



Position Paper

EMOTA Position on the European Commission guidance for the transposition and enforcement of the Consumer Rights Directive 2011/83/EU

EMOTA¹'s main goal is to assist policy makers in removing any barriers to cross-border trade. EMOTA's commitment to a barrier free EU Single Market is long standing and can be traced across all our positions and actions. We are making the following comments with the aim to constructively contribute to the debate over the future of the EU Digital Single Market for products and services by reflecting the views of online sellers across 17 markets, including the largest.

EMOTA, the European umbrella association representing distance sellers and online traders at European level, welcomes the European Commission's commitment to ensure a functional harmonised legal framework for distance selling across the EU. As a result of the Consumer Rights Directive (CRD) adopted in 2011, distance sellers and consumers will both benefit from the extended harmonisation of consumer protection rules.

EMOTA acknowledges the importance of the Consumer Rights Directive in this context. However, and as agreed by the majority of stakeholders and policy makers, there are a number of provision in the Consumer Rights Directive which require further coordination between the stakeholders, policy makers and enforcement authorities in order to meet the goals of the Directive.

As the European Commission confirmed that further guidance will be issued in the upcoming weeks, EMOTA would like to stress the need for the guidance to be strictly limited to the provisions found in the Consumer Rights Directive. In addition, such guidance might have to be reviewed in the near future in order to ensure optimal conditions for both consumers and traders.

With the aim of ensuring the highest possible level of harmonisation for distance selling rules, EMOTA should set out below the main areas where such coordination is considered necessary by its members, based on the practical experience of distance sellers:

¹ EMOTA, the European eCommerce and Omni Channel Trade Association, is the European level umbrella federation representing online and distance sellers across Europe. The main mission of EMOTA is to promote eCommerce and Distance Selling and help policy makers remove any barriers to cross-border selling. Transparency register N° 11251212351-96



Recital/Article	Summary of Provisions	Comment
Recital 2 Recital 13 Recital 17 Article 2.2	Scope could be extended to legal persons, NGOs, SMEs. Additional requirements could be introduced or maintained by Member States. Some dual purpose contracts could be brought under the scope of the CRD.	In a cross-border context such extensions of scope could lead to legal uncertainty. In general we are skeptical vis-à-vis any blurring of the borderline between businesses and consumers.
Recital/Article	Summary of Provisions	Comment
Recital 23 Article 2.10	Durable media should include paper, USB sticks, CD-ROMs, DVDs, memory cards or hard disks and e-mails.	In distance selling the recognition of digital documents as durable media is essential.
Recital/Article	Summary of Provisions	Comment
Recital 19 Article 6.1.r Article 6.1.s	Mandatory information provision for the sale of digital goods (interoperability and restrictions).	<p>The Commission should consider that the information on interoperability and copyright might not be easily available to independent traders, especially if the traders are not developers of such materials. In addition, the technical limitations to website and app design might not allow for a comprehensive description of all restrictions or possible compatibility issues.</p> <p>Although at the moment the vast majority of digital goods (publications, music, films and apps) are supplied via large market places, the legal framework cannot assume that competition from smaller players will not develop and flexibility is required in order to allow each trader to develop the best system to provide the technical information on digital products.</p> <p>On 11 December 2013, the European Commission presented a voluntary graphic table model for the provision of technical information for digital products. EMOTA welcomes the Commission's efforts and stresses that such models should remain voluntary.</p> <p>In recent years the publishing industry, with the support of the European Commission, has made significant progress in ensuring that the copyright information is included in the digital files and stays with the files until it reaches the consumer. A similar model was developed in the context of the Energy Efficiency framework, with the help of the European Commission, where producers of electric and electronic goods are required to provide traders with all necessary information in electronic</p>



