

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**



Constitutional Affairs



Justice, Freedom and Security



Gender Equality



Legal and Parliamentary Affairs



Petitions





DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

LEGAL AFFAIRS

The Potential Impact of the Consumer Rights Directive on the Member States' Contract Law

**– Side effects on the Member States' general
contract law or general sales law –**

Abstract

This study identifies and analyses the side effects that the "full harmonisation approach" of the proposed Consumer Rights Directive could have on national general contract laws or general sales laws. In particular, the study analyses the reasons for side effects of the proposed directive and provides concrete examples of such effects on national contract laws. Furthermore, it contains recommendations on possible action to be undertaken in order to avoid unwanted side effects.

This document was requested by the European Parliament's Committee on Legal Affairs.

AUTHORS

Professor Hans Schulte-Nölke, European Legal Studies Institute, University of Osnabrück
In co-operation with Dr Christoph Busch, Daniel Reiner and Martin Werneburg

RESPONSIBLE ADMINISTRATOR

Ms Roberta PANIZZA
Policy Department C - Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: roberta.panizza@europarl.europa.eu

LINGUISTIC VERSION

Original: EN

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

Manuscript completed in October 2009.
Brussels, © European Parliament, 2009.

This document is available on the Internet at:
<http://www.europarl.europa.eu/studies>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorized, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

EXECUTIVE SUMMARY	7
1. Task and Methodology	8
1.1. Side Effects of the Proposal on General Contract Law	8
1.2. Methodology	8
2. Reasons for Side Effects	10
2.1. Coexisting Consumer Law and General Contract Law Regimes	10
2.2. 'Rearrangement Effect' and 'Inconsistency Effect' of the Proposal	10
2.3. Extent of full harmonisation	12
2.3.1. Exhaustive full harmonisation	12
2.3.2. Selective (or pointillist) full harmonisation	13
2.3.3. Unclear whether exhaustive or selective full harmonisation	13
2.4. Indirect Side Effects because of Demarcation Problems	14
3. Characteristic Examples of Side Effects	15
3.1. Information Duties	15
3.2. Withdrawal	17
3.3. Sales	18
3.3.1. Delivery	18
3.3.2. Remedy for non-delivery	20
3.3.3. Conformity	21
3.3.4. Choice between repair and replacement	24
3.3.5. Hierarchy of remedies	25
3.3.6. Damages	26
3.3.7. Time limits	27
3.3.8. Notice requirement	28
3.4. Unfair Terms	30
3.4.1. Clauses individually negotiated	30
3.4.2. Unfairness test	31
4. Options for Action in order to Avoid Unwanted Side Effects	34
4.1. Clarification of scope of the Proposal	34
4.2. Clarification that Member States shall have leeway	34
4.3. Adaptation of consumer protection level	34
4.4. Clarification of the scope of full harmonisation	34
4.5. Exhaustive full harmonisation in specific sectors only	35

SELECTED REFERENCES

36

LIST OF ABBREVIATIONS

Art.	Article
CC	Civil Code
CCom	Commercial Code
Commission's Non-Paper	European Commissions' non-paper 'The proposal for a directive on consumer rights: impact on level of national consumer protection', presented by DG SANCO at the hearing on the Consumer Rights Directive, held by the committee on the Internal Market and Consumer Protection of the European Parliament on 29 September 2009
ConsC	Consumer Code
ConsProtA	Consumer Protection Act
Consumer Credit Directive	Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC
Consumer Sales Directive	Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees
Distance Selling Directive	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts
Doorstep Selling Directive	Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises
LOA	Law of Obligations Act
para.	paragraph
Proposal	Proposal for a Directive of the European Parliament and of the

Council on consumer rights, COM(2008) 614 final

Sec. Section

Unfair Terms Directive Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

EXECUTIVE SUMMARY

In its present state the Proposal for a Directive on Consumer Rights (hereafter 'Proposal') is likely to have numerous adverse 'side effects' on Member States' general contract law. The analysis has revealed that in a number of Member States, general contract law provides contract parties (including consumers) with a broader and more favourable set of rights and remedies than the Proposal. This is, for example, the case in the following areas of sales law:

- *Time of Delivery:* Article 22(1) of the Proposal regulates as a default rule that a trader shall deliver within a maximum of 30 days. In contrast, general contract law of many Member States requires the trader to deliver within a 'reasonable time', without 'undue delay' or even 'immediately', which, in most cases, is more favourable for the buyer.
- *Hierarchy of Remedies:* Article 26 of the Proposal sets strict limits to the consumer's right to rescind the contract for lack of conformity and grants such right only in cases where, for example, the lack of conformity was not remedied within a reasonable time. In contrast, in several Member States, general sales law allows the buyer to rescind the contract without such limits.
- *Limitation Periods:* Under Article 28(1) of the Proposal, the remedies for lack of conformity are only available within a period of two years from the time of delivery. In contrast, the general contract law of several Member States provide for much longer limitation periods (e.g. five or six years, in some cases, even longer).

Under the Proposal, it is unclear as to whether or not the more favourable rights and remedies of general contract law will still be available to the consumer. The full harmonisation approach of the Proposal may, in fact, in a number of Member States, lead to the paradoxical situation that consumers, if limited to the remedies available under the Proposal, will be worse off than non-consumers.

This would leave Member States with the choice between two (possibly both undesirable) alternatives: either they have to bear the paradoxical situation or they have to reorganise their general contract law (which also applies to B2B relations) according to the consumer specific approach of the Proposal.

1. TASK AND METHODOLOGY

1.1. Side Effects of the Proposal on General Contract Law

This study deals with the impact of the proposed Consumer Rights Directive on the general contract law of the Member States. Thus, this study does not focus on the impact the Proposal will have within its scope ('intra muros'), i.e. in the area of – specific – consumer contract law (B2C). In other words, this study concentrates on the side (or 'extra muros') effects the Proposal probably will have when enacted and transposed into the Member States' laws. One initial example may illustrate what such side effects of the – fully harmonising – Proposal on general contract law may be:

Example: Two-year prescription period and longer periods under general contract law

Article 28(1) of the Proposal regulates a two-year preclusion (or prescription) period, counted from the time the risk is passed to the consumer (i.e. delivery). After this period has expired, consumers lose all rights granted to them under the Proposal in the event that they bought defective goods. Several Member States regulate – usually under general contract law or general sales law – much longer periods during which the buyer (including a consumer) can enforce remedies for defective goods (e.g. UK, NL, DE [for building materials], FR [in case of a *vice caché*]). If the Proposal is transposed in the United Kingdom, for example, English and Scottish general contract law becomes inconsistent: a consumer-buyer loses all his rights two years after delivery, whereas a business – under general contract law – has a limitation period of 6 years in England¹ and 5 years in Scotland.² Hence, the business is in a much better position than the consumer. This leads to the – rather odd – question of whether or not a consumer can opt to be a business. One can call this a 'side effect' of the Proposal because the Member State (here the UK) will be forced to consider attuning its general contract law to the fully harmonised European consumer law rules. In this case, the fully harmonised B2C rules of the Proposal 'spill over' into the general contract law of the UK and thereby additionally affect the rules for B2B contracts.

1.2. Methodology

Whether a full harmonisation directive as intended by the Proposal will have such side effects on the general contract law of a Member State depends very much on the concrete situation in the individual Member State. It is, however, impossible in the course of a study of this size to scan all the general contract laws of the Member States on possible side effects. Therefore, a selective approach has been taken. A starting point for the choice of Member States to be looked at was an earlier study conducted by the author on the method of transposition of the existing directives in the field of consumer contract law.³ With regard to the four directives, which will be replaced by the Proposal, an overall picture on how these Directives have been transposed in the 27 EU Member States looks as follows:⁴

¹ England Limitation Act 1980 s. 5.

² Scotland Prescription and Limitation (Scotland) Act 1973 s. 6(3).

³ Schulte-Nölke, The transposition of European consumer directives into the national laws of the EU-Member States, *Tijdschrift voor Consumentenrecht & Handelspraktijken* (TvC) 2009.

⁴ The abbreviations for the Member States follow the European Commissions usages for internal documents.

Predominant integration into civil code or code of obligations:	CZ, DE, EE, NL, SK
Predominant integration into consumer code:	AT, BG, FI, FR, EL, ES, IT, LT, LV, LT, MT, SL
Predominant individual acts:	BE, CY, DK, HU, IE, LU, PL, PT, RO, SE, UK

As side effects of the Proposal depend, in particular, on the relationship between consumer law and general contract law, it seemed, from a methodological point of view, important to have a look at the Member States from all of these three groups. Therefore, as far as possible, the examples given in this study follow this pattern, i.e. they are taken from these three groups. In addition, examples try to cover both the 15 'old' and the 12 'new' Member States.

Sources used for this study include existing books on the Proposal⁵ and studies, in particular the Consumer Law Compendium⁶ and the comparative notes to the Draft Common Frame of Reference⁷ and – to a limited extent – additional research with the help of the international staff and the broad library of the European Legal Studies Institute at Osnabrück.

The European Commission's Non Paper 'The proposal for a directive on consumer rights: impact on the level of national consumer protection' of 28 September 2009⁸ was made public within the final stage of the drafting of the present study and has, therefore, only partially been taken into account. As far as the non-paper identified side effects, its findings will be commented on in this study, indicating where similar findings are reached and where deviations occur.

⁵ Cf., inter alia, Jud/Wendehorst, Neuordnung des Verbraucherprivatrechts in Europa? (2009), Howells/Schulze, Modernising and Harmonising Consumer Contract Law (2009).

⁶ Schulte-Nölke, Twigg-Flesner, Ebers [eds.], EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States (2008).

⁷ Von Bar, Clive [eds.], Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition (forthcoming).

⁸ Non-paper presented by DG SANCO of the Commission at the hearing on the Consumer Rights Directive, held by the committee on the Internal Market and Consumer Protection of the European Parliament on 29 September 2009.

