

# A EUROPEAN MODEL CONTRACT FOR E-COMMERCE BUSINESSES TO CONSUMER SALES

Based on a Study for BEUC  
by Geraint Howells, Hans-W. Micklitz and Norbert Reich

(This is a BEUC “work in progress” document- latest version of 13/07/2011)

**Contact:** Ursula Pachl – [consumercontracts@beuc.eu](mailto:consumercontracts@beuc.eu)

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## **A Model Contract for European Consumers**

*Disclaimer: This document is "work in progress", based on a study by Professor Geraint Howells, University of Manchester, of May 2011. It is under development and should not be considered as a final position of BEUC and its members. It has been circulated to interested stakeholders to inspire discussion and stir development of a European Model Contract for b to c on-line sales.*

This paper seeks to show what a model contract would look like for European consumers. The aim is to produce a Truly Optional Instrument that consumer groups would be willing to endorse. Truly optional not merely because it has the support of the consumer organisations, but also because it is supplementary to national law and so potentially allows the consumer the protection of his mandatory law. The overall aim is to provide a European Model Contract (EMC) that does not displace national law, but should make it practically redundant for most imaginable consumer disputes. Eventually this might be refined by a process of social dialogue with trade organisations. Potentially there is a role for standardisation in this process. Crucial to the practical effectiveness of the rules is the link to a process of Online Dispute Resolution (ODR). This should remove for both businesses and consumers the risks of being dragged into expensive cross-border disputes. This is a first draft that as far as possible sought to balance the legitimate interests of all parties, although there will inevitably be debates as to how particular matters should be resolved.

The EMC does not seek to regulate all aspects of the relationship, in particular nothing is said about rules of access to any web pages or health and safety or underage sales. Equally we do not include rules on any gift message service offered. Also we do not address the issue of refusal to supply to other states. This simply concerns the rules of the contract that has been created for the supply of goods. It concentrates on the rule for forming contracts and dealing with delivery and quality of goods as well as payment. This proposal is limited to sale of goods contracts. This is seen as the sector most likely voluntarily to adopt this proposal. If it is successful one might foresee it being eventually extended. Its main use is intended to be for cross- border sales via the internet but its voluntary nature means it could be used in any context. Its advantages will include the fact it is voluntarily adopted by

business and supported by consumer organisations, involves no issues of legal competence or private international law, promotes ADR and can be adopted quickly. It is encouraging to see that parallels can be drawn with the Law Society for England and Wales's proposal for EU-endorsed standard contract terms and conditions.

The content of the rules have been derived from various sources. In part the consumer *acquis* prescribes what should be the rules. There has been an attempt to comply with the rules in the Consumer Rights Directive in its consolidated version of June 2011 (Council document of June 2011/ EP opinion adopted in first reading 23 June 2011) and the Optional Instrument as presented by the Expert Group on 3 May 2011. Equally trade practice may suggest terms which are commonly used and that may form the basis for the EMC. Care needs to be taken that no copyright is infringed in any form of wording used. Those used in this document are purely for private educational and research purposes and will have to be reviewed for compliance before being placed into general circulation, although in practice they have not normally been simply lifted from a contract but adapted or based on legal provisions. At other times normative values have had to be applied. For each section a draft clause is provided followed by a commentary deriving from a survey of the law and contractual documents.

There may be a case for setting two levels of standards at the trader's choice to allow for competition on the basis of customer care. This may have the advantage of making choices between consumer protection rules easier if the issue concerns allocating the rights between one of two model contracts. However, the approach here has been to fix a minimum standard with it being left to the market whether actors want to offer additional rights

An important point will be to make the terms accessible. In many web-sites the terms are scattered under various headings and even the best sites may have the link hidden at the bottom of the page. This is where the blue button, possibly with the word terms printed on it might help to direct consumer's attention.

The format is:

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For each section model rules or alternative rules will be produced together with a commentary explaining their relationship to the law and legal practice.