		<p>format enabling consumers to compare the products. If such a similar initiative is launched for the provision of information on interoperability for digital products, EMOTA will actively participate.</p>
Recital/Article	Summary of Provisions	Comment
Article 6.1.g	Time of delivery	<p>In some member states the wording of Article 6.1.g “the time by which the trader undertakes to deliver the goods” was interpreted in the sense of exact time/appointment/date (e.g. Germany, France). On some media such a requirement cannot be fulfilled, as it would be the case for printed materials where the trader would not be able to know in advance when the order can be delivered as this depends on when the order reaches the trader. Traders depend on the service provided by postal operators and can only estimate a probable delivery time. Smaller traders, with lower parcel volumes will have even less control over the probable delivery date. Traders can only send an order once the possibility of payment is confirmed. The very strict interpretation of Article 6.1.g, despite Recital 36, which states the need to adapt the information requirements to the media on which they are provided to the consumer, could lead to legal uncertainty and costly enforcement actions.</p>



Recital/Article	Summary of Provisions	Comment
Recital 35 Recital 36 Recital 39 Article 8.1 Article 8.2 Article 8.4	Mandatory pre-contractual information requirements. Information to be displayed in the “close vicinity of the confirmation request”. Pre-contractual information requirements should be flexible enough to take into account the limitations of some environments (smartphones, catalogues). Order with an obligation to pay.	<p>As the volume of mobile purchases constantly increases, it is very important, especially in a cross-border context, to allow for sufficient flexibility in how the mandatory pre-contractual information is displayed. This would allow for further competition to develop in this area as those traders that develop the most user-friendly information provision mechanisms will ultimately gain the upper hand (industry best practices, codes of conduct, trust marks).</p> <p>In an app environment or “ready-made” online platforms (desktop and mobile), the trader is very often limited to what can be changed and edited to the actual structure of a website. In HTML5 platforms, which are gradually becoming the standard, this is even more challenging. In most cases specific third party modules or plug-ins are used for “keeping” the basket contents and for the check-out and payment process, which again do not allow for major alterations to the design.</p> <p>A lack of flexibility in this area could result in nonfunctional pages, as long hyperlinks or large blocks of texts often have a negative impact on the page’s display (long hyperlinks can distort the way a page is displayed) or on the ability of the trader to efficiently use search and comparison engines.</p> <p>The same concern applies to catalogue sales where very strict requirements for the provision of information might be impractical and very costly. Catalogues are printed products and the level of customization necessary to reflect the consumer specific purchase context is limited (delivery costs, delivery time, guarantees, withdrawal). For example, as delivery costs are calculated dynamically by delivery operators based on a large number of factors (volume to be delivered in a certain region, volume allocation between carriers, available routes, available sorting centres, available final delivery options), it would be very difficult for a trader to ensure that the information provided on websites, apps and printed materials is sufficiently accurate.</p> <p>We therefore call on the European Commission to stress the importance of flexibility in the transposition of these provisions. As long as the information is made available, in a visible and</p>



Recital/Article	Summary of Provisions	Comment
Article 8.6	Written consent for telephone contracts.	<p>transparent way, in line with the Directive, the obligation should be considered as fulfilled.</p> <p>The Directive allows Member States to maintain or introduce requirements for a written consent in the case of contracts concluded via telephone. EMOTA was made aware that in some Member States (Spain, Italy) this provision was used to propose the introduction of requirements for written consent or even the use of digital signatures for the conclusion of distance selling contracts via telephone.</p> <p>Such requirements are too burdensome, increase legal fragmentation and ignore the technological options (durable media) which are available for securing the consumer's consent.</p> <p>In addition, it should be clarified that Article 8.6 applies only when the trader initiated the call. Without any such distinction very basic calls made by the consumer to require a service which is not necessarily a distinct order would require a written confirmation.</p>



