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CENTRE FOR THE STUDY OF EUROPEAN CONTRACT LAW

*Centre for the Study of European Contract Law
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Report for BEUC – The European Consumers' Organisation

A critical analysis of the Proposal for a consumer rights directive

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Foreword

In this report I will discuss the most relevant parts of the proposal for a consumer rights directive. The analysis is undertaken on demand by the European Consumers' Organisation *BEUC*. The observations made, however, do not represent the view of *BEUC*, but mine.

In the analysis, I will address the subjects of the proposal on an article-by-article, and occasionally on a paragraph-by-paragraph basis. Where I am of the opinion that, within the limited time available for conducting this analysis, no commentary is necessary, I have simply refrained from mentioning any remarks.

Amsterdam, 31 January 2009

Chapter I Subject matter, definitions and scope

Article 1 Subject matter

The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts between consumers and traders.

Article 2 Definitions

For the purpose of this Directive, the following definitions shall apply:

(1) ‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;

Comments

In itself, the definition of ‘consumer’ lends itself for full harmonisation. However, this particular definition is problematic. Firstly, it is unclear why the terms ‘trade, business, craft or profession’ is introduced. It would be more logic to make use of the definitions prepared in the draft-Common Frame of Reference, which uses the term ‘trade, business, or profession’.

More importantly, however, is that the current text is too restrictive to properly safeguard consumers’ interests. The text would have the result that a person who purchases a personal computer for dual purposes – he works at home and plays games with it on the Internet – cannot be considered to be a consumer. As a result, he does not receive any protection if the computer proves to be defective after delivery. Similarly, if a person would buy a suitcase to be used for holidays and for occasional business trips, he would not receive the protection offered by the proposed directive as he *also* acts for purposes which are not outside his trade, business, or profession. Thirdly, it is questionable whether a person buying a suit would be protected under the proposed directive if the reason to buy the suit would be to properly dress for business meetings.

1. This is striking, as most buyers of computers in the given circumstances would believe to be acting as consumers and therefore being protected as such.

2. Moreover, as this person would not be considered a consumer, the contracts concluded by this person do not fall within the scope of the directive, which implies that Member States are also not bound by the full harmonisation clause of article 4 of the proposed directive when regulating this situation. As a result, Member States are free to extent the protection offered by the directive to cover this situation, or not to do so. As a result, in some Member States the person would be awarded the same protection as a consumer, whereas he would not in others, depending on the law applicable to the contract. This will have a detrimental effect on the internal market as such divergence undermines consumer confidence in the internal market.

3. The European Commission’s choice is all the more remarkable as it derogates without giving any reasons from the definition provided under the draft-Common Frame of Reference (hereafter: draft-CFR), which was commissioned by the European Commission to provide, *inter alia*, definitions of terms used in European private law. The draft-CFR defines the term ‘consumer’ as a ‘natural person who is acting *primarily* for purposes which are not related to his or her trade, business or

profession' (emphasis added, MBML).¹ Under the draft-CFR, for the buyer to be protected as a consumer, the *main purpose* of the contract must not be related to his trade, business or profession, but the mere fact that the buyer also has a professional purpose in mind when concluding the contract is of no importance.

The definition of 'consumer' under the present directive does not seem to leave room for Member States to protect other parties *resembling* consumers under the heading of the notion of 'consumer', such as SMEs and small associations and foundations (the case of mixed-purpose contracts was discussed above already and need not be repeated here, albeit that the same argument would apply). However, as the directive does not deal with contracts between traders and non-consumers and therefore the full harmonisation nature of the directive does not apply to such contracts, Member States *are* free to substantively apply consumer protection rules to other parties worthy of such protection as they see fit, provided that they do not label such persons as 'consumers'. Therefore, nothing would seem to stand in the way of a Member State introducing or maintaining – for instance – a provision providing that the provisions on unfair terms may be relied upon by SMEs. In other words: limiting the notion of consumers to natural persons acting for purposes that are not related to their trade or profession will not effectively prevent Member States from protecting such persons. However, as such persons will be protected in one Member State but not in another, the internal market aim of the directive will not be achieved *vis-à-vis* these 'non-consumers'.

On the basis of the above, the following amendment is proposed:

Proposed new text

Article 2 Definitions

(1) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are **primarily** outside his trade, business, or profession;

Current text of the proposal (continued)

Article 2 Definitions

(2) 'trader' means any natural or legal person who, in contracts covered by this Directive, 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;

Comments

As under (1), the definition of the term 'trader' should be amended by deleting the word 'craft'. Secondly, at present the definition is circular, as a trader may be defined as a person acting in the name of or on behalf of a trader.

It should be noted that even within the scope of the present directive – which relates only to contracts for sales and services between a trader and a consumer – the term 'trader' may also refer to a *producer* who is not the final seller or service provider. This is the case, in particular, where the producer provides a commercial guarantee as meant in article 29 of the proposed directive. A producer who provides the consumer with a commercial guarantee is a natural or legal person who is acting for purposes relating to his trade, business, or profession. Moreover, as contracts pertaining to

¹ Chr. Von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (Interim Outline edition)*, Munich: Sellier European law publishers, 2008, Annex I, Definitions, p. 329.

commercial guarantees are covered by the proposed directive in article 29, the producer providing a commercial guarantee is concluding a contract covered by this directive. Consequentially, for the purposes of article 29, a producer is to be considered a trader within the meaning of article 2(2). The separate definition of the notion of a producer, however, should be retained as it is needed in order for the specific provision of article 24 paragraph 2(d).

On the basis of the above, the following amendment is proposed:

Proposed new text

Article 2 Definitions

(2) 'trader' means any natural or legal person who, in contracts covered by this Directive, is

(a) acting for purposes relating to his trade, business, ~~craft~~ or profession ~~and~~; or

(b) ~~any~~ **any natural or legal person who, in contracts covered by this Directive, is acting in the name of or on behalf of another person acting for purposes relating to his trade, business, or profession;**

Current text of the proposal (continued)

Article 2 Definitions

(3) 'sales contract' means any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services;

(4) 'goods' means any tangible movable item, with the exception of:

(a) goods sold by way of execution or otherwise by authority of law,

(b) water and gas where they are not put up for sale in a limited volume or set quantity,

(c) electricity;

Comments

The exclusion of water, gas and electricity of the definition of 'goods' is not tenable in a market situation where traditional monopolies are disappearing and traders are offered the possibility to enter the market and offer their products to consumers, making use of the networks of former monopolists. It has as a result that the sale of these goods are not covered by the provisions of Chapter IV on consumer sales contracts, which is problematic in markets that have opened up for competition. See also the definition in the draft-CFR, where goods are defined as including liquids and gases.

On the basis of the above, the following amendment is proposed:

Proposed new text

Article 2 Definitions

(4) 'goods' means any tangible movable item, with the exception of ~~(a)~~ goods sold by way of execution or otherwise by authority of law, ~~(b) water and gas where they are not put up for sale in a limited volume or set quantity,~~ ~~(c) electricity;~~

Current text of the proposal (continued)

Article 2 Definitions

(5) 'service contract' means any contract other than a sales contract whereby a service is provided by the trader to the consumer;

(6) *'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;

(7) *'means of distance communication'* means any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the conclusion of a contract between those parties;

(8) *'off-premises contract'* means:

(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

(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.

(9) *'business premises'* means:

(a) any immovable or movable retail premises, including seasonal retail premises, where the trader carries on his activity on a permanent basis, or

(b) market stalls and fair stands where the trader carries on his activity on a regular or temporary basis;

(10) *'durable medium'* means any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

(11) *'order form'* means an instrument setting out the contract terms, to be signed by the consumer with a view to concluding an off-premises contract;

(12) *'product'* means any good or service including immoveable property, rights and obligations;

(13) *'financial service'* means any service of a banking, credit, insurance, personal pension, investment or payment nature;

(14) *'professional diligence'* means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity;

(15) *'auction'* means a method of sale where goods or services are offered by the trader through a competitive bidding procedure which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the services. A transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction;

(16) *'public auction'* means a method of sale where goods are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a competitive bidding procedure run by an auctioneer and where the highest bidder is bound to purchase the goods;

Comments

'Auction' is defined, in article 2 under (15), as 'a method of sale where goods or services are offered by the trader through a competitive bidding procedure which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the services'. A public auction is defined, in article 2 under (16), as 'a method of sale where goods are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a

competitive bidding procedure run by an auctioneer and where the highest bidder is bound to purchase the goods'. The two definitions show remarkable differences. Firstly, an auction may pertain to both goods and services, but a *public* auction can only pertain to goods. Why this is the case, is not explained. There does not seem to be any valid reason for this restriction. The second difference is that an auction may take place by way of a telephone or video conference of interested parties, but that in a public auction, the consumers have to be given a possibility to attend in person. This is a sensible distinction. The definition of 'public auction', however, can be much shortened by referring to the definition of 'auction' and amending where the definition of 'public auction' distinguishes itself from the generic notion of an auction.

Article 2 under (15) indicates that a transaction which is concluded on the basis of a fixed-price offer is not an auction, even if the consumer is given an option to conclude it through a bidding procedure. This probably means that contracts concluded through online platforms such as eBay are not covered by the definition of a public auction.² It would be good if this were clarified in a recital in the preamble to the directive.

Proposed new text

Article 2 Definitions

(15) '*auction*' means a method of sale where goods or services are offered by the trader to **purchasers, including consumers**, through a competitive bidding procedure which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the services. A transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction;

(16) '*public auction*' means **an auction method of sale** where ~~goods are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a competitive bidding procedure run by an auctioneer and where the highest bidder is bound to purchase the goods;~~

Current text of the proposal (continued)

Article 2 Definitions

(17) '*producer*' means the manufacturer of goods, the importer of goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods;

(18) '*commercial guarantee*' means any undertaking by the trader or producer (the 'guarantor') to the consumer to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

Comments

It should be noted that even within the scope of the present directive – which relates only to contracts for sales and services between a trader and a consumer – the term 'trader' may also refer to a *producer* who is not the final seller or service provider. This is the case, in particular, where the producer provides a commercial guarantee as

² Cf. C. Twigg-Flesner, 'Not fit for purpose? The proposals on Sales', in: G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract law*, 2009 (forthcoming), no. 2.

meant in article 29 of the proposed directive. A producer who provides the consumer with a commercial guarantee is a natural or legal person who is acting for purposes relating to his trade, business, or profession. Moreover, as contracts pertaining to commercial guarantees are covered by the proposed directive in article 29, the producer providing a commercial guarantee is concluding a contract covered by this directive. Consequentially, for the purposes of article 29, a producer is to be considered a trader within the meaning of article 2(2). This does, however, not imply that the separate definition of the notion of a producer should be deleted, as the term is needed in the specific provision of article 24 paragraph 2(d).

Current text of the proposal (continued)

Article 2 Definitions

(19) *'intermediary' means a trader who concludes the contract in the name of or on behalf of the consumer;*

Comments

This definition needs to be adjusted to cater for the first problem identified below pertaining to the text of article 7. The reason for this amendment is explained there.

On the basis of the above, the following amendment is proposed:

Proposed new text

Article 2 Definitions

(19) *'intermediary' means a trader who concludes the contract in the name of ~~or~~ and on behalf of the consumer;*

Current text of the proposal (continued)

Article 2 Definitions

(20) *'ancillary contract' means a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and these goods or services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.*

Article 3 Scope

1. *This Directive shall apply, under the conditions and to the extent set out in its provisions, to sales and service contracts concluded between the trader and the consumer.*
2. *This Directive shall only apply to financial services as regards certain off-premises contracts as provided for by Articles 8 to 20, unfair contract terms as provided for by Articles 30 to 39 and general provisions as provided for by Articles 40 to 46, read in conjunction with Article 4 on full harmonisation.*
3. *Only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 on full harmonisation, shall apply to contracts which fall within the scope of Directive 94/47/EC of the European Parliament and of the Council and of Council Directive 90/314/EEC.*
4. *Articles 5, 7, 9 and 11 shall be without prejudice to the provisions concerning information requirements contained in Directive 2006/123/EC of the European Parliament and of the Council and Directive 2000/31/EC of the European Parliament and of the Council.*

Comment

The restrictive scope of paragraphs 2-3 is not very understandable. Why should the information requirements of articles 5-7 not apply to financial services or to package travel contracts? That specific information requirement may apply to such contracts is not specific – the same applies for off-premises contracts and distance contracts. Where specific information requirements need to be set, this can be done better by adding an additional paragraph to article 5 indicating that the general information requirements of that article do not stand in the way of information requirements imposed on traders on the basis of specific Community legislation. Moreover, the provisions on consumer sales contracts do not apply to financial services, already follows from the definition of a ‘sales contract’ under article 2(3) and the definition of ‘financial service’ under article 2(13) of this directive. Similarly, the provisions on consumer sales contracts can’t apply to package travel contracts as such contracts are ‘service contracts’ under article 2(5), whereas timeshare contracts pertain to the sale or use of immovable property, whereas ‘goods’ are defined as ‘tangible movable items’ (art. 2(4)). In other words, paragraphs 2-4 may be deleted. The text of this article can therefore be very much shortened.

Proposed new text

Article 3 Scope

~~1. This Directive shall apply, under the conditions and to the extent set out in its provisions, to sales and service contracts concluded between the trader and the consumer.~~

~~2. This Directive shall only apply to financial services as regards certain off-premises contracts as provided for by Articles 8 to 20, unfair contract terms as provided for by Articles 30 to 39 and general provisions as provided for by Articles 40 to 46, read in conjunction with Article 4 on full harmonisation.~~

~~3. Only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 on full harmonisation, shall apply to contracts which fall within the scope of Directive 94/47/EC of the European Parliament and of the Council and of Council Directive 90/314/EEC.~~

~~4. Articles 5, 7, 9 and 11 shall be without prejudice to the provisions concerning information requirements contained in Directive 2006/123/EC of the European Parliament and of the Council and Directive 2000/31/EC of the European Parliament and of the Council.~~

Current text of the proposal (continued)

Article 4 Full harmonisation

Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

Full harmonisation is a measure, which requires caution. As the aim of full harmonisation is to completely align the rules in a specific area, Member States are not only required to introduce a particular minimum of consumer protection, but also to repeal existing legislation protecting consumers better than is required and allowed for by the directive.

Full harmonisation fits best with respect to the aim of improvement of the functioning of the internal market, as the ‘playing field’ will be on the same level in all Member States. In this respect, minimum harmonisation is less suitable, as differences between Member States are maintained and therefore conditions for

competition are not the same throughout the European Union. Whether this argument is valid, is, however, much debated. The argument appears to be the reflection of an economic analysis, but in fact it is not. First of all, the European Commission has left out of its considerations the costs involved in full harmonisation, caused by the implementation of the directive in the Member States – where rather large resources will have to be used to amend existing legislation. Secondly, if a true ‘level playing field’ were created, this would not lead to an increase of cross-border trade, but rather to a decrease thereof. A level playing field and true competition would lead to uniform prices, whereas the costs (in particular the shipping costs) for domestic suppliers would be lower than for suppliers in another legal system.

Whereas the success of full harmonisation is rather uncertain, it is clear that it does not fit very well with the aim of consumer protection, in particular where Member States are required to repeal existing better protection. Full harmonisation, therefore, may lead to a reduction of consumer protection. In this respect, minimum harmonisation works better, as consumers will *at least* receive the protection offered by the directive, but possibly even better protection if their Member State so decides. In particular where there are substantive differences in the laws of the Member States, reflecting different priorities and preferences, full harmonisation will be difficult to achieve and, for countries preferring a (very) high level; of consumer protection, generally hard to swallow.³

With regard to the improvement of consumer confidence, it is debatable whether full harmonisation or minimum harmonisation is to be preferred. The former has the advantage that the consumer will receive the same protection throughout the whole of the European Union, but – from the position of the consumer – this is positive only if that level of consumer protection is sufficiently high. In particular consumers living in a Member State, which traditionally offers a very high level of consumer protection – one may think in particular of the Scandinavian countries – would rather be disillusioned in the European Union and the internal market if it has lead or will lead to a decrease in consumer protection.

It is recognised that the present directive cannot (in all cases) aim for the *highest* level of consumer protection available in the Member States, but the EC Treaty requires in any case a *high* level of consumer protection. This implies in any case that where a majority of Member States has introduced a protective measure, the directive should not contain less protection. Moreover, even though the directive can’t aim for the highest level of consumer protection in all cases, in order to improve consumer confidence in the internal market and in the European Union as a whole the level of consumer protection should not be reduced in any Member State across the board. Finally, in certain areas the Member States will need some flexibility in order to cater for specific national needs. In the present proposal, in many areas the level of protection of the existing directives – which are based on *minimum* harmonisation – has been turned into the *maximum* protection, whereas in some areas, the protection in the existing directives is even lowered.⁴ This implies that the proposal for a consumer rights directive will not lead to a significant increase of the current level of consumer protection in any of the Member States, but it will – in any case in particular areas –

³ Cf. Y. Hofhuis, *Minimumharmonisatie in het Europees recht. Begrip, vormen en gevolgen*, diss. Amsterdam 2006, Deventer: Kluwer, p. 15-16.

⁴ A prominent example is the mandatory introduction of a duty for the buyer to notify a non-conformity to the trader, where at the moment Member States were not required to introduce such an obligation. See below.

bring about a decrease in consumer protection in any Member State that currently provides protection going beyond the existing minimum, as in that Member State the more far-reaching protection will have to be abrogated.

Even if one evaluates the idea of full harmonisation positively, it is clear that the choice for full harmonisation has also disadvantages. Full harmonisation is difficult to achieve where value judgements are at stake, as Member States will have different priorities and preferences. Where measures of a more *technical* nature are at stake, full harmonisation is not very problematic. In particular with regard to definitions (art. 2), scope (art. 3), information requirements (art. 4-9), form requirements as to the conclusion of contracts (art. 10-11) and the particular conditions for exercising a right of withdrawal (art. 12-20) may be fit for full harmonisation, but even there this is not always the case. For instance: if the information requirements would be fully harmonised, would this prevent Member States from imposing further information requirements in certain areas on the basis of professional diligence? It would, in particular, be rather odd if a doctor would no longer be required to inform his patient not only on the ‘main characteristics of the product’, but also on alternative treatments and the risks associated to these treatments and abstaining from any treatment. Similarly, specific information should also be given in the area of dangerous products, e.g. medicines. These examples show that full harmonisation can’t provide all the answers.

There is not much against full harmonisation in the case of merely procedural rules, e.g. the procedure to amend the list of black and grey clauses (art. 39-40) and the possibility for consumer organisations to challenge allegedly unfair terms in a collective procedure (art. 38). On the other hand, substantive rules – in particular in the area of consumer sales (art. 21-29) and unfair terms (art. 30-37) are much more the product of different value judgments. In these areas, full harmonisation is much more problematic – and in certain cases even impossible. The latter applies, in particular, where the provisions of the current proposal have to interact with provisions of national rules of general contract law (cf. ECJ 1 April 2004, case C-237/02, ECR [2004], p. I-3403, *Freiburger Kommunalbauten/Hofstetter*).

Moreover, the relation to general contract law and general tort law should be clarified. In the Explanatory Memorandum it is indicated that the proposed directive ‘does not interfere with more general contract law concepts such as the capacity to contract or the award of damages’.⁵ This, however, should be explicitly reflected in the text of article 4, which rather indicates the opposite. The formulation opted for below (in paragraph 4) is based on the text of the product liability directive, where a similar problem exists. Moreover, Member States that recognise a direct claim against the producer on the basis of general contract law or general tort law will be able to maintain such claim. However, Member States that do not recognise such a claim at the moment on which the directive is adopted will be precluded from introducing such a direct claim as it would lead to an *additional* barrier to trade not existing at the time of the adoption of the directive. Obviously, this will be different if the suggested article 29a would be adopted on direct producer’s liability.

Finally, the relation to mandatory contract law in specific areas should be clarified, in particular with regard to contracts for the lease of houses, the use of service flats, the

⁵ Explanatory memorandum to the proposal, p. 7.

hire-purchase of cars, and the services of doctors, real estate agents and travel agencies, etc.: the definition of, in particular, the notion of a 'service contract' in article 2 under (5) is so broad that it covers all of these contracts. This, obviously, goes much too far as it might be understood as preventing the Member States from introducing or maintaining mandatory legislation in specific areas. The amendment suggested below would enable the Member States to maintain such specific legislation, provided of course that such legislation is compatible with the EC Treaty.

This implies that the general formulation of article 4 needs to be adjusted in order to accommodate for provisions from which the Member States may derogate to better protect consumers than is the case under the directive.

On the basis of the above, the following amendment is proposed:

Proposed new text

Article 4 Full and minimum harmonisation

1. With regard to articles 2-20 and 38-40, unless indicated differently in this Directive, Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

2. With regard to articles 21-37, unless indicated differently in this Directive, Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.

3. Where Member States may maintain or introduce more stringent provisions to ensure a higher level of consumer protection, these provisions must be compatible with the Treaty.

4. This Directive shall not affect any rights which a consumer may have according to the general rules of contract law and the general rules of tort law.

5. This Directive does not prevent Member States from introducing or maintaining mandatory legislation for specific service contracts, provided that such legislation is compatible with the Treaty.

Chapter II Consumer information

Current text of the proposal (continued)

Article 5 General information requirements

1. *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:*

(a) the main characteristics of the product, to an extent appropriate to the medium and the product;

(b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;

(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;

(d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;

(e) the existence of a right of withdrawal, where applicable;

(f) the existence and the conditions of after-sales services and commercial guarantees, where applicable;

(g) the duration of the contract where applicable or if the contract is open-ended, the conditions for terminating the contract;

(h) the minimum duration of the consumer's obligations under the contract, where applicable;

(i) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader.

2. *In the case of a public auction, the information in paragraph 1(b) may be replaced by the geographical address and the identity of the auctioneer.*

3. *The information referred to in paragraph 1 shall form an integral part of the sales or service contract.*

Comments

The scope of article 5 is very broad. This is not problematic as regards the content of the information to be provided, but as regards the information that is *not* required under the article. First of all, it may intervene with information requirements stemming from general contract law (e.g. obligations to inform or warn on the basis of the doctrines of mistake or fraud) or of general tort law. Moreover, it does not take sufficiently into account that for (in particular) service providers more extensive information requirements are needed and currently demanded from such service providers on the basis of professional diligence? It would, in particular, be rather odd if a doctor would no longer be required to inform his patient not only on the 'main characteristics of the product', but also on alternative treatments and the risks associated to these treatments and abstaining from any treatment. Similarly, specific information should also be given in the area of dangerous products, e.g. medicines. These examples show that more room is needed for Member States to impose further information requirements, provided of course that these are compatible with the EC Treaty. Moreover, the present directive should, of course, not be read as implying that information requirements imposed on traders on the basis of specific EC legislation should no longer be possible. A new paragraph 6 indicates that this is not the case.

With it, the need to exclude in particular financial services and package travel contracts from the scope of article 5 (as was done under article 3 of the proposal) is no longer there. For that reason, in the comments to article 3 it is suggested that these paragraphs, too, are deleted.

Secondly, where a trader targets so-called vulnerable consumers, the information that he must provide may be targeted to such vulnerable consumers. Whereas the current unfair commercial practices directive clearly takes the specific interests of such vulnerable consumers into account, the current proposal does not show that it does. A specific provision to this extent is suggested.

Thirdly, it is unclear why Chapter II and Article 9 cannot be merged much more. In particular, it is not understandable why Article 5 paragraph 1 (d) and Article 9 limb (b) are not drafted in the same manner. If a right of withdrawal applies, the consumer will always need to know the conditions and procedures for exercising that right. This is not specific for off-premises contracts and distance contracts. Moreover, in order to avoid misunderstanding the consumer should always be informed whether or not he has a right of withdrawal. This is relevant, in particular, where one of the exceptions to the right of withdrawal applies, of which the consumer may not be aware. Similarly, the provision of Article 9 limbs (c) – (f) lend themselves for generalisation.

Finally, the proposal does not indicate in which the language the information is to be provided. In theory, this could mean that a trader meets his information obligations in the following situation: a French trader sells a dishwasher to an English consumer. Neither of them speaks Bulgarian, but the trader produces a preformulated text in Bulgarian, listing all information required under the directive. As the present directive is based on full harmonisation, a Member State is not allowed to set language requirements. However, it is clear that the objective of these provisions – informing consumers of their rights and obligation – has not been met. On the other hand, if Member States were allowed to set language requirements themselves, different rules would apply in the European Union, which would again hamper businesses from trading cross-border. Therefore, the text of the directive should include a provision on the language in which the information is to be provided; the language requirement should, on the other hand, also not be overburdening the trader too much. It seems fair to assume that both parties sufficiently master the language they used when concluding the contract. Where the contract is concluded in the consumer's tongue, the information should be provided in that tongue. Where, on the other hand, the consumer concludes the contract in a tongue foreign to him, he knowingly assumes the consequences of concluding a contract in another language. He should then sustain these consequences. Finally, where the trader indicates that the contract may be concluded in a language to be chosen by the consumer (e.g. by clicking on a national flag or symbol representing the country or language), the information is to be provided in that language.

On the basis of the above, the following amendment to Article 5, **with amendment of Article 9 (see below)**, is proposed:

Proposed new text

Article 5 *General information requirements*

1. 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:

- (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
- (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
- (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;
- (d) the arrangements for payment, delivery, **and performance** ~~and the complaint handling policy~~, if they depart from the requirements of professional diligence;
- (e) the complaint handling policy and, if different from his geographical address, the geographical address of the place of business of the trader (and where applicable that of the trader on whose behalf he is acting) where the consumer can address any complaints;**
- (f) the possibility of having recourse to an amicable dispute settlement, where applicable;**
- (g) the existence, or the absence thereof, of a right of withdrawal, and the conditions and procedures for exercising that right in accordance with Annex I,** ~~where applicable;~~
- (h) the existence and the conditions of after-sales services and commercial guarantees, where applicable;
- (i) the existence of codes of conduct and how they can be obtained, where applicable;**
- (j) the duration of the contract where applicable or if the contract is open-ended, the conditions for terminating the contract;
- (k) the minimum duration of the consumer's obligations under the contract, where applicable;
- (l) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
- (m) that the contract will be concluded with a trader and as a result that the consumer will benefit from the protection afforded by this Directive.**
2. In the case of a public auction, the information in paragraph 1(b) may be replaced by the geographical address and the identity of the auctioneer.
3. The information referred to in paragraph 1 shall form an integral part of the sales or service contract **and shall be provided in the language in which the contract is concluded.**
4. **Where the trader engages in the conclusion of sales or service contracts with a clearly identifiable group of consumers who are particularly vulnerable to the commercial practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, the information to be provided under this Article shall be provided in language, which is plain and intelligible for the average member of that group.**
5. **This Article does not prevent Member States from imposing further information requirements on traders**
- (a) **if such information is to be provided to the consumer on the basis of the trader's professional diligence;**
- (b) **in the case of dangerous products; or**

(c) to adequately protect clearly identifiable groups of consumers as indicated in paragraph 4.

