

Overview of the Commission Proposal for a “Directive of the European Parliament and of the Council on Consumer Rights” ; Pregled Predloga Komisije o „Direktivi Evropskog Parlamenta i Saveta o pravima potrošača“

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Part 3:
**THE FUTURE OF THE CONSUMER CONTRACT LAW IN
THE EUROPEAN UNION AND PARTICIPATING STATES**

**A. OVERVIEW OF THE COMMISSION PROPOSAL
FOR A “DIRECTIVE OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL ON CONSUMER RIGHTS“**

By *Emilia Čikara*

I. Introduction

On 8 October 2008, the Commission published its proposal for a “Directive of the European Parliament and of the Council on consumer rights”.³⁶³ This horizontal directive, which is based on full targeted harmonization should change and unite the content of Directive 85/577, Directive 93/13, Directive 97/7 and Directive 99/44 and repeal these directives at the same time. The Proposal is justified in the explanatory memorandum by the fact that the minimum harmonization principle has led to a fragmented regulatory framework across the EU, “which causes significant compliance cost for business wishing to trade cross-border“ on the one hand and results in a low level of consumer confidence in cross-border shopping on the other.³⁶⁴ The proposed Directive shall apply to sales and service contracts concluded between the trader and the consumer,³⁶⁵ while financial services contracts are excluded, except for certain off-premises contracts, certain unfair contract terms and certain general provisions.³⁶⁶

II. Structure

The Proposal is divided in seven Chapters. Chapter I provides common definitions of “consumer”, “trader”, “sales contract” and 17 other definitions (Art. 2). It also regulates the principle of full harmonisation (Art. 4). Chapter II concerns the pre-contractual information duties in all sales and service contracts between a consumer and a trader. Specific information duties and right of withdrawal for distance and off-premises contracts are regulated in Chapter III (Art. 8). For off-premises contracts there is a standard withdrawal form set out in Annex I (B) of Proposal which must be included in the traders’ order form. Chapter IV contains provisions that were prescribed by Directive 99/44 and Chapter V provisions that were regulated in Directive 93/13. Chapter V is accompanied with Annex II, which contains the so

³⁶³ COM(2008) 614 final.

³⁶⁴ *Ibid.*, 2.

³⁶⁵ Art. 3 of the Proposal

³⁶⁶ Art. 3 (2) of the Proposal

called “black list” of unfair contract terms, and with Annex III, which regulates contract terms which are presumed to be unfair. Chapter VI contains *inter alia* provisions on transposition of the Directive and Chapter VII final provisions.

III. Targeted Full Harmonization

Pursuant to Art. 4 of the Proposal member states may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection. Although the Proposal states that the horizontal Directive is based on full targeted harmonization,³⁶⁷ the review of the Proposal demonstrates targeting of almost all measures for full harmonization.³⁶⁸ Unlike previous consumer protection directives, which were based on minimum harmonization principle and allowed member states adopting or maintaining more favourable provisions to protect consumers in the field which they covered, the new Directive prohibits alterations in transposition.

IV. Definitions

Many of the common definitions regulated in Chapter I of the Proposal have been changed and broadened in order to cover a wide range of transactions. For instance, definitions of “sales contract”,³⁶⁹ “service contract”,³⁷⁰ and “distance contract” cover the majority of all consumer transactions.³⁷¹ Art. 2 (6) of the Proposal introduces a new and simplified definition for „distance contract” as any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication. According to Art. 2 (8) of the Proposal an “off-premises contract” is any sales or service contract concluded away from business premises with the simultaneous physical presence of the trader and the consumer or any sales or service contract for which an offer was made by the consumer in the same circumstances. Off-premises contract exists even if the sales or service contract were concluded on business premises but negotiated away from business premises,³⁷² and the business premises include also market stalls and fair stands where the trader carries on his activity on a regular or temporary basis.³⁷³ Art. 2 (18) of the Proposal replaces the term “guarantee” as used in the Directive 99/44 with the term “commercial guarantee”. However, the definition remained similar, except for removal of one part of definition, namely “given without extra charge”. This new formulation leads to the inclusion of guarantees which can be purchased (“extended warranties”). The notion of “consumer” has been changed and includes purposes which are outside his “craft” as well as the usual “trade,

³⁶⁷ COM(2008) 614 final, 4, 5.

