

Position Paper and amendments proposals

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

Executive summary

- UEAPME supports a targeted full harmonisation approach in order to achieve an added value in the field of the consumer rights within the Single Market.
- The targeted full harmonisation must take the interest of the small and medium-sized enterprises into account in order to avoid that the future directive will put more burdens on these enterprises.
- The proposal must introduce the concept of the “responsible consumer” and should raise the consumer education and knowledge instead of creating more and more complex rules and providing in this way consumer protection.
- The aim of the proposal should be to establish a well balanced legislation which respects the interest of consumers and entrepreneurs in an appropriate way in the field of the European consumer legislation.
- The Directive must take the practical reality of the everyday business life into account instead of introducing more bureaucratic requirements.

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](#).

General remarks on the proposal of the European Commission

UEAPME convinced that there is a need to promote one transparent directive on consumer rights against the four different directives (Unfair contract terms, Sales and Guarantees, Distance Selling and Doorstep Selling) currently existing in this field. Furthermore UEAPME has believed from the beginning of the procedure that a full targeted harmonisation in the field of Consumer Contractual Rights **can support fair competition and foster** business activities within the Single Market. 27 different systems in this field inhibit enterprises and consumers to make cross-border activities. Through the full harmonisation the barriers could be removed. Continuing the minimum harmonisation approach at European level would not give any added value in this field and would keep the existing fragmentation in the Single Market.

On the other hand we have to point out that according to the experiences UEAPME has made at European level and our member organisations have made at national level until this stage of the procedure the effects can be not only positive. If full harmonisation rules do not take the interest of SMEs in an appropriate way into account, a full harmonisation will put more burdens on small and medium-sized enterprises. The full harmonisation approach should not turn out into an overprotection of the consumers. **If the future directive will put too much extra burdens on SMEs the costs will be affiliated with unavoidable price increase.** This will have a negative outcome for the consumers at the end.

The European legislator should resist the temptation to "overengineer" legislation on consumer protection. Overly burdensome legislation will have three mayor negative effects:

- Additional burdens on companies due to overregulation are cost-intensive and will be considered in the pricing of goods and services, thus in the end imposed on the consumer.
- Complex legislation weights more heavily on small and medium-sized companies than on large-ones. Therefore, it will potentially crowd out those of the smallest businesses, not being able to comply with legal demands. In the long term, this leads to market concentration with adverse effects for competition and consumer satisfaction. Furthermore, complex legislation creates market-entry barriers for new companies.
- Consumer legislation is not an end in itself, but has to be weighed up against sometimes conflicting policy goals such as deregulation, in order to foster prosperity. In times of economic crises, it should be common sense not to increase burdens for the economy. Additionally, the "think small first" principle of the Small Business Act should be considered. Over 95 % of all SME transactions do not comprise any cross-border element. Thus, harmonisation in these cases does not give any advantages to SMEs.

Having said this UEAPME can advocate for a full harmonisation approach only under the condition that significant provisions (e.g. guarantees, definitions, withdrawal period, information requirements) will take the interest of SMEs into account. **The European legislation must consider the practical reality of businesses when drafting rules, in order to avoid that normal business life is unnecessary hampered or made de facto impossible.** The experiences show that the principle of the Small Business Act of the Commission, which was endorsed by the European Council as well, has been neglected sever times in the procedure. Especially, in times of economic crises, it should be common sense not to increase burdens for SMEs and not to forget that they are the backbone of the European economy. Furthermore a too complex and demanding legislation at European level for SMEs would create market-entry barriers for new companies, achieving exactly the contrary. For these reasons UEAPME calls for the introduction and improvement of the **"responsible consumer" and for a legislation which is based on this principle and does not** establish unnecessary burdensome rules for SMEs.

Furthermore the proposal aims to encourage the cross-border buy of the consumers and wants to give them for these satisfactory guarantees. The legislators should keep in mind on the other side that the small and medium-sized enterprises need also adequate safeguards for carrying out cross-border businesses activities as these are also for them related to significant risks. **Therefore we call for the introduction of a balanced system which ensures for both parties appropriate and fair rights and obligations.**

As already mentioned UEAPME is convinced that a targeted full harmonisation with the right approach will increase legal certainty within the Single Market and will ensure that SMEs as well as consumers will benefit of it.

However, UEAPME regrets that the negative impact on the competitiveness of SMEs, which are acting mainly on regional and local level, has been completely ignored in the proposal. This is also one of the reasons why UEAPME has been seeing the necessity from the very beginning to **carry out a new impact assessment.**

It also has to be borne in mind that 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.

General remarks on the draft report of the Internal Market and Consumer Protection Committee of the European Parliament

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.

This approach followed by the draft report 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 which 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.

Specific remarks

1) General wording and approach of the directive

Commission's proposal	Proposal of UEAPME
<p><i>Recital (14)</i></p> <p>An off premises contract should be defined as a contract concluded with the simultaneous physical presence of the trader and the consumer away from business premises, for example at the consumer's home or workplace. In an off premises context, consumers are under psychological pressure no matter whether they have solicited the trader's visit or not. Furthermore, in order to prevent circumventions of rules when consumers are approached away from business premises, a contract negotiated for example at the consumer's home but concluded in a shop should be regarded as an off-premises contract.</p>	<p><i>Recital (14)</i></p> <p>An off premises contract should be defined as a contract concluded with the simultaneous physical presence of the trader and the consumer away from business premises, for example at the consumer's home or workplace In an off premises context, consumers are under psychological pressure no matter whether they have solicited the trader's visit or not. Furthermore, in order to prevent circumventions of rules when consumers are approached away from business premises, a contract, <u>in case of an unsolicited visit by the trader</u>, negotiated for example at the consumer's home but concluded in a shop should be regarded as an off-premises contract.</p>

Justification:

The draft Directive pictures SMEs in general in a negative way. The directive should avoid giving SMEs a bad image. Furthermore it should also avoid creating the impression that traders regularly put psychological pressure on consumers to conclude unfair contracts. It has to be pointed 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 entrepreneur is fundamentally unequal. This is in fact not the case: consumers act – more often than the European legislator might imagine – considerate and responsible.** In the craft sector consumers are regularly aware about the price competition and use this knowledge in price negotiations **Moreover, often a trader is in a weaker position than a consumer. Against a well educated consumer, who exactly knows how to use his/her 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.

Comments on the draft report:

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 SMEs.

