

**Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the implementation of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts’**

COM(2006) 514 final

(2007/C 175/07)

On 21 September 2006, the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 3 May 2007. The rapporteur was Mr Pegado Liz.

At its 436th plenary session, held on 30 and 31 May 2007 (meeting of 30 May) the European Economic and Social Committee adopted the following opinion by 61 votes, with 4 abstentions.

## 1. Summary

1.1 With this Communication on the implementation of Directive 1997/7/EC, the Commission is not only informing the Council, the European Parliament and the EESC of the results of the directive's transposition and implementation, but is also opening up a public consultation of the interested parties, with the aim of gathering their opinions. The Commission does not, however, put forward any proposal for reviewing the Directive until the broader review of the consumer *acquis communautaire* is concluded.

1.2 Whilst noting the delay in the publication of this communication in relation to the deadlines set down in the directive, the EESC welcomes the initiative and agrees with a great number of the Commission's comments, many of which have in fact already been made in the Committee's own opinions, specifically those on the proposals for a directive on distance selling in general and on the distance selling of financial services in particular. The Committee also agrees with the need to bring the rules in this area into line with those of other legal instruments introduced in the meantime, in some cases without the necessary coordination and joint planning.

1.3 The EESC is of the view, however, that it would be valuable for a review of these rules to be carried out immediately, in conjunction with a review of those on the distance selling of financial services and certain aspects of electronic commerce, without waiting for work on the review of the Community *acquis* concerning consumer contracts to be concluded, out of a concern to make all the disparate provisions more accessible and easier to understand.

1.4 To this end, the EESC urges the Commission to carry out a detailed analysis of the responses to its public consultation exercise that have been received in the meantime, to which it should add reliable statistical data on the scope and scale of distance selling in the internal market, culminating in a public hearing of the interested parties.

1.5 The Committee agrees with most of the Commission's suggestions on improving the directive's wording and structure but reaffirms its position — already stated in previous opinions

— that the directive's scope should not be confined to business/consumer relations and that it would be extremely useful to reconsider this aspect in order to bring it into line, in fundamental aspects, with the scope of the regulations on electronic commerce.

1.6 The EESC disagrees with the Commission's assessment of the consequences of the use made of the 'minimum clause', which it does not consider to be the cause of the directive's implementation problems — which are rightly highlighted. The Committee does not, however, reject the possibility of envisaging a move towards total harmonisation, by means of regulation, provided that consumers are guaranteed a higher level of protection.

1.7 With the aim of contributing to an in-depth review of the rules on distance-selling, the EESC is putting forward a broad range of specific recommendations, which it considers should be studied, at the present stage of development of the internal market, in order to boost consumer safeguards and confidence, guaranteeing protection in this type of transaction equivalent to that enjoyed by consumers concluding contracts face-to-face.

1.8 The EESC also points to the need for a particular focus on providing contracting parties — particularly less well-informed consumers — with real information, and also that there should be an effective system for sanctioning practices that breach existing legal provisions.

## 2. Gist of the Communication

2.1 With the Communication on the implementation of Directive 1997/7/EC of 20 May 1997 (COM (2006) 514 final of 21 September 2006), the Commission sets out to report to the Council, the European Parliament and the European Economic and Social Committee on the directive's transposition and implementation in the period of around 10 years since its publication, thus fulfilling the requirement set out in Article 15(4) of the directive, albeit with a delay of some six years.

2.2 As well as identifying some problems in the Directive's implementation <sup>(1)</sup>, arising mainly from its 'wording' and from 'translation problems' in some language versions, the Commission comments on what it considers to be 'significant divergences between national laws as a result of the use of the minimum clause' and the Directive's potential inability to cover 'new technologies and forms of marketing'.

2.3 Lastly, the Commission has drawn up a 'questionnaire', to be returned by 21 November 2006, aimed at ensuring that there is 'public consultation' of the parties concerned, in order to confirm or disprove its observations, and envisages a public hearing.

