



UNION EUROPEENNE DE L'ARTISANAT ET DES PETITES ET MOYENNES ENTREPRISES
EUROPÄISCHE UNION DES HANDWERKS UND DER KLEIN- UND MITTELBETRIEBE
EUROPEAN ASSOCIATION OF CRAFT, SMALL AND MEDIUM-SIZED ENTERPRISES
UNIONE EUROPEA DELL' ARTIGIANATO E DELLE PICCOLE E MEDIE IMPRESE

UEAPME Position on the proposal for a Directive on Consumer Rights COD/2008/0196

General remarks

UEAPME, the European Association of Craft, Small and Medium-sized Enterprises, welcomes the European Commission's proposal for a Directive on Consumer Rights introduced on 8th October 2008. In principle, UEAPME supports the targeted full harmonisation approach of the proposal in the field of Consumer Contractual Rights.

UEAPME agrees on the need to promote one transparent directive on consumer rights against the four different directives currently existing (Unfair contract terms, Sales and Guarantees, Distance Selling and Doorstep Selling). This approach is in principle in favour of small and medium-sized enterprises (SMEs) as well as in favour of consumers. A full targeted harmonisation in the field of Consumer Contractual Rights can support the business activities of SMEs especially regarding traders selling cross-border. UEAPME has been from the beginning in favour of a full harmonisation in respect of the aforementioned directives, complemented with a mutual recognition clause on issues not fully harmonised.

Furthermore, UEAPME is convinced that a targeted harmonisation will increase legal certainty within the single market and would ensure that SMEs and consumers can make more use of it.

However, UEAPME regrets that the negative impact on the competitiveness of SMEs, which are acting mainly on regional or local level, has been completely ignored in the proposal. The impact assessment carried out focused excessively on cross-border activities.

UEAPME would like to stress that European legislation must consider the practical reality of businesses when drafting rules, in order to avoid that normal business life is unnecessarily hampered or made de facto impossible. This proposal neglects completely the main principle of the Small Business Act adopted by the Commission and endorsed by the European Council.

In any case the European and national authorities – in close cooperation with the representative intermediary organisations of craft and SMEs – will have to provide in time information, assistance and accompany these enterprises by the implementation of this new legislation.

Specific remarks

1) General wording and approach of the directive

There are several points in the proposal which must be developed in a more SME friendly way. In general SMEs are pictured in a very negative way. It is unacceptable that the Directive is using sentences such as recital 14 "*consumers are under psychological pressure no matter whether they have solicited that the trader's visit or not.*" or recital 31 "*(...) for which consumers may be subject to high pressure selling at their homes*". The directive should avoid giving a bad image of SMEs. Furthermore it should avoid creating the impression, through the words mentioned above, that traders put pressure upon consumers to earn money at any price. We would like to point out that the main assumption of the proposal still considers that the consumer is always in a weaker position than the trader or, in other words, that the relation between the consumer and the seller is fundamentally unequal, which is not the case. Moreover, often a trader is in a weaker position than a consumer.

It is understandable that legal certainty should be established and developed through the directive but therefore it is unacceptable to use the wording mentioned above. The proposal should lead to the introduction of a rule on general duty to act in accordance with the principle of good faith and fair dealing which should apply to both professionals and consumers. Small enterprises have been and still are the natural alliance of the consumers in their concern for quality and service.

2) Established common definitions, article 2

UEAPME warmly welcomes the establishment of common definitions. We outlined already in the public consultation that we are satisfied with an alignment made of the existing definitions in the acquis, without changing their scope especially the definition of "*consumer and trader*". **However, we are very disappointed about the fact that the scope of "*distance contract*" was changed and the proposal does not foresee anymore "*the presence of an organised distance selling scheme run by the trade up to the conclusion of the contract*".** It is inappropriate to put traders under such a measure, meaning in practice that all contracts concluded through distance communication will be considered as distance contracts. In many cases 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. Many of the small companies use distance communication for carrying out selling only occasionally. The proposed new definition would change the profile of many SMEs .