Commission's proposal	Proposal of UEAPME
<p><i>Recital (31)</i></p> <p>Some consumers exercise their right of withdrawal after having used the goods to an extent more than necessary to ascertain the nature and functioning of the good. In this case the consumer should be liable for any diminished value of the goods. In order to ascertain the nature and functioning of a good, the consumer should only handle or try it in the same manner as he would be allowed to do in a shop. For example, the consumer should only try on a garment and should not be allowed to wear it. In order to ensure the effectiveness of the withdrawal right in service contracts, in particular for non-urgent renovation works for which consumers may be subject to high pressure selling at their homes followed by the immediate performance of the services before the expiration of the withdrawal period, consumers should bear no cost for such a service.</p>	<p><i>Recital (31)</i></p> <p>Some consumers exercise their right of withdrawal after having used the goods to an extent more than necessary to ascertain the nature and functioning of the good. In this case the consumer should be liable for any diminished value of the goods. In order to ascertain the nature and functioning of a good, the consumer should only handle or try it in the same manner as he would be allowed to do in a shop. For example, the consumer should only try on a garment and should not be allowed to wear it. In order to ensure the effectiveness of the withdrawal right in service contracts, in particular for non-urgent renovation works for which consumers may be subject to high pressure selling at their homes followed by the immediate performance of the services before the expiration of the withdrawal period, consumers should bear no cost for such a service.</p>

2) Article 2, common definitions

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

Commission's proposal	Proposal of UEAPME
<p><i>Article 2.6.</i></p> <p>'distance contract' means any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication;</p>	<p><i>Article 2.6.</i></p> <p>'distance contract' means any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication; concluded between trader and consumer under an organized distance sales or service-provision scheme run by the trader, who for the purpose of the contract makes exclusive use of one or more means of distance communication up to and concluding the moment at which the contract is concluded;</p>

Justification:

UEAPME is very disappointed about the fact that 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 contract. In many cases, especially in respect of the activities of craftsmen, 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 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. At this stage we would like to make reference the aforementioned practical reality of businesses when drafting rules.

Comments on the draft report:

UEAPME welcomes the draft reports proposal in order to keep the current definition for distance contracts. 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.**

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

Commission’s proposal	Proposal of UEAPME
<p><i>Article 2.8.</i></p> <p>‘off-premises contract’ means:</p> <p>(a) any sales or service contract concluded away from business premises with the simultaneous physical presence of the trader and the consumer or any sales or service contract for which an offer was made by the consumer in the same circumstances, or</p> <p>(b) any sales or service contract concluded on business premises but negotiated away from business premises, with the simultaneous physical presence of the trader and the consumer.</p>	<p><i>Article 2.8.</i></p> <p><u>‘off-premises contract’ means:</u> <u>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</u></p> <p>(a) <u>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</u></p> <p>(b) <u>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.</u></p>

<i>Commission's proposal</i>	<i>Proposal of UEAPME</i>
<p><i>Recital (15)</i> <i>Business premises should include premises in whatever form (such as shops or lorries) which serve as a permanent place of business for the trader. Market stalls and fair stands should be treated as business premises even though they may be used by the trader on a temporary basis. Other premises which are rented for a short time only and where the trader is not established (such as hotels, restaurants, conference centres, cinemas rented by traders who are established there) should not be regarded as business premises. Similarly, all public spaces including public transport or facilities as well as private homes or workshops should not be regarded as business premises.</i></p>	<p><i>Recital (15)</i> <i>Business premises should include premises in whatever form (such as shops or lorries) which serve as a permanent place of business for the trader. Market stalls and fair stands, trade shows or conventions should be treated as business premises even though they may be used by the trader on a temporary basis. Other premises which are rented for a short time only and where the trader is not established (such as hotels, restaurants, conference centres, cinemas rented by traders who are established there) should not be regarded as business premises. Similarly, all public spaces including public transport or facilities as well as private homes or workshops should not be regarded as business premises.</i></p>

Justification:

It is not acceptable to extend the scope of off-premises contracts twice, firstly through a general definition as concluded in **article 2(8) a) and b)** and secondly by not making any distinction in the proposal between “solicited” and “unsolicited” visit by the consumer. This extensive definition will extend the scope of application to small and medium-sized enterprises and especially for the craft sector. The example mentioned in 2.2 with the craftsmen raise the same questions in this case. As according to the proposed definition taking measurements at the consumer’s home but conclude and finalise it on the business premises would cause off-premises contract for the trader and in this case the craftsman would face according to **article 12.1** a 14 days withdrawal period. Furthermore according to **article 17.2** “for service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period”. All this would cause that the trader will not have any other possibility than to wait until the end of the withdrawal period and to start the performance in case of an off-premises contract only after the expiration day. This example shows again the complexity of the proposal and the fact that the practical reality of the everyday business life has not been taken account during the drafting.

Situations where an offer is made outside business premises but the contract concluded on the business premises of the trader should not be considered as off-premises contracts for the purpose of the Directive.

Furthermore we would like to point out that the new review has not taken the elementary distinction **between “solicited” and “unsolicited”** visit into account and should avoid only focusing on the consumers without thinking on the effect of such unbalanced regulation. The new directive should create **legal certainty for both parties** and both parties have to consider that their interests are represented equally.

Comments on the draft report:

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 proposed definition of the draft report is too vague and extended in an inconsiderate way.

3) Article 5.1 c) f), General information requirements

Commission's proposal	Proposal of UEAPME
<p><i>Article 5.1.</i></p> <p>Prior to the conclusion of any sales or service contract, the trader shall provide the consumer with the following information, if not already apparent from the context:</p> <p>(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;</p>	<p><i>Article 5.1.</i></p> <p>Prior to the conclusion of any sales or service contract, the trader shall provide the consumer with the following information, if not already apparent from the context:</p> <p>(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated estimated in advance, the manner in which the price is calculated estimated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated estimated in advance, the fact that such additional charges may be payable;</p>

Justification:

One pillar of the draft Directive consists of rules on consumer information, obviously expressing the conviction that an informed consumer is an empowered consumer. This being true to a certain extent, it should not be omitted – as pointed out in the preliminary remarks – to consider possible adverse effects on conflicting policy goals in general and needs and expectations of SMEs in particular. Obligations related to consumer information are one of the most cost-intensive and should be proportionate to the potential goals to be achieved. It is well known that too many information are not helpful for consumers, and might be more confusing than necessary. Furthermore a number of information requirements of the proposal are less relevant to the consumers' everyday purchases. The question might be raised, why not to exclude contracts for daily needs from the scope of application of Chapter II, if not from the Directive in general. Does a consumer really need information on the "main characteristic of" bread and butter "to an extent appropriate to the medium and the goods", as stated in **article 5.1 a)**?