2.4 Despite acknowledging that the rules put in place reveal design faults and difficulties of interpretation, which are the cause of problems in implementation, the Commission does not consider it 'appropriate' to put forward any proposal for reviewing the Directive until the diagnostic phase of the review of the consumer *acquis communautaire* is concluded, and no firm deadline has been set for this.

2.5 While this opinion was being drafted, the Commission made available 84 responses received to the above-mentioned consultation and published a working paper summarising many of the responses received. The Commission proposes to complete its analysis of the remaining responses in the near future and to carry out a more detailed impact study.

### 3. The EESC's main comments on the Commission's observations

#### 3.1 General

3.1.1 The EESC welcomes the Commission initiative, but deplores the fact that it was not implemented by the date originally scheduled (June 2001) or, at the very least, within the four-year deadline for transposition (June 2004) and considers that most of the issues raised today could have been addressed and resolved at least three years ago, with obvious benefits.

3.1.2 The EESC would point out that many of the issues now raised in the Communication have already been addressed in EESC opinions, dating right back to the Directive's drafting phase.

In its opinion on the Proposal for a Council Directive on the protection of consumers in respect of contracts negotiated at a distance (distance selling) <sup>(2)</sup>, the EESC had already warned of

<sup>(1)</sup> The Commission decided deliberately to exclude from the scope of its observations and comments aspects such as 'inertia selling', 'payment by card' and 'redress'.

<sup>(2)</sup> EESC opinion published in OJ C 19/111, 25.1.1993, rapporteur: Roberto Bonvicini.

the need for some of the concepts set out in Article 2 of the directive, specifically those concerning contracts covered by the directive and the very concept of 'the consumer'.

The EESC had also expressed the view that the Commission should be clearer as regards the right to withdraw from a contract set out in the directive which, in its opinion, should be understood in the context of the right to reflect and should not be confused with or jeopardise consumers' right to terminate the contract, provided that this has not been completed or that fraudulent practices have been detected.

The EESC also drew attention to the fact that the right to withdraw from a contract within seven days is less generous than that already existing in other directives and in current legislation in some Member States and advised the Commission to harmonise time limits for exercising this right. The EESC's call for clarification of the rules on the right to reflect was, in fact, reiterated in the opinion on the Proposal for Distance Selling of Financial Services <sup>(3)</sup>.

Furthermore, similar criticism had already been made a long time ago in the most highly respected specialist academic publications <sup>(4)</sup>.

3.1.3 The EESC is surprised at the purported lack of information available to the Commission on the date of entry into force of various Member States' provisions for transposition <sup>(5)</sup> and is also surprised that, given that some flagrant breaches in transposition by some Member States have supposedly been observed, there has been no news of infringement proceedings being brought against these Member States or of the outcome of any such proceedings.

3.1.4 The EESC also considers that it would have better reflected a genuinely participatory process if the Communication had been *preceded* rather than followed by public consultation, in order to avoid many of the Commission's comments and observations being based merely on subjective 'impressions' or 'opinions' <sup>(6)</sup>.

The Committee also recalls the 10 March 2000 report on Consumer complaints in respect of distance selling (COM(2000) 127 final) and recommends that a similar exercise be carried out, but this time on the basis of an objective analysis of all the responses to the public consultation, updating and comparing data and thus creating an objective basis for reflection.

<sup>(3)</sup> EESC opinion published in OJ C 169/43, 16.6.1999, rapporteur: Manuel Ataíde Ferreira.

<sup>(4)</sup> See, for all of these, 'La protection des consommateurs acheteurs à distance', minutes of the seminar organised by CEDOC, edited by Bernd Stauder in 1999, the most important papers being those by Hans Micklitz, Jules Stuyck, Peter Rott and Geraint Howells (Bruylant, 1999).

<sup>(5)</sup> Belgium (?), Hungary, Latvia and Lithuania.

<sup>(6)</sup> See, for example, the second paragraph of point 3 '... it feels that ...', and the third paragraph of the same point 'The Commission believes that ...'.

