

# Position of Detailhandel Nederland on the Single Market Act

Detailhandel Nederland, hereunder referred to as Dutch Retail Association, represents the Dutch council for SME-retailers (MKB-Nederland) and of large retailers (Raad Nederlandse Detailhandel).

Registered as interest representative: nr 22232504133-92

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The Dutch Retail Association considers the following 10 points of the Single Market Act (SMA), as published by the European Commission in October 2010, the most important.

## 1) Copyright (point 2 SMA)

**The European Commission announces a proposal for a framework directive on the management of copyrights, which inter alia aims to improve the governance, transparency and electronic management of copyright.**

The sharing of knowledge is of great importance in a knowledge based economy for it adds value. Knowledge and content should flow as freely as possible, preferably within the whole European Union, to stimulate innovation, creativity, economic growth and employment. Both the body of intellectual property law as of copyright law do currently not allow this free flow. Therefore the Dutch Retail Association favors modernization and harmonization of the applicable rules for cross-border trade in the relevant category of goods and content (like books and music record-

ings) and services. It is in this respect essential that copyright holders could share in the proceeds without much ado.

Until far-reaching harmonization allows a true single market in which goods, content and services could freely be traded cross border, either via e-commerce or via brick-and-mortar shops, because national differences have disappeared, we favor a 'country of origin' principle. This implies that Member States shall ensure that service providers such as shops established in its territory comply with the national provisions applicable in that State, even if these providers sell their products to customers in another EU country. They need not check whether they comply with the laws of that other EU country as well.

In the context of improving the governance and transparency of the management of copyright, we would also like to draw the attention of the European Commission to the following. Many Dutch shopkeepers do play music in their shops and are thus obliged to pay copyrights. In the Netherlands an organization, called BumaStemra, has a monopoly to slap copyrights levies on shopkeepers for playing music in their premises. Many shopkeepers complain that these fees are not transparent. Moreover, they have the strong impression that the management costs of BumaStemra are disproportionately high. We would therefore favor that the new framework directive addresses this kinds of issues as well.

Lastly, we would like to draw the attention of the European Commission to the subject of enforcement of intellectual property rights. The Commission did start in January 2011 a public consultation on this issue. The aim is to gather information on how stakeholders perceive the application of the current directive on enforcement on intellectual property rights (2004/48/EC). This in the context of a possible review.

One of the important issues for retailers is the scope of the a possible new directive. Currently European associations of producers allege that some retailers with their own brand products are copying the products of the members of these associations. Although the allegations are not backed up by solid evidence, we warn that the introduction of so called parasitic copying as a form of forbidden uncompetitive

behavior under a new directive could cause serious problems. The concept of parasitic copying is much too vague and could easily distort free competition if rigidly enforced.

## 2) E-commerce (point 5 SMA)

**The European Commission announces a Communication on the operation of electronic commerce and guidelines for the Member States to guarantee the effective application of provisions in the Services Directive to combat discrimination against recipients of services because of their nationality or place of residence.**

The Dutch Retail Association agrees that discrimination against consumers purely on the basis of nationality or place of residence is in principle not acceptable. However, one should take into account that the nationality or place of residence of a consumer could implicate that the use of a certain ordered product is simply not possible. Between Belgium and the Netherlands there are for example differences in the electricity provided to consumers, which could make the use of some Dutch electrical devices in Belgium dangerously for the consumer. Another example is that pots paint are usually prepared specifically for certain regions. So paint for the Dutch market protects specifically against humidity, while paint for the Spanish market protects specifically against the sun. The amount of mercury a high energy saving lighting bulbs contains depends on the temperature of the environment in which these bulbs are used (a lower temperature requires more mercury). These examples are given to show that there may be perfectly legitimate reasons to refuse to sell a product to someone residing in another country.

It is recommendable to strive for a common European market, but one should at the same time not deny that in practice there are sometimes differences which for practical reasons cannot be neglected. Against this backdrop it is also important to note that sellers are sometimes reticent to sell cross border for the reason of differences in consumer protection rules. Under the current European rules an internet shop which sells to a consumer residing in another Member State is obliged to abide to the national consumer protection law of the consumer. Given the often substantial differences in these laws between Member States, especially with regard guarantee

rules on (non-) conformity of products, it is understandable that internet shops are sometimes hesitant to sell cross-border. These substantial differences are also a hindrance for Dutch retailers which want to establish new shops in other Member States. It is a pity that as things stand now, this problem will not be solved by the revision of the European consumer protection rules. Full harmonization of the rules on (non-) conformity is unfortunately not on the cards.

