

CEA position on the Proposal for a Directive on Consumer Rights

CEA reference:	SMC-CON-09-026	Date:	18 November 2009
Referring to:	COM(2008) 614 final		
CEA ID Number:	9901771859-89		
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| Introduction

■ Full harmonisation approach

The CEA supports the objective of the proposed directive to ensure a high level of consumer protection while establishing a real retail internal market.

Insurance undertakings providing services to consumers operate at local, national, European and international level. Some operate on a cross-border basis via freedom of establishment or freedom of services and some provide services at distance and on-line, domestically or across borders. Divergences between national consumer legislation make it legally uncertain, costly and burdensome for retail insurers to operate across border. The reduction of fragmentation in the retail insurance market is therefore a priority for the CEA.

The CEA believes that the proposed Directive will help to tackle some of the existing obstacles to cross-border business. The CEA particularly welcomes the full harmonisation approach, which, we believe, will help put an end to divergences between national consumer protection rules. Full harmonisation will help to reinforce legal certainty and predictability, thus lowering compliance costs and burdens for companies wishing to trade cross-border and enhancing consumer confidence in foreign operators and markets.

The proposal will make it easier for operators wishing to trade cross border to do so. However, it will not, per se, encourage operators to provide goods and services cross-border.

■ Scope of the proposed directive

The CEA strongly supports the scope of the directive as proposed by the European Commission. Some provisions of the proposal, such as those on distance and off-premises contracts, do not apply to insurance. Retail insurance activities are already subject to detailed and comprehensive sectoral Directives (life insurance and non-life insurance directives, insurance mediation directive, directive on the distance marketing of consumer financial services), which provide consumers with extensive protection rules adapted to insurance policyholders' needs.

However, a series of key provisions of the proposed Directive applies to insurance. These provisions are likely to have an important impact. Our comments on these provisions are the following:

| Article 27: Costs and damages

"(...) 2. Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26."

Article 27 is new compared to the current directive on the sale of consumer goods and associated guarantees, where remedies for the lack of conformity with a sales contract may include the repair and/or replacement of goods (Article 3, 1999/44/EC).

The new phrase *"for any loss not remedied in Article 26"* implies that a trader may be held liable for any damages resulting from nonconformity of a sales contract regardless of any fault or negligence on the part of the trader *or* the consumer. This implements a "no fault" liability system (ie strict liability) which would greatly increase the traders' risk exposure and yet would set no limits to liability, thereby leading to an unpredictable increase in associated costs. In other words, Article 27, as drafted, would make it extremely difficult for traders to predict when they might be held liable and thus difficult for insurers to predict the costs of covering that liability.

As the benefits of insurance are optimised when liability scenarios and resulting claims can be identified beforehand, the proposed strict liability system is likely to hinder these benefits. If insurers are unable to properly make risk and cost assessments, they are likely to either:

- (1) withdraw from the market; or
- (2) inaccurately predict the amount of insurance capacity necessary to handle the costs of increased liability.

Both these consequences would be detrimental to consumers, as the diminishment of insurance options or underestimation of claim amounts can lead to less available insurance for the adequate compensation of consumer claims. Thus, to ensure the successful effectuation of this directive, a *fault-based* liability scheme should be adopted as a prerequisite for the imposition of any damage.

Moreover, the CEA agrees with the Commission's interpretation of this article as set forth in Section 3, page 6 of its 9 October 2009 note to this directive:

"Article 27(2) means that the Member States are obliged to provide consumers with a right to damages for losses not remedied under the proposal. However, the conditions of the trader's liability (e.g. strict liability or culpability), and the type and amount of the damage will have to be determined under national law."

While the above paragraph clearly stipulates the conditions of the trader's liability according to national law, the directive itself, which is the legally binding instrument, lacks legal clarity in this regard. To avoid confusion and more easily facilitate the objectives of the Commission's proposal, the CEA wishes to see the deference to national law clarified in the directive and suggests that Article 27 be amended as follows:

"Without prejudice to the provisions of this Chapter, the consumer shall be able to claim damages provided for by national law for any loss not remedied in accordance with Article 26."

| Article 31: Transparency requirements of contract terms

"(...) 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.

The term "real" is vague and leaves the door open to various interpretations. The provision should rather provide that the consumer shall be given "*an opportunity of becoming acquainted with them [the contract terms] in a reasonable manner before...*".