3) Scope of off-premises contracts, article 2

It is unacceptable to expand the scope of off-premises contracts twice, firstly through a general definition as concluded in article 2 paragraph 8a) and b) and secondly by not making any distinction in the proposal between "solicited" and "unsolicited" visit by the consumer. The current Council Directive 85/577/EEC makes an exclusive list of contracts negotiated away from business premises to which the directive can apply and of the cases in which the directive does not apply. The introduction of a more precise and detailed definition concerning "*off-premises contracts*" would lead to more certainty.

The question of solicited and unsolicited visit of the trader by the consumer is only mentioned in the case of article 19 paragraph 2c). But only in a specific case "*the consumer has specifically requested the trader, by means of distance communication, to visit his home for the purpose of repairing or performing maintenance upon his property*". The trader can be requested by the consumer also

personally, not only by means of distance communication. It is not reasonable to make such a difference.

The new review has not taken this elementary distinction into account and should avoid only focusing on the consumers without thinking on the effects of such unbalanced regulation. This can be said in general to the structure of the proposal too. The future directive has to establish a new regime but this should not mean that consumers get benefits at the expenses of traders. Of course the other way must be equally avoided. The new directive should create legal certainty **for both parties** and both parties have to consider that their interests are represented equally. Unfortunately this is not at all the case in the above mentioned situation. **Therefore UEAPME calls for a more detailed and precise definition with the introduction of the distinction between solicited and unsolicited visit by the consumer.**

4) Formal requirements for off-premises contracts, article 10

In **article 10 paragraph 2** the Commission proposes that agreements concluded off the business premises shall only be valid, if the consumer signs or receives an order confirmation on durable medium. **This is unacceptable and against the basic principle of contractual right that an oral agreement is just as legally valid as a written agreement.** This paragraph would make the majority of agreements concluded in everyday business life void even though recital 15 explains that market stalls and fair stands should be treated as business premises. At least this exemption should be mentioned in the article to avoid legal uncertainty.

In addition, this proposed regulation causes problems with regard to service contracts if the service has been delivered but the contract is afterwards regarded void due to formalities. How can the service be returned? At this point UEAPME would like to make reference to and underlines again that the **practical reality** of businesses and situations between consumers and traders have to be taken into consideration while drafting rules. At the moment an exception in respect of service contracts is only mentioned concerning distance contracts in article 19 paragraph 1a). Therefore it is essential to make clear regulation into the proposal with regard to the service contract issues.

5) The length and starting point of withdrawal, article 12

The Commission proposes in article 12 of the Directive a withdrawal period of 14 days. UEAPME and their members considers this period as disproportionately long, as it was already articulated in the public consultation. **The current regulation period of seven days according Directive 97/7/EC distance contracts and Council Directive 85/577/EEC contracts negotiated away from business premises should not be revised.** A withdrawal period of 14 days would put too much demand on traders, especially on small enterprises, for example with respect to accounting processing, stock management, follow up of invoicing and the collection of outstanding payments. This would have in addition a very negative effect on the market and would not support the aim of the Commission to promote cross-border activities. It is also not in line with the Small Business Act as it imposes a considerable increase of administrative burdens for SMEs and brings economic insecurity for small companies.

Furthermore, the obligation to inform of the withdrawal period should not automatically cause the starting point of the withdrawal period to be postponed, when the agreement is concluded in an oral manner. This could be case in the everyday life of small enterprise without the consumer being subject to aggressive or improper marketing, as mentioned in point 4.

6) Right of withdrawal (article 12, 17) and the exceptions from the right of withdrawal (article 19)

According to article 12 paragraph 1, the proposed 14 days can be used to withdraw from a distance or off-premises contract, without giving any reasons. Due to the fact that the consumer does not have to give any reason for his withdrawal, the 14 days withdrawal period could lead to an irresponsible behaviour by the consumer. This brings to much uncertainty for SMEs especially due to the absence of reasons for the withdrawal.

