

Position Paper

UEAPME¹ position on the draft report of the rapporteur for a Directive on Consumer Rights COD/2008/0196 in the Internal Market and Consumer Rights Committee of the European Parliament

General remarks on the new structure of the draft report,

UEAPME, the European Association of Craft, Small and Medium-sized Enterprises welcomes the draft report of the rapporteur on the Proposal for a Directive on Consumer Rights. As the draft report foresees significant changes to the original proposal of the European Commission UEAPME sees the necessity to reflect on it in this separate position paper.

Although, UEAPME has been supporting the targeted full harmonisation approach of the whole future directive from the very beginning, we have the impression in this long lasting procedure that some Member States are quite reluctant to this idea. Amongst the different reasons are the various legal traditions of the Member States which makes nowadays the introduction of such an ambitious fully harmonised approach at European level in this issue difficult. UEAPME is aware that the full harmonisation, even targeted, is difficult to achieve in certain number of areas.

After having analysed the ongoing discussion in the European Institutions, UEAPME has proposed with other representative stakeholders of the European business community, to limit the full harmonisation to those aspects where an agreement can be reached. Further to those aspects where a full harmonisation is not possible the current legal framework should be kept.

UEAPME regrets that the draft report has not followed this approach, although according to the structure of it, it would be the logical consequence. The draft report fully harmonise only the common definitions, the aspects of the distance and off-premises contracts, delivery and the passing of risk. Those provisions in chapter IV which remain at minimum harmonisation level has been taken over in significant part from the current legal framework. We consider this structure of the draft report as more than confusing and the problem of the lack of legal certainty will not be solved and also legal fragmentation will be not removed in this way.

This is why we call for more clarity in order to avoid the creation of a directive which does not fulfil the aim of the simplification in this topic at all and establish a problematic composition of provisions.

¹ UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

UEAPME has the impression that the comprehension of the rapporteur does not differ too much from our position. The only difference is that the draft report is not courageous enough to admit that this directive should be limited only to those aspects where a full harmonisation is possible in the current stage of the Single Market to avoid giving the impression that this ambitious project tends to fail.

Because of this fear the draft report prefers to follow a mixed approach and limiting in this way the scope of the fully targeted harmonised approach to provisions related to distance and off-premises contracts, delivery and passing of risk.

This approach will clearly not deliver for the Single Market the necessary added value, but could be considered as a small step forward into the right direction.

With this respect we also would like to stress that in a case as this, where a draft report of the European Parliament proposing a completely new approach is so divergent from the original proposal of the European Commission, a new impact assessment has to be made, including a SME test, in order to have an appropriate overview on the final impact and outcome, especially for SMEs.

Nevertheless UEAPME could agree on the approach of the fully targeted harmonisation concerning the definitions, distance and off-premises contracts, delivery and passing of risk although we still consider that there is lack of balance and the interest of the small- and medium sized enterprises, particularly services and craft works has to be more taken into account.

We would like to urge the European Parliament, again, to take the practical reality of the everyday business life into account during the legislative process. The aim has to be the introduction of a balanced system which provides for both sides, either for the consumer and either for the small and medium-sized enterprises fair rights and obligations. This directive must create a level playing field, where the principle of think small first is taken into account.

UEAPME also would like to highlight the often forgotten fact that small and medium-sized enterprises live from their reputation. Especially, it is in the interest of the very small enterprises to satisfy their customers with whom they are in contact on a daily basis. This is also the reason why we cannot say in these kinds of consumer-trader relations that the consumer is in the weaker position. Moreover it is often the case that our members are in the weaker position, as in order to keep the good relation to the customer – which is from particular importance in the days of the economical crises – instead of sticking to their own rights, the trader is willing to fulfil extra services - which are even not part of the contract – according to the wishes of the customer. Against a well educated consumer, who exactly knows how to use his rights a small business does not have any chance as the trader often does not have the human and financial resources for starting a discussion with the consumer. Instead of this the trader tries to fulfil the wishes of the consumer without making a scrutiny on the legitimacy of the supposed demands of the consumer. Small enterprises have been and still are the natural alliance of the consumers in their concern for quality and service.