The CEA notes that the consumer is not obliged to use this opportunity. As a result, we understand that the consumer could, in line with his decision-making freedom, release the trader from his obligation. However, the current wording, combined with Article 43, might lead to the conclusion that the trader is obliged to provide the consumer with the contract terms even when the consumer expressly indicates he does not want to be acquainted with them. Therefore, we suggest introducing a new recital in the Directive confirming explicitly the possibility for the consumer to release the trader from his obligation.

| 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."

The expression "*assessment of the main subject matter of the contract*" is not clear. We suggest replacing it by the wording used in Directive 93/13/EEC on unfair terms, ie "*Paragraphs 1 and 2 shall not apply in relation to the main subject matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, provided that (...)*"¹.

| Article 34: Terms considered unfair in all circumstances

| Article 35: Terms presumed to be unfair

The CEA considers that listing the terms considered unfair in all circumstances and those presumed to be unfair may not be the most appropriate, effective way to proceed since it excludes taking into account the specific circumstances of the case and of the time. A possible alternative would be to draft a non-exhaustive list of terms which may be considered unfair.

In addition, the CEA notes that once a term has been included in the lists it will be very difficult to remove it. Therefore it is very important that:

- The lists are as clear as possible and do not include concepts which may lead to confusion or misinterpretation.
- Clear and detailed explanations justifying why the terms are included in Annexes II and III are provided.

For the same reason, the process that the Commission will use to consult stakeholders on proposals for terms to be added to Annexes II and III should be clarified (see our comments on Article 39).

¹ Article 4 (2) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: "*Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.*"

| Annex II: Contract terms which are in all circumstances considered unfair

- Annex II (a) stipulates that contract terms *“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”* shall be unfair.

Insurers increasingly offer insurance products with additional service components (assistance). These components are often delivered not by the insurer himself but by a subcontractor. The insurer has to be able to limit his liability in case this subcontractor does not deliver or delivers with a certain delay, causing thus a personal injury to the consumer. Insurance contracts need therefore to be explicitly exempted from the ban of Annex II (a).

- Annex II (b) and (e) contain different concepts and would therefore be clarified if divided respectively in two new parts.
- Annex II (d) requires that contract terms, which have the object or effect of *“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”* shall be unfair in all circumstances.

The wording *“restricting the evidence”* lacks clarity: does it cover an acknowledgment of receipt, which is nevertheless useful for proof purposes? We therefore suggest the following phrasing: *“(d) restricting inappropriately the evidence available (...)”*

| Annex III: Contract terms which are presumed to be unfair

The CEA has the following concerns about the terms included in Annex III:

- Annex III (1) (a) lays down that contract terms *“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”* are presumed to be unfair.

The CEA suggests specifying *“excluding or limiting inappropriately the legal rights of the consumer (...)”* in order to allow appropriate case-by-case evaluations.

- Annex III (1) (c) provides that a contract term is presumed to be unfair in the case it requires a consumer who does not meet his obligations to pay damages which significantly exceed the harm suffered by the trader.

It is not possible for the user of general terms and conditions to consider every individual situation in advance and to prevent terms from being rejected as unfair. Therefore, it should suffice to give the policyholder the possibility to provide evidence to the contrary in the case of deviating developments on a case-by-case basis. Therefore, we propose to rephrase as follows:

Contract terms are presumed to be unfair when they have the object of *“requiring any consumer to pay lump-sum damages if the lump sum exceeds the harm to be expected in the ordinary course of events in the cases covered and if the other contracting party is not expressly allowed to prove that no harm has been caused at all or that such harm is significantly lower than the lump sum;”*

- Annex III (1) (e) stipulates that contract terms *“enabling the trader to terminate an open-ended contract without reasonable notice except where the consumer has committed a serious breach of contract”* are presumed to be unfair.

The expression *“serious breach of contract”* is too ambiguous not to give raise to various, even divergent interpretations. We therefore propose to delete this requirement, ie *“except where the consumer has committed a serious breach of contract”*.

- Annex III (1) (f) stipulates that contract terms “*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*” are presumed to be unfair.

“Long notice” is too imprecise and should be clearly defined. The CEA suggests fixing this period to three months, ie “*has to give a ~~long~~ notice of more than three months to terminate the contract*”.

- Annex III (1) (i): contract terms “*giving the trader the possibility of transferring his obligations under the contract, without the consumer’s agreement*” are presumed to be unfair.

