

THE FUTURE OF EUROPEAN CONSUMERS' RIGHTS

BEUC's reaction to the fundamental issues raised by the
Proposal for a directive of the European Council and of the Council on
consumers rights, COM(2008)614

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Summary

This is a first response of BEUC, the European consumers' organization, to the Commission's proposal for a directive on consumer rights.

While in principle BEUC and its members agree with the objectives of the Commission's proposal, we are not able to support the proposal in its current form. There are a large number of reasons for this, the main ones of which include:

- in many Member States, the proposal would lead to the removal or reduction of important consumer protection rights;
- the Commission has not fully justified the approach it has adopted;
- the scope of the proposal is unclear. In particular, it is essential that the interface between the proposal and general civil/contract law in each Member State is clearly set out;
- the proposal is based on the principle of maximum harmonization and:
 - the reality is there will still be significance divergence at a national level;
 - minimum harmonization at a high level can for the majority of issues deliver the Commission's objectives without the pitfalls associated with maximum harmonization
- the lack of harmonized consumer laws is not a key barrier to cross border trade:
 - latest Eurobarometer surveys show that most traders will not increase their cross border sales even if consumer laws are harmonized across the EU;
 - even fully confident consumers are sometimes unable to shop cross border due to existing barriers that will not change once consumer laws are harmonized (e.g. territorial intellectual property rights);
- the Commission is placing undue reliance on the assumption that the benefits of reduced compliance costs for business will automatically be passed on to consumers in terms of reduced prices and greater choice;
- the proposal is overly complex and the Commission has not taken the opportunity to clarify existing uncertainties;
- many of the positive aspects of the proposal as highlighted by the Commission are already in place in one or more Member States and even if they are truly 'novel' rights, they cannot outweigh the negative impacts of the proposal ;
- the proposal is too focused on the existing directives: insufficient steps have been taken to 'future proof' the proposal.

BEUC is in favour of a "mixed" harmonisation approach: From a consumer perspective, **it is possible to accept maximum harmonisation only if it is set at a clearly high level of protection and is applied to cross-cutting and technical issues** (such as for example the length of the withdrawal period, the conditions to exercise it and the definition of a consumer). **For other issues covered by the proposed directive, in particular as regards unfair contract terms and guarantees, this legislative revision should be based on a minimum harmonisation** approach, which allows Member states to maintain national particularities valued by consumers and to adapt quickly to market changes.

We call on the European Parliament and the Council, to focus their efforts on improving the level of protection in this directive, which is substantially too low, and to identify those issues, which could qualify for full harmonisation, following the strict conditions as outlined below.

The future of European Consumers' Rights

This is a first response of BEUC, the European consumers' organization, to the Commission's proposal for a directive on consumer rights¹. In this paper we set out our concerns in relation to the fundamental questions raised by the underpinning rationale of the proposed directive and its effect on the development of consumer and Internal Market policy. We consider that this directive requires substantial groundwork to be done before any decision be taken. We will in a second step also publish detailed comments on the proposed directive.

1. INTRODUCTION - WHAT IS AT STAKE?

The proposal for a directive on consumer rights intends to harmonise the main legal aspects of contracts between consumers and business. It integrates four Directives of the current consumer acquis and will provide the legal regime for basically all consumer purchase contracts be they of a domestic or a cross border nature, when shopping in the grocery store next corner or on-line from the Internet. This piece of EC legislation will therefore clearly have a direct and tangible impact on the everyday life of each consumer in the EU. **The existing EC consumer contract rules must be updated** and the existing level of consumer protection **increased, in order to promote consumer confidence**. The review should **bring legal certainty, simplification and more coherence** amongst the currently diverging definitions and concepts. Already in BEUC's response² to the Commission's 2007 Green Paper which considered possible approaches for a revision of the consumer law acquis (times-share, package travel, price indication, distance selling, door-step-selling, unfair contract terms, product guarantees and injunctions Directives), we underlined that the review of the consumer aquis needs to focus on these essential objectives.