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## 1. Contract information

1.1 *The following pieces of information should be expressly stated in the EMC:*

- (a) the main characteristics of the goods;*
- (b) the identity of the trader including the geographical address at which he is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently;*
- (c) the total price inclusive of taxes, or where the nature of the goods means that the price cannot be calculated in advance, the manner in which the price is calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where these cannot reasonably be calculated in advance, the fact that such additional charges and costs may be payable. In case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is calculated should be provided;*
- (d) the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;*
- (e) the duration of the contract and the minimum duration of the consumer's obligations where applicable, or if the contract is for an indefinite period, the conditions for terminating the contract;*
- (f) information on the right of withdrawal incl. the conditions, time limit and procedures for exercising that right and where a right of withdrawal shall not apply, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal*
- (g) the existence and the conditions of any after-sale consumer assistance, after sale services, commercial guarantees and complaints handling policy;*
- (h) details of the out of court dispute resolution;*
- (i) all terms of the contract.*

These are modelled on the Consumer Rights Directive/Optional Instrument Information rights, equivalent to those in an organised distance selling regime are justified as the parties will have consciously opted to use the EMC. Provisions on issues such as delivery, performance, the right of withdrawal and redress are expanded below.

## 2. Contract formation/ordering

- 2.1. *The customer makes an offer to buy goods by either communicating a firm order or placing goods in a checkout basket and proceeding to the checkout and where appropriate selecting a delivery method and tendering payment.*
- 2.2. *The consumer shall only be bound to the contract if the trader has made the consumer aware in a clear and prominent manner and directly before placing the order, of the main characteristics of the goods, the total price, including all related price components and the duration of the contract. In all cases the consumer must be asked to confirm that the order implies an obligation to pay.*
- 2.3. *When using Internet technology the trader has to design his website in such a way that a binding order cannot be placed until the consumer has confirmed through a button or a similar function labelled with the words "order with duty of payment" that he has read and understood this price information. Moreover the consumer will be allowed time to review the order and correct any errors before the contract is concluded .Any corrections should be communicated by XXX.*
- 2.4. *For contracts concluded on the telephone, the trader must offer to send the consumer a confirmation of his offer on a durable medium if this is practicable and give the consumer the possibility to correct any errors. Any corrections should be communicated by XXX.*
- 2.5. *The contract is concluded when the offer is accepted by the trader providing confirmation the order has been accepted. Such acceptance is complete when it is accessible to the consumer.*
- 2.6. *The language of the contract must be stated and any subsequent communications will be in the same language or another language only with the express consent of consumer.*

*2.7. If the wrong quantity is ordered or wrong price demanded the contract will only be void for that reason where either the amount or price requested is so different from the norm for consumer transactions that it is obvious there has been a mistake.*

This provision draws inspiration from art. 10/11 of E-commerce Directive as regards specifying the steps need for the conclusion of the contract, the opportunity to correct input errors and the deemed receipt of communications and language issue. Some rules in even the best contracts are rather consumer unfriendly i.e. one well known trader provides: "Please note that completion of the online checkout process does not constitute our acceptance of your order. Our acceptance of your order will take place only when we dispatch the product(s) of commencement of the services that you ordered from us." Account has been taken of attempts in by the Consumer Rights Directive to require the consumer be informed fully of the price before being bound.

The last sentence of clause tries to cover the situation of obvious pricing errors or where consumers order far too many copies. It is more stringent than Amazon's terms which say that they will at their discretion either inform consumers of any higher mispriced goods before despatch and give them the choice of whether to continue or simply cancel the order (Clause 16). This differs from the typical situation covered by DCFR (see II 7:201 et seq), Optional Instrument art.45 as this type of mistake often involves the person making the mistake wanting to extract themselves from the contract i.e. the company that priced goods at £1 instead of £100 or the consumer who order 100 vacuum cleaners instead of 1. The risk is of course less for consumers as normally they could withdraw (but they may have to meet costs of returning goods in some circumstances). These rules would seem capable of applying also to fast purchase processes like Amazon's "1 Click".

### 3. Availability and Delivery

- 3.1. *If goods are unavailable the consumer will be informed as soon as possible and offered a full refund, which if requested will be made as soon as possible and in no case later than 14 days after the request.*
- 3.2. *In any event goods will be supplied by the date specified in the contract or, unless agreed otherwise, within 30 days of the trader receiving an order. If no different date has been specified and there has been no supply after 30 days the supplier will inform the consumer of the reasons for non-supply. The consumer has the option of cancelling and obtaining a full refund that will be made as soon as possible and in no case no later than 14 days after the request. If the consumer agrees to a new delivery date he will again have the right to cancel if that is not complied with. If no specific date is set for the new delivery the consumer may give notice that he will cancel if the contract is not performed within 7 days.*

The availability rule is modelled on Art. 7(2) Distance Selling Directive.

The delivery rule is only partly modelled on Art 22 (2) consumer rights directive but improves the position of the consumer by specifying that the termination of the contract is a remedy which is at the consumer's option in case of delayed delivery.

