROVISIONS	EP COMMITTEES' REPORT	COUNCIL APPROACH	ASSESSMENT
Chapter I			
Fully harmonised set of definitions	Yes	Yes	Positive
Definition of off-premises contract	No distinction between solicited and unsolicited visits (art 2.8)	Idem	Both versions are negative because they are still too burdensome for SMEs.
Definition of distance contracts	Introduces requirement “organised distance sales or service-provision scheme” (art 2.6)	Introduces the requirement that the exclusive use of means of distance communication is “up to and including the time at which the contract is concluded”.	Positive
Email and durable medium	Included in the definition of durable medium under certain criteria (art 2.10 and recital 16)	Idem	Positive
Digital content	Definition of good includes downloaded digital content (art 2.4 and recital 11d)	Downloaded digital content was left out (art 10.d and art 19.1.j)	The IMCO version is negative because it does not wait for the results of a European Commission study expected in June. Council position is positive and forward looking
Scope	On premises, distance and off-premises	Distance and off-premises	
Financial services	Out of the scope except for unfair contractual terms (art 3.2b)	Out of the scope (art 3.1.a&b)	Positive
Thresholds for off-premises contracts	Member States may define lower value for the exclusion of off-premises contracts below 40€ (art.3.5)	Threshold fixed at 60€. Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive (art 4a.2)	The IMCO version is negative because it proposes minimum harmonisation. The Council approach is more positive , however, the proposed threshold is too low.

Chapter II			
General information requirements	Member States may adopt or maintain additional pre-contractual information requirements (art 5.3)	Excluded	IMCO version is negative because it proposes a too extensive list of information requirements under minimum harmonisation
Chapter III			
Information requirements	Fully harmonised rules (art 9)	Fully harmonised rules (art 9)	The level of harmonisation is positive. However, the list is too extensive and should be reduced.
Extra requirements for distance contracts	Service contracts concluded on the phone require the consumer to send written confirmation (art 11.1a. (a)&(c))	Member States may introduce or maintain provisions of national legislation providing that the trader, when he has taken the initiative ('cold calling') for the contract, has to confirm the offer to the consumer who is committed only once he has signed the offer or sent his written consent (minimum harmonisation) (art 11.3.a)	IMCO version is negative because it proposes a broader scope that is unrealistic. Art 11.1a (c) is particularly burdensome to consumers and businesses.
Length withdrawal period	Fully harmonised on 14 days (art 12.1 to 3)	Fully harmonised on 14 days (art 12.1 to 3)	The level of harmonisation is positive. This article combined with art 16 and 17 may nevertheless lead to unbalanced situation.
Ban of payment for off-premises contracts	Member States may maintain existing legislation prohibiting the trader from collecting the payment during a given period after the conclusion of the contract (art 12.4)	In the case of off-premises contracts, Member States may introduce or maintain in their national legislation an interdiction of payment during the withdrawal period (Article 12.4)	Both are negative because they introduce minimum harmonisation and because payment bans may create difficulties for businesses and in particular SMEs.
Length of withdrawal period in case of omission of information by trader	1 year period but Member States may maintain longer period - minimum harmonisation (art 13).	6 month period with withdrawal period expiring 14 days from the day where the consumer receives the information (full harmonisation) (art 13).	IMCO version is negative because it introduces minimum harmonisation while Council follows a preferable fully harmonisation approach.

Obligations of trader in case of withdrawal	Trader shall reimburse any payment received from the consumer no later than 14 days from the day on which he is informed of the consumer's decision to withdraw (art 16.1)	Trader shall reimburse within 14 days and the trader may withhold the reimbursement until he has received the goods back (art 16.1 & 16.2)	Negative because 14 days is too short. The Council approach is preferable because the trader has a better guarantee to receive the goods back.
Cost of returning the goods after exercise of right of withdrawal	Consumer does not pay if the value of the good is more than 40€ (art 17.1)	In principle the consumer pays (art 17.1)	IMCO version is negative because the proposed threshold of 40€ is too low. Furthermore the indexation of this must not be left to Member States. Council approach is preferable
Some exceptions from withdrawal period	Services where performance has begun under express consent of consumer, good made to the consumer specifications, foodstuff and beverages (art 19)	Goods made to the consumer specifications, downloaded service contract, alcoholic beverages, goods that deteriorate or expire rapidly (art 19)	Positive
Payment of services during the withdrawal period	If consumer consents to provision of the service he loses his right of withdrawal (art 19.1.a)	Consumer is obliged to pay for services he consented (art 17.3)	Positive
Chapter IV – to be deleted			
Delivery	If nothing agreed, trader shall deliver within 30 days. No automatic termination of the contract. Trader must reimburse within 7 days if contract is terminated (art 22)	Trader shall deliver without undue delay. No automatic termination of the contract. National remedies can be applicable. (art 22)	IMCO version is negative because it falls under minimum harmonisation. Council version is preferable
Termination of contract in case of late deliver (reimbursement period for trader)	Trader has 7 days to reimburse all sums paid under the contract (art 22.2a)(minimum harmonisation)	Excluded	IMCO version is negative because of the lack of coherence with other time frames. Also, delay too short for SMEs
Passing of risk	Material possession criterion (art 23)	Same (art 23)	IMCO version is negative because it introduces minimum harmonisation (see, art 4.1). Council version is preferable

Duration of contracts	Contracts concluded between consumers and traders shall not stipulate an initial commitment period of more than 12 months (art 23a)	Excluded	The IMCO version is negative because such time limit restricts flexibility and better trade off for the consumers and businesses
Conformity of contract	Definition under minimum harmonisation (art 24 read together with article 4.1)	Excluded	IMCO version is negative because it introduces minimum harmonisation
Choice of remedies in case of non conformity	Choice of replacement or repair for consumer in case of non-conformity. No right to terminate contract if lack of conformity is minor. Member States may adopt or maintain the possibility for the consumer to terminate the contract and receive a refund or other remedy in the event of lack of conformity (art 26)	Excluded	IMCO version is negative because it introduces minimum harmonisation thanks to article 4.1.
Time limits and burden of proof	2 years guarantee period 6 months burden of proof for traders (art 28)	Excluded	IMCO version is negative because it introduces minimum harmonisation
Chapter V – to be deleted			
General unfairness clause	Fully harmonised (art 32)	Excluded	IMCO version is positive
Mutual evaluation clause and reporting by the Commission	Obligations to the Member States to explain why their legislative divergences are appropriate (art 46.a)	Excluded	IMCO version is positive
Unfair and presumed unfair terms	Member States may list additional unfair or presumed unfair terms. (art 34.2 & 35.2)	Excluded	IMCO version (carried from JURI report) is negative because it introduces minimum harmonisation