The proposed directive, which the Commission presented in October 2008 as the result of the 2007 consultation, raises many fundamental questions, reaching into the very heart of EU consumer protection policy and its future development but **also touching upon the fundamental concepts and vision of the Internal Market**. It will furthermore shape the structure of national consumer laws and their development and it will finally have a big impact on national civil law regimes in general.

With these broad implications in mind, EU co-legislators should not only focus on the examination of detailed questions in relation to the issues covered by the directive, but should be guided by deliberations on matters of principle and strategy on the future of EU and national consumer protection policy as well as on the EU's Internal Market policy.

With Europe's economy in difficulty it is more important than ever that consumers are properly protected and that consumer confidence is based on a solid framework of rights.

¹ Proposal for a directive of the European Council and of the Council on consumers rights, COM(2008)614

² BEUC/X/30/2007, to be accessed at : www.beuc.eu

2. WHAT DO EUROPEAN CONSUMERS NEED?

The aims of the proposed directive as set out by the Commission are *to achieve a real business to consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises...*³. The revision has also the objective to simplify, update and bring more coherence to the existing rules⁴. Furthermore the Commission identifies a lack of consumer confidence⁵ and the proposal is meant to contribute to increasing such confidence.

As such, BEUC welcomes these objectives. In our response to the 2007 Green Paper⁶ on the review of the consumer acquis, we outlined a number of inconsistencies across the directives that need to be tackled (divergent definitions in different directives, incoherence of certain terms...) and that furthermore an update of some of the existing rules is necessary in order to keep pace with technical and market developments and to respond to new challenges and respective needs of nowadays consumers.

More consumer research

The objective to open the Internal Market by promoting cross-border purchases has to be embedded in the wider and more fundamental objective to truly enhance consumer confidence by providing consumers with the means to play an active role in the market. This would be the only adequate approach in line with the Commission's Single Market vision⁷.

Hence, we stress that the revision of the consumer law acquis should focus on what really matters to consumers: When shopping, at home or in/from another EU country, consumers must be able to rely on a high level of consumer protection throughout the EU that is effectively implemented and properly enforced.

We notice however the manifest absence of qualitative research to identify needs and problems that consumers face when concluding contracts within or outside national borders. To identify real needs of consumers, research should include for instance the following questions: what are the problems consumers face in the fields of both, domestic and cross-border shopping? what are the products/services that consumers want to buy on line?, what kind of redress do consumers need in case a product is faulty? what makes consumers feel confident or reluctant to shop cross-border?, where do consumers shop for different types of goods and services? etc.

The Eurobarometer surveys that have been conducted in relation to business and consumer attitudes do not address these issues or only provide for quantitative data of limited value in this respect. The Commission's Impact Assessment does not give responses to these fundamental questions.

As far as we are aware, the only recent piece of consumer research in this area is a study⁸ commissioned by the European Parliament's committee on the Internal Market and Consumer Protection (IMCO) on certain key elements of the current consumer

³ Explanatory Memorandum page 2.

⁴ See recital 2 of the proposal.

⁵ Explanatory Memorandum page 2.

⁶ BEUC/X/30/2007

⁷ Commission Communication "A Single Market for the 21st century Europe" COM(2007)724 final

⁸ Study for the EP "Consumer experience of legal guarantees – transposition and implementation of the two years guarantee contained in the Sales Directive", PE 416.204, January 2009.

sales directive. The study clearly illustrates that consumers' and business' awareness of rights is generally low and that the current system of remedies for faulty goods which would stay in place according to the proposed directive, does not work for consumers.

Finally, before modifying the European consumer protection legislation in depth, it would be useful to learn from other consumer protection systems. For example, in the United States (a very wide market that can be compared to the Internal Market), there is a variety of laws both at the federal and state levels regulating consumer affairs. Has it been demonstrated that such a system is a major obstacle to the functioning of the North American market?

