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# AmCham EU's Amendments to the Commission Proposal for a Directive on Consumer Rights

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the European Commission's proposal for a Directive on Consumer Rights. We support the full implementation of the proposal to introduce one single set of rules based on maximum harmonisation that will remove the clear disincentives for both business and consumers to participate in cross-border trade.

In this context, AmCham EU is presenting amendments to ensure that the directive reflects the right balance between consumer rights and business interest.

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**POSITION STATEMENT**

### *Recital 11*

#### **Commission proposal**

(11) 'order form' means an instrument setting out the contract terms, to be signed by the consumer with a view to concluding an off-premises contract;

#### **AmCham EU Recommendation**

(11) 'order form' means an instrument setting out the contract terms, to be signed **either by physical or electronic means** by the consumer with a view to concluding an off-premises contract;

#### *Justification*

*Whilst supportive of the introduction of standard order and withdrawal forms, AmCham EU would like further clarification as to what constitutes a signature and to make alternatives to a physical signature possible, thus allowing withdrawal forms to be processed online.*

### *Recital 14*

#### **Commission proposal**

An off-premises contract should be defined as a contract concluded with the simultaneous physical presence of the trader and the consumer, away from business premises, for example at the consumer's home or workplace. In an off-premises context, consumers are under psychological pressure no matter whether they have solicited the trader's visit or not. Furthermore, in order to prevent circumventions of rules when consumers are approached away from business premises, a contract negotiated, for example at the consumer's home but concluded in a shop should be regarded as an off-premises contract.

#### **AmCham EU Recommendation**

An off-premises contract should be defined as a contract concluded with the simultaneous physical presence of the trader and the consumer, away from business premises, for example at the consumer's home or workplace. **Equally any subsequent sales transaction between the same trader and consumer pertaining to similar products should be considered off-premises contracts whatever means of conclusion are being used.** Furthermore, **in order to prevent circumventions of rules** when consumers are approached away from business premises, a contract negotiated, for example at the consumer's home but concluded in a shop should be regarded as an off-premises contract.

#### *Justification*

*The very strict definitions and mutually exclusive definitions of distance contracts and off-premises contracts create a legal vacuum in the case of repeat transactions where a mix of both techniques is used.*

*Generalising off-premises sales as pressure sales is pejorative and materially misleading, especially as the notion of off-premises sales is much wider than the notion of doorstep selling previously applied.*

### *Recital 17*

#### **Commission Text**

Consumers should be entitled to receive information before the conclusion of the contract. However traders should not have to provide the information when already apparent from the context. For example in an on-premises transaction, the main characteristics of a product, the identity of the trader and the arrangements for delivery may be apparent from the context. In distance and off-premises transactions, the trader should always provide the information on arrangements for payment, delivery, performance and the complaint handling policy, since these might not be apparent from the context.

#### **AmCham EU Recommendation**

Consumers should be entitled to receive information before the conclusion of the contract. However traders should not have to provide the information when already apparent from the context. For example in an on-premises transaction, the main characteristics of a product, the identity of the trader and the arrangements for delivery may be apparent from the context. In distance and off-premises transactions, the trader should ~~always~~ provide the information on arrangements for payment, delivery, performance and the complaint handling policy, since these might not be apparent from the context. **For repeat purchases where the consumer re-orders the same product from a trader this information is apparent from the previous transaction. These transactions should therefore be exempted from these requirements.**

#### *Justification*

*In the case of repeat transactions the consumer has already had the chance to try the product and has experience of dealing with the trader. The required information is therefore apparent from the context and there is no need to duplicate this information provision.*

### ***Recital 24***

#### **Commission proposal**

To ensure legal certainty, ~~it is appropriate that Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits<sup>1</sup> should apply to the calculation of the periods contained in this Directive. Therefore, all periods contained in this Directive should be understood to be expressed in calendar days.~~

#### **AmCham EU Recommendation**

To ensure legal certainty all periods contained in this Directive should be understood to be expressed in calendar days.