The information requirements imposed by Member States on traders on the basis of this paragraph shall be compatible with the Treaty.

6. This Article shall not affect information requirements imposed on traders on the basis of specific Community legislation.

7. This Article shall not affect any rights which a consumer may have according to the general rules of contract law and the general rules of tort law.

Current text of the proposal (continued)

Article 6 *Failure to provide information*

1. If the trader has not complied with the information requirements on additional charges as referred to in Article 5(1)(c), the consumer shall not pay these additional charges.

2. Without prejudice to Articles 7(2), 13 and 42, the consequences of any breach of Article 5, shall be determined in accordance with the applicable national law. Member States shall provide in their national laws for effective contract law remedies for any breach of Article 5.

Comment

In the Green paper on the Review of the Consumer Acquis⁶ the need to harmonize information requirements in the consumer acquis was taken into account. Several directives impose obligations on professionals to provide consumers with information before, at or after the conclusion of the contract. Failure to comply with these obligations is however regulated in an incomplete and inconsistent way. In several cases no remedies are available when information duties are ignored by professionals, the European Commission submitted. Because of the varying purposes of consumer information in the different vertical directives, the Commission indicated that the horizontal instrument would not cover the existence and the content of the information requirements, but it should encompass provisions on the failure to fulfil information requirements.⁷

Strangely, the current proposal does exactly the opposite: articles 5 and other regulate the existence and content of the information requirements, whereas article 6 largely leaves the consequences of a breach of these information obligations to the Member States. Member States are to provide for effective contract law remedies for any such breach. This means, that in general, the existing status quo has been sustained and it will be the Member States that will have to decide on what consequences accompany which breaches of information obligations. This hardly gives rise to a claim that the failure to provide information has been harmonized on the EU level. Given the fact that the harmonization of the rules on the liability of the traders for non-performance or improper performance of their information obligations was seen as one of the main issues to be tackled by the EU institutions in their works on the proposed consumer rights directive, the proposal is therefore disappointing.⁸

⁶ Green paper on the Review of the Consumer Acquis, 08.02.2007, COM(2006) 744 final, p. 19-20

⁷ Green paper, p. 19-20.

⁸ J.A. Luzak, 'Information duties in the new proposal for the Directive on consumer rights', to be published in a book edited by M.W. Hesselink and M.B.M. Loos on the implications of the proposal for a consumer rights directive for Dutch law, Den Haag: Boom 2009 (forthcoming), no. 2. The book will contain the proceedings of a symposium organised by the Centre for the Study of European Contract Law of the University of Amsterdam, held on 28 January 2009.

The European Commission's choice not to indicate the consequences of a breach of the information obligations is all the more surprising given the fact that these consequences could relatively easily be fully harmonised, as these consequences tend not to be felt as a particularly sensitive matters in the Member States. In theory, three solutions may be envisaged:

1. a breach of the information obligations of article 5 is sanctioned by an extension of the cooling-off period;
2. a breach of the information obligations of article 5 is sanctioned by the possibility for the consumer to avoid the contract;
3. a breach of the information obligations of article 5 is sanctioned by awarding damages to the consumer.

The problem with the first option, obviously, is that not in all directives where information obligations apply a right of withdrawal is awarded. Moreover, where such right is awarded, it is not always applicable given the exceptions to the right of withdrawal. Option 1, therefore, can't be applied across the board. The third option is problematic as in many cases the consumer will not sustain concrete damage as a result from the failure to provide the information. The second option, finally, may under in some cases may disproportionate. However, a combination of options 2 and 3 in most cases will lead to a reasonable outcome, provided that the consumer may choose between these options and that choosing for avoidance is that possible if it would be disproportionate in the given circumstances.

On the basis of the above, the following amendment to Article 6 is proposed:

Proposed new text

Article 6 Failure to provide information

1. *If the trader has not complied with the information requirements on additional charges as referred to in Article 5(1)(c), the consumer shall not pay these additional charges.*
2. ~~*Without prejudice to Articles 7(2), 13 and 42, the consequences of any breach of Article 5, shall be determined in accordance with the applicable national law. Member States shall provide in their national laws for effective contract law remedies for any breach of Article 5*~~***If the trader has not complied with any other information requirement as referred to in paragraph 1, the consumer may***
 - (a) avoid the contract, unless this is unreasonable in the circumstances; or***
 - (b) claim damages for any loss resulting from the failure to comply with the information requirement.***

Current text of the proposal (continued)

Article 7 Specific information requirements for intermediaries

1. *Prior to the conclusion of the contract, the intermediary shall disclose to the consumer, that he is acting in the name of or on behalf of another consumer and that the contract concluded, shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of this Directive.*
2. *The intermediary, who does not fulfil the obligation under paragraph 1, shall be deemed to have concluded the contract in his own name.*
3. *This Article shall not apply to public auctions.*

Comments

This article pertains to the situation where a trader is not dealing on his own behalf, but in the interest of another consumer. The proposed text indicates that he must disclose ‘that he is acting in the name of *or* on behalf of another consumer’; failure to do so is sanctioned under paragraph 2: he is then deemed to have concluded the contract in his own name. The idea behind the provision is sensible and accepted in many Member States. However, the present wording of the text is ambiguous, to say the least. If the current text is taken literally, it applies in two distinct cases:

1. The trader acts on behalf of a consumer, but in his own name.
2. The trader not only acts on behalf of the consumer, but also informs his counterpart to the contract he is concluding of that fact.

In the first case, the contract is simply a business-to-consumer contract, which should be covered in full by the present directive. In this situation, the trader obviously need not disclose the identity of the other consumer he represents as the contract concluded is between the trader and the first consumer. The sanction in paragraph 2 does not make sense here, as the trader already is a party to the concluded contract. Only in the *second* case, the problem of the so-called ‘undisclosed principal’ is at stake. The wording of the text of paragraph 1, however, suggests that it would also apply in the first case. It should be mentioned that the same problem also arises with (in any case) the French, Italian and Spanish language version of the proposal.⁹

Moreover, paragraph 1 indicates that the trader need only disclose that he is trading in the name and on behalf of the other consumer, but not the identity of that other consumer. This causes problems in the case of non-performance of the concluded contract, as the consumer has no-one to turn to: the trader is not a party to the contract, whereas the consumer is not aware of identity of the other consumer and can only with the help of the trader find out who is his counterpart. The present text, moreover, invites traders to abuse article 7 by stating that they are acting in the name and on behalf of another consumer – and thus escaping from the protection under the directive – without ever disclosing the identity of that consumer. Whether such other consumer exists or not can’t be verified by the first consumer.

This last remark touches upon a further problem created by the proposal. Whereas ‘normal’ contract law usually is of a default nature, the directive protects consumers from a trader’s abuse of his stronger bargaining power by introducing (and maintaining) provisions of mandatory law. As a consequence, the trader is prevented from including unfair terms (for sales contracts: whether or not individually negotiated) and required to comply with information requirements and to accept, in certain cases, a withdrawal from the contract by a consumer without the consumer having to give any reason for that withdrawal. Given these mandatory provisions, in particular rogue traders might try to evade consumer protection rules by arguing that they in fact are acting as intermediaries on behalf of other consumers, and, if need be, by even having individuals claiming that the trader is acting on their behalf. In the process, these other ‘consumers’, represented by the trader, refuse to contract with the actual consumer under the conditions set out by the directive. Several legal systems

⁹ In French: ‘au nom *ou* pour le compte’; in Italian: ‘a nome o per conto’; in Spanish: ‘en nombre del consumidor o por cuenta de este último’. On the other hand, the German and Dutch language versions indicate that the intermediary is to act ‘in the name of’ the consumer, i.e. not only for his account.

have introduced legislation to prevent such abuse.¹⁰ The idea behind such legislation is that where the intermediary is economically involved in the conclusion of the contract (e.g. he directly receives a part of the price paid by the consumer or is paid a commission by his principal) and uses his professional capacities in promoting the conclusion of the contract (e.g. by advertising the sale of cars ‘owned’ by another consumer), either the intermediary is to be considered to have concluded the contract in his own name or his professional knowledge and expertise is attributed to his principal. In the latter case, the ‘consumer’ who has engaged the services of the intermediary is considered to be a trader himself and is, therefore, subjected to the mandatory rules of the directive. It is this last option, which is introduced in the suggested paragraph 4.

The problem identified here may be remedied by including Article II. – 6:108 draft-CFR in this article by adding a new second and fourth paragraph and slightly amending the other provisions.

On the basis of the above, the following amendment to Article 7 is proposed:

Proposed new text

Article 7 Specific information requirements for intermediaries

1. Prior to the conclusion of the contract, the intermediary shall disclose to the consumer, that he is acting in the name of ~~or~~ and on behalf of another consumer and that the contract concluded, shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of this Directive.

2. If an intermediary acts for another consumer but does not reveal at that time that other consumer’s identity and geographical address, the intermediary shall disclose the identity and the geographical address within a reasonable time after a request by the first consumer.

23. The intermediary, who does not fulfil the obligations under paragraphs 1 or 2, shall be deemed to have concluded the contract in his own name.

4. Where the intermediary acting in the name and on behalf of another consumer promotes the conclusion of a contract, for the purposes of this Directive that contract is considered to have been concluded by a trader.

35. This Article shall not apply to public auctions.

¹⁰ Cf. in Germany the so-called *Sachwalterhaftung*, based on § 311 BGB (cf. Chr. Grüneberg and H. Sutschet, in: H.G. Bamberger and H. Roth (eds.), *Kommentar zum Bürgerlichen Gesetzbuch*, Munich: Verlag C.H. Beck, second edition 2007, Comment 116 to § 311 BGB.\, with references to case law) and

Chapter III Consumer information and withdrawal right for distance and off-premises contracts

Current text of the proposal (continued)

Article 8 Scope

This Chapter shall apply to distance and off-premises contracts.

Article 9 Information requirements for distance and off-premises contracts

As regards distance or off-premises contracts, the trader shall provide the following information which shall form an integral part of the contract:

- (a) the information referred to in Articles 5 and 7 and, by way of derogation from Article 5(1)(d), the arrangements for payment, delivery and performance in all cases;*
- (b) where a right of withdrawal applies, the conditions and procedures for exercising that right in accordance with Annex I;*
- (c) if different from his geographical address, the geographical address of the place of business of the trader (and where applicable that of the trader on whose behalf he is acting) where the consumer can address any complaints;*
- (d) the existence of codes of conduct and how they can be obtained, where applicable;*
- (e) the possibility of having recourse to an amicable dispute settlement, where applicable;*
- (f) that the contract will be concluded with a trader and as a result that the consumer will benefit from the protection afforded by this Directive.*

Comments

As indicated above (Article 5), when generalising these obligations and including them in Article 5, this article can be much shortened:

Proposed new text

Article 9 Information requirements for distance and off-premises contracts

In derogation of Article 5, as regards distance or off-premises contracts, the trader shall provide the following information which shall form an integral part of the contract:

- (a) the information referred to in Articles 5 and 7; by way of derogation from Article 5(1)(d)-(m), the arrangements for payment, delivery and performance in all cases;*
- (b) where a right of withdrawal applies, the conditions and procedures for exercising that right in accordance with Annex I;*
- (c) if different from his geographical address, the geographical address of the place of business of the trader (and where applicable that of the trader on whose behalf he is acting) where the consumer can address any complaints;*
- (d) the existence of codes of conduct and how they can be obtained, where applicable;*
- (e) the possibility of having recourse to an amicable dispute settlement, where applicable;*
- (f) that the contract will be concluded with a trader and as a result that the consumer will benefit from the protection afforded by this Directive.*

Current text of the proposal (continued)

Article 10 Formal requirements for off-premises contracts

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).

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.*
3. *Member States shall not impose any formal requirements other than those provided for in paragraphs 1 and 2.*

Comments

Article 2 sub (11) of the proposal defines the order form as an instrument setting out the contract terms, to be signed by the consumer. It is to contain the information which must be provided under article 9, which (in the present draft) includes the information requirements set under article 5, and the standard withdrawal form. This implies that at the moment when the contract is concluded, the consumer normally will be informed of the existence of his rights. The off-premises contract is only valid if the consumer has signed the order form and, if the contract is not in writing, he receives a copy of the order form on another durable medium. However, the wording of article 10 raises the question what is to happen if the order form is on paper, but the consumer is not given a copy thereof. Although the ideas underlying the directive undoubtedly imply that the consumer is given such a copy, no provision actually requires the trader to do so: the proposal merely requires the order form to contain the required information in plain and intelligible language and in a legible manner, and that the contract is signed. If the order form indeed contains the required form, but is taken by the trader after the consumer has signed, there is no guarantee that the consumer actually is sufficiently made aware of the information provided; in fact, there is a substantive risk that the consumer in reality was overwhelmed by the trader's visit to his house and in fact has not read anything. As the proposal (in article 10 para. 3) explicitly forbids the Member States to impose further formal requirements on the trader, this situation can't be remedied by the Member States arguing that such measure is necessary for the *effet utile* of the directive. An amendment of the proposed text of article 10 will therefore be suggested below.

Finally, a minor amendment is suggested in paragraph 1 to accommodate for the suggested changes made to articles 5 and 9 (see above).

Proposed new text

Article 10 Formal requirements for off-premises contracts

1. *With respect to off-premises contracts, the information provided for in Articles 5, 7 and 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).*
2. *An off-premises contract shall only be valid if the consumer signs an order form in writing or on a durable medium.*
3. *The trader provides the consumer with ~~and in cases where the order form is not on paper,~~ receives a copy of the order form on another durable medium.*
4. *Member States shall not impose any formal requirements other than those provided for in this ~~Article paragraphs 1 and 2.~~*

Current text of the proposal (continued)

Article 11 Formal requirements for distance contracts

1. *With respect to distance contracts, the information provided for in Article 9(a) shall be given or made available to the consumer prior to the conclusion of the contract, in*

plain and intelligible language and be legible, in a way appropriate to the means of distance communication used.

2. If the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall disclose his identity and the commercial purpose of the call at the beginning of the conversation with the consumer.

3. If the contract is concluded through a medium which allows limited space or time to display the information, the trader shall provide at least the information regarding the main characteristics of the product and the total price referred to in Articles 5(1)(a) and (c) on that particular medium prior to the conclusion of such a contract. The other information referred to in Articles 5 and 7 shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1.

4. The consumer shall receive confirmation of all the information referred to in Article 9(a) to (f), on a durable medium, in reasonable time after the conclusion of any distance contract, and at the latest at the time of the delivery of the goods or when the performance of the service has begun, unless the information has already been given to the consumer prior to the conclusion of any distance contract on a durable medium.

5. Member States shall not impose any formal requirements other than those provided for in paragraphs 1 to 4.

Comments

Whereas article 10 is directed at the conclusion of off-premises contracts, article 11 specifies the formal requirements for provision of information in case of distance contracts. There is a distinction made in this article as to the provision of information to the consumer pursuant to articles 5 and 7 on the one hand, and the provision of the remaining, additional information as listed in the current article 9 on the other hand. In the first case, the information needs to be provided to the consumer prior to the conclusion of the distance contract, in plain and intelligible language and be legible, in a way appropriate to the means of the distance communication used (cf. para. 1). As to the extra information requirements under article 9(b)-(f) no such specification is made; the information referred to in these provisions may therefore be provided after the contract is concluded. Although this clearly taken from the existing distance selling directive,¹¹ it complicates the text of the directive considerably without there being a good reason for that. Moreover, given the *content* of the remaining information requirements, the choice made in the proposal is somewhat surprising, taking into account that this remaining information includes, *inter alia*, (1) the information whether or not the contract will be concluded with a trader and, therefore, whether or not the protection of the directive shall apply to the consumer, as well as (2) the conditions and procedures for exercising the right of withdrawal.¹² The first type of information pertains to the identity of the consumer's counterpart to the contract; whereas the second pertains to one of the more important rights the consumer has under the contract and which right can only be exercised within a short period after the conclusion of the contract. From the very nature of these types of information it follows that they should be given prior to the conclusion of the contract. Obviously, where the possibility to provide information precontractually is problematic – e.g. in a text message (SMS) or in an advertisement on radio or television – only the most important information should be provided, but this is

¹¹ Cf. Luzak 2009 (forthcoming), no. 3.

¹² Cf. Luzak 2009 (forthcoming), no. 3.

already taken care of by the provision of paragraph 3 – which itself is a novelty, since the distance selling directive did not regulate what should happen in case the means of the distance communication used did not allow for a lot of information to be conveyed to the consumer.¹³

This indicates, once more, that with regard to the provision of information to the consumer not the distinction precontractual-contractual is relevant, but (only) the distinction between distance media, which allow for all relevant information to be provided precontractually, and distance media which do not allow for such precontractual dissemination of information. Only in the second case, the trader should not be burdened with the obligation to provide the information precontractually. To that extent, paragraph 3 need not be changed. To the contrary, the only amendment needed in this respect is to refer, in paragraph 1, directly to the amended text of articles 5, 7 and 9.

Proposed new text

Article 11 Formal requirements for distance contracts

1. With respect to distance contracts, the information provided for in Articles 5, 7 and 9(a) shall be given or made available to the consumer prior to the conclusion of the contract, in plain and intelligible language and be legible, in a way appropriate to the means of distance communication used.

(...)

Current text of the proposal (continued)

Article 12 Length and starting point of the withdrawal period

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.

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.

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.

(3)-(4) ...

Comments

1. Duration of the cooling-off period (para. 1)¹⁴

As a starting point, one should take that unless there are pressing reasons *not* to introduce a uniform period for all rights of withdrawal, such a uniform period should be opted for. In deciding upon the optimal duration of the cooling-off period, all existing cooling-off periods (doorstep selling, distance selling, distance marketing of financial services, life assurance, consumer credit, timeshare) should be considered. However, it is not easy to establish what an optimal duration for the cooling-off period would be. In deciding on the duration, the differing interests of the consumer

¹³ Cf. Luzak 2009 (forthcoming), no. 3.

¹⁴ Based on M.B.M. Loos, 'Rights of withdrawal', in: G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract law*, 2009 (forthcoming), no. III.1.

and the trader need to be reconciled as much as possible. The reasons for introducing and maintaining the right of withdrawal differ. In the case of distance selling, it is debatable whether there (still) is sufficient justification to maintain the right of withdrawal. This implies that the optimal duration for the cooling-off period should not take too much account of the distance selling situation in this respect. In the case of doorstep selling, timeshare and complex contracts such as financial services (including consumer credit contracts and contracts where the purchase of a good or service is combined with the conclusion of a credit contract), a right of withdrawal seems indeed to be justified. The optimal duration for the cooling-off period should therefore respect the needs that follow from the conclusion of such contracts. From this it follows that a cooling-off period of fourteen calendar days is needed but sufficient in the case of complex contracts. Such a period would in most cases also be sufficient for timeshare contracts and certainly for doorstep selling contracts (where a shorter period would probably also have been acceptable). The fourteen calendar days period opted for in article 12 paragraph 1 of the proposal for a consumer rights directive therefore seems to be optimal indeed.¹⁵

Therefore, no amendment to the text of article 12 paragraph 1 is needed.

2. Starting point for the calculation of the cooling-off period¹⁶

The existing directives calculate the start of the cooling-off period differently. On the basis of these existing directives, at least four possible moments on which the cooling-off period may start can be recognised:

1. when the contract (or a binding pre-contract) is concluded (existing rule on timeshare; distance selling of services);
2. when the trader has performed his main obligation under the contract (distance selling of goods);
3. when the trader has performed his information obligation pertaining to the existence of a right of withdrawal (doorstep selling);
4. when the trader has performed all of his information obligations (distance marketing of financial services; consumer credit; new timeshare rule).

The issue of the starting point of the cooling-off period was not addressed in the responses to the Green paper. In the reactions to the consultation on distance selling, it was established that the starting point of the cooling-off period was not unambiguous in the case of distance selling. For instance, in the case of distance selling of prepaid mobile phones the consumer purchases both a good (the mobile phone) and a service (the possibility to make use of the phone during a certain period). When does the cooling-off period start: when the phone is delivered or already when the contract is concluded? The starting point of the cooling-off period is also unclear when goods are delivered in batches: does the consumer have a right of withdrawal after every delivery, or is the delivery of the first or rather of the last good decisive for the cooling-off period to start running?¹⁷

¹⁵ In this sense already M.B.M. Loos, 'The case for a uniformed and efficient right of withdrawal from consumer contracts in European Contract Law', *Zeitschrift für Europäisches Privatrecht* 2007/1, p. 32.

¹⁶ Based on Loos 2009 (forthcoming), no. IV.1.

¹⁷ Cf. Working document of the Commission, Responses to the consultation on distance selling directive 97/7/EC contained in Communication 2006/514/EC, Summary of responses (hereafter: Distance selling document), p. 10.

These questions originate from the fact that the starting point of the cooling-off period differs whether the distance selling contract pertains to the delivery of goods or the supply of services: were the starting point harmonised, these problems could simply cease to exist. As will be explained below, there is no objective justification for a distinction between the starting moments for the delivery of goods and the supply of services on the basis of a distance contract: why should the buyer of *goods* be allowed to evaluate the purchased goods after having received them, whereas the purchaser of an online service may do that only prior to the performance of the service? In so far as there should be a right of withdrawal for distance contracts, at least the starting moments should be the same. This implies that option 2 (cooling-off period starts when the trader has performed his main obligation under the contract) should be rejected.

All other options have advantages and disadvantages. Option 1, which implies that the cooling-off period would start upon conclusion of the contract, has the clear advantage of a large degree of certainty as to the start and ending of the cooling-off period. Whether or not the consumer is informed of his right of withdrawal is of no relevance as to the starting point; failure to inform the consumer thereof does lead to an extension of the cooling-off period, but that extension is limited by the introduction of a cut-off period. Both measures contribute to legal certainty, which is in the interest of both parties. The drawback of this scenario, however, is that there is a disincentive for the trader to perform his information obligations, as in doing so he may alert the consumer to his right of withdrawal and therefore runs the risk of losing the contract. Options 3 and 4 take away these drawbacks, as the non-observance of the relevant information obligation(s) is effectively sanctioned by the delaying the start of the cooling-off period. The disadvantage, obviously, is that a contract could be withdrawn from sometimes long after the parties have started to perform it, as the *Heininger*-case indicates. However, one could limit the detrimental consequences thereof by providing, as was done in the *Hamilton*-case¹⁸, that the right of withdrawal elapses when the contract has been fully performed by both parties and subsequently a relatively short period has elapsed. In such a way, options 3 and 4 serve legal certainty in the same way as does option 1: they provide a clear starting point for the cooling-off period, i.e. when both the contract is concluded and either all information obligations (option 4) or at least the obligation to inform the consumer of his right of withdrawal (option 3) have been performed. Furthermore, they have the advantage that the minimum requirement for a proper functioning of the withdrawal is met: in order for a right of withdrawal to be effective, the consumer needs to be informed thereof.¹⁹

When determining the optimal rule for the proposal for a consumer rights directive, one should consider that the proposal starts from the perspective of full harmonisation, implying that any national rule protecting the consumer better than the existing minimum rules will have to be abrogated. This in itself could be considered an argument against option 1, which should be seen as the absolute minimum of consumer protection in the current European directives. Accepting option 1 would amount to cutting consumer protection down for most cases. Secondly, one should consider that option 4 has been adopted in the area of distance marketing directive of financial services (2002) and, even more recently, the consumer credit directive

¹⁸ ECJ 10 April 2008, case C-412/06, ECR [2008] n.y.r. (Hamilton/Volksbank Filder).

¹⁹ Cf. Loos 2007, p. 20-21.

(2008) and the new timeshare directive (2008). In this respect, it would seem odd adopt a different rule for other contracts without a convincing argument – which is lacking.

In this respect, the proposal for a consumer rights directive is simply disappointing: article 12 paragraph 2 of the proposal largely maintains the status quo. As we saw above, apart from the complications as regards information obligations, this means that the starting point of the cooling-off period is normally at or around the moment the contract is concluded.²⁰ Yet, in the case of distance selling of *goods*, the cooling-off period only starts when the goods are delivered, i.e. when the trader has already performed his main obligations under the contract.²¹ At first glance, this later moment for the start of the cooling-off period seems logical, as the cooling-off period is (also) meant to serve the interests of the consumer to ascertain the nature and the functioning of the goods, which he could not do at the moment of the conclusion of the contract.²² However, in the case of other consumer contracts where a right of withdrawal is awarded, the cooling off-period always starts to run around the time of conclusion of the contract. In many of these cases, the consumer will not have received the goods or services within the cooling-off period – so he will not be able to ascertain their nature and functioning – and if he does receive them, he may already have lost his right of withdrawal altogether, as is the case with distance selling of services.²³ In particular, it is not clear why this argumentation would be valid for distance selling of goods and doorstep (‘off-premises’) selling of the same goods, where the consumer not always is able to examine the goods prior to the conclusion either. In doorstep selling practices, the consumer is often only shown one or a few samples but is required to order from a catalogue, where also products are offered, which were not displayed to the consumer. The Commission does not substantiate why a difference needs to be made – or continued, to be more precise, as the existing distance selling directive contains the same distinction.

A case is to be made for truly harmonising the starting point for the calculation of the cooling-off period. This prevents that cooling-off periods run at different times, which causes difficulties in consumer information (both for businesses to inform consumers and for consumers to understand the information) and leads to problems in cases where two different rights of withdrawal and thus two cooling-off periods apply, as in the *Travel Vac*-case (where both the doorstep selling directive and the timeshare directive applied).²⁴

By largely maintaining the status quo, the Commission has probably chosen the worst option available. The unjustified distinction between the sale of goods and the supply of services on the basis of a distance contract is not taken away. There still is no telling when the cooling-off period starts in the case of the sale of a prepaid phone or

²⁰ Under the provisions of the proposal for a consumer rights directive: in the case of distance selling of services at the moment when the contract is concluded (art. 12 para. 2, third sentence), in the case of doorstep selling the signing of the order form or, if the contract is not signed on paper, the moment the consumer receives a copy thereof (art. 12 para. 2, first sentence). Similarly, in the case of timeshare, distance marketing of financial services and consumer credit, the signing of the contract or a binding precontract (art. 6 para. 2 of the new timeshare directive, art. 6 para. 1 distance marketing of financial services directive, and art. 14 para. 1(a) consumer credit directive).

²¹ Art. 12 para. 2, second sentence, of the proposal for a consumer rights directive.

