Briefing Paper on the Proposed Consumer Rights Directive: Chapter I - Definitions
Abstract:

The Briefing Paper examines the impact the fully harmonized definitions in the proposed Consumer Rights Directive would have on the internal market. It analyses the individual definitions listed in article 2 and the effect a horizontal use of these definitions would have on other directives and regulations.
This document was requested by the European Parliament's Committee on Internal Market and Consumer Protection

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<tr>
<td>CC</td>
<td>Civil Code</td>
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<td>CCom</td>
<td>Commercial Code</td>
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<td>ConsC</td>
<td>Consumer Code</td>
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<td>ConsProtA</td>
<td>Consumer Protection Act</td>
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<td>Directive</td>
<td>Court of Justice of the European Union</td>
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<td>Services</td>
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EXECUTIVE SUMMARY

The impact of “fully harmonised definitions” in the Consumer Rights Directive on the internal market will be rather limited. The main reason for this is that even a full harmonisation directive does not oblige the Member States (subject to minor adjustments to the domestic style of legislation) to copy-paste its definitions into their legislation. In transposing the directive, the Member States usually remain free to use other terms, to create wider definitions or not to use a definition at all.

If, however, the Member States use the definitions of the Consumer Rights Directive (which they will often do), the impact of these definitions on their laws depends upon the role the individual definitions play in the individual rules of the Directive. The definitions may be functionally classified into three, partially overlapping groups, namely (1) ‘scope relevant definitions’, (2) ‘protection level relevant definitions’ and (3) ‘standard form relevant definitions’.

If the Member States use ‘scope relevant definitions’ (of which the most important are “consumer”, “trader”, “goods”, “distance contract”) they are – in principle – free to change the legal term (i.e. “business” instead of “trader”) and to define it more widely than the Consumer Rights Directive. The Member States must not, however, define the term more narrowly than the Directive.

‘Protection level relevant definitions’ (such as “durable medium” or “order form”) bind the Member States not with regard to the term defined (i.e. they may say, e.g., “consumer protection form”), but rather they may not change the content of the definition, since this would affect the level of consumer protection.

‘Standard form relevant definitions’ are those which appear in the Model Withdrawal Form of Annex I (B) of the Directive (e.g. “consumer”, “goods”). As this form shall be used uniformly throughout Europe, the Member States are literally bound to the wording of the directive when transposing the Form. In order to avoid contradictions within their domestic laws, the Member States, without being legally bound to do so, will often have to use for practical reasons these terms consistently throughout their other consumer legislation.

The Model Withdrawal Form could thus have the most obvious positive effect on the internal market with regard to the uniform use of definitions and legal terminology. It simplifies the life of businesses in cross-border trade, because the Form can be used throughout the EU. It might even be advisable to indicate more clearly in the Form that it has been provided by the EU (one could call it, e.g., “EU Model Withdrawal Form”). Moreover, some of the ‘protection level relevant’ definitions such as “durable medium” or “order form” will probably be used rather uniformly throughout the EU, although the Member States may deviate with regard to the terminology.

With regard to the internal coherency of EU law, some other directives and regulations might be affected by a horizontal use of the definitions of the Consumer Rights Directive, in particular in the case of the definitions of “consumer”, “trader”, “financial service” or “durable medium”.
1. PRELIMINARY

This briefing paper has to answer three questions, namely:

- What will be the impact of fully harmonised definitions in the Consumer Rights Directive on the internal market?
- What would be the effect of Article 2 of the proposed Directive in its current form?
- Which other directives and regulations might be affected by a horizontal use of these definitions?

The first question is of a general nature in the sense that it concerns all the definitions of the Consumer Rights Directive (hereafter: CRD). It will be answered first (under point 2). The two other questions relate to the individual definitions contained in the CRD and will jointly be answered for each of the 20 definitions (under point 3).

The authors of this paper are well aware that in the discussion of the proposal of the CRD many alternative suggestions with regard to the definitions have been made since October 2008. The authors felt, however, bound to the task given to them for this briefing paper to ponder on the definitions of the original proposal. The results for these definitions, in particular the functional classification of the different types of definitions, should, however, easily allow an assessment of the impact of alternative suggestions for definitions made in Council and Parliament. The authors are happy to comment further upon other definitions on request.
2. IMPACT OF THE “FULLY HARMONISED DEFINITIONS” ON THE INTERNAL MARKET

Since a directive has by definition no other effect than to oblige the Member States to transpose it, the question of the impact of the “fully harmonised definitions” on the internal market actually consists of two questions, namely

- what will be the effect of the definitions in a full harmonisation CRD on the Member States’ laws, and
- what effect will the fully harmonised national transposition laws have on the internal market.

The second question can only and will only be answered after the first. However, the seemingly simple first question concerning the effect of the definitions in the CRD on the national laws needs a rather differentiated answer which will be presented in the following five steps:

(1) The CRD will not lead to “fully harmonised definitions” in the sense that the Member States have (subject to minor adjustments to the domestic style of legislation) to copy-paste its definitions into their legislation. In principle, the Member States remain free

- to transpose the directive without even creating a definition used by the directive;
- to use other techniques of definition;
- to use other words or phrases to be defined;
- to create a definition of a concept used by the directive, but giving it a different content.

However, if the Member States use definitions when transposing the CRD, the CRD may, in some cases, force them for legal and/or practical reasons to adjust their definitions to those of the CRD. The impact of the CRD may thus differ from definition to definition.

(2) Whether and to what extent a definition of the CRD has an impact on the Member States’ legislation depends on the role this individual definition plays in the individual rules of the directive. With regard to their respective provisions, the definitions may be functionally classified into three groups:

- Definitions which determine the scope of application of the CRD or of individual provisions in the directive (‘scope relevant definitions’)
- Definitions which determine the level of consumer protection regulated by an individual provision of the CRD (‘protection level relevant definitions’)
- Definitions which are used in the European Model Withdrawal Form set out in Annex I (B) of the CRD (‘standard form relevant definitions’)

(3) ‘Scope relevant definitions’ (which are the majority of the definitions in the CRD) determine the scope of application of the CRD or of individual provisions in the directive. Outside its scope of application the CRD is not applicable – likewise with regard to its full harmonisation effect. The Member States thus remain free, e.g., to protect non-consumers similar to consumers, or to grant consumers protection under contracts or in situations not regulated by the CRD. Therefore the Member States may – even under a full harmonisation directive – broaden the definitions and call, for instance, a non-consumer (in the sense of the CRD) ‘consumer’ in their national laws (e.g. a start-up businessman) or contracts not falling under the CRD’ definition ‘sales contract’ (e.g. a...
sale of immovable property). However, the Member States may not use narrower definitions as those given by the CRD if this leads to a transposition deficit.

(4) ‘Protection level relevant definitions’ occur rather rarely in the CRD. Such definitions are employed in rules which determine the level of protection, such as the amount of and the formal requirements for information to be given to the consumer (e.g. the definitions of “order form” or “durable medium”), or rules which determine the effect of withdrawal (e.g. “ancillary contract”). Member States are bound not to change the content of these definitions, as deviation would change the level of consumer protection.

(5) ‘Standard form relevant definitions’ are those which appear in the Model Withdrawal Form in Annex I (B) of the CRD. As this form shall be used uniformly throughout Europe, Member States are bound to the literal wording of the directive with regard to this form when transposing it. In order to avoid contradictions within their domestic law, the Member States, without being legally bound to do so, will often have to use, for practical reasons, these definitions consistently throughout their other consumer legislation transposing the CRD.

On the basis of these results, the effect of the definitions of the CRD on the internal market will be rather limited. It is, in broad terms, rather the effect the rules themselves.

2.1. The CRD does not create “fully harmonised definitions”

The questions to be answered by this briefing paper firstly require clarification as to what exactly “fully harmonised definitions” are. The immediate response to this preliminary question is straightforward: There is no such thing like a “fully harmonised definition”. The wording of the proposal does not create “fully harmonised definitions” and it seems very doubtful that any directive will ever create “fully harmonised definitions”.

2.1.1. Notion of “fully harmonised definition”

The notion “fully harmonised definition” is usually understood as – in principle – creating an obligation of the Member States, when transposing a full harmonisation directive such as the CRD, to copy-paste its definitions into their legislation (subject to minor adjustments to the domestic style of legislation). Such obligation (if it existed) would thus oblige the Member States to precisely mirror in their domestic legislation the definitions used in the directive with regard to three aspects:

(1) To create the type of (logical) definition the CRD uses, thus a definition of the Aristotelian and scholastic type consisting of the concept to be defined (definiendum) and a description that clarifies what falls under the concept and what not (definiens), in the very most cases using the technique of adding to the closest self-explanative overarching generic term (genus proximum) some further specifics which precisely single out the intended cases (differentia specifica)
(2) To use as the notion to be defined ("definiendum") the same or a very similar word as the directive does in the relevant language.

Example: To use the word “consumer”, thus not “private client”, “protected party”, “other party” or just “buyer”, “creditor”

(3) To mirror the material substance of the definition (definiens).

Example: If under the directive the definition of “sale” excludes contract for the sale of land, the MS would be forced to adjust their definitions and to also exclude the sale of immovables from their definition of sales contract.

2.1.2. No obligation of the Member States to mirror the “fully harmonised definitions” in their transposition laws

It might often be advisable for the Member States to mirror the definitions used in the directive in each of the three respects. However, the CRD will not oblige the Member States to do so.

The Member States will remain – in principle – free:

- not to create a definition of the concept at all (thus to transpose the directive without creating a definition used by the directive in the national legislation; e.g. just using the word consumer without defining it);
- to use other techniques of definition than the Aristotelian type (e.g. a list of covered cases);
- to use other words or phrases to be defined (e.g. to use “final addressee” instead of “consumer”);
- to create a definition used by the directive, but giving it a different content (e.g. to include legal persons into the definition of consumer).

There are, however, some limits to this autonomy of the Member States which will be elaborated below under points 2.2-2.5.

2.1.3. Reasons why “fully harmonised definitions” do not exist

The main reason why even a full harmonisation directive does not oblige the Member States to copy-paste its definitions is Article 288(3) TFEU which reads:

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1 Most of the definitions in Art. 2 follow this scheme. Exceptions are “sales contract” (paragraph 3) which does not contain a definiens, but just a clarification that also mixed-contracts are included; “product” and “producer” (paragraphs 12 and 17) where the definiens is just a list without genus proximum and differentia specifica.

2 Cf. e.g. Wendehorst, Umsetzungskonzepte, in: Jud, Wendehorst (2009), 153 at p. 179; Twigg-Flesner/Metcalfe, The proposed Consumer Rights Directive- less haste, more thought?, ERCL 2009, S. 368 (374): “But the end result will still be diverse national laws, potentially using very different language or concepts to give effect to the pCRD.”; Riehm, Vers une harmonisation totale de la terminologie?, Les Petites Affiches, N° 83 2009, S. 14: “lors de la transposition des directives, chaque État membre peut choisir sa propre terminologie, sans être tenu de reprendre la terminologie communautaire”.