2. REASONS FOR SIDE EFFECTS

2.1. Coexisting Consumer Law and General Contract Law Regimes

As the initial example (see para. 1.1.) already shows, side effects of full harmonisation are likely to occur where national general contract (and sales) law coexist with consumer law in such a way that

- matters are regulated generally for all contracts including consumer contracts (e.g. prescription in the UK example), and/or
- consumers can base their rights on both the general contract law and on specific consumer law ('concurrence of claims').

An example for the second situation is the right of a consumer-buyer under the French Code de la Consommation and the right of any buyer (irrespective whether consumer or business) under French Code civil. If the Proposal is to be understood (as it seems from its wording) that the remedies granted to a buyer under the Code civil (e.g. in case of '*vice caché*', for more details see below) also fall under the full harmonisation clause, the Proposal has a massive side effect on the Code civil.

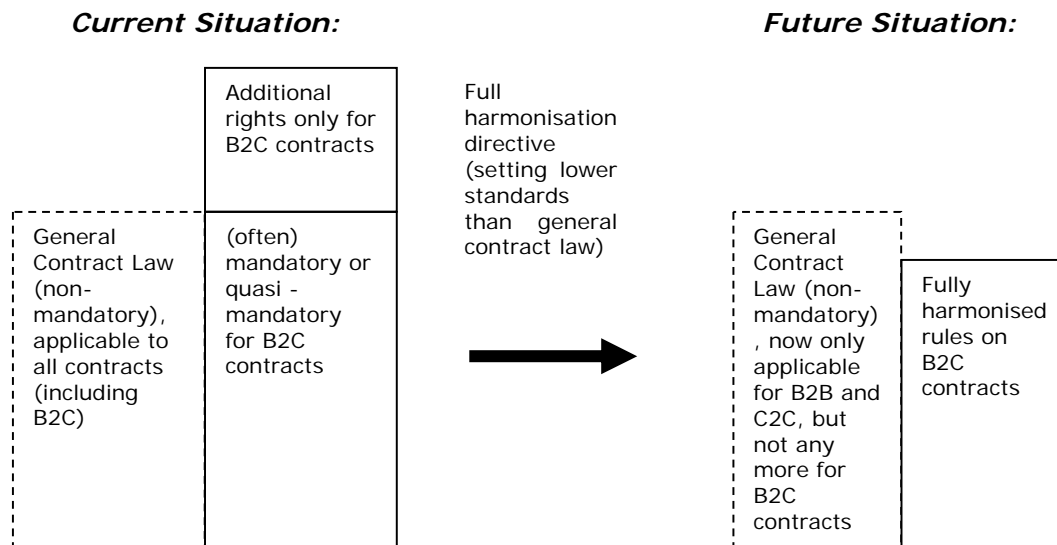
As the general table on the transposition of consumer directives in the Member States shows (see above, p. 8), such coexistence of general contract and sales law with specific consumer law on the basis of concurrent claims law is frequent in Europe. The reason is that as long as, for example, the Consumer Sales and the Unfair Terms Directives only contained minimum provisions, it was the easiest way to transpose the directives into statutes applicable parallel to existing general contract law.

2.2. 'Rearrangement Effect' and 'Inconsistency Effect' of the Proposal

The main reason for the Proposal having side effects on general contract law of Member States is that the Proposal sometimes puts a consumer in a worse position in comparison with the position of a contract party under the general contract law of a Member State.

The effects of a full harmonisation directive on the general contract law of a Member State depend very much on each concrete case. However, some general observations can be made. Member State laws usually co-ordinate the relationship between general contract law and consumer contract law according to what could be referred to as the 'on-top-principle', i.e. consumers are granted additional rights 'on top' of the contractual rights available to all parties under general contract law. The picture is slightly more differentiated as general contract law is usually non-mandatory law ('dispositive'), whereas consumer law is usually mandatory. Therefore, provisions which are non-mandatory, at least for B2B contracts, often coexist with mandatory provisions for B2C contracts.

The effect of a full harmonisation directive, which puts a consumer in a worse position (in comparison with the position of a contract party under general contract law), can be demonstrated by the following illustration:



As the illustration shows, the full harmonisation consumer directive can have two main effects on general contract law:

- **Rearrangement Effect:** The Member State is under pressure to rearrange its general system of law, in particular, to put matters which until now have been regulated generally for all (sales) contracts, including B2C, into specific rules (chapters, statutes, as the case may be) specifically applicable to B2C contracts.
- **Inconsistency Effect:** The Member State has the choice between two (possibly both undesirable) alternatives: either it has to bear the contradiction that the (non-mandatory) rules on B2B contracts place a business in a better position than a consumer, or it also has to change the rules on B2B (and C2C) contracts.

These effects can be illustrated by the example from French law mentioned above. As already said, the Proposal regulates a two year prescription period in Article 28(1), calculated from the delivery of the goods bought by the consumer. Under French law, a buyer of goods which have a hidden defect (*vice caché*) has, according to Art. 1648 Code civil, a period of two years calculated from the time when the buyer has discovered the defect. Given the two different starting points for the prescription periods, the co-existence of the two provisions in practice can make an enormous difference. Since the rights of a buyer under Art. 1648 of the French Code civil are, in this respect, more favourable for a consumer than the rules of the Code de la Consommation (which transpose the Consumer Sales Directive 1999/44/EC), the consumer can also rely on the Code civil.

In case the full harmonisation intended by the Proposal obliges France to transpose the Proposal as it stands now, France would have to consider excluding the applicability of the rules in the Code civil for consumer-buyers and to regulating the rights of the consumer-buyer exclusively in the Code de la consommation (rearrangement-effect). In addition, France would have to consider whether Art. 1648 of the Code civil can remain unchanged, thus giving a professional buyer a much longer period than a consumer (inconsistency-effect). The example again shows that the inconsistency effect also puts enormous pressure on the Member States to amend their general contract or sales law in order to avoid inconsistencies. In other words, the Proposal would have – because of its full harmonisation

approach – the effect that the Member States also have to model their general contract and sales law according to the Proposal.

2.3. Extent of full harmonisation

The question whether the Proposal will have side effects, and to what extent, depends very much on the extent of the intended full harmonisation. The core provision on this issue, Article 4 of the Proposal, does not answer this crucial question and thereby creates an enormous uncertainty as to the effects of the Proposal. The possible – rather different - understandings of this provision can be either “exhaustive full harmonisation” or just “selective (or pointillist) full harmonisation”.

2.3.1. Exhaustive full harmonisation

Exhaustive full harmonisation means that the subject matter of a provision is regulated comprehensively and exhaustively in the sense that the relevant article of the Proposal is meant to be the one and only regulation of this subject matter.

Examples:

1. Article 26 of the Proposal sets out remedies for lack of conformity in the case of a consumer sale. Rescission from the contract is only possible in certain cases (in particular, when the lack of conformity was not remedied within a reasonable time, cf. Article 26(4)) and only within two years from delivery (Article 28(1)). If this is to be understood as exhaustive full harmonisation, Member States are prohibited to grant other remedies such as the right to immediately reject (as in the UK and in Ireland) or a much longer limitation period in the case of hidden defects (*vices cachés*) in France.
2. Article 22(2) of the Proposal requires that the trader must reimburse any sums received from the consumer within 7 days in case he has not delivered in time, in the sense of Article 22(1). If this is to be understood as an exhaustive full harmonisation article, Member States are prohibited from regulating additional sanctions for the trader's delay (e.g. the claim for damages).
3. Article 7(1) of the Proposal obliges an intermediary to disclose to a consumer that he is acting in the name and on behalf of another consumer, and that a contract concluded in this situation will be a C2C contract and therefore falls outside the scope of the protection granted to B2C contract under the Proposal. Article 7(2) of the Proposal regulates a sanction for the infringement of this obligation. The sanction is that the intermediary shall be deemed to have concluded the contract in its own name. If this is meant in the sense of exhaustive full harmonisation, Member States are prohibited from regulating other sanctions for the infringement of this duty (e.g. a claim for damages against the intermediary who did not disclose that a C2C contract is concluded). The full harmonisation effect of Article 7(2) of the Proposal could even mean that there shall be just the contract between the intermediary and the consumer and no contract any more with the ‘another consumer’ (the one who was represented by the intermediary). In this case, the Member States have to leave the original contract party off the hook.

2.3.2. Selective (or pointillist) full harmonisation

Article 4 of the Proposal can also be understood in the sense that the full harmonisation effect of the provisions in the directive goes only as far as the scope of the individual provision in the Proposal reaches. This would mean that Member States are bound only by the Proposal within their rules which are specifically applicable to the situation covered by an individual article of the Proposal and only in so far as this article contains a regulation. In this case, the Member States merely have to align their provision specifically applicable to B2C contracts to the Proposal, but would, however, remain free to grant to contract parties a better position under general contract law applicable to all contract parties (including consumers).

Examples:

1. As the right to immediately reject in the UK and in Ireland, or the much longer limitation period in the case of hidden defects (*vices cachés*) in France, are regulated in general contract law (and are not part of rules applicable only on B2C contracts), the Proposal, if it is to be understood as just a selective full harmonisation measure, does not cover such generally applicable rules. The UK, Ireland and France can maintain their traditional remedies under general contract law. Other Member States are free to introduce similar remedies as long as they are generally applicable to all contracts (including consumers).
2. If Article 22(2) of the Proposal is to be understood just as a selective full harmonisation provision, it would mean that the Member States may not require the business to reimburse received funds in a period shorter or longer than 7 days. They would, however, remain free to impose other sanctions on the business (e.g. damages) as Art. 22(2) contains only a rule on repayment.
3. If Article 7(2) of the Proposal is to be understood just as a selective full harmonisation provision, the Member States may not impose other contract law sanctions on the intermediary (e.g. punitive damages). Member States, however, are free to impose non-contractual sanctions on the intermediary (administrative fines) and – more importantly - to regulate that the consumer, represented by the intermediary, shall also remain bound by the contract.

