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**Statement regarding the suggested amendments of the right of
withdrawal according to the
Draft of the Consumer Rights Directive as of 4/11/2018
“NEW DEAL FOR CONSUMERS”**

I. The main findings

The proposed limitations of the essential consumer right to withdraw are not only based on insufficient data showing a significant burden on the trader’s side, but several consequences, which possibly occur *legaliter* as well as *realiter*, need to be taken into account.

1. The proposed limitation of the right to withdraw regarding unduly tested goods and early reimbursements seems to be a solution in search of a problem.
2. The legal consequences of the limitation of the essential consumer right to withdraw lead to a classical principal-agent conflict of interest, which is as such, due to the proposed changes, even more unbalanced.
3. With regard to the real consequences, the right to withhold the reimbursement may affect the enterprises’ and consumers’ behaviour in many different ways, which is why the proposed changes should be further theoretically surveyed before implementing any changes.

II. The main arguments

Due to the “Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive” the *status quo* of consumer rights was assessed. In its cause the European Commission drafted to amend the Consumer Rights Directive in 4/11/2018 with its “NEW DEAL FOR CONSUMERS”. Thus the “right of withdrawal goods that the consumer has used more than necessary to test them” is to be exempted (right to withdraw regarding unduly tested goods), but the „trader [unless he] has offered to collect the goods himself, with regard to sales contracts, [...] may withhold the reimbursement until he has received the goods back“ (early reimbursement).

The limitation of the essential consumer right of withdrawal regarding unduly tested goods and early reimbursement is (1.) not only based on insufficient data showing a significant burden on the enterprises’ side, but further consequences, which possibly occur not only (2.) *legaliter* but as well (3.) *realiter*, need to be taken into account.

1. A solution in want of a problem

a) Does a significant burden on the traders’ side exist?

aa) Analysis of the data

First of all, a significant burden on the traders’ side cannot be based upon the data as presented in the “Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive”. In Annex 13¹ it is stated for the SME panel consultation:

“In particular, the majority of SMEs selling to consumers online replied that they never faced disproportionate burden related to the legal obligation to accept the return of unduly tested

¹ Additional data on rules on the right to withdraw of the COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT, Accompanying the document, Proposals for DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules and (2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC {COM(2018) 184 final} - {SWD(2018) 98 final}, part 3/3, pp. 29 et seq.

***goods"* (52%, i.e. **51 out of 99 respondents**) or to **reimburse the consumer without having the possibility to inspect the returned goods** (60%, i.e. **58 out of 97 respondents**). **Few respondents** have **'often'** faced disproportionate burden, 4% (**4 out of 99 respondents**) for used goods, and 5% (**5 out of 97 respondents**) for early reimbursement.” – citations omitted.**

Nevertheless, this para starts out with the – looking at the plain data of how many SMEs answered to have **never** faced disproportionate burden (51/99 [52%] responding SMEs) or reimburse without having the possibility to inspect the returned goods (58/97 [60%] responding SMEs) held against 4/99 (4%) responding SMEs who **often** faced disproportionate burden for unduly tested goods and 5/97 (5%) responding SMEs for early reimbursement – claim: “Significant share of respondents selling to consumers online replied that they face disproportionate burden.” 4% (regarding unduly tested goods) or 5% (regarding early reimbursement) respondents answering to have **often** faced disproportionate burden are no significant share compared to 52% or 60% answering to have **never** faced disproportionate burden. The absolute numbers are even more astounding: As only 4 or 5 respondents answered to have **often** faced disproportionate burden, it seems that the proposed change regarding the right to withdraw is based on a burden stated by only a very small amount of traders.

This finding is supported by further data²:

“In the SME panel consultation, close to **50% of the respondents (48 out of 99) from across 15 Member States replied that they face disproportionate burden due to these obligations at least **'sometimes' or 'rarely'** in relation to **"unduly tested goods"**; their share went down to **40% (39 out of 97 respondents)** in relation to **"early reimbursement"**.” – citations omitted.**

50% of the respondents (48/99) or 40% (39/97) answered that they **sometimes or even only rarely** faced disproportionate burden due to unduly tested goods or early reimbursement.