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“A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

Hence, the TFEU expressly allows the Member States to find ways to reach the aims of the directive without using the definitions of the directive or by using other definitions, irrespective whether it is a full or a minimum directive. Since a directive is just a directive it cannot oblige the MS to copy-paste its definitions.

Example: It is irrelevant for the level of protection of consumers under a consumer sales contract whether the consumer is called, in the national legislation transposing the CRD, “consumer” or “buyer”. The aim of ensuring the same level of consumer protection in all Member States will be reached in both ways.

Moreover, Article 4 of the CRD reads:

“Full harmonisation. Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.”

In line with Article 288(3) TFEU, Article 4 CRD speaks only of full “harmonisation” (which is not “unification” thus). The rule that Member States may not maintain or introduce “provisions diverging from those in the directive” only concerns the content of the provisions – not their wording or legislative style. The question whether a legislator uses definitions at all and which words he chooses when using definitions is – in principle – just an issue of the style of legislation. If the national legislator manages to correctly transpose the substance of the directive, it does not matter whether it uses other definitions or none at all.

2.2. The three different types of definitions

The impact of a definition on national legislation depends on the function a definition has in the Member States. The 20 definitions of the CRD are used with three main functions:

- Definitions which determine the scope of application of the CRD or of individual provisions in the directive (‘scope relevant definitions’)
- Definitions which determine the level of consumer protection regulated by an individual provision of the CRD (‘protection level relevant definitions’)
- Definitions which are used in the Model Withdrawal Form set out in Annex I (B) of the CRD (‘standard form relevant definitions’)

The following table indicates, in which Articles and Chapters of the CRD the definitions are used and their functions.
## Table: Use and Function of the Definitions in the CRD

<table>
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<th>Article(s) and Annexes</th>
<th>Chapter(s)</th>
<th>Function</th>
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<td>consumer</td>
<td>Art. 2(1)</td>
<td>Nearly all</td>
<td>All</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>• Scope relevant</td>
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<td>• Standard form relevant</td>
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<td>trader</td>
<td>Art. 2(2)</td>
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<tr>
<td>sales contracts</td>
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<td>Art. 2(5), Art. 2(8) lit. a, Art. 2(8) lit. b, Art. 3(1), Art. 5(1), Art. 5(3), Art. 16(2), Art. 17(1), Art. 19(1) lit. d, Art. 21(1), Art. 24(1), Art. 24(5), Annex I A, B</td>
<td>I (definitions and scope)</td>
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<td></td>
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<td>• Standard form relevant</td>
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<td>goods</td>
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<td>Art. 2(20), Art. 8, Art. 9, Art. 11(1), Art. 11(2), Art. 11(4), Art. 12(1), Art. 12(2), Art. 15 lit. a, Art. 14(2), Art. 18(1), Art. 19(1), Art. 20(1), Art. 20(3), Annex I A.</td>
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<td>Art. 2(11), Art. 2(20), Art. 3(2), Art. 8, Art. 9, Art. 10(1), Art. 10(2), Art. 12(1), Art. 12(2), Art. 15 lit. a, Art. 15 lit. b, Art. 18(1), Art. 19(2), Art. 20(1), Art. 20(2), Annex I A.</td>
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<td>Art. 2(8) lit. a, Art. 2(8) lit. b, Art. 19(2) lit. a, Art. 20(1) lit. d</td>
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<td>durable medium</td>
<td>Art. 2(10)</td>
<td>Art. 10(2), Art. 11(4), Art. 12(2), Art. 14(1), Art. 29(3), Annex I A., Annex III</td>
<td>I (definitions and scope)</td>
</tr>
<tr>
<td>order form</td>
<td>Art. 2(11)</td>
<td>Art. 10(1), Art. 10(2), Art. 12(2), Annex I A.</td>
<td>I (definitions and scope)</td>
</tr>
<tr>
<td>product</td>
<td>Art. 2(12)</td>
<td>Art. 5(1) lit. a, Art. 5(1) lit. c, Art. 11(3), Art. 32(2), Art. 45, Annex III</td>
<td>I (definitions and scope)</td>
</tr>
</tbody>
</table>

3 “Contract of sale”.

4 “Provision of the following service”.

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2.3. Scope relevant definitions

'Scope relevant' definitions are those which determine the scope of the directive or its individual provisions in such a way that – in principle – the Member States remain free to regulate cases outside the scope, even though it is a full harmonisation directive. The test for assessing this could be called the non-X test, whereby X stands for all factual situations and contracts falling under a definition. The question to be asked for each individual rule is whether the CRD prohibits the Member States from regulating consumer protection for non-X cases (e.g. non-consumers etc.), thus cases or situations falling outside the scope of the directive.

2.3.1. Personal Scope

The most prominent and often discussed example is of non-consumers protected by the Member States in the same way as consumers under a directive (and often also called consumers in the Member States laws). In other words: May Member States broaden the definition of consumer when transposing a full harmonisation directive (as several of them have done already)?

Only a few authors, who meanwhile seem to have fallen silent, argued (with regard to the Distance Selling of Financial Services Directive) that a full harmonisation directive would prohibit the Member States from extending the protection granted by the directive to non-consumers.5 The prevailing view in legal literature is now that Member States are

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5 Hoffman (2006), Der Verbraucherbegriff des BGB, at p. 262; Tacou (2009), Verbraucherschutz auf hohem Niveau oder Mogelpackung?, at 141.
free (unless other EU law, including the Treaties, do not provide otherwise), to extend
the scope of protection to non-consumers. 6 The case law of the CJEU on the effect of full
harmonisation directives does not directly answer the question whether the Member
States may use wider definitions in this sense, but also does not rule this out. 7 At the
current stage of discussion there is therefore rather firm ground to assume that the
Member States would be free to introduce or to maintain a wider definition of consumer.
The same would then be true for a wider definition of trader (which could, e.g., include
also non-profit associations).

2.3.2. Other contracts or situations outside the scope

A further criterion for the scope of application of the CRD is a specific type of contract or
a specific situation. For instance, the definition of goods may exclude contracts for the
sale of land or of digital products (e.g. ringtones) from the scope. The non-X test is again
whether this means that Member States are prohibited from granting the buyers of ‘non-
goods’, e.g., land or ringtones, a similar protection as Chapter IV of the CRD does. The
same questions have been phrased in legal writings in terms of whether the individual
rules of the CRD aim at selective full harmonisation (which leaves autonomy for the MS
outside the scope) or at comprehensive full harmonisation (which prohibits MS gap-
filling). 8 At least in the two examples of the sale of land and of ringtones, it is rather
clear that the CRD does not aim at comprehensive full harmonisation. These fields are
simply out of the scope of the CRD. The Member States are thus free to protect buyers of
land or ringtones at their own discretion. One way could be to use simply a wider
definition of “goods” in their national legislation.

2.3.3. Narrower scope relevant definitions?

Whereas it is rather clear that the Member States can maintain or introduce into their
domestic laws wider definitions than the ‘scope related’ definitions of the CRD, the
converse argument would be that they are prohibited from having narrower definitions.
Although plausible, this is only partly true. The Member States are actually only
prohibited from having narrower definitions in their national laws if they do not ensure by
other ways that their law correctly transposes the CRD.

Example: If in a Member State the traditional definition of service contract is narrower
than Art. 2 (5) and excludes what is called in some Member States a contract for work
(Werkvertrag, contratto d’opera, contrato de obra), the Member State could, for
instance, maintain its traditional definition and create a “cats are regarded as dogs” rule:
“For the purposes of this chapter contracts for work are to be regarded as contracts for
services”.

2.4. Protection level relevant definitions

Protection level relevant definitions are those which do not determine the scope of the
individual rules of the CRD, but the level of protection of individual consumer protection
rules in the CRD. Rather clear examples are

6 Wilhemsson (2008), Full Harmonisation of Consumer Contract Law?, at 228.
7 On the effect of a „black list“ in an annex to the (full harmonisation) Unfair Commercial Practices Directive see
ECJ, Joined Cases C-261/07 and C-299/07; VTB-VAB NV. Misleading: Di Pinto (on a minimum case).
8 Schulte-Nölke et al (2009), The potential impact of the Consumer Rights Directive on the Member States’
contract laws.
• order form
• durable medium
• ancillary contract

In some other cases such as “financial services” or “auction” it is unclear which type of definition these are. This is due to the ambiguity of some rules in the CRD with regard to the intended full harmonisation effect.

One example is the definition of the term “financial service”. The term is used at several places in the CRD, often clearly in the function a ‘scope related’ definition (see, e.g. Article 3(2) CRD).

However, in Article 20(2)(b) off-premises contracts relating to certain “financial services” whose price depends on fluctuations in the financial market outside the trader’s control, are exempted from the field of application of Articles 8 to 19 CRD, thus from the specific information duties and the withdrawal right.

The CRD leaves unclear, whether this – read in conjunction with the full harmonisation principle – means that the Member States are bound to this exemption or whether they are, by contrary, free to grant, e.g., a withdrawal right as well for such contracts on “financial services”. If the Member States are bound, the provision sets an upper limit for the protection of consumers in such cases; the definition of “financial services” is thus then relevant for the level of protection. The Member States, if they use the definition, may not narrow or widen it, as this would have the effect that consumers would enjoy better or worse protection than regulated by the directive. Ambiguities in the rules of the CRD with regard to its full harmonisation effect also affect the assessment of what the effect of the definitions on the Member States may be.

Cum grano salis one can thus say that in the case of ‘protection level relevant definitions the Member States are more strictly bound to the directive, if these definitions are used. Member States may still use other concepts (e.g. “consumer protection form” instead of “order form”) but not change the content of the definition (i.e. the “definiens”).

### 2.5. Standard form relevant definitions

Some definitions appear in Annex I (B) of the CRD which contains a ‘Model Withdrawal Form’ to be given to consumers. The CRD can be understood in the sense that the Member States shall transpose word for word Annex I (B), thus regulating by their transposition laws that the trader must provide the Model Withdrawal Form given by Annex I (B), as it stands, to the consumers. Such a requirement, to provide an EU Model Withdrawal Form, would make it strongly advisable for the Member States to use in their laws the same terms as the Model Withdrawal Forms uses in order to avoid contradictions.

*Example: Austria currently uses the term “Rücktritt” for withdrawal, whereas the German version of the CRD provides “Widerruf” in Annex I (B). Since it could be confusing to...*
employ different terms in the Austrian legislation, there is a rather strong motive to use "Widerruf" consistently and to replace "Rücktritt".⁹

2.6. General transposition requirements with regard to consumer law

In several decisions the CJEU has held that the Member States must transpose directives in a way that the legal position under national law is sufficiently precise and clear and that individuals are made fully aware of their rights. This is of particular importance where a directive is intended to accord rights to nationals of other Member States¹⁰, which is the case in the field of consumer protection.¹¹ This line of case law may have some repercussions on the question whether the Member States may employ, instead of the definitions of the CRD, very general terms in their laws in order to grant consumer protection (e.g. “creditor” instead of “consumer”).

