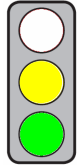


## MAIN ISSUES

**Objectives of the Directive:** The Directive aims to harmonise consumer rights in the EU.

**Parties Concerned:** Suppliers of goods and services, consumers



**Pros:** (1) Full harmonisation enhances the efficiency of the internal market.

(2) The Directive does not extend consumer rights to the extent that they might have a negative effect on growth and employment.

**Cons:** The Commission is to be allowed to determine which contract terms are deemed unfair without the co-decision of the European Parliament and the Council.

**Changes Required:** The European Parliament and the Council should reserve the right to determine whether or not a term of a consumer contract is unfair.

## CONTENT

### Title

**Proposal COM(2008) 614** of 8. October 2008 for a Directive of the European Parliament and the Council on consumer rights

### Abstract

#### ► Object and Aims

- The Directive Proposal applies to all contracts for the purchase of movable goods and services concluded between traders and consumers [Art. 3 (1)].
- “Consumer” means any natural person who “is acting for the purposes which are outside his trade, business, craft or profession” (Art. 2 No. 1).
- “Trader” means any natural or legal person who “is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader” (Art. 2 No. 2).
- The Directive is to ensure a “proper functioning of the business-to-consumer internal market” and a “high common level of consumer protection”.
- The proposed Directive revises and embraces the following directives:
  - Directive 85/577/EEC on contracts negotiated away from business premises
  - Directive 93/13/EEC on unfair terms in consumer contracts
  - Directive 97/7/EC on the protection of consumers in respect of distance contracts
  - Directive 99/44/EC on the sale of consumer goods and associated guarantees
- Member States may not maintain nor introduce provisions on consumer contractual rights deviating from the Directive (“full harmonisation”, Art. 4).

#### ► Pre-contractual Information Obligations of the Trader

Prior to the conclusion of any sales or service contract the trader must inform the consumer as to the main features of a product, the price inclusive of all taxes and duties, additional freight, delivery or postal charges, the arrangements for payment, delivery and performance and, where applicable, the existence of a right of withdrawal [Art. 5 (1)].

#### ► Purchase of Consumer Goods

- **Terms of delivery:** The trader is obliged to deliver the goods to the consumer within a period of 30 days following the contract conclusion [Art. 22 (1)]. If the trader fails to fulfil his obligation to deliver he has to refund all payments made by the consumer within further seven days (Art. 22 Abs. 2).
- **Passing of risk:** The risk of loss or damage passes to the consumer as soon as he is in material possession of the goods [Art. 23 (1)]. Should the consumer fail to take “reasonable steps” to acquire the material possession of the goods, the risk passes to the consumer at the time of delivery [Art. 23 (2)].
- **Warranty**
  - The trader is liable for any defect of the goods existing at the time the risk passes to the consumer (Art. 25). This provision is applicable if and when:
    - the defect becomes apparent within two years following the time of risk passing [Art. 28 (1)]
    - the consumer informs the trader of the defect within two months following the detection [Art. 28 (4)].
  - If the goods are not in accordance with the contract, the consumer is entitled to the following claims:
    - The trader may choose to remedy the goods by repair or replacement. If the repair or replacement is unlawful, impossible or related to a “disproportionate effort”, the consumer may either reduce the purchase price or withdraw from the contract, unless the defect is minor [Art. 26 (3)].

- The consumer may choose between repair, replacement, price reduction and contract withdrawal if the trader fails within a reasonable period of time to return the goods to a condition in accordance with contract specifications [Art. 26 (4) lit. a-c]. The same applies if the same defect reappears more than once "within a short period of time" [Art. 26 (4) lit. d].

► **Unfair Contract Terms**

- "Unfair contract terms" which are established "contrary to the requirement of good faith" by a "significant imbalance in the parties' rights and obligations arising under the contract" to the consumer's detriment are not binding on the consumer [Art. 37, Art. 32 (1)].
- All contract terms drafted in advance and to which the consumer has agreed without having the possibility of influencing their content are subject to the control of unfair terms [Art. 30 (1)].
- The proposed Directive contains the following valid EU-wide
  - terms "considered unfair in all circumstances" ("black list", Annex II)
  - terms presumed to be unfair unless the trader can prove the contrary ("grey list", Annex III No. 1)
- Unfair contract terms may be amended by the Commission, provided a committee consisting of representatives of the Member States agrees and further provided that the Council and the Parliament do not contradict (Art. 34 sentence 2, Art. 35 sentence 2, Art. 39, Art. 40; so-called "regulatory procedure with scrutiny").

