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THE PROPOSAL FOR A DIRECTIVE ON CONSUMER RIGHTS: IMPACT ON LEVEL OF NATIONAL CONSUMER PROTECTION

COMPARATIVE TABLE

On 8 October 2008 the European Commission proposed a Directive of the European Parliament and of the Council on Consumer Rights. The attached table illustrates the **impact of the most relevant issues addressed in the Proposal on the existing levels of consumer protection across the EU**.

This analysis of the regulatory impact of the proposal is in addition to that carried out in the impact assessment accompanying the proposal. While such regulatory analysis is not a requirement for Commission impact assessments, a number of requests for clarification have been raised by Member States in the Council Working Party, by the European Parliament and by consumer and business stakeholders. The table does not purport to provide an exhaustive analysis of the effects of the proposal on national laws, which would require a thorough screening of the national laws. It must be borne in mind that it is for the Member States, and not for the Commission, to screen their own legislation in order to check its compatibility with the Directive. For this reason, this note should be regarded as a living document that may be completed with the help of the Member States during the upcoming meetings of the working group in Council. For example, the Commission will verify with the Member States whether or to what extent Article 5 and Article 9 (pre-contractual information) need to be included in the table. The table may therefore be completed with the input of Member States.

The table covers only those provisions (e.g. the length of the withdrawal period and of the legal guarantee) for which it was possible to assess how the proposal would affect consumer protection in the various Member States in an unequivocal manner. Several provisions are not,

however, included in the paper since it is not always possible to undertake a mathematical "black and white" assessment (i.e. using plus and minus) of the impact of the proposal on national consumer rights.

For many provisions the assessment will be subjective since there will be arguments on both sides. A good example is Article 19, which exempts online auctions from the right of withdrawal. In 17 Member States, consumers buying at an auction (whether online or offline) have no right of withdrawal. Only 10 Member States distinguish between public auctions where the consumer enjoys no right of withdrawal and online auctions (eBay type auctions) where the consumer, after succeeding with his or her bid, may withdraw from the auction. On the one hand, it may be argued that the proposal by exempting online auctions from the right of withdrawal will reduce consumer protection in those 10 Member States. On the other hand, it may be maintained, and this is our opinion, that in the case of online auctions granting a right of withdrawal to the successful bidder harms the legitimate expectations of the unsuccessful bidders. If the successful bidder finds out, for example, that his bid was out of his or her price range, he or she could simply withdraw from the contract hoping that the next auction would lead to a better outcome. This would certainly cause detriment to the unsuccessful bidders. Other examples include the obligation of the consumer in Article 14(1) to notify the withdrawal to the trader by means of a "durable medium" (i.e. using a letter, fax or at least an e-mail). This could be seen as a burden on the consumer compared to a situation where no formal requirements apply, allowing the consumer to withdraw orally. In the Commission's view, however, a requirement to notify on a durable medium is more favourable for the consumer since it ensures that he will be able to prove that he withdrew on time in case the trader disputes this fact.

For obvious reasons the table also does not include the provisions which will have no impact on consumer rights (e.g. Article 1, objective).

A great variety of information requirements apply under national laws, many of which do not aim at protecting the economic interests of consumers. The Member States have referred to a number of such information requirements during the discussions in the Council Working

Party. It will then be possible to assess this regulatory impact only after the Member States have properly screened their legislation in this area.

For the same reasons a complete analysis of the impact of the fully harmonised grey and black lists attached to the proposal requires an equivalent screening of the clauses included in national black and grey lists. This process has been recently initiated in the Council Working Group. Only following the completion of the process will it be possible to fully assess the regulatory impact of the harmonised lists. From the initial discussions in the Council Working Group, it appears, however, that such a comparison may prove to be a challenging task. Firstly, the legal effects of the national grey and black lists sometimes differ from those in the proposal (e.g. in some Member States, even black listed terms may eventually be judged fair and legitimate). Secondly, some Member States have longer lists because they have simply split up some of the items in the lists in the proposal.

We believe Article 20 (exemptions from distance and off-premises contracts) will have a neutral impact on consumer protection since most national laws on distance and off-premises contracts do not apply to the transactions listed in this provision. The only exemption that requires clarification is Article 20(1)(a) since it is unclear to what extent the Member States exempt distance and off-premises contracts relating to immovable property rights.

NB: THIS IS WORK IN PROGRESS. THE DRAFT DOES NOT REPRESENT THE OFFICIAL VIEWS OF THE COMMISSION.