3.1.5 In the present circumstances, the EESC supports the Commission's suggestion and calls for a public hearing to be held, involving all parties concerned, whilst ensuring that the issue is not subsumed into the broader debate on the Community consumer *acquis*, on which a lengthy technical study of some 800 pages <sup>(7)</sup> was published only recently, together with the Commission Green Paper <sup>(8)</sup>.

3.1.6 Given the progress of the CFR-net's <sup>(9)</sup> work to date, the EESC doubts that it would be beneficial or advisable to make a review of this directive dependent on completion of the work and consultations on the entire Community *acquis* relating to consumer law and on the decisions that might eventually be taken, even in the latest slimmed-down version presented by the Commission <sup>(10)</sup>.

3.1.7 The EESC further suggests that the legal nature of the Community instrument to be used in a future review of the directive might be reconsidered, if it is felt that the conditions could be met to ensure that the fundamental changes required in this area are made by means of regulation, which would be the most appropriate approach <sup>(11)</sup>, whilst preserving the basic aim, which is to re-establish balance and equality between the parties concerned, as is supposed to be the case in face-to-face transactions concluded on business premises.

## 3.2 Specific comments

3.2.1 The Commission's comments on the Directive can be divided into two types:

<sup>(7)</sup> 'EC Consumer Law Compendium — Comparative Analysis', Prof. Dr. Hans Schulte-Nolke, Dr. Christian Twigg-Flesner and Dr. Martin Ebers, 12 December 2006, University of Bielefeld (drawn up for the European Commission under the Services Contract No 17.020100/04/389299: 'Annotated Compendium including a comparative analysis of the Community consumer *acquis*').

<sup>(8)</sup> COM(2006) 744 final, of 8 February 2007, on which the EESC has already set up a Study Group to work on its opinion, for which the rapporteur will be Mr Adams.

<sup>(9)</sup> The need for which is called into question by some of the best recent theory (see: 'The need for a European Contract Law — Empirical and Legal Perspectives', Jan Smits, Europa Law Publishing, Groningen, 2005).

<sup>(10)</sup> In fact, of the 22 Community legal instruments identified by the Commission in May 2003, the review's scope has now been whittled down to just eight directives.

<sup>(11)</sup> The regulation option would help to remedy the various situations described by the Commission where the directive on distance selling has not been transposed, or has been incorrectly transposed, for example, as regards Article 4(2) on the principle of good faith, Article 6 on time limits for reimbursement when the right of withdrawal is exercised and situations excluding the right of withdrawal. A regulation of this nature could, to be specific, cover areas such as the definition of concepts, their application to goods and to individuals and their respective exceptions, the form, content, scope and timing of the provision of information, the exercise and consequences of the right of withdrawal, completion of the contract and payment arrangements and the principle of fair trading, which is particularly relevant.

a) Comments concerning its wording/structure

b) Comments concerning its implementation.

A) Wording/structure

3.2.2 With regard to the directive's wording/structure, the EESC agrees with the Commission on the following points:

a) some concepts and definitions should be revised, in order to clarify their meaning <sup>(12)</sup>;

b) timing and rules on communicating prior information should be clarified, in order to avoid divergent interpretations;

c) the harmonisation of some provisions with the Directive on Unfair Commercial Practices <sup>(13)</sup>;

d) improved information on pricing in premium rate services;

e) the crucial need for a more complete description, classification and definition of the nature of the withdrawal or 'cooling-off' period, in its dual task of 'a technique for protecting the contractual intent to ensure that the consumer has given full consent' and of 'sanctioning failure to respect formalities that the supplier must observe in order to meet information obligations' <sup>(14)</sup>, in order to bring it into line with similar, but legally distinct concepts, such as the right to reflect (or to 'warm up'), the right of withdrawal and the right to terminate;

f) likewise, harmonisation is required of this time limit, of the way in which it is calculated, of the effects, in particular the financial effects, resulting from its application (reimbursement, return, etc.), of the way in which contracts are rendered null and void by explicitly or implicitly excluding this time limit, and also of the exceptions to the rule <sup>(15)</sup>;

<sup>(12)</sup> For example, the concepts of 'organised [distance] selling', 'operator of means of distance communication', 'immovable property rights', in particular those concerning 'timeshare' property, 'regular roundsmen', 'transport', including car rental, 'specific circumstances', 'durable medium', etc.