With respect to **article 5.1 c)** the calculated prices could be influenced by unexpected occurrences. For this reason we believe that it would be more suitable to talk about estimated prices for the purpose of the general information requirements.

In the **article 5.1 f)** mentioned obligation to provide information on commercial guarantees might cause problems especially in the repair sector. In case of a computer the IT expert opts, in agreement of the customer, for a spare part of another provider than the one he is used to buy from and would miss to inform about the commercial guarantees of that product, than he can be confronted with the legal effect of the consumer not being bound to the contract. With this example we would like to point out that in the everyday business life it is impossible to give on every single spare part information on guarantees. As a matter of course if the consumer asks for it the information will be given.

In general UEAPME points out that the information requirements laid down in **article 5** are not appropriate for on-premises contracts concerning items for daily needs and the performance of services, especially in the repair sector.

Comments on the draft report concerning 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.**

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) Article 9, Information requirements for distance and off-premises contracts; Article 10, Formal requirements for off-premises contracts

Commission’s proposal	Proposal of UEAPME
<p><i>Article 10</i></p> <p>1. With respect to off-premises contracts, the information provided for in Article 9 shall be given in the order form in plain and intelligible language and be legible. The order form shall include the standard withdrawal form set out in Annex I (B).</p> <p>2. An off-premises contract shall only be valid if the consumer signs an order form and in cases where the order form is not on paper, receives a copy of the order form on another durable medium.</p> <p>3. Member States shall not impose any formal requirements other than those provided for in paragraphs 1 and 2.</p>	<p><i>Article 10</i></p> <p>1. With respect to off-premises contracts, the information provided for in Article 9 shall may be given in the order form in plain and intelligible language and be legible. The order form shall may include the standard withdrawal form set out in Annex I (B).</p> <p>2. An off-premises contract shall only be valid if the consumer signs an order form and in cases where the order form is not on paper, receives a copy of the order form on another durable medium.</p> <p>2. Member States shall not impose any formal requirements other than those provided for in paragraph 1 and 2.</p>

Justification:

Article 9.b) foresees an obligation for the trader to hand over a standard withdrawal form in accordance with Annex I (B). This would delimitate the freedom of legal arrangements of the trader. It would be much more appropriate to introduce a Europe-wide instruction standard form on the right of withdrawal. It could be also possible to introduce for the different situation e.g. services, off-premises contracts etc. different standard form on the instruction of the right of withdrawal.

In **article 10.2** the Commission proposes that off-premises contracts 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 valid as a written agreement.** This paragraph would make the majority of contracts concluded in the everyday business life void. For example 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 be more burdensome for both parties.

In addition this proposed regulation causes problems with regard to services contracts if the service has been delivered but the contract is afterwards regarded void due to the formalities. How can the service be returned?

Furthermore the standard withdrawal form is not apt for special contracts. The European legislator would put with this regulation an enormous burden on businesses and there is no evident need for action from the consumer point of view.

Comments on the draft report, concerning article 10, formal rules for compliance with the information requirements for off-premises contracts:

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 really 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) Article 12, Length and starting point of the withdrawal period; Article 13, Omission of information on the right of withdrawal; Article 17, Obligation of the consumer in case of withdrawal

Commission's proposal	Proposal of UEAPME
<p><i>Article 12</i> <i>Length and starting point of the withdrawal period</i> 1. The consumer shall have a period of fourteen days to withdraw from a distance or off-premises contract, without giving any reason. 2. In the case of an off-premises contract, the withdrawal period shall begin from the day when the consumer signs the order form or in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium.</p>	<p><i>Article 12</i> <i>Length and starting point of the withdrawal period</i> 1. The consumer shall have a period of fourteen days to withdraw from a distance or off-premises contract, without giving any reason. 2. In the case of an off-premises contract, the withdrawal period shall begin from the day when the consumer signs the order form or in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium.</p>

<p>In the case of a distance contract for the sale of goods, the withdrawal period shall begin from the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires the material possession of each of the goods ordered.</p> <p>In the case of a distance contract for the provision of services, the withdrawal period shall begin from the day of the conclusion of the contract.</p> <p>3. The deadline referred to in paragraph 1 is met if the communication concerning the exercise of the right of withdrawal is sent by the consumer before the end of that deadline.</p> <p>4. The Member States shall not prohibit the parties from performing their obligations under the contract during the withdrawal period.</p>	<p>In the case of a distance contract for the sale of goods, the withdrawal period shall begin from the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires the material possession of each of the goods ordered.</p> <p>In the case of a distance contract for the provision of services, the withdrawal period shall begin from the day of the conclusion of the contract.</p> <p>3. The deadline referred to in paragraph 1 is met if the communication concerning the exercise of the right of withdrawal is sent by the consumer before the end of that deadline.</p> <p>4. The Member States shall not prohibit the parties from performing their obligations under the contract during the withdrawal period.</p> <ol style="list-style-type: none"> 1. <u>A right to withdraw may be exercised at any time after the conclusion of the contract and before the end of the withdrawal period.</u> 2. <u>The withdrawal period ends seven days after the latest of the following times:</u> <ol style="list-style-type: none"> a. <u>the time of conclusion of the contract; or</u> b. <u>if the subject matter of the contract is the delivery of goods, the time when the goods are received.</u> 3. <u>The withdrawal period ends no later than one year after the time of conclusion of the contract.</u> 4. <u>A notice of withdrawal is timely if dispatched before the end of the withdrawal period.</u>
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Commission's proposal	Proposal of UEAPME
<p><i>Article 13</i></p> <p>If the trader has not provided the consumer with the information on the right of withdrawal in breach of Articles 9(b), 10(1) and 11(4), the withdrawal period shall expire three months after the trader has fully performed his other contractual obligations.</p>	<p><i>Article 13</i></p> <p>If the trader has not provided the consumer with the information on the right of withdrawal in breach of Articles 9(b), 10(1) and 11(4), the withdrawal period shall expire three one month after the trader has fully performed his other contractual obligations.</p>

Commission's proposal	Proposal of UEAPME
<p><i>Article 17</i></p> <p><i>Obligations of the consumer in case of withdrawal</i></p> <ol style="list-style-type: none"> 1. For sales contracts for which the material possession of the goods has been transferred to the consumer or at his request, to a third party before the expiration of the withdrawal period, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive them, within fourteen days from the day on which he communicates his withdrawal to the trader, unless the trader has offered to 	<p><i>Article 17</i></p> <p><i>Obligations of the consumer in case of withdrawal</i></p> <ol style="list-style-type: none"> 1. For sales contracts for which the material possession of the goods has been transferred to the consumer or at his request, to a third party before the expiration of the withdrawal period, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive them, within fourteen days seven days from the day on which he communicates his withdrawal to the trader, unless the trader has offered to collect the goods himself.

