

**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”**



Public Hearing, Committee on the Internal Market and
Consumer Protection, 11 July 2018 from 14h30 to 16h00,
European Parliament, Brussels
Paul-Henri Spaak (PHS), Room 3C050



Dr. iur. Verena Klappstein M.A., LL.M.



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1. a solution in search of a problem

- "Significant share of respondents selling to consumers online replied that they face disproportionate burden."
- Question C 1.1.b & 1.1.c in the SME panel consultation
- Question 148 in the public consultation
- **BUT:** 12/16 responding Member States' authorities "consider the right of withdrawal [even!] for "unduly tested goods" and the right to early reimbursement" [to be] 'rather' or 'very important'"

See: Annex 13: Additional data on rules on the right to withdraw of the COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT, as well as Part 5/3. Accompanying the document: PROPOSALS FOR DIRECTIVES OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of the "Results of the Fitness Check of consumer and marketing law and of the evaluation of the Consumer Rights Directive", each at pp. 29 et seq.

3. further theoretical survey necessary

- an increase of consumer rights leads to **increased costs** passed on to the consumers
- **BUT:** a once priced in consumer right will hardly ever lead, after it has been abolished, to a reduced price
- damage might have its **cause not** in an overuse, but be an original material defect, caused by insecure packaging of either the trader or the consumer, thus might even fall within the trader's responsibility
- traders might state an overuse in cases in which none existed, as the **shortcoming is hard to distinguish**
- **BUT:** the consumer, who does not have the object to prove the non-existent overuse/material defect or transport damage anymore, **cannot easily provide proof otherwise**
- changes to the rules concerning the right to withdraw and especially the early reimbursement might even have a **negative impact on the online trade and the economy** as it adds **complexity and unclarity**, e.g. whether the trader has to resend the good on whose expense
- **further theoretical survey necessary before any changes are implemented**

2. a more unbalanced principal- agent problem / conflict of interest

- person **deciding** whether the consumer had or forfeited a **right to withdraw**, has
 1. a considerable **interest in the success of the transaction**,
 2. according to the proposed changes **good & money**,
 3. the possibility to **file for compensation**, section 357 para 7 BGB
- loss of the object to prove **changes the burden of proof de facto**
- **ex post** loss of the right to withdraw, the consumer might not have originally thought about, as it is **not clear**, in which cases a good is unduly used
- right to withhold the reimbursement will affect the **right to withdraw for any reason**
- early reimbursement **leveled out the loss** of the beforehand regime to **rewind performance upon counter-performance** (*Erfüllung Zug um Zug*, according to section 348 BGB), **protecting both, consumer & trader**
- the proposed change thus does not reduce **consumer protection** but **turns it upside down**, requiring not the trader but the consumer to file a lawsuit

Conclusions

1. **no sufficient data** for the need of a change regarding the right to withdraw for unduly tested goods and early reimbursement rules
2. suggested changes lead to an even **more unbalanced conflict of interest empowering the trader** as well as a reduced consumer protection, though ensuring the latter was the General Objective aimed for, they render consumer law more complex and unclear
3. **further theoretical survey is necessary** regarding the wider practical impact of the suggested changes *before* implementing them

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3. further theoretical

Question C 1.1.b & 1.1.c SME Panel Consultation, part 1/3 p. 29 & Annex 13, pp. 29 et seq.

SME respondents facing unnecessary/
disproportionate burden over the last two years
due to

occurrence	unduly tested goods	early reimbursement
never	51/99 (52%)	58/97 (60%)
<i>at least rarely or sometimes</i>	48/99 (50%)	39/97 (40%)
often	4/99 (4%)	5/97 (5%)

“Significant share of respondents selling to consumers
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Question 148 in the public consultation

online companies experiencing **significant problems** due to

	occurrence	unduly tested goods	early reimbursement
SME	<i>at least once</i>	24/64 (37,5%)	21/62 (34%)
ALL	<i>at least once</i>	34/94 (35%)	31/91 (34%)
	problem awareness: <i>do not know</i>	55/94 (58%)	52/91 (57%)

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