► **Distance Contracts and Off-Premises Contracts**

- **Definitions**

- A "distance contract" means any sales or services contract where the trader makes exclusive use of a means of distance communication such as a telephone or the internet for concluding the contract (Art. 2 No. 6).
- An "off-premises contract" means any sales or services contract concluded, or at least negotiated, away from business premises with the "simultaneous physical presence" of both the trader and the consumer (Art. 2 No. 8).

- **Information Requirements**

In the case of distance or off-premises contracts the trader must in particular refer to the consumer's right of withdrawal and the possibility to settle any disputes amicably (Art. 9).

- **Formal Requirements**

- In the case of distance contracts, such information must be made available to the consumer prior to contract conclusion "in a way appropriate to the means of distance communication used" [Art. 11 (1)]. If the trader makes a telephone call to the consumer in order to conclude a contract, he must disclose the purpose of his call and his identity at the beginning of the conversation [Art. 11 (2)].
- An off-premises contract is effective only if the consumer signs an order form on paper or receives a copy of the order form on another "durable medium" (USB-Stick, CD-ROM, DVD, memory card) [Art. 10 (2)]. The order form must include a standard withdrawal form [Art. 10 (1), Annex I Part B].

- **Right of Withdrawal**

- Consumers are entitled to withdraw within 14 days from distance and off-premises contracts without giving reasons [Art. 12 (1)]. If the consumer is not informed of the right of withdrawal, the withdrawal period does not expire until three months after the date on which the trader has "fully performed" his remaining contract obligations (Art. 13).
- In the case of distance contracts, the right of withdrawal pursuant to Art. 19 (1) is excluded if the contract was concluded through an auction (Art. 2 No. 15).
- Where the consumer has informed the trader of the wish to cancel, the received goods must be returned within 14 days [Art. 17 (1)]. The trader must reimburse any payment received by the consumer within 30 days upon the receipt of the withdrawal notice [Art. 16 (1)].
- In the case of withdrawal, the consumer is not liable for the diminished value of the goods unless he was informed of the right of withdrawal [Art. 17 (2) sentence 2].
- In the case of service contracts, the consumer must not bear the costs for services performed fully or partially during the withdrawal period [Art. 17 (2) sentence 3].

► **Collective Action**

In order to ensure compliance with the Directive, Member States may provide for the right of action for consumer and professional organisations, yet do not mandatorily have to do so [Art. 41 (1) and (2)].

## Changes to the Status Quo

- Minimum harmonisation according to which Member States may adopt stricter consumer protection rules is replaced by full harmonisation which does not allow for any deviations.
- Until now, delivery terms and provisions on passing the risk as regards the purchase of consumer goods were provided for by national law only, yet not by EU legislation. The consumer's two-month obligation to inform of the consumer on the defect is also new [Art. 28 (4)].
- Until now there have been no EU-wide harmonised rules on the terms, forms and effects of the withdrawal of distance and off-premises contracts.

## Statement on Subsidiarity

According to the Commission, the fragmented regulatory framework can be overcome solely by full harmonisation at EU level. This would enhance consumer confidence in the internal market and, at the same time, reduce companies' costs resulting from differing consumer contractual rights.

## Political Context

The Proposal is based on the Green Book of 8 February 2007 on the "Review of the Consumer Acquis" [COM(2006) 744, cf. [CEP Policy Brief](#)] and the "EU Consumer Policy Strategy (2007-2013)" [Communication COM(2007) 99 of 13 March 2007, cf. [CEP Policy Brief](#)].

## Legislative Procedure

08.10.08 Adoption by Commission  
Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

## Options for Influencing the Political Process

Leading Directorate General:	DG Health and Consumer
Committees of the European Parliament:	Internal Market and Consumer Protection (in charge), rapporteur: open; Legal Affairs
Committees of the German Bundestag:	Open
Decision Mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

## Formalities

Legal basis:	Art. 95 TEC (Internal Market)
Form of legislative competence:	Concurrent legislative competence
Legislative procedure:	Art. 251 TEC (Co-decision)

# ASSESSMENT

## Economic Impact Assessment

### Ordoliberal Assessment

The existing fragmentation of the legal framework regulating consumer rights in the EU does actually not impose any fundamental barriers to the internal market as far as consumers are concerned, since consumers can rely on the law applicable in their respective Member States of residence. Businesses, however, are exposed to a fragmented market with 27 at least partially differing rules, including formal requirements. This impedes their incentive to conclude contracts with consumers from other Member States. **Fully harmonising consumer rights may therefore result in a more effective exploitation of the full internal market potential.** However, the approach of full harmonisation is opposed by **diverging national preferences** and traditions regarding consumer rights, as well as by the principle advantages of a system competition which increase innovation and efficiency. There is an **unsolvable conflict of aims**.