ISSUE (including explanation)	EVALUATION OF IMPACTS ON NATIONAL LEVEL OF CONSUMER PROTECTION		
	CONTESTED (indication of rules which will have to be deleted once the Directive is adopted)	STATUS QUO	INCREASE
Article 2 - Wider definition of off-premises contracts – no monetary threshold	-	<i>Belgium, Cyprus, Czech Republic, Denmark, Latvia, Luxembourg, France, Greece, Hungary and Slovakia: in those Member States, consumers enjoy a protection irrespective of the value of the off-premises contract like in the Commission's proposal.</i>	<i>Austria (€15 or €45), Bulgaria (€61), Estonia (€15), Lithuania (€58), Malta (€47), the Netherlands (€34), Poland (€10), Portugal (€60 but not applicable to the withdrawal right), Finland (€15), Germany (€40), Ireland (€51), Italy (€26), Romania (€30), Slovenia (€12), Spain (€48), Sweden (€32), United Kingdom (€51): in those Member States consumers are not protected for contracts below a monetary threshold which differs from one Member State to the other (see above).</i>

<p>Article 2 - Wider definition of off-premises contracts – solicited visits included</p>	<p>-</p>	<p><i>France, Italy, Latvia, Luxembourg, United Kingdom (since October 2008) and Poland:</i> in those Member States, consumers enjoy a protection for all types of solicited visits.</p>	<p><i>Austria, Czech Republic, Hungary, Netherlands, Spain, Bulgaria, Cyprus, Estonia, Germany, Greece, Ireland, Portugal, Romania, Slovenia, Slovakia, Sweden, Belgium, Denmark, Finland, Lithuania and Malta:</i> in those Member States consumers are not protected for certain types of solicited visits under complex conditions which vary from one Member State to the other (for more details, see page 58 of the Annex to the Impact Assessment Report)</p>
<p>Article 2 - Wider definition of distance contracts</p> <p><i>The proposal extends consumer protection rules – i.e. the right to withdrawal – to situations when a consumer buys goods/services at a distance from a trader who only occasionally engage in distance contracts.</i></p>	<p>-</p>	<p><i>Czech Republic, Hungary, France, Lithuania, Slovakia and Latvia:</i> in those Member States consumers are already protected when buying goods/services at a distance by an occasional sale</p>	<p><i>Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Estonia, Germany, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Ireland, Greece, the UK –</i> in those Member States consumers will gain from the proposal as they are not currently protected.</p>

<p>Article 2 - Exclusion of contracts at fairs and markets from the definition of off-premises contracts</p>	<p><i>Latvia, Slovenia and Belgium (partly):</i> in those Member States, consumers are protected for contracts concluded at fairs. However, as regards Belgium, consumers are protected only for sales where no full payment is made at the fair and the value exceeds €200.</p>	<p><i>Austria, Czech Republic, Hungary, Netherlands, Spain, Bulgaria, Cyprus, Estonia, Germany, Greece, Ireland, Portugal, Romania, Slovakia, Sweden, Denmark, Finland, Lithuania, Malta, France, Italy, Luxembourg, United Kingdom and Poland:</i> in those Member States, consumers are not protected when buying at a fair or at a market.</p>	<p>-</p>
<p>Article 6(1) - Rules on hidden charges</p> <p><i>Traders have to explicitly inform consumers about all charges on top of the price. If a trader does not inform the consumer, the latter does not have to pay those additional charge</i></p>	<p>-</p>	<p>-</p>	<p>All Member States. To the best of our knowledge, no Member State provides consumer with such a clear-cut protection against hidden charges.</p>
<p>Article 9(f) – Information that the contract is covered by consumer protection rules – i.e. the consumer is protected.</p> <p><i>In the context of distance contracts (e-commerce) the consumer should be informed upfront whether he is dealing with a trader and that the benefits from consumer protection rules.</i></p>	<p>-</p>	<p>-</p>	<p>All Member States. To the best of our knowledge, no Member State provides for such an explicit information requirement.</p>