14 days has been selected as a reasonable period for refund. Provisions have been included to allow new dates to be agreed, but to prevent the consumer being in limbo if the period is dragged out.

## 4. Substitution

*4.1. If goods are not available a substitute may be offered. Wherever practicable the customer will be informed in advance of any substitution and the goods only supplied if the consumer agrees. If there is no agreement the consumer shall obtain a refund. If supplied either by agreement or because it was not practical to contact the consumer, the consumer may return the substitute goods within the withdrawal period and if desired also for any goods or services in the same order that are related to those goods. The supplier will bear the cost of returning any substitutes and related goods.*

This is modelled on Art. 7(3) Distance Selling Directive. This is not included in the Consumer Rights Directive, but the basic principle is maintained with emphasis being placed on the need to seek the consumer's agreement for the replacement goods wherever possible. It seeks however to prevent so far as possible the consumer being placed in the position of having to accept substitutes or go through a complex process of returning them, but does not insist on this in every circumstance. It also seeks to cover goods bought at the same time whose utility may be reduced if another item is not available i.e. lens bought together with a camera that is to be substituted. One item might have been supplied and the substitute only sent after the withdrawal period had expired. Also this makes it clear the cost of returning all the goods is to be met by the trader.

## 5. Right of withdrawal

- 5.1. *The consumer has the right to withdraw from the contract without giving any reason within 14 days of the date of conclusion of the contract or, if later, the date of delivery of any goods supplied under the contract. If the consumer has not been provided with material information on the main characteristics of the goods or the identity and address of the trader or the price and other costs or the conditions, time limits and procedure for exercising the right of withdrawal, the right of withdrawal is extended until 14 days after such provisions has been supplied for up to one year.*
- 5.2. *If any part of the contract relates to goods which can by law be exempted from the right to withdraw and the business wishes not to offer a right of withdrawal there must be a clear and unambiguous statement specifying which goods are not covered by the right of withdrawal.<sup>1</sup>*
- 5.3. *A consumer must give notice to the business at the address specified by the latter. The consumer can use the Notice of Withdrawal form found at xxxx or use any other means that makes clear the intention to withdraw from the contract, which can include physically returning the goods. Where electronic communications or the post are used the notice of withdrawal is effective when sent. In other cases it is effective when it arrives at one of the supplier's place of business or a place specified in the contract. Where the consumer withdraws electronically, the trader should send an acknowledgement of withdrawal by e-mail without delay. In other cases businesses should acknowledge withdrawal promptly.*
- 5.4. *Where the right of withdrawal is exercised the consumer shall return the goods within 14 days of giving notice and obtain a full refund including any standard delivery charges. All refunds will be made within 14 days of notification of the right of withdrawal. Exercising the right of withdrawal will also cancel any linked contract such as credit agreement to finance the contract, connected insurance policy or guarantee, or products intended to be used with the cancelled product and purchased at the same time.*

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<sup>1</sup> If more extensive exceptions than allowed by law then reference to the statutory right should be made.

- 5.5. *The preferred means of returning goods in case of withdrawal should be specified by the trader. Often this will be a free service but if not any charges must be clearly specified as set out below. If this procedure is followed the customer is not responsible for any damage in transit.*
- 5.6. *If the trader does not offer a free return service in case of withdrawal, the consumer is only liable for the costs of returning the good if - before being bound by a contract or offer - he has been informed by the trader about the fact that he has to bear these costs.*
- 5.7. *In case of goods that by their nature cannot be normally returned by post, the consumer only has to bear the costs if he has been informed about these costs or what reasonably is to be expected to be the level of these costs.*
- 5.8. *No reduction will be made with respect to the use of the product so long as it has not been used in any way other than is consistent with ascertaining the nature and functioning of the goods. Charges may be applied for any emergency services supplied with the customers consent during the withdrawal period.*

For the most part this is based on the consumer rights directive (final Council version 15 June 2011).

14 days has been chosen as this differentiates it from the 30 days period selected below in relation to the right of refund. Many sites do in fact allow longer under "goodwill" policies. This should of course still be allowed, but the attempt is to find a good model contract that most traders will feel free to sign up to.

The EMC prompts businesses to offer a free return or disclose the cost. No liability for cost of returning is in line with some mail order and internet company practices, but where alternative delivery mechanisms are used than that offered by the supplier the position is now the consumer would have to bear the cost and possibly risk. The balance is struck on damage in transit in that the customer is not liable if s/he follows the prescribed procedure but may be if another route is used. The rules on reduction are in line with Consumer Rights Directive, based on the idea that consumers should be able to use and inspect the goods during the withdrawal period to ascertain their nature and functioning and still be able to withdraw without giving a reason.