A strategy to focus on the essentials

Bearing in mind the need to focus on consumers needs and expectations, the following strategic questions should be considered in order to clearly define what concept should underpin the review of the current EC consumer legislation:

- What is the right way forward in combining the aim to promote cross-border trade with the need to preserve and develop valuable consumers' prerogatives and rights that matter to consumers in their daily purchases?
- Is the consumer interest in relation to contract law matters better served in a uniformly and centralistically regulated Internal Market with (supposedly) more choice or should there be space for the retention of national rules, responsive to local patterns of consumer protection?
- Is there really a direct causal link between establishing the same legal rules everywhere and providing more choice, lower prices and increased consumer confidence to EU consumers?
- Should consumer contract legislation be decided in the future exclusively on a EU level as implied by the proposed directive?
- Should the EU head towards a European Consumer Code by separating national consumer law from civil law?
- Is it possible at all to provide for an entirely harmonized consumer sales law without further harmonizing national civil law?

When looking into these strategic issues at stake, we consider that a balance must be found between seemingly opposing concepts of how consumer interests can best be served within the EU Internal Market and how consumer legislation can be improved most efficiently to the benefit of both, consumers and business.

3. THE LEVEL OF PROTECTION – HOW HIGH IS HIGH?

The proposed directive puts the question of what constitutes a high level of consumer protection center stage.

The purpose of the directive is to apply full harmonization to areas of consumer law, which so far have been governed by minimum harmonization directives. For many of its provisions, **it proposes to re-harmonize a harmonized field by imposing the previous minimum level of protection as the maximum that Member States can provide for their consumers.**

The EC treaty requires the EU institutions to set measures in the field of consumer law at a high level of consumer protection (Article 153 para 2, Article 95 para 3 ECT) and it stipulates that the activities of the Community must contribute to a strengthening of consumer protection (Art 3 paragraph 1 (t)).

Yet not only BEUC and its members, but many of the most distinguished (consumer) law scholars⁹ have identified a low level of protection proposed by the Commission, which does not meet the requirements of the EC Treaty. The proposal is not based on a high level of consumer protection in comparison to the existing directives and obviously even less so in relation to national legislation. Besides other serious concerns in relation to effects of maximum harmonization in the contract law area, we are of the opinion that **the level of protection offered by the current proposal is far too low to justify maximum harmonization**. It would clearly reduce the level of consumer protection in many Member States as our analysis, based on detailed information reported by our members and on academic research, including the Commission's Law Compendium¹⁰, shows.

In some Member States these downward adjustments would concern core provisions of consumer legislation:

In particular in the field of legal guarantees, consumers from many countries would be deprived of current rights, for example to directly proceed with the cancellation of the contract, if a product is faulty and get the money back, instead of letting the trader choose whether he/she wants to repair (or replace) the defective good, as suggested by the proposed directive¹¹. Furthermore, in many countries, the legal guarantee period is longer than the proposed 2 years, which is particularly important and justified for durable goods such as cars and household appliances: the periods range from 3 years to 6 years to "the expected life span period"¹². Additionally on the list of important negative effects, we notice the proposed introduction of an obligation for

⁹ See the presentations of academics at recent conferences and hearings on the proposed directive: Prof. Carole Aubert de Vincelles, Prof. Martijn Hesselink and Dr. Christoph Busch for the EP hearing 2nd March (<http://www.europarl.europa.eu/activities/committees/hearings.o?language=EN&page=2&body=>); Prof. Simon Whittaker and Prof. Gilles Paisan at the French Presidency Conference, Paris 5th December 2009 (http://www.eu2008.fr/PFUE/cache/offence/lang/fr/accueil/PFUE-12_2008/PFUE-05.12.2008/journees_de_la_consommation_renforcer_la_confiance_du_consommateur_europeen.jsessionid=FC92B11CAC01A13DA989B9D237A90F04); Prof. Hans Micklitz at the Consumer Day, 13 March 2009, EESC (http://eesc.europa.eu/sections/int/index_en.asp?id=1470007inten), Prof. Jules Stuijk, at the Conference Perspectives For European Consumer Law, Prague, February 2009 (http://www.konzument.cz/aktuality/soubory/Conference_program_eng.doc). As well as the numerous articles published on the proposal, for example "Modernising and harmonizing consumer contract law", Edited by Geraint Howells & Reiner Schulze, expected publication March 2009, M Sellier; "Protection or pre-emption, the Commission Proposal for a 'Directive on Consumer Rights'", Norbert Reich/Hans-W. Micklitz, forthcoming CMLRev. 2009; "The proposal for a directive on consumer rights: no single set of rules", Prof. Evelyne Terryn and Prof. Peter Rott.

