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## **Response to the Commission’s Public Consultation on the Green Paper on the Review of the Consumer Acquis**

**Preamble:** ERA EUROPE’s position paper and responses are limited at this point to the review and possible modernization and update of the **Distance Selling Directive**. To simplify our position paper we have only dealt with issues that are of direct and high impact on our members. When issues that were listed in the Commission green paper are not commented, upon this should be interpreted as “no position to express” or “ no comment at this point of the consultation process”. ERA EUROPE may propose opinions and positions on these issues at further stages of the process, as well as on other Directives in the “Consumer Acquis”.

### **About ERA EUROPE**

The Electronic Retailing Association (ERA) EUROPE is the only organization representing specifically the interests of all Television, Radio, and Internet e-retailers and associated service providers in the European market. The members of ERA EUROPE are companies established in Europe – the 25 EU member states and other European countries. ERA EUROPE is dedicated to the promotion of the highest quality standards and consumer confidence, through a Pan European industry Self Regulation program and wishes to create an environment where Direct Response Electronic Retailing can grow throughout the European Union. The program guidelines and provisions as well as our directory of member companies can be accessed on our institutional web site: [www.eraeurope.org](http://www.eraeurope.org)

### **General comments**

1. The Electronic Retailing Association, EUROPE, members are fully supportive of the aims of the Directive to provide a level of protection to consumers buying from home through digital media (on Television and on line), equivalent to that offered by traditional brick and mortar retail outlets.
2. We support any efforts and incentives to encourage confidence in the digital commerce industry, and are a firm advocate of an internal market level playing field that will encourage cross border digital media shopping by equally educated and protected consumers, wherever they buy in Europe.

3. We also call for a balanced approach, to ensure that Electronic Retailers are not discouraged from offering a full range of goods and services on digital or audiovisual media, and not financially disadvantaged because of the burdens imposed by complying with the Distance Selling Regulations.
4. More importantly, the clearly established objective of the development of the Information Society and digital media usage by European consumers calls for a limitation on the possibility that member states, through the subsidiarity principle, establish and enforce national rules substantially more stringent than the Directive, without carefully justifying such actions.

5. We share the British IMRG draft and comment below: on the **use of minimum harmonisation i.e. the possibility for Member States to retain or introduce provisions offering a higher standard of consumer protection:**

*The use of minimal clauses in conjunction with the Rome Convention (and current proposal for an EU Rome Regulation) introduce great legal uncertainty into the distance selling market, acting as a significant disincentive to offering services across the European Union and encouraging restriction of services to domestic consumers only. This is certainly not in the interest of consumers being able to shop across the internal market, comparing goods and services and choosing the best available to them. There has been much focus at EU level on why consumers don't shop more cross-border. This is, we feel, missing the point. The current complex legal environment for EU businesses means that many simply cannot afford to open up their services to non-domestic consumers, thereby denying consumers the opportunities of cross-border shopping. The EU E-Commerce Directive was deliberately based on a country of origin principle to provide that legal certainty. However, the currently proposed Rome I Regulation combined with use of minimal clauses in the consumer protection field will only serve to undermine pan-European offers. EU consumer protection Directives are already set at a high level of protection in line with the Treaties. Furthermore, there is a newly-introduced catch-all Directive dealing with Unfair B2C Commercial Practices. Giving Member States the option to introduce additional provisions creates legal uncertainty, barriers to trade and ultimately only serves to restrict consumer access and choice.*

6. Consequently: The Directive should put the words **Fully Harmonise** or **Full Harmonisation** as the key word in the preamble of the Directive and eliminate the current wording -*Approximate*. The Directive should clearly establish and strongly limit (a complete uniform interpretation being unrealistic) the circumstances and exceptions deemed acceptable for the adoption of more stringent rules by member states, to avoid these national rules to be detrimental to the free cross border access to, and to the free circulation of a larger variety and diversity of good and services, for the benefit of European Consumers.