<p>collect the goods himself.</p> <p>The consumer shall only be charged for the direct cost of returning the goods unless the trader has agreed to bear that cost.</p> <p>2. The consumer shall only be liable for any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods. He shall not be liable for diminished value where the trader has failed to provide notice of the withdrawal right in accordance with Article 9(b). For service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period.</p>	<p>The consumer shall only be charged for the direct cost of returning the goods unless the trader has agreed to bear that cost.</p> <p>2. The consumer shall only be liable for any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods. He shall not be liable for diminished value where the trader has failed to provide notice of the withdrawal right in accordance with Article 9(b). For service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period.</p> <p><u>The consumer is not liable to pay:</u></p> <p>(a) <u>for any diminution in the value of anything received under the contract caused by inspection</u></p> <p>(b)</p> <p>3. <u>The consumer is liable for any diminution in the value caused by normal use, unless that the consumer had not received adequate notice of the right of withdrawal.</u></p>
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Justification:

First of all we would like to outline that according to UEAPME's view the structure of **article 12** is not in line with the original idea of establishing one simplified directive in the field of the proposal. **Article 12** was simply put together from the provisions of Directive 97/7/EC distance contracts and Council Directive 85/577/EEC contracts negotiated away from business premises. UEAPME does believe that this is not the aim of the review. Therefore we call for a complete review of this article.

Irrespective of this UEAPME has several doubts on the structure and on the content of the proposed text of **article 12**. For example it is still unanswered when the withdrawal period for performance of services starts. If at all a right of withdrawal is imposed on provision of services, than it should be clarified that the withdrawal period starts with the conclusion of the contract (see article 6.1. of Directive 97/7/EC) and not with the beginning or end of the provision of services.

UEAPME considers the proposed **14 days withdrawal period as far too long. The current regulation of seven days according to 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. This would also not promote the European Commission's other intention to boost the business activities of SMEs in the time of the crises. In addition the proposal provides another 14 days period for returns, which would at the end mean that the consumers would be able to keep the products for 28 days, which is absolutely inadequate. A more precise and clear wording on this article is wished as well.

Furthermore according to **article 13** in case of not informing about the right of withdrawal, the deadline would extend to *"three months after the trader has fully performed his other contractual obligations"*.

With respect to the right of withdrawal and chapter III UEAPME also considers a more complex problem concerning services, as the provisions of this chapter are extended to off-premises contracts as well. Most of the services activities would fall under this regulation as they take place typically off-premises, as it was already mentioned before (see 2.4.). According to the proposal if the entrepreneur performs the service before the end of the withdrawal period, he might be confronted with the execution of this right of withdrawal. Especially sectors like painters, electricians etc. could be affected by this. UEAPME underlines again that if this provision will become part of the new directive service providers will not perform before the expiration of the withdrawal period and this will be unsatisfactory for consumers at the end.

According to our view a solution that the consumer can make a specific request on a durable medium before the end of the withdrawal period would not change the situation so far that the consumer would retain the right to withdrawal from the contract during the withdrawal period, having to bear the reasonable costs for the service provided so far. These examples show that a distinction between the right of withdrawal for good, where a market for returned mechanize exist and services is more than necessary.

Instead of putting the responsibility alone on SMEs the proposed Directive should also mention and strengthen the picture of the **responsible consumer**.

The whole proposed withdrawal system is 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.

Comments on the draft report, concerning article 12, length and starting point of the withdrawal period; article, 13, omission of information on the right of withdrawal; article 16, reimbursement by the trader in case of withdrawal; article 17, obligation of the consumer to return goods, in the case of withdrawal:

UEAPME deeply regrets that the draft report has not made the more then 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) Article 19, Exceptions from the right of withdrawal

Amendments according to the Draft Common Frame of Reference

Commission's proposal	Proposal of UEAPME
<p><i>Article 19</i> <i>Exceptions from the right of withdrawal</i></p> <p>1. In respect of distance contracts, the right of withdrawal shall not apply as regards the following:</p> <p>(a) services where performance has begun, with the consumer's prior express consent, before the end of the fourteen day period referred to in Article 12;</p> <p>(b) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader;</p> <p>(c) the supply of goods made to the consumer's specifications or clearly personalized or which are liable to deteriorate or expire rapidly;</p> <p>(d) the supply of wine, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place beyond the time-limit referred to in Article 22(1) and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;</p> <p>(e) the supply of sealed audio or video recordings or computer software which were unsealed by the consumer;</p> <p>(f) the supply of newspapers, periodicals and magazines;</p> <p>(g) gaming and lottery services;</p> <p>(h) contracts concluded at an auction.</p> <p>2. In respect of off-premises contracts, the right of withdrawal shall not apply as regards the following:</p> <p>(a) contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, selected in advance by the consumer by means of distance communication and physically supplied to the consumer's home, residence or workplace by the trader who usually sells such goods on his own business premises;</p> <p>(b) contracts for which the consumer, in order to respond to an immediate emergency, has requested the immediate performance of the contract by the trader; if, on this occasion, the trader provides or sells additional services or goods other than those which are strictly necessary to meet the immediate emergency of the consumer, the right of withdrawal shall apply to those additional services or goods;</p> <p>(c) contracts for which the consumer has specifically requested the trader, by means of distance</p>	<p><i>Article 19</i> <i>Exceptions from the right of withdrawal</i></p> <p>1. In respect of distance contracts, the right of withdrawal shall not apply as regards the following:</p> <p>(a) services where performance has begun, with the consumer's prior express consent, before the end of the fourteen day period referred to in Article 12;</p> <p>(b) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader;</p> <p>(c) the supply of goods made to the consumer's specifications or clearly personalized or which are liable to deteriorate or expire rapidly;</p> <p>(d) the supply of wine, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place beyond the time-limit referred to in Article 22(1) and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;</p> <p>(e) the supply of sealed audio or video recordings or computer software which were unsealed by the consumer;</p> <p>(f) the supply of newspapers, periodicals and magazines;</p> <p>(g) gaming and lottery services;</p> <p>(h) contracts concluded at an auction.</p> <p>2. In respect of off-premises contracts, the right of withdrawal shall not apply as regards the following:</p> <p>(a) contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, selected in advance by the consumer by means of distance communication and physically supplied to the consumer's home, residence or workplace by the trader who usually sells such goods on his own business premises;</p> <p>(b) contracts for which the consumer, in order to respond to an immediate emergency, has requested the immediate performance of the contract by the trader; if, on this occasion, the trader provides or sells additional services or goods other than those which are strictly necessary to meet the immediate emergency of the consumer, the right of withdrawal shall apply to those additional services or goods;</p> <p>(c) contracts for which the consumer has specifically requested the trader, by means of distance</p>