¹⁰ to be accessed at : http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#comp

¹¹ Despite recent statements of the Commission to the contrary, our reading of the proposal would imply that UK and Irish consumers would lose the "right to reject", a very well established consumer remedy, which allows the consumer to cancel the contract and get the money back in case a product is faulty, without having to accept repair or replacement of the good. In any case, consumers in Portugal, Greece, Slovenia, Latvia and Lithuania would lose the initial right to choose between four remedies, including the right to rescind from the contract.

¹² Finland, Sweden, Ireland, the Netherlands and the United Kingdom provide for a longer guarantee period than the proposed 2 years.

consumers to notify the trader¹³ within two months from discovery that the purchased good is defective (if not the right to a guarantee is lost), as well as the limitation of the period for withdrawal where consumers are not informed of their right to cancel to 3 months¹⁴, the obligation to meet certain form requirements when exercising the right of withdrawal in distance selling contracts¹⁵, and finally that consumers in some countries would from now on be deprived from withdrawing from a contract concluded through an auction at a "power platform" on the Internet (such as for example e-Bay)¹⁶.

Many other examples of the negative impact of the proposed directive on important national consumer law can be found. Against this background, BEUC starts from the assumption that the level of protection of the current directives, which are based on a minimum harmonization approach, must not be the level of protection provided for by an instrument based on full harmonization. Logically, this approach would only lead to a reduction of consumer protection throughout the EU.

We regret in this context that the Commission ignored most of the "recommendations" made in the DCFR¹⁷. We notice for example that the Draft Common Frame of Reference provides for a higher level of consumer protection than the proposal in particular as regards the provisions on sales contracts, such as on the lack of conformity and guarantees¹⁸. Why did the Commission close the eye to such recommendations?

Finally, in some instances the provisions in current directives have been weakened even (with no clear justification) when taken over by the proposal. An example of this is Article 26 which, unlike the existing directive on consumer sales, gives the initial choice between the remedies for a lack of conformity to the trader, not to the consumer, who is the first one to choose under the current directive ; or in other cases, in which Member States according to the current directives can choose to implement certain obligations or not, the Commission has chosen the consumer "unfriendly" option to become the default rule across the EU (see for example article 28.4¹⁹).

¹³ Consumers from 10 EU countries (Austria, Belgium, Czech Republic, France, Germany, Greece, Ireland, Latvia, Luxembourg, UK and the Netherlands) would be worse off than today;

¹⁴ Longer withdrawal periods in case of the omission of information about the right to withdrawal for doorstep selling or/and for distance selling exist for example in: Austria, Germany, UK, Spain, Finland and Greece

¹⁵ Consumers in 19 Member States, when buying at a distance, would lose the right to exercise withdrawal by any means. Instead they would have to fulfil certain form requirements (Czech Republic, Austria, Belgium, Greece, Denmark, Estonia, Finland, France, Hungary, Ireland, Latvia, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Sweden, Romania, and Spain).

¹⁶ In Germany for example consumers can make use of such a right.

¹⁷ The Academic "Draft Common Frame of Reference" (DCFR), prepared by the Study group on a European civil code and the research group on EC private law (Acquis group); the full out-line edition has been published in February 2009 (see <http://www.sellier.de>)

¹⁸ The DCFR also overtakes the directive in that it extends the definition of consumer to cover « mixed purposes » contracts, the protection is extended to software and digital content, the consumer has a free choice of remedies, there is no duty for the consumer to pre-notify lack of conformity to the trader and the commercial guarantee is expressly transferable to subsequent buyers.