³⁶⁸ A general exception to the full harmonization is contained in Art. 3 (1) of the Proposal, which defines the scope of application, namely business to consumer sales and service contracts. Departure from this general rule is allowed in some other provisions which refer to member states law, for instance in Art. 6 (2) of the Proposal according to which the consequences of any breach of general information requirements (Art. 5) shall be determined in accordance with the applicable national law.

³⁶⁹ Art. 2 (3) of the Proposal.

³⁷⁰ Art. 2 (5) of the Proposal.

³⁷¹ C. Twigg-Flesner, D. Metcalfe, “The proposed Consumer Rights Directive – less haste, more thought?”, *European Review of Contract Law* 2009, <http://ssrn.com/abstract=1345783>, last visited 19.2.2010, 2.

³⁷² Art. 2 (8) of the Proposal.

³⁷³ Art. 2 (9) of the Proposal.

business or profession” in the current consumer protection directives.³⁷⁴ The Proposal uses the term “trader” and replaces all different terms used in current directives, such as “supplier”, “seller”, “trader” and “seller or supplier”. “Trader” is defined as a natural or legal person who is “acting for purposes relating to his trade, business, craft or profession”, with the added reference to “anyone acting in the name of or on behalf of a trader”.³⁷⁵

V. Information duties

Consumer information is dealt with in Chapter II (Art. 5 to 7 of the Proposal). Art. 5 (1) of the Proposal prescribes the general information requirements for the trader, except if they are already apparent from the context. This information concerns e.g. the main characteristics of the product, address and the identity of the trader, price and arrangements for payment, delivery, performance etc., and once provided they become part of the contract.³⁷⁶ Art. 7 of the Proposal regulates specific information requirements for intermediaries. Alongside the general information duties in Chapter II, Chapter III regulates in its Art. 9 certain special information requirements for distance and off-premises contracts, like information on arrangements for payment, delivery and performance, on conditions and procedures for exercising the right of withdrawal, on address of the place of business of the trader to which the consumer can address complaints etc. With respect to off-premises contracts, this information shall be given in the order form (Art. 10 of the Proposal) while with respect to distance contracts, it shall be given or made available to the consumer prior to the conclusion of the contract (Art. 11 of the Proposal).

VI. Right of withdrawal

Art. 12 to 19 of the Proposal regulate the right of withdrawal for distance and off-premises contracts. Unlike the seven day period prescribed in the current directives, the withdrawal period is extended to fourteen days. With respect to off-premises contracts the withdrawal period begins once the consumer has signed the order form or, in appropriate circumstances, has received a copy thereof on another durable medium, and for distance contracts it begins once the consumer has acquired the material possession of the goods, or in case of provision of services from the day of the conclusion of the contract.³⁷⁷ However, if the trader has not provided the consumer with the information on the right of withdrawal, the withdrawal period expires three months after the trader has fully performed his other contractual obligations.³⁷⁸ When exercising his right of withdrawal the consumer should “inform the trader of his decision to withdraw on a durable medium”, either in his own words, or using the standard withdrawal form as set out in Annex I (B).³⁷⁹ No other formal requirements can be added to the standard withdrawal form. With regard to distance contracts concluded on the Internet, the trader may in addition allow the consumer to electronically fill in and submit the standard withdrawal form on the trader’s website in which case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal. The exercise of the

³⁷⁴ Art. 2 (1) of the Proposal.

³⁷⁵ Art. 2 (2) of the Proposal.

³⁷⁶ Art. 5 (3) of the Proposal.

³⁷⁷ Art. 12 (2) of the Proposal.

³⁷⁸ Art. 13 of the Proposal.

