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**THE PROPOSAL FOR A DIRECTIVE ON CONSUMER RIGHTS:
SCOPE, RELATIONSHIP WITH NATIONAL GENERAL CONTRACT LAW AND RELATIONSHIP
WITH OTHER COMMUNITY LEGISLATION**

On 8 October 2008 the Commission proposed a Directive of the European Parliament and of the Council on Consumer Rights. The purpose of this paper is to address some major outstanding issues raised in the legislative process. The note is based on the original text of the Commission's proposal.

1. Relationship between the proposal, the Services and E-Commerce Directives and other Community legislation

Like the proposal, **the Services and E-Commerce Directives** have a very broad scope of application covering respectively all services contracts and all transactions concluded on-line. The proposal will not affect the information requirements set out in Article 22 of the Services Directive and Article 6 of the E-Commerce Directive¹. However, it will prevent Member States from imposing additional pre-contractual information requirements in consumer contracts over and above those set out in these provisions. In other words the proposal will have the effect of completing the pre-contractual information requirements set out in the Service and E-Commerce Directives, by requiring Member States, for consumer contracts, to refrain from imposing information requirements different from the mandatory requirements laid down in these two directives and in the proposal. This point may require further clarification in the proposal.

The proposal complements the **Unfair Commercial Practices Directive (UCP)**. UCP regulates commercial practices and protects the collective interest of consumers from unfair commercial practices. While UCP regulates in Article 7(4) the information to be provided by traders in an invitation to purchase, it does not provide consumers with any individual rights that can be enforced against traders. Article 3(2) makes clear that the Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract. The proposal, on the other hand, grants contractual rights to consumers, including the right to receive appropriate pre-contractual information. The proposal provides in Article 5(3) that this information shall form an integral part of the contract and regulates certain contractual consequences of failure to provide information in Article 6(2).

¹ It should be noted that other information obligations provided by the E-Commerce Directive (notably in Article 5) do not constitute pre-contractual requirements and do not become an integral part of a contract. In particular Article 5 regulates information that service provider have to render permanently accessible (e.g. the name of the supervisory authority). This type of information is outside the scope of the proposal.

Recital 10 of the proposal makes clear that its provisions should be without prejudice to Regulation (EC) No 593/2008 of the European Parliament and the Council applicable to contractual obligations (**Rome I**). The issue of the applicable law to a contract must therefore be judged solely under the Rome I Regulation. The proposal contains no international private law rules.

The proposal should be considered *lex generalis* compared to **sector specific Community legislation** (EU laws applying only to contracts for specific categories of goods or services such as the Cross-border Healthcare Directive or the legislation on food labelling). In case of conflict the specific information requirements in those vertical instruments will take precedence over those in the proposal. The minimum harmonisation in those sectoral instruments will be unaffected by the proposal.

2. *Scope*²

Dual usage contracts (i.e. contracts concluded both for professional and private purposes) may come under the scope of the proposal, when the private purpose is clearly predominant. It could be clarified in the proposal that the predominant purpose will have to be assessed by national courts on a case by case basis, taking into account the definition of "consumer" in Article 2(1).

Member States may decide to extend the application of the rules of the proposal to legal or natural persons which are not "consumer" in the meaning of Article 2(1). For example, Member States may decide that NGOs or small businessmen not acting as "consumers" can benefit from the consumer rights guaranteed in the proposal. However, these NGOs or businessmen should not be referred to as "consumers" as that would be incompatible with the definition in the proposal.

The Commission does not aim at regulating contracts for sale of or transfer of rights in **immovable property**. The proposal covers other contracts related to immovable property – e.g. rental, construction contracts or home improvements contracts.

The proposal does not regulate the **liability of producers for faulty products** (i.e. products which do not conform to the contract of sale). The freedom of the Member States to regulate this matter will thus be unaffected by the Directive.

Similarly the legal guarantee under Article 24³ of the proposal applies only to contracts for the sale of goods. It does not apply to service contracts; Member States are thus free to regulate the legal guarantee for service contracts.

Contracts for the **supply of water, gas and electricity** fall within the definition of service contracts and, therefore, are covered by the rules in the proposal on service contracts (i.e. chapters I- III, V and VI).