¹⁹ The Consumer Sales Dir. leaves MS with the option to impose a duty of the consumer to notify lack of conformity within two months, whereas the proposal *obliges* MS to provide for such a duty. The foreseen duty to notify produces an extra burden on consumers and is not necessary.

We acknowledge that the proposal provides for some novelties, yet most of these positive points already exist in at least a few Member States and even if they do not, it is questionable whether they are rights that are really important/will be valued by consumers if compared to the potential losses at stake. Such provisions concern for example the inclusion of “non organised” distance selling schemes into the scope of the directive and the fact that in on-line transactions pre-ticked boxes are not binding for the consumer; On the other hand, we consider that the introduction of a horizontally applicable 14-day withdrawal period, the introduction of a consumer friendly regime for the passing of the risk after purchase and the inclusion of solicited visits in door-step-selling are real improvements that the proposed directive provides.

Even though these few improvements are welcome, they can never compensate the loss of numerous core consumer protection provisions at national level caused by the repeal of such rules as an effect of the full harmonisation/low level of protection combination of the proposed directive.

4. THE DEGREE OF HARMONIZATION – CAN FULL HARMONIZATION DELIVER?

Breaking with a legal tradition in EC consumer policy, the proposal is based on the principle of full harmonization which would from now on apply to all key aspects of consumer contracts. Member States consequently cannot deviate from the directive by maintaining or introducing national provisions eventually providing for a higher level of consumer protection. This implies that even if changes or abuses in specific markets show an urgent need for legislative action, such action can only be taken at EU level²⁰.

What the Commission calls “targeted full harmonisation” is a broad and un-nuanced application of full harmonization to all previously minimum harmonized four directives under review, plus an extension of full harmonisation beyond the current directives, for example regarding information requirements.

The Commission justifies this change of approach by assuming that the defragmentation of national markets through full harmonization will lead to increased consumer choice: enhanced competition on consumer markets will lead, according to the Commission, to enhanced consumer welfare.

BEUC believes that this analysis falls short in many respects:

- there is not enough evidence that fragmentation through legal divergences is the main reason for lack of cross-border trade
- full harmonization as it is presented by the proposal does not lead to unification of legal systems : a lot of legal uncertainty will remain or be newly created

Rather to the contrary, we do think that the principle of full harmonization is neither a suitable nor a sustainable tool to harmonise consumer contract legislation, in particular if full harmonization is applied horizontally and without a proper assessment of its effects and consequences in each case.

²⁰ For example, in some EU countries consumer problems have arisen due to loans offered to consumers via SMS. These countries cannot tackle the problems at national level because of the harmonised provisions of the Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services, which is based on maximum harmonisation.

Is full harmonization an adequate response to market fragmentation?

Despite the Commission's deep belief in the catalytic potential of full harmonization, it has failed to provide conclusive evidence that firstly, the differences in consumer law across the EU are mainly responsible for the (seemingly) low level of cross-border trade in the EU, secondly that those legal divergences are the reason why consumers do not engage more in cross border transactions and thirdly, that - even if transactions costs for business would be reduced through the elimination of these legal discrepancies – traders would indeed significantly increase cross-border selling and consequently engage in competition with the local traders, thereby offering the best products at the lowest prices to the benefit of consumers.

On the contrary, the latest Eurobarometer surveys show that most traders would not increase their cross-border sales even if the laws were made identical throughout the EU²¹. Other factors (e.g. lack of appropriate cross-border redress mechanisms, language barriers, Internet access, fears regarding security and data protection) influence consumers and businesses attitudes toward cross-border contracts much more²². We also observe increasingly unjustified market segmentation through territorial discrimination of consumers by bigger businesses. Companies prevent consumers from accessing their products/services in another country than the consumer's country of residence and exclude them from benefiting from better prices and eventually more choice²³. Some of these restrictions are founded on intellectual property rights and in exclusive distribution arrangements organized along national boundaries, which won't be changed once laws are harmonized.

