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E. Distance Selling Directive (97/7)

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Executive summary

1. Transposition deficiencies

Despite many variations of the wording in the national transposition laws, the number of substantial transposition deficiencies to be found throughout the EC does not seem to be very high. Examples of at least some importance are:

- The total (as opposed to only partial) exemption of contracts in the sense of Art. 3(2) 1st indent (regular roundsmen) or 2nd indent (accommodation, transport, catering or leisure services) from the scope of application of the Directive by some member states.
- No general obligation to confirm the prior information according to Art. 5(1) sent. 1 in the CZECH REPUBLIC, LITHUANIA and SPAIN.
- The withdrawal period of seven “jour francs” in FRANCE (cf. Art. 6(1)).¹
- The lack of duty to inform the consumer that goods or services ordered are unavailable (Art. 7(2)) in GERMANY, GREECE and LITHUANIA.

2. Enhancement of protection

a. Extension of scope

Some member states have broadened the scope of application of their national laws on distance selling, for instance, by:

- Broadening the notion of consumer (e.g. legal persons);
- Broadening the notion of distance selling contract (e.g. no organised distance selling scheme required);
- Not transposing exceptions provided in Art. 3.

¹ The Commission seems to be uncertain with regard to the withdrawal period in France, cf. the Commission’s report COM (2006) 514 final on the implementation of Directive 97/7/EC, Annex IV; http://ec.europa.eu/consumers/cons_int/safe_shop/dist_sell/comm_21092006_en.pdf.

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b. Use of options

The member states have made different use of the options the Directive offers:

- Article 7(3) (allowance to deliver goods or services of equivalent quality and price) has been transposed by about half of the member states.
- Article 11(3)(a) (burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent) has also been transposed by about half of the member states.
- Article 11(4) (self-regulatory bodies) has only been transposed by 6 member states.
- Article 14, sent. 2 (ban of marketing of certain goods or services, particularly medicinal products) has only been transposed by 3 member states.

c. Use of minimum clause

Most member states have made use of the minimum clause. Some examples of major importance are:

- Article 4: additional pre-contractual information duties (e.g. suppliers address, telephone number; non-existence of withdrawal right)
- Article 5(1):
 - Additional information to be confirmed in good time during the performance of the contract;
 - Fixing an earlier point in time when this confirmation is due;
 - Additional formal requirements: not transposing the term “another durable medium available and accessible to the consumer” and thereby obliging the supplier to always provide confirmation of the information in written form;
 - Duties to use a certain wording or form to inform the consumer (in particular a standard notice on the right of withdrawal);
 - Language requirements.
- Article 6(1):
 - Prolongation of withdrawal period;

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- Introduction of formal requirements for the exercise of the withdrawal right by the consumer;
- Not transposing exceptions provided in Art. 6(3).

3. Inconsistencies or ambiguities

Some major inconsistencies or ambiguities of the Directive are:

- It is unclear whether mixed purpose cases fall under the notion of ‘consumer’ (Art. 2(2)).
- It is unclear whether non-profit organisations can fall under the notion of ‘supplier’ (Art. 2(3)).
- It is unclear whether the so-called ‘Ebay auctions’ fall under the notion of ‘auction’ (Art. 3(1) 5th indent).
- The requirement that certain information has to be provided ‘in good time’ (Art. 4(1)); Art. 5(1) seems to have created some ambiguities.
- The length of the withdrawal period (7 working days) is difficult to handle (in particular in cross-border cases where different days may be public holidays) and not in coherence with the withdrawal periods provided for in other directives.
- It is unclear whether Art. 6(1), sent. 3 and 4 prolong the withdrawal period up to three months or up to three months plus 7 working days.
- The prolongation of the withdrawal period up to the three months (probably plus 7 working days) maximum period is not in coherence with other Directives and the ECJ *Heininger*² ruling.
- Article 7(1) does not mention the – necessary – prerequisite that the obligation created there only comes into force if the contract is concluded.
- The Directive does not contain any rules on the computation of time, which leaves some ambiguities, e.g. with regard to the notion of ‘working day’ or to time limits ending on a Sunday, other public holidays, or Saturdays.

² ECJ judgment of 13 December 2001, C-481/99 - *Georg Heininger et Helga Heininger v Bayerische Hypo- und Vereinsbank AG*.

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4. Gaps in the Directive

The analysis did not reveal many gaps in the Directive. Examples of at least some importance are:

- The absence of provisions on whether it suffices for the consumer to dispatch the notice of withdrawal before the end of the withdrawal period.
- An express provision clarifying to what extent the Directive applies to digital content, such as computer software, music or games, supplied online.

5. Potential barriers to (cross-border) trade

Obvious barriers to trade in the field of the Directive are:

- The differences of the information obligations, also the differences with regard to formal requirements for the provision of information.
- The different withdrawal periods, the formal requirements imposed on the consumers when exercising their withdrawal rights, and the differences with regard to the unravelling of the contract after withdrawal (because such differences hamper the information of consumers on their withdrawal right).

6. Conclusions and recommendations

In order to remove ambiguities, the following issues could be tackled:

- Definition of consumer (with regard to mixed purpose cases);
- Definition of supplier (with regard to non-profit organisations);
- New definition of goods (with regard to digital content);
- (New) Definition of auction (with regard to Ebay auctions);
- Clarification of 'in good time' (Art. 4(1); Art. 5(1)) along the model of Directive 2002/65, perhaps also following the example of some member states;
- Provision of some rules on computation of time (or – perhaps better – a reference to Regulation 1182/71);
- Clarification whether Art. 6(1), sent. 3 and 4 prolong the withdrawal period up to three months or up to three months plus 7 working days;

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- Clarification in Art. 7(1) that this obligation only comes into force if the contract is concluded;
- Introduction of a dispatch rule, which also clarifies its applicability in case the consumer dispatches the declaration of withdrawal in time, but it never reaches the supplier.

Moreover, in order to at least remove the most obvious barriers to trade the following measures could be considered:

- At least the pre-contractual information (Art. 4) duties could be brought in line with Directive 2002/65 and the law of those member states which made use of the minimum clause (e.g. supplier's address, non-existence of withdrawal right).
- Provision of a (EC law) standard notice informing the consumer of his right of withdrawal.
- The withdrawal period could be changed into 14 (calendar) days, also following Directive 2002/65.
- Any formal requirement for the exercise of the withdrawal right could be prohibited.
- The (3 month) prolongation of the withdrawal period in case of non-fulfilment of information duties could be reviewed in the sense that the lack of information about the withdrawal right is exempted. For this type of information, a more intensive sanction could be envisaged, be it the eternal period along the lines of the *Heininger*³ case, or a much longer maximum period (e.g. one year, as is the case in FINLAND).

In particular, it will have to be considered whether at least some of these provisions could be exempted from the minimum clause and thereby maximised in order to avoid member states creating new barriers to trade.

³ ECJ judgment of 13 December 2001 C-481/99 - *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank AG*.

