

**WORKING TEAM ON E-COMMERCE  
DRAFT FOR WARSAW COORDINATING COMMITTEE MEETING  
JUNE 2004**

**INTRODUCTION**

The Working Team on E-Commerce was asked by the Coordinating Committee at the meeting in Leuven in December 2003 to analyze the need to synchronize the already existing texts to accommodate electronic communication. The Team was asked to particularly take into account the EU Directives relevant for e-commerce. The Team has consisted of Marco Loos (Amsterdam), Hector MacQueen (Edinburgh), Christina Ramberg (Göteborg), and Matthias Storme (Leuven).

For the meeting in Warsaw, the Team has prepared three issues to be discussed:

1. Input errors (mistake),
2. Cooling off periods in consumer transactions,
3. Unsolicited goods and services.

The issues all relate to amendments to, changes in and clarifications of PECL.

**1. INPUT ERRORS**

**Existing text and (in bold) suggested amendments to PECL**

**PECL Article 4:103: Fundamental Mistake as to Facts or Law** (no change suggested)

- (1) *A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:*
- (a) *(i) the mistake was caused by information given by the other party; or*  
*(ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or*  
*(iii) the other party made the same mistake, and*
  - (b) *the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.*
- (2) *However a party may not avoid the contract if:*
- (a) *in the circumstances its mistake was inexcusable, or*
  - (b) *the risk of the mistake was assumed, or in the circumstances should be borne, by it.*

**PECL Article 4:104: Inaccuracy in Communication**

- (1) *An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person which made or sent the statement and Article 4:103 applies.*
- (2) *Subject to article 4:103(2), a party concluding a contract at another party's website may avoid the contract for mistake if the other party does not provide effective, accessible and technological means to identify and correct input errors prior to the transmission of a statement.*
- (3) *The parties cannot derogate from paragraph (2) to the detriment of a consumer.*

## **2. COOLING OFF PERIODS (RIGHT TO WITHDRAW)**

### **Suggested new Article to PECL**

#### **Article 2:212 Consumers' right to withdraw in certain contracts**

- (1) This article applies where a consumer has concluded a contract with a professional seller or supplier of services when
  - (a) the contract has been concluded using a technique for distance communication, and the seller or supplier systematically makes use of such a technique in order to conclude contracts; or*
  - (b) the contract has been concluded outside the seller's or supplier's normal place of business, and the seller or supplier systematically makes use of such a mode of concluding contracts; or*
  - (c) the seller or supplier has employed marketing techniques aimed at assembling the consumer and other potential customers in the seller's or supplier's place of business without informing the consumer about the commercial nature of the event.**
- 2) The consumer is entitled to withdraw from the contract without stating reasons by sending a notice to the other party within fourteen days after having concluded the contract and having been informed by the seller or supplier of his right to withdrawal and the consequences thereof and supplied with any other data prescribed in any relevant regulation by the European Commission. Whether or not the seller or supplier provided such information, the consumer's right to withdraw expires six months after the date of the conclusion of the contract.*
- (3) The consumer who has withdrawn from the contract must return any good or service received at his own expense. The seller or supplier of a service is required to return any other payment received from the consumer within thirty days after the good or service is received by that party.*
- (4) The right to withdraw does not apply to contracts regarding goods or services exposed to rapid price variations, goods or services that may be multiplied without influencing the good or service provided, quickly perishable goods, ... and ...*
- (5) The parties cannot derogate from this article to the detriment of the consumer.*

## ANNEX : RELEVANT ARTICLES FROM EC-DIRECTIVE

### I INPUT ERRORS

#### *The E-Commerce Directive*

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Article 11(2) E-Commerce Directive (2000/31/EC) reads:

*'Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.'*

### II COOLING OFF PERIODS (RIGHT TO WITHDRAW)

#### *Door-to-door-selling Directive*

Article 5 Council Directive to protect the consumer in respect of contracts negotiated away from business premises (85/577/EEC) reads:

1. *The consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law. It shall be sufficient if the notice is dispatched before the end of such period.*
2. *The giving of the notice shall have the effect of releasing the consumer from any obligations under the cancelled contract.*

#### *Timeshare Directive*

Article 5 Directive on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (94/47/EC) reads:

*The Member States shall make provision in their legislation to ensure that*

1. *in addition to the possibilities available to the purchaser under national laws on the nullity of contracts, the purchaser shall have the right*
  - *to withdraw without giving any reason within 10 calendar days of both parties' signing the contract or of both parties' signing a binding preliminary contract. If the 10th day is a public holiday, the period shall be extended to the first working day thereafter*
  - *if the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, at the time of both parties' signing the contract or of both parties' signing a binding preliminary contract, to cancel the contract within three months thereof. If the information in question is provided within those three months, the purchaser's withdrawal period provided for in the first indent, shall then start;*
  - *if by the end of the three-month period provided for in the second indent the purchaser has not exercised the right to cancel and the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, to the withdrawal period provided for in the first indent from the day after the end of that three-month period;*
2. *if the purchaser intends to exercise the rights provided for in paragraph 1 he shall, before the expiry of the relevant deadline, notify the person whose name and address appear in the contract for that purpose by a means which can be proved in accordance with national law in accordance with the procedures specified in the contract pursuant to*

point (1) of the Annex. The deadline shall be deemed to have been observed if the notification, if it is in writing, is dispatched before the deadline expires;

3. where the purchaser exercises the right provided for in the first indent of paragraph 1, he may be required to defray, where appropriate, only those expenses which, in accordance with national law, are incurred as a result of the conclusion of and withdrawal from the contract and which correspond to legal formalities which must be completed before the end of the period referred to in the first indent of paragraph 1. Such expenses shall be expressly mentioned in the contract;

4. where the purchaser exercises the right of cancellation provided for in the second indent of paragraph 1 he shall not be required to make any defrayal.

### **Distance selling of goods and services**

Article 6 Directive on the protection of consumers in respect of distance contracts (97/7/EC) reads:

1. For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

The period for exercise of this right shall begin:

- in the case of goods, from the day of receipt by the consumer where the obligations laid down in Article 5 have been fulfilled,

- in the case of services, from the day of conclusion of the contract or from the day on which the obligations laid down in Article 5 were fulfilled if they are fulfilled after conclusion of the contract, provided that this period does not exceed the three-month period referred to in the following subparagraph.

If the supplier has failed to fulfil the obligations laid down in Article 5, the period shall be three months. The period shall begin:

- in the case of goods, from the day of receipt by the consumer,

- in the case of services, from the day of conclusion of the contract.

If the information referred to in Article 5 is supplied within this three-month period, the seven working day period referred to in the first subparagraph shall begin as from that moment.

2. Where the right of withdrawal has been exercised by the consumer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. Such reimbursement must be carried out as soon as possible and in any case within 30 days.

3. Unless the parties have agreed otherwise, the consumer may not exercise the right of withdrawal provided for in paragraph 1 in respect of contracts:

- for the provision of services if performance has begun, with the consumer's agreement, before the end of the seven working day period referred to in paragraph 1,

- for the supply of goods or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier,

- for the supply of goods made to the consumer's specifications or clearly personalized or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly,

- for the supply of audio or video recordings or computer software which were unsealed by the consumer,

- for the supply of newspapers, periodicals and magazines,

- for gaming and lottery services.

4. The Member States shall make provision in their legislation to ensure that:

- if the price of goods or services is fully or partly covered by credit granted by the supplier, or
  - if that price is fully or partly covered by credit granted to the consumer by a third party on the basis of an agreement between the third party and the supplier, the credit agreement shall be cancelled, without any penalty, if the consumer exercises his right to withdraw from the contract in accordance with paragraph 1.
- Member States shall determine the detailed rules for cancellation of the credit agreement.