<p>Article 12 - An EU wide 14 days cooling off period for distance and off premises contracts</p>	<p><i>Malta and Slovenia:</i> in those Member States consumers enjoy 15 calendar days cooling-off period</p>	<p><i>Cyprus, Czech Republic, Denmark, Estonia, Finland, Latvia, Portugal, Sweden and Germany:</i> in those Member States consumers already enjoy 14 calendar days (or two weeks) cooling-off period</p>	<p><i>Austria, Belgium, Bulgaria, France, Greece, Spain, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Slovakia, the UK, Poland and Hungary:</i> in those Member States consumers have shorter cooling-off periods (between 7 and 10 working days).</p>
<p>Article 12 – starting point of the withdrawal period for off-premises-contracts</p>	<p><i>Denmark, Hungary, Greece, Italy (in exceptional cases), Luxembourg, Portugal, Slovakia, Slovenia, Spain (case law), Sweden:</i> from the moment of delivery of goods, if later than conclusion of the contract</p> <p><i>Cyprus:</i> delivery of goods or day after conclusion of the contract if the latter is later</p> <p><i>Finland:</i> receipt of a specific information form or, if later, delivery of the good</p> <p><i>Latvia:</i> always delivery of goods</p>	<p><i>Austria, Estonia, Germany, Italy, Lithuania, Poland:</i> receipt of the information on the right of withdrawal</p> <p><i>Czech Republic, Belgium, France, Ireland, Malta, UK:</i> conclusion of the contract (if information on the right of withdrawal received)</p>	<p>-</p>
<p>Article 13 – where the consumer is not informed about the right to withdraw, the withdrawal period expires of 3</p>	<p><u>For distance contracts:</u></p> <p><i>Germany:</i> there is no cut-off date</p>	<p><u>For distance contracts:</u></p> <p><i>Czech Republic</i></p>	<p><u>For distance contracts:</u></p> <p><i>Austria, Belgium, Denmark,</i></p>

<p>months after the trader has fully performed the contract (in the context of off-premises and distance sales).</p>	<p>- the withdrawal period is unlimited; <i>Finland and Sweden</i>: the "withdrawal period" is one year; <i>Greece</i>: there is no cut-off date - the withdrawal period is unlimited unless the trader provides the information within the first 3 months; in <i>the UK</i>: the withdrawal period is 3 months and 7 days from the delivery of the goods.</p> <p><u>For off-premises contracts:</u></p> <p><i>All Member States</i>: there is no cut-off date - the withdrawal period should be unlimited (following ECJ judgement in the Heinger case).</p>		<p><i>Estonia, Hungary, Ireland, Italy, Latvia, Luxemburg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain</i>: in those Member States the consumer loses the right to withdraw 3 months after the delivery of goods or conclusion of a contract for services (the Proposal increases consumer protection for services).</p> <p><i>Lithuania and Cyprus</i>: in those Member States the consumer loses the right to withdraw 3 months after the conclusion of a contract (the Proposal increases consumer protection both for goods and services).</p>
<p>Article 16(2) in combination with article 17(2) - trader's right to withhold reimbursement</p> <p><i>If the consumer withdraws, the proposal introduces a right for traders to withhold reimbursement until receiving the goods or getting evidence from the consumer of having sent the goods back.</i></p>	<p>On the one hand, consumer protection will decrease in all Member States (current directive obliges the trader to reimburse the consumer as soon as possible and always within 30 days). On the other hand, this new rule protects traders against dishonest consumers, which do not intend to return the product.</p>	<p>=</p>	<p>=</p>

<p>Article 17(1) – in case of withdrawal the consumer has to bear the direct costs of returning the goods to the trader</p>	<p><i>Estonia, Finland, Greece, Spain:</i> in those Member States the trader always covers the cost of returning goods.</p> <p><i>Germany:</i> as a general rule, the trader bears the costs of the return. The costs of return may be imposed upon the consumer only in exceptional cases where the price of the item to be returned does not exceed € 40.</p>	<p><i>All other Member States.</i> To the best of our knowledge the consumer bears direct costs of returning goods.</p> <p><i>Austria and Italy:</i> situation comparable to the proposal – consumer might be obliged to cover these costs under the contract</p>	<p>=</p>
<p>Article 19 – exemption from the right of withdrawal for distance sale of newspapers, periodicals and magazines.</p>	<p><i>Estonia, Denmark and Greece:</i> in those Member States consumers may withdraw from any distance sale of newspapers (but not of periodicals and magazines)</p> <p><i>Austria:</i> consumers may withdraw from any distance sale of periodicals and magazines but NOT newspapers,</p> <p><i>Finland, Germany:</i> in those Member States consumers may withdraw from any distance sale of newspapers, periodicals and magazines if offered by cold-calling</p>	<p><i>All Member States (except Austria, Estonia, Finland Denmark, Greece and Germany):</i> consumers do not have the right to withdraw from these contracts.</p>	<p>-</p>
<p>Article 22 (1) – deadline for delivery</p>	<p><i>France and Germany:</i> General</p>	<p><i>Finland, Hungary,</i></p>	