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I. Member state legislation prior to the adoption of the Distance Selling Directive

Prior to the adoption of Directive 97/7, consumer protection in the field of Directive 97/7 was rather different. This may be illustrated by three groups of examples:

1. Some member states had already enacted consumer protection legislation comparable to the protection provided by the Directive. For instance: BELGIUM in the Trade Practices Act of 1971 and the Act of 14 July 1991 on trade practices and consumer information and protection which both contained a provision on inertia selling. DENMARK with its Act No. 137 of 29 March 1978 on consumer contracts, which included provisions on distance selling. PORTUGAL with its Decree-Law 272/87 of July 3, which imposed duties of information on the trader and gave the consumer a right of withdrawal comparable to that in the Directive, and FRANCE with its “Law of 6 January 1998” which stated some rules for home shopping and had established a rather high level of consumer protection in the area of distance selling at a relatively early stage. Other member states like GREECE and SPAIN adopted legislation on the background of the Commission proposals for a Directive 97/7 in the early 1990s.

2. Member states like FINLAND, IRELAND, ITALY, the NETHERLANDS, SWEDEN and the UNITED KINGDOM had no specific legislative acts dealing with distance selling, except for some provisions on inertia selling, as in the Ireland⁴ and the United Kingdom, and selling via telephone and post in Finland. Nevertheless, consumers were protected by codes of conduct and other self-regulatory instruments.

3. A third group of member states had no comparable protection in the field of distance selling before the transposition of the Directive. In AUSTRIA and GERMANY, no specific legislative protection of consumers existed in civil law. Only a small selection of commercial practices were considered unfair and, thus, sanctioned by the UWG (Act against Unfair Competition). Furthermore, in the new member states (e.g. CYPRUS, the CZECH REPUBLIC, ESTONIA, HUNGARY, LITHUANIA, MALTA, SLOVAKIA, SLOVENIA, POLAND) no comparable protection existed. Under ROMANIAN law the general rules in the Romanian CC applied. In BULGARIA the Law on Consumer Protection was first enacted in 1999. Later, in 2005, a

⁴ Grabitz *Hilf/Micklitz*, Haustürwiderrufsrichtlinie, „Nach A3“, Rn 17.

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second Law on Consumer Protection was enacted. Before these two laws general rules in the CC applied.

II. Scope of application

1. Consumer

In Article 2(2) of the Directive, a consumer is defined as a “natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”.

a. Legislative techniques

Some member states have implemented a general definition of a consumer, applicable to many consumer contracts. They are e.g. AUSTRIA, BELGIUM, BULGARIA, the CZECH REPUBLIC, ESTONIA, FINLAND, GERMANY, GREECE, ITALY, LATVIA, LITHUANIA, MALTA, the NETHERLANDS, POLAND⁵, SLOVENIA and SPAIN.

DENMARK⁶, PORTUGAL⁷, SLOVAKIA⁸ and SWEDEN have established the same definitions for doorstep and distance selling contracts. Other member states have transposed Directive 97/7 in a separate legislative act and, therefore, stipulated a separate definition in the corresponding acts, e.g. CYPRUS, IRELAND, LUXEMBOURG and the UNITED KINGDOM. In FRANCE, case-law has developed a notion of consumer because there is no explicit transposition of this definition in the national law.⁹ In HUNGARY, the transposition law of Directive 97/7 does not contain an express definition. It is unclear whether the definition of the Hungarian CC § 685(d) or the definition in § 2(e) of the Consumer Protection Act is applicable. With the planned integration of the distance selling regulation into the Civil Code in the future, this question could be cleared up.

⁵ The POLISH CC Art. 22 (applicable to doorstep and distance selling and to unfair terms).

⁶ § 3(1) of the Act No. 451 of 9 June 2004 on certain consumer contracts.

⁷ Article 1(3)(a) of the Decree-Law 143/2001 of April 26.

⁸ § 1 of the Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling.

⁹ See for example Cass. civ., chambre civile 1, judgment of 5 March 2002, Bulletin 2002 I no. 78, 60.

Transposition of Art. 2(2) of Directive 97/7: Definition of Consumer

Reference to a more general definition	AT, BE, BG, CZ, DE, EE, EL, ES, FI, HU, IT, LT, LV, MT, NL, PL, SL (17)
Definition for purposes of both doorstep and distance selling provisions	DK, PT, SE, SK (4)
Definition for purposes of distance selling provisions	CY, IE, LU, RO, UK (5)
Not transposed expressly	FR ¹⁰ (1)

b. Content of the definitions

Though generally the member states have implemented the definition of a consumer set by the Directive properly, a huge number of variations is noticeable. This is due to the fact that most member states did not transpose the definition word for word. As a result, the differences mainly consist in details only. A broad overview is given in the general chapter on the notion of consumer.¹¹ With regard to distance selling, some major variations can be outlined as follows:

aa. Inclusion of certain legal persons

As in the Directive, the BULGARIAN, CYPRIOT, DUTCH, ESTONIAN, FINNISH, GERMAN, IRISH, ITALIAN, LATVIAN, LITHUANIAN, LUXEMBOURGIAN, MALTESE, PORTUGUESE, ROMANIAN, SLOVENIAN, SLOVAKIAN, SWEDISH and UK Regulations are expressly limited in the scope of distance selling and only apply to natural persons. In LATVIA, there has recently been a reform, so that from now on legal persons are excluded from the notion of consumer.¹²

In some countries, however, certain legal persons (e.g. private associations) are treated as consumers on the condition that they act for private purposes. Such member states are

¹⁰ Case-law has developed a notion: See for example Cass. civ., chambre civile 1, judgment of 5 March 2002, Bulletin 2002 I no. 78, 60.

¹¹ See Part 3. A.

¹² Amendment of the Consumer Protection Law, which came into force on 11 November 2005.

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AUSTRIA, BELGIUM¹³, the CZECH REPUBLIC, DENMARK, FRANCE, GREECE¹⁴, HUNGARY, IRELAND, POLAND and SPAIN.

Overview: Inclusion of legal persons

Limitation to natural persons	BG, CY, DE, EE, FI, IE, IT, LT, LU, LV, MT, NL, RO, PT, SE, SL, SK, UK (18)
Inclusion of certain legal persons	AT, BE, CZ, DK, EL, ES, FR, HU, PL (9)

bb. Clarification of ‘mixed’ purpose cases

The definition of consumer in Art. 2(2) of the Directive 97/7 does not clarify expressly whether a person who concludes a contract intended for a ‘mixed’ purpose falls under the notion of consumer (e.g. a purpose which is in part within and in part outside his trade or profession, for example, the purchase of a car for both private and professional use). In applying the rather similar definition in Art. 13 of the Brussels (I) Convention, the ECJ (C-464/01 – *Gruber*) has held that in such a case the person may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose “is so limited as to be negligible in the overall context of the supply”. The fact that the private element is predominant has been considered to be irrelevant in that respect. It is an open question whether this ruling is also applicable in the field of distance selling.

Some member states have tried to clarify when a person concluding such a contract for a ‘mixed’ purpose is a consumer. DENMARK, FINLAND¹⁵ and SWEDEN¹⁶ have expressly stated that in such cases the preponderant purpose prevails. According to the preparatory works, in Finland, as a guideline, the professional purpose is at question when a person is accountable according to the Accounting Act.¹⁷ In GERMANY, the courts would probably also focus on the question of whether the private or business purpose is predominant.¹⁸ In ITALY, the definition is rather similar to the Directive in this respect. But in the case where a small tobacconist

¹³ Article 1 No.7° of the TPA: “act for exclusively private purposes”.