<p>communication, to visit his home for the purpose of repairing or performing maintenance upon his property; if on this occasion, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal shall apply to those additional services or goods.</p> <p>3. The parties may agree not to apply paragraphs 1 and 2.</p>	<p>communication, to visit his home for the purpose of repairing or performing maintenance upon his property; if on this occasion, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal shall apply to those additional services or goods.</p> <p>3. The parties may agree not to apply paragraphs 1 and 2.</p> <p>1. <u>In respect of distance contracts and off-premises contracts, the right of withdrawal does not apply to:</u></p> <ul style="list-style-type: none"> (a) <u>a contract concluded by means of an automatic vending machine or automated commercial premises;</u> (b) <u>a contract concluded with telecommunication operators through the use of public payphones;</u> (c) <u>a contract for the construction and sale of immovable property or relating to other immovable property rights, except for rental;</u> (d) <u>a contract for the supply of foodstuff, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer by regular roundsmen;</u> (e) <u>a contract concluded by means of distance communication, but outside of an organised distance sales or service-provision scheme run by the supplier;</u> (f) <u>a contract for the supply of goods, other assets or services whose price depends on fluctuations in the financial market outside the supplier's control, which may occur during the withdrawal period;</u> (g) <u>contract concluded at an auction;</u> (h) <u>travel and baggage insurance policies or similar short-term insurance policies of less than one month's duration.</u> <p>2. <u>If the business has exclusively used means of distance communication for concluding the contract, the right of withdrawal also does not apply:</u></p> <ul style="list-style-type: none"> (a) <u>the supply of accommodation, transport, catering or leisure services, where the business undertakes, when the contract is concluded, to supply these services on a specific date or within a specific period;</u> (b) <u>the supply of services other than financial services if performance has begun, at the consumer's express and informed request, before the end of the withdrawal period referred to in Article 12 paragraph 1;</u> (c) <u>the supply of goods made to the consumer's specifications or clearly personalised or which, by reason of their nature, cannot be returned or are liable to</u>
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	<p><u>deteriorate or expire rapidly;</u></p> <p>(d) <u>the supply of audio or video recordings or computer software</u></p> <p>(i) <u>which were unsealed by the consumer, or</u> (ii) <u>which can be downloaded or reproduced for permanent use, in case of supply by electronic means;</u></p> <p>(e) <u>the supply of newspapers, periodicals and magazines;</u></p> <p>(f) <u>gaming and lottery services.</u></p> <p>3. <u>With regard to financial services, the right of withdrawal also does not apply to contracts that have been fully performed by both parties, at the consumer's express request, before the consumer exercises his or her right of withdrawal.</u></p>
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Commission's proposal	Proposal of UEAPME
<p><i>Article 19</i> <i>Exceptions from the right of withdrawal</i> 1. In respect of distance contracts, the right of withdrawal shall not apply as regards the following:</p> <p>(a) services where performance has begun, with the consumer's prior express consent, before the end of the fourteen day period referred to in Article 12;</p> <p>(b) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader;</p> <p>(c) the supply of goods made to the consumer's specifications or clearly personalized or which are liable to deteriorate or expire rapidly;</p> <p>(d) the supply of wine, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place beyond the time-limit referred to in Article 22(1) and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;</p> <p>(e) the supply of sealed audio or video recordings or computer software which were unsealed by the consumer;</p> <p>(f) the supply of newspapers, periodicals and magazines;</p> <p>(g) gaming and lottery services;</p> <p>(h) contracts concluded at an auction.</p> <p>2. In respect of off-premises contracts, the right of withdrawal shall not apply as regards the following:</p>	<p><i>Article 19</i> <i>Exceptions from the right of withdrawal</i> 1. In respect of distance contracts, the right of withdrawal shall not apply as regards the following:</p> <p>(a) services where performance has begun, with the consumer's prior express consent, before the end of the seven day period referred to in Article 12;</p> <p>(b) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader;</p> <p>(c) the supply of goods and services made to the consumer's specifications or clearly personalized or which are liable to deteriorate or expire rapidly;</p> <p>(d) the supply of wine, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place beyond the time-limit referred to in Article 22(1) and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;</p> <p>(e) the supply of sealed audio or video recordings or computer software which were unsealed by the consumer;</p> <p>(f) the supply of newspapers, periodicals and magazines;</p> <p>(g) gaming and lottery services;</p> <p>(h) contracts concluded at an auction.</p> <p>2. In respect of off-premises contracts, the right of withdrawal shall not apply as regards the following:</p> <p>(a) services where the performance has begun,</p>

<p>(a) contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, selected in advance by the consumer by means of distance communication and physically supplied to the consumer's home, residence or workplace by the trader who usually sells such goods on his own business premises;</p> <p>(b) contracts for which the consumer, in order to respond to an immediate emergency, has requested the immediate performance of the contract by the trader; if, on this occasion, the trader provides or sells additional services or goods other than those which are strictly necessary to meet the immediate emergency of the consumer, the right of withdrawal shall apply to those additional services or goods;</p> <p>(c) contracts for which 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; if on this occasion, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal shall apply to those additional services or goods.</p> <p>3. The parties may agree not to apply paragraphs 1 and 2.</p>	<p><u>, before the end of the seven day period referred to in Article 12;</u></p> <p>(b) <u>contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, physically supplied to the consumer's home, residence or workplace by the trader who usually sells such goods on his own business premises;</u></p> <p>(c) contracts for which the consumer, in order to respond to an immediate emergency, has requested the immediate performance of the contract by the trader; if, on this occasion, the trader provides or sells additional services or goods other than those which are strictly necessary to meet the immediate emergency of the consumer, the right of withdrawal shall apply to those additional services or goods;</p> <p>(d) contracts for which 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; if on this occasion, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal shall apply to those additional services or goods.</p> <p>3. The parties may agree not to apply paragraphs 1 and 2.</p>
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Justification:

Article 19.1 a) mentioning that the right of withdrawal shall not apply in respect of distance contracts, if “services where performance has begun, with the consumer’s prior express consent”. According to our opinion the legal certainty is more ensured, if the criteria “express” is deleted as it is difficult to judge what can be considered as “express”. Furthermore it is necessary to add to the exceptions those kinds of distance contracts which are related to transport, catering, supply of accommodation etc, where the services have to be supplied on a specific date or within a specific period. Also the exceptions for those kind of goods which by reason of their nature cannot be returned or are liable to deteriorate or expire rapidly have to be added.