### **Financial services**

Article 6 Directive concerning the distance marketing of consumer financial services (2002/65/EC) reads:

1. *The Member States shall ensure that the consumer shall have a period of 14 calendar days to withdraw from the contract without penalty and without giving any reason. However, this period shall be extended to 30 calendar days in distance contracts relating to life insurance covered by Directive 90/619/EEC and personal pension operations.*

2. *The period for withdrawal shall begin:*

- *either from the day of the conclusion of the distance contract, except in respect of the said life assurance, where the time limit will begin from the time when the consumer is informed that the distance contract has been concluded, or*
- *from the day on which the consumer receives the contractual terms and conditions and the information in accordance with Article 5(1) or (2), if that is later than the date referred to in the first indent.*

*Member States, in addition to the right of withdrawal, may provide that the enforceability of contracts relating to investment services is suspended for the same period provided for in this paragraph.*

2. *The right of withdrawal shall not apply to:*

(a) *financial services whose price depends on fluctuations in the financial market outside the suppliers control, which may occur during the withdrawal period, such as services related to:*

- *foreign exchange,*
- *money market instruments,*
- *transferable securities,*
- *units in collective investment undertakings,*
- *financial-futures contracts, including equivalent cash-settled instruments,*
- *forward interest-rate agreements (FRAs),*
- *interest-rate, currency and equity swaps,*
- *options to acquire or dispose of any instruments referred to in this point including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates;*

(b) *travel and baggage insurance policies or similar short-term insurance policies of less than one month's duration;*

(c) *contracts whose performance has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal.*

3. *Member States may provide that the right of withdrawal shall not apply to*

(a) *any credit intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected building, or for the purpose of renovating or improving a building, or*

(b) *any credit secured either by mortgage on immovable property or by a right related to immovable property, or*

(c) *declarations by consumers using the services of an official, provided that the official confirms that the consumer is guaranteed the rights under Article 5(1).*

*This paragraph shall be without prejudice to the right to a reflection time to the benefit of the consumers that are resident in those Member States where it exists, at the time of the adoption of this Directive.*

*4. Member States making use of the possibility set out in paragraph 3 shall communicate it to the Commission.*

*5. The Commission shall make available the information communicated by Member States to the European Parliament and the Council and shall ensure that it is also available to consumers and suppliers who request it.*

*6. If the consumer exercises his right of withdrawal he shall, before the expiry of the relevant deadline, notify this following the practical instructions given to him in accordance with Article 3(1)(3)(d) by means which can be proved in accordance with national law. The deadline shall be deemed to have been observed if the notification, if it is on paper or on another durable medium available and accessible to the recipient, is dispatched before the deadline expires.*

*7. This Article does not apply to credit agreements cancelled under the conditions of Article 6(4) of Directive 97/7/EC or Article 7 of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.*

*If to a distance contract of a given financial service another distance contract has been attached concerning services provided by the supplier or by a third party on the basis of an agreement between the third party and the supplier, this additional distance contract shall be cancelled, without any penalty, if the consumer exercises his right of withdrawal as provided for in Article 6(1).*

*8. The provisions of this Article are without prejudice to the Member States' laws and regulations governing the cancellation or termination or non-enforceability of a distance contract or the right of a consumer to fulfil his contractual obligations before the time fixed in the distance contract. This applies irrespective of the conditions for and the legal effects of the winding-up of the contract.*

### **III UNSOLICITED CONTRACTS**

#### ***Distance selling of goods and services***

Article 9 Directive on the protection of consumers in respect of distance contracts (97/7/EC) reads:

*Member States shall take the measures necessary to:*

- prohibit the supply of goods or services to a consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment,*
- exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent.*

#### ***Financial services***

Article 9 Directive concerning the distance marketing of consumer financial services (2002/65/EC) reads:

*Without prejudice to Member States provisions on the tacit renewal of distance contracts, when such rules permit tacit renewal, Member States shall take the necessary measures to:*

- prohibit the supply of financial services to a consumer without a prior request on his part, when this supply includes a request for immediate or deferred payment,*
- exempt the consumer from any obligation in the event of unsolicited supplies, the absence of a reply not constituting consent.*