Sorting the data of part 1/3, p. 29 and Annex 13, pp. 29 et seq., the overview speaks for itself:

- 51/99 (52%) or 58/97 (60%) respondents have **never** faced disproportionate burden;
- 48/99 (50%) or 39/97 (40%) respondents have at least **sometimes or rarely** faced disproportionate burden;
- 4/99 (4%) or 5/97 (5%) have **often** faced disproportionate burden due to unduly tested goods or early reimbursement.

By far the majority of respondents have either **never** or only **sometimes/rarely** faced disproportionate burden due to unduly tested goods or early reimbursement. Taking these entrepreneurial findings into account, it seems that the limitation of the right to withdraw for unduly tested goods and the change of the rules on early reimbursement is a solution in search of a problem, which does not exist in a significant way as the first assess in part 1/3, p. 29 or of Annex 13, pp. 29 et seq. suggested on the face of it.

A similar conclusion can be drawn from the assessment of “Question 148 in the public consultation” (“Do you consider that traders face unnecessary and/or disproportionate burden due to the following obligations related to the right of withdrawal?”) in Annex 13³:

² COMMISSION STAFF WORKING DOCUMENT, IMPACT ASSESSMENT, Accompanying the document, Proposals for DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules and (2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC {COM(2018) 184 final} - {SWD(2018) 98 final}, part 1/3, p. 29.

³ See: fn. 1, p. 29.

“Only 16 out of 30 consumer associations replied to these questions. 7 of them acknowledged that the right of withdrawal for unduly tested goods creates disproportionate/unnecessary burden for traders to 'a large' or 'some extent' and 6 replied the same in relation to the early reimbursement obligation.

As regards public authorities, 10 out of the 16 agreed that traders may experience burden to 'a large' or 'some extent' for both the return of "unduly tested goods" and "early reimbursement".

In the public consultation, out of the 94 online companies replying to the questions on the right of withdrawal for unduly tested goods, 58% (55 respondents) replied "do not know" to whether they had experienced significant problems to accept the return of such goods. Out of the 91 online companies replying to whether they had experienced significant problems due to the "early reimbursement", 57% (52 respondents) replied "do not know".

Around 35% of them⁴¹ declared having experienced significant problems at least 'once'⁴². This is also true for small or micro enterprises operating online: around 34-37% of them⁴³ replied they had experienced significant problems at least 'once'.

In the public consultation 10 out of the 16 responding authorities⁴⁴ agree that traders may experience burden to 'a large' or 'some extent' for both the return of "unduly tested goods" and "early reimbursement".

However, very few respondents provided quantitative data/estimates. As regards the share of returned used goods, 12 respondents (businesses selling online, two individuals and a national business association) indicated that 20% of goods are "unduly tested" in proportion to all returned goods (median value).

At the same time, one should underline that most consumer associations (14 out of the 15 respondents), Member States authorities (12 out of the 16 respondents) and 'others' category (5 out of the 8 respondents) consider the right of withdrawal for "unduly tested goods" and the right to early reimbursement are 'rather'⁴⁵ or 'very important'⁴⁶. – citations omitted.

Only 16/30 consumer associations answered the relevant questions. A total of 7 or 6 of them acknowledged that the right of withdrawal for unduly tested goods or early reimbursement obligation create a disproportionate/unnecessary burden for traders to 'a large' or 'some extent', however, the associations could of course not identify a quantitative problem. Neither could the public authorities, of which 10/16 held the same opinion.

Interestingly in the public consultation:

⁴¹ 34 out of the 94 respondents for the unduly tested goods, and 31 out of the 91 respondents for early reimbursement.

⁴² Respectively 34% (32 companies) 'often' or 'a few times' for used goods, and 32% (29 companies) 'often' or 'a few times' for early reimbursement. Only two companies experienced such problems 'once'.

⁴³ 24 out of the 64 responding SMEs for the unduly tested goods and 21 out of the 62 responding SMEs for early reimbursement.

⁴⁴ Authorities from the following countries: Germany, Romania, United Kingdom, Czech Republic, Netherlands, Luxembourg, Norway, Finland, Cyprus, Italy, Hungary, Austria, Portugal, Latvia.

⁴⁵ For 2 consumer associations, 7 MS authorities, 1 of 'other' category right of withdrawal for unduly tested goods is rather important, while 'early reimbursement' is rather important for 1 consumer associations, 8 MS authorities, and 2 of 'other' category.

