

Protection of consumers: distance contracts

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This document constitutes the Commission's report on the implementation of Directive 97/7/EC, as provided by its Article 15(4) of that Directive. In particular, the Commission looks at whether the national divergences in transposition and the use of the minimum clause in Article 14 (which states that Member States may introduce more stringent provisions) have had an impact on the Internal Market and affected business and consumer confidence in cross border trade. The Commission does not consider it appropriate to put forward any proposal for revising the Directive until the diagnostic phase of the review of the consumer acquis is concluded.

Scope of Application – Article 3 exemptions: Article 3 limits the scope of the Directive by excluding certain distance contracts from all or part of the Directive's provisions. The Commission needs to establish whether the exemptions are still appropriate, whether they need to be revised, expanded or repealed. The report considers a number of problems encountered by the Commission. It particularly mentions the fact that the increase in popularity of on-line auctions since the adoption of the Directive has led to a significant rise in consumer complaints. Whereas originally websites such as eBay were geared towards C2C transactions of second hand goods, they are increasingly being used for B2C transactions of new goods. The Commission is aware of national case law on whether websites such as eBay amount to auction houses and are therefore exempted from the Directive. The transposition checks have confirmed the need to look at the meaning of " auction " in national laws. Some Member States appear to have only partially transposed the exemption and others have extended the partial exemptions at Article 3(2) to all the provisions of the Directive.

Prior Information – Article 4: the prior information requirements raise some important interpretation questions. Although a significant number of Member States have transposed Article 4(1) literally, most of them have also used the minimum clause to enhance national consumer protection. The transposition checks have revealed that some requirements have been transposed poorly in some Member States. This report focuses on those requirements which may have been badly transposed because of possible interpretation problems with the Directive. The timing and modalities for giving prior information may need to be reconsidered to ensure consumers are adequately informed when deciding whether to enter into a transaction. Some Member States, including Belgium and Sweden have not explicitly referred to taxes in their transposition. The Commission will clarify with them whether it is a principle of national law that taxes are always included in references to price. It will also consider whether the Directive should explicitly refer to other forms of charges made to the consumer e.g. booking/handling fees taking into account Article 7(4)(c) of the UCP. The Commission is also aware of problems concerning price transparency and the operation of premium rate services and will examine whether the provisions of the Directive relevant to premium rate services need to be reinforced. A significant number of Member States have not expressly transposed the good faith requirement at Article 4(2) and/or make no express reference to the protection of certain types of consumers, including minors.

Written Confirmation – Article 5: the Commission states that the timing of written confirmation needs to be discussed with a number of Member States. Enquiries concerning the information to be confirmed in writing must also be made with some Member States since some may have omitted to prescribe confirmation of all, or part of the required information. Moreover, the minimum clause has led to divergences in national requirements such as language requirements (Cyprus, Greece, Spain) or additional information to be provided in writing. Confirmation of information concerning the right of withdrawal in particular has generated additional national rules. Some Member States and stakeholders have raised the need to clarify the concept of " durable medium " in Article 5(1) in the light of Directive 2002/65/EC and new technologies.

Right of Withdrawal – Article 6: the Directive sets a minimum period of seven working days for the consumer to withdraw from the contract. Member States have transposed this requirement in a multitude of ways, the most common being seven working days or 14 calendar days. The point from which the period starts to run raises more fundamental questions. For instance, “ receipt ” of goods may be subject to different interpretations in the Member States. The issue of when receipt takes place has been raised on occasion and will be considered in the broader review work. The Commission also wonders whether the treatment of deliveries in batches needs to be re-examined in the course of the review. The financial consequences of withdrawing from a contract and/or the timing of reimbursement must also be discussed with a number of Member States. The minimum clause has been used when transposing Article 6. Some of the exemptions at Article 6(3) have not been transposed evenly across Europe. National divergences are particularly clear when looking at the modalities for exercising the right of withdrawal: in Portugal the goods must be returned within 30 days; the form of the notice of withdrawal is prescribed in some Member States; a number of Member States, including the United Kingdom, Finland and Portugal have made provisions concerning a duty of care whilst the goods are in the consumer’s possession. Member States have also made different uses of the regulatory option concerning the cost of returning the goods, including payment by the consumer in all cases (e.g. Cyprus), payment by the consumer in certain circumstances (e.g. United Kingdom, Ireland, Belgium), payment by the consumer at the supplier’s discretion (Estonia, Malta) and payment by the supplier where this can be done by normal post (Finland). In Estonia, there is a 10 euro cap on the cost to be borne by the consumer when returning the goods.

Performance – Article 7: overall, the transposition of Article 7 dealing with performance of the contract gives rise to problems associated with timing. The main comment relates to the inconsistent use of terminology throughout the Directive and within Article 7 in particular. Indeed, Article 7 refers to “days ” whereas Article 6 refers to “ working days ”. In addition, the point from which calculation periods run is specified in Article 7(1) (“ from the day following ” the order) and unspecified in Article 7(2). As presently drafted, Article 7(2) has been interpreted in a number of ways. Some Member States have interpreted the timing requirement as applying only to the refund, others to both the refund and the notification of non availability. The transposition of Article 7(3) is also weak in some Member States.

Restrictions on the use of certain means of distance communication - Article 10: many Member States have failed to notify their national provisions transposing this Article. The Commission states that this may be justified by the fact that subsequent community legislation also covers these restrictions. Directive 2002/58/EC on privacy and electronic communications requires Member States to ensure that the use of automated calling systems without human intervention, facsimile machines or electronic mail be only allowed for the purposes of direct marketing in respect of subscribers who have given their prior consent (“opt-in” system).

Conclusions: the transposition of the Directive raises a number of confirmed or apparent problems. Many of these may emanate from the wording of the Directive. Although, the Directive appears to be flexible enough to cover new technologies and forms of marketing, the practical application of the Directive may not weather the test of time. The proper execution of the rights and obligations set out in the Directive is not always practicable. In addition, the transposition checks have revealed significant divergences between national laws as a result of the use of the minimum clause. It is unclear at this stage to what extent these divergences affect the proper functioning of the Internal Market and consumer confidence. The Commission must establish this in order to decide whether the Directive needs to be revised. These issues will all be examined further in the course of the review of the acquis. In doing so, the Commission will need to take into account not only consumer protection legislation, but also other fields of community legislation including e-commerce and privacy legislation.