¹⁴ In GREECE, legal persons are treated as consumers even if they act for professional purposes, provided that they are the end recipients of the products or services.

¹⁵ Chapter 1 sec. 4 of the Consumer Protection Act of 20 January 1978/38.

¹⁶ Chapter 1 sec. 2 of the Law (2005:59) on Consumer Protection on Distance Contracts and Doorstep Selling Contracts.

¹⁷ Kirjanpitolaki 1336/1997.

¹⁸ Cf. OLG Naumburg, judgment of 11 December 1997, NJW-RR 1998, 1351 (concerning consumer credit).

concluded a contract for the hire of a vehicle, which was for both private and business use, he was held to be a consumer.¹⁹ It is not clear from that decision whether the private use was predominant. Mixed purpose transactions are not a problem in GREECE, as according to the notion of consumer, a professional might also be treated as a consumer. In Greece, the only criteria is whether the consumer is the end recipient of the product or service or not.

In AUSTRIA²⁰ and BELGIUM²¹, the consumer needs to acquire or use goods or services for purposes which fall outside his professional activity. As a consequence, a person is considered to be a consumer only if he or she has concluded the contract for a purely private purpose. Although the definition of some other member states reads rather similarly, it cannot be discerned how the courts would decide on the matter.

Overview: ‘mixed’ purpose transactions as consumer contract

Purely private purpose	AT, BE (2)
Also ‘mixed’ purpose, preponderant purpose prevails	DE, DK, FI, SE (4)
Also ‘mixed’ purpose – unclear whether private purpose must preponderate	IT (1)
No clear rule on ‘mixed’ purpose transactions discernible	BG, CY, CZ, EE, EL, ES, FR ²² , HU, IE, LT, LU, LV, MT, NL, PL, PT, RO, SK, SL, UK (20)

¹⁹ Giudice di pace Civitanova Marche, 4 December 2001, Gius 2002, 1188.

²⁰ § 1(1)(1) and § 1(1)(2) of the Consumer Protection Law: § 1(1) Dieses Hauptstück gilt für Rechtsgeschäfte, an denen

1. einerseits jemand, für den das Geschäft zum Betrieb seines Unternehmens gehört, (im folgenden kurz Unternehmer genannt) und

2. andererseits jemand, für den dies nicht zutrifft, (im folgenden kurz Verbraucher genannt) beteiligt sind.

²¹ Article 1 No. 7 of the Act of 14 July 1991 on Trade Practices and Consumer Information and Protection and Art. 2(2) of the Act of 2 August 2002 on Misleading and Comparative Advertising, Unfair Contract Terms and Distance Marketing in Respect of Professional Services .

²² In lower jurisdictions’ case-law, some examples of application of the unfair terms’ legislation in cases of mixed purpose can be found, where private purpose preponderates.

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cc. Extension to certain professionals

Some member states have broadened the notion of consumer in a way that it also covers certain professionals. This is the case in FRANCE, where, according to well-established case-law, a consumer is a (natural or legal) person concluding contracts which are not directly related to his or her profession.²³ Hence, a business will be protected like a consumer if an atypical contract is concluded. In such a case the business will be considered as non-professional.²⁴ In POLAND, the seemingly rather similar definition of the CC is applicable so that a person, who is acting indirectly for his professional purposes, is also considered to come under the definition of consumer. Also the LATVIAN²⁵ law provided for a similar definition: a natural or legal person who expresses a wish to purchase, purchases or might purchase goods or utilises a service for a purpose which is not directly related to his or her entrepreneurial activity. In GREECE, where in contrast to other member states a limitation to private purposes does not exist, a consumer is any individual or legal entity for whom goods or services on the market are intended, or who makes use of these goods or services, provided that this individual or legal entity constitutes the end recipient of the goods or services. The recipient of advertisements is equally regarded as a consumer. In practice, such a broad definition can lead to difficulties in applying the law, so that in academic literature a necessity for a teleological reduction is considered. The condition for being qualified as an end consumer is a need for protection which must be verified in each case. MALTESE law refers to the general definition of the consumer in the Consumer Affairs Act, which contains the most detailed rule of all member states. Under the relevant law a consumer is:

- (i) any individual who in transactions and other matters is acting for purposes which are not related to his trade, business, craft or profession; and
- (ii) any other individual, not being the immediate purchaser or beneficiary, and whether or not a member of the consumer's household, who having been expressly or tacitly authorised or permitted by the consumer, may have consumed, used or benefited from any goods or services provided to the consumer by a trader acting in the course of a trade, business, craft or profession, including goods or services provided as part of gift schemes and similar or analogous inducements; and

²³ See for example Cass. civ., chambre civile 1, judgment of 5 March 2002, Bulletin 2002 I no. 78, 60.

²⁴ See the general chapter on the notion of consumer, Part 3.A. for more details.

²⁵ Since 27 October 2005 when the changes in Consumer Rights Protection Law were made, the definition of consumer applies only to any natural person.

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(iii) any other class or category of persons whether natural or legal as may, from time to time, be designated as "consumers" for all or for any of the purposes of the Consumer Affairs Act by the Minister responsible for consumer affairs after consulting the Consumer Affairs Council.

At least no. iii also allows professionals to fall under the Maltese definition of consumer.²⁶

SPANISH law does not use the terms of the Directive but instead - partly - introduces the notion of a "buyer". Nevertheless, in other articles the "consumer" is mentioned. The notion includes legal persons and focuses on the concept of "final addressee". This term seems to include any buyer, that is the public in general, and not necessarily the "consumer", as Spanish law does not refer to the terms "acting for purposes outside of his trade". The scope of application of Spanish law is much broader than in the Directive on the one hand. On the other hand it could be doubted that Spanish law covers a buyer who wants to use a good for a private purpose but who intends to resell it afterwards. It is disputed in Spanish legal literature whether this can be brought in line with the Directive.

In GERMANY, the relevant definition of the term consumer clarifies that an employee, who concludes a contract for a purpose in relation to his job, is protected as a consumer (e.g. a worker buying workwear). Accordingly, the German Bundesarbeitsgericht (Federal Labour Court) considers an employee to be a consumer.²⁷ It is possible that, to some extent, some other member states also protect professionals as consumers.

Overview: extension to certain professionals

Extension to certain professionals	EL, FR, MT, LV, PL (5)
Clarification that employees are consumers	DE (1)

²⁶ It is to be noted that the Minister has to date not specifically designated professionals as a class or category to be included within the definition of consumers.

²⁷ Bundesarbeitsgericht, judgment of 25 May 2005, 5 AZR 572/04, NJW 2005, 3305; cf. also Part 3. A of the study "Definition of consumer".