### ***Justification***

*The reference to Regulation 1182/71, is confusing as it refers to working days. This may lead to different calculations in Member States and undermine this important harmonising affect.*

### ***Recital 33(a) new!***

#### **Commission proposal**

**AmCham EU Recommendation**  
**Exemptions shall be established for contracts with of a limited value where the sum payable by the consumer does not exceed ... Euro**

### ***Justification***

*Exempting transactions of a limited value from the scope of distance selling and off-premises trade regulations would relieve traders not from offering the possibility for the consumer to return the products and being reimbursed (this is guaranteed by self-regulation) but from the onerous and paper-consuming obligation to inform the consumer about these additional rights for out-of-store retailing.*

*Such exemptions were possible for transactions of a lesser value than 60 Euro under Article 3(1) of Directive 85/577/EEC. This exemption would equate to approximately 200 Euros today. The additional paperwork and administration costs will place upward pressure on pricing and ultimately reduce economic growth. This is especially true for low cost consumable products which are purchased on a repeated basis.*

*Such low cost transactions carry an equivalent low-risk for the consumer. The associated costs brought by removing the exemption will yield very little in*

<sup>1</sup> OJ L 124, 8.6.1971, p. 1.

*return. Ultimately it will carry more cost to the consumer than benefit.*

**Recital 37**

**Commission Text**

For the purpose of simplification and legal certainty, the right of withdrawal should apply to all types of off-premises contracts, except under strictly defined circumstances which can easily be proved. Therefore, no right of withdrawal should apply for urgent repairs at the consumer's home for which such a right of withdrawal would be incompatible with the emergency situation as well as for supermarket home-delivery schemes which allow consumers to select food, drinks and other goods intended for current consumption in the household through the supermarket's website and have them delivered at their home. These are goods, which are inexpensive and bought regularly by consumers for their every day's consumption or everyday use in the household and should therefore not be subject to a right of withdrawal.

**AmCham EU Recommendation**

For the purpose of simplification and legal certainty, the right of withdrawal should apply to all types of off-premises contracts, except under strictly defined circumstances which can easily be proved. Therefore, no right of withdrawal should apply for urgent repairs at the consumer's home for which such a right of withdrawal would be incompatible with the emergency situation as well as **for low value transactions below a threshold of x euros** for food, drinks and other goods intended for everyday consumption or use in the household ~~through the supermarket's website and have them delivered at their home.~~ These are goods, which are inexpensive and bought regularly by consumers for their every day's consumption or everyday use in the household and should therefore not be subject to a right of withdrawal.

**Justification**

*Low value goods intended for everyday use in the home, such as cosmetics should also be exempted. There is no reason, for example, why a product ordered on-line from a supermarket would or should be treated differently to that ordered from the website of any other type of company and such an exception risks creating a competitive disadvantage for other market players. For clarity a threshold could be set below which the requirements would not apply. This would be in keeping with the EU commitment to better regulation and would avoid unnecessary cost burdens for business.*

**Article 2 (8b)**  
*Definitions*

**Commission proposal**

‘off-premises contract’ means:

~~(b) any sales or service contract concluded on business premises but negotiated away from business premises, with the simultaneous physical presence of the trader and the consumer.~~

**AmCham EU Recommendation**

‘off-premises contract’ means:

**(b) any subsequent contract pertaining to similar sales of goods or services between the trader and the consumer whatever means are used.**

**Justification**

*This amendment will include repeat sales in the scope of “off-premises contracts”. At the same time it will safeguard against potential abuse occurring where a first sale of an item of low value is then followed by various expensive unrelated products.*

*The very strict and mutually exclusive definitions of distance contract and off-premises contract found in the Commission proposal create a legal vacuum in the case of repeat transactions where a mix of both techniques is used.*

**Article 3(4)**  
*Scope*

**Commission proposal**

4. Articles 5, 7, 9 and 11 shall be without prejudice to the provisions concerning information requirements contained in Directive 2006/123/EC of the European Parliament and of the Council<sup>14</sup> and Directive 2000/31/EC of the European Parliament and of the Council<sup>15</sup>.

**AmCham EU Recommendation**

4. Articles 5, 7, 9 and 11 shall be without prejudice to the provisions concerning information requirements contained in ~~Directive 2006/123/EC~~ **Directive 2005/29/EC** of the European Parliament and Council and of the Council<sup>14</sup> and Directive 2000/31/EC of the European Parliament and of the Council<sup>15</sup>.