	contract law stipulates that the contract must be performed immediately unless otherwise agreed.	<p><i>Netherlands, Poland, Latvia, Lithuania, Slovenia:</i> 30 days from the day of conclusion of the contract</p> <p><i>Austria, Belgium, Cyprus, Denmark, Estonia, Greece, Ireland, Italy, Luxemburg, Malta, Portugal, Spain, Sweden Slovakia, UK:</i> 30 days from the day following that on which the consumer forwarded his order to the supplier. This solution is comparable with the proposal.</p>	
<p>Article 22(2) - right to reimbursement in case of non-delivery/late delivery</p> <p><i>When the trader has failed to deliver goods on time, the consumer has the right to full refund of all monies paid within 7 days.</i></p>	-	-	<p><i>All Member States:</i> currently consumers have to wait 30 days (14 days in Slovakia) for refund in case of non-delivery instead of 7 days as envisaged in the proposal.</p> <p><i>In France and Germany</i> the procedure for refund will be facilitated as the existing right to refund is subject to further conditions.</p>

<p>Article 23 - rules on passing of risk</p> <p><i>The consumer becomes liable for loss of or any damage to the goods only after the goods are handed over to him (or someone indicated by him). The consumer is not liable for any loss or damage during transport of goods.</i></p>	<p>-</p>	<p><i>Most Member States provide for a similar rule.</i></p>	<p><i>Italy:</i> in this Member State the risk passes at the time of conclusion of a contract – i.e. consumers are liable for any loss or damage during transport.</p> <p><i>France:</i> the risk of loss or damage passes when the goods are handed over to the consumer, except in the case of force-majeure. The Proposal extends the protection to cases of force majeure (e.g. during transport).</p> <p><i>Spain:</i> the proposed rule clarifies the situation.</p>
<p>Article 24(2) – Conformity with the contract.</p> <p><i>The list of conditions under Article 24(2) determines the conformity of the goods with the contract</i></p>	<p>In <i>Cyprus</i>, the additional conditions include the availability of spare parts, accessories and specialised technicians, safety as well as the appearance and finish.</p> <p><i>Estonia, Denmark, Finland and Sweden:</i> "proper packaging" is the additional condition of conformity.</p>	<p><i>Most Member States provide for an identical list of conditions sometimes with the use of slightly modified wording.</i></p>	<p>-</p>

<p>Article 26 - the order of remedies for faulty goods.</p> <p><i>This article establishes a certain order of remedies for defective goods</i></p> <p><i>In comparison with the existing consumer acquis the proposal increases the number of circumstances where the consumer will be able to invoke any of the remedies without following any order (see article 26 paragraph 4)</i></p> <p><i>NB The relationship between the remedies in traditional contract law of the Member States, such as the right to reject in the UK and the hidden faults regime in France, is dealt with in the accompanying note.</i></p>	<p><i>Slovenia, Greece, Lithuania and Portugal –in those Member States a consumer may choose any of the remedies (i.e. no order of remedies applies)</i></p> <p><i>In Latvia a consumer has a wider choice of remedies then envisaged by the proposal (within the first 6 months after the purchase)</i></p>	<p>-</p>	<p><i>All the other Member States. Consumers will profit from clearer rules and slightly more possibilities to request reduction of price or to request all money back (to the best of our knowledge no Member State has a provision equivalent to Article 26(4)).</i></p>
<p>Article 26 – the initial choice between repair and replacement</p> <p><i>This article enables the trader to make the initial choice between repair and replacement.</i></p>	<p><i>All Member States: following the existing Directive on the sale of consumer goods all Member States allow the consumer to choose between repair and replacement. However the trader can easily contest consumer's choice on proportionality grounds, which may give rise to consumer disputes. Therefore the proposed solution clarifies the situation without any excessive reduction in consumer protection.</i></p>	<p>-</p>	<p>-</p>