²² See explicitly recital (22) in the preamble to the proposal for a consumer rights directive.

²³ Cf. art. 19 para. 1 sub (a) of the proposal for a consumer rights directive.

²⁴ Cf. ECJ 22 April 1999, case C-423/97, *ECR* 1999, I-2195 (*Travel Vac SL/Anselm Sanchís*).

the delivery of goods in batches. And the different approach between distance contracts and other ‘off-premises’ contracts is maintained. In other words: in this respect, the review has simply failed. In order to remedy this, the proposal should be changed. For reasons explained above, a uniform starting point should be formulated in the same manner as is done in the new timeshare directive.

In doing so, another problem with the current paragraph 2 is also dealt with. Under the present draft, in the case of off-premises contracts the cooling-off period may start before the contract is concluded, *i.e.* in the case where the consumer signs the order form before the trader is legally bound to the contract. The consumer is normally informed of his right by way of the order form he signs. If the order form is on paper, the cooling-off period starts to run at that moment. However, the signing of the order form (and therefore the start of the cooling-off period) need not coincide with the conclusion of the contract, as in some cases the signing of the order form only signals the offer the consumer is making to the trader. In those cases, the contract is concluded only when the *trader* accepts the offer. This implies that the cooling-off period starts before the contract is concluded, and possibly even ends before the conclusion of the contract.

Proposed new text

Article 12 Length and starting point of the withdrawal period

1. The consumer shall have a period of fourteen days to withdraw from a distance or off-premises contract, without giving any reason.

2. The period of withdrawal shall be calculated:

(a) from the day of the conclusion of the contract or any binding preliminary contract; or

(b) from the day when the consumer receives the contract or any binding preliminary

contract or a copy thereof on paper or on a durable medium if the day is later than the date referred to in point (a).

~~*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.*~~

~~*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.*~~

~~*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.*~~

Current text of the proposal (continued)

Article 12 Length and starting point of the withdrawal period

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.

Comments²⁵

²⁵ Based on Loos 2009 (forthcoming), no. VII.

Even when the declaration of withdrawal need not be in written form or on durable medium (see below, comments to article 14), in order to be able to prove the (timely) delivery of the notice it will nevertheless often be in the consumer's interest to dispatch his notice of withdrawal in writing. However, sending a written notice may lead to difficulties as regards the timeliness of the withdrawal. In many legal systems, a notice becomes effective (only) when it reaches the addressee (receipt principle).²⁶ This is usually understood as implying that if a time limit applies as regards the giving of notice, the notice must have become effective before the time limit has elapsed. For the right of withdrawal, this would mean that the notice of withdrawal is only then effective if it is received by the trader within the cooling off-period. This is problematic, in particular, if the cooling-off period is short. It may also be problematic if the period is longer, but the postal services are reputedly slow. This is notoriously the case in cross-border situations, where letters sometimes first are shipped to the capital of the country where the consumer lives, from there to the capital of the country where the trader resides, and from there to the trader itself. Finally, no matter how long the cooling-off period is, the receipt principle will always be problematic of the consumer only shortly before the ending of the cooling-off period decides to make use of his right of withdrawal.

Therefore, if the receipt principle were to apply in the case of a right of withdrawal, the period available for timely withdrawal would in practice often be considerably shorter than would appear from the black letter text of the applicable law. Especially in cross-border cases, the receipt principle would imperil the effectiveness of the right of withdrawal. This clearly plays a role in the case of timeshare, where the buyer often lives in a country other than where the contract is concluded, the trader resides and the immovable property is located. Not surprisingly, in the original timeshare directive, the European legislator set aside the receipt principle and accepted the *dispatch* principle with regard to the timeliness of the withdrawal. Under this principle, the notice is effective when it is dispatched during the cooling off-period (art. 5 para 2 of the existing timeshare directive and art. 7, third sentence, of the new timeshare directive), provided of course that it eventually reaches the addressee. The same solution had been adopted earlier in the doorstep selling directive (art. 5 para. 1), and was accepted in the case of distance marketing of financial services (art. 6 para. 6), and, recently, in the consumer credit directive (art. 14 para. 3(a)). Unfortunately, in the case of distance selling – where the promotion of the internal market removing barriers for cross-border transactions is said to be the reason for introducing a cooling off-period – and the case of life assurance, the directives are silent about the applicability of either the receipt or the dispatch principle. Whereas the second life assurance directive explicitly leaves both the consequences of a successful withdrawal and the conditions under which the withdrawal is to take place to the national legal systems (art. 15 para. 1, third sentence), the distance selling directive simply ignores the matter. As explained above, in many legal systems this could be understood as tacit acceptance by the European legislator of the *receipt* principle for these rights of withdrawal. However, if the consumer rights directive were enacted as is now proposed, this possible misunderstanding would be clarified, as article 12 paragraph 3 of the proposal explicitly indicates that the deadline set for the end of the cooling-off period is met 'if the communication concerning the exercise of the right of withdrawal

²⁶ Cf. the notes to art. 1:303 of the Principles of European Contract Law (PECL). Art. 1:303 PECL also accepts the receipt principle as the main rule, but recognizes an exception in the case of non-performance, where the dispatch principle is accepted.

is sent by the consumer before the end of that deadline'. Paragraph 3, therefore, contains the proper rule.

Current text of the proposal (continued)

Article 12 Length and starting point of the withdrawal period

4. *The Member States shall not prohibit the parties from performing their obligations under the contract during the withdrawal period.*

Article 13 Omission of information on the right of withdrawal

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.

Comment²⁷

Both the current proposal for a consumer rights directive and the existing consumer law directives contain numerous information obligations. Breaches of the obligations to inform the consumer are sanctioned differently at the moment. This problem was addressed in the Green paper on the review of the consumer acquis. According to the European Commission, more than half of the respondents supported one of the two solutions suggested to regulate this matter; i.e. extension of the cooling-off period as a uniform remedy or different remedies for breaching different groups of information requirements.²⁸ The presentation by the European Commission is somewhat misleading: in reality, this means that *none* of the suggested solutions were supported by a majority of respondents to the Green paper. This implies that whichever solution is adopted in the proposal can't be justified by simply referring to the outcome of the consultation – even apart from the question to what extent these responses should play a major role in the development of the consumer rights directive, given the partial nature of these responses from stakeholders (the word 'stakeholder' itself indicating that their responses are far from objective).²⁹

Therefore, one should (also) take a look at the manner in which breaches of the information obligations are sanctioned under the existing consumer law directives. Under the distance marketing of financial services directive and the consumer credit directive, as the cooling-off period does not start to run before the information obligations have been met, the consumer might be able to withdraw from the contract long after it has been fully performed by both parties. The same holds true for doorstep selling in so far as the consumer was not informed of his right of withdrawal, albeit that under the *Hamilton*-case a Member State may provide that the right to withdraw ends after a relatively short period has passed once both parties have fully performed the contract.³⁰ Under the distance selling directive and the existing timeshare directive, however, a breach of (any of) the information obligations only implies that the cooling-off period is extended to a maximum of three months (in the

²⁷ Based on Loos 2009 (forthcoming), no. IV.2.

²⁸ Commission staff working document, Report on the outcome of the public consultation on the green document on the review of the consumer acquis (hereafter: Review of consumer acquis document), p. 8.

²⁹ Cf. M.B.M. Loos, *Review of the European Consumer Acquis*, Sellier. European law publishers, Munich, 2008, p. 8.

³⁰ Cf. ECJ 10 April 2008, case C-412/06, ECR [2008] n.y.r. (*Hamilton/Volksbank Filder*).

case of distance selling, art. 6 para. 1) or to a maximum of three months plus ten days (in the case of timeshare, art. 5 para. 1). Under article 6 paragraph 3 of the new timeshare directive, however, the extension will be much longer. If the information on the right of withdrawal has not been provided the cooling-off period ends when one year and fourteen calendar days have passed after the conclusion of the contract; if other information obligations have not been met, the cooling-off period ends three months and fourteen calendar days after the conclusion of the contract.³¹ The new timeshare directive seems to have struck the right balance between the interests of both parties: on the one hand, the extension of the cooling-off period with three months in case of breach of 'normal' information obligation seems to provide a proper incentive for the trader to meet these information obligations. Where the consumer is simply left unaware of the existence of his right of withdrawal, a much longer period is offered. An indefinite extension, allowing the consumer to withdraw even years after the contract has otherwise been performed, would not be in the interest of legal certainty and not serve any justified interest on the part of the consumer.

In the proposal for a consumer rights directive, however, the Commission did not follow the solution introduced in the 2008 timeshare directive, nor did it follow the solution adopted under the 2002 distance marketing of financial services directive and the 2008 consumer credit directive. In stead, it basically combined the rules in the doorstep selling directive as interpreted by the European Court of Justice in the *Hamilton*-case with the provisions of the distance selling directive: article 13 of the proposal for a consumer rights directive provides that only in the case of a breach of the obligation to inform the consumer of his right of withdrawal the cooling-off period is extended. The extension is restricted to three months after the trader has fully performed his other obligations under the contract. Any other breach of the information obligations is not sanctioned by the proposed directive itself, but – in accordance with the general provision of article 6 paragraph 2 of the proposal – left to the Member States. However, it is unclear whether the restriction of the extension of the cooling-off period to three months also applies if the trader has not only breached his obligation to inform the consumer of his right of withdrawal but also other information obligations. As article 5 paragraph 3 of the proposal explicitly provided that the information to be given under article 5 paragraph 1– including that on the existence of a cooling-off period (art. 5 para. 1(e)) – forms an integral part of the contract, the non-performance of the obligation to inform could prevent the operation of the provision on the ending of the cooling-off period.

However, in most cases the proposal will be less favourable to consumers than is currently the case for both distance selling and doorstep selling contracts. Under article 6 paragraph 1 of the present distance selling directive, *any* breach of the information obligations leads to an extension of the cooling-off period. Under article 13 of the proposal for a consumer rights directive, however, the cooling-off period is extended *only* if the trader has not informed the consumer of his right of withdrawal. A breach of any other information obligation is not sanctioned by an extension of the cooling-off period. Instead, and in line with the general provision of article 6 paragraph 2 of the proposal, the sanction to such a breach of an information obligation

³¹ In fact, para. 2 refers to paragraph 1 as a whole, thus including also limb (b). This would mean that the cooling-off period does not end at the intended date, as it would not have started according to limb (b). Obviously, the reference must be intended to refer to paragraph (1)(a) only, as paragraphs 2 and 3 would otherwise virtually have no meaning.

is left to the Member States.³² In the case of doorstep selling contracts, consumers will be worse off under the proposal as it limits the extension of the cooling-off period to three months after the trader has performed his other contractual obligations, whereas currently the cooling-off period would not start to run before the consumer is informed of his right of withdrawal.

As indicated above, the new timeshare directive seems to have struck the right balance between the interests of both parties: on the one hand, the extension of the cooling-off period with three months in case of breach of 'normal' information obligation seems to provide a proper incentive for the trader to meet these information obligations. Where the consumer is simply left unaware of the existence of his right of withdrawal, a much longer period is offered. An indefinite extension, allowing the consumer to withdraw even years after the contract has otherwise been performed, would not be in the interest of legal certainty and not serve any justified interest on the part of the consumer. The solution opted for in the new timeshare directive is therefore taken over in the suggested amendment. The reference to articles 9(b), 10(1) and 11(4) is changed in a reference to the amended articles 5, 7 and 9, as proposed above.

Proposed new text

Article 13 Omission of information on the right of withdrawal

- 1. If the trader has not provided the consumer with the information on the right of withdrawal in breach of Articles 5(g)–9(b), 10(1) and 11(4), the withdrawal period shall expire ~~three months~~ one year and fourteen days after the trader has fully performed his other contractual obligations.***
- 2. If the trader has not complied with any other information requirement, the withdrawal period shall expire three months and fourteen days after the trader has fully performed his other contractual obligations.***
- 3. If, after the period of withdrawal has expired, the trader has failed to comply with the information requirements set out in this Directive, the consumer may***
 - (a) avoid the contract, unless this is unreasonable in the circumstances; or***
 - (b) claim damages for any loss resulting from the failure to comply with the information requirement.***

Current text of the proposal (continued)

Article 14 Exercise of the right of withdrawal

- 1. The consumer shall inform the trader of his decision to withdraw on a durable medium either in a statement addressed to the trader drafted in his own words or using the standard withdrawal form as set out in Annex I(B). Member States shall not provide for any other formal requirements applicable to this standard withdrawal form.***
- 2. For distance contracts concluded on the Internet, the trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader's website. In that case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.***

³² See for comments on this 'sanction' above, comments to article 6 of the proposal.

Comments³³

Another important matter is how the consumer must express his decision to withdraw from the contract. The current European directives do not provide one uniform answer as to how the consumer is to withdraw from the contract. In short, three different rules apply as regards the requirements that may be posed on the notification of the withdrawal:

1. notification of withdrawal is possible by any means (existing timeshare rule; distance selling);
2. notification of withdrawal is possible by any means that can be proven in accordance with national law (distance marketing of financial services; consumer credit);
3. notification of withdrawal should be in writing or on a durable medium (doorstep selling, as amended for the electronic age; new timeshare rule).

The second option implies that the applicable national law is to decide upon the validity of the notification. Such a rule is problematic in cases where the consumer without being aware thereof has concluded an international contract, which may occur in particular in the case of distance contracts. In many cases, such a contract would be governed by the law of the trader, which may impose requirements unfamiliar to the consumer as to the proof of his withdrawal. Even though this is the option chosen in the two most recent directives awarding the consumer a right of withdrawal, it should be rejected as the possible rule for a consumer rights directive. This leaves us with the 'liberal' rule of option 1, and the more stringent option 3.

That there is a need for harmonisation of the manner in which the right of withdrawal is to be exercised is clear from the responses to the Green paper. Such a uniform regulation would lead to simplification and legal certainty. Consumer organisations generally prefer not to introduce form requirements to the notification of withdrawal (the simpler, the cheaper and more effective the right of withdrawal is), implying a preference for option 1. From the business side and even some consumer organisations a form that allows for proof of the withdrawal – a registered letter, an e-mail or a fax message – is sometimes preferred (option 3). The European Parliament propagates the introduction of a standard form, drafted in all the official languages of the Community. Such a standard form should serve to meet several concerns of the Parliament: simplifying procedures, savings costs, increasing transparency and improving consumer confidence.³⁴ Such a standard form is suggested as well in reactions from consumer organisations to the distance selling consultation.³⁵ The Member States are divided on the matter of form requirements.

The manner in which the consumer may withdraw from the contract has been explicitly regulated in the draft-Common Frame of Reference (draft-CFR).³⁶ Under Article II.-5:102 of the draft-CFR, the consumer need only give notice of his wish to withdraw from the contract, without having to specify the reasons for doing so. From Article II.-1:106 draft-CFR it follows that the notice may be given by any means appropriate to the circumstances and that it becomes effective when it reaches the trader. That is considered always to be the case if the notice is delivered to the trader

³³ Based on Loos 2009 (forthcoming), no. VI.

³⁴ Review of consumer acquis document, p. 9.

³⁵ Distance selling document, p. 9.

³⁶ On the draft-CFR, see Loos 2008, p. 2-5, with references.

in person or when it is delivered to the trader's place of business. The drafters of the draft-CFR thus have chosen in favour of option 1. In the comments to the Acquis Principles, which have formed the underlying data on which the draft-CFR is based in this area, this choice is explained by pointing out that it is at least questionable whether the introduction of any form requirement could be regarded as an improvement of the *acquis communautaire*. It is acknowledged that the observance of a specific form may help to verify the actual events – which is in the interests of both parties – and as such could help the consumer to prove he has indeed exercised his right of withdrawal. However, such formal requirement so make it more complicated for the consumer to withdraw at all. Moreover, the argument that a requirement as to textual form in writing on a durable medium could serve as a proof of the withdrawal is required as false: in fact, 'anything short of a registered letter could fall short of this function' of the form requirement.³⁷ In the view of the drafters of the draft-CFR and the Acquis Principles, the notice should only serve to inform the trader of the withdrawal. The form of the notice, therefore, should not matter. For that reason, a notice by text message (SMS) sent to a mobile phone number indicated in the business card of the trader should suffice for a valid withdrawal.³⁸ Moreover, returning the subject matter of the contract (e.g. the goods delivered) equally shows the trader that the consumer no longer wishes to be bound by the contract. As a consequence, it should also be considered to be a withdrawal. Therefore, following the example set by § 355 paragraph 1 of the German Civil Code, Art. II.–5:102, third sentence, of the draft-CFR explicitly provides that returning the subject matter of the contract is considered a tacit withdrawal.³⁹

Given these – in my view: convincing – choice in favour of option 1, is at least surprising that the proposal for a consumer rights directive and the new timeshare directive opt in favour of option 3. Moreover, the way in which the Commission has worded the form requirement raises serious problems. According to article 14 paragraph 1 of the proposal, the consumer may choose to express his withdrawal in his own words or on a standard withdrawal form to be supplied by the trader, which order form is to meet the requirements of Annex I to the proposal for a consumer rights directive. Moreover, but apparently *only* in the case of a distance contract concluded over the Internet, the consumer may also make use of an electronic standard withdrawal form on the trader's website if the trader decides to provide for such an additional possibility (cf. art. 14 para. 2 of the proposal). Apart from this additional possibility, however, the notification must be given *on a durable medium* (art. 14. para. 1 of the proposal). This notion is defined in article 2 (10) as 'any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored'.⁴⁰ Obviously, this rules out an oral

³⁷ Cf. P. Møgelvang-Hansen, E. Terry and R. Schulze, 'Comments to Article 5:102 Acquis Principles', in: Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Private Law (Acquis Principles), Contract I, Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, Munich: Sellier. European Law Publishers 2007, p. 163, no. 5.

³⁸ Cf. S. Leible, J. Pisulinski and F. Zoll, 'Provisional Comments to Article 1:301 Acquis Principles', in: Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Private Law (Acquis Principles), Contract I, Pre-contractual Obligations, Conclusion of Contract, Unfair Terms*, Munich: Sellier. European Law Publishers 2007, p. 39, no. 3.

³⁹ In this sense also Article 5:102, third sentence, Acquis Principles.

⁴⁰ In this sense also art. 2 under (h) of the new timeshare directive.

notification. However, much more problematic is that under the current draft of articles 2 and 14 of the proposal (and under articles 2 and 7 of the new timeshare directive) a withdrawal may not be notified to the trader by sending an e-mail. It is clear that the e-mail itself is not an instrument, which satisfies the requirements of article 2 of the proposal. The preamble to the proposal further clarifies that '(t)he definition of durable medium should include in particular documents on paper, USB sticks, CD-ROMs, DVDs, memory cards and the hard drive of the computer on which the electronic mail or a pdf-file is stored'. From this it unequivocally follows that not the e-mail itself, but the hard drive of the computer on which the e-mail is stored, would qualify as 'durable medium'. This, clearly, cannot have been the intention of the European Commission, as even in cases where the contract was concluded electronically, a written statement of a statement on a usb stick or another medium would be required. If the Commission were to stick with its choice for option 1, it should at least reconsider the wording of articles 2 and 14 of the proposal for a consumer rights directive (and articles 2 and 14 of the new timeshare directive), in any case for those contracts that were concluded electronically or where the trader advertises or otherwise has informed the consumer of an address for electronic mail or communication through a website. However, it would be much simpler if the Commission would simply indicate that a notice could be given by any means. In that case, paragraph 2 can be deleted altogether, as is suggested in the following amendment. Moreover, a new paragraph 2 should be added along the lines of Article II.-5:102 of the draft-CFR, accommodating for the situation where the consumer withdraws from the contract by returning the goods which he had obtained under the contract.

Proposed new text

Article 14 Exercise of the right of withdrawal

1. The consumer shall inform the trader of his decision to withdraw ~~on a durable medium~~ either in a statement addressed to the trader drafted in his own words or using the standard withdrawal form as set out in Annex I(B). Member States shall not provide for any other formal requirements applicable to this standard withdrawal form.

*2. ~~For distance contracts concluded on the Internet, the trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader's website. In that case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.~~ **Returning the goods of which the material possession had been transferred to the consumer, or at his request to a third party, before the expiration of the withdrawal period is considered a notice of withdrawal unless the circumstances indicate otherwise.***

Current text of the proposal (continued)

Article 15 Effects of withdrawal

The exercise of the right of withdrawal shall terminate the obligations of the parties:

(a) to perform the distance or off-premises contract, or

(b) to conclude an off-premises contract, in cases where an offer was made by the consumer.

Comments

The proposal is conformity with the ECJ-ruling in the *Travel Vac*-case.⁴¹ Regulating this matter explicitly is useful. No amendments seem necessary.

Current text of the proposal (continued)

Article 16 *Obligations of the trader in case of withdrawal*

1. *The trader shall reimburse any payment received from the consumer within thirty days from the day on which he receives the communication of withdrawal.*

2. *For sales contracts, the trader may withhold the reimbursement until he has received or collected the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest.*

Article 17 *Obligations of the consumer in case of withdrawal*

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 collect the goods himself.*

The consumer shall only be charged for the direct cost of returning the goods unless the trader has agreed to bear that cost.

Comments⁴²

Once the consumer has successfully withdrawn from the contract, performances rendered under the contract must be returned. Even though this principle is recognised in almost all directives, until now the way it is to be realised is largely left to national law.⁴³ The fact that the performance must be returned entails a risk for in particular the trader of goods, both in the case of distance selling and doorstep selling: the trader is required to reimburse the consumer within thirty days after having received the notification of withdrawal (see explicitly art. 6 para. 2 of the distance selling directive) without being certain whether the consumer properly and in good time returns the goods. Withholding performance of the obligation to pay back the contract price and additional charges until the consumer has returned the goods is not dealt with under the current directives, and it is unclear whether the directives would allow the trader to do so as neither the doorstep selling directive nor the distance selling directive sets a period for performance of the consumer's obligation to return the goods. The doorstep selling directive also is silent on the period within which the trader is to return any payment received from the consumer. Article 6 paragraph 2 of the distance selling directive, however, does require the trader to reimburse the consumer within thirty days. Under articles 16 and 17 of the proposal for a consumer rights directive, the imbalance is restored in two ways. Firstly, the consumer is

⁴¹ Cf. case C-423/97, ECJ 22 April 1999, *ECR* 1999, I-2195 (*Travel Vac SL/Anselm Sanchís*), nos. 57-58.

⁴² Based on Loos 2009 (forthcoming), no. VIII.

⁴³ Cf. art. 7 of the doorstep selling directive, art. 6 of the existing timeshare directive, art. 6 para. 2 of the distance selling directive, and art. 15 of the second life assurance directive. Only the distance marketing of financial services directive contains an extensive article on the consequences of the withdrawal, cf. art. 7 of that directive. Art. 14 para. 3 (b) of the consumer credit directive indicates that where the consumer withdraws from a consumer credit contract, he must pay back any sums received under the contract with the interest accrued thereon without any undue delay and in any case within 30 days he sent his notice of withdrawal to the creditor. Art. 8 para. 1 of the new timeshare directive only indicates that the withdrawal terminates the obligation of the parties to perform the contract.

required to return the goods within fourteen days from the date that he communicates his withdrawal to the trader (art. 17 para. 1 of the proposal). The trader therefore no longer will need to set a period for performance of the obligation to return the goods before the consumer is put in default. Secondly, until the moment the consumer has returned the goods or has supplied evidence of having sent back the goods (e.g. by providing a photocopy of a shipping or postal order), the trader may withhold performance of the obligation to reimburse the consumer (art. 16 para. 2 of the proposal). These provisions are certainly an improvement to the current situation. Article 17 paragraph 1 does, however, not answer whether the trader must have obtained possession of the goods within that period. In other words: should the goods have been received by the trader within the fourteen days period, or may the consumer hand over the goods to the postal services or a carrier on the last day of the fourteen days period in order to properly perform his obligations under this paragraph? In order to prevent litigation on this question, a specific provision should be added indicating that the consumer need only hand over the goods to the postal services or a carrier within the fourteen days period. The wording suggested is taken from that of article 12 paragraph 3 and article 16 paragraph 2 of the current proposal.

Proposed new text

Article 17 Obligations of the consumer in case of withdrawal

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 collect the goods himself.

The consumer shall only be charged for the direct cost of returning the goods unless the trader has agreed to bear that cost.

The deadline referred to in the first sentence is met if the consumer has supplied evidence of having sent back the goods before the end of that deadline.

Current text of the proposal (continued)

Article 17 Obligations of the consumer in case of withdrawal

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.

Comments⁴⁴

At present, it is unclear to what extent the consumer may use the goods during the cooling-off period. In this respect, it should be noted that in many cases, such use would render the good to become second-hand, whereas in some cases – e.g. in the case of software installed on a computer – it is not even possible to prevent the consumer from using the good after withdrawing from the contract and returning the cd-rom on which the software was located. Nevertheless, as the right of withdrawal – at least also – is meant to enable the consumer to assess the qualities of the goods

⁴⁴ Based on Loos 2009 (forthcoming), no. IX.

offered, the consumer must be allowed to test the goods to a certain extent. Obviously, this implies that the consumer may open the packing, even if this would mean that the goods can no longer be sold to another consumer in the event this particular consumer makes use of his right to withdraw. However, where 'testing' evolves into simply using the good, the right of withdrawal should elapse.

Given the problems for traders to resell the goods returned to them after withdrawal from the contract by a consumer, it is understandable that traders try to minimise the use of delivered goods, which are still susceptible to a right of withdrawal as much as possible. One way of doing so is by trying to invoke exceptions to the right of withdrawal. Where these exceptions can't be relied upon by the trader, other evasive techniques are invoked. To defend their interests, some traders stipulate in their standard contract terms that 'in the case of return of the goods' the goods must be returned undamaged and in their original packaging. In any case when the goods were packaged in vacuum, this is in practice impossible. Clearly, this practice is at odds with the idea that the cooling-off period, expressed in recital (22) of the proposal for a consumer rights directive, is (also) meant to enable the consumer to ascertain the nature and the functioning of the goods. In such standard contract terms, the notion of 'withdrawal' is explicitly avoided, as in that case the breach of the directive would have been too obvious, thus leaving room for the interpretation that the clause only pertains to contractual rights of withdrawal or possibly claims for non-conformity. Nevertheless, there is a serious risk that, when confronted with the term, the consumer will simply take it that he is not entitled to withdraw from the contract. For this reason, I think such clauses should be seen as unfair contract terms.