**Justification**

*It is essential that the information requirements laid out in the directive (Articles 5, 7, 9 and 11) are identical to those set in Article 7 (4) of the Unfair Commercial Practices Directive and remain in line with the applicable Articles of the E-commerce Directive, as e-commerce transactions are covered by this text. At the same time AmCham EU is concerned by the mention of the information requirement list contained in Article 22 of the Services Directive which is extremely complex, onerous and not justified for most transactions pertaining to the retailing of goods.*

**Article 5(1b)**

*General Information Requirements*

**Commission proposal**

(b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;

**AmCham EU Recommendation**

(b) the geographical address and the identity of the trader, such as his trading name, **Value Added Tax (VAT) registration number and company registration number** and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;

**Justification**

*When applicable the traders' VAT and trade registration number should also be given.*

**Article 7**

*Specific information requirements for intermediaries*

**Commission proposal**

1. Prior to the conclusion of the contract, the intermediary shall disclose to the consumer, that he is acting in the name of or on behalf of another consumer and that the contract concluded, shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of this Directive.
2. The intermediary, who does not fulfil the obligation under paragraph 1, shall be deemed to have concluded the contract in his own name.
3. This Article shall not apply to public auctions.

**AmCham EU Recommendation  
(Deletion)**

**Justification**

*An intermediary, as defined in the Commission's proposal, is a trader, predominantly a business seller, who concludes a contract on behalf of a consumer (to sell predominantly second-hand goods). In conducting their business, such traders usually inspect and select the goods suitable for resale. Excluding these economic operators from the scope of the EU consumer protection legislation will create a significant lacuna. In view of the B2C focus of the proposal such traders should be bound by the normal obligations that*

*come with operating a business.*

**Article 9 (paragraph 2 new!)**

*Information requirements for distance and off-premises contracts*

**Commission proposal**

**AmCham EU Recommendation**

Article 9 paragraph 2 (new)

In case of repeat orders from the same supplier of the same products, this information need only be provided prior to the initial transaction.

**Justification**

*In the case of repeat transactions the consumer has already had the chance to try the product and has experience of dealing with the trader. The required information is therefore apparent from the context and there is no need to duplicate this information provision.*

**Article 10 (2b) new!**

*Formal requirements for off-premises contracts*

**Commission proposal**

**AmCham EU Recommendation**

Article 10 (2b) new!

**2b. The requirements of Article 10 are considered fulfilled in subsequent sales transactions between the same trader and consumer using either distance or off-premises contracts, provided the consumer has had the opportunity in person to see or have demonstrated the goods or services that are the subject of the transaction, and provided that the requirements of Article 10 have been observed with respect to a previous transaction.**

**Justification**

*Repeat transactions in direct selling (off-premises contracts) should remain subject to the rules applicable for off-premises contracts. This amendment ensures the seamless application of one set of law for both direct sellers and their customers. A right of withdrawal remained guaranteed. Exempting repeat transaction from information provisions should insure that consumers receive sufficient information concerning their rights, while direct sellers are relieved of costly administrative burden*

**Article 12(1)**

*Length and starting point of the withdrawal period*

**Commission proposal**

1. The consumer shall have a period of ~~fourteen~~ days to withdraw from a distance or off-premises contract, without giving any reason.

**AmCham EU Recommendation**

1. The consumer shall have a period of **seven** days to withdraw from a distance or off-premises contract, without giving any reason.

**Justification**

*The benefit of 14 days to both trader and consumer is questionable. Seven calendar days is more appropriate.*

**Article 12(2)**

*Length and starting point of the withdrawal period*

**Commission proposal**

2. In the case of an off-premises contract, the withdrawal period shall begin from the day when the consumer signs the order form or in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium.

**AmCham EU Recommendation**

2. In the case of an off-premises contract, the withdrawal period shall begin from the day when the consumer signs the order form or in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium.

In the case of a distance contract for the sale of goods, the withdrawal period shall begin from the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires the material possession of each of the goods ordered.