According to the evidence available and to our members' experience, it is simply wrong to claim that consumers do not buy cross-border because the laws are not the same in all countries²⁴: For example, consumers shop cross border in cross border areas, because this is "local" (Strasbourg-Kehl for example) despite the fact that different legislation applies (for example, the fact that the right to a "garantie décennale"²⁵ does not exist in Germany, does not prevent French consumers to buy from German companies)

²¹ According to the 2008 Flash Eurobarometer (Flash EB nr 224) only 16% of traders would increase their cross-border sales if the laws were the same throughout the EU; in total 74% of traders claimed that harmonised laws would make little or no difference to their cross-border activities.

²² 71% of consumers answered that it is harder to resolve problems such as complaints, returns, price reductions, guarantees, when purchasing from providers located in other EU countries compared to the ones based in their home country (2006 Eurobarometer). 59% of traders mentioned as an important barrier the perceived cost of the difficulty in resolving cross-border complaints (Special Eurobarometer 244, 2008)

²³ Electronic devices, travel tickets or digital content are examples of goods that are often subject to geographical restrictions. See in this regard the study *"Refusals to serve consumers because of their nationality or residence"* Natali Helberger, Institute for Information Law, University of Amsterdam, January 2007: www.ivir.nl.

²⁴ See e.g. T. Wilhelmsson, "The abuse of the confident consumer as a justification for EC consumer law", *Journal of Consumer Policy* 2004, 317-337. See also P. Rott, who questions whether it can be empirically demonstrated that regulation can increase consumer confidence, P. Rott, "Minimum harmonisation for the completion of the internal market? The example of consumer sales law", *C.M.L.Rev.* 2003, 1122.

²⁵ Specific legal guarantee in French law in the construction sector

The minimum directives have already harmonized the legal framework of Member States: consumers benefit from minimum rights which are the same everywhere. Moreover, the average consumer is usually not aware of the laws in force in his/her country of residence but this does not stop him/her to conclude contracts within national borders. Consumers do not expect to find everywhere the same commercial culture as in their own country but they mostly worry about effective ways to solve eventual problems or disagreements with the seller. Finally, the rules of the recently adopted Rome I regulation²⁶ should – according to our interpretation - ensure that consumers buying cross-border on the Internet in many cases anyhow benefit from the protection afforded in their country of residence.

“The- same-rules-everywhere” full harmonization approach does in our opinion not provide an added value to European consumers’ confidence. The Commission is chasing the wrong target and with disproportionate means.

Will full harmonization provide the unifying effects it is expected to bring?

What is the impact of the proposed directive on national legislation in Member States? What national legislation will have to be repealed, due to the directive's full harmonization character?

The Commission so far did not provide an assessment of which national rules – according to their interpretation of the proposal - are not in conformity with the proposed directive and consequently would have to be eliminated in the Member States or on the other hand what rules might be maintained. Due to the unclear scope of the proposal in particular regarding its impact on national civil law remedies and to the delimitation problems linked to that, the factual impact of the proposal remains in the dark to a large degree.

As a stakeholder representing the interests of European consumers, we criticize that the Commission in its impact assessment has not provided more information regarding the proposal's influence on national legislation. When core consumer rights are at stake, such as for example consumers’ remedies in case a product is faulty, EU citizens should be able to have a clear picture of what impact a piece of EC legislation may have in their country. This unprecedented degree of lack of clarity of a proposed piece of key EC legislation in terms of its factual consequences for EU citizens and consumers is in our opinion contrary to good governance and the EU’s “Better Regulation” objective.

We welcome therefore that the European Parliament has asked the Commission to provide for an analysis in this respect and we suggest that no decision be taken unless in the light of such information. We also hope that the Council will be involved or contribute to the Commission’s analysis of the proposal's impact in Member state, as national delegations will have assessed the directive's effect on their country in detail.

“Bad surprises” for consumers, as for example in the field of product liability, where the European Court of Justice many years after its implementation ruled that the

²⁶ Regulation (EC) No. 593/2008 on the law applicable to contractual obligations

directive on product liability requests Member States to repeal certain provisions in favour of consumer protection, must be avoided²⁷.