	<p>The decrease will be particularly acute in <i>Slovenia, Greece, Lithuania, and Latvia</i> since these countries do not follow any order of remedies.</p> <p><i>There may be a slight decrease in Portugal where currently the consumer can choose any remedy on condition his choice is proportionate (i.e. he does not abuse his right).</i></p>		
<p>Article 26 (3) subparagraph 2: "The consumer may only rescind the contract if the lack of conformity is not minor"</p>	<p><i>Czech Republic, Denmark, Estonia, Portugal, UK:</i> consumers may request their money back even if there is only a very small defect (in Denmark only if the trader has not repaired or replaced the good within reasonable time).</p>	<p><i>All other Member States</i></p>	<p>-</p>
<p>Article 28(1), the 2 year legal guarantee.</p> <p><i>The seller is liable towards the consumer for 2 years from the moment the risk is transferred to the consumer.</i></p>	<p><i>The UK and Ireland:</i> the current liability period is 6 years in the UK (with the exception of 5 years in Scotland) and Ireland.</p> <p><i>The Netherlands, Finland:</i> there is no general liability period. Consumer's rights are assessed taking into consideration the life span of a product</p>	<p><i>All the other Member States</i></p>	<p>-</p>

	<p><i>Sweden:</i> the current liability period is 3 years.</p> <p><i>Germany, Hungary (and possibly some other Member States):</i> extended liability period for some specific products (e.g. building materials – 5 years in Germany and Denmark; <i>Hungary:</i> durable goods 3 years, <i>Greece:</i> durable goods up to 5/7 years)</p>		
<p>Article 28(2) – new guarantee for replaced goods</p> <p><i>A consumer, whose faulty product is being replaced for a new one, enjoys a new, two years guarantee for the new, replaced product.</i></p>	-	<i>Denmark</i>	<i>All Member States with the exception of Denmark. To the best of our knowledge those Member State do not provides for such a clear cut rule to the benefit of the consumer.</i>
<p>Article 28(3) - the shorter guarantee period for second hand goods (1 year)</p> <p><i>A seller of second hand goods may agree with a consumer to shorten the standard liability period from two to one year.</i></p>	<p><i>Denmark, Estonia, Finland, France, Greece, Ireland, Latvia, Lithuania, Malta, the Netherlands and the UK:</i> in those Member States traders and a consumers cannot agree on a shorter liability period for defective, second-hand goods</p>	<p><i>Austria, Belgium, Czech Republic, Cyprus, Germany, Italy, Hungary, Luxembourg, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden:</i> in those Member States, traders and consumers may agree on a shorter liability period for defective, second-hand</p>	-

		goods.	
<p>Article 28 (4) – Duty to notify lack of conformity</p> <p>Remark: The Commission does not consider the duty to notify the lack of conformity as necessarily decreasing consumer protection. On the one hand a duty to notify brings legal certainty both consumers and business and by prompting the consumer to notify shortly after the discovery of the defect may protect consumers from possible damages. On the other hand, the Commission acknowledges that a duty to notify is an additional burden for consumers</p>	<p><i>Austria, Czech Republic, France, Germany, Greece, Ireland, Latvia, Luxemburg, UK:</i> no duty to notify</p> <p><i>Belgium, Poland:</i> Duty to notify within one year</p> <p><i>Finland, The Netherlands:</i> within reasonable time of at least two months</p>	<p><i>Cyprus, Denmark, Estonia, Hungary, Italy, Lithuania, Malta, Portugal, Slovenia, Slovakia, Spain, Sweden:</i> as in the proposal</p> <p><i>Hungary:</i> as soon as possible, which includes two months</p>	
<p>Article 28(5) - the reversal of the burden of proof (6 months)</p> <p><i>Within first 6 months following a purchase, a consumer does not have to provide a proof, that a product was faulty already at the time of purchase.</i></p>	<p><i>Portugal:</i> in Portugal the reversal of the burden of proof is for the whole 2 years period (instead of 6 months as provided by the existing community legislation and the proposal)</p>	<p><i>All the other Member States (except Portugal)</i></p>	-
<p>Article 31(3) - the ban on pre-ticked boxes</p> <p><i>Especially in the context of e-commerce, traders will not be allowed to use pre-selected (pre-ticked) options involving additional payments.</i></p>	-	-	<p><i>All Member States.</i> It is our understanding that none of the Member States explicitly bans pre-ticked boxes in their national legislation.</p>

<p>Article 32 (3) – no assessment of the main subject matter of the contract and the adequacy of the remuneration</p>	<p><i>Austria, Denmark, Finland, Greece, Latvia, Luxemburg, Poland, Slovenia, Spain, Sweden:</i> these countries have not transposed Art 4 (2) of Directive 93/13/EE; the unfairness control therefore applies to the main subject matter and the adequacy of the remuneration</p>		
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