

## Commission's proposal for a Directive on consumer rights FIEC POSITION

*FIEC is the European Construction Industry Federation, representing via its 34 national Member Federations in 29 countries (27 EU & EFTA, Croatia and Turkey) construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as "global players", carrying out all forms of building and civil engineering activities.*

### **Construction contracts should NOT fall into the scope of the directive on consumer rights:**

Firstly, the conclusion of a construction contract is subject to specificities which cannot be associated to doorstep selling: construction is the only sector where the trader, following solicitation by a consumer, always needs to visit the works site. Following this visit, the trader is able to evaluate the works to be undertaken and, afterwards, could propose a personalized estimate adapted to the consumer's needs and the layout of the premises. The signature of architecture and construction contracts at the place of the client is of common practice in order to explain technical aspects orally and, also, by courtesy.

In the case where the presence of the trader is requested for an urgent intervention, it may happen that the final intervention goes beyond the original repair requested by the consumer. This cannot be considered as doorstep selling as the trader has an obligation of information towards the consumer and may therefore propose an adapted offer, more suited to the client's needs.

Considering these specificities, most construction contracts would fall in the scope of the directive, according to the definition of "off-premises contracts", as defined in the proposed directive (article 2, paragraph 8).

However, provisions applied to "off-premises contracts" as proposed in the directive lead to major difficulties in interpretation, transposition and proof. For examples:

- **Article 12 of EC proposal:** a withdrawal period of 14 days implies that all construction contracts are subject to hazards and makes it foolhardy for the trader to order tailor-made materials or to start the works at once. It would actually delay the onset of works for all contracts, detrimentally to the consumer.
- **Article 13 of EC proposal** means that the consumer would have the possibility to withdraw 3 months after the completion of construction works (e.g. new house building or renovation works), in case of omission of information by the trader! This is clearly disproportionate and inequitable.
- **Article 16 of EC proposal:** in case of withdrawal, the trader would then be obliged to reimburse the consumer while the contract has been at least partially performed. In extreme cases, this means that a consumer could be in a situation that, at the end of the day, he has got a house for free.

**Therefore, construction contracts should be excluded from the scope of the definition of "off-premises contracts".**

Moreover, FIEC stresses that this is the solution which has been chosen in the draft Common Frame of Reference, where "contracts for the construction of immovable property" have been excluded from the scope of the definition of "contracts negotiated away from business premises" (II. – 5:201). Without prejudging the outcomes of this legal theoretical exercise, it is very important that the various (legislative or non-legislative) texts which apply to the construction are consistent with each other!

Article 20 of the EC proposal (chapter III) should consequently read:

"(1) Articles 8 to 19 shall not apply to distance and off-premises contracts: (a) for the sale of immovable property, **works or other rights** relating to ~~other~~ immovable property **rights**, except for rental ~~and works~~ relating to immovable property;"

Secondly, construction contracts cannot be considered as "mixed-purpose contracts" as they rather constitute a very specific type of contracts, where it is always question of a (construction) service, together with the provision of (construction) products/materials. Provisions applicable to the supply of goods are not always – rather seldom – suitable for materials on a construction site, considering that most of them are transformed or incorporated in the building. Moreover, provisions on goods for mixed-purpose contracts, introduced by article 21 paragraph 1 of the proposed directive, would lead, if applied to construction products/materials, to a conflict in the applicable regimes of guarantee: construction works are already covered by specific guarantees (e.g. "garantie décennale" in France).

**Therefore, construction contracts should also be excluded from the scope of the definition of "mixed-purpose contracts".**

|                                                                   |
|-------------------------------------------------------------------|
| <b>ANNEX: additional background information for comprehension</b> |
|-------------------------------------------------------------------|

### 1. Comparison between the scopes of the existing directives concerned and the new proposal:

The original Commission's proposal for a directive on consumer rights (COM(2008)614 dated 8/10/2008) is aimed at merging together for better coherency and harmonisation 4 of the 8 EU consumer directives, namely :

- 93/13/EEC on unfair contract terms
- 99/44/EC on sales and guarantees
- 97/7/EC on distance selling
- 85/577/EEC on "doorstep selling"

As far as consumer information and the right of withdrawal are concerned, directives 97/7/EC and 85/577/EEC are the directives of reference.