7. In the rest of our position paper we will not repeat for each of the proposals or suggestions that we make that we expect full harmonisation to be obtained on each and every definition or provision in the future revised Directives.
8. Special attention should be brought to an anti-competitive usage of such national interpretations.
9. We call on the EU Institutions to establish a clear framework for Distance Selling Industry Self Regulation Programmes, and to contribute to promote them, in relation and coordination with professional and consumer organizations. ERA EUROPE has implemented a Self Regulation programme encompassing all aspects of the relation between Consumers and Electronic Retailers. As condition for their membership, ERA EUROPE members have the obligation to comply with the provisions of this programme which provide to European Consumers a level of protection equal or higher than the provisions of the current directive. We believe that Self Regulation deserves a specific chapter of consultations during the Consumer Acquis revision process, to clarify, update, upgrade and harmonize the criteria and provisions that European Self Regulation Programmes should comply with to be a full component of European consumers' education and protection. – We would actively support the organization by the Commission of a well prepared European Consumer Protection Self Regulation Forum -

<b>Vertical approach versus horizontal approach .</b>
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We do not believe that a single horizontal Directive can address the variety of goods, properties and services that European Consumers can buy, through Home Shopping. Although intellectually attractive, a horizontal approach will result in a lower denominator level of provisions and possibly a too wide dispersion of interpretation of the Directive's provisions by member states

We strongly suggest a vertical approach, simplified by the effort made to create a relevant and actionable horizontal dimension, by a logical regrouping of the product categories and commercial environments of Distance Selling.

<b>Specific areas of concern:</b>
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**Withdrawal and refund**

- 1) The major burden for the distance retailer is concentrated in the interpretation of the conditions imposed, for refunding the consumer in a reasonable delay, when the consumer activates his withdrawal right.
- 2) We believe that it is imperative that a clear principle be established, linking the refund by the retailer of sums paid by the consumer to the return of the goods delivered to the Consumer.
- 3) In other words, the Directive should clearly establish the option given to the retailer, of having the goods returned to the retailer, as part of the withdrawal

and refund mechanism.

- 4) In parallel the Directive should protect the consumer's right to obtain a refund from excessive, unfeasible or unfair demands by the retailer, before considering the return as executed properly.
- 5) The variety of goods and services sold on-line or through digital / audiovisual media is such that the general approach stressed above should be modulated to reflect the specific nature of some goods or merchandise, which might impact the conditions and terms of the return, after withdrawal of the purchase, of the same goods or merchandises to the retailer. This specific area is the major reason why a carefully segmented vertical approach seems the only one giving legal clarity and certainty to the respective rights and obligations of the retailer and consumers.
- 6) The Directive should explicitly allow for the retailer to create conditions for refunds more flexible for the consumer than the Directive provisions.
- 7) The Directive should reinforce the balanced approach consisting of:
  - a. The obligation for the retailer to clearly communicate in an accessible and intelligible way, the provisions and conditions that the return of the goods have to fulfil, for the Consumer to receive a refund.
  - b. The obligation for the retailer to clearly communicate the costs to be charged to the consumer when returning the goods.
  - c. The failure, by the retailer to clearly inform, in terms and conditions established by the Directive, the consumer, prior to the purchase, should be sanctioned by the extension of the cooling-off period to 12 months . .
  - d. We agree that a 30 day maximum delay should be imposed on the retailer, starting after the Consumer has executed his obligation of returning the goods, along with the conditions stipulated in the general conditions of the purchase.
  - e. The Directive should establish what elements should be taken as valid to materialize the execution by the consumer of his obligation of returning the goods, taking in consideration that the goods, once shipped by the consumer are not any more under the consumer's control, but not yet under the retailer's control.
  - f. Should the information be properly communicated and made accessible to the Consumer, prior to the purchase, in the general conditions, we support the position that Consumers , when concluding the purchase , are explicitly accepting to take adequate care of the merchandise, when exercising their right of withdrawal and the return of the merchandise, to benefit from the refund .