On **digital services** (i.e. software, downloaded music, etc), the provisions on information requirements and unfair contract terms (chapters II and V) apply in their entirety. As

² The present section provides guidance to the application of the proposal for certain types of contracts. The explanation provided will indicate whether chapters II, III, IV or V are applicable. If any of these chapters do indeed apply, then the relevant provisions of chapter I on subject matter, definitions and scope and chapter VI apply as well.

³ Conformity of the good with the contract.

regards the rules on distance selling, the proposal retains the derogation from the right of withdrawal in the existing Distance Selling Directive for services where performance has begun. It follows that the consumer is no longer able to withdraw once he has started downloading the digital service (i.e. by starting a download, performance begins and hence the consumer gives express consent under Article 19(1)(a). Furthermore, the rules on sales in chapter IV apply only to "tangible movable items". Digital services are therefore not covered by these rules. The Commission services will study further the issue of digital services in order to determine whether consumers are suffering detriment as a result of the lack of regulation at EU level of the liability of traders for faulty digital services.

Transport services are covered by the proposal, with certain exceptions. In general, the information requirements in chapter II and the rules on unfair contract terms in chapter V apply. The rules in chapter III apply only to transport services sold off-premises; the rules on information and right of withdrawal do therefore not apply to transport services sold at a distance⁴. The scope is even more reduced in relation to timeshare and package travel contracts – only chapter V on unfair contract terms applies to these contracts. As regards more specifically taxi contracts, it should be noted that the definition of business premises in Article 2(9) includes "movable retail premises". Taxi contracts are therefore considered to be concluded on-premises and are thus not subject to a right of withdrawal. Similarly, consumers will not be entitled to withdraw from the contract when they order a taxicab via phone since the right of withdrawal does not apply for transport contracts.

Social services are not excluded from the scope of the proposal. To the extent that such services are provided on the basis of a contract between the provider and the recipient, the provisions in chapters II, III and V apply. National information requirements would have to comply with the proposal to the extent that they have the purpose to protect the economic interests of consumers – i.e. Member States will not be allowed to introduce further, more prescriptive information obligations than those enumerated in chapter II of the proposal. For example in the case of an old people's or residential home a Member State will not be able to oblige the home management in its national legislation to comply with more detailed information obligations in the contracts with future residents (e.g. a number of meals or social and recreational activities).

Chapter V on unfair contract terms applies to **financial services** in general. Chapter III applies only to some specific financial services contracts concluded off-premises (insurance contracts, financial services whose price depends on fluctuations in the financial market and consumer credit covered by Directive 2008/48/EC are not covered by Chapter III). In practice the most important financial services contracts that will be covered are mortgage credit contracts and consumer credit contracts for less than EUR 200 or more than EUR 75000 (i.e. consumer credit contracts falling outside the scope of Directive 2008/48/EC). For these financial services contracts, the information requirements in Article 5 and 7 will apply by virtue of the reference in Article 9.

⁴ The scope of Chapter III in relation to transport services is defined by Article 8 in conjunction with Article 20(3).

Internet auctions where traders sell goods or services to consumers are covered by the proposal. All chapters of the proposal apply to contracts concluded at an internet auction (except of course chapter IV for services). The definition of auction in Article 2(15) covers eBay-style auctions, i.e. online auctions where a competitive bidding procedure is carried out on a website, without the intervention of an auctioneer. The right of withdrawal does not apply to contracts concluded at such auctions (Article 19.1 (h)). The derogation in Article 21(4) allowing Member States to not apply chapter IV to the sale of second-hand goods at public auctions applies only to auctions where the consumer may attend in person.

