



CNUE Position Paper on the Proposal for Horizontal Directive on Consumer Rights

The notaries of Europe at the CNUE are following with great interest the work at the European institutions on the **proposal for a Directive of the European Parliament and of the Council on Consumer Rights (COM (2008) 614 final)**.

One of the notary's most important tasks is to ensure that the parties are correctly informed and fully aware of what they are committing to. The authentic act is a particularly effective means of protecting consumers. Another advantage of notarial authentication is the lasting and irrefutable nature of the concluded act that thus provides legal certainty both for the contracting parties and for third parties which are not directly involved in the act but are affected by the consequences.

Consequently, notaries of Europe attach particular importance to efforts undertaken by the European institutions in favour of greater harmonisation of legislation related to consumer protection. With this in mind, the CNUE had already adopted a position paper on the European Commission's Green Paper on the *Review of the Consumer Acquis* (COM(2006) 744 final).

From the European notariat's point of view, the Commission's draft directive gives rise to the following remarks:

I. The maximum harmonisation approach and its consequences for consumers, national legislators and legal practice.

The framework instrument is characterised by the principle of maximum harmonisation. Article 4 of the proposal for a Directive prohibits the Member States from introducing or maintaining national provisions that differ from those of the Directive.

The CNUE considers that, in the interests of effective Community protection for consumers, there is a practical need to legislate exhaustively on certain appropriate aspects ('targeted maximum harmonisation') such as the definition of specific notions in addition to requirements regarding the scope of rights of withdrawal at Community level. In this area, the maximum harmonisation approach could be appropriate and useful.

However, for other aspects, the Member States should have the possibility to maintain or to take stricter national measures with respect to consumer protection.

This is even more important as the consumer protection sought by the Directive is limited once again essentially to rights of information and withdrawal, despite the fact that their effectiveness is generally called into question in legal literature related to contract law or the legal economy. Detailed written information often creates confusion for consumers as the plethora of information camouflages essential elements of contracts. Often consumers do not take advantage of their rights of withdrawal – either because they are not aware of this option in the contract or because they do not want to admit to themselves that they have made a bad decision or acted in haste.

Moreover, it is impossible to identify the consequences of maximum harmonisation on the national legal system as a whole. The Commission misjudges this fact when it considers that the proposal only regulates essential aspects of consumer contract law and does not infringe upon more general concepts of contract law (p.8 of the introduction). A maximum harmonisation approach carries the risk of causing unintentional repercussions on national law. The consequences of this situation on the legal systems would be barely predictable.

II. **Withdrawal of formal requirements, particularly for real estate transactions**

1. Articles 10.3 and 11.5 concern formal obligations for distance and off-premises contracts. They prohibit the Member States from imposing any formal requirement other than those provided for by these two articles. This means that it will no longer be possible to impose other formal requirements that could protect consumers further.
2. Article 31.4 of chapter V (Consumer rights concerning contract terms) also provides that Member States abstain from imposing any formal requirements concerning the wording of the contract terms or the way in which they are made available to the consumer. In practice, this proscription will lead to considerable inconvenience for the consumer. The sphere of contract terms is a particularly delicate legal area in terms of consumer protection. Particularly regarding the use of contract terms, many Member States have strict protection rules in order to provide consumers with better protection. This situation should remain unchanged.

The current provision of Article 31(4) excludes authentication by a notary of transactions likely to be considered as contract terms. This would apply, for example, for the constitution of securities relating to an immovable property (mortgage, land charges) and also for the authentication and certification of documents recorded on the public registers. This exclusion of formal requirements for contract terms applies to all legal areas as chapter V of the proposal for a Directive refers to ‘products’ in general. Consequently, the area of immovable property is also included. With respect to contract terms, the CNUE therefore expressly proposes to leave Member States the possibility to maintain or foresee stricter protection rules.