2.7. Effect on the internal market

It is difficult to answer the question whether definitions (taken in isolation) have an effect on the internal market. This question mainly makes sense with regard to the rules of the directive, in which, of course, the definitions are used.

If one, however, sticks to definitions or the uniform use of the CRD’s terminology by the Member States, the Model Withdrawal Form could have the most obvious positive effect on the internal market. The Form would become a Europe wide standardised tool in particular for distance selling and e-commerce. Consumers who are actively shopping in the internal market would get used to the Form (although it is in different languages). Such an ubiquitous Form could contribute to creating more consumer confidence in the internal market which then appears to be, at least in part, uniformly regulated by the EU. It might even be advisable to clearly indicate in the Form that it has been provided by the EU (one could call it, e.g., “EU Model Withdrawal Form”).

As explained, the Form may have the further effect that the Member States use more frequently those terms which appear in it as well as in their transposition legislation, thus in particular the terms “consumer” or “goods” (or its equivalents in the other languages).

Some of the ‘protection level relevant’ definitions such as “durable medium” or “order form” will probably be used rather uniformly throughout Europe although the Member States may use other terms other than the CRD.

Besides these – certainly positive – effects for the internal market, one should not be too optimistic that the CRD will lead to a much more uniform use of legal terms (including the definitions). As the CRD is a directive, the Member States still have great freedom to employ their traditional legal terminology. Moreover, they can and most probably will maintain in particular their broader definitions (which cover persons or situations outside

the scope of the directive) in order to maintain the protection of certain contract parties. The effect of the CRD for a common European legal terminology used both in the EU legislation and the national laws will be rather limited.
3. ANALYSIS OF INDIVIDUAL DEFINITIONS

3.1. Consumer

**Article 2(1) CRD:** 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.

3.1.1. Type of definition and its impact on the Member States’ laws

The definition of “consumer” is a ‘scope relevant definition’. This results from Article 1 CRD according to which the provisions of the Directive are applicable to ‘contracts between consumers and traders’. Member States are not restricted in applying national provisions that implement the Directive’s provisions to ‘non-consumers’, i.e. persons not covered by the CRD. Thus, on the one hand, the full harmonisation principle of the CRD will not hinder Member States both to retain consumer definitions that already go beyond the notion of consumer found in the current acquis and to actively extend their national notion of consumer. On the other hand, Member States will not be allowed to lower the level of consumer protection by excluding situations covered by the CRD’s definitions. That, however, was already the case under the minimum harmonisation directives.

The definition of consumer is furthermore ‘standard form relevant’ because its is used in Annex I (B). The Member States must use the term in their national legislation transposing the Model Withdrawal Form. The obligation to employ the term “consumer” literally in the Model Withdrawal Form will probably motivate most Member States to stick to or to introduce the term “consumer” also into their corresponding legislation.

3.1.2. Examples of definitions from the Member States’ laws

3.1.2.1. Mixed purpose contracts

European law does not answer the question whether a person acting partly for private purposes and partly for business purposes has to be considered as a consumer. Current solutions in the Member States range from exclusively private use and predominant private use to no clear rule on mixed purpose contracts at all. Unlike the DCFR and the Acquis Principles, the CRD does not require the person acting primarily for non-business related purposes to qualify as a consumer. Some authors have taken the view that the CRD’s definition suggests that a person will always be treated as a consumer in situations of dual use while others understand that dual use will generally preclude the qualification as a consumer. Because of this ambiguity the effect a full harmonised

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12 According to ECJ, 20 January 2005, *Johann Gruber v. Bay Wa AG*, C-464/01, ECR 2005, I-439, paras. 51 et seq., a person cannot claim the protection of Articles 13 to 15 of the Brussels Convention if this person negligently has created the impression that he or she was acting in the course of a business. However, it remains unclear to what extend this approach can be transferred from international civil procedural law to substantive consumer protection law.


14 Article I.–1:105 DCFR: ‘A “consumer” means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.’

15 Article 1:201 ACQP: ‘Consumer means any natural person who is mainly acting for purposes which are outside this person's business activity.’


definition of consumer will have on national laws remains unclear. If European consumer protection rules were to apply to any person acting, at least in part, privately, some Member States, such as GERMANY, DENMARK, FINLAND and SWEDEN which require a preponderant private purpose, would have to change their notion of consumer because their solutions would be narrower than the European notion. If European consumer contract law were only applicable to contracts concluded exclusively for private purposes, Member States would be entirely free to regulate mixed purpose contracts.

To provide clarification on this matter, it would be reasonable to redraft the definition in the CRD.

3.1.2.2. Situations not harmonised by the CRD

A number of Member States extend the scope of several consumer protection provisions to certain legal persons and do not limit the notion of consumer to natural persons. Although the ECJ has expressly stated (concerning the consumer definition of Article 2 of the Unfair Terms Directive) that EU (then: EC) law does not require an extension of the meaning of consumer to certain legal persons, Member States which do so will not have to change their definitions. AUSTRIA, BELGIUM, the CZECH REPUBLIC, DENMARK, FRANCE, GREECE, SLOVAKIA, SPAIN and the UNITED KINGDOM will still be allowed to treat certain legal persons as consumers.

The German legislator has transposed the various consumer definitions in § 13 Civil Code according to which consumers are those persons who ‘enter into a transaction which can be attributed neither to their business nor to their self-employed capacity’. Although acting in a capacity outside of their employment, yet not being self-employed, an employed person is consequently regarded as a consumer. There is a debate about whether the European notion of consumer includes employed persons yet. Even if the European legislator were to exclude employees from the consumer definition, Germany would not be hampered in regarding an employed person, one who is acting in a professional capacity as a “consumer”. This means particularly that, under German law, standard business terms in contracts of employment are in principle subject to the unfairness test of the Unfair Terms Directive.

In GREECE and in HUNGARY, all ‘final addressees’ or final recipients are protected. Generally, this concept will offer a wider protection than the European definition of consumer, since it also includes certain business transactions. Therefore, the full harmonisation principle will not hamper those Member States who use the notion of a ‘final addressee’.

19 § 1(1) no. 2 in conjunction with para. (2) Konsumentenschutzgesetz (ConsProtA).
20 The Cour de Cassation has clarified that the notion of ‘consumer’ (consommateur) according to the ECJ decision in Idealservice cannot be carried over to legal persons, whereas on the other hand, the notion non-professionel (used in context of the articles concerning unfair contract terms; see Art. L. 132-1 ConsC) can also be a legal person under French law (Cass.civ., 15 March 2005, no. 02-13285).
21 Article 3 Legislative Decree 1/2007 (ConsProtA): ‘las personas físicas o jurídicas’.
22 Case law has declared that a company may ‘deal as a consumer’ within the meaning of the Unfair Contract Terms Act (e.g. R. & B. Customs Brokers Co. Ltd. v. United Dominions Trust Ltd. [1988] 1 WLR 321). In other consumer protection instruments only a natural person can be a consumer.
25 Article 1(4)(a) ConsProtA: a consumer is every ‘natural or legal person, to whom products or services on a market are aimed, and who makes use of such products and services, so long as the person is the end recipient.’
26 Article 2(i) ConsProtA.
The definition of consumer contained in the CRD does not expressly state whether a person who makes transactions in the course of preparatory professional activity (so-called founding activities) is likewise a ‘consumer’. With regard to international civil procedure law the CJEU decided that specific protection is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future.\textsuperscript{27} This view is confirmed by the Financial Services Distance Selling Directive.\textsuperscript{28} Although EU law seems therefore to be in favour of excluding founding activities from the notion of consumer, Member States who have or will address this issue are in no way bound by European law. Likewise, already existing differences will remain between AUSTRIA, where transactions by which a natural person, prior to commencing a business, obtains the necessary goods or services do not qualify as business transactions,\textsuperscript{29} and GERMANY, where courts have regarded founders of businesses not as consumers, but as businesses.\textsuperscript{30}

### 3.1.3. Corresponding definitions in the four directives under revision

The definition of consumer laid down in Article 2(1) CRD follows corresponding definitions in the existing 4 directives within the remit of the CRD:

- **Art. 2 Doorstep Selling Directive 85/577/EEC**
  
  `'consumer’ means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession;`

- **Art 2(b) Unfair Terms Directive 93/13/EEC**
  
  `'consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;`

- **Art. 2(2) Distance Selling Directive 97/7/EC**
  
  `'consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;`

- **Art. 1(2)(a) Consumer Sales Directive 1999/44/EC**
  
  `'consumer: shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession;`

All definitions stipulate two common conditions of consumer; the consumer is (1) natural person (2) who is acting for certain non-business related purposes. With the exception of the Doorstep Selling Directive where the definition does not mention ‘business’, all four directives exempt trade, business and professional activities. The definition of ‘consumer’ in the CRD also includes ‘craft’ as a purpose that shall be outside the person’s activity.\textsuperscript{31}

\textsuperscript{27} ECJ, 3 July 1997, Francesco Benincasa v. Dentalkit Srl., C-269/95, ECR 1997, I-3767, para. 17.

\textsuperscript{28} Recital (29) of Directive 2002/65/EC: ‘[t]his Directive is without prejudice to extension by Member States, in accordance with Community law, of the protection provided by this Directive to non-profit organisations and persons making use of financial services in order to become entrepreneurs.’

\textsuperscript{29} § 1(3) Konsumentenschutzgesetz (ConsProtA): ‘Geschäfte, die eine natürliche Person vor Aufnahme des Betriebes ihres Unternehmens zur Schaffung der Voraussetzungen dafür tätig, gehören noch nicht im Sinn des Abs. 1 Z. 1 zu diesem Betrieb.’

\textsuperscript{30} Federal Court of Justice (BGH), 24 February 2005, Neue Juristische Wochenschrift (NJW) 2005, pp. 1273-1275.

\textsuperscript{31} This is similar to the Unfair Commercial Practices Directive and the Timeshare Directive which include ‘craft’ while the Payment Services Directive and the Consumer Credit Directive do not.
However, because in most cases a person’s craft will be his trade or business also, the inclusion of ‘craft’ does not seem to substantially narrow the notion of consumer.