⁴⁶ For 12 consumer associations, 5 MS authorities, 4 of 'other' category Row for unduly tested goods is very important, while 'early reimbursement' is very important for 13 consumer associations, 4 MS authorities, and 4 of 'other' category.

- 55/94 (58%) or 52/91 (57%) online companies were not even aware of the existence of any problem regarding the return of unduly tested goods or early reimbursement, as they answered, they *would not know*;
- 34/94 (35%) or 31/91 (34%) of the online trading respondents had experienced significant problems for unduly tested goods or early reimbursement *at least once*;
- 24/64 (37,5%) or 21/62 (34%) of the responding SMEs replied to have experienced significant problems for unduly tested goods or early reimbursement *at least once*.

As about 57% of the responding online companies are not even aware of any problem and about 35% experienced significant problems at least once, it is hard to ascertain a significant burden.

bb) The estimated annual losses

Especially with regard to the provided quantitative data/estimates of only 9/94 online companies responding – as well as two individuals and one national business association that need to be added –, which indicated a median value of 20% of the returned goods were ‘unduly tested’, the necessity to take action is even more reduced.⁴

Taking the annual losses SMEs reported on average into account, does not lead to any other conclusion. In the SME panel consultation the estimated annual losses according to the answers to question 1b (“What are your enterprise's estimated losses related to the previously mentioned obligations?”).⁵ were the following:

Size class	Range of estimated annual losses in Euro (median/mode)	to accept the unduly used goods (number of responses)	Range of estimated annual losses in Euro (median/mode)	for early reimbursement (number of responses)
Micro	0–13500 (50/0)	22	0–10000 (0/0)	22
Small	0–12000 (550/0)	6	0–4000 (50/0)	4
Medium	0–1000 (0/0)	3	0–10000 (0/0)	5
Large	N/A	2	N/A	1
SMEs	0–13500 (100/0)	31	0–10000 (0/0)	31

Table 1: Range of estimated annual losses answering question 1b in the SME panel consultation⁶

Due to the obligation to accept the return of unduly tested goods an annual loss on average of EUR 2223 (median: EUR 100) could be reported; regarding the trader's obligation for early reimbursement the average estimated annual losses were EUR 1212 (median: 0).⁷ For the only(!) two responding large enterprises the losses were EUR 1000 and EUR 500000 for the return of unduly tested goods, or – for only one respondent – EUR 1000 regarding the early

⁴ See: fn. 3 and following text.

⁵ COMMISSION STAFF WORKING DOCUMENT, IMPACT ASSESSMENT, Accompanying the document, Proposals for DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules and (2) on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC {COM(2018) 184 final} - {SWD(2018) 98 final}, part 3/3, Annex 11, pp. 25 et seq.

⁶ See: fn. 5.

⁷ See: fn. 2, part 1/3, p. 74.

reimbursement obligation.⁸ Looking only at these numbers, one can neither determine, whether the burden on the traders is high or low, as this conclusion depends on their annual profits, nor, whether the burden is significant. Further, it is stated, that this “burden is likely to increase due to growing e-commerce and increasing consumer awareness about their withdrawal rights”.⁹ This is possible, but must, yet again, be related to the – then as well increased – annual profits. What is more, to reason for a significant burden *especially* for online traders their losses should be compared to “brick-and-mortar shops” losses caused by consumers trying and testing goods they do not or do not even intend to buy. However, considering the fact that roughly 57–58% of the online companies answering in the public consultation would not even know of any problem regarding the return of unduly tested goods and early reimbursement, it seems to be rather unlikely, that a hard burden exists.¹⁰

Having said that, the traders already have the possibility to take action and file a lawsuit against the consumer, who tested the good unduly. They can claim compensation (*Wertersatzanspruch*) according to section 357 para 7 *BGB*. Thus the legal system does indeed provide for a solution. The question is rather, whether a legal change is needed if the traders who had experienced a loss due to unduly tested goods or early reimbursement do not want to take legal action, though they could.

b) The “Retouren Studie 2016” of the “Online-Händlerbund”