Mixed-purpose contracts, i.e. contracts having as their object both goods and services are treated as sales contracts under the proposal by virtue of the definition in Article 2(3). This means that all chapters of the proposal apply to such contracts. Chapter IV however applies only to the goods supplied under the mixed-purpose contract and not to the service element (Article 21(1)). In the case of a contract for the purchase of a mobile phone combined with a subscription to mobile phone services, it is clear that the rules on delivery and remedies for lack of conformity apply only to the mobile phone itself and not to the mobile phone services to be supplied. These contracts, even when concluded at a distance, are regarded as sales contracts (see Article 2(3)). Therefore when a mixed-purpose contract is concluded at a distance, the consumer will be protected by the rules on distance contracts for the whole contract (e.g. he will be able to withdraw from the mixed-purpose contract). However, the consumer should be liable for the service consumed during the withdrawal period although this may need to be clarified in the proposal.

The Commission does not intend to harmonise language requirements applicable to consumer contracts, which are outside the scope of the proposal.

3. *Impact on and relation with national general contract law*

It is assumed that the proposal will not affect to a significant extent the traditional **general contract law** in the Member States. The proposal fully harmonises only a limited number of issues with a strong internal market impact⁵. On these issues the Member States will not be able to go below or above the proposed level of protection. They will, nevertheless, have to adapt these rules to fit their national law—for example, the legal meaning of unfair contract terms not being "binding on the consumer" (Article 37 of the proposal). Furthermore the rules in the proposal will have to be complemented by general contract law.

For example, the consequences of the consumer being late in sending the goods back after withdrawal (Article 17) will have to be determined under national contract law. The Commission has refrained to the maximum extent possible from interfering with the general contract law of the Member States.

This means that:

- a) Issues such as (in)capacity to contract, rules on the conclusion of the contract (offer and acceptance), validity of contracts (with the exception of article 10(2)), voidness and voidability of contracts are unaffected by the proposal. They are outside the scope of the proposal and will continue to be governed by national law.

⁵ See in particular recital 4 and 8 of the Proposal.

- b) In general, the proposal does not affect the general national rules on the conclusion of the contract, including the corresponding **formal requirements** (e.g. the requirement of a notary deed for transfer of rights in immovable property or of a contract under seal in the UK)⁶. The only exception is Article 10(2) which requires mandatory written form for the valid conclusion of off-premises contracts. This provision prevents the Member States from requiring additional formal, presentational requirements for off-premises contracts⁷.

By contrast, the proposal prevents the Member States from prescribing additional formal, presentational requirements on the way the pre-contractual information has to be communicated to the consumer both for off-premises and distance contracts (e.g. type and size of characters). This includes the "model withdrawal form", which the Member States will not be able to change.

The proposal does not regulate the contract law consequences of the **omission of information**,⁸ with the exception of Articles 6(1)⁹, 7(2)¹⁰ and article 13(b)¹¹. In these three cases the Member States will be precluded from adding further contract law consequences/sanctions.¹² In all the other cases it will be for the Member States to determine the legal consequences of the omission (see Article 6(2)).

Articles 15 – 18 regulate the rights and obligations of the parties in case of **withdrawal**. The Member States will not be allowed to add to these rights and obligations. They will, nevertheless, have to adapt these rules to fit their national law. For example, it will be for the Member States to regulate the contract law consequences when one of the parties to the contract fails to fulfil its obligations as set out in Articles 16 – 18 of the proposal.

Much concern has been expressed about the relationship between the **consumer sales remedies** referred to in Article 26 and the traditional contract law remedies of the Member States, such as the right to reject in the UK and IE, the guarantee for hidden faults in France or the *azione redibitoria* in Italy.

It was never the intention that the full harmonisation of the specific consumer remedies in the proposal would preclude Member States from retaining their traditional contract law remedies. Full harmonisation of the existing consumer sales remedies should not exhaust the remedies for faulty goods available to the consumers on condition that the legal requirements for the exercise of these general remedies are different from those applying to the consumer sales remedies. In most Member States the consumer sales remedies coexist with the traditional contract law remedies, and the consumer may choose to use either regime. For example, in the UK and IE a consumer may decide to resort to the consumer sales remedies or to the right to reject. The requirements for the exercise of right to reject

⁶ The title of Article 11 may have to be amended to better reflect its actual content.

⁷ Presentational requirements relate to the prescribed layout and formatting of the pre-contractual information and contracts. Those include an obligation provide information using a particular size of font or the use of text boxes and similar.

⁸ However, the provided information must become an integral part of the contract.