³⁷⁹ Art. 14 of the Proposal.

right of withdrawal shall have the effect of terminating the obligations of the parties.³⁸⁰ Upon withdrawal, the trader must reimburse any payment received from the consumer within thirty days, but may wait until the consumer returns the goods.³⁸¹ In case of withdrawal the consumer is obliged to return goods to the trader within fourteen days from the day on which he communicated his withdrawal, unless the trader offers to collect them. The consumer can only be charged for the direct cost of returning the goods and can only be liable for any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods. If the trader has not properly informed the consumer on his right to withdrawal, the consumer shall not be liable at all. The consumer shall bear no cost for services performed, in full or in part, during the withdrawal period where the contract was subject to a right of withdrawal.³⁸² A number of exceptions from the right of withdrawal are regulated in Art. 19 of the Proposal and can be divided into exceptions regarding distance contracts (Art. 19 (1))³⁸³ and exceptions regarding off-premises contracts (Art. 19 (2)). Art. 20 of the Proposal excludes the application of whole Chapter III with respect to certain distance and off-premises contracts.

VII. Sales contracts

Chapter IV regulates other consumer rights specific to sales contracts and encompasses, with important modifications, the provisions contained in Directive 99/44. While most significant provisions on conformity, on sellers' strict liability for non-conformity, on criteria for the assessment of non-conformity, on remedies and on commercial guarantees have been taken over, certain new provisions have been introduced.³⁸⁴ According to Art. 21 of the Proposal this Chapter applies to sales contracts, whereby in case of mixed-purpose contracts for goods and services, this Chapter only applies to the goods. It also applies to contracts for the supply of goods to be manufactured or produced. However, it does not apply to spare parts replaced by the trader when remedying the lack of conformity of the goods by repair under Art. 26 of the Proposal. Also, member states may decide not to apply provisions of this Chapter to the sale of second-hand goods at public auctions. The Proposal introduces new provisions on delivery and the passing of risk in Articles 22 and 23. The trader delivers goods by transferring the material possession to the consumer or to a third party other than the carrier and indicated by the consumer, within maximum thirty days from the conclusion of the contract.³⁸⁵ Where the trader fails to fulfil his obligations to deliver, the consumer is entitled to a refund of any sums paid within seven days from the delivery date.³⁸⁶ According to Art. 23 (1) of the Proposal "the risk of loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer has acquired material possession of the goods". If the consumer or a third party, other than the carrier and indicated by the consumer has failed to take reasonable steps in taking the material possession of

³⁸⁰ Art. 15 of the Proposal.

³⁸¹ Art. 16 of the Proposal.

³⁸² Art. 17 of the Proposal.

³⁸³ E.g. according to Art.19 (1) lit. a) of the Proposal where service provision commences during the withdrawal period with the consumer's consent, no right of withdrawal exists.

³⁸⁴ H.-W. Micklitz, N. Reich, "Crónica de una muerte anunciada: The Commission proposal for a „directive on consumer rights"", *Common Market Law Review*, 46/2009, 501.

³⁸⁵ Art. 22 (1) of the Proposal.

³⁸⁶ Art. 22 (2) of the Proposal.

the goods, the risk shall pass to the consumer at the time of delivery as agreed by the parties.³⁸⁷ Another novelty represents the different approach of the Proposal with regard to the consumer's remedies in case of a lack of conformity. Although the list of remedies remains essentially the same and includes repair or replacement, reduction in price and rescission, Art. 26 (2) of Proposal gives the "trader" the right to choose between repair and replacement. The consumer may choose remedies only under the limited conditions in Art. 26 (3) and (4) of the Proposal.³⁸⁸ If the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or disproportionate, the consumer may choose between price reduction and rescission of contract.³⁸⁹ However, the consumer may only rescind the contract if the lack of conformity is not minor. Unlike Directive 99/44, the Proposal expressly regulates in its Art. 27 (2) that the consumer may claim damages for any loss not remedied in accordance with Art. 26 on the other remedies. An important change concerns time limits, where new Art. 28 (4) of the Proposal imposes a duty of the consumer to notify the trader of the lack of conformity within two months of detection.

