

Permanent Representation of Belgium to the EU
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Proposed directive on consumer rights

Dear Attaché,

I am writing on behalf of BEUC, the European Consumers' Organisation, with regard to the proposed consumer rights directive and the negotiations now led by the Swedish presidency.

To ensure that this piece of legislation becomes the best possible framework for the consumers of today and of tomorrow, substantial improvements must be made and national legislations that have found better solutions than suggested in the proposed directive should be carefully considered.

To date, BEUC did not take a position on the details of the proposed directive, mainly because of the very high level of uncertainty of the proposed text. We therefore welcomed the substantive work done by the Czech presidency to analyse and identify the scope and the impact of the proposed text. We hope that the forthcoming Commission's comparative table and explanatory note - with the help of Member States - will serve as a basis for a comprehensive overview of the effects of the proposed directive. Further work needs to be done in relation to clarifying in particular the scope of the proposed directive and its relationship with national contract law.

BEUC is concerned by the recent explanation of the Commission with regards to the relationship of the proposed directive with the services and e-commerce directive. We understand from the Commission's explanations that the proposed directive would have the effect of turning the information requirements of the services directive into maximum harmonization if a consumer contract is concerned. This explanation is worrying as it may set a precedent whereby the nature of the chosen harmonisation under a directive (in this case the services directive) would be fundamentally altered by a subsequent measure (the proposed consumer rights directive) thereby leading to the absurd situation that consumers cannot benefit from national information requirements going beyond the services directive, while business can. Moreover, the proposed directive does not contain wording which would imply this change of nature of the services directive.

Below we set out our position in relation to a few key provisions in the proposed directive. Please keep in mind that this is only a preliminary and non-comprehensive position, which will be completed as we go along the process of further clarifications and/or interpretations of the Commission's proposal. BEUC will issue more fully developed comments on the proposed directive after the summer recess.

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✚ Some of BEUC's key concerns

Definition of "consumer" (Article 1 paragraph 1)

The definition of the "consumer" in the proposal needs to be amended to cover situations in which a consumer buys goods or services partly for personal and partly for professional purposes (mixed purpose). A person who buys, for instance, a computer for dual purposes (he/she uses it for professional reasons but also plays games or watches films on it) will not receive the protection provided by consumer legislation should the computer become defective for instance. We consider that a consumer should be defined as a "natural person who acts **primarily** for purposes that are outside his trade, business craft or profession". It would furthermore be interesting to know how business could make a difference as to the private purpose or not when a person buys online or in a shop. Should they have different standard contracts on their desk? The directive should also clearly state that Member States are free to apply consumer protection legislation to contracts concluded by other entities (legal persons, start-up-undertakings etc).

Information requirements – Article 5

It being a positive development at first sight, this provision has to be very carefully assessed in the light of the principle of full harmonization and the very broad scope that it would cover under the Commission's "one size fits all" approach in this Article. We refer to information requirements for certain categories of goods, for example for "dangerous" products or for specific categories of goods for which national requirements in commercial law exist, which should not be affected by the proposed directive. Moreover in the field of services, specific consumer needs have to be addressed in specific sectors which could no longer/not be done under the proposed regime. This is not acceptable and contrary to the EU institutions obligation to provide for a high level of protection in EC legislation. We propose the following solution:

The services directive already contains (in Article 3.1) a *lex specialis* rule that states that if there is a conflict with other Community rules then the other specific rules shall prevail. We propose that the proposed consumer rights directive would 1) clearly set out which information requirements of the services directive (Art 22) are applicable to consumer contracts in addition to the ones in Article 5 of the proposed directive and 2) stipulate that Member States may provide for further information requirements for service contracts supplied to consumers.

Right of withdrawal - Starting point (Article 12)

The proposal does not improve the existing *acquis* on this issue but rather worsens it. The proposed system is complex and burdensome. A more simple and consumer friendly solution is required. The starting point of the cooling-off period should be linked with the trader's compliance with his information obligations; otherwise a contract could persist even in cases where the consumer was not properly informed of his rights, yet this creates a disincentive for the trader to perform his information obligations. The system should also allow the consumer to test the goods during the period of withdrawal.

We suggest to insert the following rule (also adopted in the DCFR, draft Common Frame of Reference): *The withdrawal period ends fourteen days after the latest of the following times: a) the conclusion of the contract; b) the time when the entitled party receives from the other party adequate information on the right to withdraw; or c) if the subject-matter of the contract is the delivery of goods, the time when the goods are received.*

Ban on payments before the end of the withdrawal period (Article 12.4)

BEUC does not agree with the proposed provision prohibiting Member States to ban payments before the end of the right of withdrawal. The European Court of Justice (Gysbrechts, c-205/07) has recently ruled that a national (Belgian) measure prohibiting the trader to ask for any payment before the end of the right of withdrawal was justified and proportionate and thus compatible with the Treaty. The Court has at the same time considered incompatible with the Treaty a prohibition for the trader to request, before expiry of that period, the number of the consumer's payment card. BEUC would like to see the ruling of the ECJ reflected in the future directive. If this solution is not accepted by the EC legislators, then at the very least Art 12.4 should be deleted from the proposed directive.

Failure to inform on the right of withdrawal (article 13)

BEUC considers that a 3 month period for exercising the right of withdrawal if the trader has not provided the consumer with the information on that right as suggested by the Commission is much too short. Many Member States currently provide for a longer or even unlimited period of time in such cases. A high level of consumer protection under a maximum harmonisation rule calls for a significantly longer period.