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dd. Examples for variations in wording

The variety of national transpositions can be exemplified by some further national laws. Most follow the wording of Directive 97/7 rather closely. Examples are, besides many others, CYPRUS, PORTUGAL or LUXEMBOURG (e.g. « *toute personne physique qui, dans les contrats relevant de la présente loi, agit à des fins qui n'entrent pas dans le cadre de son activité professionnelle* »). In ESTONIA, the term is much the same (“purposes not related to his or her business or professional activities”). This also applies to the NETHERLANDS, where a consumer constitutes a natural person who is acting for purposes which are outside his trade, business or profession. In the UK, it is any natural person who, in contracts to which these Regulations apply, is acting for purposes which are outside his business. A similar definition is given by CZECH legislation: Consumer means any person who, when concluding and performing a contract, does not act in his commercial or entrepreneurial capacity. SLOVAKIAN law considers a natural person as a consumer when he or she buys the goods or a material performance or deed from the service provided and they are not used to perform that person’s trade, profession or business. The SLOVENIAN definition resembles the following; a consumer is any natural person who acquires or uses goods or services for purposes which are outside his professional or profit-making activity. Likewise in LITHUANIA, where a consumer means a natural person, who expresses the intention to buy, buys and uses goods or services for a purpose that can be regarded as outside his trade or profession: to meet his own personal or household needs. The ROMANIAN definition is: any natural person or group of natural persons constituting associations who purchases, uses or consumes products or services outside his professional activity. AUSTRIAN law approaches the notion of a consumer in a negative way: a consumer is someone who is *not* a trader. A trader is in turn someone for whom the transaction belongs to the business of his enterprise. Although different in wording, such definitions seem to transpose the Directive properly or can at least be interpreted in accordance with the Directive.

2. Supplier

Under the terms of Directive 97/7, a supplier is “any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity”. The wording of this definition slightly varies from the respective definitions in the other consumer

protection directives.²⁸ Nevertheless, it can be assumed that these definitions are generally to be interpreted in a similar way.

It might be useful to bear in mind that the main purpose of the definition of the supplier is simply to clarify that the Directive is only applicable for B2C situations, but not in C2C relations. Therefore, variations in the transposition laws of the member states are not very relevant for the proper functioning of the law, as long as the definition of consumer is precise and the respective definition of its counterpart does not exclude persons who come under “supplier” in the sense of the Directive.

From this starting point, the differences to be found in the member states do not seem to be far-reaching. Some member states have used the copy and paste technique transposing the definition into their national law, e.g. DENMARK, IRELAND, ITALY, the NETHERLANDS and PORTUGAL. However, not all member states have explicitly adopted this definition. In the CZECH REPUBLIC the general definition of supplier also applies to distance selling situations.²⁹ In ESTONIA, FINLAND, MALTA, POLAND and SWEDEN, the term “trader” is used, whilst in ITALY and LUXEMBOURG, it is the “professional”³⁰ against whom the consumers can exercise their rights. In SLOVENIAN legislation, the term “undertaking” is used, whilst in GERMANY, it is “entrepreneur”. Many member states have tried to clarify details or give examples. LATVIAN³¹ and LITHUANIAN³² law list the “seller” of goods and the “service provider”. BELGIUM uses the notion of “seller”, focusing on the activity of selling goods or services³³ and not – slightly different from the Directive - on the contract itself. This seems to be similar in ESTONIA and FINLAND, where - besides selling – offering and marketing of goods and services are enumerated. In BULGARIA, the conclusion of a distance sales contract with a consumer is mentioned along with the requirement of acting in his commercial or professional

²⁸ For more details see Part 3.B.

²⁹ CC § 52(2) applicable for all consumer contracts: “... a person who concludes and fulfils a contract within the framework of his commercial or other business activity.

³⁰ In LUXEMBURG “professionnel”, in ITALY “professionista”.

³¹ Article 1 CRPL defines “service provider” as a natural or legal person who provides a service to a consumer. The definition does not include any reference to the entrepreneurial or professional activity of person

³² Under the terms of the Law on Consumers Protection the **seller** means a person who sells the goods on the premises intended for business purposes or outside them, and **service provider** means a person who supplies services to the market.

³³ Only the provision of services which constitute acts of commerce (as referred to in Art. 2 - 3 Commercial Code) or artisanal activities fall under the scope of the Act of 14 July 1991 on Trade Practices and Consumer Information and Protection.

capacity. Moreover, the BELGIAN legislator has explicitly included traders and artisans.³⁴ The HUNGARIAN legislator has enumerated certain business enterprises in its transposition law. The ROMANIAN definition though, relating to a person authorised to carry on trading activity with products or services within the framework of his activity, appears rather indistinct.³⁵

Further examples of additions are revealed in GERMAN legislation, where partnerships with legal capacity (meaning those who are capable of acquiring rights and entering into engagements) are expressly mentioned (CC § 14), or in the CYPRIOT notion, where the supplier acts “either personally or through his representative”.³⁶ MALTA expressly makes reference to corporate and incorporated bodies as well as to commercial partnerships. Among others, AUSTRIA, FINLAND, GREECE and MALTA have made clear that legal persons of public law are also covered. In other member states, Germany for example, the same would follow from the general definition of legal person.

Some member states have tried to clarify whether a person who does not intend to make a profit is included. In AUSTRIA, the legal transaction has to belong to the undertaking of the business. The term ‘business’ is defined as an organisation of independent commercial activity, even if it does not have the aim of making a profit. In GREECE, non-profit-making organisations or institutions as well as public corporations and local authorities can also act as suppliers.³⁷ The GERMAN courts also seem to interpret the definition in a way that an intention to make a profit is not a prerequisite to qualify a person, who regularly and steadily sells goods, as an entrepreneur.³⁸ In contrast to that, SLOVENIAN and FINNISH law expressly regulates that the purpose of making a profit or other economic gain is necessary in order to qualify as a professional.

In two member states though, no explicit definition of “supplier” exists. The SPANISH implementing legislation relates to the term “retail trade” (in Art. 1(2) of the Law 7/1996) and sometimes characterises the supplier as an “enterprise of distance selling” while other provisions refer to the “seller”. It cannot be assessed to what extent such a variety of terms

³⁴ Article 1(6) of the Act of 14 July 1991 on Trade Practices and Consumer Information and Protection.

³⁵ Article 2(1) lit. d of the Ordinance on consumers’ protection regarding the conclusion and performance of distance selling contracts.

³⁶ Article 2 of the Law for the Conclusion of Consumer Distance Contracts of 2000.

³⁷ Article 1(4)(B) and Art. 1(3) of the Consumer Protection Act.

³⁸ BGH judgment of 29 March 2006, VIII ZR 173/05, NJW 2250.

causes difficulties in the application of Spanish law. In FRANCE, however, where also no explicit definition exists, a considerably wide application has been favoured by the legal literature³⁹ and the courts.

3. Contracts falling within the scope of the Directive

a. Definition of "distance contract"

According to Art. 2(1) of the Directive, the term 'distance contract` means any contract:

- concerning goods or services,
- under an organised distance sales or service-provision scheme run by the supplier,
- that, 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.