- 8) The Directive should clearly establish a general duty of normal care of the goods or merchandise by the consumer until he activates his withdrawal right during the cooling-off period.
  - a. The Directive should protect the consumer's right to obtain a refund, from excessive, unfeasible or unfair demands by the retailer, in the interpretation of "normal care" of goods or merchandise.
  - b. The Directive should establish principles protecting the retailer from abusive usage of the cooling off period and right of withdrawal, (such as ordering 5 different size of a dress, and returning 4 at the expense of the retailer without making the effort to find when placing the order the one or two that are likely to fit) or of abusive usage of the product during the cooling off period, when the consumer exercises his or her right of withdrawal.

### **Cooling-Off period**

- 1) Our members believe that the cooling-off period should be established as a minimal one, leaving the retailer the possibility to adopt longer cooling off periods as part of his commercial policies.
- 2) The cooling off period minimum duration should be segmented in the same exact lines that the vertical approach calls for, to reflect the consumer's decision making mechanisms, based upon the nature of the purchased goods or merchandises.
- 3) We suggest a strict 10 calendar day cooling off period, to make sure that the Consumer has a weekend during the cooling off period, this will protect working consumer rights, especially those working away from home.

### **Exemptions to the right of withdrawal**

Our view is that clarification is needed of the following exemptions:

- 1) **The supply of goods made to the consumer's specifications or clearly personalised**  
We suggest that the test of whether an item has been made to a consumer's specification should be whether the components forming that item have been particularly selected or whether that item has been particularly added to, altered or changed for that individual consumer.
- 2) **The supply of goods that by their very nature cannot be returned**  
We suggest that the Directive should include an explanation of this exception which clarifies that the scope of this exception extends to products that raise health and safety or hygiene concerns or which by their nature, will have a zero value for the Retailer. (Electronic Gift voucher once they have been used.)

## Products protected by copyright

- 1) Retailers should be given the right, as part of their commercial rights, to apply a total exemption to the right of withdrawal to Products protected by copyright. Brick and mortar retailers are not required to offer to consumers a right of withdrawal for these products.
- 2) Should this withdrawal right be offered by the retailer, they should be subject to a specific set of provisions for refund, as well as of specific set of Consumer information obligations, to protect retailers from an abuse of copyright.
- 3) The specific set of provisions for products protected by copyright should encompass and integrate, but not duplicate the general legal provision protecting owners of copyright.

## Other provisions related to refund / withdrawal

The Distant Selling Directive should not introduce specific variations of protections of the Consumer against defective products, which exist in other general commercial regulations, and which define the recourses and rights for refund or replacement when a product is defective or damaged during the delivery process.

## Written Elements/ Durable Medium

- 1) The Directive should update and modernize the concept of durable medium regarding the access and storage of information and documents related to the contract; and for the access and download by the consumer using on line media, of general terms and conditions and products or services descriptions and specifications.
- 2) The Directive's provisions on "digital durable media" should be synchronized with the legal framework encompassing digital documents usage, validity and protection in the general law on "contracts".
- 3) The principle of a parallel usage by the Consumer and the retailers of the same type of durable medium should be established:
  - a. When a consumer activates a distance selling transaction on-line, generating digital elements of the purchase contract, the retailer should not be obligated to provide to this specific consumer written elements (especially confirmations and general conditions) on a non-digital durable medium. The provision of these elements on digital durable medium as defined below should be deemed legally sufficient as for the retailer's information provision obligations.
  - b. When a consumer is offered the possibility to activate a distance selling transaction using a non-digital durable medium (printed order form or fax) , he should be entitled, on request , to receive the

Retailer's written elements (such as confirmations) through the same nature of medium, even if a digital durable media is the default mode, elected by the retailer , to communicate with the Consumer

- 4) The following should be deemed durable media :
- a. Information on a website provided that the retailer operates a strict version control policy so it is able to demonstrate which information was provided in relation to any particular contract.
  - b. An email which includes a link to a "locked down" version of the relevant information stored on a server. We do not support, at this point, the concept of considering the text of an email or an attachment to an email as a "durable medium", because of the current vulnerability of these media to technical incidents or to incompatible configuration of security system on communication networks.
  - c. In relation to goods, use of a delivery note to provide the required information.