2.3.3. Unclear whether exhaustive or selective full harmonisation

The core problem of the Proposal is that it does not clarify to what extent full harmonisation is intended. The wording of Article 4 of the Proposal clearly indicates exhaustive full harmonisation. The most striking evidence is a comparison with Art. 22 of the Consumer Credit Directive (2008/48/EC) which states that the Member States may not maintain or introduce provisions diverging from those laid down in this Directive “in so far as this Directive contains harmonised provisions”. As Article 4 of the Proposal does not contain the “in so far” by-phrase one could conclude by *argumentum e contrario* that the Member States may not maintain or introduce provisions in so far as the Proposal is silent. However, the Commission’s Explanatory Memorandum to the Proposal indicates that general contract law is not intended to be touched.⁹ It goes without saying that the Proposal will have many more side effects in the sense of this study if exhaustive full harmonisation is intended.

⁹ Explanatory Memorandum, p. 7.

2.4. Indirect Side Effects because of Demarcation Problems

Furthermore, the Proposal may have indirect side effects because it contains some unclear definitions. Such ambiguity causes a grey zone around the scope of the Proposal where the Member States are in the dark as to which issues fall in the fully harmonised area. This may result in the indirect side effect that Member States regulate situations which fall into the grey zone around the Proposal just by way of precaution.

In particular, precise definitions of the notion of both consumer and trader will be crucial for the Member States when amending their consumer law according to the requirements of the Proposal. However, the unclear scope of application of the Proposal, particularly caused by vague definitions, may mislead Member States when implementing the provisions of the future directive.

Article 2(1) of the Proposal, for example, contains a definition of the notion of consumer that fails to address the issue of mixed purpose contracts, although this issue is discussed controversially throughout Europe and has already been dealt with in the Working Document of the Committee on the Internal Market and Consumer Protection of the European Parliament.¹⁰ Under the Proposal it remains unclear as to whether a person acting for purposes which only partly relate to his or her trade can, for example, exercise the right of withdrawal provided for in the Proposal. A similar problem exists with regard to the notion of the trader. The definition contained in Article 2(2) leaves open whether an intention to make a profit is necessary to qualify the person as a trader. Member States such as Austria¹¹ and Germany¹² have qualified a person as a trader (or 'business') even if the person does not intend to make a profit, whereas other Member States, e.g. Finland¹³ and Slovenia¹⁴, limit the notion of trader to persons that act in order to gain income or with an economic interest.

To be on the safe side, Member States may give the definitions of consumer and trader a broader meaning than were meant by the European legislator. Encouraged by the Proposal, Member States may give up autonomy in regulating situations that actually fall outside the scope of the Proposal.

¹⁰ European Parliament, Committee on the Internal Market and Consumer Protection, Working Document on European contract law and the revision of the acquis: State of play and the notion of consumer (17.5.2006).

¹¹ ConsProtA § 1(2).

¹² BGH 29 March 2006, NJW 2006, 2250.

¹³ ConsProtA Chapter 1 § 5.

¹⁴ ConsProtA § 1(3).

3. CHARACTERISTIC EXAMPLES OF SIDE EFFECTS

3.1. Information Duties

Article 5(1) of the Proposal: *Prior to the conclusion of any sales or service contract, the trader shall provide the consumer with the following information, if not already apparent from the context:*

(a) the main characteristics of the product, to an extent appropriate to the medium and the product;

(b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;

(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

(d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;

(e) the existence of a right of withdrawal, where applicable;

(f) the existence and the conditions of after-sales services and commercial guarantees, where applicable;

(g) the duration of the contract where applicable or if the contract is open-ended, the conditions for terminating the contract;

(h) the minimum duration of the consumer's obligations under the contract, where applicable;

(i) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader.

Article 5(1) of the Proposal contains pre-contractual information obligations which, to large extent, have been derived from existing directives, notably the Distance Selling Directive (97/7/EC). Whereas under that Directive several items of information had to be given prior to a contract concluded by means of distance communication, the information items listed in Article 5 cover all kinds of consumer sales and service contracts. The information required includes, inter alia, the main characteristics of the product, the geographical address and identity of the trader, the price, arrangements for payment and performance, delivery conditions, right of withdrawal, duration of the contract and termination. Read in conjunction with the concept of full harmonisation, the Article in its current wording precludes Member States from adopting (or maintaining) other information items than those listed in that Article.

Article 5(3) of the Proposal declares that the list of pre-contractual information items contained in paragraph (1) shall form an 'integral part' of the contract. Together with the concept of full harmonisation, this seems to hinder Member States requiring traders to include other information into the contract. In so far, Article 5 of the Proposal does not only prescribe certain pre-contractual information to be given to the consumer, but also, essentially regulates the content of sales and services contracts between traders and consumers.

Analysis of Member States' laws

Following the Distance Selling Directive in particular, the information items listed in Article 5(1) of the Proposal are, to a large extent, already part of national consumer contract law. In implementing the Distance Selling Directive, the Member States have applied them with regard to consumer contracts that have been entered into by means of distance communication. In France¹⁵ and Belgium¹⁶ a general duty exists to give information in B2C contracts which requires a seller to provide the consumer with information about all essential characteristics of the goods or services to be provided under the contract.

Besides information duties in consumer contract law, pre-contractual information requirements can also be found in general contract law. In Estonian law, for example, a general pre-contractual duty exists to inform the other party of all circumstances the other party can reasonably expect, especially circumstances with regard to which the other party has an identifiable essential interest.¹⁷ In a series of Member States a party giving incorrect or incomplete information may be liable under the doctrine of *culpa in contrahendo*. To avoid this liability, this party has to provide the other party with the necessary information. The concept of *culpa in contrahendo* thus creates a large number of pre-contractual duties to provide information which also applies in the field of consumer contract law. It must be noted that the information to be given to avoid liability for *culpa in contrahendo* is not restricted to a closed list of information items but is mostly linked to the notion of good faith and therefore, to a large extent, subject to national case law.

Most notably, the concept of *culpa in contrahendo* is visible in Germany where a trader may be liable for damages for breach of a pre-contractual duty to provide information.¹⁸ Austrian law, which until recently allowed damages only in case of fraud¹⁹, now awards damages for *culpa in contrahendo*²⁰. Similarly, Czech and Slovenian²¹ law regulate a liability for incorrect information on the basis of pre-contractual liability for *culpa in contrahendo*.

Furthermore, a number of legal systems provide indirectly for information duties by means of the doctrines of mistake and fraud. Under these systems, a party that provides incorrect information through negligence or fraud on, inter alia, the goods to be sold or services to be provided, is liable for damages; the other party is to be placed in the position which would have existed, if the incorrect information had not been given. There is thus a strong incentive for the trader to provide the necessary information prior to, or at the conclusion of, the contract. In Austrian law, mistake may lead to pre-contractual liability²²; in Germany, the liability of the party giving incorrect information may follow from the rules on *culpa in contrahendo*. Similar concepts that allow a party who has not been provided with the information to be given prior to the conclusion of the contract to claim for damages exist in, for example, Greece²³, Italy²⁴, the Netherlands²⁵ and Poland²⁶. In addition, in Bulgaria, the trader has to remedy the mistaken party according to the rules of pre-contractual liability.²⁷

¹⁵ ConsC Article L. 111-1.

¹⁶ Trade Practices Act article 30.

¹⁷ LOA § 14(2).

¹⁸ CC §§ 280(1), 311(2), 241(2).

¹⁹ CC § 874.

²⁰ Bydlinski, Bürgerliches Recht I³, nos. 6/36 et seq.

²¹ LOA § 20.

²² Koziol/Bydlinski/Bollenberger (-Bollenberger), ABGB, § 874 no. 2.

²³ CC arts. 197-198 and 914.

²⁴ See Mengoni, Riv.Dir.Com. 1956, II, 360, Castronovo, L'obbligazione senza prestazione ai confini tra contratto e torto, 160 et seq., Roppo, Il contratto, 878.

²⁵ CC art. 6:162.

²⁶ CC art. 72 § 2.

²⁷ LOA art. 12.

Possible side effects

The general information clause contained in Article 5 of the Proposal may have significant influence on national contract law. Read in conjunction with Article 4, the list of information items may be seen as exhaustive in the sense that Member States must not introduce or maintain additional information requirements. National information duties can only be maintained if they relate to the 'main characteristics of the product (cf. Article 5(1) lit. (a) of the Proposal). This could reduce or even fully exclude the application of *culpa in contrahendo* or the French *obligation de renseignement*²⁸ in consumer contracts because not all pre-contractual information duties established under these concepts are concerned with the main characteristics of the goods or services.

Information duties based on general contract law would be precluded in B2C relations but, even more strikingly, they could be maintained without consumer contract law. The field of pre-contractual information would thus be separated into information duties found in non-consumer contract law and information duties based on consumer contract law. Several national information duties could only be maintained for persons not acting as consumers. For example, a duty to give information about legal restrictions for the use of goods offered (e.g. the need for a licence or a ban on export) or to give information on certain dangers (e.g. danger of suffocation of children when playing with plastic bags) could be maintained for B2B or C2C contracts but would be precluded for B2C contracts. There is also the risk that Article 5 of the Proposal might be seen as exhaustive with regard to the pre-contractual information duties for specific services (e.g. patient information by physicians; investor-related duties to warn and to inform of banks).

3.2. Withdrawal

Article 20(1) of the Proposal: "*Articles 8 to 19 shall not apply to distance and off-premises contracts: (a) for the sale of immovable property or relating to other immovable property rights, except for rental and works relating to immovable property; [...]*"

Article 20(1)(a) of the Proposal follows the Doorstep and the Distance Selling Directives which both exempt contracts for the sale of immovable property from their scope of application. Read in conjunction with the full harmonisation clause of Article 4 of the Proposal, Member States are precluded from granting consumers a right to withdraw from contracts for the sale of immovable property.

Analysis of Member States' laws

Some Member States have refrained from simply copying the exceptions of the Directives and have instead granted a right of withdrawal for areas exempted by the Directives. However, the additional rights of withdrawal were only introduced for B2C contracts.