Specific remarks,

1) General wording and approach of the directive

With respect of the general wording in the recitals and the relation between trader and consumer we take reference on the aforementioned. Although we can see a slight improvement of the wording of recital 14 of the draft report to the original proposal of the European Commission, it still does not provide a fair picturing of SMEs². Furthermore we would like to point out that especially in situations where the off-premises contract and the related visit of the trader is taking place on the request of the consumer we cannot speak about any psychological “pressure”.

UEAPME regrets that the draft report follows the proposal of the Commission and not introducing a clear distinction between solicited and unsolicited visits.

2) Article 2, common definitions

2.1. Definition of distance contract, article 2(6)

UEAPME welcomes the draft reports proposal in order to keep the current definition for distance contracts. As already mentioned many times in our positions during the long procedure especially in respect of the activities of craftsmen and retailers which could lead to distance selling, nowadays the using of distance communication is only an additional necessity but it should not lead to the conclusion that a contract is considered as a distance contract right away. After taking measurements in the consumer’s home, sending the offer per distance communication and receiving the confirmation in the same way would mean immediately that the contract is considered as a distance contract. Not to mention the fact that many of the small companies use distance communication for carrying out selling only occasionally. The proposed definition of the Commission would change the profile of many SMEs which would avoid using distance communication. This again would have a negative effect for the consumers who will not receive the service on the fastest way.

The draft report takes in this stage practical reality of businesses to a certain extent into account. But especially for reasons of legal certainty we consider it necessary to include in the definition also the aspect that exclusive use is made of one or more means of distance communication **up to and including the moment at which the contract is concluded.**

² „(...) consumers are temporarily in a special situation which is different from the situation in a shop, e.g. from a psychological point of view and as regards the scope for comparing goods and prices, no matter whether they have solicited the trader’s visit or not”, recital 14 draft report of the EP on Consumer Rights, 2010

2.2. Definition of off-premises contract, article 2(8)

UEAPME regrets that there is no improvement in the draft report concerning the definition of off-premises contracts. The draft report similar to the proposal of the European Commission has not taken the elementary distinction between “solicited” and “unsolicited” visit into account. The new directive should create legal certainty for both parties and both parties have to consider that their interests are represented equally. In principle consumer protection should take place under those circumstances when it is needed. There is a fundamental difference whether provisions for consumer are established for any situation or for those situations the consumer is in need of protection. The situations and places where consumers need to be protected concerning off-premises contracts should be defined more precise, which is the case in the current legal framework³. UEAPME cannot support the proposed definition of the draft report. Furthermore the definition of off-premises contracts should be limited to those contracts to which the disclosure has been given outside of the premises of the trader.

The proposed definition of the draft report is too vague and extended in an inconsiderate way. For this reason UEAPME proposes the following definition, which covers the sense of the off-premises contracts and take the everyday reality of the business life for both, consumer and trader into account:

‘off-premises contract’ means:

a contract between the trader and the consumer in respect of which the consumer submit his contractual statement with the simultaneous physical presence of the trader and the consumer

- (a) in a place which is not a business premises of the trader unless the consumer himself has established the business contact with the trader or his agent for the purpose of making the contract, or*
- (b) on premises where the trader or a third party working with him has conveyed the consumer, in the course of a direct marketing trip, excursion, or by personally and individually addressing the consumer on the street, to the premises of the trader.*

3) Chapter II, consumer information and withdrawal right for distance and off-premises contracts, article 5 information requirements for distance and off-premises contracts

Although the draft report is limiting the scope of the information requirements only to distance and off-premises contracts, it proposes little changes in the amount of information that has to be provided. So long there is no limitation of the too broad definition of off-premises contracts UEAPME urges to limit the amount of the information requirements in article 5 of the draft report in order to bring in line with the everyday reality of business life.

³ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, article 1.1

We wonder if those extensive information requirements of article 5 are really a priority as they constitute in addition a high administrative burden for the service provider.