#### ➤ Directive 97/7/EC on the protection of consumers in respect of distance contracts:

**Distance contract is defined as:** *"any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales of services provision scheme run by the supplier, who, for the purpose of the contract, **makes exclusive use of one or more means of distance communication** up to and including the moment at which the contract is concluded". (art. 2 paragr. 1)*

**MOREOVER**, art. 3 paragr. 1 (exemptions) states that: ***"This directive shall not apply to contracts concluded for the construction and sale of immovable property or relating to other immovable property rights, except for rental."***

So, this directive concerns contracts in the field of e-commerce, which clearly does not target construction contracts. Both the definitions proposed by the Commission and the Rapporteur maintain the reference to "exclusive use to distance communication", which also makes construction contracts out of this scope.

#### ➤ Directive 85/577/EEC "to protect the consumer in respect of contracts negotiated away from business premises":

While there is here no definition on the kind of contract targeted, the scope is detailed in article 1 and basically targets doorstep selling, that is, where *"the visit does not take place at the express request of the consumer"*.

**MOREOVER**, art. 3 paragr. 2 then states that: ***"This directive shall not apply to: (a) contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property."***

**EXCEPTION:** *"Contracts for the **supply of goods and for their incorporation in immovable property** or contracts for **repairing immovable property** shall fall within the scope of this Directive."*

So, this directive only concerns very specific cases where the contractor/craftsman goes door to door, without the request of the consumer, and proposes to undertake some repairs in the house or install some specific equipment. The wording used here is however too broad as the only contracts concerned should actually be those related to a good sale with installation of this good, where the main object of the contract is the good itself and the installation is accessory.

➤ **Scope of the new proposal for a consumer rights directive:**

The new proposal introduces a complete reversal of the situation: the question of “doorstep selling” is now broadened through the wording “off-premises contract”. According to the definitions of “off-premises contract” now proposed by the Commission and the Rapporteur, they are so broad that now **all** construction contracts would be concerned.

**MOREOVER**, construction contracts are not any more specifically excluded from the scope of the directive, but on the contrary in both cases explicitly mentioned as falling into the scope of the new proposal!...

**FIEC expresses major concerns about this and considers that such a major change in the scope of the directive cannot find a proper justification.**

**Indeed, the arguments used by the Commission and supported by the Rapporteur in recitals 31 and 35 DO NOT justify such an extension of the scope of the directive to ALL construction contracts!**

**2. The question of “unfair commercial practices” (recitals 31, 2<sup>nd</sup> part and 35):**

Both the Commission and the Rapporteur use the same wording in recitals 31 and 35 of the new proposal, which introduce considerations concerning existing aggressive practices in the field of “home improvement” and “non-urgent renovation works”.

The origin of this statement is to be found in the Commission Staff Working Document accompanying the proposals for a Directive on consumer rights – “ANNEXES” – and in particular in the Working Document of the Commission summarizing the responses to the former consultation on the Doorstep Selling Directive (2007).

According to both documents, the UK Office of Fair Trading is the only stakeholder explicitly mentioned and said that “high pressure selling was the biggest problem identified in the home improvement sector.”

While the Commission mentions double glazing, roof repair and conservatories as examples of such “home improvement” or renovation services, it appears that the analysis of the UK OFT only concerned double glazing, kitchens, bathrooms and heating systems...

In order to protect consumers from this kind of practices, the Commission and the Rapporteur propose that: ***“The scope of the information and withdrawal rules should be clarified and extended in order to cover this kind of contract”***.

While FIEC agrees that consumers should indeed be protected against this kind of practices, the way the Commission and the Rapporteur propose to do it (see above: question of **general** extension) is however not appropriate:

- firstly because a very specific problem to be avoided is targeted in the recitals 31 and 35, **BUT** its translation into the provisions of the directive leads to generalize the treatment of this specific phenomenon in including **all** construction contracts, which is a **totally disproportionate solution**;
- secondly because the specific problem targeted is in fact more specifically a question of aggressive or “unfair commercial practice”, which should rather fall under the scope of the **directive 2005/29/EC on unfair B2C commercial practices**. Should it not be the case at present, then, the scope of this directive should be extended to such specific cases.