Other techniques primarily centre on the borderline between 'testing' and 'using' the goods delivered. Clearly, there is a risk here that traders or service providers will try to define unilaterally what constitutes 'use' by determining (in standard contract terms) that opening the packing of the goods amounts to a waiver of the right of withdrawal. If such a clause would be accepted, it would in fact become virtually impossible to assess the qualities of the good without the right of withdrawal to elapse. Such provision therefore undermines the consumer's rights under the distance selling directive or the future consumer rights directive and should not be given effect. What in this respect is to be considered '(continued) use' cannot be left to the parties but needs to be determined objectively by a court of law. However, when the trader proves that the consumer has indeed *used* the good (and not only tested it) in my view the consumer should no longer be able to withdraw from the contract, even if he had not been informed of his right of withdrawal. Of course, if the good does not have the qualities the consumer could have expected it to have the consumer should be able to claim the remedies for non-conformity. However, I fail to understand why he should be able to surpass the requirements for such remedies by invoking the right of withdrawal.

The current practice may, to some extent, have been caused by an omission in the current directives. At present, the distance selling directive and the doorstep selling directive do not indicate what is to happen if, during the cooling-off period, the goods are damaged. Not surprisingly, in their reactions to the Green paper businesses insisted on clarifying what claims a trader has when the goods are used.⁴⁵ Business also argued that consumers should be explicitly required to take proper care of the

⁴⁵ Review of consumer acquis document, p. 9-10.

good as long as it is in his possession.⁴⁶ There is no reason to object to this particular rule. Such an obligation already exists in many Member States, either as an explicit obligation or as a consequence from general rules of contract law, in particular from the principle of good faith.

In this respect, the draft-CFR answers to the demands made by the business side, but probably not entirely to its liking. Art. II. – 5:105 paragraph 3 draft-CFR provides that the consumer need not pay for any diminution in the value to the good delivered under the contract caused by inspection and testing and for any damage, destruction or loss to that good, provided that the consumer used reasonable care to prevent such damage. On the other hand, paragraph 4 adds that the consumer is required to compensate for any diminution in value caused by normal use, unless the consumer was not properly informed of his right of withdrawal. From this it follows that the consumer may test the good and need not compensate the trader for any loss in value or damage caused by doing so. If the testing of the good implies that he must take the good out of its original packaging without being able to put it back in after testing, he is entitled to do so, provided that he exercises reasonable care in order to prevent unnecessary damage to the good. After all, the fact that he may wish to return the good, requires the consumer to take the justified interests of the trader into account. Moreover, if he *continues* to use the good and later on decides to withdraw from the contract, he is liable for further diminution of the value. Given the fact that the consumer is not liable for the diminution of the value or – provided that he has taken reasonable measures to prevent damage – destruction or loss of or damage to the good during the testing phase, it is up to the trader to prove that the consumer did not exercise proper care or that the diminution of the value was caused by normal use of the good after the testing phase had ended.

The proposal for a consumer rights directive follows the suggestion in the draft-CFR by stipulating, in article 17 paragraph 2, that in the case of withdrawal, the consumer is not responsible for damage which arises by the inspection and testing the goods, but that he *is* liable to pay damages if he continues to use the goods after the nature and the functioning of the goods have been ascertained and as a result of the continued use, the goods diminish in value. Moreover, if the consumer had not been properly informed of his right of withdrawal, he may not be held liable for the diminished value, the article provides.⁴⁷ The wording of article 17 paragraph 2 is, however, not easy to read. Perhaps it would be better if the text were replaced by that of Article II. – 5:105 paragraphs 3 and 4 of the draft-CFR, which provisions substantively contain the same rules but are written in language that is easier to understand. Moreover, unlike the present draft of article 17 paragraph 2, Article II. – 5:105 paragraph 4 draft-CFR rightly indicates that even in the case of normal use of the goods, the consumer should not be liable to pay for any diminution of the goods if he was not properly informed of his right of withdrawal.

Proposed new text

Article 17 Obligations of the consumer in case of withdrawal

~~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~~

⁴⁶ Distance selling document, p. 9.

⁴⁷ Art. 8 para. 2 of the new timeshare directive is to the same extent.

~~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. The consumer is not required to pay for~~

~~(a) any diminution in the value of anything received under the contract caused by inspection and testing;~~

~~(b) for any destruction, or loss of, or damage to, anything received under the contract, provided that the consumer used reasonable care to prevent such destruction, loss or damage.~~

~~3. The consumer is liable for any diminution in the value caused by normal use, unless the trader had not properly informed the consumer of his right of withdrawal.~~

Current text of the proposal (continued)

Article 18 **Effects of the exercise of the right of withdrawal on ancillary contracts**

1. Without prejudice to Article 15 of Directive 2008/48/EC, if the consumer exercises his right of withdrawal from a distance or an off-premises contract in accordance with Articles 12 to 17, any ancillary contracts shall be automatically terminated, without any costs for the consumer.

2. The Member States shall lay down detailed rules on the termination of such contracts.

Article 19 **Exceptions from the right of withdrawal**

1. In respect of distance contracts, the right of withdrawal shall not apply as regards the following:

(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;

(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;

(c) the supply of goods made to the consumer's specifications or clearly personalized or which are liable to deteriorate or expire rapidly;

(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;

(e) the supply of sealed audio or video recordings or computer software which were unsealed by the consumer;

(f) the supply of newspapers, periodicals and magazines;

(g) gaming and lottery services;

(h) contracts concluded at an auction.

2. In respect of off-premises contracts, the right of withdrawal shall not apply as regards the following:

(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;

(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;

(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.

3. The parties may agree not to apply paragraphs 1 and 2.

Comments⁴⁸

I am not capable of commenting on the exceptions listed in article 19 of the proposal in any detail. Most of these exceptions already feature in the existing distance selling and doorstep selling directives, with the notable and somewhat surprising exception of *vins de primeur* ('early wines') in the case of distance selling (para. 1 (d)), insisted on by businesses who were afraid of speculating consumers, and by the United Kingdom, which is all the more surprising given the fact that this country most likely imports more of these wines than it exports. The exceptions appear to have been deemed specific for the different modes for contracting and are not harmonised: article 19 paragraph 1 lists the exceptions in the case of distance contracts, paragraph 2 those for doorstep selling contracts. Some changes are made, though. For instance, the exception of the right of withdrawal for goods that 'by reason of their nature, cannot be returned' (art. art. 6 para. 3, third indent, of the distant selling directive) is not reproduced in the proposal for a consumer rights directive.

Article 19 paragraph 3 of the proposal makes clear that the parties are free to agree not to apply the exceptions to the right of withdrawal that are listed in the previous two paragraphs. Article 19 paragraph 3 thereby reaffirms the principle of party autonomy. Where the parties have chosen to not apply the exceptions listed in article 19 paragraphs 1 or 2, the other provisions regarding the right of withdrawal will probably apply as well, including the dispatch principle (art. 12 para. 3) as regards the timeliness of the withdrawal and the provisions of articles 16 and 17 of the proposal for a consumer rights directive as regards the mutual obligations of the parties to return the performances rendered. On the basis of the wording of paragraph 3, it seems clear that the same does not apply for mere *contractual* rights of withdrawal. No amendment of the text seems necessary.

Current text of the proposal (continued)

Article 20 Excluded distance and off-premises contracts

1. Articles 8 to 19 shall not apply to distance and off-premises contracts:

(a) for the sale of immovable property or relating to other immovable property rights, except for rental and works relating to immovable property;

(b) concluded by means of automatic vending machines or automated commercial premises;

⁴⁸ Based on Loos 2009 (forthcoming), no. X.

(c) concluded with telecommunications operators through public payphones for their use;

(d) for the supply of foodstuffs or beverages by a trader on frequent and regular rounds in the neighbourhood of his business premises.

2. Articles 8 to 19 shall not apply to off-premises contracts relating to:

(a) insurance,

(b) financial services whose price depends on fluctuations in the financial market outside the trader's control, which may occur during the withdrawal period, as defined in Article 6(2)(a) of Directive 2002/65/EC and

(c) credit which falls within the scope of Directive 2008/48/EC.

3. Articles 8 to 19 shall not apply to distance contracts for the provision of accommodation, transport, car rental services, catering or leisure services as regards contracts providing for a specific date or period of performance.

Comments

I am not capable of commenting on the exclusion listed in article 20 of the proposal.

Chapter IV Other consumer rights specific to sales contracts

Introductory Comments

Whereas services make up more than 70 % of EU GDP⁴⁹ and some 60 % of employment in the EU,⁵⁰ regulation of services contracts is still very much obsolete. Recently, some initiatives have tried to provide the groundwork for the introduction of such rules. From the side of the European Union, the services directive should be mentioned, containing provisions on the quality of services (art. 22-26). Furthermore, the development of the Principles of European Law on Service Contracts,⁵¹ followed by the development of the draft-Common Frame of Reference, set the necessary groundwork for additional substantive rules. In this respect, it is remarkable that the proposal for a consumer rights directive does aim at the harmonisation of the rules concerning the *conclusion* of contracts (in the form of information obligations for all sales and services contract, and a unified regulation for rights of withdrawal and the associated cooling-off periods for off-premises contract for sales and services and distance contracts for goods and services), but does not contain rules aimed at the harmonisation of the rules concerning the proper *performance* of those contracts. In the Green paper the Commission had expressly asked whether it should strive for a general regulation of contractual remedies. In particular consumer organizations and academics were in favour of such a general regulation. They argued that differences as regards the applicable remedies lead to differences in consumer protection, which in itself was considered a reason for harmonisation. Antagonists – primarily from the business side, but supported by the European Parliament – were of the view that the different remedies for non-performance are justified and depend on the nature on the contract at stake. Moreover, such a general regulation of remedies belongs to contract law in general, which should not be harmonised. This was said to apply in particular to the right to damages, which should be left to the Member States.⁵²

On the basis of the opposition from the business side and the European Parliament, it seemed improbable that a general regulation of remedies, applicable to both sales contracts and service contracts, would be developed. On the other hand, it did seem unlikely that the European Commission would leave out substantive rules concerning service contracts altogether: after all, the internal market pertains to the provision of goods *and* services. For this reason, it seemed likely that the European Commission would at least ensure that similar rules would apply to sales contracts as to service contracts that relate to the use or repair of tangible goods. This would imply that similar rules would apply to the question of non-conformity of a car, irrespective whether that car was sold or merely leased to the consumer. Similarly, whether a car is repaired properly would then be determined in a uniform manner, irrespective of the question whether the car was repaired by the trader on the basis of a remedy for non-conformity, or by a garage keeper on the basis of an independent service contract.⁵³ The Commission could in this case really make use of the (draft-) CFR as a

⁴⁹ Cf. recital 4 of the services directive (Directive 2006/123/EC, OJ 2006, L 376/36 on services in the internal market).

⁵⁰ See J.M. Barendrecht *et al.* (eds.), *Principles of European Law on Service Contracts (PEL SC)*, Munich: Sellier. European Law Publishers 2006, p. 127.

⁵¹ Barendrecht *et al.* (eds) 2006.

⁵² See extensively Loos 2008, p. 19-20.

⁵³ Cf. Loos 2008, p. 77-78.

toolbox, as it contains extensive rules on service contracts and general rules on non-performance and remedies.⁵⁴

However, unfortunately the European Commission decided otherwise. The proposal for a consumer rights directive does not contain any substantive rules on service contracts, apart from two very specific rules, which were already included in the consumer sales directive, i.e. specific rules on the equalization of defective installation by or on behalf of the trader with a non-conformity of the goods delivered to the consumer (art. 25 para. 5 of the proposal) and the straight-forward application of consumer sales rules to the contract for the delivery of goods to be manufactured or produced (art. 21 para. 2 of the proposal). In my view, the European Commission let a great moment slip to both further the internal market and improve consumer protection.

Current text of the proposal (continued)

Article 21 *Scope*

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.

Comments

The European Commission did not only abstain from providing substantive rules for services contracts, it even restricted the scope of the provisions on consumer sales law in the case of a ‘mixed-purpose contract having as its object both goods and services’ by limiting the application of Chapter IV of the proposal: the provisions on sales contracts *only* apply to the delivery of the goods, even though the contract as a whole is defined, in article 2 under (3), as a sales contract. What this means, and what in this respect is meant with a ‘mixed-purpose’ contract, is not clarified in the explanatory memorandum or in the recitals preceding the proposal for a consumer rights directive. In certain cases, the contract can easily be divided in the provision of goods and of services, e.g. when a trader promises to supply the consumer with a car and to provide yearly maintenance services pertaining to that car. In other cases, the division does not really make sense. An example would be the case where the parties agree on the delivery of a table and agree that the trader will revarnish the table before delivery. In this case, the table need not be manufactured or produced, so paragraph 2 would not apply. Under the present draft of paragraph 1, the sales rules would not apply to the revarnishing of the table, leaving the performance of the ‘service’ to be regulated by national law. In most national laws, probably the whole contract would be governed by the sale provisions, the sales element constituting the predominant part of the contract. Given the explicit *exclusion* of the services element from the scope of the sales chapter, this no longer seems possible. The opposite rule would probably fit better with Member States law.

Proposed text

Article 21 *Scope*

⁵⁴ In this respect, I should mention that I am one of the authors of the previously mentioned Principles of European Law on Service Contracts, which are the basis of the rules on service contracts in the (draft-) CFR and therefore far from objective. See for a very critical analysis of these rules H. Unberuth, *Dienstleistungsvertrag im DCFR, Zeitschrift für Europäisches Privatrecht* 2008/4, p.745-774.

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 **unless the provision of services constitutes the predominant part of the contract**~~is to the goods~~.*

Current text of the proposal (continued)

2. *This Chapter shall also apply to contracts for the supply of goods to be manufactured or produced.*

3. *This Chapter shall not apply to the spare parts replaced by the trader when he has remedied the lack of conformity of the goods by repair under Article 26.*

Comments

This restriction is not understandable. When the trader repairs a good making use of spare parts, the goods should be fit for use once more. If the spare parts themselves are defective (e.g. suffer from the same defect that initially has caused the non-conformity of the goods), the consumer of course should be able to claim repair or replacement or to terminate the contract under article 26 paragraph 4. However, as article 26 is a part of Chapter IV, it seems that none of these rights may be invoked on account of the odd provision of article 21 paragraph 3. The only interpretation where article 21 paragraph 3 would make some sense is when it refers to the parts that were taken out of the defective good and replaced by functioning parts. Obviously, with regard to the parts taken out, the consumer can't *also* invoke a remedy, e.g. price reduction. This, however, need not be regulated as the consumer has not purchased the individual parts but the whole good, which (after repair) indeed is in conformity with the contract. Therefore, in the most favourable interpretation, paragraph 3 does not do much harm (but does not do any good either); whereas in the most unfavourable interpretation the provision would deprive the consumers of the rights he should be entitled to. Paragraph 3, therefore, should be deleted.

Proposed text

Article 21 Scope

~~3. This Chapter shall not apply to the spare parts replaced by the trader when he has remedied the lack of conformity of the goods by repair under Article 26.~~

Current text of the proposal (continued)

Article 21 Scope

4. *Member States may decide not to apply this Chapter to the sale of second-hand goods at public auctions.*

Comments

Article 1 paragraph 3 of the consumer sales directive gives Member States the possibility to exclude the sale of second-hand goods 'at public auctions where consumers have the opportunity of attending the sale in person' from its protective scope. Article 21 paragraph of the proposal for a consumer rights directive gives Member States the same possibility in the case of a public auction. The definition of 'public auction' in article 2 under (16) indicates that consumers must be given a possibility to attend the auction in person. Where the sale of second hand goods is offered by way of distance communication (e.g. through the internet, a telephone or video meeting of interested parties), it can't be considered a public auction, which implies that the consumer sales provisions will apply.

Why the Member States are given the option to retain (or introduce) the exclusion of second-hand goods purchased at a public auction – i.e. why the current option is maintained – is not explained in the explanatory memorandum or the recitals to the directive. It is also rather surprising, given the fact that in 2007, only 8 Member States have made use of the option, whereas 17 did not.⁵⁵ Obviously, the fact that the goods were purchased at a public auction will have an effect on the information the trader is required to provide (see articles 5 paragraph 2, and 7 paragraph 3 of the Commission’s proposal) as well as on the legitimate exceptions the consumer may have of the goods (following from the conformity-test under article 24). A valid reason to exempt second-hand goods from the protection of the directive altogether, however, does not seem to exist. Moreover, it is difficult to reconcile with the Commission’s general approach to remove any barriers to trade. It is therefore suggested to delete article 21 paragraph 4.

Article 2 under (15) indicates that a transaction which is concluded on the basis of a fixed-price offer is not an auction (and therefore also not a public auction), even if the consumer is given an option to conclude it through a bidding procedure. This probably means that contracts concluded through online platforms such as eBay by definition can’t be considered to have been concluded at a public auction,⁵⁶ which in turn implies that the consumer sales rules apply in so far as the trader is a trader, i.e. acting in the performance of his business or profession, even if the suggested deletion of article 21 paragraph 4 would not be taken over. In that case, it would be wise to indicate this explicitly in the recitals in the preamble to the directive to avoid misunderstandings on this matter.

Proposed text

Article 21 Scope

~~*4. Member States may decide not to apply this Chapter to the sale of second-hand goods at public auctions.*~~

Current text of the proposal (continued)

Article 22 Delivery

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 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.

Comments

⁵⁵ Cf. C. Twigg-Flesner, ‘Consumer sales directive’, in: H. Schulte-Nölke *et al.*, *EC Consumer Law Compendium, Comparative analysis*, 2006, p. 612. See also the Communication from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers’ liability, COM (2007) 210 final (hereafter: Consumer sales implementation communication), p. 6, which lists only 6 countries that having introduced the option.

⁵⁶ Cf. Twigg-Flesner 2009 (forthcoming), no. 2.

Paragraph 1 is a most welcome addition to the current consumer sales directive. It indicates when the trader must perform his main obligation under the contract. Obviously, this article can only provide a default rule,⁵⁷ indicating that the parties may agree to a shorter period for performance of the trader's main obligation under the contract, but also to a *longer* period for performance. This may be necessary to enable the trader to obtain the goods, in particular if they have to be shipped from the other side of the world. This is properly indicated by recital (38) in the preamble. The question is, however, why the *default* rule is that performance need only take place thirty days after the contract is concluded. In the case of a 'traditional' sales contract, concluded in a regular shop, the trader would normally be required to perform immediately – save any agreement to the contrary. This may be different for distance selling contracts, but in such contracts a different period for performance is always indicated on the website or in the brochure from which the consumer orders. Under Article 2:102 of the PELS, the default rule for the time of delivery is 'a reasonable time after the conclusion of the contract'. From the notes to this provision it becomes clear that this rule is the default rule in the majority of Member States, whereas a large minority of member States even requires performance 'without undue delay', implying an even shorter period for performance.⁵⁸ From this it follows that currently in *all* legal systems performance must be tendered shortly after the conclusion of the contract in stead of thirty days later. Similarly, Articles IV.A. – 2:202 and III. – 2:102 of the draft-CFR require performance within a reasonable period after the conclusion of the contract. This provision, supported in the majority of Member States, should be included in paragraph 1. Moreover, as is suggested in article 3:101 PELS and Articles IV.A. – 3:101 and III. – 2:102 of the draft-CFR, the default rule should be that delivery coincides with the moment of payment, as is the case in the majority of Member States, entitling both parties to withhold performance if the other party does not tender its performance.⁵⁹ This enables the consumer to order goods without being burdened unnecessarily with the risk of insolvency without jeopardizing the trader's interest.

Paragraph 2 adds that if the trader has failed to deliver on time, he is required to refund the consumer any sums paid within seven days from the date on which the trader should have delivered the goods. At first sight, this appears to be a sensible provision as the trader should not be able to first take payment from a consumer and then delay delivery indefinitely without returning the consumer's money. However, the provision has strange effects if the late delivery is not followed by termination of the contract (or by a withdrawal from the contract, as the case may be): under the current draft of paragraph 2, the mere fact that the trader is late in delivering the goods would entitle the consumer to receive back any payments made in advance, even if the trader delivers afterwards and the consumer takes delivery at that time. If understood in this way, paragraph 2 introduces a rather harsh penalty. This can, of course, not have been the intention of the European Commission. Clearly, the provision should be altered, giving the consumer an immediate right to termination of the contract if the trader fails to deliver on the date specified and (1) does not indicate in advance when he can deliver, or (2) indicates that he can deliver only after a reasonable period of time of two weeks after the agreed date has elapsed (in which one could see a reflection of the notion of *mise-en-demeure*), or (3) merely indicates that he has no

⁵⁷ Cf. also Twigg-Flesner 2009 (forthcoming), no. 3.

⁵⁸ Cf. Hondius *et al.* (eds.) 2008, Notes to Article 2:102 PELS, p. 173-174.

⁵⁹ Cf. Hondius *et al.* (eds.) 2008, Notes to Article 3:101 PELS, p. 235.

intention of delivering at all.⁶⁰ From that moment on, the consumer should also be entitled to damages for the loss caused by the failure to deliver on time.

In certain cases, the consumer can't be expected to award the trader an additional period for delivery. This is the case, in particular, where strict compliance with the contract is 'of the essence' for the consumer and this must have been clear for the trader. For instance, if the parties had agreed that the trader would supply the consumer with a wedding dress on 1 February, one day before the wedding is scheduled to take place, obviously delivery at a later date is of no value to the consumer. The consumer should then not be required to accept later delivery (but instead be free to immediately purchase a wedding dress elsewhere).

Finally, unlike article 23, the present draft does not take into account the possibility that the trader in fact tries to deliver the goods on time, but the consumer frustrates delivery by failing to take reasonable steps to take delivery. Surely, such conduct by the consumer should not be rewarded by allowing him to terminate the contract or by allowing him to reclaim sums paid in advance.⁶¹ The suggested paragraph 7 remedies this omission in the current text.

Proposed text

Article 22 Delivery and payment

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~~ reasonable time from the day of the conclusion of the contract.

2. Unless the parties have agreed otherwise payment shall take place at the moment of delivery.

23. Where the trader has failed to fulfil his obligations to deliver at the agreed moment, the consumer shall be entitled to immediately rescind the contract, unless (a) the trader indicates before the period for delivery has elapsed that he will deliver the goods within two weeks from the date agreed in the contract; and (b) delivery at that later date does not substantively deprive the consumer from what he is entitled to receive under the contract.

4. If delivery does not take place within the period indicated in paragraph 3, the consumer is entitled to rescind the contract.

5. The consumer may rescind the contract under paragraphs 3 or 4 by giving notice to the trader in writing or on another durable medium. The trader is required to a refund of any sums paid within seven days from the date he receives the consumer's notice of delivery provided for in paragraph 1.

6. The consumer may claim damages for any loss resulting from the failure to deliver as of the moment he would be entitled to rescind the contract in accordance with paragraph 4.

7. Paragraphs 3-6 do not apply 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.

Current text of the proposal (continued)

⁶⁰ Cf. also Twigg-Flesner 2009 (forthcoming), no. 3.

⁶¹ Cf. also Twigg-Flesner 2009 (forthcoming), no. 3.

Article 23 *Passing of risk*

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.*

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.*

Comments

The passing of risk is not regulated in the existing consumer sales directive. This means that the passing of risk is currently regulated under national law. The legal systems differ with regard to the moment when risk passes. The division basically reflects the differing moments when ownership passes. In legal systems where ownership passes when the contract is concluded (e.g. France, Latvia, and Belgium), risk also passes at that moment. Under other legal systems, ownership only passes when the material possession of the goods is transferred (e.g. in Germany, Denmark, and the Czech Republic; this system is also adopted in art. 69 para. 1 CISG). Risk is transferred at that moment as well. For both types of legal systems, risk can only pass once the goods have been identified to the contract. In case of specific goods, this is automatically the case, but generic goods need to be specified first. For the first group of legal systems, this implies that for generic goods risk does not (already) pass when the contract is concluded, but only when the goods are specified.⁶²

For most legal systems, no different regime exists for consumer sales. However, many legal systems do provide that in consumer sales the trader shall bear the risk while the goods are under transportation. Risk then passes only when the buyer obtains material possession of the goods (e.g. England and Scotland, Finland, Germany, and Sweden). Under Nordic consumer sales, this applies even when it is not the trader who is to transport the goods, but the consumer-buyer who is to *collect* the goods.⁶³

From the above it follows that the suggested text of article 23 paragraph 1 of the proposal for a consumer rights directive is rather consumer-friendly, as – in the normal case – risk only passes when the goods are in the material possession of the consumer, even if ownership under national law has passed at an earlier moment. However, the proposed rule is in conformity with Article 5:103 of the Principles of European Law on Sales (hereafter also: PELS) and Article IV.A. – 5:103 of the draft-Common Frame of Reference. One may therefore conclude that even though the provision of article 23 of the proposal reflects the current situation in only a minority of Member States, it is supported by modern legal thinking. The text, therefore, should remain unaffected.

The main rule of paragraph 1 is subject to one exception – broadly supported in the responses from both consumer organisations and businesses in the consultation on the Green paper:⁶⁴ in case the consumer or the third party nominated by the consumer has failed to take reasonable steps to take delivery, risk is deemed to have passed at the

⁶² Cf. E.H. Hondius *et al.* (eds.), *Principles of European Law on Sales (PELS)*, Munich: Sellier. European Law Publishers 2008, Notes to Article 5:102 PELS, p. 334-336.

⁶³ Cf. Hondius *et al.* (eds.) 2008, Notes to Article 5:103 PELS, p. 339.

⁶⁴ Cf. Review of acquis document, p. 12.

time when delivery, according to the contract, should have taken place.⁶⁵ This would be the case where the consumer does not answer the door when the carrier at a moment on which the parties had agreed earlier wishes to transfer the goods in the hands of the consumer, or when the consumer fails to collect the goods from the post-office depot within the period indicated by the post-office. This exception is also included in Article 5:103 paragraph 2 PELS and Article IV.A. – 5:103 paragraph 2 draft-CFR.

Article 22 of the proposal regulates the obligation to *deliver* the goods. It does not deal with the transfer of ownership. Article 23 deals with the transfer of risk. As was set out above, in the proposal the transfer of risk is not connected to the moment when ownership passes, but with the moment when the consumer obtains the material possession of the goods. In this respect, the directive need not go into the transfer of property itself and therefore not in the question whether ownership should pass at the conclusion of the contract or afterwards. This can and – on the basis of article 295 of the EC Treaty must – be left to the national property laws. However, if under national law property does not pass at the conclusion of the contract, the trader is normally obliged to transfer property at a specific moment (usually, but not necessarily coinciding with delivery). The proposal should therefore contain an explicit obligation to this extent for those legal systems where property does not pass at the moment of conclusion of the contract, leaving it to the Member States to determine when ownership does pass.

Proposed text of new article

Article 23a Transfer of property

Where, under the law applicable to the contract, ownership of the goods does not pass automatically at the moment of the conclusion of the contract, unless the parties have agreed otherwise, the trader is required to transfer ownership. The transfer of ownership takes place at the moment determined by the law applicable to the contract.