### 3.1.4. Effect on other consumer directives in the acquis communautaire

It could be desirable to create a common definition of ‘consumer’ throughout the acquis, which should be feasible without great changes of individual definitions. ‘Consumer’ is defined in, e.g., the following consumer directives:

<table>
<thead>
<tr>
<th>Directive</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art 2(4) Package Travel Directive 90/314/EEC</td>
<td>‘consumer’ means the person who takes or agrees to take the package (‘the principal contractor’), or any person on whose behalf the principal contractor agrees to purchase the package (‘the other beneficiaries’) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (‘the transferee’)</td>
</tr>
<tr>
<td>Art. 2 lit. e E-Commerce Directive 2000/31/EC</td>
<td>‘consumer’: any natural person who is acting for purposes which are outside his or her trade, business or profession</td>
</tr>
<tr>
<td>Art. 2 lit. d Distance Marketing of Financial Services Directive 2002/65/EC</td>
<td>‘consumer’ means any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession</td>
</tr>
<tr>
<td>Art. 2 lit. a Unfair Commercial Practices Directive 2005/29/EC</td>
<td>‘consumer’ means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession</td>
</tr>
<tr>
<td>Art. 4(11) Payment Services Directive 2007/64/EC</td>
<td>‘consumer’ means a natural person who, in payment service contracts covered by this Directive, is acting for purposes other than his trade, business or profession</td>
</tr>
<tr>
<td>Art. 3 lit. a Consumer Credit Directive 2008/48/EC</td>
<td>‘consumer’ means a natural person who, in transactions covered by this Directive, is acting for purposes which are outside his trade, business or profession</td>
</tr>
<tr>
<td>Art. 2(1) lit. f Timeshare Directive 2008/122/EC</td>
<td>‘consumer’ means a natural person who is acting for purposes which are outside that person’s trade, business, craft or profession</td>
</tr>
</tbody>
</table>
3.2. Trader

**Article 2(2) CRD:** ‘trader’ means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.

3.2.1. Type of the definition and its impact on the Member States’ laws

The definition of “trader” is a ‘scope relevant’. This results from Article 1 of the CRD according to which the provisions of the Directive are applicable to ‘contracts between consumers and traders’. Therefore the Member States remain free to extend the term trader beyond the scope of the directive, whereas narrower definition (e.g. excluding SME’s) will not be in line with the CRD. This, however, was already the case under the minimum harmonisation directives.

3.2.2. Examples of definitions from the Member States’ laws

Several of the Member States have introduced a uniform definition for the counterpart of the consumer, in particular AUSTRIA\(^{32}\), the CZECH REPUBLIC\(^{33}\), FINLAND\(^{34}\), GERMANY\(^{35}\), ITALY\(^{36}\), SPAIN\(^{37}\) and SLOVENIA\(^{38}\). In BULGARIA, the Law on Consumer Protection distinguishes between three types of consumer contracts depending on the nature of the consumer’s contractual partner (trader, producer or supplier)\(^{39}\) and hence applies different rules. LATVIA and LITHUANIA define the terms “seller” and “service provider” generally for all kinds of consumer contracts\(^{40}\). SLOVAKIA introduced general definitions for “seller” and “supplier”\(^{41}\). Other Member States by contrast, in particular FRANCE, abstain from express definitions, relying instead on their case law to develop an overarching definition of business.

The definition of “trader” in the CRD does not clarify whether the trader must have the intention to make profit. The Member States have regulated the issue differently. In AUSTRIA business is described in Article 1(2) of the Consumer Protection Act as “every organisation on a continuing basis of independent economic activity”, even if this organisation does not intend to make a profit. In GERMANY the Federal Supreme Court clarified that an intention to generate a profit is not needed\(^{42}\). In GREECE, it is likewise recognised that non-profit-making organisations or institutions as well as public corporations and local authorities can act as suppliers. In the NETHERLANDS and SWEDEN enterprises which have no profit motive also included.

In FINLAND and SLOVENIA the position is different. According to Art. 1:5 of the FINNISH Consumer Protection Act the trader has to act “in order to gain income or with another economic interest.” According to Art. 1(3) of the SLOVENIAN Consumer Protection Act, a “trader” is defined as a legal or natural person, who is “engaged in a profitable activity” regardless of its legal form or ownership.

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\(^{32}\) Article 1(2) of the Consumer Protection Act.  
\(^{33}\) CC Art. 52(2).  
\(^{34}\) Chapter 1 Art. 5 of the Consumer Protection Act.  
\(^{35}\) CC Art. 14.  
\(^{36}\) Article 3(1) lit. (c) of the Consumer Code.  
\(^{37}\) ConsProtA art. 4  
\(^{38}\) Article 1(3) of the Consumer Protection Act.  
\(^{40}\) Article 1(1) sec. 4-5 of the Latvian Consumer Protection Act; Art. 2(2) and (3) of the Lithuanian Consumer Protection Act.  
\(^{41}\) Article 2(1) lit. (b) and (e).  
\(^{42}\) BGH (DE) 29. Mar. 2006 VIII ZR 173/05.
Under the CRD it is questionable whether the Member States remain free to regulate a requirement of a profit motive. Ideally the CRD would clarify this issue.

Moreover, it has not yet been clarified whether public bodies may also be included in the definition of “trader”. A series of Member States expressly regulated that “business” includes legal persons under public law. In AUSTRIA legal persons under public law always qualify as businesses. BULGARIAN law expressly states that the terms “trader” and “supplier” include legal persons whether publicly or privately owned. ITALIAN law includes (for sales contracts) under the definition of “seller” every natural or legal person of private and public law. In SLOVENIA, a “trader” is defined as a legal or natural person “regardless of their legal form or ownership”. In SPAIN the definition of “business” covers both private and public activities. In other Member States such as GERMANY it follows from the general definition of legal person that public bodies are also included.

3.2.3. Corresponding definitions in the four directives under revision

The definition of trader laid down in Article 2(2) CRD follows corresponding definitions in the 4 existing directives within the scope of the CRD:

<table>
<thead>
<tr>
<th>Directive</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 2 Doorstep Selling Directive 85/577/EEC</td>
<td>‘trader’ means a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader;</td>
</tr>
<tr>
<td>Art 2(c) Unfair Terms Directive 93/13/EEC</td>
<td>‘seller or supplier’ means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned;</td>
</tr>
<tr>
<td>Art. 2(3) Distance Selling Directive 97/7/EC</td>
<td>‘supplier’ means any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity;</td>
</tr>
<tr>
<td>Art. 1(2)(c) Consumer Sales Directive 1999/44/EC</td>
<td>‘seller’ shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession;</td>
</tr>
</tbody>
</table>

Unlike the definition of consumer there was not a uniform term to describe the other side of a consumer contract in EC law before. Despite terminological deviations all of the directives mentioned conform to the norm that the other party to a consumer contract can either be (1) a natural or a legal person (2) who is acting for purposes relating to this person’s self-employed trade, work or profession.

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43 Article 1 (2), sent. 2 of the Consumer Protection Act.
44 Law on Consumer Protection, Additional Provisions, § 13 no. (2) and (4).
45 Article 128(2)(b) of the Consumer Code.
46 Article 1(3) of the Consumer Protection Act.
47 ConsProtA art. 4.
### 3.2.4. Effect on other consumer directives in the acquis communautaire

Corresponding definitions of trader which might be harmonised or pooled exist in various other consumer directives:

<table>
<thead>
<tr>
<th>Article</th>
<th>Directive</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 2 lit. b</td>
<td>E-Commerce Directive 2000/31/EC</td>
<td>'service provider': any natural or legal person providing information society service</td>
</tr>
<tr>
<td>Art. 2 lit c</td>
<td>Distance Marketing of Financial Services Directive 2002/65/EC</td>
<td>'supplier' means any natural or legal person, public or private, who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts</td>
</tr>
<tr>
<td>Art. 2 lit b</td>
<td>Unfair Commercial Practices Directive 2005/29/EC</td>
<td>'trader' means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader</td>
</tr>
<tr>
<td>Art. 3 lit b</td>
<td>Consumer Credit Directive 2008/48/EC</td>
<td>'creditor' means a natural or legal person who grants or promises to grant credit in the course of his trade, business or profession</td>
</tr>
<tr>
<td>Art. 2(1) lit. e</td>
<td>Timeshare Directive 2008/122/EC</td>
<td>'trader’ means a natural or legal person who is acting for purposes relating to that person’s trade, business, craft or profession and anyone acting in the name of or on behalf of a trader</td>
</tr>
</tbody>
</table>

### 3.3. Sales Contract

**Article 2(3) CRD:** ‘sales contract’ means any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services

### 3.3.1. Type of the definition and its impact on the Member States’ laws

The definition of “sales contract” is ‘scope relevant’, in the sense that the Member States are free to regulate ‘non-sales-contracts’ or to extend their definition of sales contracts (if such contracts are not covered by the CRD or other full harmonisation such as, e.g., service contracts).

In Article 3(1), 5(1) and (3) CRD the term “sales contract” is used in the phrase “sales and [or] service contract” thereby meaning all sort of contracts falling under the CRD. The Member States remain free to regulate contracts falling outside this scope (e.g. contracts for donation or partnership agreements).

Article 16(2) and 17(1) regulate some peculiarities of the unravelling of sales contracts after withdrawal. The Member States thus remain free to diverge with regard to ‘non-sales contracts’.

In Article 19(1)(d) (exception for wines bought en primeur), the use of the term “sales contract” is probably superfluous; it should read just “contract”.

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*IP/A/IMCO/NT/2010-10*
Chapter IV of the CRD deals with 'other consumer rights specific to sales contracts'. In this Chapter Article 21(1) makes clear that the definition of ‘sales contract’ relates to the scope of the directive: ‘This Chapter shall apply to sales contracts’. Therefore the Member States remain free to enacting or maintain provisions beyond the scope of the directive. However a restriction is not possible. The use on the term “sales contract” in Article 24(1)(5) CRD is superfluous; it should simply read “contract”.

The definition of sales contract is furthermore ‘standard form relevant’ as it is included (in the form of “contract of sale”) in Annex I (B). The Member States must use this term literally in the Model Withdrawal Form to be created in their national legislation.

### 3.3.2. Examples of definitions from the Member States’ laws

In most Member States there is an explicit definition of sale or sales contract.48 In some systems the necessary elements of a sale follow from the provisions dealing with the main obligations of the parties,49 others fail to provide for such a legal definition at all, thus leaving the definition to legal literature. These definitions spell out the obligations which are typical of a sale, e.g. the main obligations of the parties. It is striking that these definitions contain a general definition of sales contract and not as laid down in the CRD a definition of sales contract relating to consumer sales.

In addition, all the systems have specific rules relating to consumer sales. On the one hand, these provisions can be contained in a separate Code or Act.50 Under SPANISH law there are several Acts dealing with consumer sales: Consumer Sales Act 23/2003, Consumer Protection Act (Ley 26/1984), Retail Trade Act (Ley 7/1996) and Instalments Sales Act (Ley 28/1998). Most of these rules have been consolidated in the Consumer Protection Act (Real Decreto Legislativo 1/2007) in a single updated legal text. On the other hand, under a number of systems rules dealing specifically with consumer sales can also be found blended in with the general rules on sales.51 Under HUNGARIAN law, since the rules on defective performance and the resulting liability are generalised for all contracts for consideration, the rules dealing with consumer sales also appear as special rules for consumer contracts among the general rules on defective performance.