The CEA considers that a transfer of obligations by a trader shall not be unfair unless there is, in fact, some detriment to the consumer as a result. Otherwise, its effects would be too broad and would preclude transfers of good faith. We suggest the following specification: “*i) giving the trader the possibility of transferring his obligations under the contract, without the consumer’s agreement and causing detriment to the consumer*”.

- Annex III (1) (k) provides that contract terms “*k) enabling the trader to unilaterally alter the terms of the contract including the characteristics of the product or service*” are presumed to be unfair.

Insurance contracts are usually long-term contracts. Many external factors may vary in the course of the contract, making it necessary to introduce these changes into the contract: changes in law, or resulting from courts’ or ombudsmen’s decisions, implementation of industry codes of practice, change of market or tax rates, etc. Therefore the CEA considers that such a clause as above shall be presumed unfair only when there is no valid reason specified in the contract for doing so. Such a valid reason could be eg to respond proportionally to the changes mentioned above. We propose to modify Annex III (1) (k) as follows: “*k) enabling the trader, without any valid reasons, to unilaterally alter the terms of the contract including the characteristics of the product or service*”.

- Annex III (1) (l) stipulates that a term is presumed to be unfair if it permits that contract terms communicated to the consumer in a durable medium can be unilaterally amended through on-line contract terms which have not been agreed by the consumer.

The concrete cases that this rule is supposed to address are not clear, particularly since Annex III (1) (k) already provides for a comprehensive ban on amendments. The CEA therefore proposes to either specify this provision or delete it without replacement.

| Article 39: Review of the terms in Annexes II and III

“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).”

Some of the CEA members, such as the German and Italian insurance associations, consider that the review of the terms listed in Annexes II and III shall be made through co-decision procedure. They propose therefore to delete Articles 39 and 40, including the committee for unfair terms in consumer contracts. They consider indeed that enactment of legal instruments of a legislative nature should be left to the European legislator and not be delegated to the European Commission. In fact, the lists of terms concerned are essential evaluations in terms of the law applicable to general terms and conditions. Moreover, consideration should be given to the fact that, according to the German Constitution, any legally valid decision on the effectiveness of terms is incumbent on jurisdictions. It would be incompatible with this if the European Commission made such evaluations in a binding manner, as is to be achieved

by Article 39. In fact, jurisdictions would basically be bound by the evaluation of the directive and could basically not deviate from this.

Other CEA members, including the British insurance association, propose to modify the review clause as follows:

- Article 39 provides that the Commission “*shall*” review the terms in Annexes II and III based on Member States’ feedback. The wording seems to imply that the review will take place regardless of the opinion of the Committee on unfair terms in consumer contracts (Article 40). These CEA members suggest therefore to replace “*shall amend...*”, which is too prescriptive, by “*may amend...*”.
- These CEA members also point out that the possibility to review the Annexes implies a high level of legal uncertainty, which would expose the business community, which relies on long-term contracts, to unpredictable, additional costs and burdens. Therefore, they recommend ensuring that the review process includes a serious consultation of all interested parties, including business groups, as well as a thorough evaluation of the impact of including new terms in the Annexes, notably in terms of business compliance costs.

| 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.”

The CEA has concerns about the potential effect of prohibiting inertia selling. For instance, in the UK, from 1 January 2012 UK employers will be legally obliged to automatically enrol employees in contract-based pensions pursuant to the Pensions Act 2008. Does Article 45 interfere with this obligation? A priori employees’ auto-enrolment does not constitute a commercial practice and therefore falls outside the scope of the proposed directive. However, an explicit clarification that Article 45 does not affect the ability of contract-based pensions to automatically enrol employees would be welcome.

In addition, Article 45 may result in prohibiting tacit renewals of insurance contracts, which is a useful practice that benefits consumers. A clarification that such a prohibition is not sought is therefore needed.

About the CEA

The CEA is the European insurance and reinsurance federation. Through its 33 member bodies – the national insurance associations – the CEA represents all types of insurance and reinsurance undertakings, eg pan-European companies, monoliners, mutuals and SMEs. The CEA represents undertakings that account for approximately 94% of total European premium income. Insurance makes a major contribution to Europe’s economic growth and development. European insurers generate premium income of €1 100bn, employ one million people and invest €6 900bn in the economy.