<sup>(13)</sup> Directive 2005/29/EC of 11 May 2005, OJ L 149, 11.6.2006; EESC Opinion: OJ C 108, 30.4.2004.

<sup>(14)</sup> See: Cristine Amato: 'Per un diritto europeo dei contratti con i consumatori' [Towards a European consumer contract law], p. 329, Giuffrè, Milan 2003.

<sup>(15)</sup> It should be noted that, when adopting Directive 97/7/EC, the Council issued a statement urging the Commission to study the possibility of harmonising existing methods of calculating reflection periods in current consumer protection directives.

g) the need to review, in particular, the exclusion of 'auctions', bearing in mind not only that the same expression has different legal meanings in the various translations and national legislative traditions <sup>(16)</sup>, but also that 'auctions' held on the Internet raise specific problems that were not known at the time the Directive was being drafted <sup>(17)</sup>.

3.2.3 The EESC does not agree with the Commission, however, on:

- a) the exclusion from the outset of financial services from a single directive on distance selling <sup>(18)</sup>;
- b) whether the distinction should be maintained between the 'distance selling' and 'electronic commerce' directives, given the partial overlap of their content and the fact that they offer contradictory solutions in various key aspects of their rules concerning situations that are in practice identical <sup>(19)</sup>; the apparent justification for this lies merely in the fact that the internal 'origin' of the legal texts is not the same or has not been properly coordinated between the different departments.

3.2.4 The EESC also recommends that the Commission endeavour to simplify all the provisions relating to distance selling, which are currently scattered across a number of different instruments, and make them more accessible and easier to understand.

## B) Implementation-related issues

3.2.5 As regards the Directive's implementation and given the EESC's knowledge of experience in some Member States, it can agree with and support most of the Commission's comments, but considers that more detailed work should be carried out in order to give a complete rather than a piecemeal overview of situations where there is divergence or incompatibility regarding the Directive's transposition or interpretation in all Member States.

The EESC, therefore, urges the Commission, once it has studied the answers to the questionnaire, to carry out such a study, and to make its results known.

<sup>(16)</sup> For example, the Portuguese legal concept of 'leilão' does not have the same meaning as the terms 'vente aux enchères', 'auction', and 'vendita all'asta' in French, Anglo-Saxon or Italian law.

<sup>(17)</sup> See the important article by Prof. Gerard Spindler, of the University of Gottingen, 'Internet-Auctions versus Consumer Protection: The Case of the Distant Selling Directive', in German Law Journal, 2005 Vol. 06 no 3 pp. 725 et seq.

<sup>(18)</sup> As stated in the opinion on the proposed directive concerning the distance marketing of consumer financial services (EESC Opinion published in OJ C 169/43, 16.6.1999), rapporteur: Manuel Ataíde Ferreira. This was also the opinion expressed by the European Parliament at its two readings.

<sup>(19)</sup> Directive 2000/31/EC of 8 June 2000, OJ L 178, 17.7.2000; this was, in fact, the view set out in the Opinion on the Directive, published in OJ C 169/36, 16.6.1999, rapporteur: Harald Glatz.

It should be added that the Commission has not yet provided the statistical data which make it possible to assess the proportion of distance selling to consumers in all cross-border transactions, or which show the volume of this type of business in relation to transactions with consumers in each Member State. Such information cannot be gleaned with the necessary objectivity from the most recent data collected by Eurobarometer <sup>(20)</sup>; this information is crucial to assessing criteria for inclusion and for determining whether the exemptions set out in the directive are appropriate.

3.2.6 The EESC is concerned at the position adopted by the Commission, when, on the one hand, it identifies a number of problems in the directive's transposition and yet, on the other, expresses doubts regarding its relevance to consumer confidence, stating that it will not make any changes and failing to announce more vigorous measures to address these transposition-related problems.