### 3) **Energy efficiency (point 11 SMA)**

**The European Commission announces that it will present an energy efficiency plan to exploit the potential for significant energy savings by complementing existing policies in all sectors where energy is consumed.**

The Dutch Retail Association supports in principal policies which lead to energy savings. Such savings are often good for the environment (less CO<sub>2</sub>-emissions). However, with respect to obligations to save energy in shops, we would like to stress that investments should take into account the economical lifespan of energy consuming installations. New obligations should not force shopkeepers to a greatly accelerated, and thus financially costly, amortization of installations. Ideally new investments should only take place at, or at least near, the end of the economic lifespan of an installation.

We would also like to point out that we are worried about ideas regarding obliging energy companies to improve the efficiency with which their final customers use energy (for example via white certificates schemes). In practice this could lead to situations in which energy utilities buy all kinds of energy saving equipment for domestic use, which they subsequently sell as part of an energy savings service package to their final customers. This could be very detrimental to retailers, for often the energy companies will buy these products not at their shops but directly from a producer or one of its subsidiaries.

### 4) **SME access to finance (point 12 SMA)**

The European Commission announces that it will adopt an action plan for improving SME access to capital markets in 2011. This will inter alia include measures to make

investors more aware of SMEs.

Roughly 95% of all shops are small and medium sized companies. Access to finance for them is still relatively hard. Especially in the aftermath of the economic and financial crisis, many banks maintain a restrictive stance with regard to providing capital. Against this background guarantee schemes backed by governments or European institutions are more important than ever. However, the Dutch Retail Association notes that the conditions attached to these schemes are often biased towards producing companies, leaving service companies, like retail shops, in the cold. The Dutch Retail Association calls on the European Commission to make remedying this situation part of its action plan to improve SME access to capital markets in 2011.

#### 5) **Accounting rules (point 14 SMA)**

The Commission announces a review of the accounting directives to simplify financial reporting obligations and to reduce administrative burdens.

The Dutch Retail Association is in favor of simplifying reporting obligations and cutting back on administrative burdens. Against this background we are against a new standard for reporting on real estate lease contracts, as proposed by the International Accounting Standards Board (IASB).

This standard (Exposure Draft ED/2010/9 Leases) would result in increased borrowing costs and difficulty to access financing for growth of retail businesses. Various entities operate in the Dutch retail industry consisting of large listed multinationals and a significant number of small and medium-sized entities. Although non-listed small and medium-sized entities do not have to comply with International Financial Reporting Standards, they are indirectly impacted by the proposed lease standard. Key performance metrics used by retail analysts and lenders will be redefined and reset for the industry as a whole after adoption of the lease standard by listed retailers. Therefore, any negative reset of key performance indicators for the industry as a whole will also indirectly impact non-listed retailers.

The new standard as proposed by the IASB assumes that all leasing arrangements

are a form of financing. This would cause a change from rental expenses to amortisation and interest expense and related front-loading of costs, which does not fairly represent the nature of many real estate leases in the retail industry. The economic performance of a lease does not change over time for real estate leases in the retail industry, but the proposed accounting suggests the lease performance increases over time which is not in line with economic reality/substance of lease agreements in the retail industry. Therefore the Dutch Retail Association is concerned that this will not provide users of the financial statements with useful information and would actually result in more confusing information for users.

We have also taken note that the European Financial Reporting Advisory Group, which advises the European Commission on financial reporting issues, has concluded last year that the aforementioned IASB proposal is 'not effective in addressing the concerns about the complexity of lease accounting and comparability of information. Furthermore, EFRAG is not convinced that the proposals result in information that is relevant to users of financial statements'.

The Dutch Retail Association believes that the European Commission should refrain from preparing a draft regulation on the basis of the current proposal of the IASB on leases. We are of course prepared to engage in a constructive dialogue on how to redraft the proposal in such a manner that it provides relevant financial information on leases.

#### 6) VAT (point 20 SMA)

**The European Commission announces to publish a new VAT strategy in 2011 on the basis of a green paper conducting a fundamental review of the VAT system, planned for 2010.**

With regard to VAT the Dutch Retail Association is in favor of a European harmonized low tariff for ecological responsible products. This will stimulate the uptake of these products, which is good for the environment, citizens and retailers. We also favor that the current low tariff for foodstuffs in the Netherlands remains in place, given that affordable foodstuffs are of huge importance, especially for people with low incomes or on unemployment benefits.