Current text of the proposal (continued)

Article 24 Conformity with the contract

- 1. The trader shall deliver the goods in conformity with the sales contract.*
- 2. Delivered goods shall be presumed to be in conformity with the contract if they satisfy the following conditions:*
 - (a) they comply with the description given by the trader and possess the qualities of the goods which the trader has presented to the consumer as a sample or model;*
 - (b) they are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted;*
 - (c) they are fit for the purposes for which goods of the same type are normally used or*
 - (d) they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.*

⁶⁵ In continental systems, this would be a case of *mora creditoris*.

Comments

Article 24 of the proposal for a consumer rights directive largely resembles the existing text of article 2 of the consumer sales directive. Both articles indicate as the central norm that the goods must be ‘in conformity with the contract’. The wording of article 24 basically replicates, with minor changes, the text of article 2 paragraph 2 of the consumer sales directive. However, at the end of limb (c), the word ‘or’ is inserted in the text. This word – which also appears in (at least) the French, German and Dutch language version of the proposal – could be interpreted as implying that the criteria for non-conformity are not cumulative, but alternative. This, of course, can only be a drafting error: the mere fact that the goods are fit for their normal purpose (para. 2(c)) does not mean that they are by definition in conformity with the contract. They are not, for instance, if they are not fit for the particular purposes communicated to the trader at the time of the conclusion of the contract.⁶⁶ The word ‘or’ should therefore be changed into ‘and’.

Proposed text

Article 24 *Conformity with the contract*

2. *Delivered goods shall be presumed to be in conformity with the contract if they satisfy the following conditions:*

(a) they comply with the description given by the trader and possess the qualities of the goods which the trader has presented to the consumer as a sample or model;

(b) they are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted;

(c) they are fit for the purposes for which goods of the same type are normally used; **and**

(d) they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.

Current text of the proposal (continued)

Article 24 *Conformity with the contract*

3. *There shall be no lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or should reasonably have been aware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.*

Comments

Paragraph 3 derogates from the wordings of article 2 paragraph 3 of the consumer sales directive. In the existing directive the consumer can’t invoke a lack of conformity if the consumer at the time the contract was concluded was aware, *or could not reasonably be unaware* of the lack of conformity. However, under the proposal, the consumer can’t invoke a lack of conformity if the consumer at the time the contract was concluded was aware, *or should reasonably have been aware* of the lack of conformity. This may be interpreted as having the same meaning as the text in the current directive, but it may also be interpreted as implying a duty to investigate or

⁶⁶ Cf. also Twigg-Flesner 2009 (forthcoming), no. 4.

inspect the goods prior to the conclusion of the contract. Such an active duty would go too far. That the consumer should be reasonably attentive is only fair, but this is captured better in the wording of article 2 paragraph 3 of the consumer sales directive. This wording is reinstated in the proposed text.

Proposed text

Article 24 *Conformity with the contract*

3. *There shall be no lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or ~~should~~ could not reasonably have been **unaware** of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.*

Current text of the proposal (continued)

4. *The trader shall not be bound by public statements, as referred to in paragraph 2(d) if he shows that one of the following situations existed:*

(a) *he was not, and could not reasonably have been, aware of the statement in question;*

(b) *by the time of conclusion of the contract the statement had been corrected;*

(c) *the decision to buy the goods could not have been influenced by the statement.*

5. *Any lack of conformity resulting from the incorrect installation of the goods shall be considered as a lack of conformity of the goods where the installation forms part of the sales contract and the goods were installed by the trader or under his responsibility. The same shall apply equally if the goods, intended to be installed by the consumer, are installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.*

Article 25 *Legal rights – Liability for lack of conformity*

The trader shall be liable to the consumer for any lack of conformity which exists at the time the risk passes to the consumer.

Article 26 *Remedies for lack of conformity*

1. *As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:*

(a) *have the lack of conformity remedied by repair or replacement,*

(b) *have the price reduced,*

(c) *have the contract rescinded.*

2. *The trader shall remedy the lack of conformity by either repair or replacement according to his choice.*

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.*

The consumer may only rescind the contract if the lack of conformity is not minor.

Comments

When the consumer is entitled to a remedy for non-conformity the question is which remedy the consumer may invoke. The consumer sales directive has introduced a

hierarchy of remedies by providing, in article 3 paragraphs 3 and 5, that a consumer is first entitled to repair or replacement of the good and that he is entitled to price reduction or termination of the sales contract only when repair or replacement are not available or not performed by the trader within a reasonable time or without causing significant inconvenience to the consumer. In the responses to the Green paper on the Review of the consumer acquis, opinions were almost equally divided whether the hierarchy should be maintained or not. Not surprisingly, businesses argued that the hierarchy has proven to be effective and that it has led to a good balance between the interests of consumers and traders. Abrogation of the hierarchy – and in particular reintroduction of the right to terminate the contract as a primary remedy – would lead to legal uncertainty and detrimental consequences for traders.⁶⁷ This opinion was supported by practitioners, the European Parliament and half of the Member States. However, the argument of legal uncertainty is simply false: the uncertainty is not caused by the consumer's right to choose, but by the possibility that a consumer will invoke any remedy. The extent of the uncertainty, however, to a large extent depends on the trader himself: if he delivers properly functioning goods, the chances of a consumer in need to invoke any remedy are rather slim. Only where the trader does not perform his obligations properly, the question whether or not the consumer may invoke a remedy comes into play. Of course, businesses are correct in arguing that termination is more detrimental to traders than repair or replacement – as the trader loses the profit he had hoped to gain from the contract, and receives a good which in any case needs repair if the trader wishes to resell it. However, it is not easy to see why this should lead to a restriction of the remedies of the consumer, in particular given the fact that in many legal systems *such a hierarchy does not exist for non-consumer sales*. Moreover, the introduction of such hierarchy does not appear to be advocated for commercial sales (or C2C-contracts). This is all the more remarkable as the financial interests of the trader are much more compromised in the case of the termination of a commercial sale than in the case of the termination of a consumer sale. This in itself would be an argument *against* the current hierarchy.

Nevertheless, in article 26 paragraphs 2 and 3 of the proposal for a consumer rights directive, the Commission proposes to maintain the hierarchy of remedies, by listing repair and replacement as the primary remedies and termination and price reduction as the secondary remedies. One would have expected the Commission to indicate – either in the explanatory memorandum or in the recitals to the preamble – why it chooses to maintain the hierarchy, but any explanation as to its reasons is missing. Retaining the hierarchy is all the more surprising given the aim of improving the use of the internal market by consumers. To the contrary: the mere fact that in case of non-conformity the consumer will not simply be entitled to receive back any payments he has made (termination), but will need to send back the goods to a trader in another country and then have to wait until that good is repaired or replaced, will be rather a disincentive to shop cross-border. The simple fact that the good must be sent to another country (and back) means that it will take a longer period before the consumer can enjoy the use of the good once more than would have been the case had he bought the good in the shop around the corner. Surely, this will not improve consumer confidence in the internal market.⁶⁸ If anything, consumer confidence could have been boosted by abrogating the hierarchy.

⁶⁷ Review of consumer acquis document, p. 13.

⁶⁸ In this sense also Twigg-Flesner 2009 (forthcoming), no. 5(b).

Under the current text, the hierarchy is not only maintained, but the consumer's right to invoke the remedy of his choice is even further restricted. Under the consumer sales directive, it is ambiguous whether it is the consumer or the trader who may choose *between* the primary remedies of repair and replacement. The wording of article 3, paragraph (3) of the directive, however, seems to suggest that it is the *consumer* who may make that choice, provided that the remedy chosen is neither impossible or disproportionate to the trader. In Germany, the consumer's right to choose has even been laid down explicitly in § 439 paragraph (1) of the BGB.⁶⁹ Even though the outcome of the public consultation does not indicate any need to change this (nothing is said on this matter), and without any explanation in the explanatory memorandum or the recitals to the proposed directive, in the proposal for a consumer rights directive the choice is given to the *trader*. This trader-friendly rule seems to fall from the skies. The change suggested in the proposal is certainly weakening the consumer's right to (in particular) replacement. It is clearly an example where consumer protection at the European level is decreased, which is all the more disturbing given the fact that the current proposal aims at full harmonisation.

When the consumer is entitled to termination or price reduction – as indicated above, this should in principle be a primary remedy and not a secondary remedy – the question arises what these remedies actually mean. Neither article 26 paragraph 3 of the proposal, nor any other provision in the text, indicates what the consequences of termination or price reduction are. How, for instance, is the reduction of the price to be calculated? Probably, the trader should simply return the difference in value between a conforming good and the defective good, but other ways of calculating the reduction are possible as well. It would be useful to have some indication of this in the article.

More importantly, whereas the consequences of withdrawal are regulated in no less than three articles, there is no single article regulating the consequences of termination of the contract. Moreover, *how* the consumer is to terminate the contract is not regulated either. Apparently, these consequences and how to terminate the contract are left entirely to national law. This is rather surprising given the importance of these consequences and the huge differences between legal systems where termination is only possible by way of a court order (and where the court even may have discretionary powers whether or not to award termination), and legal systems where the creditor may by simple letter terminate the contract. If such consequences and the manner for termination would be left national law, this should be said explicitly.

What is useful is the clarification when repair and replacement are disproportionate. At the moment, it is not clear whether the proportionality-test only applies with regard to the comparison between the costs for repair and replacement, or whether also price reduction and termination may be included in the comparison.⁷⁰

Proposed text

⁶⁹ Similarly, in the Netherlands, before the implementation of the consumer sales directive the trader was entitled to make the choice, but the provision allowing the trader to make the choice was deemed not to be in conformity with the directive and therefore repealed, cp., *Bijlage Handelingen Tweede Kamer* 2000-2001, 27 809, no. 3 (Explanatory Memorandum to the bill implementing the consumer sales directive), p. 6.

⁷⁰ Cf. Twigg-Flesner 2006, p. 638-639.

Article 26 Remedies for lack of conformity

1. As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:

- (a) have the lack of conformity remedied by repair or replacement,
- (b) have the price reduced,
- (c) have the contract rescinded,

according to the consumer's choice.

2. The trader shall remedy the lack of conformity by either repair or replacement according to **the consumer's** ~~his~~ choice.

3. **The consumer is not entitled to have the lack of conformity remedied by repair or replacement** 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 **any other remedy available to the consumer** ~~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.

4. The consumer may only rescind the contract if the lack of conformity is not minor.

Comments

As indicated above, the manner in which the consumer is to terminate the contract and the consequences of termination and price reduction need to be taken care of. In order to prevent confusion as much as possible, the rules on termination and withdrawal – which have basically the same effect – need to be carefully aligned. For that reason, the articles suggested below largely mirror the provisions on withdrawal. An exception applies to the last paragraphs. Firstly, the fact that the goods have diminished in value between the time of delivery and their return is a logical consequence of the use of these goods, which the consumer was entitled to do. Once the consumer is aware or should have been aware of the lack of conformity he must take the interests of the trader into account, which implies that he is required to take proper care of these goods in order to prevent unnecessary deterioration or destruction of the goods.

Proposed text

Article 26a Exercise of the right of rescission

The consumer shall inform the trader of his decision to rescind from the contract on a durable medium in a statement addressed to the trader drafted in his own words. Member States shall not provide for any other formal requirements applicable to the notice of rescission.

Article 26b Effects of price reduction and rescission

1. **Where a consumer rescinds from the contract the obligations of the parties shall terminate. Where a consumer invokes the right to price reduction, the trader shall reimburse the difference in value between the good delivered and the price paid by the consumer.**

2. **The trader shall reimburse any payment received from the consumer within thirty days from the day on which he receives the communication of rescission or price reduction.**

3. 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 collect the goods himself. The deadline referred to in the first sentence is met if the consumer has supplied evidence of having sent back the goods before the end of that deadline.

4. The trader may withhold the reimbursement until he has received or collected the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest.

5. The consumer is not required to pay for any diminution in the value of the goods, unless the consumer has not taken proper care of the goods after he was or should have been aware of the lack of conformity.

Current text of the proposal (continued)

Article 26 Remedies for lack of conformity

4. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:

(a) the trader has implicitly or explicitly refused to remedy the lack of conformity;

(b) the trader has failed to remedy the lack of conformity within a reasonable time;

(c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;

(d) the same defect has reappeared more than once within a short period of time.

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).

Comments

Given the comments made above – the hierarchy should be abolished – the importance of the remaining paragraphs of article 26 of the proposal is much less important. Paragraphs 4 and 5 of the proposal are of relevance only in the case where termination is not allowed under article 26 paragraph 4 (which is now a self-standing paragraph), *i.e.* when the lack of conformity is minor, and the consumer has opted for repair or replacement. Paragraph 4 (which will be renumbered below as paragraph 5) sets out the cases where the consumer, notwithstanding the relative insignificance of the non-conformity, may terminate the contract anyway because of the trader’s failure or refusal to remedy the defect in accordance with the consumer’s wishes. Given this subsidiary nature of the provision of paragraphs 4 and 5, only a minor comment is made here pertaining to paragraph 4(d). Under the current language versions of the proposal, it is unclear how many times the trader must be offered a chance to cure the lack of conformity: the words ‘reappeared more than once’ suggest that a total of two attempts to repair or replace (1. the original good is defective, 2. the repaired good suffers from the same defect. 3. the same defect reappears a second time), whereas the lack of conformity must have been caused by the *same defect*. This seems a bit much: if the good, after two attempts to repair or replace it, breaks down again, the consumer should be able to walk away from the contract, whether the same defect has reappeared or another defect has manifested itself

Article 26 Remedies for lack of conformity

45. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:

- (a) the trader has implicitly or explicitly refused to remedy the lack of conformity;
- (b) the trader has failed to remedy the lack of conformity within a reasonable time;
- (c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;
- (d) the same **or another** defect has ~~reappeared more than once~~ within a short period of time **after the good was first repaired or replaced.**

Current text of the proposal (continued)

Article 27 Costs and damages

1. The consumer shall be entitled to have the lack of conformity remedied free of any cost.
2. Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.

Comments

The existing consumer sales directive does not deal with the consumer's right to damages. As a consequence, the right to damages is exclusively governed by national law. Clearly, this will lead to divergences in the laws of the Member States. In the Green paper on the Revision of the Consumer Acquis, the European Commission indicated that the relationship between national rules on damages and the remedies provided for by the specific directives, such as the consumer sales directive, is unclear. The Commission asked whether the introduction of a general right to damages would be advisable and, if so, whether the type of damages to be compensated should be decided at Community level or at the national level.⁷¹ This question was one of the most debated in the responses to the Green paper. However, the way the Commission presented the outcome of the consultation was already telling: it indicated that '(a)lmost half of the respondents', including 75 % of business respondents, were opposed to the idea of introducing a general right to damages at EU level. One could just as easily have written that 'more than half of the respondents', including a majority of consumer organizations and academics, *supported* the introduction of a general provision on the right to damages.⁷² The following reasons are given for opposing such a general provision:

1. Damages are a matter for national legal systems.
2. Member States already provide for compensation in their legislation in case of breach of contract.
3. Particularly moral damages are mentioned as hard to define at EU level because of their strong cultural dimension.

The first and second reasons are simply false. Whether or not damages are to be awarded, is no more or less a matter for national legal systems than any other remedy (i.e. specific performance in the form of repair and replacement, termination and price reduction). In some legal systems, termination or specific performance is the normal remedy; in other legal systems damages occupy that position. Why one type of remedy should not be governed at the European level and others should, is not clear. The third objection is valid, but need not stand in the way of a general recognition of the right to damages.

⁷¹ Green paper on the Review of the Consumer Acquis, p. 23.

⁷² Cp. Review of consumer acquis document, p. 10-11.

From the way the Commission presented the outcome of the responses it was already clear that it would follow the preference from the business side. Nevertheless, article 27 paragraph 2 of the proposal indicates that in so far as repair, replacement, price reduction and termination do not take away all damage sustained by the consumer – in particular: consequential loss, e.g. the damage caused to other goods owned by the consumer or personal injury – the trader is required to compensate for these losses. The proposal does not indicate how the compensation is to be calculated. Apparently, this is left to the national laws of the Member States. The drawback, obviously, is that the directive will not produce any harmonising effect apart from the mere recognition that a *residual* right to damages exists. Leaving the matter largely to national law is possibly acceptable at the current state of the law given the large differences between the Member States and, in particular, the different approach to non-pecuniary loss (sometimes referred to as ‘moral damage’). However, if that argument is accepted, it should be stated explicitly.

Proposed text

Article 27 *Costs and damages*

~~2. Without prejudice to the provisions of this Chapter~~ ***The consumer may claim damages in stead of repair or replacement in accordance with the law applicable to the contract, and for any loss not remedied in accordance with Article 26, including any non-pecuniary loss caused by the non-conformity in so far as the consumer is entitled to the compensation of such non-pecuniary loss under the law applicable to the contract.***

Current text of the proposal (continued)

Article 28 *Time limits and burden of proof*

1. The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the risk passed to the consumer.

Comments

If a good does not conform to the sales contract, the consumer is entitled to repair or replacement of the good or to price reduction or termination of the sales contract, or to damages in accordance with national law. Under article 5 paragraph 1 of the consumer sales directive a consumer is only entitled to a remedy if the lack of conformity manifests within two years after delivery. This period may serve well as a *minimum* period for the legal guarantee, but is rather short for a *maximum* period, preventing Member States to protect consumers better. In some Member States, e.g. in the United Kingdom and the Netherlands, the legal guarantee is not restricted to two years after delivery, but extends to six years after delivery (UK) or throughout the economic life span of the good. This implies that a consumer does not lose his rights already after two years if he proves that he could reasonably expect the good to last for a longer period. In this respect, one may think of defects to a new car or a washing machine, which are discovered four years after delivery and which could not be detected at an earlier moment. Both cars and washing machines are intended to last for more than four years, so if they break down for reasons other than normal tear and wear their breaking down is to be seen as construing a non-conformity of the good

delivered to the consumer.⁷³ In this respect it is not surprising that the two-year cut-off period is not taken over in the draft-CFR. Unfortunately, in the proposed consumer rights directive it is maintained, turning the existing minimum period into the maximum period during which the consumer is entitled to a remedy for a lack of conformity. If this rule would be maintained, this would imply a *large step back* in consumer protection in these legal systems. It is not unlikely that such Member States may not wish to adopt the directive at all if it contains such an important step back. It would be wise to explicitly make clear that the directive contains a minimum rule here from which the Member States may derogate in favour of consumers or to adopt a significantly longer period for the legal guarantee, e.g. the six-year period known under UK law.

Paragraph 1 of article 28 therefore needs to be reconsidered. Two alternatives may be envisaged. First, one could retain the two years limit, but explicitly give the Member States the option to maintain a longer period. This, of course, implies that the laws of the Member States will remain to differ, but it is clearly an area where national preferences may differ considerably. This could therefore justify a different regime. Alternatively, one could envisage taking over the longer period of six years as is known in the UK, which could serve as a compromise between those legal systems preferring a clear-cut rule and those preferring a longer period to claim a remedy for lack of conformity.

Proposed text – alternative 1

Article 28 Time limits and burden of proof

1. The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the risk passed to the consumer. The Member States may decide not to apply this limitation to two year.

Proposed text – alternative 2

Article 28 Time limits and burden of proof

1. The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within ~~two~~ six years as from the time the risk passed to the consumer.

Current text of the proposal (continued)

Article 28 Time limits and burden of proof

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.

Comments

In the responses to the Green paper the duration of the legal guarantee was only touched upon with regard to a possible extension in the case of repair or replacement during the legal guarantee. With exception of businesses a majority of all categories of respondents, including 20 Member States, advocated a prolongation of the legal guarantee. Businesses wonder why legislation would be needed in this area, and

⁷³ See further M.B.M. Loos, *Consumentenkoop* (Mon. Nieuw BW, B-65b), Deventer: Kluwer, 2004, no. 24, p. 46-47.

largely are against a prolongation of the legal guarantee, arguing that such prolongation would lead to legal insecurity.⁷⁴ This argument is not very convincing, as the prolongation could easily be constructed as being the period between the moment when the good is handed over for repair or replacement and the moment when the good is repaired or replaced and collected by the consumer. Obviously, the moment when the good is handed over for repair or replacement should be registered, but in many cases the consumer will only be able to claim repair or replacement if he is able to produce evidence that he purchased the good at that shop. In practice, this means that he will have to provide the invoice or receipt. The parties can, of course, write down on that same invoice or receipt the period with which the legal guarantee is prolonged.

Article 28 paragraph 2 of the proposal for a consumer rights directive does contain a prolongation of the legal guarantee in case of replacement of the goods, but not in case of repair thereof, even though in both cases the consumer has not been able to make use of the goods during a certain period. In both cases a prolongation of the legal guarantee seems justified. Moreover, introducing a prolongation of the legal guarantee in the case of replacing of the goods but not in the case of repairing of the goods will be a clear disincentive for the trader to replace the goods. As article 26 paragraph 2 of the proposal already leaves the choice between repair and replacement to the discretion of the trader, it is unlikely that the trader will replace the goods when he can repair them. Clearly, paragraph 2 of article 28 needs to be amended to rectify this.

Proposed text

Article 28 Time limits and burden of proof

*2. When the trader has remedied the lack of conformity by **repair or 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 the period meant under paragraph 1 shall be suspended from the moment the consumer informs the trader of the lack of conformity until the moment the consumer has reacquired the material possession of the replaced goods.~~*

Current text of the proposal (continued)

Article 28 Time limits and burden of proof

3. In the case of second-hand goods, the trader and the consumer may agree on a shorter liability period, which may not be less than one year.

Comments

At present, article 7 paragraph 1 of the consumer sales directive allows Member States to provide that in the case of second-hand goods the parties may contractually limit the period for liability of the trader to one in stead of two years. Currently only a small majority of Member States have introduced the option.⁷⁵ Nevertheless, in the responses to the Green paper, a majority of respondents, including 18 Member States, consider such specific rules needed for the sale of second-hand goods. A minority of respondents, consisting in particular of consumer organisations and academics, are against such specific rules. They rightly argue that such contractual derogation will

⁷⁴ Review of consumer acquis document, p. 12.

⁷⁵ Cp. Cf. Twigg-Flesner 2006, p. 612. Cf. also Consumer sales implementation communication, p. 11.

probably be unfavourable to the consumer, who in any case is in a weaker bargaining than a professional trader and therefore will probably be forced to agree to a shorter period for liability.⁷⁶ In this respect it should be noted that the proponents of specific rules for second-hand goods seem to forget that the mere fact that the good was second-hand already influences the question whether or not the good meets the contractual requirements. In other words: the fact that the good was second-hand will generally reduce the expectations the consumer may have of the good. If the good nevertheless does not meet these lowered expectations, I see no reason why the buyer should not obtain the same remedies he would have had had the good been new. Moreover, a specific rule will lead to all kinds of problems. First of all, when is a good second-hand? It is generally argued that as soon as a car has been taken for a ride, it has lost a third of its value, as it is then second-hand. But most consumers take their new car for a test ride. Does that mean that the car is second-hand when the consumer decides to buy it? Or is the car second-hand if another consumer buys the car afterwards? Secondly, if liability may be restricted to one year, the trader has an interest in pretending the good was not new anymore or to make use of the good himself before he sells it. What guarantees are there that the trader is not able to do so? Thirdly, can the trader validly limit liability in his standard contract terms? Or should this be considered an unfair term? And can the trader validly stipulate in standard contract terms that the goods sold by the trader are to be considered second-hand? Questions such as these are certainly more relevant if specific, trader-friendly rules apply for second-hand goods.

Specific rules applicable to second-hand goods have not been included in the Principles of European Law on Sales (PELS) or in the draft-CFR. In the PELS, which contains extensive comments on almost all issues, the question whether specific rules for second-hand goods could be necessary, is not even addressed. This is, however, not to say that the drafters of the PELS overlooked the matter. On the contrary, the drafters acknowledge that the fact that a good is second-hand does have consequences. For instance, in the case of a non-conformity, replacement generally is not available to the buyer as a remedy.⁷⁷ Moreover, the fact that the good is second-hand will influence the expectations the buyer may have of the good.⁷⁸ They apparently felt that with such (rather obvious) nuances a further modification of the rules is not needed.

Despite all arguments to the contrary, Article 28 paragraph 3 of the proposal reproduces the specific provision allowing a contractual restriction of the legal guarantee to 1 year, even though only 14 Member States have made use of the option to do so, whereas 11 Member States have not.⁷⁹ This implies that if the current option is now introduced in a full harmonisation directive consumer protection will be lowered on this issue in almost half of the Member States. In my view, this paragraph should be deleted altogether, but even if one would not agree thereto, a not-individually negotiated clause to this extent should in any case be blacklisted.

Proposed text – alternative 1

Article 28 *Time limits and burden of proof*

⁷⁶ Review of consumer acquis document, p. 12.

⁷⁷ Cp. Hondius *et al.* (eds.) 2008, Comment C to Art. 4:202 PELS, p. 267.

⁷⁸ Cp. Hondius *et al.* (eds.) 2008, Comment B to Art. 2:202 PELS, p. 193.

⁷⁹ Cp. Twigg-Flesner 2006, p. 612.

~~3. In the case of second-hand goods, the trader and the consumer may agree on a shorter liability period, which may not be less than one year.~~

Proposed text – alternative 2

Article 28 Time limits and burden of proof

3. In the case of second-hand goods, the trader and the consumer may agree on a shorter liability period, which may not be less than one year. **A contract term to this extent, which was not individually negotiated between the parties is deemed to be unfair within the meaning of Article 32 paragraph 1.**

Current text of the proposal (continued)

Article 28 Time limits and burden of proof

4. In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within two months from the date on which he detected the lack of conformity.

Comments

At the time the consumer sales directive was being drafted the need for a duty of the consumer to notify the trader of a non-conformity was debated at length. Such a duty would force the consumer to inform the trader of a lack of conformity within a certain period after discovery thereof, under penalty of the loss of all remedies for non-conformity. The Netherlands were at that time one of the few Member States that – inspired by article 43 paragraph 1 of the Vienna Sales Convention – had already introduced such a duty to notify. According to the Dutch government, a duty for the consumer to notify a lack of conformity within a certain period after discovery of the non-conformity was necessary to balance the interests of the trader and the consumer. In this respect, it is important to mention that under Dutch law, the legal guarantee is not restricted to two years after delivery, but extends throughout the economic life span of the good. A duty to notify implies that the buyer could invoke a non-conformity even if the two year-period had already elapsed, but that he would be required to inform the trader thereof within a short period. This period was to be kept relatively short in order to protect the trader from claims which are made at a late stage and which therefore are difficult to dispute, e.g. because the trader had already disposed of evidence in his favour. The duty to notify therefore counterbalances the longer period during which the trader may be held liable for non-conformity under Dutch law.