VIII. Contract terms

Chapter V of the Proposal incorporates the provisions contained in Directive 93/13.³⁹⁰ According to Art. 30 (1) of the Proposal, Chapter V applies to contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, especially standard form contracts. If the consumer had the possibility of influencing some of the terms, Chapter V still applies to other contract terms which form part of the contract.³⁹¹ Art. 31 of the Proposal introduces new transparency requirements, under which contract terms must *inter alia* be "made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract".³⁹² Also, the trader needs consent of the consumer regarding any payment in addition to the remuneration foreseen for the trader's main contractual obligation. If the trader uses default options by requiring the consumer to reject in order to avoid the additional payment, the consumer is entitled to reimbursement of this payment.³⁹³ Exclusions previously contained in Art. 4 (2) of the Directive 93/13 are now regulated in Art. 32 (3) of the Proposal, which excludes the main subject matter of the contract and the adequacy of the remuneration from the control of fairness. Under Art. 37 of the Proposal the consumer will not be bound by contract terms which are unfair, whereby contract terms, as set out in the „black list“ in Annex II, are considered unfair in all circumstances (Art. 34) and contract terms, as set out in the „grey list“ in Annex III, are considered unfair, unless the trader has proved that such contract terms are fair (Art. 35). The list in Annex III of the Proposal is very similar to the list in the Annex to the Directive 93/13. However, there are few minor changes and several of the terms previously presumed to be unfair entered the "black-list" in Annex II of the Proposal.

³⁸⁷ Art. 23 (2) of the Proposal.

³⁸⁸ Art. 3 (5) of the Directive 99/44 has been replaced with Art. 26 (4) of the Proposal, according to which the consumer may resort to any remedy available under para. 1, where one of the special situations exists, e.g. when the trader has failed to remedy the lack of conformity within a reasonable time.

³⁸⁹ Art. 26 (3) of the Proposal.

³⁹⁰ Arts. 30 to 39 of the Proposal.

³⁹¹ Art. 30 (2) of the Proposal.

³⁹² Art. 31 (2) of the Proposal.

³⁹³ Art. 31 (3) of the Proposal.

IX. Conclusions

The Commission Proposal for a Directive on consumer rights represents an important piece of legislation, which tries to develop a coherent set of rules in European consumer contract law. The introduction of unified common definitions, rules on information duties and of central regulation of right of withdrawal for distance and off-premises contracts should affect the current regulatory fragmentation in this field and thus contribute to legal certainty of consumers. However, with the exception of these improvements and certain additional rules, the Proposal largely replicates the content of the current consumer protection directives. The major difference represents the shift from the minimum to full harmonisation principle. The application of this principle will mean the achievement of comparably higher level of consumer protection on the one hand, and the reduction of the existing level of consumer protection in individual states on the other. While full harmonization is suitable for provisions on withdrawal and on specific information duties, it is not appropriate for provisions on remedies in sales contracts and provisions on black and grey list of unfair contract terms. In conclusion, although the Proposal should be improved and revised by the European legislator, it undoubtedly represents a good starting point for a discussion on the future of coherent European consumer contract law.³⁹⁴

³⁹⁴ This discussion was recently continued by publication of Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) published on 1 July 2010. The purpose of this Green Paper is to set out the options on how to strengthen the EU internal market by making progress in the area of European Contract Law, and launch a public consultation to gather orientations and views from relevant stakeholders. To this purpose the Commission has set up an Expert Group to study the feasibility of a user-friendly instrument of European Contract Law and which will assist the Commission in selecting certain parts of the Draft Common Frame of Reference (DCFR) which are directly or indirectly related to contract law. This instrument could range from non-binding to binding, depending on offered options, where Option 1. ends with mere publication of the results of the Expert Group, Option 2. foresees the adoption of an official „toolbox“ for the EU legislator, Option 3. is based on attachment of the instrument of European Contract Law to a Commission Recommendation addressed to the Member States and Option 4. foresees adoption of a Regulation setting up an optional instrument of European Contract Law in each Member State. Furthermore, Option 5. recommends the adoption of Directive on European Contract Law, which would harmonize national contract law on the basis of minimum common standards. On the contrary Option 6. foresees the adoption of Regulation establishing a European Contract Law, while Option 7. suggests the adoption of Regulation establishing a European Civil Code. Depending on the results of the consultation, that will run from 1.7.2010 to 31.1.2011 the Commission could propose further action by 2012.