No different conclusion can be drawn from the study of the “Online-Händlerbund”, an association of and for traders. It purported in its “Retouren Studie 2016”, asking 856 online traders, that 44% of the goods sent back (“zurückgesendete Waren”) were damaged.¹¹ Unfortunately, no further detailed data for this assertion was offered. The mere number is higher than the 20% answer of Question 148 in the public consultation.¹² And yet, it is unclear, which question was exactly asked by the “Online-Händlerbund”. Thus it is as well unclear, whether the goods were sent back because of a right to withdraw or they were originally damaged and this was the consumer’s reason to send them back. What is more, it is reported, that the goods had “Beschädigungen oder andere Mängel” (partial damages or other shortcomings), which can as well have existed in the first place, might have been caused by the consumer or originate in the transport to or from the consumer. For each of these different causes, the legal system has specified regimes of liability that both, the trader and the consumer may use.

c) Intermediary result

The proposed change is due to the fact astounding, as not only nearly all responding consumer associations (14/15, 93%), but as well the majority of involved Member States authorities (12/16, 75%) “consider the right of withdrawal [*even!*] for “unduly tested goods” and the right to early reimbursement” [to be] ‘rather’ or ‘very important’”.

Given these overall findings, there is no hard data on such a large scale that would require the proposed change of the right to withdraw regarding unduly tested goods or the right to early reimbursement.

2. Legal consequences

Concerning the legal consequences the loss of the object to prove the cause of the shortcomings, which might be an overuse, but does not have to be, and the right to withhold

⁸ See: fn. 2, part 1/3, p. 74.

⁹ See: fn. 2, part 1/3, p. 74.

¹⁰ See: fn. 1, p. 29.

¹¹ See: *Händlerbund*, Retouren Studie 2016, available at: <https://www.haendlerbund.de/de/downloads/studie-retouren-2016.pdf>, last access 6/10/2018.

¹² See fn. 3 and following text.

the reimbursement until the trader has received the goods back, lead to a *de facto* shift in the burden of proof and hold a classical principal-agent problem: The person deciding whether or not the consumer had a right to withdraw in the first place is the person having a considerable interest in the success of the transaction. In comparison to nowadays situation, the trader may decide on the overuse and has not only the burden of proof but must file a lawsuit for compensation, section 357 para 7 *BGB*.

If the proposed limitation is enacted, this is entirely shifted. What is more: It might lead to an *ex post* loss of the right to withdraw, the consumer did not think about in the first place, with the *caveat* that he did not act intentionally. Furthermore, it will not only affect the right to withdraw in cases of overuse but as the right to withhold the reimbursement is set in place for the overall right to withdraw for any reason, it will, other than set forth,¹³ as well affect all of these.

The proposed change regarding the rule on early reimbursement has to be examined for its different versions over time: Till 6/13/2014 a rather high consumer protection was in place because the unwinding of the contract had to take place performance upon counter-performance (*Erfüllung Zug um Zug*, according to section 348 *BGB*). That was due to the fact, that upon the exercise of the right to withdraw, the actual unwinding took place according to the sections governing the rescission of contract, sections 346 et seq. *BGB*. Section 348 *BGB* ensures that both parties of the contract fulfill their duties properly, securing each in the same manner. Since 6/13/2014 the trader has a special right to refuse reimbursement till he received the goods back, section 357 para 4 sentence 1 *BGB*. In this historic context, the rule on early reimbursement can be classified as a rule to increase and keep the consumer protection somewhat up, leveling out the different protection aspects of both, trader and consumer. This can be comprehended especially compared to the aforehand rule requiring performance upon counter-performance. If the possibility of early reimbursement is, as proposed, disestablished, the level of consumer protection is further minimized as his intermediate duty (*Vorleistungspflicht*) to send the goods back is for the consumer ineluctable. Only if the trader had offered to collect the good, he has no right of retention, section 357 para 4 sentence 2 *BGB*. However, this possibility depends entirely on the trader. The consumer, who could aforehand send the proof that he had sent the returned goods already back to the trader, could create himself a situation similar to the performance upon counter-performance of section 348 *BGB* and thus speed up the process of rewinding. Due to the proposed change, he loses this mechanism that he could anyways only opt in to by taking action.

Considering these legal consequences the proposed changes give the trader a far stronger position than the consumer. The trader has both: good and money. He can decide whether or not a right to withdraw existed or was forfeited and as well, whether and if, to which amount, the consumer will be reimbursed.

The proposed changes are rather risk loaden, as the right of early reimbursement will affect *all* of the other withdrawal rights, which rule for the consumer's reimbursement before actually receiving the returned goods.