Article 19.1 c) only makes an exception concerning distance contracts on the supply of goods in case the goods was *“made to the consumer’s specification or clearly personalised or which are liable to deteriorate or expire rapidly”*. According to our view and the experiences were made by our member organisations during their activities in the business life it is often the case that the owner of a business visits the home of the costumer and gives some estimation on the price. After this often the one of the employees takes over the activities and during these changes are made, also many times on the wishes of the costumer/consumer until the work is finished. If the trader would stick to the given pre-contractual information the services cannot be adapted to the wishes of the consumers. For this reason it is necessary to add to **article 19.1 c)** services as well.

With respect to off-premises contracts UEAPME cannot understand concerning **article 19.2 a)** why is it necessary for the exception the criteria that the consumer *“selected in advance” “by means of distance communication”*? Even than when the food etc is not selected in advance by the means of distance communication but the contract is concluded off-premises it is nonsense to exercise the right of withdrawal. The wording used in **article 19.2 b)** *“immediate emergency”* is bringing more legal uncertainty than clarification. 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 cases these kind of additional reparations avoid extra costs and time which is in favour of the interest of the consumer.

The current proposal of **article 19.2 c)** would lead once to a change of attitude of traders namely that SMEs, especially crafts who would be effected by this provision, will try to avoid personal contracts with the consumers because contracts *“for which the consumer has specifically requested the trader, by means of distance communication”* have a more privileged position compared to regular off-premises contracts. Not to mention that it is not at all clear why the exclusion is only applying if the work is *“for the purpose of repairing or performing maintenance upon his property”*. Furthermore this and **19.2.a)** discriminate again, because of the use of distance communication, as craftsmen and micro enterprises acting at local level and maintaining personal contacts with their customers. This trend of establishing conditions which would demolish the well functioning personal contacts between consumers and traders at local and regional level should be not followed and supported by the European legislation.

Furthermore the right of withdrawal should be generally excluded for off-premises services contracts in **19.2**.

Furthermore we see the need to add to the exclusions concerning off-premises contracts, those which are concluded by the means of automatic vending machine or automatic commercial premises and contracts concluded with telecommunication operators through the use of public payphones.

With respect to the whole system of the exceptions concerning UEAPME’s point of view it would give more legal certainty if the provisions introduced by the Draft Common Frame of Reference² for the purpose of the new directive would replace the **article 19** of the proposal.

² Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke, 2009

Comments on the draft report, concerning article 19, exceptions from the right of withdrawal:

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 from 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) Article 21, Scope, article 22, Delivery

Commission's proposal	Proposal of UEAPME
<p><i>Article 21</i> <i>Scope</i> 1. This Chapter shall apply to sales contracts. Without prejudice to Article 24(5), where the contract is a mixed-purpose contract having as its object both goods and services this Chapter shall only apply to the goods.</p>	<p><i>Article 21</i> <i>Scope</i> 1. This Chapter shall apply to sales contracts between the trader and the consumer for those sales of goods which have not manufactured goods as subject. Without prejudice to Article 24(5), where the contract is a mixed-purpose contract having as its object both goods and services this Chapter shall only apply to the goods.</p>

Commission's proposal	Proposal of UEAPME
<p><i>Article 22</i> 1. Unless the parties have agreed otherwise, the trader shall deliver the goods by transferring the material possession of the goods to the consumer or to a third party, other than the carrier and indicated by the consumer, within a maximum of thirty days from the day of the conclusion of the contract. 2. Where the trader has failed to fulfil his obligations</p>	<p><i>Article 22</i> 1. Unless the parties have agreed otherwise, the trader may deliver the goods by transferring the material possession of the goods to the consumer or to a third party, other than the carrier and indicated by the consumer, within a maximum of thirty days from the day of the conclusion of the contract. 2. Where the trader has failed to fulfil his obligations to</p>

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.	deliver, the consumer may be entitled to a refund of any sums paid within seven days from the date of delivery provided for in paragraph 1.
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Justification:

With respect of the scope of chapter IV UEAPME suggest to clarify in article 21 that the chapter is applying only for the sale of goods and only to those sales contracts which have not manufactured goods as subject. In these cases is the core issue a service, the manufacturing of the good and not the transmission of the right of possession.

Article 22.2 states “where the trader has failed to fulfil his obligation 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 the contract which gives the consumer a right to cancel the contract. This again does not take the everyday business life into account. We would like to draw in attention that not in every case 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. This can be especially the case concerning **article 21.2** which extend the scope of this chapter to the “supply of goods to be manufactured or produced”. Furthermore the provision of **article 22.2** is completely appropriate as the consumers would be entitled to a refund of any sums paid, even if they accept goods that are delivered after 30 days. It has to be taken into account that an obligation according to **article 22.2** can cause serious cash flow problems for SMEs in particular in the automotive sector. How should be the consumer immediately reimbursed if the manufacture does not reimburse the trader immediately? The right to cancel the contract should be considered case by case. **UEAPME calls for an amendment to a more flexible direction.**

Comments on the draft report:

The new approach which the draft report is introducing on the delivery will not solve the aforementioned problem. In those cases is more than appropriate to **extend the deadline for the delivery.**

8) Article 23, Passing of risk

Commission’s proposal	Proposal of UEAPME
<p><i>Article 23</i> <i>Passing of risk</i></p> <p>1. The risk of loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer has acquired the material possession of the goods.</p> <p>2. The risk referred to in paragraph 1 shall pass to the consumer at the time of delivery as agreed by the parties, if the consumer or a third party, other than the carrier and indicated by the consumer has failed to take reasonable steps to acquire the material possession of the goods.</p>	<p><i>Article 23</i> <i>Passing of risk</i></p> <p>1. The risk of loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer has acquired the material possession of the goods.</p> <p>2. The risk referred to in paragraph 1 shall pass to the consumer at the time of delivery as agreed by the parties, if the consumer or a third party, other than the carrier and indicated by the consumer has failed to take reasonable steps to acquire the material possession of the goods.</p> <p><u>3. The risk referred to in paragraph 1 shall pass with the delivery to the transporter in case of a commonly accepted mode of dispatch is used.</u></p>

Justification:

UEAPME has some doubt whether the rules introduced on the passing of risk would not cause a serious interference with the civil laws of the Member States and are indicated due to the principle of subsidiarity. Even if a European wide regulation should be established on the issue of passing of risk, it is not proportionate to regulate the passing of risk in general at the expenses of entrepreneurs. In case of a commonly accepted mode of dispatch (e.g. post, railway etc.) is used, the risk should pass with the delivery to the transporter.

