UNION LUXEMBOURGEOISE DES CONSOMMATEURS
Membre de «Consumers International» (C.I.)
Membre du Bureau Européen des Unions de Consommateurs (BEUC)
nouvelle a.s.b.l.

EP Committee on the Internal Market and Consumer Protection
- Public Hearing on the Consumer Rights Directive -
(29 September 2009)

1. The Commission has not provided convincing evidence that *minimum harmonisation* has *genuinely* created barriers to cross-border trade. [1] *Eurobarometer* surveys show that other reasons such as differences in language, tax regimes, the lack of redress systems are much more relevant and that most traders will not increase their cross border sales even if consumer laws are harmonized across the EU.[2] The necessity of *full harmonisation* has not been proven, therefore, and the impact on national consumer protection levels has been insufficiently examined. The Commission's draft table on the impact on national legislation needs to be improved and extended as some of the most important provisions (information requirements, unfair contract terms) are not covered. Member States should be asked to review the impact. On several points, we disagree with the Commission's explanatory note, more particularly on the relationship with the Services directive.

2. The claim that full harmonisation would solve the "fragmented regulatory framework across the Community "[3] is misleading. The proposed rules cannot be applied in isolation but will operate within non-harmonised national legal regimes (e.g. general contract law). The recent ECJ judgment in Case C-489/07 Pia Messner concerning the right of withdrawal and relation with principles of civil law such as good faith or unjust enrichment, is a perfect illustration. Differences will remain between national procedures (e.g. different statutory limits) and penalties/remedies for non-compliance (for instance right to void a contract and compensation rules) and these are often more significant causes of consumer frustration in cross-border cases than differences in the provisions targeted by the proposal. These limits of full harmonisation have been exposed by the European Economic and Social Committee.[4]

3. We are pleased that the discussions held so far within **other EU institutions**[5] support the unanimous criticism by national / European consumer organisations.

[1] The synthesis report on consumer and business attitudes to cross-border sales and consumer protection in the internal market (October 2008) concluded that « the views of retailers who are selling cross-border suggest that many consumers and non-cross-border retailers may be overly concerned » (page 15)
[2] According to Flash Eurobarometer 224 of 2008 (Graph 33), 71% of traders say that their cross-border sales would "not change" or "increase a little".
[3] Commission explanatory memorandum in COM(2008) 614/3
[4] Point 5.2. of the Opinion
[5] Opinions by the Committee of the Regions and European Economic and Social Committee

4. Given the effect of full harmonisation –which prevents Member States (including national parliaments and courts) from maintaining or introducing more protective measures - **national scrutiny** of the proposal deserves prime attention. Several parliamentary bodies have taken a position which supports the consumer view that the proposal acts against the consumer interest and questions the competence for full harmonisation under the subsidiarity principle. We refer more particularly to :

- The UK House of Lords report [6] : " … *we believe that consumers and their interests must be kept at the heart of this proposal…the existing directives covered in this proposal should be taken as the base upon which to build. We consider it of utmost importance that the overall level of protection afforded to consumers should not be reduced…*"

- The French Senate's resolution[7] : " *..believes that the whole of the French legislative provisions guarantee French consumers an efficient protection which should not be diminished for reasons of improving the retail internal market…requests Government to oppose all measures leading to a reduction of the protection of the French consumer…*"

- The German Bundesrat decision [8] : "*....The proposal would force Germany to reduce its comparatively very high protection standards. It is questionable, therefore, whether the proposal lives up to its prime objective, namely to strengthen consumer confidence….*"[9]

Other parliamentary bodies have expressed strong reservations such as the Greek parliament or objections raised in the Netherlands and Finland.

5. In its opinion on the Green Paper, Parliament warned that full harmonisation should be pursued restrictively. The opinions on the proposal by the Committee of the Regions and European Economic and Social Committee – supported by national bodies such as the UK House of Lords, German Bundesrat and Hellenic Parliament – support the view that "full harmonisation should be considered selectively for provisions of a more technical nature".[10] It should be restricted, according to these bodies, to issues such as definitions, information duties and right of withdrawal. We support this **mixed approach** (combination full / improved minimum harmonisation).

6. **Information requirements** / relationship with other Community legislation : For reasons of coherence and transparency, the general information obligations applicable to goods and services should apply, in principle, to all consumer contracts including those falling under the E-commerce[11] and Services directives [12]. However, this rule must be mitigated by a provision stipulating that it is without prejudice to additional and/or

---

[6] Report " EU Consumer Rights Directive : getting it right " (15 July 2009) available on http://www.parliament.uk/parliamentary_committees/leuscommg.cfm

[7] Résolution Européenne N° 130 du Sénat (29 juillet 2009) available on http://www.senat.fr/leg/tas08-130.html

[8] Beschluss des Bundesrates, Drucksache 765/08 (06.03.09) available on http://www.bundesrat.de

[9] Bundesrat press release 43/2009 (06.03.09)

[10] Committee of the Regions

[11] Directive 2000/31/EC (OJ L 178, 17.7.2000)

[12] Directive 2006/123/EC (OJ L 376, 27.12.2006)

specific rules fixed in other Community texts such as the Services directive[13] and Member States' right to adopt or maintain rules in non harmonised areas, especially for specific service contracts.