The interplay between fully harmonized consumer law and national civil law and the scope of the proposed directive

Consumer law naturally develops alongside contract law and one cannot be isolated from the other. Consumer contract law is a branch of private contract law. The full harmonization approach of the proposed directive would lead to a “freezing” effect of consumer contract law at EU level while general and in particular B2B contract law would continue to evolve freely. Such an approach is likely to create inconsistencies and paradoxes in the long run (e.g. businesses having more rights than consumers). BEUC is not in favour of a split of contract law into national (B to B, C to C) civil law and EC governed consumer (B to C) law.

According to the proposal’s Explanatory Memorandum, the directive is without prejudice to “more general contract law concepts”²⁸. Hence the question arises as to whether general contract law in fields falling within the scope of the proposal, e.g. in relation to remedies to exercise the legal guarantee, are affected or not. If civil law remedies remain unaffected, important legal divergences would remain, despite the full harmonisation character of the proposal. Legal uncertainty would not be decreased. Recent explanations of the Commission seem to imply that important consumer remedies could be maintained, such as the UK and Irish “right to reject”. These issues should be urgently clarified.

The proposed directive raises furthermore a series of questions in relation to what kind of contracts are covered (for example contracts for housing, immovable property) and how the proposed directive relates to other EC legislation, such as the e-commerce directive and the services directive.

Subsidiarity and Proportionality

According to the Commission, the proposal aims to strike the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring the strict respect of the principle of subsidiarity.

We consider that only minimum harmonization can be reconciled with the principle of subsidiarity when it comes to the core of consumer contract legislation. The European legislator should only take over from the national legislator where there is a clear need to do so. As explained above, we think that the Commission has not provided the proof for the necessity to apply full harmonization across the main aspects of consumer contracts.

Furthermore the Commission’s choice of tool for achieving the objectives of the directive is not proportionate in relation to the clearly negative effects of full harmonization as described above.

Full harmonisation – under what conditions?

²⁷ For example see the case law of the European Court of Justice C-293/91, C-327/05 .

²⁸ Explanatory memorandum p. 7

In the light of the previous considerations we conclude that full harmonization can only be envisaged from a consumer perspective, if the following strict conditions are met:

- it only applies to technical and cross-cutting issues such as the length of the withdrawal period, the conditions to exercise it and the definition of a consumer for example; Beyond those, full harmonization will not bring about the expected benefits for consumer or increased legal certainty
- its application does not result in an overall decrease of the level of consumer protection, but is set at a high level of protection
- the scope of the fully harmonised field is clear from the text of the directive so that legal certainty is provided

In relation to issues which are very closely linked to national civil law orders, such as **unfair contract terms or many elements of legal guarantees, the approach of the legislative revision should be based on minimum harmonisation**, which allows Member States to maintain more advantageous rules for consumers and to adapt them quickly to market changes.

If minimum harmonisation is done at a high enough level, it can deliver the benefits of max harmonisation without the pitfalls: EC consumer protection legislation set at a high enough level, does not provide an incentive for Member States to 'go further' – This approach could de facto create (nearly) the same rules everywhere, just as maximum harmonisation.

5. MISSING: A MODERN AND FUTURE PROOF CONSUMER LEGISLATION

BEUC regrets that the Commission refrained from addressing the challenges of new technologies and market innovations as well as the need to promote sustainable consumer purchase decisions. In this respect the proposal is a missed opportunity that is too focused on the existing directives.

In relation to consumer needs in the **digital environment**, given the fact that this directive will determine the daily transactions of consumers in the EU for – at least – the next decade, the Commission regrettably missed the opportunity to make consumer legislation future proof, at least in the most important areas, such as for example the issue of purchases of downloaded content (music, audiovisual services etc).

The current business models for distributing content online raise a number of concerns from the consumer's perspective, ranging from the transparency and fairness of content license conditions to the consumers' remedies in case of insufficient information or the application of unfair terms. Consumers are moreover not only confronted with problems relating to the contracts, but also with new technologies, so-called "technical protection measures", that may enforce unfair restrictions to use the purchased content. With regard to these new business models and new technologies it is crucial to establish clear information requirements on the possible use of digital content, while at the same time ensuring that the judicial review of the fairness of such contract terms is possible. Consumers should also be provided with the same remedies for any defective products/services as the ones they enjoy when buying offline.