In general we would like to underline that consumer protection measures have to be scrutinized for the angle of a “business friendly environment”. In the case of legal measures in the consumer protection field the majority of consumers as well as the fundamental principles of private law (e.g. “pacta sunt servanda”) have to be considered better. The concessions of the right of withdrawal or cancellation are something taking place too frivolously. The possibility to withdraw from a validly concluded contract without any reason burdens the business life and with it entrepreneurial action. They almost tempt the consumer to conclude contracts without due consideration. Rights of withdrawal should only be granted in cases with a special justification is present. The concession of withdrawal rights should be dealt with reluctance and sense of proportion.

4) Formal rules for compliance with the information requirements for off-premises contracts, article 10

Although the draft report makes some changes concerning the formal requirements of off-premises contracts and introduces an exemption in case it is reasonable because of the “*the nature of the contract*” UEAPME considers this as too vague. This wording provides no legal certainty for SMEs. If there is no concrete provision regarding exemptions from the formal rules the danger to breach the form requirements is too high for SMEs and a reasonable trader would not make this risk.

We urge for more flexibility regarding the formal rules for compliance with the information requirements for off-premises contracts which takes the everyday reality into account and don't establish situations which are too burdensome for both parts. Especially in the craft sector, many contracts are not concluded in written form, because verbal agreements – also expressing a certain level of mutual trust and respectability of contractual parties – are deemed to be more appropriate. Only complex contracts and those bearing high economic risk are fixed in written form. The introduction of a formal requirement will change this culture based on mutual trust against one of potential distrust and would put more burdens on both parties.

5) Length and starting point of the withdrawal period, article 12; Omission of information on the right of withdrawal, article 13; Reimbursement by the trader in case of withdrawal, article 16; Obligation of the consumer to return goods in the case of withdrawal, article 17

UEAPME deeply regrets that the draft report has not made the more than necessary changes concerning the length of the withdrawal period and the related length of the obligation for sending the good back. In all the consumer has still 28 days to keep the good before returning it back after having used his withdrawal right.

Furthermore the draft report makes the situation in article 13 even worse for SMEs, as it would change the omission of information on the right of withdrawal from three months to one year.

Article 16 put SMEs in an even more difficult and harmful situation in a way that the trader shall reimburse – according to the draft report – any payments within fourteen days from the day on which receives the communication of withdrawal. In this stage UEAPME calls for appropriate changes and urges the European Parliament to make the SME test in order to establish a balanced system. It is more than difficult for small enterprises to return the money back within such a short time, after the consumer kept the good for 28 days. During that time the trader already invested this money and cannot know whether the consumer will use his right of withdrawal during the inappropriate long withdrawal period. If the European Parliament will not be able to establish a balance approach concerning this significant point it will case the end of many SMEs which should be avoided in the time of the crises.

6) Exceptions from the right of withdrawal, article 19

UEAPME considers the added changes in article 19 1.(ca), (cb) and (cc) problematic.

With respect of 19.1 ca it is not understandable why the exemption is only valid concerning food, beverages or hygienically sensitive goods only when the consumer has already opened the packaging or sealing. For example if the packaging of the milk or the strawberry has not been opened but the consumer hasn't stored it as it is required he can make use of the right of withdrawal. This again shows that during the drafting procedure the everyday reality of the business life is often forgotten. For foodstuffs, beverages or other hygienically sensitive goods should be established a general exception form the right of withdrawal.

Concerning 19.1 cb and cc we have our concerns as well. In cases like immediate emergency or specific request of the consumer to the trader to visit his home the trader has to provide, before starting with the additional service, a separate document which makes clear the consumer's disclaimer on the right of withdrawal also regarding the additional services. Further in these kinds of situations it is often the case that everything has to be settled as quickly as possible on request of the consumer and the trader simply does not have the possibility to provide all the compulsory information requirements. In this case if he would forget under pressure only one of them, irrespective of the kind and relevance of this information, the withdrawal period is prolonged immediately up to one year. This is again not in line with the reality of everyday business life and would not establish a balanced situation. These two articles would lead to the approach that traders would oppose to give any additional services in case of immediate emergencies and specifically requested home visits by the consumer according to 19.1. cb and ca. This should be not the aim of the future directive.