The definition of sales contract laid down in the CRD does not contain regulations concerning the obligations of the parties. So the elementary content of a sales contract is in general the obligation of one party to deliver the good or transfer the property. The other party is obliged to pay the price. The definition of the CRD presupposes these obligations and contains therefore only regulations concerning a sale of goods by the trader to the consumer. Hence it is rather a consumer sales contract than a general sales contract. This is conform to the Consumer Sales Directive, which contains no definition of sales contract, but requires national provisions concerning sales contract and therefore only regulate specific rules relating to consumer sales.

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48 AUSTRIA CC § 1053; BELGIUM CC art. 1582(1); CZECH REPUBLIC CC § 588; ENGLAND and SCOTLAND Sale of Goods Act s. 2(1); ESTONIA LOA § 208(1); FRANCE CC art. 1582(1); GREECE CC art. 513; HUNGARY CC § 365(1); LATVIA CC art. 2002; LITHUANIA CC art. 6.305; NETHERLANDS CC art. 7.1; PORTUGAL CC art. 874; SPAIN CC art. 1445.

49 GERMANY CC § 433; POLAND CC art. 535; SLOVAKIA CC § 588 and Ccom § 409; SLOVENIA LOA § 435.


51 BELGIUM CC arts. 1649bis- 1649octies; CZECH REPUBLIC CC §§ 52-65 and 612-627; DENMARK Sale of Goods Act §§ 72-86; ENGLAND and SCOTLAND Sale of Goods Act s. 48A to 48F; ESTONIA LOA §§ 208-237; GERMANY CC §§ 474-479; LITHUANIA CC arts. 6.392-6.401; NETHERLANDS all through CC Book 7, Title 1, Sections 1-7; SLOVAKIA CC §§ 52-60, 588-610 and 612-627.
The definition of sales contract laid down in the CRD has no effect on a national regulation concerning the obligations of the parties to a general sales contract. However the Member States have to enact specific provisions relating to consumer sales. These provisions can either be contained in a separate Code or Act or blended in with the general rules on sales.

By including mixed-purpose contracts in the definition the Member States remain constrained from enacting deviating provisions since this is a provision relating to the scope of the directive. However this was already the case under the Consumer Sales Directive, which clarifies in Article 1(4) that “contracts for the supply of consumer goods to be manufactured or produced shall also be deemed contracts of sale for the purpose of this Directive”.

Full Harmonisation does not mean a word by word implementation of the definition into national law, so it is possible that the definition of sales contract has no effect on the Member States law.

3.3.3. Corresponding definitions in the four directives under revision

Sales Contract is not defined in the existing four directives. Although the Consumer Sales Directive is about certain aspects of the sale of consumer goods and also treats as contracts of sales those contracts involving the “supply of consumer goods to be manufactured or produced”, there is no complete definition of sales contract.

3.3.4. Effect on other consumer directives in the acquis communautaire

A definition is sales contract is not to be found in any other consumer directive.

3.4. Goods

**Article 2(4) CRD:** goods mean any tangible movable item, with the exception of:
- (a) goods sold by way of execution or otherwise by authority of law
- (b) water and gas where they are not put up for sale in a limited volume or set quantity
- (c) electricity;

3.4.1. Type of the definition and its impact on the Member States’ laws

The definition of “goods” is ‘scope relevant’. This can be seen, e.g. in Chapter IV, where Article 21 CRD reads: “[...] this Chapter shall only apply to goods”. As mentioned above, full harmonisation, on the one hand, does not restrict the Member States from enacting provisions beyond the scope of the directive. On the other hand, Member States will not be allowed to lower the level of protection by excluding situations covered by the CRD’s definition.

The definition of “goods” is furthermore ‘standard form relevant’ because it appears in Annex I (B). The Member States will have to use the term in the Model Withdrawal Form to be created in their respective national legislation.
3.4.2. Examples of definitions from the Member States’ laws

Some Member States apply the same definition of “goods”, namely BELGIUM, BULGARIA, CYPRUS, FRANCE, HUNGARY, IRELAND, LUXEMBOURG, POLAND, and SWEDEN. The CRD’s definition of “goods” has therefore no effect on the law of these Member States.

However, variations exist in many Member States. A number of Member States have not made use of the exceptions listed in Article 2(4)(b): DENMARK, ESTONIA, FINLAND, GERMANY (which also includes water and gas supplied through the mains), LATVIA and MALTA (“any tangible moveable item of property”). ROMANIA uses the term “product” and has added the reference that the final destination of the product is “the individual or common consumption or use”. SLOVENIA has adopted a broader definition of goods and does not define consumer goods separately. SPAIN has added a reference that the goods must be “aimed at the private consumer”.

As a word-by-word implementation of definitions into national law is not required, the use of the word “product” or “thing” instead of “goods” is hence possible. It is, however, questionable whether restrictions to the “individual or common consumption or use” or “aimed at the private consumer” are in line with the CRD. If this excludes certain subject matters of contract from the scope of “goods”, such national definitions are contrary to the principle of full-harmonisation.

In most systems ships, vessels and hovercraft are treated as “goods” e.g. in CZECH REPUBLIC, ENGLAND and SCOTLAND, ESTONIA, FINLAND, FRANCE, LATVIA, NORWAY, POLAND, SLOVAKIA, SLOVENIA, SPAIN, SWEDEN. In contrast under a few systems their sale may be governed by the rules on the sale of immovables (GERMANY, LITHUANIA). As this only concerns very big ships highly improbable to become the subject matter of a consumer contract, this exception seems to be in line with the CRD.

In the most Member States animals are also generally considered to be goods. Similarly in POLAND animals are not considered to be goods but are treated as such. In GERMANY a number of issues surrounding the sale of animals have been discussed by the courts52. AUSTRIAN law contains a specific regime for specific types of defects in certain livestock, which deals with the presumption and time of non-conformity53. In SPANISH law the only particular rules refer to the remedies in case of hidden defects54.

The definition does even not clarify whether software or other digital products should be included. As the definition of “goods” is ‘scope relevant’ the Member States may extend their consumer protection rules for sales contract to the sale of digital services.

3.4.3. Corresponding definitions in the four directives under revision

Unlike the definition of consumer and trader, the definition of goods laid down in Article 2(4) CRD has no corresponding definitions in any of the existing 4 directives but the Consumer Sales Directive.

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52 For a landmark decision see BGH 29 March 2006, NJW 2006, 2250 ff.
53 CC §§ 924 to 927.
54 CC arts. 1491 ff.
The Definition of goods in the Consumer Sales Directive focuses on consumer goods whereas the definition of the CRD applies to goods in general. However there is no material difference between the two definitions.

3.4.4. **Effect on other consumer directives in the acquis communautaire**

A definition of goods is not to be found in any other consumer directive.

### 3.5. **Service Contract**

**Article 2(5) CRD**: ‘service contract’ means any contract other than a sales contract whereby a service is provided by the trader to the consumer

#### 3.5.1. **Type of the definition and its impact on the Member States’ laws**

The definition of “service contract“ is ‘scope relevant’. This results from Chapter I Article 3 of the CRD. Article 3 emphasises that “this Directive shall apply […] to sales and service contracts concluded between the trader and the consumer“. Therefore the Member States remain free to enact or maintain provisions beyond the scope of the directive. It has, however, to be pointed out that the definition of service contract is rather all-encompassing as it tries to cover all consumer contracts other than sales contracts. Where the definition is used in the phrase “sales and [or] service contracts“ there are not many contracts between a trader and a consumer left for which the Member States have discretion. Examples could be employment contracts, gratuitous contracts, partnership agreements.

The definition of service contract is furthermore standard form relevant owing to Annex I (B). The Member States will have to use the term in the Model Withdrawal Form to be created in their national legislation.

#### 3.5.2. **Examples of definitions from the Member States’ laws**

A similar appreciation of service contract is to be founded in ENGLAND: contract law rules apply not only to services involving the supply or modification of an immovable structure or movable thing but also to mere intellectual services. The situation is only slightly different in FRANCE and BELGIUM where all services are generally subject to the rules on the contract for work, with the exception of mandate (agency), mandat, and storage (bailment), dépôt. In many systems storage services (or contracts for deposit) are dealt separately from other services.⁵⁵

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⁵⁵ AUSTRIAN CC §§ 957 ff and Ccom §§ 415 ff; GERMAN CC §§ 688 ff and Ccom §§ 467; GREECE CC arts. 822 ff; ITALY CC arts. 1766 ff; the NETHERLANDS CC arts. 7:600 ff; POLAND CC arts. 835 ff and 853 ff, PORTUGAL CC arts. 1185 ff and Ccom arts. 403 ff and SPAIN CC arts. 1758 ff.
As regards the qualification of service other than storage or deposit, many systems distinguish between contracts for work involving material services and pure contracts of service involving only the provision of intellectual or similar services. The system of AUSTRIA, GERMANY, GREECE, ITALY, the NETHERLANDS, POLAND, PORTUGAL and SPAIN – unlike the system of FRANCE and BELGIUM – distinguish in different ways material services from intellectual. In Austria and Germany, for instance, most material and intellectual services are subject to the provisions on contract for work. A different point of view is taken in the Netherlands, Portugal, Spain and Italy where mere intellectual services and material services (other than storage services) are qualified differently. In the Netherlands, for instance, the general provision of CC arts. 7:400 ff (opdracht) are applicable to intellectual services. On the other hand services involving the supply or modification of an immovable structure or movable thing are covered by the provision of CC arts. 7:750 ff (aanneming van werk). In Spain the CC art. 1544 distinguishes material contract for work (contratos de obra) from mere intellectual contracts for services (contratos de servicio).

Excluding FINLAND and SWEDEN no Member State enacted specific legislation governing consumer service contracts (Finland see Chapter 8 of the Consumer Protection Act on certain consumer service contracts, Sweden see the Consumer Service Act).

Since the provisions of the CRD on service contracts do not – other than for sales contracts – regulate consumer remedies for services of bad quality, the traditional distinctions in the national laws will probably not be touched by the CRD.

### 3.5.3. Corresponding definitions in the four directives under revision

Service contract is not defined in the existing four directives.

### 2.5.2. Effect on other consumer directives

A definition of services is not to be found in any other consumer directive.