Ultimately the Member States have been offered (in article 5 para. 2 of the consumer sales directive) the possibility to introduce or maintain that, in order to benefit from his rights, the consumer must inform the trader of the lack of conformity within a period of two months from the date on which he detected such lack of conformity. From the Communication concerning the implementation of the directive it appears that the duty to notify has been introduced or maintained in 16 Member States; the EC Consumer Law Compendium indicate that 15 Member States have done so.⁸⁰ Obviously, the fact that some Member States have introduced a duty to

⁸⁰ Cf. Consumer sales implementation communication, p. 10. According to the Commission, only Austria, the Czech Republic, France, Germany, Greece, Ireland, Latvia, Luxembourg and the United Kingdom have not made use of the possibility. Twigg-Flesner 2006, p. 612, indicates that at that time 15 Member States had made use of the option, whereas 10 had not.

notify, whereas others have not implies that there are divergences between the Member States, which could hinder trade. In so far as one believes it to be necessary to take away that possible hindrance, the divergence may be solved in two ways: either by introducing the duty to notify in all legal systems or by removing it from the laws in all Member States. The European Commission does not seem to have even thought of the latter option, which may seem logic given the fact that a large majority of Member States have made use of the option. However, amongst the minority are the three countries with the highest numbers of inhabitants (Germany, the UK and France), whereas the total of countries that have not introduced the duty to notify represent – depending on whether Rumania and Bulgaria have introduced the duty to notify law and the way one interprets the position of Belgium – probably represent a majority of the inhabitants of the European Union.⁸¹ Introducing the duty to notify in a full harmonisation directive consumer protection therefore means that consumer protection will be lowered for a very significant number of consumers in the European Union. This would seem a self-standing argument not to introduce such a duty.

Moreover, there are substantive reasons for not accepting a duty to notify as it produces an extra burden for consumers. Some of the respondents to the Green paper on the Review of the Consumer *acquis* rightly noticed that it is in any case in the interest of the buyer to promptly inform the trader of a non-conformity in order to receive as quickly possible a good which functions properly.⁸² In my opinion the duty to notify is unjustified, in any case if the buyer may only invoke a remedy for non-conformity within the first two years after delivery in stead of during the whole economic life span of the good. In this respect it should be noted that it is the *buyer* who must prove the non-conformity. Moreover, unless the defect manifests within six months after delivery of the goods the buyer must also prove that the non-conformity already existed when the good was delivered. The more time has elapsed after delivery and after the non-conformity was detected, the more difficult it will become for the buyer to prove, in particular, that the defect already existed at the time of delivery. Only if *at that moment* the good did not meet the contractual requirements can there be a non-conformity that leads to a remedy for the consumer. If the buyer nevertheless succeeds in proving both the non-conformity and the existence thereof at the moment of delivery, the fact that the notification was late does not justify the loss of *all* remedies.⁸³ In particular, there is no reason why the consumer should not be able to claim damages, price reduction and repair of the good. In my view, this implies that the duty to notify should be deleted or *at least* only having implications as to the consumer's right to claim replacement and termination.

It is therefore very disappointing to see that the European Commission without even discussing the need for a duty to introduce a duty to notify in all legal systems proposes to do so in article 28 paragraph 4. This is in line with Article 4:302 paragraph 1 PELS, but not in line with the draft-Common Frame of Reference. In the

Apparently, the position of Belgium – where parties may *agree* upon a notification period – is evaluated differently by the European Commission than by Twigg-Flesner.

⁸¹ Cf. a website operated by the Dutch Bureau of the European Parliament and the University of Leiden, <http://www.europa-nu.nl/9353000/1/j9vvh6nf08temv0/vh72mb14wkwh> (lastly checked on 30 January 2009) the 8 countries mentioned by the European Commission represent over 49% of all inhabitants of the EU. If either Rumania or Bulgaria have not introduced the duty to notify, or Belgium is not calculated amongst the Member States that have done so, a majority of inhabitants of the European Union are currently not subjected to the duty to notify.

⁸² Review of consumer *acquis* document, p. 13.

⁸³ Cf. extensively Loos 2004, no. 32, p. 70-71.

draft-CFR the duty to notify has been taken out of the Sales Book (Book IV.A) and placed in Book III. Article III. – 3:107 draft-CFR provides that the buyer (the creditor in this case) must notify the seller (the debtor) of the nature of the non-conformity within a reasonable time when the good or service is supplied or, if this is a later time, within a reasonable time when the defect is or ought to be discovered. However, Article III. – 3:107 paragraph 4 explicitly *excludes* the duty to notify in the case the creditor is a consumer. In other words: where the PELS followed the general trend in the Member States to introduce a duty to notify, the draft-CFR explicitly derogates from that trend by not accepting a duty to notify for consumer contracts. The draft-CFR, in this respect, is therefore more consumer-friendly than the proposed directive.

From the responses to the Green paper it follows that the proponents of a duty to notify did not agree whether the consumer should notify the lack of conformity within a short but flexible period after discovery of the defect ('within a reasonable period') or within a short and clear-cut period ('within two months'). Some respondents, including a number of consumer organisations, practitioners and Member States, are of the opinion that the notice should be given within a reasonable time 'rather than establishing a cut-off date which would deprive consumers of their remedies', whereas others prefer the existing two months-period. Articles 4:302 paragraph 1 PELS opts for the notification to take place within a reasonable time after the discovery of the defect, as does Article III. – 3:107 of the draft-CFR, which (as was explained above), however, does not apply to a consumer sales contract. Personally, I think that – in so far as a duty to notify is to be maintained at all – the Dutch solution is to be preferred. Article 7:23 of the Dutch Civil Code indicates that the consumer must notify within a reasonable period of time after he discovers the lack of conformity, but a notification within two months is deemed to have been on time. In the vast majority of cases this will mean that a notification, which takes place after the two months period has elapsed will not be considered in due time, but some flexibility is retained to deal with exceptional circumstances, which may excuse the late notification.

Proposed text – Alternative 1

Article 28 Time limits and burden of proof

~~4. In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within two months from the date on which he detected the lack of conformity.~~

Proposed text – Alternative 2

Article 28 Time limits and burden of proof

4. In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within **a reasonable time** ~~two months~~ from the date on which he detected the lack of conformity. **A notification within two months from the date on which he detected the lack of conformity is deemed to have been made on time.**

Current text of the proposal (continued)

Article 28 Time limits and burden of proof

5. Unless proved otherwise, any lack of conformity which becomes apparent within six months of the time when the risk passed to the consumer, shall be presumed to

have existed at that time unless this presumption is incompatible with the nature of the goods and the nature of the lack of conformity.

Comments

Article 5 paragraph 3 of the consumer sales directive indicates that if a lack of conformity becomes apparent within six months after delivery, the defect is presumed to have already existed at the moment of delivery, unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. A majority of the respondents feel that the present rule should be maintained. Businesses, practitioners, the European Parliament and 15 Member States oppose a prolongation of this period, arguing that such prolongation would lead to unreasonable detriment to businesses and would entice consumers to abuse the protection offered by the directive. Consumer organisations, some academics and 12 Member States, on the other hand, argue in favour of a prolongation of the period as a consumer generally lacks the necessary knowledge and expertise to be able to prove that the defect already existed at the moment of delivery. Some of these respondents recognise, however, explicitly that the prolongation must be in agreement with the nature of the good that is the subject-matter of the sales contract. Thus a different rule must apply for perishable goods, they put.⁸⁴

There is some merit in maintaining the status quo. Clearly, consumers will generally have a problem proving that the good they received already contained a hidden defect when it was originally delivered. However, in many cases businesses – in particular retail shops – will equally have difficulty in proving that the defect did not exist at the moment of delivery and therefore must have been caused by an event which took place after delivery (and therefore is not their responsibility). As is often the case, the party that bears the burden of proof will most likely lose the case. In my opinion, there is insufficient reason to unilaterally burden the trader with this risk. However, courts (and ADR institutions) should be given the flexibility to shift the burden of proof if they see good reason to do so in the case before them, for instance on the basis of the doctrine of *res ipsa loquitur*. This will provide a more just and equitable result than a full reversal of the burden of proof, or than not allowing such a shift at all. In this respect, I can live with the provision of paragraph 5 of the proposal, which is in line with Article 2:208 paragraph 2 PELS and Article IV.A. – 2:308 paragraph 2 draft-CFR. However, if other consumer-unfriendly provisions in this Article – such as the cut-off provision of paragraph 1 and the introduction of the duty to notify in paragraph 4 – are maintained, an extension of the period during which the burden of proof is shifted should be contemplated as a counterbalance for the introduction and maintenance of these consumer-unfriendly rules. For that situation, the following amendment is suggested:

Proposed text – Alternative I

Article 28 Time limits and burden of proof

*5. Unless proved otherwise, any lack of conformity which becomes apparent within ~~six months~~ **one year** of the time when the risk passed to the consumer, shall be presumed to have existed at that time unless this presumption is incompatible with the nature of the goods and the nature of the lack of conformity.*

Current text of the proposal (continued)

⁸⁴ Review of consumer acquis document, p. 13.

Article 29 Commercial guarantees

1. A commercial guarantee shall be binding on the guarantor under the conditions laid down in the guarantee statement. In the absence of the guarantee statement, the commercial guarantee shall be binding under the conditions laid down in the advertising on the commercial guarantee.

2. The guarantee statement shall be drafted in plain intelligible language and be legible. It shall include the following:

(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.

3. If the consumer so requests, the trader shall make the guarantee statement available in a durable medium.

4. Non compliance with paragraph 2 or 3 shall not affect the validity of the guarantee.

Comments

In many cases the trader or the producer offer the consumer better protection than follows from the law by way of a *commercial* guarantee. Such a guarantee is given on a voluntary basis and may not limit or restrict the consumer's statutory rights, article 6 paragraph 2 of the consumer sales directive indicates. The question arises what consequences a possible resale of the good has with regard to the existence of the guarantee. Whereas such a resale in the past was of a rather exceptional nature, in recent years the practical relevance of the matter has increased significantly with the rising popularity of the resale of goods by consumers to consumers through Internet auctions. In some legal systems, a commercial guarantee is in principle transferred automatically if the good to which it pertains is transferred to a new owner. At the moment there is no European rule as to the transferability of commercial guarantees to successive owners of the good. In their responses to the Green paper on the Review of the Consumer acquis, consumer organisations, supported by twelve Member States, generally advocate an automatic transfer of the guarantee if the good itself is transferred. In their view, the guarantee is associated with the good and not with the person of the buyer. The automatic transfer does not burden the provider of the guarantee anymore than it did prior to the transfer or had the good not been transferred. Consequently, they see no reason for the guarantee to be lost if the good is transferred. Respondents from the business side, not surprisingly, do not feel that European legislation in this respect is needed. Equally, seven Member States oppose such a European rule, generally with the argument that the transferability of commercial guarantees belongs to the law of obligations in general and therefore should be left to the Member States.⁸⁵ Five Member States support an in-between solution: they accept the automatic transfer as a main rule, but acknowledge the possibility for the trader or producer providing the commercial guarantee to exclude the transfer of the guarantee. The position of the Netherlands, which is one of the countries opposing a European rule, is a bit odd, as the current situation in the Netherlands is actually the in-between position suggested by five Member States.

⁸⁵ Review of consumer acquis document, p. 14-15.

It is this intermediate solution – automatic transfer of the guarantee as a default rule, but subject to contractual modification by the trader or producer – that is taken over in Articles 6:102 paragraph 2 PELS and IV.A. – 6:102 paragraph 2 of the draft-CFR. The Comments to the PELS in this respect indicate that if the guarantor does not specify otherwise, the new owner of the goods obtains the rights arising from the guarantee automatically. However, the guarantor may limit the applicability of the guarantee to the first buyer (and thereby exclude its transferability), or restrict the transferability by, for instance, requiring either the first or the new owner to notify that the goods have been transferred, or by requiring permission by the guarantor in order for the guarantee to be transferred to another person.⁸⁶

Even though a clear majority of the Member States advocated an automatic transfer of the commercial guarantee, and also considerable support existed for the intermediate position – automatic transfer of the guarantee, but subject to contractual modification – the proposed directive does not seem to have taken this up. This is, however, not entirely, as Annex III indicating contract terms which are presumed to be unfair if not individually negotiated greylists (under j) a clause ‘restricting the consumer’s right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the trader’. Nevertheless, greylisting the clause implies that the trader may prove that in the circumstances of the case the clause is *not* unfair. Blacklisting the clause would have been more in line with the outcome of the consultation.

Consumer organisations and businesses again have contrasting views as to the question whether a default content of the commercial guarantee is needed: consumer organisations, supported by sixteen Member States, favour such a default content, whereas businesses, supported by nine Member States oppose such a default content. One of the Member States opposing a default content remarks that there is a risk that consumers would see the default rules as minimum-rules. Businesses argue that since commercial guarantees are only provided on a voluntary basis, exceed the mandatory legal requirements and are meant as marketing instruments to attract customers, imposing liability risks would ultimately lead to the discontinuation of the use of such guarantees on the present large scale.⁸⁷ Consumer organisations and a majority of the Member States are of the opinion that the guarantee must indicate its scope and that unless specified otherwise the guarantee is to be interpreted as applying to the good as a whole and not only to specific parts thereof. As may be expected, businesses disagree with this.⁸⁸ However, under both Articles 6:103 paragraph 1 PELS and IV.A. – 6:103 paragraph 1 draft-CFR, the party who gives the guarantee is required to provide the consumer with a guarantee document, which must be drafted in plain and intelligible language and which must state that the buyer has legal rights which are not affected by the guarantee, which points out the advantages of the guarantee for the consumer in comparison with the conformity rules, and which lists all the essential particulars necessary for making claims under the guarantee, in particular the name and address of the guarantor, the name and address of the person to whom any notification is to be made and the procedure by which the notification is to be made, as well as any territorial limitations to the guarantee. If the guarantor neglects to produce a guarantee document or if such a document does not contain the required elements, the consumer may demand either specific performance of this obligation or

⁸⁶ Cf. Hondius *et al.* (eds.) 2008, Comment B to Art. 6:102 PELS, p. 362.

⁸⁷ Review of consumer acquis document, p. 14.

⁸⁸ Review of consumer acquis document, p. 15.

claim damages, paragraph 4 adds.⁸⁹ The Comments to the PELS, however, do not indicate what the consequences are if the guarantor does not indicate any territorial limitations. In my view, this would normally have to be interpreted that the guarantor indeed does not geographically limit the guarantee, *i.e.* that the guarantee is world-wide. This is different only if the consumer could not reasonably have understood the guarantee to be without geographical limitations.⁹⁰

The reluctance from the business side to create more stringent rules as to commercial guarantees is not very surprising. More surprising is the rather extreme stand the European Parliament takes on the matter. It basically argues that all matters of content, transferability and scope of commercial guarantees are a matter of freedom of contract and therefore should not be regulated.⁹¹ Even if one starts from the assumption that it is the seller or producer who is to decide what the content of its voluntarily assumed obligations is, one could think that at least the matter whether – as a default rule – the guarantee should be transferred if the good is transferred to a second buyer, deserves some thought, especially since the differences in the national legal rules necessarily lead to differences in the protection of consumers in the Member States. Fortunately, the European Commission has not followed this silly suggestion by the European Parliament.

Direct producer's liability (currently missing in the proposal)

Comments

In the Green paper the European Commission asked whether there would be support for the introduction of a direct claim for the consumer towards the producer of the non-conforming good, in addition to the contractual claim the consumer has towards the seller. The idea behind the introduction of such a direct claim is that it would promote the number of cross-border contracts, as it would be relatively easy for consumers to trace the identity of the producer, as the producer's name will normally be printed on the good or in an accompanying instruction. Moreover, in many cases it will be easier for consumers in cross-border cases to turn to the local representative of the producer in their own country than to the seller abroad. It is therefore not surprising that almost all consumer organisations support this idea, as do fourteen Member States.⁹² From the Communication on the implementation of the consumer sales directive it follows that of the 17 countries reporting, only 6 Member States have introduced some form of direct producer's liability. Obviously, direct producer's liability may increase consumer protection, if only because an additional debtor may be relied upon. This is true in particular in cases where the seller is not able or willing to resolve the consumer's complaints. Oddly enough, a number of Member States argue that direct producer's liability would even *decrease* consumer protection because of uncertainty as to the applicable law and delay the resolution of consumer complaints.⁹³ Moreover, the conditions for making direct claims against producers vary considerably, with the broadest approach being taken in Finland and Sweden, where the consumer may turn to anyone in the distribution chain, whereas in Latvia and Spain the consumer may submit his claim only to the producer or to the importer

⁸⁹ Cf. Hondius *et al.* (eds.) 2008, Comment G to Art. 6:103 PELS, p. 368.

⁹⁰ Cp. extensively Loos 2004, no. 19, p. 39-40

⁹¹ Review of consumer acquis document, p. 14.

⁹² Review of consumer acquis document, p. 14.

⁹³ Consumer sales implementation communication, p. 12.

of the goods in the European Economic Space. In Spain and Sweden, this is possible only when a claim against the seller is either impossible or disproportionate, e.g. in the case of bankruptcy of the seller or (in the case of Spain) a persistent refusal to acknowledge the lack of conformity. Remedies vary from any of the remedies available under the consumer sales directive in Finland, Latvia and Sweden to only repair and replacement in Portugal and Spain. In France and Finland, the consumer's claims need to be based on the contract concluded between the producer and his contractual counterpart in the distribution chain.⁹⁴

In their responses to the Green paper, the business side is clearly divided in correspondence to their background. Retail organisations support the introduction of the direct claim and argue that retailers in practice operate as intermediaries between producers and buyers. Moreover, they argue, a defect most of the time originates from the production phase, for which not the retailer but the producer is responsible. Academics add that most producers nowadays already assume some responsibility on the basis of voluntary (commercial) guarantees. However, a clear majority of business respondents, as well as the European Parliament and (a minority of) eleven Member States strongly oppose such direct liability for producers. Some respondents argue that 'it is impossible to expect that manufacturers will deal with contractual complaints from consumers with whom they have no contractual relationship'.⁹⁵ Others state that introducing direct liability for producers may ultimately obscure who is responsible and liable for a defective product (the seller or the producer). In the end, this could mean that the consumer is stuck in the middle, getting redress from neither the seller nor the producer. These respondents argue that liability of (only) the seller implies that consumers know who is liable, as that can only be the seller.⁹⁶

In my view, both arguments are false. Firstly, the direct claim would go together well with the legislation on product liability, on the basis of which the producer can already now be held liable if the defect can be qualified as a safety defect and that defect has led to personal injury or damage to other consumer goods used in the private sphere.⁹⁷ Moreover, confusion as to who is liable already exists, as many sellers simply do not know that they are liable and merely point in the direction of the producer. In the case of a direct claim, the consumer could hold both the seller (on the basis of non-conformity) and the producer (on the basis of a statutory provision, *i.e.* on the basis of tort law) liable. Moreover, a direct claim would prevent lengthy and expensive recourse procedures, which would decrease the total societal costs in case of non-conformity. Whether a direct claim is or is not something to aspire is therefore above all a *political* choice. That businesses would need to change their way of conducting their business is merely a *consequence* of such a choice, but as such can't be considered as a valid reason to oppose that choice.

Whether or not a direct claim against the producer would be desirable, is ultimately a political decision. Currently there is no basis in European or international law for such a direct claim and only a very small number of Member States have something of this kind in their national laws. Even though the arguments against such direct liability are rather weak, it is therefore not very surprising that the proposal has not introduced such a direct liability. Introducing such a claim would, moreover, raise questions as to

⁹⁴ Consumer sales implementation communication, p. 11-12.

⁹⁵ Review of consumer acquis document, p. 14.

⁹⁶ Review of consumer acquis document, p. 14.

⁹⁷ Cp. art. 1, 6 and 9 product liability directive (Directive 85/374/EEC, *OJ* 1985, L 210/29).

the duration of the claim against the producer. Would such a claim still be possible once the currently proposed two-year limit to claim for non-conformity has elapsed? If that were the case, this would surely weaken the opposition against the two-year limit, but it would also certainly raise the opposition from the side of producers against the direct liability for producers.

If there would be political support to introduce a direct liability of the producer, it could result in the introduction of an article, which more or less follows the provisions the product liability directive. For reasons of political feasibility, the claim against the producer should only apply to a claim for repair or replacement and only if he proves that the lack of conformity already existed (whether manifest or hidden) at the time when the producer put the goods into circulation. Moreover, the full stop-period of 10 years after the goods were put into circulation introduced in the product liability directive should be copied here in order to give finality to the claims against the producer. Finally, as in the product liability directive, the national rules on recourse and contribution should not be affected by this article.

Proposed text

Article 29a Direct producer's liability

- 1. The producer is liable towards the consumer to repair or replace the goods for any lack of conformity that existed at the time when the goods were put into circulation.***
- 2. The producer shall repair or replace the goods, at his choice, between 30 days after having been notified of the lack of conformity.***
- 3. The consumer's rights under this Article shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put the goods into circulation, unless the consumer has in the meantime instituted proceedings against the producer.***
- 4. This Article is without prejudice to the provisions of national law concerning the right of contribution or recourse.***

Chapter V Consumer rights concerning contract terms

Current text of the proposal (continued)

Article 30 Scope

- 1. This Chapter shall apply to contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, in particular where such contract terms are part of a pre-formulated standard contract.*
- 2. The fact that the consumer had the possibility of influencing the content of certain aspects of a contract term or one specific term, shall not exclude the application of this Chapter to other contract terms which form part of the contract.*

Comments

In the Explanatory Memorandum to the proposal for a consumer rights directive the European Commission indicates that the proposal ‘broadly reflects’ the existing unfair terms directive.⁹⁸ This implies that where the proposal does not derogate from the existing unfair terms directive, the directive and in particular the recitals in the preamble to the unfair terms directive (which are not reproduced in so many words) remain relevant for to the interpretation of the future consumer rights directive.

The unfair contract terms directive offers consumers protection from pre-arranged imbalanced contract terms, which the parties did not negotiate individually and which the consumer therefore could not influence. Such contract terms usually are part of standard contract terms, but may occasionally consist in terms which were specifically drafted for one specific contract – e.g. in the case where a trader offers a good or service on specific conditions for one consumer – provided that the term was drafted unilaterally. Individually negotiated contract terms – *i.e.* contract terms that were the subject of specific negotiations – at present are excluded from the scope of the directive. In their responses to the Green paper on the Review of the consumer acquis, consumer organisations and fifteen Member States favour the extension of the scope of the directive to include also these individually negotiated terms, whereas businesses and nine Member States oppose such an extension. A number of respondents, including the European Parliament, are of the view that the interests of consumers and businesses can be reconciled by a clear definition of what constitutes an ‘individually negotiated’ term. In doing so, it should be made clear that a term is only then individually negotiated if it is demonstrated that the consumer had a real opportunity to have the content of the term changed. Only in that case the term should be excluded from the protection offered by the directive.⁹⁹

The matter was discussed at lengths at meetings of the Study Group on a European Civil Code and of the Acquis Group, more or less along the same lines. On this particular issue, the two groups could not agree. Whereas the Study Group wanted to include the individually negotiated clauses in the unfairness test if the contract was concluded between a business and a consumer, the Acquis Group insisted that the unfairness test be restricted to clauses not individually negotiated. As a consequence, on this particular issue the two groups have suggested two different texts in Article II. – 9:404 draft-CFR, the Study Group’s version being the larger formula, the restriction

⁹⁸ See the Explanatory Memorandum to the proposal, COM(2008) 614 final, p. 10.

⁹⁹ Review of consumer acquis document, p. 6-7.

to not-individually negotiated terms indicated between brackets reflecting the Acquis Group's preference.¹⁰⁰

The European Commission therefore has had to make its choice here with opposite responses to the Green paper – although a clear majority of the Member States opted for an extension of the scope of the unfairness test – and a divided recommendation from the academic side. Article 30 paragraph 1 of the proposal indicates in so many words that the scope of Chapter V of the proposal is restricted to terms that were drafted in advance. Terms that were drafted after negotiations had taken place are therefore excluded from the scope of the Chapter. Although the word 'drafted' suggests otherwise, it is not relevant whether the terms are laid down in writing or published on another durable medium: oral terms that were preformulated and therefore determined unilaterally are also within the scope of the Chapter.¹⁰¹

The fact that terms are part of a pre-formulated standard contract may be seen as an indication (but not more) that the terms were not the subject of individual negotiations. Moreover, article 33 of the proposal provides that where the trader claims that a term has been individually negotiated, he bears the burden of proof thereof. This provision is slightly broader than the existing wording of article 3 paragraph 2, last sentence, of the unfair terms directive, which specifically refers to *standard* terms.

In most cases, whether or not a clause, which was the subject of individual negotiations, is subjected to the unfairness test of article 32 paragraph 1 or not, will not matter much. The fact that it was negotiated between the parties – even if it would not be changed as a result of these negotiations – would be taken into account when assessing the term. In most cases, the fact that the consumer willingly accepted the term will mean that a court would not consider the term invalid. However, the outcome would be fundamentally different if the consumer would have 'agreed' to a clause which features on the black list of article 34 and Annex II as such a clause would be deemed to be unfair, irrespective of the circumstances of the case. The exclusion of individually negotiated terms from the scope of the directive opens the way for fraudulent behaviour by the trader by acting as if he is willing to change the terms of the contract, but in fact not budging an inch.¹⁰² This implies that the provision of article 33 is not sufficient. In stead, article 30 paragraph 1 should be amended. In that case, article 33 may be deleted. However, if article 30 paragraph 1 would not be amended, article 33 should of course be retained.

Proposed text

Article 30 Scope

*1. This Chapter shall apply to contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, in particular where such contract terms are part of a pre-formulated standard contract. **This Chapter shall apply to a contract term which was***

¹⁰⁰ Cp. also Chr. von Bar *et al.* (eds.) 2008, no. 79.

¹⁰¹ See also recital (11) to the unfair terms directive, which remains of relevance for the interpretation of the consumer rights directive, see the first part of this comment.

¹⁰² Cf. Jac. Hijma, *Algemene voorwaarden*, Monografie Nieuw BW nr. B55, second edition, Deventer: Kluwer 2003, p. 19.

subject of negotiations between the parties but not changed as a result of these negotiations.

Article 33 — Burden of proof

~~*Where the trader claims that a contract term has been individually negotiated, the burden of proof shall be incumbent on him.*~~

Current text of the proposal (continued)

Article 30 Scope

3. This Chapter shall not apply to contract terms reflecting mandatory statutory or regulatory provisions, which comply with Community law and the provisions or principles of international conventions to which the Community or the Member States are party.