### 7) International Trade (point 23 SMA)

**The European Commission announces to further develop regulatory cooperation with its main trading partners, both bilaterally and multilaterally. It will pursue negotiations for international trade agreements with a focus on both market access and convergence on regulatory issues, particularly for services, IPR and subsidies.**

The Dutch Retail Association deplores that it is now 10 years ago that the Doha Round was launched. This round of trade negotiations, within the remit of the WTO, needs to be concluded as soon as possible. A Doha deal would strengthen internationally agreed rules and market opening, and provide a boost of confidence to the global economy and its stakeholders. Small and large retail businesses, employees and workers and consumers, will gain by improved access for importers and exporters of goods and services to fast growing markets like China, India, South-East Asia, and Latin America. Consumers would benefit via lower prices and a more diverse availability of products and services.

### 8) Product safety (point 39 SMA)

**The European Commission inter alia announces to propose a revision of the general product safety directive in order to ensure a coherent and effective framework for the safety of consumer goods in the European Union.**

The Dutch Retail Association would like to stress that with regard to product safety producers and importers should play a key role. They should be responsible for providing adequate information on safety aspects to the consumer (in the form of a leaflet and/or via the internet). Market surveillance authorities should concentrate their controlling activities on producers and importers and in case of safety problems which do require a recall, it is primarily up to producers and importers to take the necessary steps to repair or replace products.

### 9) Alternative dispute resolution and collective redress (point 46 SMA)

**The European Commission announces an initiative on the use of alternative dispute resolution in the EU and it will also carry out a public consultation on a Eu-**

**European approach to collective redress. The latter is aimed at identifying arrangements which could be introduced into the legal framework of the European Union and the legal systems of the Member States.**

The Dutch Retail Association is strongly in favor of alternative dispute resolution to settle any serious problem between a customer and a shop on products or services delivered. In the Netherlands many so called 'geschillenregelingen' are valid for durable goods. Both consumer organizations and shopkeepers are in general happy with these out of court settlement arrangements, which are fast and relatively cheap.

We take note that the European Commission has recently started a new consultation on a European approach to collective redress. This is the third consultation on this issue in three year time, which clearly shows how controversial the issue is.

The Dutch Retail Association would like to draw the attention of the European Commission to an opinion of the legal service of the European Parliament on the possible legal basis for a Community instrument for collective redress, dated 23 January 2009 : 'Judicial mechanisms for collective redress are at present available in the legal orders of thirteen Member States. In a number of cases, these mechanisms have only been introduced comparatively recently, and the number of occasions on which such mechanisms have been used is generally too small to permit generalizations as to their utility.'

So, it would make sense to first gain more insight at the national level into the effectiveness of the mechanism and its possible side effects, either intended or unintended, and either positive or negative. Special attention should be paid to what we expect to be an unintended negative side effect of these mechanisms: that they could be the cause of an excessive claim culture.

Especially the often abundant media coverage of collective redress suits worry retailers. In 2008 the European Commission argued in its Green paper on Consumer collective redress that 'elements which contribute to the effectiveness and efficiency of collective redress mechanisms include high media coverage (which can act as



an incentive for traders to settle and can also help in finding financing companies; in general it can have a deterrent effect on wrongdoers)'.

However, the Dutch Retail Association believes that this element of high media coverage is also one of the main reasons to be careful with stimulating collective redress mechanisms. Retailers operate in consumer markets. Especially large retailers with a well-known brand or corporate name are prone to loss of corporate reputation and loss of consumer loyalty due to negative publicity. For this reason these retailers will be tempted to settle claims for damages as quickly as possible, even if these claims are without merit. But also small and medium sized retailers are in a vulnerable position. They will often lack the financial means and specialized legal staff to fight an unmeritorious claim.

#### 10) National transposition of EU rules (point 47 SMA)

##### **The European Commission will work in partnership with the Member States to develop a more resolute policy to enforce the rules of the single market.**

The Dutch Retail Association is in favor of all partnerships aimed at better enforcement of the single market rules. We however believe that a more resolute policy should start with the Commission itself. As guardian of the treaty it should launch without mercy infringement procedures against Member States that do not live up to the rules of the single market. We have the impression that not seldom the Commission for political reasons is reticent to go after Member States that flout internal market rules. A case in point is Hungary, currently holding the presidency of the European Union. Hungary obliges foreign companies to pay a special new tax, targeting large telecom, energy and retail companies. Large retailers must pay up to 2,5 percent of their annual turnover to the Hungarian treasury in the form of a crisis tax. The tax is enacted in 2010 and valid retroactively for the past year. It will remain into force until 2014. It is clear that a tax solely targeted at large foreign companies is of a discriminatory nature, given that it not applies to domestic companies. It also has a protectionist effect. The tax deters foreign retailers from entering the Hungarian market, or forces them to leave it.

The fact that Hungary presides over the European Union should be of no relevance.



It is high time that the European Commission starts an infringement procedure against this country.

For any questions and/or comments please contact the Brussels office of Detailhandel Nederland at 0032-2-7365830 or send a mail to:

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