In the case of a distance contract for the provision of services, the withdrawal period shall begin from the day of the conclusion of the contract.

In the case of a distance contract for the sale of goods, the withdrawal period shall begin from the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires the material possession of each of the goods ordered.

In the case of a distance contract for the provision of services, the withdrawal period shall begin from the day of the conclusion of the contract.

**In the case of a distance or off-premises contract for the sale of goods with a value above €500 the withdrawal period shall begin from the day of the conclusion of the contract and end when**

**delivery has taken place.**

***Justification***

*The provision regarding the right of withdrawal should take into account the purchase of high value and complex goods that lose a large percentage of their value on delivery. In such cases it is usual that the consumer conducts research (including test of the good) before purchasing. It is estimated that white goods/large appliances lose up to 30% of their value, regardless whether they have been used or not, as they automatically become second hand goods. Exercising the right of withdrawal after having received the good would create a disproportionate effect as it would cause a significant loss to the manufacturer at no disadvantage to the consumer. The withdrawal period for such goods should begin from the day of the signature of the contract and ends the moment that delivery has taken place.*

**Article 17 (2)**

***Obligations of the consumer in case of withdrawal***

**Commission proposal**

2. The consumer shall only be liable for any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods. He shall not be liable for diminished value where the trader has failed to provide notice of the withdrawal right in accordance with Article 9(b). For service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period.

**AmCham EU Recommendation**

2. The consumer shall only be liable for any diminished value of the goods resulting from the handling other than what is **strictly** necessary to ascertain the nature and functioning of the goods. He shall not be liable for diminished value where the trader has failed to provide notice of the withdrawal right in accordance with Article 9(b). For service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period.

***Justification***

*The right of inspection for the consumer shall not exceed the rights granted to consumers outside distance selling e.g. for the sale of goods in a shop. The consumer should not have the right to use the goods like an owner to ascertain the nature and functioning. Otherwise the goods can no longer be sold as new in case of withdrawal from the contract. This is of particular concern to the automotive industry in the case of a sale of a new vehicle, since cars lose up to 30 % of their value once used.*

**Article 19**

*Exceptions from the right of withdrawal*

**Commission Text**

**AmCham EU Recommendation**

Article 19 paragraph 2. In respect of off-premises contracts, the right of withdrawal shall not apply as regards the following:

(a) contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, selected in advance by the consumer by means of distance communication and physically supplied to the consumer's home, residence or workplace by the trader who usually sells such goods on his own business premises;

Article 19 paragraph 2. In respect of off-premises contracts, the right of withdrawal shall not apply as regards the following:

(a) **low value** contracts below a threshold of x euros for the supply of foodstuffs, beverages or other goods intended for current consumption **or use** in the household, selected in advance by the consumer by means of distance communication and physically supplied to the consumer's home, residence or workplace. ~~by the trader who usually sells such goods on his own business premises;~~

**Justification**

*Other low value goods beneath a threshold value intended for everyday use in the home, should also be exempted. Today supermarkets sell a broad range of products, from cosmetics to clothing, and there is no reason why a product ordered on-line from a supermarket would or should be treated differently to that ordered from the website or catalogue of any other type of company. Indeed such an exception risks creating a competitive disadvantage for other market players.*

*For clarity a threshold could be set below which the requirements would not apply. This would be in keeping with the EU commitment to better regulation and would avoid unnecessary cost burdens for business. The value of this threshold should be further discussed but should be higher than the 60 euros set out in Directive 85/577/CEE, given the increase in prices in the intervening 20 years*

**Article 20 (1e) new!**

Obligations of the consumer in case of withdrawal

**Commission proposal**

**AmCham EU Recommendation**

Articles 8 to 19 shall not apply to distance and off-premises contracts:

(...)