AUSTRIA, BELGIUM, CYPRUS, DENMARK, FRANCE, GERMANY, IRELAND, ITALY, LUXEMBOURG, MALTA, PORTUGAL, ROMANIA, SLOVENIA and the UNITED KINGDOM have, verbatim or almost verbatim, transposed the definition of a distance contract given in Art. 2(1) of the Directive 97/7. FINLAND, the NETHERLANDS and SWEDEN have used some different terms which seem to have the same meaning as the definition in the Directive. ESTONIA⁴⁰ and LATVIA⁴¹ have added that the supplier must have made an offer or a proposal to the consumer to make an offer. Among others, BULGARIAN⁴², CZECH⁴³, DANISH⁴⁴, ESTONIAN⁴⁵, GREEK⁴⁶, POLISH⁴⁷ and SPANISH⁴⁸ law clarify the definition by stating that there is no distance contract if the supplier and the consumer are present together in the same place at the time the contract

³⁹ *Calais-Auloy, Steinmetz*, Droit de la consommation, 4, propose to include all kinds of professionals such as private or public institutions/ co-operations, irrespective of a purpose of gaining profit and stress the organised and customary character which creates an imbalance between the professional and the consumer.

⁴⁰ § 52 (1)(2) of the Law of Obligations Act.

⁴¹ Article 10(1) of the Consumer Rights Protection Law.

⁴² Article 48(1) of the Law on Consumer Protection.

⁴³ § 53(1) of the CC.

⁴⁴ § 10a(1) of the Consumer Contracts Act.

⁴⁵ § 52(1)(3) of the Law of Obligations Act.

⁴⁶ Article 4(1) of the Consumer Protection Act 2251/94.

⁴⁷ Article 6(1) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

⁴⁸ Article 38(1) of the Law 7/1996 of January 15 on retail trade.

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is concluded. In Bulgarian law, there is no distance contract if the supplier and the consumer are present together at the same place at the time within the time (from the time) of the offer and (till the time of) the conclusion of the contract.

Some member states have not implemented the – restrictive – precondition that the contract must be concluded “under an organised distance sales or service-provision scheme”. This can be observed for the CZECH REPUBLIC, HUNGARY, LATVIA, LITHUANIA and SLOVAKIA. Consequently, such member states have extended the scope of application of their distance selling laws to contracts concluded without such a system, e.g. cases where the supplier uses means of distance communication, merely exceptionally, for the conclusion of a contract.

b. Definition of "means of distance communication"

Article 2(4), sent. 1 of the Directive 97/7 defines “means of distance communication”, being one of the elements of the distance contract, as “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”.

Most of the member states have transposed this definition literally or with only some deviations in the wording, e.g. AUSTRIA⁴⁹, BELGIUM⁵⁰, CYPRUS⁵¹, the CZECH REPUBLIC⁵², DENMARK⁵³, ESTONIA⁵⁴, FINLAND⁵⁵, FRANCE⁵⁶, GERMANY⁵⁷, IRELAND⁵⁸, ITALY⁵⁹, LITHUANIA⁶⁰, LUXEMBOURG⁶¹, MALTA⁶², the NETHERLANDS⁶³, PORTUGAL⁶⁴, ROMANIA⁶⁵, SLOVENIA⁶⁶ and the UNITED KINGDOM⁶⁷.

⁴⁹ § 5a(2) of the Consumer Protection Act.

⁵⁰ Article 77(1)(2) of the Act of 14 July 1991 on trade practices and consumer information and protection; Art. 2(7) of the Act of 2 August 2002 on Misleading and Comparative Advertising, Unfair Contract Terms and Distance Marketing in Respect of Professional Services.

⁵¹ Article 2, 6th indent of the Law for the Conclusion of Consumer Distance Contracts of 2000.

⁵² § 53(1) of the CC; also including “means..., operated by an entrepreneur whose activity involves provision of one or more means of distance communication”.

⁵³ § 4 Consumer Contracts Act.

⁵⁴ § 52(2) of the Law of Obligations Act.

⁵⁵ Chapter 6 § 4 of the Consumer Protection Act of 20 January 1978/38.

⁵⁶ Consumer Protection Act, Art. L. 121-16.

⁵⁷ CC § 312b(2).

⁵⁸ Article 2(1) 7th indent of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.

⁵⁹ Article 50(1)(b) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.

⁶⁰ Article 2(10) of the Law on consumer protection.

⁶¹ Article 1(4) of the Distance Contracts Act of 16 April 2003.

POLISH⁶⁸ and SLOVAKIAN⁶⁹ legislation have incorporated the definition of “means of distance communication” into the definition of a distance contract. GREEK⁷⁰ and SPANISH law⁷¹ use the term, but do not define it. A combination of methods ways can be found in BULGARIA, where certain means of distance communications are not defined but only listed. However, a catch-all provision for those media not named in the relevant provision exists. The element of absence of physical contact rather relates to the distance sales contract.⁷² LATVIAN⁷³ law does not give a theoretical definition of “means of distance communication”, but lists possible and more frequently used means of communication. Also in SWEDEN, the term “means of distance communication” is not defined. The Swedish Law on Consumer Protection on Distance Contracts and Doorstep Selling Contracts uses a verbal construction instead, which reads as “communication takes place exclusively at a distance”.⁷⁴

Article 2(4), sent. 2 of the Directive refers to Annex I which contains a rather detailed indicative list of examples of means of distance communication. Seemingly, the member states have different legislative cultures to deal with such detailed lists of examples. Some have left it out completely (e.g. BELGIUM, DENMARK, FRANCE, LUXEMBOURG, the NETHERLANDS, PORTUGAL and SPAIN). ITALY had originally had such a list but recently adopted its new Consumer Code⁷⁵, which had it removed.⁷⁶ However, CYPRUS, the CZECH

⁶² Article 2, 6th indent of the Distance Selling Regulations, 2001.

⁶³ CC Book 7 Art. 46a(e).

⁶⁴ Article 2(b) of the Decree-Law 143/2001 of April 26.

⁶⁵ Article 2(1)(d) of the Ordinance on consumers’ protection regarding the conclusion and performance of distance selling contracts.

⁶⁶ Article 43(2) of the Consumer Protection Act.

⁶⁷ Regulation 3(1) 16th indent of the Consumer Protection (Distance Selling) Regulations 2000.

⁶⁸ Article 6(1) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

⁶⁹ According to § 9 para. 1 of the Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling (as amended by Act No. 118/2006 Z.z. (date of coming into force 1 April 2006) ‘distance contract’ means a contract on goods or services concluded between a supplier and a consumer with the use of one or more means of distance communication, as mainly; addressed letter, addressed book-post, unaddressed book-post, offering catalogue, book-post advertisement with order form, automatic telephone set, telephone, videophone, fax, videotext (microcomputer with TV monitor) with keyboard or touch-sensitive display, radio, teleshopping or electronic mail.

⁷⁰ Article 4(1), sent. 1 and 2 of the Law 2251/94 on Consumer Protection.

⁷¹ Article 38(6) of the Law 7/1996 of January 15 on retail trade.

⁷² Article 48(1), (3), (4) of the Law on Consumer Protection.

⁷³ Article 10 (1) of the Consumer Rights Protection Law.

⁷⁴ Chapter 1 Section 2 of the Law (2005:59) on Consumer Protection in Distance Contracts and Doorstep Selling Contracts.