7) Remarks on chapter IV

The draft report keeps the European Commission's proposal for the scope of chapter IV. According to this within the scope are also those kinds of sales contracts which have as subject matter the delivery of manufactured goods. In these cases is the core issue a service, the manufacturing of the good and not the transmission of the right of possession. The new approach which the draft report is introducing on the delivery will not solve the problem. In the aforementioned cases is more than appropriate to extend the deadline for the delivery. UEAPME calls for the limitation of the scope of chapter IV only on those sales contracts which have not manufactured goods as subject.

UEAPME regrets that the draft report has not followed of the European Commission approach on article 26, the remedies for lack of conformity. It is from great importance for small firms to have the initial choice of remedies. The right to choose the remedies is definitely better placed with the trader, since he has the best knowledge of possibilities and costs related to each remedy. Nevertheless UEAPME welcomes the introduction of article 26.5.a which ensures that the consumer "*shall not be entitled to have sales contract rescinded if the lack of conformity is minor*".

UEAPME strongly opposes the proposed article 27.1a. This provides that "*the consumer shall also be refunded by the trader, to a reasonable extent, the cost of remedying the lack of conformity himself*". It should be assured that the priority of repair cannot be undermined by the consumer having the repair done by third parties and afterwards asking the entrepreneur who is obliged to remedy to pay for the costs. It has to be made clear that, if the entrepreneur has no opportunity to repair because the consumer has made an execution by substitution without authorization, the latter will lose all his rights to remedy and cannot claim the costs of the execution by substitution in particular.

UEAPME has already outlined the problem of right of redress in the stage of the public consultation. Although the draft report has made a step forward since it has introduced in article 27a the right of recourse it has to be improved. The question of the right of redress of the final seller, (especially small) retailers and installers has to be included in a directive on a way establishing more legal certainty. The current article 4 of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees regulate this problem but does not does not fulfil the objective.

UEAPME supports the opinion⁴ of the ESC insofar, as *“issues regarding legal and commercial guarantee arrangements and after-sales service should not be viewed in isolation as consumer problems alone, but considered part of the chain manufacturer-wholesaler-retailer. Greater attention must therefore be paid to relationships within the marketing chain, in particular, the unsatisfactory contractual or de facto situation in which retailers often find themselves with regard t their suppliers. The options open to retailers for gaining redress from the person in the marketing chain responsible for a defect is generally a crucial consideration in how far they are willing to go to find a solution acceptable to their customers.”*

Therefore it is necessary to introduce such a regulation in any case. Another possible solution could be the introduction of the direct liability of the producer into the proposal.

UEAPME calls also with respect to article 28 and related to recital 41 for more balance. According to the draft report provision the consumer *“should not compensative the trader for the use of the defective good”*. This combined with the two years liability period of article 28 can lead to several problems. In case of cars it would lead to the situation that the consumer can drive the car for 1, 5 year, return it to the trader because of non-conformity and the trader cannot ask for any compensation of the use. Here is more proportionality needed.

Further we make reference to the above mentioned in the general remarks. UEAPME does not see the added value to include chapter IV into the directive, expect of the aspects of the delivery and the passing of risk which should be fully harmonised. UEAPME calls for the deletion of these two chapters in order to keep the status quo of the current legal framework on these provisions. In this way the problems related to the different traditions of the remedies would not exist.

⁴ See: Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive on the sale of consumer goods and guarantees', more especially point 2.6. *Official Journal C 066, 03/03/1997 P. 0005*
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51996AC1387:EN:HTML>

8) Remarks on Chapter V, unfair terms, black and grey lists

UEAPME considers the solution of the draft report for the black and grey listed unfair terms as feasible. The proposal of the draft report has taken more the different legal tradition and practice of the Member States more into account than the European Commission's proposal. For this reason UEAPME encourages the legislator to follow this way.

Closing remarks,

UEAPME advocates for a fair and balanced consumer protection at European level. The future directive has to give more legal certainty and reduce the barriers in European businesses. This is the reason why at least rules with single market aspects, distance and off-premises contracts have to be fully harmonised at on balanced way. With respect to other issues where a full harmonisation is not possible the well-functioning current legal framework should continue to apply. This would provide a clear directive and situation for both parties.

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