Under the heading of the General objective to “Protect the economic interests of consumers and ensure a high level of consumer protection” it is put forward that the “proposed changes would formally represent a **reduction** of consumer protection” (citations omitted) with the further consequence to “reduce the burden experienced by the SMEs, which was also recognised by a significant number of respondents from consumer associations and public

¹³ See: fn. 2, part 1/3, p. 75: „All other categories of consumers that exercise the right of withdrawal will not be affected by this proposed change“.

authorities”.¹⁴ Instead of the trader, the consumer is asked to take action “in the event of a dispute on this issue, consumers will have all the available redress opportunities (e.g. ADR, ODR, small claims procedure)”.¹⁵ This counterfeits the general objective to ensure a high level of consumer protection.

3. Further consequences (*realiter*)

With regard to the consequences to be faced *realiter* any increase in consumer rights leads to an increase in costs. Costs that the trader passes on to the consumer. In other words, consumer rights will be considered by traders in the price.¹⁶ However, by experience, a once priced in consumer right will not – or hardly ever – lead, after it had been abolished, to a reduced price, though the traders could do so.¹⁷

What has to be considered is that the right to withhold the reimbursement rules for any right to withdraw. Thus the trader can claim an overuse in cases in which none existed. It is thus unclear, how the traders will and can distinguish the different possible damages due to transport, undue use or beforehand lack of inspection leading to having sent a damaged good in the first place. Therefore the damage might have its cause not in the consumer’s undue use, but be a material defect or caused by the insecure packaging of either the enterprise or the consumer. If that was the case, the defects might even fall under the enterprise’s responsibility. However, the consumer, who does not have the object to prove the non-existent overuse/material defect or transport damage anymore, cannot easily prove otherwise. It seems rather odd, that it is considered the right cause of action to postulate that the consumer “in the event of a dispute on this issue” can take action via ADR, ODR or small claims procedure, but not stipulate the same of the trader.¹⁸ At the same time, the trader already has a claim for compensation, section 357 para 7 *BGB*.

If the proposed changes are enacted, further questions need to be answered, as to how trader and consumer have to proceed. Will the trader have a duty to offer to send and then to send the good yet again to the consumer, now that the latter knows he had forfeited his right to withdraw? And who should pay for the third transport? Resolving these further consequences adds more complexity to the rules and the procedure to unwind.

At last, to change the rules concerning the right to withdraw and the early reimbursement might lead to a reduction of online trade, deterring consumers from shopping, especially with regard to the unclear situation, whether or not the testing and trying of the good was still due, the right to withdraw exists or could be performed undue and the right to withdraw is forfeited. It could as well have a negative impact on the online trade and the economy. To estimate this impact, further theoretical survey is necessary.

In a nutshell, a limitation of the right to withdraw for undue used goods and early reimbursement signals instability and will, as does any legal change, lead to insecurity for the consumers as well as the enterprises. According to the Fitness Check public consultation 2016¹⁹ about 64% of the responding consumer/business associations and public authorities

¹⁴ See: fn. 2, part 1/3, p. 74.

¹⁵ See: fn. 2, part 1/3, p. 75.

¹⁶ See: Schäfer, H.-B./Ott, C., *Lehrbuch der ökonomischen Analyse des Zivilrechts*, 5th ed., Springer, Heidelberg 2012, pp. 14 & 163 & 374 with further references in fn. 55 & p. 492.

¹⁷ See: fn. 2, part 1/3, p. 75.

¹⁸ See: fn. 2, part 1/3, p. 75.

¹⁹ COMMISSION STAFF WORKING DOCUMENT, Impact Assessment Accompanying the document Proposals for DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (1) amending Council Directive 93/13/EEC, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of the EU consumer protection rules and (2) on representative actions

already think the consumer law to be too complex. The proposed changes will, e.g. regarding the possibility to forfeit a once existing right to withdraw and to lose the minimal security of early reimbursement, lead to more complexity.

III. The conclusion

1. There is no sufficient data to require a change regarding the right to withdraw for unduly tested goods and early reimbursement rules;
2. the suggested changes lead to an even more unbalanced conflict of interest empowering the traders on the consumers' costs;
3. further theoretical survey is necessary concerning the practical impact of the suggested changes before implementing any changes, especially with regard to possible practical and legal consequences.