⁷⁵ Legislative decree of 6 September 2005, No. 206 “Consumer code”.

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REPUBLIC, GREECE, HUNGARY⁷⁷, IRELAND, MALTA, SLOVENIA⁷⁸, LITHUANIA, ROMANIA and the UNITED KINGDOM (“letter” instead of “standard letter”) have basically adopted the examples of the Annex. Other national legislators have been inspired to omit or to add some examples in order to improve the list. The CZECH REPUBLIC exempts correspondence.⁷⁹ ESTONIA, FINLAND and SLOVAKIA have the notion “telephone” for both cases “telephone with or without human intervention” of the Annex. GERMANY has shortened the list to some core techniques and incorporated it into the definition of ‘means of distance communications’. BULGARIAN⁸⁰, POLISH⁸¹, LITHUANIAN⁸² and SLOVAKIAN⁸³ law have added further examples to their list. As the list is only indicative, such examples should not infringe EC law, in particular when the definition is transposed properly, which anyway has to be interpreted in accordance with the Directive.

c. Definition of "operator of a means of communication"

Article 2(5) of Directive 97/7 defines an ‘operator of a means of communication’ as “any public or private natural or legal person whose trade, business or profession involves making one or more means of distance communication available to suppliers”. It should be noted that the term ‘operator of a means of communication’ is rather self-explanatory and is used in the Directive only in two cases, namely in Art. 5(2) and in Art. 11(3)(b). The first being a small exception from a general rule, the second being a rather general task assigned to the member states which can be implemented in many ways. Therefore, it is easily possible to transpose these two articles of the Directive without an explicit definition of the term ‘operator of a means of communication’ or even without using it at all.

⁷⁶ Legislative decree of 22 May 1999, No. 185 “Implementation of the Directive 97/7/EC concerning distance contracts between consumers and suppliers”.

⁷⁷ § 1(5) of the Government Decree No. 17/1999 (II.5.) on Distance Contracting.

⁷⁸ Under SLOVENIAN law in particular, the following are means of distance communication: standard letter and other printed matters, catalogues, telephone conversations, press advertising with order form, teleshopping, facsimile machine, electronic mail, internet.

⁷⁹ § 53(1) of the CC.

⁸⁰ “Internet”.

⁸¹ “Electronic advertising ... or other electronic means of communication within the meaning of the Act of 18 July 2002 on the provision of electronic services (Official Gazette No 144, item 1204)”.

⁸² “Telegraph”.

⁸³ “Address list”.

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Thus, it is not a surprise that many member states have not transposed this notion at all, such as AUSTRIA, the CZECH REPUBLIC, FRANCE, GERMANY, GREECE, HUNGARY, LATVIA, SLOVENIA, SLOVAKIA and SWEDEN. DANISH Law does not contain a specific definition of a *provider* of communication technique, corresponding with Art. 2(5) of Directive 97/7. A specific definition is not deemed necessary since the definition of a provider in the Directive already corresponds with the generally applicable understanding of "a provider" under Danish law.

However, BELGIUM, CYPRUS, ITALY, LUXEMBOURG and PORTUGAL have transposed the term by copy and paste technique. Some national legislators deviate slightly from the wording of the Directive, e.g. the NETHERLANDS. SPANISH law replaces "whose trade involves making available" with "who are titleholders of the means of communication".⁸⁴ Others do not distinguish in regard to the specific nature of the entrepreneur between natural and legal (UNITED KINGDOM⁸⁵) or public and private (BULGARIA⁸⁶, IRELAND⁸⁷, LITHUANIA⁸⁸ and ROMANIA⁸⁹). This may be due to the respective national meaning of the term 'person' which often includes legal persons or public law persons.⁹⁰

FINLAND⁹¹ abstains from its own definition of an operator of a means of communication. POLAND refers to the Directive's definition for the transposition of Art. 5(2) of Directive 97/7 ("invoiced by a natural or legal person who within the framework of his enterprise makes at least one means of distance communication available, to which the consumer and the contractor have access"⁹²). The ESTONIAN Electronic Communication Act uses the term of an "electronic communications undertaking", which is defined as "a person who provides a publicly available electronic communications service to the end user or to another provider of

⁸⁴ Article 48(2) of the Law 7/1996.

⁸⁵ Regulation 3(1) of the Consumer Protection Regulations 2000.

⁸⁶ Article 54(4) of the Law on Consumer Protection.

⁸⁷ Article 2(1) of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.

⁸⁸ Article 2(11) of the Law on Consumer Protection.

⁸⁹ Article 2(1)(e) of the Ordinance on consumers' protection regarding the conclusion and performance of distance selling contracts.

⁹⁰ E.g. MALTA where the Interpretation Act Cap. 249 of the Laws of Malta applies - more specifically article 4(d) which states that the express 'person' shall include a body or other association of persons, whether such a body or association is corporate or not.

⁹¹ Chapter 6 § 4 (1) the Consumer Protection Act.

⁹² Article 9(4) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

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a publicly available electronic communications service”.⁹³ Such variations seem to be deviations of the wording only and not of the substance.

d. Exemptions provided by Art. 3 of the Distance Selling Directive

aa. Contracts concluded by means of automatic vending machines or automated commercial premises

Exemption (Art. 3(1) 2nd indent)	Member States
As in the Directive	AT, BG, CY, CZ, DE, DK, EL, ES, FI, FR, IE, IT, LV, LU, MT, NL, PL, PT, RO, SE, SK, UK (22)
Variations	EE, HU, LT, SL (4)
Not transposed	BE (1)

The exemption concerning contracts concluded by means of automatic vending machines or automated commercial premises has been adopted by a great majority of member states, with the exception of BELGIUM. AUSTRIA has, in general, transposed this exemption, but the specific protection with regard to fraudulent use of credit cards according to Art. 8 of the Directive has been transposed in a way that it is also applicable to contracts concluded by means of automatic vending machines.⁹⁴ ESTONIA⁹⁵, HUNGARY⁹⁶, LITHUANIA⁹⁷ and SLOVENIA⁹⁸ did not implement the exemption for “automated commercial premises”, but for ‘automatic vending machines’. LITHUANIA exempts these contracts from the application of Articles 4 (prior information), 5 (confirmation), 7(1) (obligation to execute the order within a maximum of 30 days) and Article 11(3)(a) of the Directive.⁹⁹

bb. Contracts concluded with telecommunications operators through the use of public payphones, Art. 3(1) 3rd indent

⁹³ § 2(5) of the Electronic Communications Act.

⁹⁴ § 31a of the Consumer Protection Act.

⁹⁵ § 53(2)(1) of the Law of Obligations Act.

⁹⁶ § 1(3)(b) of the Government Decree 17/1999 (II.5.) on Distance Contracting.

⁹⁷ Article 17(3) 5th indent of the Law on Consumer Protection.

⁹⁸ Article 43a(1)(5) 1st indent of the Consumer Protection Act.

⁹⁹ Article 17(3) of the Law on Consumer Protection; CC Art. 6.366(3).