This is different in the Netherlands where a specific right of withdrawal for the sale of houses was introduced which is applicable both for B2C and C2C contracts.²⁹

Possible side effects

Article 20(1) of the Proposal understood in the sense of exhaustive full harmonisation will hinder Member States to apply provisions for distance and doorstep selling to contracts for the sale of immovable property. In the Netherlands the existing right to withdraw from

²⁸ Cf. Calais-Auloy and Steinmetz, *Droit de la consommation*, 7th ed., 2007, paras. 51-54.

²⁹ CC Art. 7:2(2).

contracts for the sale of houses could not be maintained in B2C relations. However, the Dutch legislator would not be forced to exempt contracts between two consumers from the right of withdrawal. Consumers buying a house from another consumer would be allowed to withdraw while no right of withdrawal would be granted to consumers buying from a business.

3.3. Sales

3.3.1. Delivery

Article 22(1) of the Proposal: *"Unless the parties have agreed otherwise, the trader shall deliver the goods by transferring the material possession of the goods to the consumer or to a third party, other than the carrier and indicated by the consumer, within a maximum of thirty days from the day of the conclusion of the contract."*

Article 22(1) of the Proposal stipulates that the trader must deliver goods within a maximum of thirty days from the day of the conclusion of the contract. This is a default rule, i.e. the parties to the contract can agree on a shorter (or longer) period and only where such an agreement has not been made the maximum time-limit of thirty days will apply.

Analysis of Member States' laws

Member States have not dealt with the issue of time of performance for consumer sales separately. However, differing from this observation, nearly all Member States have implemented a provision similar to the present Article that applies to contracts concluded by means of distance communication. These national rules have been enacted in order to transpose Article 7(1) of the Distance Selling Directive (97/7/EC) according to which a supplier is obliged to execute the order of the consumer within a maximum of thirty days. Only the Czech Republic and Germany have refrained from including the thirty days' maximum into their civil codes. Under German law, the general rule that a contract must be performed immediately also applies to distance selling contracts³⁰, whereas in the Czech Republic the distance selling contract must be performed within an 'adequate period'.

It has to be noticed that, where Member States have chosen to transpose the maximum of thirty days, this period applies only with regard to distance selling contracts. There are no comparable provisions that specifically apply to consumer sales. Instead, rules on time of performance that apply to consumer sales can be found in either general contract law or, in a series of Member States, in specific provisions on sales contracts.

Similar to Article 22(1) of the Proposal most of the Member States' rules allow the contracting parties to agree on a shorter or longer period. However, no Member State gives the trader a general period of thirty days to deliver, but they provide for much shorter periods. Some national laws require performance to be made within a 'reasonable time' after the conclusion of the contract. Notably, this includes Estonian³¹, Lithuanian³², Finnish and Swedish law³³. The 'reasonable time' rule also applies under the Sale of Goods Acts of Ireland³⁴ and the United Kingdom³⁵.

³⁰ CC § 271(1).

³¹ LOA § 82(3).

³² CC Article 6.319.

³³ § 9(1) Sale of Goods Act.

³⁴ Section 29 Sale of Goods Act 1893.

³⁵ Section 29(3) Sale of Goods Act 1979.

Other legal systems such as Austria³⁶, the Czech Republic³⁷, the Netherlands³⁸ or Slovakia³⁹ provide that delivery must be made without 'undue delay' after the conclusion of the contract. Under German law, if nothing else can be derived from the contract or the circumstances, the trader has to perform 'immediately' after the conclusion of the contract.⁴⁰ Most of the other Member States, e.g. France⁴¹, Greece⁴², Italy⁴³ and Portugal⁴⁴, similarly require the trader to deliver the goods within a rather short period after the conclusion of the contract.

Possible side effects

Although the Member States have not regulated the time of delivery specifically for consumer sales contracts, their general contract or sales laws provide that a trader has to perform within 'reasonable time', without 'undue delay' or 'immediately' after the contract has been concluded. Thus, there is an extreme discrepancy between the maximum of thirty days brought forward by the Proposal and the rather short periods existing under national laws.

As the full harmonisation clause in Article 4 of the Proposal also extends to the rule on time of delivery contained in Article 22(1) of the Proposal, Member States cannot maintain their shorter, and more consumer-friendly, provisions on time of performance. If Member States have to transpose the maximum of thirty days set out in the Proposal, they are likely to transpose the thirty-day period only with respect to B2C contracts. This way, delivery on the thirtieth day after the conclusion of the contract would be timely for traders contracting with consumers, but not for traders delivering to another business.

Comments on the Commission's Non Paper

The Commission's Non Paper observed that Austria, Belgium, Cyprus, Denmark, Estonia, Greece, Ireland, Italy, Finland, Hungary, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom have adopted the thirty-day period.

Deviating from the observations made in this study, the Commission's Non Paper seems to indicate that the thirty-day deadline is already part of national consumer sales law. However, it must be noted that the maximum of thirty days has only been implemented for contracts concluded by means of distance communication and that, therefore, there are no comparable national provisions that specifically apply to consumer sales.

Furthermore, the Commission's Non Paper concedes that in the case of France and Germany where general contract law stipulates that the contract must be performed immediately unless otherwise agreed, these countries will have to abandon rules on time of performance once the proposed Directive is adopted. However, from the observations made above, it becomes clear that not only France and Germany but all Member States would be required to modify their rules on time of performance for consumer sales once the Proposal has to be implemented into national law.

³⁶ CC § 904.

³⁷ CC § 591.

³⁸ CC Article 6.38.

³⁹ CC § 591.

⁴⁰ CC § 271(1).

⁴¹ CC Article 1901.

⁴² CC Article 323.

⁴³ CC Article 1183(1).

⁴⁴ CC Article 777(2).

3.3.2. Remedy for non-delivery

Article 22(2) of the Proposal: *“Where the trader has failed to fulfil his obligation to deliver, the consumer shall be entitled to a refund of any sums paid within seven days from the date of delivery provided for in paragraph 1.”*

Article 22(2) of the Proposal gives the consumer a remedy where the trader fails to fulfil his obligation to deliver within the maximum of thirty days. The consumer is entitled to a refund of any sums paid within seven days after the thirty-day period. The trader shall not be able to retain any of the consumer's pre-payments while delaying delivery. A similar provision was contained in the Distance Selling Directive where Article 7(2) required the trader to refund any advance payments within thirty days.

However, some issues arising under the present Article remain unsolved. It is, for example, unclear as to whether the contract is automatically terminated after the thirty-day period has elapsed or whether the contractual obligations continue and the consumer is only entitled to a repayment of his advance payments (which the consumer probably would have to pay again if the trader finally delivered the goods). Furthermore, read in conjunction with the full harmonisation clause contained in Article 4 of the Proposal, the present Article suggests that the refund of pre-payments is the only remedy provided by the Proposal for non-delivery within the thirty-day period. There seems to be no other remedy that will help the consumer in the case of non-delivery, even the rule on damages provided for by Article 27(2) of the Proposal does not apply in this context because it is only designed with regard to a lack of conformity in the sense of Article 25 of the Proposal.

Analysis of Member States' laws

It has to be noticed that the refund period of thirty days contained in the Distance Selling Directive has been implemented by the Member States only with respect to contracts concluded by means of distance communication. For consumer sales a similar period has not been transposed. Instead, remedies for non- or late delivery are to be found in general contract law.

Several legal systems give the buyer/consumer a right to terminate the contract where the trader has not delivered the goods to be sold under the contract. Mostly, the buyer/consumer must fix an additional period, giving the trader a reasonable time period in which to perform, and can only terminate the contract after this period has elapsed. Under German law, for example, the buyer has to fix a so-called *Nachfrist* before terminating the contract.⁴⁵ The expiry of a *Nachfrist* is also a requirement for termination under the laws of Austria⁴⁶, Estonia⁴⁷, Finland and Sweden⁴⁸ and Poland⁴⁹. Similarly, in England and Wales where the time period “was not of the essence” to the contract, the buyer has to give the trader notice to perform within a reasonable timeframe once the date of performance has passed; only if the obligation remains unperformed may the buyer terminate the contract.⁵⁰

Another common remedy is damages for non- or late performance. In German law, the trader has to pay for any loss suffered by the buyer as a consequence of late delivery subject to the fault principle⁵¹. Similar provisions exist in Greece⁵² and in the Netherlands⁵³.

⁴⁵ CC § 323(1).

⁴⁶ CC §§ 918, 919.

⁴⁷ LOA § 116(1).

⁴⁸ §§ 25(2), 54(2) and 55(2) Sale of Goods Act.

⁴⁹ CC Article 491 § 1.

⁵⁰ Cf. *Treitel*, Remedies for Breach of Contract, para. 249.

⁵¹ CC §§ 280(2), 286.

⁵² CC Article 288.

Possible side effects

If Article 22(2) of the Proposal implies the automatic termination of the contractual obligations of the parties, the current legal situation in the case of non- or late delivery found at national level would be dramatically changed. Most of the Member States analysed above require the buyer to give such notice that the trader is allowed to perform his obligation before terminating the contract. Even the final termination has to be executed by giving notice of termination to the trader. The automatic termination is an extremely uncommon legal instrument of national contract law. This would mean that consumers are not allowed to choose whether the trader should deliver or not. Non-consumers could insist on performance in case of non- or late delivery while consumers automatically lose their right to claim performance.

On the other hand, if Article 22(2) of the Proposal is to be interpreted as not providing for automatic termination and, at the same time, precluding Member States to grant any other remedies for non- or late performance than the re-payment of advance payments (i.e. exhaustive full harmonisation), there would be a discrepancy between buyers that act as consumers and other buyers. Member States would be forced to grant no other remedies, such as a right to terminate the contract or damages, to consumers while providing these remedies for buyers that are acting as business.

Comments on the Commission's Non Paper

Deviating from the present study, the Commission's Non Paper envisages an increase in the national level of consumer protection because 'currently consumers have to wait 30 days (14 days in Slovakia) for a refund in case of non-delivery instead of 7 days'. However, it has to be pointed out that these thirty or fourteen-day periods apply only to contracts concluded by means of distance communication. Therefore, the impact of Article 22(2) cannot be described as an increase in the level of consumer protection because, essentially, it depends on the way the Article is to be interpreted (see above).