### Impact on Efficiency and Individual Freedom of Choice

The **full harmonisation of consumer rights** increases consumer choice as a basic principle, since a reduction of market barriers increases supplies from abroad. It intensifies competition and thus **increases the efficiency of the entire economy**.

**Consumer rights might incur costs** leading to higher prices and reduced supplies. **However, the Proposal takes this issue into account appropriately.** For instance, pre-contractual information obligations will hardly lead to additional costs for companies since they may be complied with at low costs.

In the case of internet auctions, the Proposal excludes a right of withdrawal for consumers. On the one hand, this is not to be objected to, since the right of withdrawal generally contradicts the nature of an auction. On the other hand, however, this might decrease incentives for consumers to conclude contracts through auctions on the internet. In this case, affected companies may grant their own corresponding right which serves their interests.

### Impact on Growth and Employment

Harmonised consumer protection requirements will stimulate the internal market, in particular retail trade, and boost competition. **Consequences will be more growth and an increase in employment.** A dramatic increase of consumer rights at EU level would have had a negative impact on employment. This is not to be expected from the submitted Proposal.

### Impact on Europe as a Business Location

Unproblematic.

## Legal Assessment

### Legal Basis

Pursuant to Art. 95 (1) TEC, the EU has the power to approximate single states' requirements related to consumer contractual rights. In realising the internal market the EU must at the same time achieve a high common level of consumer protection [Art. 95 (3) TEC, Art. 153 (1) and (3) lit. a TEC].

### Subsidiarity

Legal fragmentation constitutes a barrier to the free movement of goods and services and reduces the incentive for companies to sell cross-border. As the said barrier can only be overcome through **full harmonisation** at EU level, the Directive Proposal **is in line with the principle of subsidiarity** pursuant to Art. 5 (2) TEC.

Not substantive is the Commission's argument that without full harmonisation consumer confidence in the internal market would be undermined. Art. 6 (2) of the Regulation (EC) No. 593/2008 of 17. June 2008 on the law applicable to contractual obligations ("Rome I") stipulates that with cross-border trade consumers may always rely on the statutory requirements of their home Member State.

### Proportionality

Full harmonisation of essential parts of consumer contractual rights might constitute an infringement of the principle of the least possible intervention, since minimum harmonisation would intervene less with the legal systems of Member States. However, the problem of legal fragmentation can only be solved through full harmonisation, and therefore it does not constitute an infringement of the principle of proportionality pursuant Art. 5 (3) TEC.

### Compatibility with EU Law

Given the overall principle of democracy, **it is questionable whether or not the Commission should be entitled to determine which contract terms** are included in either the "black" or "grey" list and, as a result, **considered unfair** (Art. 34 sentence 2, Art. 35 sentence 2, Art. 39, Art. 40). These are essential provisions of consumer contractual law. However, the Commission has the right to adopt implementing measures solely if related to "non-essential provisions" [Art. 2 (2) of the "Comitology Decision" 1999/468/EC of 28. June 1999]. Though in this "regulatory procedure with control" the European Parliament can, with a majority of its members and the Council with a qualified majority, choose to reject the amendment proposals of the Commission, this does not conform to the scope for design these two EU organs usually have in the normal legislative procedure pursuant to Art. 251 TEC.

### Compatibility with German Law

The transposition of the Directive Proposal would lead to manifold modifications, in particular of the German Civil Code (BGB). According to § 271 BGB, a creditor in doubt is entitled to claim the contractual performance without delay. With a delivery term of 30 days for the purchase of consumer goods, the aforesaid rule would become irrelevant. There is still no notice period for defects of purchased consumer goods. While according to § 438 BGB the purchaser may choose to have defective goods remedied either by repair or replacement, the Directive transfers such right of choice to the trader. The statutory right of withdrawal for purchases through auctions on the internet (§§ 312d, 355 BGB) would be omitted, since the Directive allows for a right of withdrawal in the case of auction purchases only if agreed upon by the contract parties.

## Alternative Policy Options

The definition of whether or not contract terms are unfair should remain the right of the European Parliament and the Council.

## Possible Future EU Action

The Commission has announced a communication to be published in December 2008 wherein collective actions of consumers and consumer organisations will be assessed.

## Conclusion

Full harmonisation of consumer rights leads to more effective exploitation of the full internal market potential and conforms to the principle of subsidiarity. The Directive does not entail any higher costs limiting the supply of goods and services or increasing prices. However, the fact that the Commission determines which contract terms are deemed unfair without a co-decision of the European Parliament and the Council gives cause for concern, since this would inappropriately restrict the influence of the European Parliament and the Council. The Directive should be revised in this regard.