Exceptions from the right of withdrawal (articles 19 and 20)

BEUC is in particular concerned about the exception of distance contracts for the provision of accommodation, transport and car rental services, catering and leisure services. Given the increasing popularity of buying these services over the Internet and the fact that the trader will not suffer any loss in case of withdrawal in many cases (e.g. long-term bookings), these exceptions should be re-considered.

BEUC is also concerned about the exception of the right of withdrawal for services where performance has begun. This provision of the current Distance Selling Directive does not reflect the necessity and possibility to withdraw (and of course partially reimburse the trader) after performance has begun in the case of continuing obligations (e.g. internet provider). Thus, we consider that the right of withdrawal should apply until the service contract has been fulfilled.

Regarding e-auctions, a number of Member States currently provide for a right of withdrawal for consumers in the context of purchases from professional sellers through e-auctions on I-net platforms (such as : E-Bay, PriceMinister, OXL). These platforms are increasingly used by consumers and can serve as a way to circumvent consumer rights compared to other distance sellers. The exception should be removed.

Delivery (Art 22)

Regarding the proposal for the introduction of a general delivery period, we would prefer a rule that states that the trader should in principle deliver as soon as possible, but in any case within 30 days. In the majority of concluded sales contracts, delivery times are probably much shorter. In our opinion, 30 days (as currently the delivery period in the distance selling directive) does not suit as default rule for ALL purchases. Regarding the consequences of late delivery, consumers should be able to decide to cancel or to maintain the contract. Otherwise, traders could well misuse the effects of late delivery and in cases where the trader no longer wants to deliver the good, maybe because he ran out of stock or could get a better price from another purchaser, just delay the delivery.

Hierarchy of remedies (Art 26 paragraph 3)

The only effective way to increase consumer confidence in shopping cross-border is to provide consumers with the right to terminate the contract if the good is faulty right from the start and not only as a second tier remedy. The fact that in such a case the consumer will simply not be entitled to receive back any payments he/she has made, but will need to send back the goods to the trader in another country and then have to wait until that good is repaired or replaced, is a disincentive to cross-border shopping.

Our member organizations in the countries where no hierarchy of remedies exist, but an initial choice between four remedies or "the right to reject" does exist, are very clear about the fact that these provisions are key tools for consumers and provide the consumer with a good "bargaining" position, if a product turns out to be faulty. BEUC believes that the proposed hierarchy should be replaced by a concept which allows for a free choice between all remedies right from the start. If such a change to the proposed directive is not possible, we consider that under all circumstances and as a minimum, the EU regime for legal guarantees must remain under minimum harmonisation.

Guarantee period – Article 28 Paragraph 1

A number of Member States provide for a longer period than 2 years. Turning the current EC minimum into a maximum threshold as suggested by the Commission is not acceptable. It would also run counter to the EC's Sustainable Production and Consumption policy which aims at extending the durability of consumer goods. BEUC asks for a general guarantee period of 3 years complemented by a lifespan guarantee to apply to more durable goods (cars, washing machines, construction materials, refrigerators...). If this approach does not receive the support of the legislators, the suggested period of 2 years should be subject to minimum harmonization.

This definition of the lack of conformity in Art 24 paragraph 2 is based on the concept that certain goods normally last longer than only 2 years and that consumer expectations to this end are justified. Two years is not the "normal" or "maximum" lifespan for all products in normal use. The normal duration of home appliances has generally been set to be much longer than the commercial guarantee period. A washing machine or a car should last for more than 2 years. A fully harmonized cut-off of the guarantee period at 2 years would counter the proposed directive's own definition of the lack of conformity.

Obligation to notify the lack of conformity – Article 28 paragraph 4

The introduction of such a duty for consumers on an EU wide level is not justified. Consumers in any event have an interest to notify the defect as early as possible. We cannot see any real benefit for business from the introduction of such an obligation because it will be difficult to prove at what moment the consumer actually observed the defect. We are rather concerned that the obligation will be used by traders to deter valid claims. We are not aware of a detriment to business in those countries where such a duty does not exist to date.

Direct producer's liability

The achievement of the objective of the pCRD to promote consumer confidence to shop cross-border would be greatly helped by the introduction of a joint liability of the producer and the trader for remedying faulty products. Consumers would be much more inclined to buy goods from another country, if he/she knows that in case of a defect, repair can be exercised in his /her home country. BEUC therefore strongly recommends the introduction of the joint liability of the producer and the seller as an essential element of modern consumer legislation, providing a clear incentive for consumers to shop cross-border.

Unfair contract terms – Art 30- 39

Unfair contract terms legislation is a principle-based field of law, based on non-harmonised national civil law. Applying full harmonisation in this area as suggested by the Commission would entail a significant decrease of consumer protection in many Member States whilst at the same time not fulfilling the Commission's objectives of providing for more legal certainty. The latter could equally efficiently be achieved with a high degree of protection under minimum harmonisation. We are currently undertaking an analysis of existing national black and grey lists of unfair contract terms with a view to proposing amendments to the Annexes, based on a comprehensive non-exhaustive minimum harmonised EU list of unfair contract terms.

BEUC is not only very worried about the pre-emptive effects of the proposed directive, which would significantly reduce the level of consumer protection in many Member States, but also about the eventual "fossilisation" of national consumer law as a consequence of the very broad application of full harmonisation by the proposed directive. We hope that you will consider our concerns when discussing the proposed directive further.

We remain at your disposal for any further information /clarification that you would require (mail to: consumercontracts@beuc.eu).

Yours sincerely,



Monique Goyens
Director General