3.3.3. Conformity

Article 24 of the Proposal: *"1. The trader shall deliver the goods in conformity with the sales contract.*

2. Delivered goods shall be presumed to be in conformity with the contract if they satisfy the following conditions:

(a) they comply with the description given by the trader and possess the qualities of the goods which the trader has presented to the consumer as a sample or model;

(b) they are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted;

(c) they are fit for the purposes for which goods of the same type are normally used or

(d) they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.

3. There shall be no lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or should reasonably have been

⁵³ CC Article 6.2.

aware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.

4. The trader shall not be bound by public statements, as referred to in paragraph 2(d) if he shows that one of the following situations existed:

(a) he was not, and could not reasonably have been, aware of the statement in question;

(b) by the time of conclusion of the contract the statement had been corrected;

(c) the decision to buy the goods could not have been influenced by the statement.

5. Any lack of conformity resulting from the incorrect installation of the goods shall be considered as a lack of conformity of the goods where the installation forms part of the sales contract and the goods were installed by the trader or under his responsibility. The same shall apply equally if the goods, intended to be installed by the consumer, are installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions."

Article 24 of the Proposal contains the requirement of conformity of goods with the contract. Only small differences exist in comparison to Article 2 of the Consumer Sales Directive. However, in connection with Article 4 of the Proposal, Article 24 leads to side effects. As shown above, side effects of full harmonization occur in cases of coexistence of general contract or general sales law and consumer law. This is probably the case if matters falling under the scope of the Consumer Sales Directive are transposed generally for all contracts or if consumers can base their rights on both general contract law and consumer law.

Analysis of Member States' laws

Article 2 of the Consumer Sales Directive has been transposed generally for all sales contracts in Austria⁵⁴, Denmark⁵⁵, Estonia⁵⁶, Germany⁵⁷, Hungary⁵⁸, Lithuania⁵⁹ and the Netherlands⁶⁰.

Nevertheless, deviations occur in some of these Member States. In Germany, the aspects of "conformity" laid down in Art. 2(2) Consumer Sales Directive have not been transposed literally. Instead the 'agreement as to the quality' between the parties has been set as the starting point for defining conformity.⁶¹ Only in the event that no express agreement exists, are the criteria corresponding to Article 2(2) of the Consumer Sales Directive applicable. Moreover, the term "descriptions" is restricted to those given only by the seller. In addition, sales by sample or model are not expressly listed. Finally, the criteria are not regarded as cumulative, but are ranked instead by priority. Other Member States have added additional factors in order to establish conformity. For example, in Estonia, "proper packaging" has been added to the relevant factors defining conformity. In the event that goods are not packaged in the usual way, there will be a lack of conformity.⁶² In addition Denmark also includes "proper packaging" in the list of relevant factors. Moreover, "durability" is relevant,⁶³ and a lack of conformity also occurs in case the seller neglected to give the

⁵⁴ CC § 922(1).

⁵⁵ §§ 75a, 76, Act. No. 523/2007 on Sales of Goods.

⁵⁶ LOA § 217.

⁵⁷ CC § 434.

⁵⁸ CC §§ 277, 372.

⁵⁹ CC Art. 6.363.

⁶⁰ CC Art. 7:17.

⁶¹ CC Art. 434(1), sent. 1.

⁶² Article 217(1),(2) sub-para. (5) of the Law of Obligations Act.

⁶³ Article 75a(2) of the Consolidated Act on Sale of Goods.

consumer information relevant to the consumer's assessment of the goods and which the seller knew or should have been aware of.⁶⁴

In other Member States separate regimes for non-conformity exist. Apart from the general sales law, these Member States have introduced a special regime for consumer sales. In the United Kingdom, under general sales law, any failure to comply with the terms of a contract, whether express or implied, constitutes a breach of contract. Section 13(1) of the Sale of Goods Act provides, in cases of a sale of goods by description, an implied term that the goods will correspond to that description.⁶⁵ A sale will not be by description where the description did not sufficiently influence the decision to purchase the goods so as to become a term of the contract.⁶⁶ Descriptive words, which do not concern the nature of the goods sold, may, nonetheless, amount to an actionable misrepresentation according to Section 14(2) Sale of Goods Act. However, Section 14 Sale of Goods Act is only applicable if the seller sells in the course of a business. Compared to Article 2 of the Consumer Sales Directive, this provision does not contain an identical list of factors, but takes corresponding items into account. The main test is that of "satisfactory quality". There is, then, a list of factors that may be considered: (a) fitness for all the purposes for which goods of the kind in question are commonly supplied; (b) appearance and finish; (c) freedom from minor defects; (d) safety and (e) durability. In the case of Consumer Sales contracts, goods do not conform to the sales contract if there is a breach of an express term of the contract or a term implied by Sections 13 to 15 of the Sale of Goods Act.⁶⁷

Under French and Belgian law, a distinction has to be made between hidden defects (*vices cachés*⁶⁸) and non-conforming delivery (*défaul de délivrance conforme*).⁶⁹ The Belgian regulation of a guarantee against hidden defects has largely been developed by the case law of the Belgian *Cour de Cassation*. The seller's guarantee against hidden defects exists under strict conditions only. The goods sold must be affected by a hidden and fundamental or functional defect that was already latently present at the moment the contract was concluded. A broad functional interpretation of the concept of 'defect' is used.⁷⁰ Thus, it is possible that the goods themselves are perfect and shows no structural or intrinsic defect, but that they are unfit for the desired purpose. This functional interpretation is also applicable to a condition that the seller knew about concerning the purpose of the goods because either the buyer informed him of the purpose or it concerns the usual application of the goods. The same applies in a case where the seller has suggested the purpose in the advertisement beforehand, or at the moment of conclusion of the contract. However, the French *Code de la Consommation*⁷¹ and Belgian CC⁷² provide regulations transposing Article 2 of the Consumer Sales Directive which are therefore applicable on B2C sales contracts. Yet specific provisions of general sales law, especially concerning hidden defects, remain applicable.

Possible side effects

Article 24 of the Proposal, understood in the sense of exhaustive full harmonisation, will generate side effects, especially in France and Belgium. These Member States allow consumers to rely on both general sales law and specific consumer sales law. In the case of

⁶⁴ Article 76(1) of the Consolidated Act on Sale of Goods.

⁶⁵ A sale by description is one where the description used delimits the nature of the goods sold: *Beale v. Taylor* [1967] 1 WLR 1193; *Border Harvesters Ltd. v. Edwards Engineering (Perth) Ltd.* 1985 SLT 128.

⁶⁶ *Harlingdon & Leinster Enterprises Ltd. v. Christopher Hull Fine Art Ltd.* [1991] 1 QB 564.

⁶⁷ Sale of Goods Act 1979 s. 48F.

⁶⁸ CC Arts. 1641 ff.

⁶⁹ CC Art. 1604.

⁷⁰ *Cour de Cassation* of 18 November 1971 (AC 1972, 274) and 17 May 1984 (AC 1983-84, 1205).

⁷¹ ConsC Arts. L. 211-1 ff.

⁷² CC Art. 1649ter §§ 1 ff.

exhaustive full harmonisation, the Proposal will ban these Member States from applying general sales law provisions to B2C contracts.

However, even if Article 24, in connection with Article 4 of the Proposal, is only to be understood as a selective full harmonisation provision, side effects may occur if Member States have additional or diverging criteria for conformity with the contracts that are applicable to all types of contracts. This is the case in Germany, Estonia, and Denmark. The same applies to the United Kingdom where the conformity in B2C contracts refers to the conformity criteria applicable to B2B contracts.

Moreover, if Member States have enacted the conformity rules in Article 2 of the Consumer Sales Directive without altering the criteria, but also with regard to B2B and C2C contracts, the deviation between Article 2 of the Consumer Sales Directive and Article 24 of the Proposal (see the “or” at the end of Article 24(2) lit. c) can lead to side effects. This may well be the case in Austria, Lithuania and the Netherlands.

Comments on the Commission's Non Paper

With regard to Cyprus, Denmark, Estonia, Finland and Sweden, the Commission's Non Paper in comparison to this study reached findings similar to the findings above.

However, it has to be added that in Denmark “durability” is also a relevant factor as well as the case whereby the seller himself neglected to give the consumer information relevant to the consumer's assessment of the goods and which the seller knew or should have been aware of. Moreover, remarks on deviations from Article 24 of the Proposal in Belgium, Germany and France are missing.

3.3.4. Choice between repair and replacement

Article 26(2) of the Proposal: *“The trader shall remedy the lack of conformity by either repair or replacement according to his choice.”*

Comparable to the Consumer Sales Directive, Article 26(2) and (3) of the Proposal establishes a “hierarchy” of remedies. First the consumer is entitled to repair or replacement of the goods. Only when repair and replacement are not available or are not performed by the trader is the consumer entitled to price reduction or termination of the sales contract. At the first level of the remedies, the choice between repair and replacement is now given to the trader. Read in conjunction with Article 4 of the Directive, Article 26(2) precludes Member States from giving the consumer the right to choose.

Analysis of Member States' laws

The Member States have implemented the remedies of the Consumer Sales Directive and, to a large extent, they have given the consumer the right to choose between the first level remedies. Notably in Germany, the right to choose between the first level remedies is part of general sales law and therefore non-consumers can also choose between repair and replacement.⁷³ In addition, Austria has regulated the choice for the buyer in general sales law.⁷⁴

⁷³ CC § 439(1).

⁷⁴ CC § 932(1).

Possible side effects

Member States (e.g. AU, DE) that also leave the choice between repair and replacement to the buyer, who is not acting as consumer, would either have to change their general sales rules or would have to bear the contradiction that non-consumers can choose between repair and replacement while consumers cannot.