### **Consumer to Consumer distance on-line selling**

The development of distance selling – most frequently on “ bid-up“ auction models, from consumers to consumers, requires a special attention from the Commission in the Directive.

We believe that the Directive should be establish the principle that “peer-to-peer” transactions, for the sale and purchase of single items, belong to the private transaction domain, and should not be placed in the scope of the Distance Selling Directive, whether they are conducted on a fixed price model or auction scheme.

Conditions and provisions should be established to define when a recurrent / permanent activity of this category, especially in the format of virtual “boutiques”, becomes a “distance selling organized “activity, of **one –to- many** consumers. Running objectively a commercial activity , these consumers-retailers are holding themselves out as running a business and as such should fall within the definition and rules of an organised distance sales system, and consequently subject to the Distance Selling Directive. Exempting such a wide range of sellers of whatever size from the Directive would serve to undermine consumer trust in the channel and create not insignificant competitive distortions, especially in small size markets, where a limited number of retailers operate.

### **AUCTIONS**

- 1) We believe that 3 types of distance selling auctions can be defined and be incorporated into the scope of the Distance Selling Directive.

- a. Consumer to Consumer auctions  
Please refer to the previous paragraph
- b. Genuine auctions: auction that is open to the general public (including real time online auctions) and where a single item appearing in the auction will be sold to the highest bidder.  
We do not believe such auctions should be placed in the scope of the Distance Selling Directive, provided only one of the item is being sold, and the non repetition of the sale being clearly established
- c. Distance selling of goods or merchandise, under an auction concept  
Such concepts are developing rapidly on television and internet, operated by television shopping companies, directly competing with traditional Home Shopping Channels. The range of goods sold is identical to the catalogue of products sold by distance selling companies (Jewellery, sport and exercise goods, cookware .etc...)  
The fact that the price that consumer will pay is defined by an auction (bid-up or bid-down scheme) and that the quantity of goods offered during the auction is limited does not remove this type of distance selling from the standard consumer protection and retailer obligations:
  - The consumer can be disappointed by the product he or she bid for on a simple visual impression and a set of information about the product characteristics, features and quality.
  - The fact that the withdrawal rights will generate an inventory of products that were supposed to be completely sold or liquidated by the auction is not an argument to exempt these auctions from the withdrawal right. Returned goods can eventually be sold through another auction.

#### Conclusion:

The Distance Selling Directive is seen , in general, as providing balanced framework for business and consumers. Nevertheless, from consultations with our industry members in the 25 member states , the problems they face result from national diverging interpretations of the provisions of the directive. It is almost impossible to understand why these diverging interpretations exist, when the concept of Consumer Protection is quite universal, and the operating and business models of Distance Selling Companies, almost identical from Member State to Member State . This irrational diverging interpretations non only create zone of legal uncertainty in the laws regulating the distance selling sector in the various Member States, but they are a true deterrent for an active cross border digital ( TV and on-Line) retail activity.

The modernization and revision of the Distance Selling Directive which started, constitute a unique opportunity to adopt a **full harmonisation approach**. We fully support this effort.

The core principles we proposed above, do balance the interest of both consumers and companies and leaves enough commercial room for companies to differentiate their offer in the marketplace.

From our internal consultation with Distance Selling operators on TV or on the Net, in various major and emerging markets in the EU, they would greatly unify, clarify and simplify when implemented the understanding and application of the mutual rights and obligations of Distance Retailers and Consumers in Europe

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May 11, 2007

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