⁹ Information about the price inclusive of all charges.

¹⁰ Rules on intermediaries.

¹¹ Information on the right to withdrawal.

¹² However, Member States will be allowed to provide for non-contract law consequences see Article 42.

are different from those of the consumer sale remedies. The consumer does not have two years to reject a faulty product but has to do it within a reasonable time (to examine the good). Moreover, the consumer does not benefit from a reversal of the burden of proof when he exercises the right to reject. Similarly, in France, the consumer should still be able to refer to the guarantee of hidden faults. By harmonising only the consumer sales remedies the impact of full harmonisation on this topic should be rather limited and thus UK and FR consumers could retain their specific rights. Member States should however be precluded from circumventing the full harmonisation character of the proposal by amending the hierarchy of remedies provided in Article 26¹³ which is specific to consumer contracts.

A number of Member States have expressed doubts about the practicality of such a dual regime and are willing to go further and harmonise consumer remedies for faulty goods exhaustively by including further remedies in the proposal, such as a right to reject. However, should such an exhaustive harmonisation not be achieved, a provision in the proposal could be inserted unequivocally confirming that full harmonisation of the specific consumer remedies in the proposal does not preclude Member States from retaining their traditional contract law remedies.

It must also be borne in mind that the proposal will not affect the consumer's **right**, under national law, **to enforce performance** of the contract or **seek damages** since these issues are not covered. The proposal does not affect the consumer's freedom to seek damages or enforce performance of the contract straight away (i.e. he may decide not to use the consumer sales remedies). Article 27(2) means that the Member States are obliged to provide consumers with a right to **damages for losses not remedied under the proposal**. However, the conditions of the trader's liability (e.g. strict liability or culpability), and the type and amount of the damage will have to be determined under national law.

Article 24¹⁴ applies only to faulty goods. It does not apply when the consumer buys a good which is subject to a **third party right** that would adversely affect the buyer. For example, Article 24 would not apply if a consumer purchases a good from a retailer who has not paid the price in full to the wholesaler who has made it subject to retention of title until the whole price has been paid. This situation will have to be addressed under the general contract laws of the Member States.

4. *Unfair Contract Terms*

On the provisions in the proposal on **unfair contract terms**, it should be noted that the **general unfairness clause** in the text is identical to the unfairness general clause currently contained in Article 3 of Directive 93/13/EEC on unfair contract terms. This means that the proposal will in principle respect existing national case law on unfair terms in consumer contracts and will not restrict the competence of national authorities to investigate and assess contract terms. The general unfairness clause has autonomous regulatory function (i.e. its scope of application is broader than that of the lists).

Member States will, however, have to amend their existing lists of unfair contract terms, enshrined in their laws, to bring them in line with the grey and black lists attached to the proposal. Member States will thus not be able to retain in their legislation terms on their national lists which are not included in Annex II and III to the proposal. In addition,

¹³ It includes the prohibition to give consumers the right to choose freely among consumer sales remedies.

¹⁴ Conformity with the contract.

Member States will not be able to retain decisions of national authorities or courts of last resort, which are universally applicable (i.e. with a binding effect similar to legislation for all traders and consumers) as this would have the same effect as the black and grey lists established by the proposal. They will also have to ensure that the wording of their general clauses is brought in line with that of the proposal.

The screening of Member States' national lists may however lead to the inclusion of additional terms in the course of the negotiations.

Full harmonisation will not change the different **roles played respectively by the ECJ and national courts** in assessing unfair contract terms. The Court will continue to interpret the general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question (see case C-237/02 *Freiburger Kommunalbauten*, paragraph 22, concerning Directive 93/13/EEC¹⁵). In order to clarify the role of national courts, a recital might be inserted to this effect.

Under Article 30(1) of the proposal, the fully harmonised rules on unfair contract terms apply to contract terms which have not been **individually negotiated** by the consumer. The proposal does not restrict the freedom of Member States to regulate individually negotiated unfair contract terms.

¹⁵ The ECJ states that, "in the context of its jurisdiction under Article 234 EC to interpret Community law, the Court may interpret general criteria used by the Community legislature in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question".