3.3.5. Hierarchy of remedies

Article 26(3) of the Proposal: *“Where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded.”*

Article 26(3), together with paragraph (2), establishes a hierarchy of remedies for non-conformity. The first level remedies are repair and replacement (paragraph (2)); at the second level the consumer can ask for price reduction and termination. This two step procedure has been derived from Article 3 of the Consumer Sales Directive. Read in conjunction with Article 4, the present Article precludes Member States from giving consumers free choice between the four remedies.

Analysis of Member States’ laws

Most Member States have adopted the hierarchy set out by the Directive. However, the laws of Lithuania⁷⁵, Greece, Portugal and Slovenia allow a consumer to initially choose any of the remedies.

The common law countries England⁷⁶ and Ireland recognise a ‘right to rejection’ of defective goods provided that the buyer has not accepted the goods. The rejection implies a termination of the contract with full refund of the money paid (‘money back’ rule). This remedy applies to all contracts of sale, also in B2C relations.

Possible side effects

Under exhaustive full harmonisation, a right to immediately reject defective goods could only be maintained for B2B or C2C contracts. Thus, some legal systems (e.g. IR, UK) would either have to bear this contradiction or abolish the right to immediately reject defective goods for all contracts.

Comments on the Commission’s Non Paper

Corresponding to the findings of this study, the Commission’s Non Paper observed that in Ireland and the United Kingdom general contract law remedies exist, under which a consumer is not restricted to repair or replacement in the first instance. However, according to the Commission’s Non-Paper, it is generally not intended to force Member States to abandon their traditional contract law remedies, especially if the requirements of these remedies are different from those applying to the consumer sales remedies. This would mean, for example, that the United Kingdom is not required to restrict the remedies provided for by general sales law to non-consumer cases. It is suggested that this interpretation of full harmonisation is clarified in an amended version of the Proposal.

⁷⁵ CC art. 6.363(8).

⁷⁶ Sale of Goods Act 1979 sec. 11(3).

3.3.6. Damages

Article 27(2) of the Proposal: *“Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.”*

Article 27(2) of the Proposal states that in case of a lack of conformity the consumer may claim damages for any loss not remedied in accordance with Article 26. This provision, if read in conjunction with the concept of full harmonisation, may be understood as requiring Member States to grant consumers an unconditional claim to damages for any lack of conformity which has not been remedied by the trader.

Analysis of Member States' laws

Unlike Article 27(2) which contains an isolated rule regarding damages for lack of conformity in B2C sales contracts, a number of Member States regulate the issue of damages for non-performance in a broader context. In particular, Member States' laws contain a variety of detailed rules on matters inextricably linked to damages such as the issues of contributory negligence of the creditor, (adequate) causation and foreseeability, and the measure of damages.

Thus, both the French and Belgian Civil Code, for example, contain a set of general provisions regulating damages for the non-performance of an obligation (*inexécution de l'obligation*) which is not limited to a specific type of contract.⁷⁷ Similarly, the German Civil Code regulates the issue of damages by formulating general rules that apply to all kinds of (contractual or statutory) obligations.⁷⁸

Possible side effects

In its current wording, Article 27(2), if taken literally, would seriously disrupt the balanced system on the existing rules on damages in Member State laws. The introduction of an isolated provision, which only deals with the narrow issue of damages for lack of conformity in B2C sales contracts, and which, at the same time, is entirely silent on related issues such as contributory negligence, causation etc. would force those Member States, which currently rely on a unified system of damages rules for a broad range of obligations, to introduce a separate regulatory provision for the cases covered by Proposal. In other words, the Proposal in its current wording is likely to lead to a (probably unwanted) “split system” of damages rules within Member States' laws.

What could make matters worse is that some Member States – in order to preserve the integrity of their Civil Codes – might choose to introduce an “invisible” split system, in which the existing broad rules have to be interpreted differently depending on whether a particular case falls within the scope of the Directive or not.

One might argue that Article 27(2) does not have the purpose of disrupting the existing systems of damages rules within Member State Civil Codes. Indeed, the Commission's Explanatory Memorandum briefly mentions that the Proposal “does not interfere with more general contract law concepts such as [...] the award to damages”.⁷⁹ However, the very broad wording of Article 27(2) does not provide for such limitation.

⁷⁷ CC Articles 1146 et seq.

⁷⁸ CC Articles 249 et seq.

⁷⁹ Explanatory Memorandum, p. 7.

3.3.7. Time limits

Article 28 of the Proposal covers the content of Art. 5 of the Consumer Sales Directive. However, in connection with the principle of full harmonisation laid down in Article 4 of the Proposal, conflicts arise with existing transposition measures in many Member States.

Article 28(1) of the Proposal: *"The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the risk is passed to the consumer."*

Article 28(1) of the Proposal specifies that the trader is held liable where the lack of conformity becomes apparent within two years as from the time the risk is passed to the consumer. Two categories of conflicts with general contract law or general sales law will arise if Article 28(1) comes into force as proposed.

Analysis of Member States' laws

Firstly, deviations from this period can be noticed especially in Denmark, Finland, France, Germany, Ireland, and the United Kingdom.

Under English law there is a six-year prescription.⁸⁰ In Scotland, a prescription period of five years prevails.⁸¹ Under Belgian law, lack of conformity concerning delivery is subject to the general period of prescription which amounts to 10 years, running from the day of the conclusion of the contract.⁸² In Ireland, the statutory limitation period of six years from the breach of contract, applies in this regard. The same applies to France. Under French general sales law, in the case of hidden defects (*vices cachés*)⁸³ even longer prescription periods may occur.

In Finland, the time limit set up by Article 5(1) of the Consumer Sales Directive is not implemented. Furthermore, some Member States established diverging liability periods for building materials or immovable goods, e.g. Germany (5 years in the case of building materials, 30 years, if the defect consists of a real right of a third party on the basis of which return of the purchased article may be demanded, or some other right registered in the Land Register)⁸⁴ or Denmark (5 years in case of building materials).⁸⁵

Secondly, the prescription period may not run from the passing of risk. In Austria, the prescription for warranty of title starts when the buyer becomes aware of the lack of title.⁸⁶ Under other systems, the prescription period runs from the day when the buyer informs the seller of the non-conformity, e.g. in the Netherlands⁸⁷ and Slovenia.⁸⁸ The same occurs in the Czech Republic and Slovakia.⁸⁹ In other Member States, the prescription period starts running from the day when the lack of conformity becomes manifest, or upon detection. This is the case in Finland⁹⁰, France⁹¹ as well as in parts of the United Kingdom (Scotland).⁹² Although the Spanish provision⁹³ indicates that the period starts running from

⁸⁰ Sec. 5 Limitation Act 1980.

⁸¹ Sec. 6(3) Prescription and Limitation (Scotland) Act 1973.

⁸² CC Art. 2262bis.

⁸³ CC Art. 1643 et seq.

⁸⁴ CC § 438(1).

⁸⁵ § 83 Consolidated Act no. 523/2007 on Sales of Goods.

⁸⁶ CC § 933(1).

⁸⁷ CC. Art. 7:23(2).

⁸⁸ LOA § 480.

⁸⁹ CC § 508 in conjunction with § 101.

⁹⁰ Prescription Act (*Laki Velan Vanhentumisesta* 15 August 2003/728).

⁹¹ CC Art. 1648.

⁹² Sec. 6(3) Prescription and Limitation (Scotland) Act 1973.

⁹³ CC Art. 1490.

the day of delivery, case law has indicated that the period starts running when the buyer knows about the hidden defects⁹⁴. The Spanish Supreme Court (Tribunal Supremo) has repeatedly established that all these specific actions are not incompatible with the general remedies for non-performance under CC Art. 1124, whose period of prescription amounts to 15 years (general prescription period for personal actions).

Possible side effects

The proposed Directive on Consumer Rights does not prevent Member States from keeping in force provisions applicable to B2B and C2C contracts, and only forces them to adapt their national laws concerning contracts within the scope of the proposal. Since the prescription period, as well as the starting point, vary from Article 28(1) of the Proposal in some Member States, the level of protection for buyers is higher for B2B and C2C contracts than under the proposed directive. Therefore, irrespective of the question whether Article 28(1) of the Proposal is to be understood in the sense of exhaustive full harmonisation or in the sense of selective full harmonisation, the two-year time period may cause side effects and legal distortions. Notably, in Germany, Ireland, and the United Kingdom, for example, provisions concerning the prescription of buyer's rights are applicable to B2C, as well as to B2B and C2C sales contracts. Similar findings can be made with regard to the starting point of the prescription period.

In case Article 28(1), in connection with Article 4 of the Proposal, is to be understood in the sense of exhaustive full harmonisation, side effects may also occur in France with respect to the general sales law, applicable to all kinds of sales contracts (especially concerning the seller's liability for hidden defects (*vices cachés*)).

Comments on the Commission's Non Paper

With regard to Denmark, Finland, Germany, Greece, Hungary, Ireland, the Netherlands Sweden and the United Kingdom, the Commission's Non Paper came to the same results as this study.

In addition to the Non Paper, the possibly longer liability periods for hidden defects (*vices cachés*) in France have to be mentioned. Moreover, the Commission's Non Paper does not differentiate between the duration of the prescription period and its starting point. Such a differentiation is necessary as the end point of the prescription period depends not only on the duration of the period but also on its beginning. Therefore, the maximum liability period depends on the starting point.

3.3.8. Notice requirement

Article 28(4) of the Proposal: *"In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within two months from the date on which he detected the lack of conformity."*

In comparison to Article 5(2) of Consumer Sales Directive, Article 28(4) of the Proposal introduces a change. However, Article 5(2) of the Consumer Sales Directive constitutes an option for the Member States to oblige the consumer to inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity. With the implementation of the full harmonisation approach into the proposed Directive on Consumer Rights, Article 28(4) of the Proposal becomes binding for all Member States.

⁹⁴ TS 23 July 1994, RAJ 1994 no. 6587.