9) Article 26, Remedies for lack of conformity

Commission's proposal	Proposal of UEAPME
<p><i>Article 26</i> <i>Remedies for lack of conformity</i></p> <p>1. As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:</p> <ul style="list-style-type: none"> (a) have the lack of conformity remedied by repair or replacement, (b) have the price reduced, (c) have the contract rescinded. <p>2. The trader shall remedy the lack of conformity by either repair or replacement according to his choice.</p> <p>3. Where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded. A trader's effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity.</p> <p>The consumer may only rescind the contract if the lack of conformity is not minor.</p> <p>4. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:</p> <ul style="list-style-type: none"> (a) the trader has implicitly or explicitly refused to remedy the lack of conformity; 	<p><i>Article 26</i> <i>Remedies for lack of conformity</i></p> <p>1. As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:</p> <ul style="list-style-type: none"> (a) have the lack of conformity remedied by repair or replacement, (b) have the price reduced, (c) have the contract rescinded. <p>2. The trader shall remedy the lack of conformity by either repair or replacement according to his choice.</p> <p>3. Where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded. A trader's effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity.</p> <p>The consumer may only rescind the contract if the lack of conformity is not minor</p> <p>4. <u>In case the remedies are not impossible or disproportional</u> the consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:</p> <ul style="list-style-type: none"> (a) the trader has implicitly or explicitly

<p>(b) the trader has failed to remedy the lack of conformity within a reasonable time;</p> <p>(c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;</p> <p>(d) the same defect has reappeared more than once within a short period of time.</p> <p>5. The significant inconvenience for the consumer and the reasonable time needed for the trader to remedy the lack of conformity shall be assessed taking into account the nature of the goods or the purpose for which the consumer acquired the goods as provided for by Article 24(2) (b).</p>	<p>refused to remedy the lack of conformity;</p> <p>(b) the trader has failed to remedy the lack of conformity within a reasonable time;</p> <p>(c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;</p> <p>(d) the same defect has reappeared more than once within a short period of time.</p> <p><u>5. Paragraph 4 refers only in those cases the trader has no opportunity to repair because of the consumer's executing by substitution without authorisation. In this case the consumer loses all rights to remedy and cannot claim the costs of execution by substitution in particular.</u></p> <p>6. The significant inconvenience for the consumer and the reasonable time needed for the trader to remedy the lack of conformity shall be assessed taking into account the nature of the goods or the purpose for which the consumer acquired the goods as provided for by Article 24(2) (b).</p>
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Justification:

UEAPME welcomes that the trader has the right to choose between repair and replacement according to the situation requires. On the other side we see the need for clarification on **article 26.4** because the consumer should be only entitled to make use of **article 26.4** in case the remedies are not impossible or disproportional. Furthermore it has to be added as well that the consumer can make only use of **article 26.4** if the repair has not been already done by a third party. This should avoid that the entrepreneur, who is obliged to remedy, is asked afterwards to pay for the costs. According to UEAPME's view **article 26.4 d)** has to be deleted. Nowadays a big amount of the goods (e.g. cars) are very complex composed which means that it is normal that they are repaired more than once. Because of this complexity it is not always possible to analyse all demand at the same time. Furthermore the consumer should be given the choice to turn to either the final seller **or the manufacturer**. This option could limit the number of cases where the final seller himself needs to seek redress towards his manufacturer.

Comments on the draft report:

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"*.

10) Article 27, Costs and damages

Commission's proposal	Proposal of UEAPME
<p><i>Article 27</i></p> <p>1. The consumer shall be entitled to have the lack of conformity remedied free of any cost.</p> <p>2. Without prejudice to the provision of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.</p>	<p><i>Article 27</i></p> <p>1. The consumer shall be entitled to have the lack of conformity remedied free of any cost. <u>In case the contract is rescinded by the consumer, any reimbursement can be reduced taking into account of the use of the consumer has had of the goods during a period up to one year.</u></p> <p>2. Without prejudice to the provision of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.</p>

Justification:

According to our view **article 27** raises sever questions. It would be useful if the proposal would provide the definition on “damages” and “losses”. Especially in respect of losses it is not clear which kind of losses are meant by the proposal. Are non-economical losses also covered? Should the losses be compensated? Does the consumer have the obligation to make notice on “damages” and “losses”? We see here an important need for further clarification.

With respect of the current text of the proposed **article 27** for keeping a fair balance between the interest of businesses and consumers there is an additional provision required on **article 27.1** which ensures that any reimbursement to the consumer, in case the contract is rescinded, can be reduced to take account of the use the consumer has had of the goods during a period that might last up to one years.

The proposed **article 27.2** would lead to an unacceptable strict liability for traders especially for consequential damage caused by a lack of conformity and for immaterial damages. For this reason **article 27.2** should be deleted.

Comments on the draft report:

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.**

11) Article 28, Time limits and burden of proof

Commission's proposal	Proposal of UEAPME
<p><i>Article 28</i></p> <p>1. The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the risk passed to the consumer.</p> <p>2. When the trader has remedied the lack of</p>	<p><i>Article 28</i></p> <p>1. The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the risk passed to the consumer, <u>who has to claim within this period for the remedies.</u></p>

<p>conformity by replacement, he shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the consumer or a third party indicated by the consumer has acquired the material possession of the replaced goods.</p> <p>4. In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within two month from the date on which he detected the lack of conformity.</p>	<p>2. When the trader has remedied the lack of conformity by replacement, he shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the consumer or a third party indicated by the consumer has acquired the material possession of the replaced goods. <u>The liability period does not start anew except for those elements (or parts) of the product that have been defective in the product originally delivered.</u></p> <p>4. In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within two month from the date on which he detected the lack of conformity <u>from the moment the lack of conformity have been able to discovered by the consumer.</u></p>
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Justification:

Concerning by the Commission proposed **article 28.1** UEAPME sees the need for further clarification in the interest of legal certainty. According to our view it is also important to mention that within the two years period the responsible consumer has to claim for the remedies. Furthermore concerning **article 28.2** it has to be clarified that in case of replacement of a good, the liability period does not start anew except for those elements or parts of the product that have been defective in the product originally delivered.