3. ***Proposed amendment to text***

Article 10.3: withdrawal of paragraph 3 or rewording:

“Member States *remain free to impose other formal requirements* than those provided for in paragraphs 1 and 2 *if these requirements apply regardless of whether or not the contracts are distance contracts.*”

Article 11.5: withdrawal of paragraph 5 or rewording:

“Member States *remain free to impose other formal requirements* than those provided for in paragraphs 1 to 4 *if these requirements apply regardless of whether or not the contracts are distance contracts.*”



Article 31.4 sentence 2 (new):

“This Article is not detrimental to the freedom of Member States to impose further formalities for the validity or effects of the contract such as the authentication of the contract or certification of the signature.”

III. Exclusion of immovable property from the scope of the Directive

1. It is not clear in the proposal for a Directive to what extent it applies to immovable property, particularly for chapter III on “Consumer information and withdrawal right for distance and off-premises contracts” and chapter V on “Consumer rights concerning contract terms”.

Chapter II provides that it shall not apply to the sale of immovable property (Article 20(1)(a)). However, this chapter does after all apply to mixed purpose real estate contracts such as rental-sale and property development contracts.

The CNUE underlines that it cannot see any plausible reason to deal with mixed purpose real estate contracts such as property development contracts or rental-sale contracts differently from real estate sale. This is even more true as Article 2(3) of the Directive, contrary to the provision concerning real estate transactions, also qualifies as a ‘sales contract’ any mixed-purpose contract having as its object both goods and services in the context of sales of movable property.

In the interests of clarity, the CNUE proposes excluding the sale of immovable property and other rights linked to immovable property from the scope of the Directive, including mixed-purpose contracts relating both to the sale and related services, in addition to mortgages on immovable property and other comparable securities commonly used to this end in a Member State. The aim of this exclusion is to clarify the scope of the proposal for a Directive and to prevent it from inadvertently encroaching upon competences reserved for the Member States.

2. *Proposal to amend the text*

3.

Article 3.5 (new):

“This Directive is not detrimental to national legislation concerning the legal nature, acquisition or transfer of immovable property or other rights linked to immovable property, including mixed-purpose contracts relating to the sale and related services, in addition to mortgages on immovable property and any other comparable services commonly used to this end in a Member State.”

The notaries of Europe underline that if this new Article 3.5 were to be introduced, then withdrawal of Article 20(1)(a), which provides that contracts for the sale of immobile property or relating to other immovable property rights are excluded from the scope of chapter II, could be envisaged.

IV. Exception to the right of withdrawal for acts concluded before a notary or before a court

1. In virtue of the proposal for a Directive, the establishment of a contract before a notary or a court is carried out “*away from business premises*” (cf. Art. 2(9) of proposal for a Directive) and thus constitutes a ‘direct sale’. Consequently, the right of withdrawal provided for by the Directive applies here.

However, when a notary or other public official is involved, the consumer has been fully informed of the consequences of his or her commitment. The aim of the right of withdrawal is to protect the consumer against unfair commercial practices in the area of direct sale and in other comparable situations in which a contract is drawn up when the trader takes the initiative away from business premises and the consumer is caught off his or her guard. These situations cannot be compared to the establishment of a contract before a notary or a court. This is why the notion of a contract negotiated away from business premises as defined by Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts away from business premises was worded so that the Directive and therefore the right of withdrawal do not apply to contacts concluded before a notary or a court. A right of withdrawal is also difficult to reconcile with the effects particular to authentic acts such as probative value, enforceability and tax consequences. The CNUE considers that this situation should remain unchanged.

2. *Proposal to amend the text*

Article 2 paragraph 8

- (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
 - i) *at the consumer’s place of work or private dwelling, unless the consumer has in advance, and upon his or her own initiative, asked the trader to be present,*
 - ii) *during an excursion organised by the trader or by a third party in the interests of the trader or*
 - iii) *in public places, including modes of transport*
- or* 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 *for the conclusion of which the consumer has been encouraged by negotiations conducted in the conditions mentioned in a)*”



Explanation: This proposal is based on the provisions of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts away from business premises.

*Council of the Notariats of the European Union,
Brussels, 16 June 2009*