Finally, we note an increasing prevalence of so-called **“bundled” goods** and services contracts, for example as a combination of digital services and technical appliances, which are offered to consumers only in this bundled form. The fact that the proposed directive excludes “services” from the scope of the legal guarantees is problematic and will lead to disputes regarding whether a defect of a “bundled” product relates to a ‘good’ or a ‘service’. The proposed directive should be clarified and extended to cover this kind of contract.

We acknowledge that digital material and data are in many respects ‘different’ from other tangible goods, and might require specific rules. The starting point of these rules must be that consumers are equally protected online and offline. Since the Commission’s proposal intends to promote e-commerce and on-line shopping, we think that at least the basic consumer problems in the field of digital content provision should be addressed by the proposed directive.

Turning to another key subject of nowadays society, we consider that the Commission strategy to move towards a more European **sustainability** policy framework is not sufficiently reflected in the directive. In the Single Market policy review, the Commission underlined that its Internal Market policy should take full account of the social and environmental implications of market opening.

In the context of consumer contracts, sustainability should be promoted by providing for example for specific consumer information requirements when vulnerable consumer groups are targeted. Extending the period of the legal guarantee as well as the period for the reversal of proof for the faultiness of purchased items would lead to reduction in planned obsolescence²⁹ policies and encourage companies to develop more sustainable production patterns and provide consumers with more durable and better quality products. This would thus lead to more sustainable consumption behavior and non negligible household savings. Likewise the envisaged rules for second hand goods in the Commission’s proposal should be improved to promote the circulation of second hand goods in the market.

Finally, EC consumer legislation based on modern thinking should indeed offer the advantages of a market without barriers also to consumers. The introduction of a **joint responsibility** of the trader and the producer for faulty products would make the Internal Market finally come true for consumers: a consumer who bought a faulty item abroad should be able to invoke remedies in his/her home country, if the producer has a branch there, instead of being obliged to send the faulty product back to the seller, what might imply from one corner in the EU to the other, struggling with foreign languages and procedures.

²⁹ “Planned obsolescence” or “built-in obsolescence” is the process of a product becoming obsolete and/or non-functional after a certain period or amount of use in a way that is foreseen or designed by the manufacturer. In other words, even if products are not ‘programmed’ to fail, (some) manufacturers do and will engage in ‘value engineering’ to make sure products don’t last any longer than they need to (i.e. 2 years under the proposal)..

6. CONCLUSIONS

For the reasons outlined above, the proposal needs to be improved substantially before it can provide a real added value to European consumers. In its current version it would inevitably lead to a decrease in consumer protection across the EU, and while it would result in more similar consumer contract law rules, this is unlikely to lead to a significant increase in cross border trade. In addition, the proposal would generate new legal uncertainty instead of reducing it.

What constitutes a high level of protection should be elaborated on the basis of current national legislation ("best practices", with which we do not refer to whatever "highest" level of protection, but to well-functioning, efficient rules, valued by consumers) and on research on the needs and expectations of nowadays consumers. Valid recommendations on what rules may qualify as a high level of protection can also be found in the Draft Common Frame of Reference (DCFR)³⁰ which is supposed to provide a reference ("tool-box") for consumer law making.

The desired simplification of the framework has clearly failed by reason of the complexity of the proposal³¹ and the numerous uncertainties and questions that arise from its provisions.

Moreover, the Commission regrettably fails to take a visionary and future-proof approach in particular in relation to the needs of consumers in the digital environment, but also regarding incentives to meet the EC's objective of a horizontal European sustainability policy.

END

³⁰ See FN 15

³¹ The complexity of the proposal is reflected most prominently as regards the definition of its scope of application: article 3 is itself complex and its interaction with other provisions of the directives renders the scope yet more imprecise.