**(e) where the sum payable by the consumer does not exceed ... Euro. The Council and the European Parliament, acting on a proposal from the Commission, shall examine and, if necessary, revise this amount for the first time no later than four years after notification of the Directive and thereafter every two years, taking into account economic and monetary developments in the Community and by reference to the inflation factor.**

**Justification**

*Exempting transactions of a limited value from the scope of distance selling and off-premises trade regulations reduces the administrative burden and lowers costs for both business and consumers alike. It is important that the value of this exemption should be examined every two years to ensure it remains relevant to real market conditions.*

**Article 26**

*Remedies for lack of conformity*

**Commission proposal**

**AmCham EU Recommendation**

1. As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:

- (a) have the lack of conformity remedied by repair or replacement,
- (b) have the price reduced,
- (c) have the contract rescinded.

1. As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:

- (a) have the lack of conformity remedied by repair or replacement,
- (b) have the price reduced,
- (c) have the contract rescinded, **only if the lack of conformity is not minor.**

2. The trader shall remedy the lack of conformity by either repair or replacement according to his choice.

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3. Where the trader has proved that remedying the lack of conformity by repair or replacement is

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unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded. A trader's effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity. The consumer may only rescind the contract if the lack of conformity is not minor.

4. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:

- (a) the trader has implicitly or explicitly refused to remedy the lack of conformity;
- (b) the trader has failed to remedy the lack of conformity within a reasonable time;
- (c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;
- (d) the same defect has reappeared more than once within a short period of time.**

5. The significant inconvenience for the consumer and the reasonable time needed for the trader to remedy the lack of conformity shall be assessed taking into account the nature of the goods or the purpose for which the consumer acquired the goods as provided for by Article 24(2)(b).

unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded, **as provided under paragraph 1.** A trader's effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity. ~~The consumer may only rescind the contract if the lack of conformity is not minor.~~

4. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:

- (a) the trader has implicitly or explicitly refused to remedy the lack of conformity;
- (b) the trader has failed to remedy the lack of conformity within a reasonable time;
- (c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;
- ~~(d) the same defect has reappeared more than once within a short period of time.[delete]~~

5. The significant inconvenience for the consumer and the reasonable time needed for the trader to remedy the lack of conformity shall be assessed taking into account the nature of the goods or the purpose for which the consumer acquired the goods as provided for by Article 24(2)(b).

### *Justification*

*The provision whereby 'the consumer may only rescind the contract if the lack of conformity is not minor' (Article 26 (3)) should apply to the entire Article 26. Article 26 should in fact take into account complex goods and goods of high value. Granting the consumer the right to rescind the contract when a minor defect (e.g. the malfunctioning of the wing mirror in a vehicle) reappears more than once would be disproportionate with regards to the value of the returned vehicle to the trader. This would also not be in line with the provision under*

*Article 26 (3) that recognise the need not to place disproportionate effort on the trader. Complex goods are frequently composed of several parts which may require repairs that take a certain time or demand several interventions. Therefore, giving the right to terminate the contract – in particular in the case of complex and high value goods – carries the risk to the trader a disproportionate effort. Articles 26 a) and c) provide sufficient protection, whereas the trader should not be confronted with further claims by the customer.*

**Article 27 (2)**  
*Cost and damages*

**Commission proposal**

1. The Consumer shall be entitled to have the lack of conformity remedied free of any costs.
2. **Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.**

**AmCham EU Recommendation**

1. The Consumer shall be entitled to have the lack of conformity remedied free of any costs.
2. [deletion]

**Justification**

*It is unacceptable that “the consumer may claim damages for any loss not remedied in accordance with Article 26” without defining the relevant preconditions. This would lead to a liability regardless of negligence without giving the opportunity of rectification of defects.*

**Article 36 (1)**  
*Interpretation of terms*

**Commission proposal**  
**Article 36**

1. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.

**AmCham EU Recommendation**  
**Article 36**

1. Where there is doubt about the meaning of a term, **the contract has to be interpreted by the courts. In case of remaining doubts** the interpretation most favourable to the consumer shall prevail.

**Justification**

*The interpretation of terms must be left with the courts rather than written into the law as it lays on different factors and may vary from case to case. Courts shall take into consideration the nature of the good, the specific history of a given purchase and the ground of the dispute.*

\* \* \*

*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled \$1.8 trillion (€1.24 trillion) in 2008 and currently supports 4.8 million direct jobs in Europe.*

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**POSITION STATEMENT**