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Exemption (Art. 3(1) 3rd indent)	Member States
As in the Directive	BG, CY, CZ, DK, ES, FI, FR, HU, IE, IT, LV, LU, MT, NL, PL, PT, SE, SK, SL, UK (20)
Variations	DE, EE, LT, RO (4)
Not transposed	AT, BE, EL (3)

This exemption has been transposed in all countries except for AUSTRIA, BELGIUM and GREECE. The LITHUANIAN legislator did not restrict the provision to the use of public payphones, but excludes all contracts concluded with telecommunications operators. In ESTONIA¹⁰⁰, GERMANY¹⁰¹ and ROMANIA¹⁰², the transposition law only exempts the contracts concluded with telecommunications operators through the use of public payphones insofar as they concern the use of those payphones.

cc. Contracts concluded for the construction and sale of immovable property, Art. 3(1)

4th indent

Exemption (Art. 3(1) 4th indent)	Member States
As in the Directive	AT, BG, CY, CZ, DE, DK, FR, HU, IE, IT, LU, MT, PL, PT, RO, SK, SL, UK (18)
Variations	BE, EE, ES, FI, NL, SE (6)
Not transposed	EL, LT, LV (3)

Only GREECE, LATVIA and LITHUANIA did not make use of this exemption. In BELGIUM, the exemption is not transposed in the Act of 2 August 2002 on Misleading and Comparative Advertising, Unfair Contract Terms and Distance Marketing in Respect of Professional Services (Liberal Professions Act, LPA). The Act of 14 July 1991 on Trade Practices and Consumer Information and Protection (Trade Practices Act, TPA) on the other hand does not apply to the sale of immovable goods. But according to well-established case-law, the TPA

¹⁰⁰ § 53(2)(2) of the Law of Obligations Act.

¹⁰¹ CC § 312b(3)(7)(b).

¹⁰² Article 6(c) of the Ordinance on consumers' protection regarding the conclusion and performance of distance selling contracts.

applies to all service contracts relating to immovable property, including e.g. contracts for the construction of an immovable property. Whereas ESTONIA did not implement the part “except for rental”, SPAIN did not include the entire part relating to “other immovable property rights, except for rental”. The NETHERLANDS¹⁰³ and SWEDEN¹⁰⁴ only exempt contracts for the construction of immovable property. In contrast, FINNISH legislation does not refer to the construction of immovable property. Swedish law also mentions, besides the construction of buildings, “other fixed plants on land or in water”¹⁰⁵. Member states like GERMANY, Finland and SLOVENIA explicitly exempt timeshare contracts besides contracts concluded for the construction and sale of immovable property.

dd. Contracts concluded at an auction, Art. 3(1) 5th indent

Exemption (Art. 3 (1) 5th indent)	Member States
As in the Directive	AT, CY, CZ, HU, IE, IT, LT, LU, MT, NL, PL, PT, RO, UK (14)
Variations	DE, DK, EE, ES, FI, FR, LV, SE, SK, SL (10)
Not transposed	BE, BG, EL (3)

Except for BELGIUM, BULGARIA and GREECE, this exemption has been transposed by every member state. However, BELGIUM has not totally exempted auctions, as the Trade Practices Act¹⁰⁶ and the Liberal Professions Act¹⁰⁷ only contain provisions that empower the King to lay down specific provisions for public auctions organised by means of distance communication.

Again, there are a significant number of member states who have deviated from the Directive. In LATVIA, the supplier is disburdened from any duties of information and from a right of withdrawal, when the contract has been concluded at an auction¹⁰⁸, whereas the other

¹⁰³ CC Book 7 Art. 46i(2)(b).

¹⁰⁴ SWEDEN exempts contracts that are concluded for the construction of buildings or other fixed plants on land or in water.

¹⁰⁵ Chapter 2 Section 1 of the Law (2005:59) on Consumer Protection in Distance Contracts and Doorstep Selling Contracts.

¹⁰⁶ Article 83undecies(1) No. 6 of the TPA.

¹⁰⁷ Article 11, sent. 3 of the Act of 2 August 2002 on Misleading and Comparative Advertising, Unfair Contract Terms and Distance Marketing in Respect of Professional Services.

¹⁰⁸ Sections 8.3 and 15.9 of the Regulation regarding Distance Contracts.

provisions of the distance selling law seem to be applicable. GERMANY and ESTONIA have not completely exempted auctions. In ESTONIA, auctions are only exempted from the right of withdrawal. This is similar in GERMANY, where the rules on distance contracts in principle apply to auctions, but the consumer does not have the right of withdrawal.¹⁰⁹ The Federal Supreme Court has held in this context that an Ebay ‘auction’ is not to be considered as an ‘auction’ in this sense.¹¹⁰ Consequently, Ebay auctions fall under the distance selling laws.

The same result with regard to Ebay auctions should be reached in the following countries. DENMARK exempts auctions where “a significant number of bidders is normally present at the place of the auction”. The FINNISH Consumer Protection Act does not apply to contracts concluded at an auction, “if participation in the auction is also possible without using a means of distance communication”¹¹¹. In SPAIN, auctions are generally exempted from the scope of application, but the Law 7/1996 of January 15 on retail trade¹¹² is, according to its Art. 38(3) (b), applicable to auctions concluded by electronic means. SWEDISH law does not apply to contracts concluded at auctions where the bidding could be made by means other than at a distance.¹¹³ In FRANCE¹¹⁴, SLOVAKIA¹¹⁵ and SLOVENIA¹¹⁶ only public auctions are exempted.

ee. Partial exemption of contracts for the supply of foodstuffs etc. supplied by regular roundsmen, Art. 3(2) 1st indent

Partial Exemption (Art. 3(2) 2nd indent)	Member States
As in the Directive	AT, BG, DE, DK, ES, FR, IT, LU, MT, NL, PL, PT, RO, SE, UK <i>(15)</i>

¹⁰⁹ CC § 312d(4)(5).

¹¹⁰ BGH judgment of 3 November 2004, VIII ZR 375/03, NJW 2004, 53-56.

¹¹¹ Chapter 6 sec. 6(5) of the Consumer Protection Act 20.1.1978/38.

¹¹² Ley 7/1996, de 15 de enero, de ordenación del comercio minorista.

¹¹³ Chapter 2 Section 1(2)(4) of the Law (2005:59) on Consumer Protection in Distance Contracts and Doorstep Selling Contracts.

¹¹⁴ A "vente aux enchères publiques" is a classical auction where movable or immovable goods are sold openly to the public. The auction is mostly driven by a "commissaire priseur" who is a public official.

¹¹⁵ The Act on Voluntary Public Auction 527/2002 provides provisions on public auctions. The Act applies to the sales initiated by the owner of the unsecured assets, as well as to the sales of pledged assets initiated by the secured creditor on behalf of the pledgor.

¹¹⁶ The public auction is regulated in the Execution of Judgments in Civil Matters and Insurance of Claims Act; the Ministry of Justice is empowered to regulate the procedure of the public auction in detail by regulation. The public auction is basically a way of selling certain seized movables (of higher value and is expected that they will be sold for a higher price than the estimated value).