We are in favour of excluding from the Consumer Rights directive certain *particularly sensitive service contracts* which were excluded also from the Services directive such as financial, transport, healthcare and social services. The Commission's explanatory note shows the complexity/inadequacy of applying the directive partly to such services and the risks of by-passing specific information needs (example of old people's home).

We welcome the Commission's clarification that *national language requirements* for providing the pre-contractual and contractual information remain unaffected. This must be written into the directive.

As information obligations are core provisions for the proper functioning of the internal market and a high level of consumer protection, "a clear set of remedies for the breach of pre-contractual duties", as recommended by the draft Common Frame of Reference for Contract Law (CFR), should be essential. It is missing. We could support common remedies, however, only if the full range of options including the right to terminate the contract, were proposed.

7. Relationship between the **consumer sales remedies** and traditional contract law : According to the Commission's interpretation of its own proposal, the UK and Irish right to reject (an immediate option for consumers in these countries) and the French, Belgian and Luxembourg civil code rules on " *vices cachés* " (hidden defects) would remain unaffected by full harmonisation. We doubt, however, the legal certainty and practicality of such a dual regime. We are pleased with Commissioner Kuneva's offer to Parliament to work further on these questions, more particularly :
" - Is the two years guarantee period long enough ?
- Is the six month burden of proof period on the retailers fair for consumers ?
- Is the order of the remedies the right one ?…"[14]

We believe that only an *improved minimum harmonisation* should be sought in this area. It would increase consumer confidence in the Single Market and reduce risks of litigation resulting from too different national standards.

8. **Unfair contract terms** : Discussions have shown already that full harmonisation with a strictly defined general clause and fully harmonised black and grey lists of unfair contract terms, looks destined to fail. Full harmonisation is particularly risky as "the issue of unfair terms in contracts is horizontally applicable to <u>all</u> contracts concluded with consumers and also often to those concluded between traders" (European Economic and Social Committee). Furthermore, the proposal will not deliver the solution to legal

[13] see in particular Art. 22 (5) " The information requirements laid down in this Chapter.. do not prevent Member States from imposing additional information requirements applicable to providers established in their territory."
[14] Commissioner Kuneva speech to the EP IMCO hearing of 2 March 2009

fragmentation as this field of law "is essentially characterised by case law" (Bundesrat), with the Commission conceding itself "that the proposal will not call into question the existing national case laws on unfair terms in consumer contracts."[15] The mixed experience with the fully harmonised black lists of prohibited unfair commercial practices should serve as a warning. Fully harmonised but limited black / grey lists preventing national legislators to maintain / introduce further terms will defeat the objective of greater legal certainty within the internal market, because greater reliance will be placed on the general test for fairness. As a result, the opposite will occur : a transfer of power from the legislator to the judge who will rule on a case-by-case basis. [16] Accordingly, we believe the current proposal would lower existing legal standards and give rise to increasing legal uncertainty in all Member States for decades to come.

Some concluding remarks :

'Total' harmonisation gives the misleading impression that we are achieving a uniform application of contract law for B2C relations. The revised consumer credit directive[17] has shown that, as a minimum, final agreement on a directive qualified as being a 'total' harmonisation measure requires that Member States are given regulatory options[18] for the most sensitive provisions where national rules and traditions are too different.

In this case, the fields covered and issues at stake are so numerous that all EU and national institutions which have taken a position already, reached, independently from each other, similar conclusions : **to be successful this directive must be based on a mix of total and minimum harmonisation provisions**.

In any case, the question of the relationship with general national law will remain and a general reservation clause will be necessary : *" The rights resulting from this Directive shall be exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability "*.[19]

Bob SCHMITZ
EU counsel

[15] Commission paper cited under (13)
[16] See *mutatis mutandis* comment on Cases C-261/07 and C-299/07 concerning the Belgian prohibition of joint offers held as contrary to Directive 2005/29/EC on unfair commercial practices in Journal de droit européen N° 160-juin 2009
[17] Directive 2007/64/EC of 13.11.2007 (OJ L 319, 5.12.2007)
[18] Article 26 of the directive requires Member States which make use of these regulatory choices to inform the Commission which shall make that information public on a website or in another easily accessible way. Member States shall diffuse that information amongst national creditors and consumers
[19] cf. Article 8 of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (OJ L 171, 7.7.1999)