We support the provision of **article 28.4** but would propose to amend this point in a more appropriate way. The consumer should have to inform the trader from the moment they should have been able to discover the lack of conformity. Otherwise the trader bearing the burden of proof it would often impossible to prove when exactly the consumer has really detected the lack of conformity. The omission of this information will cause the loss of claims resulting from lack of conformity. Furthermore the **burden of proof should be reversed to the consumer side** after a period of 6 months for goods that can be expected to be used intensively and have a relatively short lifespan, counting from the day of the delivery of the goods.

Comments on the draft report:

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**.

12) Article 29, Commercial guarantees

Commission's proposal	Proposal of UEAPME
<p><i>Article 29</i></p> <p>2. The guarantee statement shall be drafted in plain intelligible language and be legible. It shall include the following:</p> <ul style="list-style-type: none"> (a) legal rights of the consumer, as provided for in Article 26 and a clear statement that those rights are not affected by the commercial guarantee, (b) set the contents of the commercial guarantee and the conditions for making claims, notably the duration, territorial scope and the name and address of the guarantor, (c) without prejudice to Articles 32 and 35 and Annex III (1) (j), set out, where applicable, that the commercial guarantee cannot be transferred to a subsequent buyer. <p>3. If the consumer so requests, the trader shall make the guarantee statement available in a durable medium.</p> <p>4. Non compliance with paragraph 2 or 3 shall not affect the validity of the guarantee.</p>	<p><i>Article</i></p> <p>2. The guarantee statement shall be drafted in plain intelligible language and be legible. It shall include the following:</p> <ul style="list-style-type: none"> (a) legal rights of the consumer, as provided for in Article 26 and a clear statement that those rights are not affected by the commercial guarantee, (a) set the contents of the commercial guarantee and the conditions for making claims, notably the duration, territorial scope and the name and address of the guarantor, (b) without prejudice to Articles 32 and 35 and Annex III (1) (j), set out, where applicable, that the commercial guarantee cannot be transferred to a subsequent buyer. <p><u>3. Legal rights subsist in the case of a commercial guarantee in their full extent.</u></p> <p><u>4.</u> If the consumer so requests, the trader shall make the guarantee statement available in a durable medium.</p> <p><u>5.</u> Non compliance with paragraph 2 or 3 shall not affect the validity of the guarantee.</p>

Justification:

UEAPME considers **article 29.2** as too vague. Voluntary guarantee statements cannot include warranty rights. The intention can only be to confirm that a legal warranty right subsists in the case of guarantee in their full extent. This has to be clarified.

General remarks on chapter IV of the draft report:

In case there it is impossible to reach full harmonisation with respect to chapter IV UEAPME does not see the added value to include chapter IV into the directive, except 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.

13) Right of Redress

Directive 1999/44/EC/Commission	Proposal of UEAPME
<p><i>Article 4</i></p> <p>Where the final seller is liable to the consumer because of a lack conformity resulting from an act or omission by the procedure, a previous seller in the same chain of contracts or any other intermediary, the final seller shall be entitled to pursue remedies against the person liable in the contractual chain. The person or persons liable against whom the final seller may pursue remedies, together with the relevant actions and conditions of exercise, shall be determined by national law.</p>	<p><u>Where the final seller is liable to the consumer because of the lack of conformity resulting from an act or omission by the procedure, the final seller shall be entitled to pursue remedies against the producer.</u></p>

Justification:

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 opinion³ 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.

Comments on the draft report:

We welcome the introduction of article 27a) on the right of recourse. Although the solution still not introducing the direct liability of the producer and in this way does not fulfil the objective, it is solving at least the problem on a similar way the current legal framework does in this case.

³ 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>

14) Article 31, transparency requirements of contract terms

Article 31.2 foresees that the “contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract, with due regard to the means of communication used”. UEAPME questions how traders can prove that his obligation was fulfilled? This provision would again create a situation of legal uncertainty for traders. It should be stopped to improve consumer information on that way that constantly new obligations are introduced for traders. The tendency will not change the attitude of the consumers not to read the contract. Here again will be assumed that this is the duty of the trader to inform his consumer on any price. But what shall the trader do if the consumer is not reading the contract?

For this reason UEAPME see the need to introduce within article 31 respectively within the whole directive the model of the responsible consumer and advocate for a more effective consumer education in general at European level.

15) Article 40, The Committee

According to UEAPMEs view **article 40.1** does not give sufficient information about the fact how the Commission will be assisted by the Committee on unfair terms. This has to be clarified.

16) Article 45, Inertia selling

According to **article 45** the consumer shall be exempted from the provision of any consideration and the absence of a response shall not constitute consent with respect of unsolicited supply of products.

Deliveries in error can happen and therefore information and return requirements seem appropriate in the case of obvious deliveries in error.

General remarks on chapter V and VI of the draft report:

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. UEAPME also agrees on article 46 a) of the draft report which regulates reporting requirements for Member States and mutual evaluation.

17) Annex I

Commission’s proposal	Proposal of UEAPME
ANNEX I A.3. For all sales contracts, a statement informing the consumer about the time-limits and modalities to send back the goods to the trader and the conditions for the reimbursement in accordance with Articles 16 and 17(2).	ANNEX I A.3. <i>Delete</i>

18) Annex II

Annex II (b) has to make clear that the traders can reserve their definite agreement on the conclusion of a contract.

19) Annex III

According to **Annex III (1) g)** even an objectively justified increase of the price which is not caused by the trader (e.g. change of a legislation, changes in public pricing etc.) would have the effect that the consumer can terminate the contract. This again shows that the proposal does not establish a balanced system and assumes that the consumer is in the weaker position. Why should the SMEs be the victims of price increase which is not affected by them? Who will pay for the extra costs they have? Especially in times of economic crises cannot be put such unjustified demand on the small and medium-sized enterprises and should be avoided that more and more SMEs have to close down.

In **Annex III (3) c)** and **(4) a)** shall be clarified that interest rate adjustments based on indexation should also be permissible without a right of termination for the consumer (analogue to price indexation terms).

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