### 3.6. Distance Contract

**Article 2(6) CRD:** ‘distance contract’ means any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication.

### 3.6.1. Type of definition and its impact on the Member States’ laws

The definition of distance contract is a ‘scope relevant definition’. Provisions on distance contracts can only be found in Chapter III of the CRD dealing with ‘consumer information and withdrawal rights’. The first provision in this chapter, Article 8, makes clear that the definition of ‘distance contract’ relates to the scope of the directive: ‘This Chapter shall apply to distance […] contracts.’ The definition does not therefore have to be implemented word by word, rather the Member States are free to enact definitions which are wider and cover areas not protected under the CRD.
3.6.2. Examples of definitions from the Member States’ laws

Since most of the Member States’ laws contain a definition of ‘distance contract’ which is close to the one set out in the Distance Selling Directive, their level of protection is lower than the CRD allows. These Member States, among them Austria, Belgium, Cyprus, Denmark, France, Germany, Ireland, Italy, Luxembourg, Malta, Portugal, Slovenia and the United Kingdom, will have to amend their definitions of ‘distance contract’ by dropping the restrictive precondition that the contract must be concluded under an organised distance sales or service-provision scheme. The Czech Republic, Hungary, Latvia, Lithuania and Slovakia have already extended the scope of application of their distance selling laws to contracts concluded without such a system and will therefore be able to maintain their definitions.

Other minor derivations in Member States’ definitions may not have to be revised. This applies, for example, to the clarifications in Czech, Danish, Estonian, Greek and Polish laws which state that there is no distance contract if the supplier and the consumer are present together in the same place at the time the contract is concluded. Although the Proposal’s definition does not explicitly exclude these cases, the requirement of ‘exclusive use’ contained in the Proposal’s definition shows that presence at the same time does preclude the application of the distance selling provisions.

3.6.3. Corresponding definitions in the four directives under revision

The definition of distance contract laid down in Article 2(6) CRD is contained in the Consumer Sales Directive:

| Art. 2(1) Distance Selling Directive 97/7/EC | ‘distance contract’ means any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded |

The main difference between the existing definition and the proposed definition is that the latter does not require the contract to be concluded ‘under an organised distance sales or service-provision scheme.’ This change means that even in cases where the supplier uses means of distance communication exceptionally, these are also covered by the new definition.64

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3.6.4. **Effect on other consumer directives in the acquis communautaire**

Furthermore a definition of distance contract is contained in the Financial Services Distance Selling Directive 2002/65/EC. The definition is consistent with the one laid down in the Distance Selling Directive 97/7/EC.

Art. 2(a) Financial Services Distance Selling Directive 2002/65/EC

‘distance contract’ means any contract concerning financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.

3.7. **Means of distance communication**

Article 2(7) of the Proposal: ‘means of distance communication’ means any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the conclusion of a contract between those parties.

3.7.1. **Type of the definition and its impact on the Member States’ laws**

The definition of ‘means of distance communication’ is a ‘scope relevant definition’. Therefore the Member States remain free to enact or maintain provisions beyond the scope of the directive.

3.7.2. **Examples of definitions from the Member States’ laws**

Since the definition contained in the acquis and the one contained in the CRD do not differ – except that the indicative list is left out in the CRD – Member States who have fully transposed the Directives’ definition will not be required to change them in order to transpose the Proposal’s definition. The correct transposition can be observed for the great majority of Member States.\(^{65}\)

Member States who have transposed the indicative list – this applies to roughly half of the Member States\(^{66}\) – will not be required to remove the list, since the list is not exhaustive. As long as the definition is transposed properly, additional examples of means of distance communication do not infringe EU law.

3.7.3. **Corresponding definitions in the four directives under revision**

The definition ‘means of distance communication’ contained in Article 2(7) CRD is to be found in the Distance Selling Directive:

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Art. 2(4) Distance Selling Directive 97/7/EC

‘means of distance communication’ means any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties. An indicative list of the means covered by this Directive is contained in Annex I.

In contrast to the Distance Selling Directive the CRD’s definition does not refer to an indicative list of means of distance communication and the CRD does not contain such a list.

### 3.7.4. Effect on other consumer directives in the acquis communautaire

A definition of means of distance communication is additionally contained in the Financial Services Distance Selling Directive 2002/65/EC:

Art. 2(e) Financial Services Distance Selling Directive 2002/65/EC

‘means of distance communication’ refers to any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the distance marketing of a service between those parties.

Similar to the definition laid down in the proposal the Financial Services Distance Selling Directive does not contain an indicative list of means of distance communication.

### 3.8. Off-Premises Contract and Business Premises

**Article 2(8) CRD:** ‘off-premises contract’ means:

(a) any sales or service contract concluded away from business premises with the simultaneous physical presence of the trader and the consumer or any sales or service contract for which an offer was made by the consumer in the same circumstances, or

(b) any sales or service contract concluded on business premises but negotiated away from business premises, with the simultaneous physical presence of the trader and the consumer.

**Article 2(9) CRD:** ‘business premises’ means:

(a) any immovable or movable retail premises, including seasonal retail premises, where the trader carries on his activity on a permanent basis, or

(b) market stalls and fair stands where the trader carries on his activity on a regular or temporary basis;

### 3.8.1. Type of the definition and its impact on the Member States’ laws

The definition of off-premises contract relates to the scope of application of the CRD’s provisions. The same applies to the definition of business premises. This results from the fact that provisions on off-premises contracts can only be found in Chapter III of the CRD dealing with ‘consumer information and withdrawal rights’. In this Chapter Article 8 makes clear that the definition of ‘off premises contract’ relates to the scope of the
directive: ‘This Chapter shall apply to distance and off-premises contracts’. The definition is therefore not to be implemented word by word, instead Member States are free to enact definitions which are wider and cover areas not protected under the CRD.

3.8.2. **Examples of definitions from the Member States’ laws**

Under the Doorstep Selling Directive most Member States have expanded the list of situations falling within the scope of the directive. In GERMANY\(^{67}\) contracts concluded following an unannounced, impromptu approach by the trader on public transport or in an open public space are covered by national transposition law. In ROMANIA\(^{68}\) and ITALY the transposition law is applicable to contracts concluded in transitional situations, e.g. temporary work, study, medical treatment or in public areas. In LITHUANIA\(^{69}\) contracts concluded during a visit to an educational institution (e.g. school, university, etc.) or any other such venue fall within the scope of the national transposition law. Contracts concluded outside the trader’s business premises, e.g. contracts concluded on the streets, on squares, in restaurants, at railway stations or in other public places, and on the telephone are protected by DANISH\(^{70}\) national law. Since these are provisions beyond the scope of the directive full harmonisation does not hinder the Member States from including these situations in national law.

The proposals definition of business premises also includes market stalls and fair stands where the trader carries on his activity on a regular or temporary basis. Therefore the proposal’s definition could affect some Member States’ concept of transposition in the way, that cases in which a contract is concluded on the street, in public places, on the market or on the fair, which have in a way defined the term ‘away from business premises’ will no longer be in the scope of some of the national transposition laws because these cases could now mean that a contract was concluded on business premises if the trader carries on his activity at market stalls or fair stands on a regular or temporary basis.

3.8.3. **Corresponding definitions in the four directives under revision**

The term off-premises contract, as well as business premises, is not defined in the existing four directives. Indeed business premises is directly mentioned in the full title of the Doorstep Selling Directive reading “Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises”, as well as in the recital and Art. 1(1) 1\(^{st}\) sentence 1\(^{st}\) indent of the very same Directive. The expression “contracts negotiated away from business premises” seems to be synonymous with the term off-premises contract.

3.8.4. **Effect on other consumer directives in the acquis communautaire**

Due to the fact that neither off-premises contract, nor business premises is defined in any other consumer directive, the definition has no effect on other directives.

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\(^{67}\) § 312(1) 1\(^{st}\) sentence 3\(^{rd}\) indent German Civil Code.

\(^{68}\) Article 3 lit. c of the Ordinance regarding consumers contracts negotiated away from business premises 106/30.8.99.

\(^{69}\) Article 14(1) of the Law on consumer protection, CC, Art. 6.357.

\(^{70}\) Article 3(1) of Act 451 of 9 June 2004 on certain consumer contracts.
3.9. **Durable Medium**

**Article 2(10) CRD:** ‘durable medium’ means any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

3.9.1. **Type of the definition and its impact on the Member States’ laws**

The definition of durable medium is a ‘protection level relevant definition’. Therefore the Member States are prevented from adopting or maintaining deviating provisions.

As stated in the recital of the CRD the definition of durable medium should include in particular documents on paper, USB sticks, CD-ROMs, DVDs, memory cards and the hard drive of the computer on which the electronic mail or a pdf file is stored. It is not clear whether internet sites are included. If an internet website fulfils the criteria contained in the definition of durable medium it should be included. This means that internet sites are excluded, unless the information has been stored on the website for a sufficient period of time and cannot be altered by the person who has posted the information.

3.9.2. **Corresponding definitions in the four directives under revision**

Durable Medium is not defined in the existing four directives.

3.9.3. **Effect on other consumer directives in the acquis communautaire**

A similar definition is to be found in several other consumer directives:

- **Art. 2 lit. f Financial Services Distance Directive 2002/65/EC**
  
  ‘durable medium’ means any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored

- **Art. 4(25) Payment Services Directive 2007/64/EC**
  
  ‘durable medium’ means any instrument which enables the payment service user to store information addressed personally to him in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored

- **Art. 3 lit. m Consumer Credit Directive 2008/48/EC**
  
  ‘durable medium’ means any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored
reproduction of the information stored

Art. 2(1) lit. h Timeshare Directive 2008/122/EC  ‘durable medium’ means any instrument which enables the consumer or the trader to store information addressed personally to him in a way which is accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored

None of these directives mention the trader as authorised to store the information, only the consumer.

3.10. Order Form

**Article 2(11) CRD:** ‘order form’ means an instrument setting out the contract terms, to be signed by the consumer with a view to concluding an off-premises contract.

3.10.1. Type of the definition and its impact on the Member States’ laws

The definition of order form relates to the protection-level of application of the Directive’s provisions. The term is mentioned in Article 10 CRD dealing with formal requirements for the conclusion of off-premises contracts. According to Article 10(1) and (2) an off-premises contract will only be valid if the consumer signs an order form which must contain the Model Withdrawal Form provided at Annex 1(B). Therefore the Member States cannot adopt or maintain deviating provisions. They may not impose any additional formal requirements.

3.10.2. Examples of definitions from the Member States’ laws

The current acquis does not contain a definition of ‘order form’ and the term is not used in any of the consumer protection directives. Member States were therefore not required to introduce the concept of ‘order form’ into their national laws.

With regard to the information of the consumer about the right of withdrawal, Article 4 of the Doorstep Selling Directive introduced the requirement of a ‘written notice’ given to the consumer. The requirement of a written notice has been implemented by all Member States.71 Read in conjunction with Article 12 CRD the definition of ‘order form’ is much narrower than the requirement of a ‘written notice’ contained in the Doorstep Selling Directive and laid down in all Member States’ laws. All Member States will therefore be required to abandon the term ‘written notice’ and to employ the definition of ‘order form’.

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3.10.3. Corresponding definitions in the four directives under revision

‘Order form’ is not defined in the existing four directives. Article 4 of the Doorstep Selling Directive introduced the concept of ‘written notice’ instead.