Comments

Article 30 paragraph 3 of the proposal stipulates that Chapter V also does not apply to contract terms ‘reflecting mandatory statutory or regulatory provisions, which comply with Community law and the provisions or principles of international conventions to which the Community or the Member States are party’. A similar exclusion was included in article 1 paragraph 2 of the unfair terms directive, where the example of international transport treaties was explicitly mentioned.¹⁰³ The reason for this exclusion was that these terms were either direct or indirectly determined by the Member States implying that it would not be necessary to evaluate these terms.¹⁰⁴ The exclusion is however problematic. Firstly, it is unclear whether the exclusion applies only to terms that correspond to terms, which were established by *national* governments, or it also applies to rules, which were established by local authorities. One may think of standard terms of the local waterworks companies, which are often owned by local authorities. As far as these standard terms have been incorporated in for example a municipal regulation it could be argued that these terms fall under the exclusion. Whether this would be the case or not would ultimately have to be determined by the European Court of Justice.

Secondly, the provision is somewhat misleading: according to the preamble to the unfair terms directive – which is still relevant, as was indicated in the first comments to this Chapter – contract terms ‘reflecting mandatory statutory or regulatory provisions’ includes terms that reflect provisions reflecting *default* rules.¹⁰⁵ Moreover, when does a term *reflect* a statutory provision and when it does it deviate thereof on a minor point in which case it would subject to the unfairness test? Clearly, some clarification would be needed here. However, it seems better to simply strike the provision out altogether as it can only cause uncertainty. It can be left to the courts and the administrative authorities to deal with the matter; it is obvious that they would act cautiously when terms are to be evaluated that appear only to reflect the current state of the law.

Proposed text

Article 30 Scope

~~*3. This Chapter shall not apply to contract terms reflecting mandatory statutory or regulatory provisions, which comply with Community law and the provisions or*~~

¹⁰³ The example is now included in recital (46) of the preamble to the proposal.

¹⁰⁴ Cf. recital (13) of the preamble to the unfair terms directive.

¹⁰⁵ Cf. the end of recital (13) of the preamble to the unfair terms directive.

~~principles of international conventions to which the Community or the Member States are party.~~

Current text of the proposal (continued)

Article 31 *Transparency requirements of contract terms*

1. *Contract terms shall be expressed in plain, intelligible language and be legible.*
2. *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.*
3. *The trader shall seek the express consent of the consumer to any payment in addition to the remuneration foreseen for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.*
4. *Member States shall refrain from imposing any presentational requirements as to the way the contract terms are expressed or made available to the consumer.*

Comments

Article 31 of the directive proposal carries the heading 'transparency requirements of contract terms'. The first paragraph contains the so-called transparency principle: terms in consumer contracts must be drafted in clear and intelligible language – i.e. a normal consumer should be able to understand them – and must be legible. The provision largely mirrors that of article 5, first sentence, of the unfair terms directive, but adds that the consumer must also be able to read the terms. This implies that the terms should be printed in such font and size that the consumer can effectively read them. A consumer who is not visually impaired (i.e. a consumer who normally does not need glasses or contact lenses) should therefore not have to make use of a magnifying glass in order to read the content of the standard terms. However, paragraph 4 prohibits Member States from providing additional requirements to the presentation of the terms. The transparency principle is meant to enable the consumer to determine before the conclusion of the contract what his rights and obligations under the contract are.¹⁰⁶ It is however not clear what the consequences of a breach of transparency principle are as the proposal does not indicate this. A possible consequence would be that an intransparent term would be considered unfair – article 32 paragraph 2 indicates that this should at least be taken into account when assessing the fairness of the term – but a court could also simply establish that the term may not be considered to have been agreed upon. A suggestion to that extent, following the example of article 37 of the proposal is included in the suggested text below.

A particular interpretation of the transparency principle has been incorporated in article 31 paragraph 3 of the proposal. Under this provision the trader must ask the consumer explicitly whether the latter agrees with possible additional payments next to the payment agreed upon for the trader's main obligation under the contract. The somewhat ambiguous paragraph concludes by stating: 'If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.' The meaning of the provision is clarified in the preamble, from which follows that opt-out systems in the form of pre-

¹⁰⁶ Cf. Bundesgerichtshof 14 May 1996, *Betriebs-Berater* 1996, 1402.

ticked boxes in case of online-sales will have to be prohibited.¹⁰⁷ One may think of the case in which a consumer buys a computer online and automatically an additional product is added to his order, for instance an insurance or extra guarantee, which option he must deactivate. In so far as a consumer has paid too much as a result of a forbidden additional order, the extra payment must be paid back to him.

Article 31, different from what its heading suggests, also introduces a far-reaching obligation: paragraph 2 provides that 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’. Recital (47) of the preamble to the proposal indicates that the consumer must be given the opportunity to read the contract terms before the contract is concluded. ‘This opportunity could be given to the consumer by providing him with the terms on request (for on-premises contracts) or making those terms otherwise available (e.g. on the trader’s website in respect of distance contracts) or attaching standard terms to the order form (in respect of off-premises contracts)’, the recital indicates. An explicit obligation to this extent was not included in the unfair terms directive, but was indicated in recital (20) of the preamble to that directive. The obligation is not explicitly sanctioned, whereas paragraph 4 of article 31 prohibits the Member States to pose additional requirements as to the way contract terms are to be made available to the consumer. On the other hand, the directive also requires the Member States to provide for effective, proportionate and dissuasive penalties in case a trader breaches the obligations under the directive. This implies, I would argue, that Member States may determine that contract terms, which were not sufficiently brought to the consumer’s attention prior to the conclusion of the contract, are not part of the contract or may be avoided by the consumer. Nevertheless, it seems that it would be better if this would be made clear in the article itself.

Oddly enough, article 31 does not speak of the language in which the contract terms are to be made available to the consumer. In particular in cross-border contracts this is problematic. As with the general information requirements under article 5, this opens the door for rogue traders providing the required information in a language that the consumer does not understand. In theory, this could mean that a trader meets the obligations under this article in the following situation: a French trader sells a dishwasher to an English consumer. Neither of them speaks Bulgarian, but the trader produces a preformulated text in Bulgarian, listing all contract terms in a language which would be perfectly understandable for any consumer, provided that such a consumer would understand Bulgarian. As the present directive is based on full harmonisation and article 31 paragraph 4 even explicitly prohibits Member States from imposing any presentational requirements as to the way the contract terms are expressed or made available to the consumer, one could argue that the trader has properly performed his obligations under article 31. Clearly, this would not enable the consumer to properly assess his rights and obligations under the contract. On the other hand, if Member States were allowed to set language requirements themselves, different rules would apply in the European Union, which would again hamper businesses from trading cross-border. Therefore, the text of the directive should include a provision on the language in which the information is to be provided; the language requirement should, on the other hand, also not be overburdening the trader

¹⁰⁷ Recital (47) of the preamble to the proposal.

too much. It seems fair to assume that both parties sufficiently master the language they used when concluding the contract.

Proposed text

Article 31 Transparency requirements of contract terms

1. *Contract terms shall be expressed in plain, intelligible language and be legible **and in the language in which the contract is concluded.***
2. *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.*
3. *The trader shall seek the express consent of the consumer to any payment in addition to the remuneration foreseen for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.*
4. ***A contract term, which does not meet the requirements of this Article shall not be binding on the consumer.***
45. *Member States shall refrain from imposing any presentational requirements as to the way the contract terms are expressed or made available to the consumer.*

Current text of the proposal (continued)

Article 32 General principles

1. *Where a contract term is not included in Annex II or III, Member States shall ensure that it is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*
2. *Without prejudice to Articles 34 and 38, the unfairness of a contract term shall be assessed, taking into account the nature of the products for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion and to all the other terms of the contract or of another contract on which the former is dependent. When assessing the fairness of a contract term, the competent national authority shall also take into account the manner in which the contract was drafted and communicated to the consumer by the trader in accordance with Article 31.*

Comments

The unfairness test of Article 32 paragraph 1 of the proposal represents the core content of Chapter V. It has been taken over virtually literally from article 3 paragraph 1 of the current unfair terms directive. Paragraph 2 adds, in accordance with article 4 paragraph 1 of the unfair terms directive that all circumstances which existed at the time the contract was concluded are to be taken into account when assessing the fairness of a term. This implies that regard must be had to all other terms of the contract or of a linked contract, to the way in which trader has drafted the contract terms and the way he has communicated these terms to the consumer.¹⁰⁸ According to recital (48) of the preamble to the directive the court should in addition have regard to the bargaining positions of the parties, to the answer to the question whether the consumer in any way was incited to accept the term, and to the answer to the question

¹⁰⁸ Compare also art. 4 para. 1 of the unfair terms directive, where the two last elements were not mentioned in so many words.

whether the goods or services were provided on the special order of the consumer. The recital indicates that a term is not unfair where the trader ‘deals fairly and equitably with the other party whose legitimate interests he should take into account’. However, even with these indications on how to apply the unfairness test it seems unlikely that the laws of the Member States will truly be harmonised on this point, since the Court of Justice in *Freiburger Kommunalbauten*¹⁰⁹ expressly left it to the national courts to assess whether a term meets the criteria to be considered unfair and further indicated that the national court also needs to take into account which impact the term may have under the law applicable to the contract. This implies that national case law in principle will remain unaffected by the shift from minimum to full harmonisation: courts in the Member States will and may continue to use the national value judgments as to the fairness of individual clauses when assessing the fairness of a term under article 32 paragraph 1 of the proposal. Within the boundaries set by the criteria of article 32 – which are unchanged, implying that the position of the ECJ will not change either – the courts are largely free in this matter and may even draw inspiration from their former national black and grey lists, which – even though formally abrogated once the consumer rights directive is enacted – of course may still be felt to reflect such national value judgments. As these value judgments and the reflections thereof in the national contract laws of the Member States will differ from one country to the next, in this area full harmonisation will only occur when not only the whole of contract law (or even patrimonial law) is harmonised, but also the national value judgments and preferences underlying the contract law legislation and adjudication. Case law may provide for some clarity, but the *Freiburger Kommunalbauten*-decision implies that a ruling from the German Bundesgerichtshof on the validity of a contract term need not be followed by the French Cour de Cassation or the Greek Areios Pagos. This has as its main consequence that a contract term may be considered fair and therefore allowed in one Member State, but unfair and therefore not binding on the consumer in another Member State. Traders therefore can’t be certain that they may use their standard terms throughout the European Union. In other words, full harmonisation in this area is an illusion.

Current text of the proposal (continued)

Article 32 **General principles**

3. Paragraphs 1 and 2 shall not apply to the assessment of the main subject matter of the contract or to the adequacy of the remuneration foreseen for the trader’s main contractual obligation, provided that the trader fully complies with Article 31.

Comments

Under article 4 paragraph 2 of the unfair terms directive core terms – terms describing the main obligations of the parties – may not be judged to be unfair. In their responses to the Green paper on the Review of the Consumer acquis the majority of consumer organisations argued in favour of abolishing the exclusion of core terms from the scope of the unfairness test: such exclusion was not considered fair because of the structural inequality between consumers and traders and, as a consequence thereof, the structural imbalance in bargaining positions between consumers and traders. A clear majority of the respondents to the Green paper did not share this view as an extension of the unfairness test to core terms would be in conflict with the principle of

¹⁰⁹ ECJ 1 April 2004, case C-237/02, [ECR]. 2004, p. I-3403 (*Freiburger Kommunalbauten Baugesellschaft /Hofstetter*).

the free market and the principle of freedom of contract.¹¹⁰ This argument assumes of course that the consumer is able to freely decide whether or not to contract if he does not agree with the conditions set by the trader. However, notwithstanding the inequality in bargaining positions, exactly with regard to the core terms – the terms describing the main obligations of both parties – the consumer is able to do just that: if the goods or services offered are too expensive to the taste of the consumer he will refuse to conclude the contract. Moreover, as a general rule the consumer would not be helped much with an extension from the unfairness test to core terms: where an unfair core term would not be binding on the consumer, the whole contract would be nullified for lack of an objectively determinable reciprocal obligation of the party whose obligation is no longer the subject of a contractual term. Declaring a core term to be unfair, therefore, would in most cases not be in the interest of the consumer. Moreover, traditional concepts such as fundamental mistake, undue influence and fraud probably provide sufficient possibilities to escape from the contract in the odd situation where the consumer would want to. The exclusion of core terms, which is also reflected in Article II. – 9:407 paragraph 2 draft-CFR is therefore justified.

Article 32 paragraph 3 of the proposal makes clear that the exclusion of core terms from the unfairness test. Both the wording of article 32 paragraph 3 of the proposal and the fact that the directive aims at *full* harmonisation indicate that the Member States may not extend the unfairness test to core terms, as is probably allowed under the current directive.¹¹¹ Paragraph 3 also prohibits the court to assess whether the price paid by the consumer to pay is fair in comparison with the goods or services provided. The price may, however, play a role when assessing the fairness of other contract terms, recital (49) of the preamble indicates.

The exclusion of the possibility of reviewing core terms, however, only applies if the trader has *fully* complied with article 31. Core terms, which are formulated in an unclear or incomprehensible manner, are therefore subjected to the unfairness test. However, as article 31 of the proposal not only pertains to the transparency principle, but also to the obligation to provide the contract terms to the consumer before the conclusion of the contract, core terms are also subject to review if this second obligation has not been met. If the suggested amendment to article 31 is accepted, however, article 31 would carry its own sanction, implying that the reference to it in article 32 paragraph 3 may be omitted. It should be noted that where a core term is considered unfair under paragraph 1 of article 32, the whole contract will have to be declared null as the reciprocal obligations of the parties can't be determined objectively.

Current text of the proposal (continued)

Article 33 *Burden of proof*

Where the trader claims that a contract term has been individually negotiated, the burden of proof shall be incumbent on him.

Comments

¹¹⁰ Review of consumer acquis document, p. 7.

¹¹¹ The European Court of Justice will soon decide on this matter when it decides case C-484/08 (Caja de Ahorros y Monte de Piedad de Madrid/Asociación de Usuarios de Servicios Bancarios ('Ausbank')).

See the comments to article 30 paragraphs 1 and 2. If the proposed change to article 30 paragraph 1 is taken over, this article may be deleted. Otherwise, it should be retained.

Current text of the proposal (continued)

Article 34 *Terms considered unfair in all circumstances*

Member States shall ensure that contract terms, as set out in the list in Annex II, are considered unfair in all circumstances. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40.

Article 35 *Terms presumed to be unfair*

Member States shall ensure that contract terms, as set out in the list in point 1 of Annex III, are considered unfair, unless the trader has proved that such contract terms are fair in accordance with Article 32. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40.

Comments

An open test such as the one under Article 32 paragraph 1 of the proposed directive has the disadvantage that it offers little support to practice. In many legal systems practice is, however, helped because the legislature has created black and grey lists of terms that are considered or presumed to be unfair. The annex to the current unfair terms directive contains a list, but the status thereof is rather unclear. Article 3 paragraph 3 of the unfair terms directive merely indicates that the list is indicative and non-exhaustive.

The European Commission has concluded from the responses to the Green paper that there is much support exists for the introduction of a black and a grey list: half of all respondents, including the European Parliament and a clear majority of eighteen Member States favoured such an approach, with businesses being divided on the matter.¹¹² The Common Frame of Reference also contains a black and a grey list, be it that the black list of Article II. – 9:410 draft-CFR unfortunately only consists of one term: the jurisdiction clause, which was deemed unfair by the Court of Justice in the *Océano*-case. The current Annex is incorporated in its entirety in Article II. – 9:411 draft-CFR, which stipulates that the terms listed are presumed to be unfair. It is therefore up to the trader to prove that the term in fact is fair in the circumstances at hand. Whether this is the case must be determined in accordance with the open fairness test of Article II. – 9:408 draft-CFR, which is the same as that of article 32 paragraph 1 of the directive. In an earlier comment on the grey list of Article II. – 9:411 draft-CFR I already indicated that in my opinion more provisions of the grey list should be blacklisted, in particular a clause limiting or excluding liability in the case of physical injury or death (Art. II. 9:411 under (a) draft-CFR). Such a condition is already prohibited in most Member States.¹¹³

The Commission has made use of the extensive support for the introduction of a black and a grey list. To that extent it has divided the terms listed in the current annex into two new lists; only a few extra terms were added to the grey list. Remarkably, the

¹¹² Review of consumer acquis document, p. 7.

¹¹³ Cf. M. Ebers, Unfair Contract terms, in: H. Schulte-Nölke *et al.*, *EC Consumer Law Compendium, Comparative analysis*, p. 377.

jurisdiction clause is missing on the black (or even the grey) list, even though the Court of Justice has indicated that such clause is always unfair.¹¹⁴ The black list consists of 5 terms, which in all cases are considered unfair (art. 34 and appendix II), whereas the grey list contains 12 terms that are presumed to be unfair (art. 35 and appendix III). The lists must ensure legal certainty and serve to improve the functioning of the internal market.¹¹⁵ They must be implemented in all Member States.¹¹⁶ This is not unimportant since the existing national grey and black lists will have to be abrogated because of the full harmonisation nature of the proposed directive.

The mere fact that a term no longer features on the national black or grey list should not lead a court to apply an *a contrario*-argumentation¹¹⁷ as to the fairness of a term. Rather the opposite should be the case. The ECJ indicated in *Freiburger Kommunalbauten* that it is up to the national courts to assess whether a term meets the criteria to be considered unfair and that the national court also needs to take into account which impact the term may have under the law applicable to the contract. This implies that national value judgments as to the fairness of individual clauses may be taken into account when assessing the fairness of a term under article 32 paragraph 1 of the proposal, including the fact that a specific term was deemed or presumed to be unfair under the abrogated lists.¹¹⁸ This is all the more relevant since the number of terms listed in the Annexes is somewhat disappointing – national black lists and grey lists tend to be much longer – for instance: the black lists of §§ 308 and 309 of the German Civil Code contain 8 and 13 terms, the black and grey lists of articles 6:236 and 237 of the Dutch Civil Code contain 13 terms each. Of course, terms, which are considered to be unfair by the national courts – with or without applying the abrogated national lists as ‘a source of inspiration’ – may be submitted to the Committee on unfair terms in consumer contracts to be evaluated in accordance with the procedure indicated in articles 39 and 40 of the proposed directive. Nevertheless, Member States that fear a limitation of their black and grey lists would do go to pressure the European legislator to list additional provisions on the European black and grey lists. From a Dutch perspective, in particular terms shortening prescription periods to less than one year¹¹⁹ and terms that require the consumer to give immunity to the trader for third party claims¹²⁰ should be added to these lists; additional terms may be insisted on in each Member State.

¹¹⁴ At a symposium on the proposal for a consumer rights directive in Manchester on 12 and 13 January 2009 on being asked, Eric Sitbon, civil servant at the European Commission, declared that it was not necessary to put the jurisdiction clause on the black list as such a clause would be invalid under article 17 of the Brussels-I Regulation (*OJ* 2001, L 12/1). However, this is true only for *international* jurisdiction clauses; the *Océano*-ruling pertained to a *national* jurisdiction clause. Therefore, it appears that the omission of the jurisdiction clause is caused by mistake.

¹¹⁵ Cf. recital (50) of the preamble to the proposal for a consumer rights directive.

¹¹⁶ Cf. art. 34 and 35 of the proposal for a consumer rights directive; cf. also recital (50) of the preamble to the proposal.

¹¹⁷ For instance in the following way: ‘the term is no longer listed on the black or grey list and therefore apparently acceptable’.

¹¹⁸ One may speak of ‘retroicipating’ application of the abrogated lists (as opposed to anticipating application, i.e. application of legal rules that are not yet in force). Cf. H.J. Snijders, *Retrocipatie: opmerkingen over het beroep op onder het oude Burgerlijk Wetboek gevormde precedenten bij de toepassing van het huidige, dit in aansluiting op beschouwingen over de betekenis van precedenten in het algemeen*, inaugural address Leiden, Deventer: Kluwer, 1995.

¹¹⁹ Now blacklisted under article 6:236 lit (g) Dutch Civil Code.

¹²⁰ Now blacklisted under article 6:236 lit (h) Dutch Civil Code.

The Member States have every reason to insist on such additions as the full harmonisation nature of the directive will require them, as stated above, to at least formally abrogate their national lists. This is true not only for black lists and grey lists applicable to all contractual clauses but also to black lists and grey lists applicable only to contracts in specific sectors, such as contracts for the lease of houses, the use of service flats, the hire-purchase of cars, and the services of doctors, real estate agents and package travel companies, etc.: the definition of, in particular, the notion of a ‘service contract’ in article 2 under (5) is so broad that it covers all of these contracts. This, obviously, goes much too far as it might be understood as preventing the Member States from introducing or maintaining mandatory legislation in specific areas. The amendment suggested in article 4 paragraph 5 would enable the Member States to maintain such specific legislation.

Current text of the proposal (continued)

Article 36 Interpretation of terms

1. *Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.*
2. *This Article shall not apply in the context of the procedures laid down in Article 38(2).*

Comments

This article reflects (part of) the content of article 5 of the unfair terms directive (the other part is reflected in article 31 paragraph 1 of the proposal). The provision has proved to be useful and need not be commented on further.

Current text of the proposal (continued)

Article 37 Effects of unfair contract terms

Contract terms which are unfair shall not be binding on the consumer. The contract shall continue to bind the parties if it can remain in force without the unfair terms.

Comments

Article 37 of the proposal mirrors the provision of article 6 of the unfair terms directive and sanctions the unfairness of a contract term by declaring them ‘not ... binding on the consumer’. At the moment it is not clear whether the provision requires absolute nullity of the unfair term, or that a contract term may be considered valid until the consumer invokes the unfairness and thus avoids the term. The latter approach entails the risk that the consumer does not invoke the unfairness and is therefore bound by the unfair terms. This is particularly problematic if the consumer does not invoke the unfairness because he is not aware of the unfairness or of the possibility to avoid the term. From the ECJ’s rulings in *Océano*, *Cofidis/Fredout* and *Mostaza Claro* it is clear that the national court is required to test potentially unfair terms of its own motion and to set them aside in so far as this is possible under national procedural law.¹²¹ This, however, does not tell us whether the sanction of avoidance as such is permissible under the directive. The answer to this question may be expected shortly when the ECJ decides on a prejudicial question posed by a

¹²¹ Cp. ECJ 27 June 2000, joint cases C-240/98 u/i C-244/98, [ECR] 2000, p. I-4941 (*Océano Grupo Editorial et al/Murciano Quintero et al.*); ECJ 21 November 2002, case-473/00, [ECR] 2002, p. I-1875 (*Cofidis/Fredout*); and ECJ 26 October 2006, case C-168/05, [ECR] 2006, p. I-10421 (*Mostaza Claro/Centro Móvil Milenium*).

Hungarian court in the *Pannon*-case.¹²² As the consumer rights directive makes use of the same notion of unfair terms ‘not binding’ on the consumer, the outcome of the *Pannon*-case will be decisive as to whether avoidability is an acceptable sanction for unfair terms. However, given the fact that recital (54) of the consumer rights directive indicates that ‘(t)he Member States may use any concept of national contract law which fulfils the required objective that unfair contract terms should not be binding on the consumer’, I expect the question to be answered affirmatively. Either way, after the decision in the *Pannon*-case the matter will be decided by the ECJ, so no further clarification is needed with regard to the consumer rights directive.

Current text of the proposal (continued)

Article 38 *Enforcement in relation to unfair contract terms*

1. *Member States shall ensure that, in the interests of consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by traders.*
2. *In particular, persons or organisations, having a legitimate interest under national law in protecting consumers, may take action before the courts or administrative authorities for a decision as to whether contract terms drawn up for general use are unfair.*
3. *Member States shall enable the courts or administrative authorities to apply appropriate and effective means to prevent traders from continuing to use terms which have been found unfair.*
4. *Member States shall ensure that the legal actions referred to in paragraph 2 and 3 may be directed either separately or jointly depending on national procedural laws against a number of traders from the same economic sector or their associations which use or recommend the use of the same general contract terms or similar terms.*

Comments

Article 38 of the proposal for a consumer rights directive largely mirrors article 7 of the unfair terms directive. The provision has proved to be useful. As argued above, in the comments to article 32 of the proposed directive, the proposed directive, irrespective of its aim full harmonisation, will not lead to truly harmonised law on unfair terms. The reason for that is the leeway that the ECJ has given the courts of the Member States to take into account the effects that national legislation will have on the possibly unfair terms (cf. *Freiburger Kommunalbauten*). As explained in the comments to article 32, as the underlying national value judgments in the Member States are not the same, consequentially, neither will be the assessment of the terms. The provisions on collective action are not changed under the proposed directive and national legislation implementing article 38 need not be changed either. This implies that the character of a full harmonisation measure most likely will not have any impact on the litigation activities of consumer organizations regarding the control of contract terms.

Current text of the proposal (continued)

Article 39 *Review of the terms in Annexes 2 and 3*

¹²² Case C-243/08 (Pannon GSM Zrt./Sustikné Győrfi Erzsébet), prejudicial question raised by the Budaörsi Városi Bíróság (Hungary) of 2 June 2008.

- 1. Member States shall notify to the Commission the terms which have been found unfair by the competent national authorities and which they deem to be relevant for the purpose of amending this Directive as provided for by paragraph 2.*
- 2. In the light of the notifications received under paragraph 1, the Commission shall amend Annex II and III. Those measures designed to amend non essential elements of this Directive shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 40(2).*

Chapter VI General provisions

Current text of the proposal (continued)

Article 40 The Committee

1. The Commission shall be assisted by the Committee on unfair terms in consumer contracts (hereinafter referred to as "the Committee").
2. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Comments

With respect to unfair terms the committology procedure of articles 39 and 40 is new. On the basis of these articles, not the European Parliament and the Council will decide on amendments to the European lists, but the European Commission, assisted by the newly erected Committee on unfair terms in consumer contracts.¹²³ To this end the Commission will have to make use of the particular powers which it is awarded under article 39 paragraph 2 of the proposal. These powers are to be used in order to that guarantee that the provisions on unfair terms are applied throughout the European Union in a consistent manner.¹²⁴

The Committee on unfair terms in consumer contracts will meet three times each year to evaluate whether the lists should be supplemented with terms that were considered unfair in the Member States. In order to facilitate the work of the Committee the Member States are required to notify the Commission of decisions of courts and public authorities by which terms were declared unfair. However, the obligation to notify these decisions applies only to those decisions which the Member States 'deem to be relevant for the purpose of amending this Directive'.¹²⁵ In other words: it is left to the discretion of the Member States to ascertain whether a decision by which a term is declared unfair it to be communicated to the European Commission. The restriction does not seem unreasonable: an obligation to notify all decisions by which terms are declared unfair could easily lead to an overload of notifications and as a result to a collapse of the whole systems. Moreover, in deciding on the basis of article 32, the court must take all circumstances of the case into account, so the fact that the court judges a term to be unfair in a *particular* (concrete) case does not necessarily mean that it will be considered unfair in *all* cases. This is different, however, in the case of a collective procedure under article 38 paragraph 2 of the proposal, the assessment does not take place on the basis of an assessment of the concrete circumstances but rather in an abstract manner. It is suggested that such decisions lend themselves for generalisation, implying that these should always be notified to the European Commission.