3.2.7 First and foremost, concerning the scope of Directive 1997/7/CE, the Commission itself acknowledges that the exemptions set out in the directive have been transposed differently in the Member States and that some of these exemptions should be reconsidered. The EESC thus calls on the Commission to take more concrete measures in this area.

3.2.8 Regarding the effects of the use of the 'minimum clause' the EESC disagrees with the Commission that all of the situations it lists result from the incorrect implementation of the clause set out in Article 14.

3.2.8.1 The EESC considers, rather, that most of the very real discrepancies observed are not the consequence of the minimum clause being used improperly, but rather of identified shortcomings in the Directive's design, wording and transposition/translation.

3.2.8.2 The EESC is of the view that the minimum clause, which allows Member States to go beyond Community requirements in directives for minimum harmonisation, while complying with the Treaty, as stipulated in Article 153, is a useful tool that will ensure a high level of consumer protection, and will help ensure that account is taken of each national system's specific cultural, social and legal characteristics.

3.2.8.3 The EESC nevertheless suggests that, insofar as a higher degree of consumer protection is indeed secured, certain areas of law should be subject to total harmonisation — and preferably in the form of a regulation — as a means of guaranteeing uniformity, and this could also apply to the directive under consideration.

<sup>(20)</sup> See Eurobarometer Special Edition No 252, 'Consumer protection in the Internal Market', September 2006, requested by DG SANCO and coordinated by DG Communication. These data do, however, give some indication of the broad consumer trends in light of Community work on completion of the internal market.

## C) Issues not covered

3.2.9 The EESC considers that there are other issues that might warrant reassessment in a review of the Directive and to which the Communication does not refer.

3.2.10 Specifically, these are:

- a) whether the Directive on the distance selling of financial services should be reviewed together and at the same time as this Directive; the EESC wishes to express its clear disagreement with the thrust of the Commission Communication of 6 April 2006 (COM(2006) 161 final);
- b) retention of the 'exclusive' nature of the use of means of distance communication instead of the concept of 'predominance' (Article 2(1));
- c) the legal nature of the request to conclude a contract as an invitation to purchase and the essential nature of its terms and characteristics as constituent elements of the subject of the sales contract itself;
- d) the entire 'burden of proof' system that the Directive fails to regulate, or regulates poorly, deferring to the general principles of Member States' law, which governs contracts with consumers, unless they make use of the mechanism for reversing the burden of proof provided for in Article 11(3);
- e) retention of relations with 'consumers' — regardless of the debate as to whether its definition is correct (on where there is disagreement) — as the Directive's only focus, when the matter generally concerns a certain type of selling, with certain characteristics, and not solely the recipient, as is correctly provided for in the e-commerce Directive;
- f) clarification of what is meant by '*means of distance communication*' and '*organised distance sales or service provision scheme*' and the need for a more in-depth study of the justification for retaining this criterion and of the reasons for excluding special protection for consumers purchasing at a distance from businesses using these means only sporadically;
- g) retention of the seemingly unjustified exclusion of its application to package holidays and timeshare contracts, as well as to the distance-selling of foodstuffs;
- h) the absence from the list of prior information to be given to consumers of after-sale services and commercial guarantees, to be reviewed in line with the Directive on guarantees <sup>(21)</sup>;
- i) the rules on the right of use, the duty of care and the risk of an item's loss or deterioration during the withdrawal period and its transport, either from the business to the consumer or vice-versa, in the case of returns, regardless of the reason (a decision to withdraw or the item being non-compliant/defective/broken), in line with the rules established by the directive on guarantees;
- j) the issue of the language of contracts, which should no longer be 'a matter for the Member States' (recital 8);
- k) the definition of a 'working day' in European Community law, which is essential for a harmonised calculation of deadlines, in particular where cross-border sales are concerned, or simply the setting of all deadlines for consecutive calendar days;
- l) the form in which the right of withdrawal is communicated — whether or not proof of receipt of communication is required — with the respective legal consequences;
- m) prevention of the risk of non-compliance with the contract and the rules on failure to complete the contract in time or on partial fulfilment of the obligation to supply goods or to provide services <sup>(22)</sup>;
- n) retention of the exclusion of goods made to the consumer's specifications;
- o) the need to give greater consideration to the growing phenomenon of business conducted by telephone or by mobile phone (m-commerce), including contemplation of a general 'opt-in' system to protect against unsolicited offers;