Analysis of Member States' laws

In the majority of Member States, the buyer is obliged to inform the seller in case of a lack of conformity. This is the case in Bulgaria⁹⁵, Cyprus⁹⁶, the Czech Republic⁹⁷, Denmark⁹⁸, Estonia⁹⁹, Finland¹⁰⁰, Hungary¹⁰¹, Italy¹⁰², Lithuania¹⁰³, Malta, the Netherlands¹⁰⁴, Poland¹⁰⁵, Portugal¹⁰⁶, Romania,¹⁰⁷ Slovakia¹⁰⁸, Slovenia¹⁰⁹, Spain¹¹⁰, and Sweden¹¹¹. In Belgium, in the case of B2C sales contracts there is no duty to notify a lack of conformity within the specific period. However, the parties may specify a notification period (not less than two months). They are also allowed to stipulate the consequences in case of failure to notify in due time.¹¹² Moreover, the consumer has to act within one year (even where the two-year period would not have expired by then). Under Spanish commercial sales, the buyer is obliged to notify obvious defects immediately if the goods are examined by the buyer at the time of delivery, and notification within four days if the goods are packed.¹¹³ Hidden defects must be notified within 30 days from the time of delivery.¹¹⁴

Under other systems, the buyer is generally not obliged to notify the seller (at least concerning hidden defects). Member States that have chosen not to make use of the option provided in Article 5(2) of the Consumer Sales Directive are Austria, France, Germany, Greece, Ireland, Latvia, Luxembourg and the United Kingdom.¹¹⁵ The buyer may, however, be obliged to bring a court claim within a specific period. In common law countries, a failure to notify a lack of conformity within a reasonable time after delivery will preclude the remedy of termination.¹¹⁶ Nevertheless, the fact that the buyer may exercise his remedies without being subject to a notification duty is not always unconstrained. Under Greek law, the exercising of any remedy must be in compliance with good faith, otherwise it may be abusive.¹¹⁷ However, the courts have been hesitant in declaring the exercising of remedies in the context of sales being abusive.¹¹⁸

Nevertheless, in Austria¹¹⁹ and Germany¹²⁰ a duty to notify the seller is to be found under commercial sales. Moreover, under commercial sales law, the buyer is often under a strict obligation to notify quickly. Under Austrian and German law, the buyer is obliged to notify immediately or without delay.

⁹⁵ Art. 126 Law on Consumer Protection.

⁹⁶ Art. 7(2) The Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law of 2000.

⁹⁷ CC §§ 504 and 599 and Ccom Art. 428.

⁹⁸ SGA § 52(1).

⁹⁹ LOA § 220(1).

¹⁰⁰ SGA § 32(1).

¹⁰¹ CC § 307.

¹⁰² CC Art. 1495.

¹⁰³ CC Art. 6:348.

¹⁰⁴ CC Art. 7:23(1).

¹⁰⁵ CC Art. 563.

¹⁰⁶ CC Art. 916.

¹⁰⁷ Art. 17 of Law 449/2003.

¹⁰⁸ CC §§ 504 and 599 and Ccom Art. 428.

¹⁰⁹ LOA §§ 461 and 462.

¹¹⁰ Art. 123(4) Legislative Decree 1/2007.

¹¹¹ SGA § 32(1); for Consumer Sales see also Art. 23 of the Consumer Purchase Act.

¹¹² CC Art. 1649 *quarter* (2); in B2B and C2C sales the seller is not liable for obvious defects which the buyer was able to convince himself, CC. Art. 1642.

¹¹³ Ccom Art. 336.

¹¹⁴ Ccom Art. 342.

¹¹⁵ Twigg-Flesner, in: Schulte-Nölke/Twigg-Flesner/Ebers (eds), EC Consumer Law Compendium, pp. 431 et seq.

¹¹⁶ England and Scotland Sale of Goods Act s. 35(4).

¹¹⁷ CC Art. 281.

¹¹⁸ A.P.17/1995 EIIDik 38, 41; Ef Thessalonikis 781/1999 Arm 1999, 800.

¹¹⁹ Ccom § 377.

¹²⁰ Ccom § 377.

In some Member States, the buyer's duty to notify the seller in case of legal defects is specifically regulated and deviates from the general notification requirements. Under Polish law, the buyer from whom a third party vindicates claims for the article sold is obliged to notify the seller about the fact immediately and to summon him to participate in the case.¹²¹ In Spain, if the goods are taken from the buyer by a third party on the basis of a final court judgment, the buyer has to notify the seller at the moment the buyer knows about the claim instituted by the third party.¹²² Under Dutch law, a legal defect is not seen as constituting non-conformity. Therefore, CC Art. 7:23 does not apply to legal defects.

Possible side effects

Side effects may occur in Member States providing general sales laws applicable on all kinds of sales contracts. This is the case, for example, in Austria, Germany, Ireland and the United Kingdom. These Member States do not oblige the buyer to notify the seller in case of lack of conformity. In the case of Austria and Germany, this does not apply to B2B contracts. Therefore, side effects may arise in these Member States irrespective of how Article 28(4), in connection with Art. 4 of the Proposal, is to be interpreted with regard to the aspect of exhaustive or selective full harmonisation.

As French law gives the consumer the opportunity to rely on general sales law, side effects will occur in France if this provision is to be understood in the sense of exhaustive full harmonisation. Moreover, exhaustive interpretation of the full harmonisation provision will preclude all Member States from regulating notification requirements in general contract or general sales law.

Comments on the Commission's Non Paper

With regard to B2C contracts in Austria, Belgium, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Poland, Portugal, Slovenia, Slovakia, Spain, Sweden and the United Kingdom, the Commission's Non Paper came to similar findings compared to this study.

3.4. Unfair Terms

3.4.1. Clauses individually negotiated

Article 30(1) and (2) of the Proposal: *"(1) This Chapter shall apply 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, in particular where such contract terms are part of a pre-formulated standard contract.*
(2) The fact that the consumer had the possibility of influencing the content of certain aspects of a contract term or one specific term, shall not exclude the application of this Chapter to other contract terms which form part of the contract."

According to Article 30 of the Proposal in connection with recital 45, provisions on unfair contract terms within the Proposal are not applicable to individually negotiated terms. In contrast, the Unfair Terms Directive (93/13/EC) did not pre-empt such contract terms.¹²³ However, in connection with the principle of full harmonization in Article 4 of the Proposal,

¹²¹ CC Art. 573.

¹²² CC Arts. 1481, 1482.

¹²³ See recital 16 of Directive 93/13/EEC.

Member States are precluded from extending the fairness assessment to clauses which are individually negotiated.

Analysis of Member States' laws

Some Member States have widened the scope of their domestic provisions transposing the Unfair Terms Directive to individually negotiated terms.¹²⁴ However, most of the Member States provide provisions applicable to individually negotiated terms in their general contract laws. In Germany, contract terms have to comply with the principles of good faith and must not be contrary to public policy.¹²⁵ The same applies to Austria.¹²⁶ In the Nordic countries, a vast usage of the general clause can be noticed. This clause, laid down in Art. 36 of the Contracts Act makes it possible to disregard an agreement, if the term is unfair/unreasonable with respect to the contract's content, the position of the parties and the circumstances prevailing during and after the conclusion of the contract. This also applies to individually negotiated terms.

Possible side effects

In case Article 30(1) and (2) of the Proposal are to be understood in the sense of exhaustive, full-harmonising provisions, Member States will *cum grano salis* be banned from applying provisions to contract terms in B2C contracts differing from those provisions laid down in Chapter V of the Proposal. This may be noticed in Austria, Denmark, Finland, Germany and Sweden. These Member States cannot maintain a fairness test for individually negotiated terms in B2C contracts. Consequently, Member States providing fairness tests in their general contract law, applicable to individually negotiated terms, are only allowed to provide this test to contracts out of the scope of the Proposal (i.e. B2B and C2C contracts).

3.4.2. Unfairness test

Article 32(1) of the Proposal: *"Where a contract term is not included in Annex II or III, Member States shall ensure that it is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."*

Article 32(3) of the Proposal: *"Paragraphs 1 and 2 shall not apply to the assessment of the main subject matter of the contract or to the adequacy of the remuneration foreseen for the trader's main contractual obligation, provided that the trader fully complies with Article 31."*

Article 34 of the Proposal: *"Member States shall ensure that contract terms, as set out in the list in Annex II, are considered unfair in all circumstances. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40."*

Article 35 of the Proposal: *"Member States shall ensure that contract terms, as set out in the list in point 1 of Annex III, are considered unfair, unless the trader has proved that such contract terms are fair in accordance with Article 32. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40."*

Article 32 of the proposal contains the general unfairness test. This test is accompanied by two lists of terms in Annexes II and III. Whilst the Unfair Terms Directive (93/13/EEC) only

¹²⁴ These Member States are: Belgium, Czech Republic, Denmark, France, Latvia, Luxembourg, Malta, Slovenia and Sweden; for details see: Ebers, in: Schulte-Nölke/Twigg-Flesner/Ebers, EC Consumer Law Compendium, p. 226.

¹²⁵ CC §§ 138(1), 242.

¹²⁶ CC § 879(1) and (2).

provided an illustrative list of terms that may be unfair and which could be defined as a so-called grey list,¹²⁷ the Proposal contains both a so-called black list, containing terms considered unfair in all circumstances, and a so-called grey list. In connection with Article 4 of the Proposal, these lists ban existing longer lists in Member States' laws as well as substantive changes of the lists. Moreover, Member States are not permitted to assess other unfairness tests to the terms defined in Article 30 of the Proposal. For example, Article 32(3) of the Proposal, in connection with Article 4, no longer allows Member States to extend the scope of the fairness assessment to core contract terms, i.e. those contract terms determining the main subject matter of the contract or the remuneration.

Analysis of Member States' laws

Many Member States provide fairness criteria in their general contract laws. In Cyprus, the general rules of conclusion of contract of the General Contract Law are applied.¹²⁸ In the Scandinavian States the general clause in Art. 36 of the Contracts Act is not limited to B2C contracts, but also applies to contracts in general. However, it must be noted that in the context of non-consumer contracts, the threshold of unreasonableness is higher. Hungarian law contains general provisions applicable to all persons on the incorporation and interpretation of standard contract terms.¹²⁹ A content review is likewise available in all contractual relationships, albeit in stages. According to CC art. 209(1), a standard contract term is unfair if, contrary to the requirement of good faith, it causes a considerable and unjustified disadvantage to the other party.