3.10.4. Effect on other consumer directives in the acquis communautaire

A definition is not to be found in any other consumer directives in the acquis.

3.11. Product and Producer

**Article 2(12) CRD:** ‘product’ means any good or service including immovable property, rights and obligations;

**Article 2(17) CRD:** ‘producer’ means the manufacturer of goods, the importer of goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods

3.11.1. Type of the definition and its impact on the Member States’ laws

Both definitions relate to the scope of application of the Directive’s provisions. The term ‘producer’ is only mentioned in Article 24(2)(d) CRD which regulates the presumption of conformity.

3.11.2. Examples of definitions from the Member States’ laws

Most Member States have correctly transposed the definition of ‘producer’ found in the Consumer Sales Directive and will not be required to change this definition because it is identical with the one contained in the CRD. AUSTRIA, however, has refrained from including a definition of ‘producer’, although it uses the term ‘producer’ when regulating conformity. The same applies to DENMARK, FINLAND and POLAND who equally do not provide a definition. ROMANIA provides an extensive definition of producer which covers, for example, also the distributor of a product.

3.11.3. Corresponding definitions in the four directives under revision

Product is not defined in the existing four directives. A definition of ‘producer’ is contained in the Consumer Sales Directive. This definition is consistent with the one contained in the CRD:


producer: shall mean the manufacturer of consumer goods, the importer of consumer goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the consumer goods;

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72 § 922(2) Civil Code (ABGB).
73 Article 2(1)(d) Law no. 449/2003 regarding the sale of products and associated guarantees.
3.11.4. **Effect on other consumer directives in the acquis communautaire**

A definition of ‘product’ is to be found in the Distance Marketing of Financial Services Directive. This definition is consistent with the definition laid down in the CRD.

Art. 2(c) Distance Marketing of Financial Services 2002/65/EC

‘product’ means any goods or service including immovable property, rights and obligations;

3.12. **Financial Service**

**Article 2(13) of the Proposal:** ‘financial service’ means any service of a banking, credit, insurance, personal pension, investment or payment nature

3.12.1. **Type of the definition and its impact on the Member States’ laws**

The term ‘financial service’ is used at several places in the CRD, often clearly with the function of a ‘scope related’ definition (see, e.g. Article 3(2) CRD). However, in Article 20(2)(b) off-premises contracts relating to certain financial services whose price depends on fluctuations in the financial market outside the trader's control, are exempted from the field of application of Articles 8 to 19 CRD, thus from the specific information duties and the withdrawal right.

The CRD leaves unclear, whether this – read in conjunction with the full harmonisation principle – means that the Member States are bound to this exemption or whether they are, on the contrary, free to grant, e.g., a withdrawal right as well for such contracts on “financial services”. If the Member States are bound, the provision sets an upper limit for the protection of consumers in such cases; the definition of “financial services” is thus then relevant for the level of protection. The Member States, if they use the definition, may not narrow or widen it, as this would have the effect that consumers would enjoy better or worse protection than regulated by the directive. Ambiguities in the rules of the CRD with regard to its full harmonisation effect also affect the assessment of what the effect of the definitions on the Member States may be.

3.12.2. **Corresponding definitions in the four directives under revision**

The term ‘professional diligence’ is not mentioned in the four directives within the scope of the CRD.

3.12.3. **Effect on other consumer directives in the acquis communautaire**

A fully consistent definition can be found in the Distance Marketing of Financial Services Directive:

Art. 2(b) Distance Marketing of Financial Services Directive 2002/65/EC

‘financial service’ means any service of a banking, credit, insurance, personal pension, investment or payment nature;

3.13. **Professional diligence**

**Article 2(14) CRD:** ‘professional diligence’ means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.
3.13.1. **Type of the definition and its impact on the Member States’ laws**

The definition of professional diligence relates to the protection-level of application of the Directive's provisions. Therefore the Member States are unable to adopt or maintain deviating provisions.

3.13.2. **Examples of definitions from the Member States’ laws**

Following the consistent definition of professional diligence in the Unfair Commercial Practices Directive, Member States have introduced a similar definition within their unfair competition laws. The definitions contained in the CRD as well as the one contained in the Unfair Commercial Practises Directive both define an objective and a normative standard of professional diligence.

3.13.3. **Corresponding definitions in the four directives under revision**

The term ‘professional diligence’ is not mentioned in the four directives within the field of the CRD.

3.13.4. **Effect on other consumer directives in the acquis communautaire**

A definition can be found in the Unfair Commercial Practices Directive:

> Art. 2(h) Unfair Commercial Practices Directive 2005/29/EC 'professional diligence’ means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity;

This definition is fully consistent with the one contained in the CRD.

3.14. **Auction**

*Article 2(15) of the Proposal:* 'auction' means a method of sale where goods or services are offered by the trader through a competitive bidding procedure which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the services. A transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction;

3.14.1. **Type of the definition and its impact on the Member States’ laws**

The definition of "auction” only appears (besides the cases of a “public auction” dealt with under 3.15) in Article 19(1)(h) CRD. This provision exempts contracts concluded at an auction from the withdrawal right. Whether “auction” is a ‘scope relevant’ or a ‘protection level relevant’ definition depends on the interpretation of Article 19(1)(h) CRD. The provision is, however, unclear as to whether it regulates comprehensive full harmonisation (i.e. prohibits the Member States from granting a withdrawal right for contracts concluded at an auction) or just selective full harmonisation (i.e. Member
States will be free to grant a withdrawal right). For the moment, it is not possible to clarify this question; academic opinion is divided.\footnote{Cf. Riefa, Christine, A Dangerous Erosion of Consumer Rights: The Absence of a Right to Withdraw from Online Auctions (March 29, 2009). MODERNISING AND HARMONISING CONSUMER CONTRACT LAW, Geraint Howells and Reiner Schulzé, eds., Sellier European Law Publishers, pp. 177-188, 2009. Available at SSRN: http://ssrn.com/abstract=1374063.}

As a matter of urgency, the EU legislator must clarify this issue as the Member States need to know when transposing the provision and the definition of “auction” what margin they have.

\section*{3.14.2. Examples of definitions from the Member States’ Laws}

Whilst Article 3(1) excludes contracts concluded at an auction from the scope of the Distance Selling Directive, this Directive does not provide a definition of what an auction is. This has lead to much legal uncertainty and divergence between the individual rules of Member States\footnote{Hans Schulte-Nölke and Andreas Börger, Consumer Law Compendium, Comparative Analysis, E. Distance Selling Directive, (97/7), p. 500.}. For instance, in FRANCE and LUXEMBOURG, consumers buying on online auction sites benefit from a right to withdraw, because only public auctions are excluded from the scope of the Directive. In BELGIUM and GREECE, eBay auctions are also subject to the distance selling regime. These countries did not implement the exclusion of contracts concluded at an auction at all. In GERMANY, consumers are also protected following a decision of the Federal Supreme Court, which held in this context that an eBay “auction” is not to be considered as an “auction” in the sense of the provision\footnote{Judgment of 3 November 2004, VIII ZR 375/03, NJW 2004, 53-56.}, thereby referring to the traditional definition of auction in Paragraph 156 of the German Civil Code. Consequently in Germany eBay auctions fall under the distance selling laws. By contrast, in ESTONIA, auctions have been included within the scope of the distance selling regime, but the right of withdrawal does not apply in the case of online auctions. The United Kingdom, Malta or Ireland have implemented the exclusion in their distance selling regimes, but not enacted any authoritative definition of “auction”.

With the formulation “which may include the use of means of distance communication”, the definition of auction laid down in Article 2(15) CRD clarifies that auction includes both traditional and internet auctions. Therefore internet auctions would fall under the exemption. In effect, the directive in, e.g., Germany’s case would overrule the Supreme Court’s judgment. The exclusion of trader-consumer internet auctions from contracts to which the distance selling regulations apply, will in some Member States reduce the protection of consumers. Whether the interests of traders outweigh those of consumers is a policy decision. However, in light of the fact that the distance selling regulations do not, in any case, affect the case of consumers selling to consumers, which constitutes a proportion of, for example, eBay transactions, the effects of the reduction in consumer protection may be justified or less pertinent. It is also important to note that traditional auctions and internet auctions differ in one crucial respect: the contract is concluded at the traditional auction when no higher bidding is submitted, whereas the contract at an internet auction is concluded with lapse of time. Whether both types of auctions should be treated alike is questionable.

\section*{3.14.3. Corresponding definitions in the four directives under revision}

The term auction is not defined in the existing four directives.
3.14.4. Effect on other consumer directives in the acquis communautaire

A definition is not to be found in any other consumer law directive.

3.15. Public Auction

**Article 2(16) CRD**: 'public auction' means a method of sale where goods are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a competitive bidding procedure run by an auctioneer and where the highest bidder is bound to purchase the goods.

3.15.1. Type of the definition and its impact on the Member States’ laws

The definition appears in Articles 5(2), 7(3), 21(4) CRD. In Article 5(2) the term ‘public auction’ is clearly ‘protection level relevant’ as the fully harmonised general information duty regulated in Art. 5 CRD is slightly modified for public auctions.

Article 7(3) CRD, which is an exemption from the specific information requirements for intermediaries in case of public auctions, does not clarify whether the MS shall be bound to this exception or free to regulate this case, as it is falling outside the scope of the directive. The black-letter interpretation seems preferable, since otherwise the MS would be prohibited from imposing any information duties with regard to the level of consumer protection on intermediaries in public auctions – which is most probably not intended. The definition is thus ‘scope relevant’ here.

Article 21(4) CRD is clearly ‘scope relevant’ as the provision expressly gives the Member States the discretion to exempt the sale of second-hand goods at public auctions from the scope of Chapter IV of the CRD.

3.15.2. Examples of definitions from the Member States’ Laws

As Article 21(4) CRD is lifted from Article 1(3) of the Consumer Sales Directive several Member States have made use of this option thereby using the term “public auction” without defining it.

**Spain** has introduced a more limited exclusion, referring only to “administrative auctions”. In the United Kingdom, this option has been exercised, not by amending the definition of “goods”, but rather by modifying the definition of “dealing as consumer” in the sense that a natural person will not regarded as dealing as a consumer in a public auction. Other countries, which have made use of this option, are **Bulgaria, Finland, France, Germany, Greece, Hungary** and **Romania**. These exceptions would remain untouched by the CRD.

3.15.3. Corresponding definitions in the four directives under revision

As with the definition of auction, the term public auction is not defined in the existing four directives.

3.15.4. Effect on other consumer directives in the acquis communautaire

A definition is not to be found in any other consumer directive.
3.16. Commercial Guarantee

**Article 2(18) CRD:** 'commercial guarantee' means any undertaking by the trader or producer (the 'guarantor') to the consumer to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract.