The wording of article 39 of the proposal suggests that the procedure can only lead to terms being *added* to the black and grey list: they leave little to no room to *limit* the scope of the lists. If the European Commission nevertheless would feel that such would be needed, the directive itself would have to be amended. Finally, it is unclear whether an amendment could have the result that a clause is moved from the grey list to the black list, or vice versa. It seems to me that in the former case this would be

¹²³ Zie art. 40 lid 1 van het richtlijnvoorstel.

¹²⁴ Zie overweging (53) bij het richtlijnvoorstel.

¹²⁵ Zie art. 39 lid 1 van het richtlijnvoorstel.

allowed as it would strengthen consumer protection, whereas the latter would lead to a decrease in consumer protection, which should only be allowed by way of an amendment to the directive itself.

The suggested procedure for amendment of the black and grey lists is of course much easier to comply with than a formal amendment of the directive itself. Nevertheless, it seems unlikely that the procedure will lead to frequent adaptations of the lists, given the experience in Member States such as France and the Netherlands where formal amendments to the lists are extremely rare. On the other hand, in particular the French example shows that the mere recommendation of the Committee may be influential in the Member States even if the recommendation would ultimately not lead to a formal amendment of the lists. In this respect the committology procedure may prove to become a rather important instrument in protecting consumers from unfair terms.

Proposed text

Article 39 *Review of the terms in Annexes 2 and 3*

*1. Member States shall notify to the Commission the terms which have been found unfair by the competent national authorities and which they deem to be relevant for the purpose of amending this Directive as provided for by paragraph 2. **Terms that have been found unfair in a procedure as meant under Article 38 shall always be notified to the Commission.***

2. In the light of the notifications received under paragraph 1, the Commission shall amend Annex II and III. Those measures designed to amend non essential elements of this Directive shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 40(2).

Current text of the proposal (continued)

Article 41 *Enforcement*

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.

2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:

(a) public bodies or their representatives;

(b) consumer organisations having a legitimate interest in protecting consumers;

(c) professional organisations having a legitimate interest in acting.

Comments

This article and the following articles and the annexes do not need to be commented on specifically.

Article 42 *Penalties*

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

2. Member States shall notify those provisions to the Commission by the date specified in Article 46 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 43 Imperative nature of the Directive

If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive.

Article 44 Information

Member States shall take appropriate measures to inform consumers of the national provisions transposing this Directive and shall, where appropriate, encourage traders and code owners to inform consumers of their codes of conduct.

Article 45 Inertia selling

The consumer shall be exempted from the provision of any consideration in cases of unsolicited supply of a product as prohibited by Article 5(5) and point 29 of Annex I of Directive 2005/29/EC. The absence of a response from the consumer following such an unsolicited supply shall not constitute consent.

Article 46 Transposition

1. Member States shall adopt and publish, by [eighteen months after its entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive. They shall apply those provisions from [two years after its entry into force]. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Chapter VII Final provisions

Current text of the proposal (continued)

Article 47 Repeals

Directives 85/577/EEC 93/13/EEC and 97/7/EC and Directive 1999/44/EC, as amended by the Directives listed in Annex IV, are repealed.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex V.

Article 48 Review

The Commission shall review this Directive and report to the European Parliament and the Council no later than [insert same date as in the second subparagraph of Article 46(1) +five years].

If necessary, it shall make proposals to adapt it to developments in the area. The Commission may request information from the Member States.

Article 49 Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 50 Addressees

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament
The President*

*For the Council
The President*

ANNEX I INFORMATION CONCERNING THE EXERCISE OF THE RIGHT OF WITHDRAWAL

A. Information to be provided with the withdrawal form

1. The name, geographical address and the email address of the trader to whom the withdrawal form must be sent.
2. A statement that the consumer has a right to withdraw from the contract and that this right can be exercised by sending the withdrawal form below on a durable medium to the trader referred to in paragraph 1:
 - (a) for off-premises contracts, within a period of fourteen days following his signature of the order form;
 - (b) for distance sales contracts, within a period of fourteen days following the material possession of the goods by the consumer or a third party, other than the carrier and indicated by the consumer;
 - (c) for distance service contracts:
 - within a period of fourteen days following the conclusion of the contract, where the consumer has not given his prior express consent for the performance of the contract to begin before the end of this fourteen day period;
 - within a period ending when the performance of the contract begins, where the consumer has given his prior express consent for the performance of the contract to begin before the end of the fourteen day period.
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).
4. For distance contracts concluded on the Internet, a statement that the consumer can electronically fill in and submit the standard withdrawal form on the trader's website and that he will receive an acknowledgement of receipt of such a withdrawal from the trader by email without delay.
5. A statement that the consumer can use the withdrawal form set out in Part B.

B. Model withdrawal form

(complete and return this form only if you wish to withdraw from the contract)

- To:
- I/We* hereby give notice that I/We* withdraw from my/our* contract of sale of the following goods*/provision of the following service*
- Ordered on*/received on*
- Name of consumer(s)
- Address of consumer(s)
- Signature of consumer(s) (only if this form is notified in writing)
- Date
- *Delete as appropriate.

**ANNEX II CONTRACT TERMS WHICH ARE IN ALL CIRCUMSTANCES
CONSIDERED UNFAIR**

Contract terms, which have the object or effect of the following, shall be unfair in all circumstances:

- (a) excluding or limiting the liability of the trader for death or personal injury caused to the consumer through an act or omission of that trader;*
- b) limiting the trader's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular condition which depends exclusively on the trader;*
- (c) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions;*
- (d) restricting the evidence available to the consumer or imposing on him a burden of proof which, according to the applicable law, should lie with the trader;*
- (e) giving the trader the right to determine whether the goods or services supplied are in conformity with the contract or giving the trader the exclusive right to interpret any term of the contract.*

ANNEX III CONTRACT TERMS WHICH ARE PRESUMED TO BE UNFAIR

1. *Contract terms, which have the object or effect of the following, are presumed to be unfair:*

(a) *excluding or limiting the legal rights of the consumer vis-à-vis the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the rights of the consumer of offsetting a debt owed to the trader against a claim which the consumer may have against him;*

(b) *allowing the trader to retain a payment by the consumer where the latter fails to conclude or perform the contract, without giving the consumer the right to be compensated of the same amount if the trader fails to conclude or perform the contract;*

(c) *requiring any consumer who fails to fulfil his obligation to pay damages which significantly exceed the harm suffered by the trader;*

(d) *allowing the trader to terminate the contract at will where the same right is not granted to the consumer;*

(e) *enabling the trader to terminate an open-ended contract without reasonable notice except where the consumer has committed a serious breach of contract;*

(f) *automatically renewing a fixed-term contract where the consumer does not indicate otherwise and has to give a long notice to terminate the contract at the end of each renewal period;*

(g) *allowing the trader to increase the price agreed with the consumer when the contract was concluded without giving the consumer the right to terminate the contract;*

(h) *obliging the consumer to fulfil all his obligations where the trader has failed to fulfil all his obligations;*

(i) *giving the trader the possibility of transferring his obligations under the contract, without the consumer's agreement;*

(j) *restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the trader;*

(k) *enabling the trader to unilaterally alter the terms of the contract including the characteristics of the product or service;*

(l) *unilaterally amending contract terms communicated to the consumer in a durable medium through on-line contract terms which have not been agreed by the consumer.*

2. *Point 1(e) shall not apply to terms by which a supplier of financial service reserves the right to terminate unilaterally an open-ended contract without notice, provided that the supplier is required to inform the other contracting party or parties thereof immediately.*

3. *Point 1(g) shall not apply to*

(a) *transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;*

(b) *contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;*

(c) *price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.*

4. *Point 1(k) shall not apply to*

(a) *terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other*

charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately;

(b) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;

(c) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;

(d) terms under which the trader reserves the right to alter unilaterally the conditions of an open-ended contract, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to terminate the contract.

ANNEX IV Repealed Directives with the list of its successive amendments

(referred to in Article 47)

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Directive 97/7/EC of the European Parliament and of the Council

Directive 2002/65/EC of the European Parliament and of the Council

Directive 2005/29/EC of the European Parliament and of the Council

Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007

Directive 1999/44/EC of the European Parliament and of the Council

ANNEX TO THE ANALYSIS OF THE PROPOSAL FOR A CONSUMER RIGHTS DIRECTIVE

List of proposed amendments

Article 2 Definitions

(1) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are **primarily** outside his trade, business, or profession;

(2) 'trader' means any natural or legal person who, in contracts covered by this Directive, is

(a) acting for purposes relating to his trade, business, ~~craft or profession and~~; or

(b) ~~anyone~~ **any natural or legal person who, in contracts covered by this Directive, is acting in the name of or on behalf of another person acting for purposes relating to his trade, business, or profession;**

(4) 'goods' means any tangible movable item, with the exception of (a) goods sold by way of execution or otherwise by authority of law, (b) ~~water and gas where they are not put up for sale in a limited volume or set quantity,~~ (c) electricity;

(15) 'auction' means a method of sale where goods or services are offered by the trader **to purchasers, including consumers**, through a competitive bidding procedure which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the services. A transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction;

(16) 'public auction' means **an auction** ~~method of sale where goods are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a competitive bidding procedure run by an auctioneer and where the highest bidder is bound to purchase the goods;~~

(19) 'intermediary' means a trader who concludes the contract in the name of ~~or~~ **and** on behalf of the consumer;

Article 3 Scope

~~1. This Directive shall apply, under the conditions and to the extent set out in its provisions, to sales and service contracts concluded between the trader and the consumer.~~

~~2. This Directive shall only apply to financial services as regards certain off-premises contracts as provided for by Articles 8 to 20, unfair contract terms as provided for by Articles 30 to 39 and general provisions as provided for by Articles 40 to 46, read in conjunction with Article 4 on full harmonisation.~~

~~3. Only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 on full harmonisation, shall apply to contracts which fall within the scope of Directive 94/47/EC of the European Parliament and of the Council and of Council Directive 90/314/EEC.~~

~~4. Articles 5, 7, 9 and 11 shall be without prejudice to the provisions concerning information requirements contained in Directive 2006/123/EC of the European Parliament and of the Council and Directive 2000/31/EC of the European Parliament and of the Council.~~

Article 4 Full and minimum harmonisation

- 1. With regard to articles 2-20 and 38-40, unless indicated differently in this Directive, Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.**
- 2. With regard to articles 21-37, unless indicated differently in this Directive, Member States may adopt or maintain in force more stringent provisions, compatible with the Treaty in the field covered by this Directive, to ensure a higher level of consumer protection.**
- 3. Where Member States may maintain or introduce more stringent provisions to ensure a higher level of consumer protection, these provisions must be compatible with the Treaty.**
- 4. This Directive shall not affect any rights which a consumer may have according to the general rules of contract law and the general rules of tort law.**
- 5. This Directive does not prevent Member States from introducing or maintaining mandatory legislation for specific service contracts, provided that such legislation is compatible with the Treaty.**

Article 5 General information requirements

- 1. 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:**
 - (a) the main characteristics of the product, to an extent appropriate to the medium and the product;**
 - (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;**
 - (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;**
 - (d) the arrangements for payment, delivery, and performance ~~and the complaint handling policy~~, if they depart from the requirements of professional diligence;**
 - (e) the complaint handling policy and, if different from his geographical address, the geographical address of the place of business of the trader (and where applicable that of the trader on whose behalf he is acting) where the consumer can address any complaints;**
 - (f) the possibility of having recourse to an amicable dispute settlement, where applicable;**
 - (g) the existence, or the absence thereof, of a right of withdrawal, and the conditions and procedures for exercising that right in accordance with Annex I, ~~where applicable~~;**
 - (h) the existence and the conditions of after-sales services and commercial guarantees, where applicable;**
 - (i) the existence of codes of conduct and how they can be obtained, where applicable;**
 - (j) the duration of the contract where applicable or if the contract is open-ended, the conditions for terminating the contract;**
 - (k) the minimum duration of the consumer's obligations under the contract, where applicable;**

(l) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
(m) that the contract will be concluded with a trader and as a result that the consumer will benefit from the protection afforded by this Directive.

2. In the case of a public auction, the information in paragraph 1(b) may be replaced by the geographical address and the identity of the auctioneer.

3. The information referred to in paragraph 1 shall form an integral part of the sales or service contract and shall be provided in the language in which the contract is concluded.

4. Where the trader engages in the conclusion of sales or service contracts with a clearly identifiable group of consumers who are particularly vulnerable to the commercial practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, the information to be provided under this Article shall be provided in language, which is plain and intelligible for the average member of that group.

5. This Article does not prevent Member States from imposing further information requirements on traders

(a) if such information is to be provided to the consumer on the basis of the trader's professional diligence;

(b) in the case of dangerous products; or

(c) to adequately protect clearly identifiable groups of consumers as indicated in paragraph 4.

The information requirements imposed by Member States on traders on the basis of this paragraph shall be compatible with the Treaty.

6. This Article shall not affect information requirements imposed on traders on the basis of specific Community legislation.

7. This Article shall not affect any rights which a consumer may have according to the general rules of contract law and the general rules of tort law.

Article 6 Failure to provide information

1. If the trader has not complied with the information requirements on additional charges as referred to in Article 5(1)(c), the consumer shall not pay these additional charges.

~~*2. Without prejudice to Articles 7(2), 13 and 42, the consequences of any breach of Article 5, shall be determined in accordance with the applicable national law. Member States shall provide in their national laws for effective contract law remedies for any breach of Article 5*~~*If the trader has not complied with any other information requirement as referred to in paragraph 1, the consumer may*

(a) avoid the contract, unless this is unreasonable in the circumstances; or

(b) claim damages for any loss resulting from the failure to comply with the information requirement.

Article 7 Specific information requirements for intermediaries

1. Prior to the conclusion of the contract, the intermediary shall disclose to the consumer, that he is acting in the name of ~~or~~ and on behalf of another consumer and that the contract concluded, shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of this Directive.

2. If an intermediary acts for another consumer but does not reveal at that time that other consumer's identity and geographical address, the intermediary shall disclose

the identity and the geographical address within a reasonable time after a request by the first consumer.

23. The intermediary, who does not fulfil the obligations under paragraphs 1 or 2, shall be deemed to have concluded the contract in his own name.

4. Where the intermediary acting in the name and on behalf of another consumer promotes the conclusion of a contract, for the purposes of this Directive that contract is considered to have been concluded by a trader.

35. This Article shall not apply to public auctions.

Article 9 Information requirements for distance and off-premises contracts

In derogation of Article 5, as regards distance or off-premises contracts, the trader shall provide the following information which shall form an integral part of the contract:

(a) the information referred to in Articles 5 and 7; by way of derogation from Article 5(1)(d)-(m), the arrangements for payment, delivery and performance in all cases;

(b) where a right of withdrawal applies, the conditions and procedures for exercising that right in accordance with Annex I;

(c) if different from his geographical address, the geographical address of the place of business of the trader (and where applicable that of the trader on whose behalf he is acting) where the consumer can address any complaints;

(d) the existence of codes of conduct and how they can be obtained, where applicable;

(e) the possibility of having recourse to an amicable dispute settlement, where applicable;

(f) that the contract will be concluded with a trader and as a result that the consumer will benefit from the protection afforded by this Directive.

Article 10 Formal requirements for off-premises contracts

1. With respect to off-premises contracts, the information provided for in Articles 5, 7 and 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).

2. An off-premises contract shall only be valid if the consumer signs an order form in writing or on a durable medium.

3. The trader provides the consumer with and in cases where the order form is not on paper, receives a copy of the order form on another durable medium.

4. Member States shall not impose any formal requirements other than those provided for in this Article paragraphs 1 and 2.

Article 11 Formal requirements for distance contracts

1. With respect to distance contracts, the information provided for in Articles 5, 7 and 9(a) shall be given or made available to the consumer prior to the conclusion of the contract, in plain and intelligible language and be legible, in a way appropriate to the means of distance communication used.

Article 12 Length and starting point of the withdrawal period

1. The consumer shall have a period of fourteen days to withdraw from a distance or off-premises contract, without giving any reason.

2. The period of withdrawal shall be calculated:

(a) from the day of the conclusion of the contract or any binding preliminary contract; or

(b) from the day when the consumer receives the contract or any binding preliminary contract or a copy thereof on paper or on a durable medium if the day is later than the date referred to in point (a).

~~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.~~

~~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.~~

~~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.~~

Article 13 Omission of information on the right of withdrawal

1. If the trader has not provided the consumer with the information on the right of withdrawal in breach of Articles 5(g)–9(b), 10(1) and 11(4), the withdrawal period shall expire ~~three months~~ one year and fourteen days after the trader has fully performed his other contractual obligations.

2. If the trader has not complied with any other information requirement, the withdrawal period shall expire three months and fourteen days after the trader has fully performed his other contractual obligations.

3. If, after the period of withdrawal has expired, the trader has failed to comply with the information requirements set out in this Directive, the consumer may
(a) avoid the contract, unless this is unreasonable in the circumstances; or
(b) claim damages for any loss resulting from the failure to comply with the information requirement.

Article 14 Exercise of the right of withdrawal

1. The consumer shall inform the trader of his decision to withdraw ~~on a durable medium~~ either in a statement addressed to the trader drafted in his own words or using the standard withdrawal form as set out in Annex I(B). Member States shall not provide for any other formal requirements applicable to this standard withdrawal form.

~~2. For distance contracts concluded on the Internet, the trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader's website. In that case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay. Returning the goods of which the material possession had been transferred to the consumer, or at his request to a third party, before the expiration of the withdrawal period is considered a notice of withdrawal unless the circumstances indicate otherwise.~~

Article 17 Obligations of the consumer in case of withdrawal

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 collect the goods himself.

The consumer shall only be charged for the direct cost of returning the goods unless the trader has agreed to bear that cost.

The deadline referred to in the first sentence is met if the consumer has supplied evidence of having sent back the goods before the end of that deadline.

~~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. The consumer is not required to pay for~~

(a) any diminution in the value of anything received under the contract caused by inspection and testing;

(b) for any destruction, or loss of, or damage to, anything received under the contract, provided that the consumer used reasonable care to prevent such destruction, loss or damage.

3. The consumer is liable for any diminution in the value caused by normal use, unless the trader had not properly informed the consumer of his right of withdrawal.

Article 21 Scope

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 **unless the provision of services constitutes the predominant part of the contract**~~is to the goods.~~

2. This Chapter shall also apply to contracts for the supply of goods to be manufactured or produced.

~~3. This Chapter shall not apply to the spare parts replaced by the trader when he has remedied the lack of conformity of the goods by repair under Article 26.~~

~~4. Member States may decide not to apply this Chapter to the sale of second-hand goods at public auctions.~~

Article 22 Delivery and payment

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~~ **reasonable time** from the day of the conclusion of the contract.

2. Unless the parties have agreed otherwise payment shall take place at the moment of delivery.

~~23. Where the trader has failed to fulfil his obligations to deliver at the agreed moment, the consumer shall be entitled to immediately rescind the contract, unless~~

~~(a) the trader indicates before the period for delivery has elapsed that he will deliver the goods within two weeks from the date agreed in the contract; and~~

~~(b) delivery at that later date does not substantively deprive the consumer from what he is entitled to receive under the contract.~~

~~4. If delivery does not take place within the period indicated in paragraph 3, the consumer is entitled to rescind the contract.~~

5. The consumer may rescind the contract under paragraphs 3 or 4 by giving notice to the trader in writing or on another durable medium. The trader is required to ~~a~~ refund of any sums paid within seven days from the date ~~he~~ receives the consumer's notice of delivery provided for in paragraph 1.

6. The consumer may claim damages for any loss resulting from the failure to deliver as of the moment he would be entitled to rescind the contract in accordance with paragraph 4.

7. Paragraphs 3-6 do not apply 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.

Article 23a Transfer of property

Where, under the law applicable to the contract, ownership of the goods does not pass automatically at the moment of the conclusion of the contract, unless the parties have agreed otherwise, the trader is required to transfer ownership. The transfer of ownership takes place at the moment determined by the law applicable to the contract.

Article 24 Conformity with the contract

1. The trader shall deliver the goods in conformity with the sales contract.

2. Delivered goods shall be presumed to be in conformity with the contract if they satisfy the following conditions:

(a) they comply with the description given by the trader and possess the qualities of the goods which the trader has presented to the consumer as a sample or model;

(b) they are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted;

(c) they are fit for the purposes for which goods of the same type are normally used ~~or~~; and

(d) they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.

*3. There shall be no lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or ~~should~~ **could not** reasonably have been **unaware** of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.*

Article 26 Remedies for lack of conformity

1. As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:

(a) have the lack of conformity remedied by repair or replacement,

(b) have the price reduced,

(c) have the contract rescinded,

according to the consumer's choice.

*2. The trader shall remedy the lack of conformity by either repair or replacement according to **the consumer's** ~~his~~ choice.*

*3. **The consumer is not entitled to have the lack of conformity remedied by repair or replacement** 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 **any other remedy available to the consumer** ~~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.

4. The consumer may only rescind the contract if the lack of conformity is not minor.

45. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:

(a) the trader has implicitly or explicitly refused to remedy the lack of conformity;

(b) the trader has failed to remedy the lack of conformity within a reasonable time;

(c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;

(d) the same **or another** defect has ~~reappeared more than once~~ within a short period of time **after the good was first repaired or replaced.**

Article 26a Exercise of the right of rescission

The consumer shall inform the trader of his decision to rescind from the contract on a durable medium in a statement addressed to the trader drafted in his own words. Member States shall not provide for any other formal requirements applicable to the notice of rescission.

Article 26b Effects of price reduction and rescission

1. Where a consumer rescinds from the contract the obligations of the parties shall terminate. Where a consumer invokes the right to price reduction, the trader shall reimburse the difference in value between the good delivered and the price paid by the consumer.

2. The trader shall reimburse any payment received from the consumer within thirty days from the day on which he receives the communication of rescission or price reduction.

3. 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 collect the goods himself. The deadline referred to in the first sentence is met if the consumer has supplied evidence of having sent back the goods before the end of that deadline.

4. The trader may withhold the reimbursement until he has received or collected the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest.

5. The consumer is not required to pay for any diminution in the value of the goods, unless the consumer has not taken proper care of the goods after he was or should have been aware of the lack of conformity.

Article 27 Costs and damages

1. The consumer shall be entitled to have the lack of conformity remedied free of any cost.

~~2. Without prejudice to the provisions of this Chapter~~ **The consumer may claim damages in stead of repair or replacement in accordance with the law applicable to the contract, and for any loss not remedied in accordance with Article 26, including**

any non-pecuniary loss caused by the non-conformity in so far as the consumer is entitled to the compensation of such non-pecuniary loss under the law applicable to the contract.

Article 28 Time limits and burden of proof

1. The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the risk passed to the consumer. **The Member States may decide not to apply this limitation to two year.**

alternative 2

1. The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within ~~two~~ **six** years as from the time the risk passed to the consumer.

2. When the trader has remedied the lack of conformity by **repair or 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 the period meant under paragraph 1 shall be suspended from the moment the consumer informs the trader of the lack of conformity until the moment the consumer has reacquired the material possession of the replaced goods.~~

3. ~~In the case of second hand goods, the trader and the consumer may agree on a shorter liability period, which may not be less than one year.~~

alternative 2

Article 28 Time limits and burden of proof

3. In the case of second-hand goods, the trader and the consumer may agree on a shorter liability period, which may not be less than one year. **A contract term to this extent, which was not individually negotiated between the parties is deemed to be unfair within the meaning of Article 32 paragraph 1.**

4. ~~In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within two months from the date on which he detected the lack of conformity.~~

alternative 2

4. In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within **a reasonable time** ~~two months~~ from the date on which he detected the lack of conformity. **A notification within two months from the date on which he detected the lack of conformity is deemed to have been made on time.**

5. Unless proved otherwise, any lack of conformity which becomes apparent within ~~six months~~ **one year** of the time when the risk passed to the consumer, shall be presumed to have existed at that time unless this presumption is incompatible with the nature of the goods and the nature of the lack of conformity.

Article 29a Direct producer's liability

1. The producer is liable towards the consumer to repair or replace the goods for any lack of conformity that existed at the time when the goods were put into circulation.

2. The producer shall repair or replace the goods, at his choice, between 30 days after having been notified of the lack of conformity.

3. The consumer's rights under this Article shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put the goods into circulation, unless the consumer has in the meantime instituted proceedings against the producer.

4. This Article is without prejudice to the provisions of national law concerning the right of contribution or recourse.

Article 30 Scope

1. This Chapter shall apply to contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, in particular where such contract terms are part of a pre-formulated standard contract. **This Chapter shall apply to a contract term which was subject of negotiations between the parties but not changed as a result of these negotiations.**

2. The fact that the consumer had the possibility of influencing the content of certain aspects of a contract term or one specific term, shall not exclude the application of this Chapter to other contract terms which form part of the contract.

~~3. This Chapter shall not apply to contract terms reflecting mandatory statutory or regulatory provisions, which comply with Community law and the provisions or principles of international conventions to which the Community or the Member States are party.~~

~~**Article 33 Burden of proof**~~

~~Where the trader claims that a contract term has been individually negotiated, the burden of proof shall be incumbent on him.~~

Article 31 Transparency requirements of contract terms

1. Contract terms shall be expressed in plain, intelligible language and be legible **and in the language in which the contract is concluded.**

2. 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.

3. The trader shall seek the express consent of the consumer to any payment in addition to the remuneration foreseen for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.

4. A contract term, which does not meet the requirements of this Article shall not be binding on the consumer.

45. Member States shall refrain from imposing any presentational requirements as to the way the contract terms are expressed or made available to the consumer.

Article 39 Review of the terms in Annexes 2 and 3

1. Member States shall notify to the Commission the terms which have been found unfair by the competent national authorities and which they deem to be relevant for the purpose of amending this Directive as provided for by paragraph 2. **Terms that have been found unfair in a procedure as meant under Article 38 shall always be notified to the Commission.**

2. In the light of the notifications received under paragraph 1, the Commission shall amend Annex II and III. Those measures designed to amend non essential elements of

this Directive shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 40(2).