In the United Kingdom a series of protective mechanisms to review standard contracts exists in general contract law. According to case law, standard terms would only then form part of the contract if the user had given the other contractual party reasonable opportunity to become acquainted with the terms.¹³⁰ The first piece of legislation was the Unfair Contract Terms Act 1977 (UCTA). UCTA is not limited to consumer contracts; it applies to B2B contracts, and also, in limited circumstances, to C2C contracts.

In Austria¹³¹ and Germany¹³², provision on the proportion between the subject matter and remuneration can be found in general contract law. Furthermore, in Germany the provisions transposing the Annex to the Unfair Terms Directive are applicable to C2C contracts and, indirectly, – by the use of the general clause – also to B2B contracts.¹³³

Possible side effects

A similar problem arises in the case of the control of individual negotiated terms. Although Member States maintain their legislative competence concerning negotiated and non-negotiated terms in B2B and C2C contracts, side effects on general contract law will come up in the case of general provisions applicable to contracts within and out of the scope of the Proposal, should these terms be interpreted as measures of exhaustive full harmonisation. This may be the case in Austria, Germany, the Scandinavian Member States, as well as in the United Kingdom. For this reason, the business in a B2B contract or even the consumer in a C2C situation is in a better position than the consumer in a B2C situation covered by the Proposal. This may lead to a 'side effect' of the Proposal because

¹²⁷ Ebers, in: Schulte-Nölke/Twigg-Flesner/Ebers, EC Consumer Law Compendium, pp. 232 et seq.

¹²⁸ General Contract Law Art. 149.

¹²⁹ CC Art. 205a et seq.

¹³⁰ The reasonable notice test, see *Parker v. South Eastern Railway Co Ltd*. [1877] 2 CPD 416; *Thornton v. Shoe Lane Parking Ltd* [1971] 2 QB 163.

¹³¹ CC § 879 para. (3).

¹³² CC § 138 para. (2).

¹³³ CC § 307ff.

the Member States providing such a general fairness test have to consider bringing into line its general contract law with the fully harmonized European consumer law rules.

4. OPTIONS FOR ACTION IN ORDER TO AVOID UNWANTED SIDE EFFECTS

Based on the analysis of Member States' laws and possible side effects set out above, several options for EU action in order to avoid or reduce such unwanted side effects can be identified:

4.1. Clarification of scope of the Proposal

In some cases (e.g. unclear definitions of consumer or trader) a simple clarification would reduce unwanted side effects.

4.2. Clarification that Member States shall have leeway

In cases where it is unclear as to whether the Proposal itself sets full harmonisation standards or whether it just assigns a regulatory task to the Member States (see for example Article 27(2) on damages for lack of conformity), a possible solution could be to add clarification to the recitals of the Proposal or in the respective provision itself (and not just in the Commission's Explanatory Memorandum or subsequent non-papers).

A good example of this approach is Article 7 of the Doorstep Selling Directive which makes clear whether Member States have to take regulatory action in a particular field (viz. reimbursement of payments after withdrawal) but, at the same time, gives Member States leeway as to how they achieve the intended consumer protection.¹³⁴ The Proposal itself also contains an example for this technique in Article 6(2).

4.3. Adaptation of consumer protection level

With regard to some other unwanted side effects, the EU legislator could adapt the level of consumer protection. This applies in particular to possible contradictions between consumer sales law and (more favourable) remedies under general sales law which – as a paradoxical result of full harmonisation – would still be available for B2B contracts, but no longer for B2C contracts (e.g. the 'right of rejection' recognised by Irish and English law and the rules regarding liability for hidden defects (*vices cachés*) under French law). Such contradictions could be avoided by raising the level of consumer protection, i.e. by incorporating the general contract law remedies into the Proposal.

4.4. Clarification of the scope of full harmonisation

Another solution to avoid unwanted spillover effects into general contract law could be to clarify that the Proposal only aims at achieving selective full harmonisation. Thus, the Proposal could clearly state that Member States are free to maintain or introduce law provisions which have a similar economic effect as the provisions laid down in the Proposal into their general contract law.

However, this approach could make it possible for Member States to undermine the concept of full harmonisation by introducing new general contract law remedies (e.g. a 23-month 'right of rejection' for all buyers under general contract law, which would, in practice,

¹³⁴ Article 7 Doorstep Selling Directive: "If the consumer exercises his right of renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received."

neutralise the 'hierarchy of remedies'). In order to avoid this, the EU legislator might consider adding a provision which allows Member States to maintain existing general contract law rules but prohibits the introduction of new provisions in the field of general contract law which would interfere with the Proposal. This would result in a preservation of the status quo with regard to the existing traditional remedies in the Member States' laws, but would also prevent other Member States from introducing new general remedies applicable to B2C contracts covered by the Proposal.

4.5. Exhaustive full harmonisation in specific sectors only

There are some areas in the Proposal where exhaustive full harmonisation is not feasible without undesirable side effects because, in these areas, the Proposal only contains some individual provisions without aiming at a comprehensive regulation of a specific sector. In particular, this is the case with regard to the general information duties in Article 5 (including the sanction in Article 6) and to sales (Articles 21-29). These matters are too closely entwined with non-harmonised provisions in the Member States' laws. If, however, the Member States can enact or maintain provisions under selective full harmonisation within their general contract law, which give contract parties (including consumers) more rights than the Proposal, legal fragmentation and the distortion of cross border trade resulting from it will remain.

In other areas, especially in specific sectors like information duties and withdrawal rights (Articles 7-20) or, in addition – with some reservation – unfair terms (Articles 30-38), exhaustive full harmonisation is feasible on the basis of the Proposal.

The EC legislator will have to decide either to put only those areas under exhaustive full harmonisation where progress towards market integration can be made, or to speed up and broaden the Proposal to such an extent that exhaustive full harmonisation will work in other areas as well. In as far as the Proposal cannot be broadened, a combination of selective and exhaustive full harmonisation could be the way forward. Therefore, the Proposal has to be reviewed on an article-by-article basis in order to clarify which effects of harmonisation can be reached and shall be intended.

SELECTED REFERENCES

- European Parliament, Committee on the Internal Market and Consumer Protection, Working Document on European contract law and the revision of the acquis: State of play and the, notion of consumer, Draftswoman: Diana Wallis, 17.5.2006, PE 374.155v01-00 (http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/615/615453/615453en.pdf).
- Gsell, Schellhase (2009), *Vollharmonisiertes Verbraucherkreditrecht – Ein Vorbild für die weitere europäische Angleichung des Verbrauchervertragsrechts?*, Juristenzeitung (JZ), pp. 20-29.
- Hesselink, Loos (2009) [eds.], *Het voorstel voor een Europese richtlijn consumentenrechten*, The Hague.
- Hesselink (2009), *Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the consumer rights directive*, Centre for the Study of European Contract Law Working Paper Series No. 2009/06.
- Hesselink (2009), *The Consumer Rights Directive and the CFR: two worlds apart?*, European Review of Contract Law, pp. 290–303.
- House of Lords, European Union Committee, 18th Report of Session 2008–09, *EU Consumer Rights Directive: getting it right* (<http://www.publications.parliament.uk/pa/ld200809/ldselect/ldecom/126/126i.pdf>)
- Howells, Schulze (2009) [eds.], *Modernising and Harmonising Consumer Contract Law*, Munich.
- Jud, Wendehorst (2009) [eds.], *Neuordnung des Verbraucherprivatrechts in Europa?*, Wien.
- Loos (2010), *Consumer Sales Law in the Proposal for a Consumer Rights Directive*, European Review of Private Law, forthcoming.
- Micklitz, Reich (2009), *Crónica de una muerte anunciada: The Commission proposal for a "directive on consumer rights"*, Common Market Law Review, pp. 471-519.
- Paisant (2009), *Proposition de directive relative aux droits des consommateurs. Avantage pour les consommateurs ou faveur pour les professionnels?*, Semaine juridique, pp. 11-16.
- Rochfeld (2009), *Les ambiguïtés des directives d'harmonisation totale : la nouvelle répartition des compétences communautaire et interne*, Dalloz, pp. 2047-2052.
- Rott, Terryn (2009), *The Proposal for a Directive on Consumer Rights: No Single Set of Rules*, Zeitschrift für Europäisches Privatrecht (ZEuP) pp. 456-488.
- Schulte-Nölke, Twigg-Flesner, Ebers (2008) [eds.], *EC Consumer Law Compendium. The Consumer Acquis and its transposition in the Member States*, Munich.

-
- Schulte-Nölke, Tichy (2009) [eds.], *Perspectives for European Consumer Law. Towards a Directive on Consumer Rights and Beyond*, Munich, forthcoming.
 - Schulte-Nölke (2009), *The transposition of European consumer directives into the national laws of the EU-Member States*, Tijdschrift voor Consumentenrecht & Handelspraktijken (TvC), pp. 133-138.
 - Smits (2009), *Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights*, TICOM Working Paper on Comparative and Transnational Law 2009/2.
 - Study Group on a European Civil Code, Research Group on EC Private Law (Acquis Group) (2009) [eds.], *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition*. Munich, forthcoming.
 - Tonner, Tamm (2009), *Der Vorschlag einer Richtlinie über Rechte der Verbraucher und seine Auswirkungen auf das nationale Verbraucherrecht*, Juristenzeitung, pp. 277-290.
 - Twigg-Flesner, Metcalfe (2009), *The Proposed Consumer Rights Directive - Less Haste, More Thought?*, European Review of Contract Law, pp. 368-391.
 - Whittaker (2009), *Unfair Contract Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of 'Full Harmonisation'*, European Review of Contract Law, pp. 223-247.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website: <http://www.europarl.europa.eu/studies>

PHOTO CREDIT: iStock International Inc.