## 6. Risk

*6.1 Goods are at the consumer's risk once they are in his possession or that of someone nominated by the consumer. They cease to be at the consumer's risk when they are returned to a carrier nominated by the supplier.*

This is based on the likely rule on passing of risk in Consumer Rights Directive and reiterates the rule on returning goods.

## 7. Price and payment

*7.1 The price sets out the cost of the goods including any taxes and delivery charges. The price is stated in xxx [currency] and all debits will be in xxx [currency].*

*7.2 The time of payment will be stated i.e. time order is placed or goods dispatched. If latter is chosen trader may take credit card details as security.*

The payment provisions acknowledge that many traders will want to take payment when the order is placed, but allows them to be more generous by also have the security of payment provided by a credit card as allowed in *Gysbrecht*.

## 8. Good not conforming to the contract

*8.1 Goods will comply with any description given and possess the same qualities as any sample or model or as required by the contract. They will be fit for the purposes for which goods of the same type are normally used and show the quality and performance which are normal in goods of that type taking into account any statement made by the seller about the goods to the consumer or any public statements made by the producer or earlier links in the chain. They will be fit for any particular purpose made known to the business at the time of the conclusion unless the consumer did not rely or it was unreasonable for him to rely on the seller's skill and judgment. Goods can not be of the right quality because they have not been packaged in a manner adequate to preserve and protect the goods or have not been supplied with accessories, installation instructions or other instructions that the consumer could reasonably expect to receive.*

*8.2 There is a presumption that goods failing to meet these standards within one year of delivery were not in conformity with the required standard at the time of supply. There will no liability for defects specifically drawn to the consumer's attention. The consumer is under no duty to notify the seller prior to seeking to enforce their legal rights. The consumer should be able to exercise these rights within two years or any longer period for which the goods can reasonably be expected to be durable.*

This is taken from the Optional Instrument. It includes abbreviated versions of public statement issues and a defence of consumer knowledge of defect. Consideration might be given to whether more detail is needed. Possibly the understanding of these terms will be influenced by Consumer Sales Directive that includes discussion of public sales/defences. This is an example of the virtue of the model contract as it should be simpler than a law can be. Any deficiencies in the quantity delivered as to the quantity ordered will be regarded as non-conforming.

## 9. Remedies for non-conformity

9.1 If goods are not conforming to the contract, as set out in clause 8, consumers may alternatively request repair or replacement so long as this is not disproportionate or obtain a price reduction. They can also terminate the contract, return the goods and obtain a full refund including all delivery costs and the costs of returning the goods. This right to terminate does not apply to insignificant defects.

9.2 The repair or replacement will be offered in a manner that is convenient for the consumer and in any event be effected within one month of a request without any costs or charges to the consumer. If the goods are not brought into conformity within this month the consumer can terminate the contract, return the goods and obtain a full refund including all delivery costs and the costs of returning the goods. Where an attempted repair fails or a replacement is inadequate the consumer will have the immediate right to terminate the contract

## 10. After-sales services

Any after-sales service should be mentioned together with conditions for using it. In particular the languages available should be specified.

## 11. Additional Guarantees

Any additional guarantees should be set out in clear and intelligible language. It should set out the conditions for making claims, notably the duration, territorial scope and the name and address of the guarantor. It should make it clear that it is contractually binding, but does not affect the legal rights of the consumer. It should be transferable to a subsequent buyer.

## 12. Complaints handling

*12.1 If you have a complaint please in the first instance draw this to our attention by xxxx.*

Any complaint handling system should ideally comply with ISO 10002. This should be a direction to company rather than something included in actual contract.

### 13. Dispute Resolution

*13.1 If your complaint is not satisfactorily resolved we recommend that you use our free dispute resolution service which is not binding on you the consumer but will bind our company. Please contact xxxx. Before using this procedure you should first try to use the internal complaint mechanism as referred to in clause 12.*

The hope is that the EMC/ODR should try to resolve most straightforward consumer cases in simpler ways than going to courts. The ODR decision is non-binding on consumers.

### 14. Choice of Law and Relationship with national law

*14.1 The dispute resolution system described in clause 13 is recommended to be used first and should resolve most cases on the basis of the EMC. However the consumer retains the right to bring the matter before a court. Any choice of law clause should be restricted to either the law of the trader or the law of the consumer and will be the consumer's law unless clearly stated otherwise. National consumer protection rules might provide better protection and still be applicable under rules of private international law.*