Recital/Article	Summary of Provisions	Comment
Recital 37 Recital 40 Recital 45 Recital 47 Article 9.2.(i) Article 9.2.(ii) Article 14.2	Right to withdraw. Start of the right to withdraw. Using the products beyond testing.	<p>The Directive seems not to create a sufficiently clear link between the functionality relation of the products ordered and the moment the right of withdrawal should start. According to Article 9.2.(i) and 9.2.(ii) the right to withdraw starts when the consumer received the last item of an order or the last item of a lot consisting of multiple pieces.</p> <p>However, some consumers might deliberately order an item which is on stock together with a second item which is not, with the intention to extend the use of the first item until the right to withdraw would start, with the delivery of the second item. Such a context creates the conditions for abuse. We recommend further clarification which should establish a link between the start of the withdrawal period and the functionality relation between the products ordered.</p> <p>Furthermore, although the Directive establishes that the consumer is liable for any diminished value of the product in Recital 37 and Article 14.2, these provisions would be extremely difficult to enforce without further guidance on what should be understood as “testing” in order to ensure that the product can be sold again by the seller. Such guidance should be produced by the industry bodies with the support of the European Commission.</p>
Recital/Article	Summary of Provisions	Comment
Recital 44 Article 11.1 Article 13.3	Consumer’s unequivocal statement. Obligations of the trader in case of withdrawal.	<p>Recital 44 and Article 11.1 of the CRD state that the consumer can withdraw from the contract by using the withdrawal form provided in Annex I B or by making a “unequivocal/clear statement”. The latter leaves it open how to interpret situations where the consumers do not pick up deposited items.</p> <p>If the consumer sends the parcel back without any notice, the seller would not be able to know, without a comprehensive check, whether the product is being returned because of a fault, which might only be noticeable in some instances (including in lengthy use), or whether the consumer is withdrawing from the contract. Furthermore, in some instances it might be impossible for the trader to identify the coordinates of the consumer that is returning the product (e.g. damaged packaging/address information/labels).</p>



Recital/Article	Summary of Provisions	Comment
Article 21	Basic rate for telephone calls	<p>Article 13.3 establishes that the trader can withhold the reimbursement until the product has been returned or the consumer “supplied evidence” of having sent back the good. If no safeguards are introduced traders could be forced to refund the products which have not been checked for damage or improper testing. Some consumers could choose to provide the evidence of having sent back the good at the last possible moment, which would not allow the trader to inspect the good before a refund is made.</p> <p>Despite the provisions found in Recital 47 and Article 14.2, which establish the liability of consumers for the diminished value as a result of using the products beyond testing, some companies will be left open to high levels of abuse. For some of the most popular product segments, such as fashion, the return rates are very high in connection with a high probability that consumers would use the products beyond testing. In such a context a company could find itself in a situation where for more than 50% of its order volume it would have to establish a system to claim the diminished value after having refunded the product. This could be a significant burden. In some Member States there are discussions about the introduction of sanctions, and including criminal sanctions, should distance sellers delay the refund until the product has been returned, or refuse to refund consumers in case the product cannot be sold anymore.</p> <p>In Article 13.1 traders are required to refund all payments received from the consumer, including the costs of delivery. However, the Directive does not clarify how the refund would be calculated in those instances where the consumer returns only some of the products when it comes to the delivery costs.</p> <p>EMOTA urges the European Commission to further clarify the conditions around the right of withdrawal and guarantee that sellers can inspect the goods before issuing the refund.</p>



Recital/Article	Summary of Provisions	Comment
Article 6.4 Annex I A Annex I B	Model withdrawal form	<p>The existing model withdrawal form does not take into account a series of situations, such as the possibility for the consumer to withdraw partially from a contract that entails multiple items.</p> <p>First, the model provided by the Directive does not seem to easily allow the distinction between different withdrawals where such a distinction would be necessary.</p> <p>In Annex I A the trader seems to only be allowed to use one of the provided statements in connection to a certain order. This would not allow the use of a single withdrawal form in some cases (e.g. when some of the products ordered can be returned by post while others not). In other cases the return possibilities might differ depending on the moment the consumer decided to withdraw (items which in their disassembled form are delivered by post and can be returned by post disassembled, but which once assembled can no longer be returned by regular postal service – but which can be inspected by the consumer in their disassembled form).</p> <p>In order to be fully compliant with the requirements of the Directive, a trader would in such cases have to provide consumers with multiple withdrawal forms and multiple information scenarios based on different delivery/return costs. Such an approach would only confuse consumers, increase complexity and raise the operational costs for distance sellers.</p> <p>It is therefore of utmost importance that it's use remains voluntary.</p>

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