Furthermore, according to article 17 paragraph 2 the directive ensures that *“for service contracts subject to a right of withdrawal, the consumer shall bear no costs for services performed, in full or in part, during the withdrawal period.”* Both proposed regulations cannot be introduced in this way. If these articles are not modified traders will not have any other possibilities than to wait until the end of the withdrawal period and to start with the performance of the services only after the expiration day. Although there is an exception in respect of distance contracts in article 19 paragraph 1 a) in the case of services where performance has begun, with the consumer's prior express consent, it will not solve the problem mentioned above.

The exceptions introduced in respect of off-premises contracts could bring more legal uncertainty due to the fact that neither the expression of *“immediate emergency”* in article 19 paragraph 2b) nor the wording *“repairing or performing maintenance upon his property”* is clarified. Concerning *“immediate emergency”* cases there could be any time actions which have to be undertaken in connection with the emergency but are not considered like emergency. For example in connection to an emergency water pipe burst also other things have to be replaced, which will be get broken in a short time, but at the moment their preparation cannot be considered as an *“immediate emergency”*. In most of the cases this additional reparations avoid extra costs and time which is in favour of the consumer.

Furthermore, paragraph 2a) and c) of article 19 introduce the use of exception only if the consumer used means of distance communication. In connection with the situation mentioned, especially in cases of article 19 paragraph 2c) the consumer visits already before the trader's premises and concludes already a contract concerning how to carry out the *“repairing and performing maintenance upon”*. This can be particularly the case with regards to craft enterprises. The regulation would lead to a change of attitude of traders namely that they will try to avoid personal contacts with the consumers because in the cases of article 19 paragraph 2a) and c) contracts concluded by means of distance communication have a more privileged position compared to business-premises contracts by which distance communication was not used. It also discriminate craftsmen and micro enterprises acting in a local basis. This trend should not be followed and supported by the European legislation.

7) Delivery, article 22

Article 22 paragraph 2 states *“Where the trader has failed to fulfil his obligations to deliver, the consumer shall be entitled to a refund of any sums paid within seven days from the date of delivery provided for in paragraph 1”*. As stated before the delay of the trader is considered as an essential breach of contract which gives the consumer a right to cancel the contract. Not in all cases where delay is more than 30 days (even though the parties have not agreed otherwise) can be said that the delay equals to essential breach of contract. The right to cancel the contract should be considered case by case. **This article is too radical in that respect and UEAPME calls for an amendment to a more flexible direction.**

8) Right of Redress

It is regrettable that the issue of the right of redress is not mentioned in the proposal. UEAPME has already outlined this problem in the stage of the public consultation. The question of the right of redress of the final seller, (especially small) retailers and installers has to be included in a directive which tries to establish 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 at least this problem even if it does not fulfil the objective.

UEAPME supports the opinion¹ of the ESC which is that *“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 UEAPME is on the opinion that a redrafted version of the current regulation must be in any case included in the proposal. Another possible solution could be the introduction of the direct liability of the producer into the proposal.

9) Amendments and review with regards to Annex II and Annex III of the directive

Doubts were expressed already in the previous stage of the legislation procedure in respect of the procedure introduced by the directive according to the amendments on review of Annexes II and III. First of all the regulation should be more clear and transparent concerning the structure of *“the Committee”* mentioned in article 40. There are no exact details who will participate in *“the Committee”*. Furthermore, according the proposal the introduction procedure of amendments and changes on Annexes II and III will be undertaken alone by the European Commission within the comitology procedure without involving the European Parliament.

As mentioned above, UEAPME welcomes the proposal and see also the needs for harmonising certain aspects of the consumer rights. This should be done in a way by the European legislation which doesn't establish more gaps between consumers and traders and take the practical every day life into account. Therefore it would be important to introduce a balanced directive which would ensure legal certainty for both, for the consumers but also for the traders.

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For more information on this position paper, please contact:

Dora Szentpaly-Kleis,

Adviser,

Legal Affairs

Rue Jacques de Lalaingstraat 4

B-1040 Brussels

Tel : + 32 2 230 7599

E-mail : [**d.szentpaly@ueapme.com**](mailto:d.szentpaly@ueapme.com)

¹ 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>