3.16.1. Type of the definition and its impact on the Member States’ laws

The definition of commercial guarantee is a ‘scope relevant definition’. Besides Article 5(1)(f) which regulates information requirements, the term ‘commercial guarantee’ is only used in Article 29 CRD, the article on commercial guarantees. This article sets out rules which apply to commercial guarantees. For example, according to Article 29(2) CRD a guarantee statement has to be drafted in plain and intelligible language. All rules contained in Article 29 are only applicable if the statement in question qualifies as ‘commercial guarantee’ within the meaning of the definition of Article 2(18). Therefore, the definition ‘commercial guarantee’ relates to the scope of application of a certain provision in the CRD. It does not lay down a certain standard or level of protection. Member States are therefore not restricted in providing a wider definition of commercial guarantee.

3.16.2. Examples of definitions from the Member States’ laws

The Consumer Sales Directive only applies to guarantees provided to the consumer without extra charge. Member States, like FINLAND, ITALY\(^77\) and POLAND\(^78\), who have accepted this solution, will have to amend their laws once the proposed Directive is adopted. Where the law is silent on this issue Member States will not be required to change their definition. This applies to most Member States. The legal systems that expressly regulate guarantees provided against payment, like the CZECH REPUBLIC\(^79\) or the NETHERLANDS\(^80\) will equally not be forced to change their notion of guarantee.

3.16.3. Corresponding definitions in the four directives under revision

The definition of commercial guarantee laid down in Article 2(18) of the Proposal can be traced back to the definition of ‘guarantee’ contained in the Consumer Sales Directive:

\[
\text{Art. 1(2)(e) Consumer Sales Directive 1999/44/EC: guarantee: shall mean any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising;}
\]

\(^{77}\) Article 128(2)(c) Consumer Code.

\(^{78}\) Article 13(1) Consumer Sales Act.

\(^{79}\) § 620(5) Civil Code.

\(^{80}\) Article 7:6a Civil Code.
The definitions of the CRD and of the Consumer Sales Directive differ in two respects: (1) While the Directive indicates that the guarantee must be provided free of charge the definition of the CRD does not restrict the term ‘commercial guarantee’ to guarantees given free of charge. Thus far, the CRD follows the definition of ‘consumer goods guarantee’ contained in the DCFR.\(^81\) This means that it will no longer be possible to circumvent the provisions on guarantees by introducing a nominal charge for guarantees.\(^82\) (2) The CRD’s definition specifies that, in the case of associated advertising, the guarantee extends only to those specifications which were available at the time the contract was concluded. This seems to be a mere clarification since the Directive also did not want the guarantor to be liable for advertising statements made after the conclusion of the contract.

### 3.16.4. Effect on other consumer directives in the acquis communautaire

Commercial guarantee is not defined in any other consumer directive.

### 3.17. Intermediary

**Article 2(19) CRD:** ‘Intermediary’ means a trader who concludes the contract in the name of or on behalf of the consumer.

#### 3.17.1. Type of the definition and its impact on the Member States’ laws

The definition of intermediary is a ‘scopre relevant definition’. Therefore the Member States remain free to enact or maintain provisions beyond the scope of the directive.

Two points can be made. First, the term intermediary is a catch-all phrase. In effect, it creates a residuary category. This allows the legal systems of member states the freedom to extend, for example by analogy, liability to a person who for the purposes of possible idiosyncrasies in member states’ definition of ‘seller’ would have been exempt. Second, and resulting from the previous point, the term ‘intermediary’ is not restricted to the case where a trader concludes a contract on behalf of a consumer with another consumer. In the Consumer Sales Directive, intermediary would be just as applicable to an intermediary trader acting on behalf of another trader, which in the context of cross-border trade is more likely to be the case. However, should ‘intermediary’ be defined as strictly a trader acting between two consumers this may allow for the possibly unintended consequence of preventing the final seller, already liable to a consumer, from pursing remedies against an act or omission resulting from an intermediary acting on behalf of a trader. This would not normally prove problematic because the act or omission would be attributable to the ‘principal’, or trader upon whose behalf the intermediary was acting, although the eventual insolvency of the principal would deprive the final seller of an effective remedy.

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\(^81\) Article IV.A.–6:101 DCFR: Definition of a consumer goods guarantee.

(1) A consumer goods guarantee means any undertaking of a type mentioned in the following paragraph given to a consumer in connection with a consumer contract for the sale of goods: (a) by a producer or a person in later links of the business chain; or (b) by the seller in addition to the seller’s obligations as seller of the goods.

(2) The undertaking may be that: (a) apart from misuse, mistreatment or accident the goods will remain fit for their ordinary purpose for a specified period of time, or otherwise; (b) the goods will meet the specifications set out in the guarantee document or in associated advertising; or (c) subject to any conditions stated in the guarantee, (i) the goods will be repaired or replaced; (ii) the price paid for the goods will be reimbursed in whole or in part; or (iii) some other remedy will be provided.

3.17.2. Corresponding definitions in the four directives under revision

The term intermediary is not defined in the existing four directives. It is mentioned in the Consumer Sales Directive.

3.17.3. Effect on other consumer directives in the acquis communautaire

The term intermediary is used in other consumer law directives. Here, intermediary means a third party concluding the contract on behalf of a trader.

Art. 3 (f) Consumer Credit Directive 2008/48/EC

‘credit intermediary’ means a natural or legal person who is not acting as a creditor and who, in the course of his trade, business or profession, for a fee, which may take a pecuniary form or any other agreed form of financial consideration:

(iii) concludes credit agreements with consumers on behalf of the creditor;

Preamble (6) (clarifying articles 3(1) and 77(1)) Payment Service Directive 2007/64/EC

However, it is appropriate for that legal framework to apply to cases where the operator acts only as an intermediary who simply arranges for payment to be made to a third-party supplier;

It is to be noted that in the other directives intermediary is more likely to refer to a trader acting on behalf, and in the name, of another trader concluding a contract with a consumer than to the case of an intermediary acting between two consumers.

The definition proposed, first, narrows a pre-existing concept in consumer law and, second, turns into a term of art a concept which was hitherto a non-legalistic word which could denote several different relationships. As regards the first point, this makes the definition’s application unsuitable in the whole area of consumer contract law.\(^\text{83}\) Should a later directive wish to restate or rationalise all the previous consumer law directives into one directive the proposed definition would need to be redefined. However, given that the definition is only applicable specifically to one article in the proposed directive, there are two solutions. Either, the definition itself could be made more specific, so, for example, “consumers’ intermediary”. Or, the definition of intermediary could be left out altogether for a later full codification of all consumer law directives and the relevant article refer itself to the factual situation envisaged.

It should also be noted that the inclusion of the term ‘trader’ in the definition of intermediary reproduces the inconsistencies that may already exist between member states (i.e. does the intermediary between two consumers need to be in the pursuit of a profitable activity?).\(^\text{84}\)

\(^{83}\) Cf. Terms of reference in the ‘Methodological Approach’, ‘to provide a set of definitions that can be applied in the whole area of consumer contract law’.

\(^{84}\) Infra, 3.2, definition of trader.
3.18. Ancillary Contract

Article 2(20) CRD: ‘ancillary contract’ means a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and these goods or services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.

3.18.1. Type of the definition and its impact on the Member States’ laws

The definition of ancillary contract relates to the protection-level of the CRD’s provisions. Ancillary contract is only used by Article 18(1) which states that, in case of withdrawal of a distance or off-premises contract, any ancillary contract is automatically terminated.

3.18.2. Examples of definitions from the Member States’ laws

Following Article 6(4) of the Distance Selling Directive the Member States have enacted provisions regarding linked credit agreements. Some Member States, like AUSTRIA\(^{85}\), ESTONIA\(^{86}\) and GERMANY\(^{87}\), require that the credit contract is economically linked with the distance contract. When implementing the definition of ‘ancillary contract’ used in the CRD these Member States must not use the concept of ‘economical unit’ since it is more narrow than the definition of the CRD.

3.18.3. Corresponding definitions in the four directives under revision

The Distance Selling Directive does not recognise the concept of ‘ancillary contract’ but provide for the cancellation of a linked credit agreement:

| Article 6(4) Distance Selling Directive 97/7/EC | The Member States shall make provision in their legislation to ensure that: – if the price of goods or services is fully or partly covered by credit granted by the supplier, or – if that price is fully or partly covered by credit granted to the consumer by a third party on the basis of an agreement between the third party and the supplier, the credit agreement shall be cancelled, without any penalty, if the consumer exercises his right to withdraw from the contract in accordance with paragraph 1. Member States shall determine the detailed rules for cancellation of the credit agreement. |

The definition in the CRD is not restricted to credit agreements but to any contract related to the distance or off-premises contract. It therefore widens the possibility of cancellation of linked contracts.

3.18.4. Effect on other consumer directives in the acquis communautaire

The term ‘ancillary contract’ is used by the new Timeshare Directive.

\(^{85}\) § 5(h) Consumer Protection Act (Konsumentenschutzgesetz).
\(^{86}\) § 52 Law of Obligations Act.
\(^{87}\) § 358(3) Civil Code (BGB).
Article 2(1)(g) Timeshare Directive 2008/122/EC

‘ancillary contract’ means a contract under which the consumer acquires services which are related to a timeshare contract or long-term holiday product contract and which are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.

This definition is consistent with the definition of the CRD. A similar but not congruent definition is contained in the Consumer Credit Directive 2008:

Article 3(n) Consumer Credit Directive 2008

‘linked credit agreement’ means a credit agreement where (i) the credit in question serves exclusively to finance an agreement concerning the supply of goods or the provision of a service and (ii) those two agreements form from an objective point of view a commercial unit; a commercial unit is involved where the supplier or service provider himself finances the credit for the consumer or, if it is financed by a third party, if the creditor uses the services of the supplier or service provider in connection with the conclusion, or preparation, of the credit agreement, or if the credit agreement makes reference to the specific goods or services to be financed with the credit.

This definition is narrower than the one employed by the CRD since it uses the concept of ‘commercial unit’. Only partly is this concept used to describe the relationship between the trader and a third party: in that case there has to be an arrangement between that third party and the trader. The only provision in the CRD dealing with ‘ancillary contract’, Article 18(1), states that the cancellation of an ‘ancillary contract’ has to be without prejudice to the concept of ‘linked credit agreement’ of the Consumer Credit Directive.
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**Dir. 2003/31/EC:** Art. 2 lit. b: ‘service provider’: any natural or legal person providing an information society service, Art. 2 lit c: ‘established service provider’: a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider; **Dir. 2002/65/EC:** Art. 2 lit c: ‘supplier’ means any natural or legal person, public or private, who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts; **Dir. 2008/48/EC:** Art. 3 lit b: ‘creditor’ means a natural or legal person who grants or promises to grant credit in the course of his trade, business or profession; **Reg. EC No. 593/2001:** Art. 6(1): Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional.
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