<sup>(21)</sup> Directive 1999/44/EC of 25 May 1999, OJ L 171, 7.7.1999. The EESC had already stated, in its opinion on the proposed directive on distance selling, that consumers should be given information on the existence of the rules on guarantee, in particular in the event of failure or delay in fulfilling the contract.

<sup>(22)</sup> The EESC has already stated its position on this matter in the opinion on the directive on distance selling, alerting the Commission to the need to reaffirm safeguards for financial interests and the prevention of risks arising from non-fulfilment of the contract, for example by setting penalties. The EESC has also suggested that a guarantee fund be created by the companies in the sector to cover these situations.

- p) the reference to the rules set out in the Directive on the counterfeiting and certification of goods and the protection of copyright and associated rights that are weakened in distance selling in particular;
- q) the extension of the obligation to provide information to all interested parties, with particular emphasis on the most vulnerable groups of consumers, such as minors, the elderly or the disabled, as already set out in the directive on unfair commercial practices;

- r) the need to provide for effective and sufficiently dissuasive sanctions for non-compliance with the obligations set out in the Directive.

3.2.11 The EESC is of the view that proper consideration of these issues is crucial to achieving the aims that the directive proposes to guarantee, in other words, that consumers of goods and services purchased at a distance should enjoy protection equivalent to the protection rightly provided in contracts concluded face to face.

Brussels, 30 May 2007.

The President  
of the European Economic and Social Committee  
Dimitris DIMITRIADIS

**Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council amending Council Directive 78/855/EEC concerning mergers of public limited liability companies and Council Directive 82/891/EEC concerning the division of public limited companies as regards the requirement for an independent expert's report on the occasion of a merger or a division'**

COM(2007) 91 final — 2007/0035 (COD)

(2007/C 175/08)

On 29 March 2007, the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 3 May 2007. The rapporteur working without a study group was **Ms Sánchez Miguel**.

At its 436th plenary session, held on 30 and 31 May 2007 (meeting of 30 May), the European Economic and Social Committee adopted the following opinion by 143 votes, with 26 against and 12 abstentions.

## 1. Introduction

1.1 The Commission's proposal to amend the legislation governing mergers or divisions of public limited companies is part of the plan to modernise company law and improve corporate governance in the EU <sup>(1)</sup>. It provides for an action plan to complete a radical legislative reform for the short, medium and long term that does more than simply execute the proposals for Directives still pending.

1.2 Also, at a more general level, Annex III of the Action Programme for Reducing Administrative Burdens in the European Union <sup>(2)</sup> presents ten specific proposals for introducing 'fast track actions', with the aim of reducing minor requirements that do not change the level of legal protection. This is the purpose of the proposal under discussion, which simply

abolishes the expert report on the draft terms of mergers or divisions, provided 'all' shareholders agree.

1.3 It should be noted that Article 8(4) of Directive 2005/56/EC on cross-border mergers of limited liability companies <sup>(3)</sup> already waives the requirement for an expert report on the draft terms of mergers if all the members of the companies agree. Similarly, the last amendment of Directive 77/91/EEC on the formation of public limited liability companies and the maintenance and alteration of their capital <sup>(4)</sup> introduced two new articles, 10a and 10b, under which the expert report is not required for non-cash contributions in circumstances where the real value of the assets contributed can be guaranteed.

<sup>(1)</sup> Communication from the Commission to the Council and the European Parliament, COM(2003) 284 final.

<sup>(2)</sup> COM(2007) 23 final.

<sup>(3)</sup> OJ L 310 of 25.11.2005, p. 1.

<sup>(4)</sup> Directive 2006/68/EC, OJ L 264 of 25.9.2006.