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Variations	CY, CZ, EE, EL, FI, HU, IE, LV, LT, SK, SL (<i>II</i>)
Not transposed	BE (<i>I</i>)

According to Art. 3(2) 1st indent of the Directive 97/7, Articles 4 (prior information), 5 (confirmation), 6 (right of withdrawal) and 7(1) (obligation to execute the order within a maximum of 30 days) do not apply to contracts “for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home of the consumer, to his residence or to his workplace by regular roundsmen”. This exemption is said to be designed for the traditional English dairy man, but its scope is, of course, broader.

All the member states, except for BELGIUM, have implemented provisions transposing this exemption. AUSTRIA, BULGARIA, DENMARK, FRANCE¹¹⁷, GERMANY, ITALY, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL, ROMANIA, SPAIN, SWEDEN and the UNITED KINGDOM have transposed this partial exemption more or less literally. In principle, FINLAND has also implemented the exemption for the supply of foodstuff by regular roundsmen, but has narrowed it slightly.¹¹⁸ If the supplier offers those goods and services by way of “cold calling”, the provisions on prior information, the confirmation and the right of withdrawal all apply.¹¹⁹ According to LITHUANIAN law, no reference to the supply by regular roundsmen is made. Furthermore, the provisions transposing Art. 11 (3)(a) of the Directive do not apply to these contracts.¹²⁰

By contrast, some member states, such as the CZECH REPUBLIC, GREECE, SLOVAKIA and SLOVENIA, have widened the exemption and completely excluded these contracts from the scope of application of their transposition laws. This may constitute an infringement of the Directive, as, for instance, Art. 8 (Payment per Card) and Art. 9 (Inertia Selling) are applicable to such contracts and, therefore, must be transposed. Contrary to the Directive, ESTONIA has broadened the exemption by also excluding the provisions transposing Art. 7(2) of the Directive 97/7.¹²¹ The IRISH transposition law states that Regulations 4, 5, 6 and 7(1) shall not apply to the contracts for the supply of foodstuff etc. supplied by regular roundsmen.

¹¹⁷ Not transposing “foodstuffs and beverages”, only referring to goods for everyday consumption.

¹¹⁸ Using the term „regular delivery system” in Chapter 6 sec. 7(1)(1) of the Consumer Protection Act of 20 January 1978/38.

¹¹⁹ Chapter 6 sec. 7(2) of the Consumer Protection Act 20.1.1978/38.

¹²⁰ CC Art. 6.366(3): “The provisions of this **Article** shall not apply...”.

¹²¹ § 53(3) of the Law of Obligations Act.

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Regulation 7(1) of the Irish Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation does not contain the obligation to execute the order within a maximum of 30 days. This is a wrong transposition – probably a drafting mistake - because this obligation is stated in Reg. 9(1) of Irish transposition law.

Some member states have stated differences concerning the place of the supply of the goods. HUNGARIAN law only refers to the “foodstuff and contracts concerning the regular delivery of everyday consumer goods”. Also, the GREEK legislator did not explicitly lay down the consumer’s residence or workplace as places that the food could be supplied to.¹²² In CYPRUS, the scope has been widened for the supply of the said goods by regular roundsmen at all places other than the supplier’s workplace.¹²³

ff. Partial exemption of contracts for the provision of accommodation, transport, catering or leisure services, Art. 3(2) 2nd indent

Partial Exemption (Art. 3(2) 2nd indent)	Member States
As in the Directive	CY, PT, RO, UK (4)
Variations	AT, BE ¹²⁴ , BG, CZ, DK, DE, EE, EL, ES, FI, FR ¹²⁵ , HU, IE, IT, LT, LU, LV, MT, NL, PL, SE, SK, SL (23)
Not transposed	(0)

Article 3(2) 2nd indent provides that Articles 4, 5, 6 and 7(1) shall not apply:

- to contracts for the provision of accommodation, transport, catering or leisure services,
- where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period.

Exceptionally, in the case of outdoor leisure events, the supplier can reserve the right not to apply Article 7(2) in specific circumstances.

¹²² Article 4(13)(γ) of the Consumer Protection Act 2251/94.

¹²³ Article 4(2)(a) of the Law for the Conclusion of Consumer Distance Contracts.

¹²⁴ The Royal Decree of 18 November 2002 states only an exemption for Art. 4 and 5 of Directive 97/7 and additionally requires that the contract may not exceed 350 Euro.

¹²⁵ Article L. 121-20-4, 2^o, of the Consumer Protection Act, however, states that articles L. 121-18 and L. 121-19 (information and written confirmation to be provided) do nonetheless apply to **electronic contracts** for the provision of accommodation, transport, catering etc.

Until now, this Article is the only provision of Directive 97/7 which had to be applied by the ECJ (C-336/03 – *Easycar*).¹²⁶ The Court held that Art. 3(2) of the Directive is to be interpreted as meaning that ‘contracts for the provision of transport services’ includes contracts for the provision of car hire services. The reasoning offers some guidance for the future application of this provision. The Court stated that the exemption has the purpose of protecting the interests of suppliers of certain services in order that they should not suffer the disproportionate consequences arising from the cancellation at no expense and with no explanation of services. An example of this would be a booking which is made and then cancelled by the consumer at short notice before the date specified for the provision of that service. In the view of the ECJ, car hire undertakings carry out an activity which, against such consequences, the legislature intended to protect by means of the exemption. The reason is that those undertakings must make arrangements for the performance on the date fixed at the time of booking, of the agreed service and, therefore, suffer the same consequences in the event of cancellation as other undertakings operating in the transport sector or in the other sectors listed in the exemption.

Only four member states have transposed Art. 3(2) 2nd indent of the Directive faithfully. Many other member states have chosen different methods of transposing this exemption. For instance, the CZECH REPUBLIC, GREECE, LITHUANIA, SLOVAKIA and SLOVENIA have completely exempted the contracts regulated in Art. 3(2) 2nd indent. As this provision allows only a partial exemption, such member states are in breach of EC law. This may also be the case with ESTONIA, which has broadened the exemption by also excluding the provisions transposing Art. 7(2) of Directive 97/7.¹²⁷

One core element of the partial exemption in Art. 3(2) 2nd indent of Directive 97/7 is that the date of execution must be fixed at the time of the conclusion of the contract. AUSTRIA, BELGIUM, CYPRUS (“upon conclusion of the contract”), DENMARK, ESTONIA (“upon conclusion of the contract”), FINLAND, GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL, SPAIN (“upon conclusion of the contract”), SWEDEN (“in the contract”) and the UNITED KINGDOM have implemented this clause. Others, for

¹²⁶ Judgment of 10 March 2005 C-336/03 *EasyCar (UK) Ltd v Office of Fair Trading*; see in particular n° 28, 29.

¹²⁷ § 53(3) of the Law of Obligations Act.

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example, the CZECH REPUBLIC, FRANCE, HUNGARY, LATVIA, LITHUANIA, POLAND, SLOVAKIA and SLOVENIA have extended the exemption to contracts where the date of execution is fixed after the conclusion of the contract.

The majority of the member states has not transposed the second part of the exemption in Art. 3(2) 2nd indent (“exceptionally, in the case of outdoor leisure events...”), namely AUSTRIA, BELGIUM, BULGARIA, the CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, SLOVAKIA, SLOVENIA, SPAIN¹²⁸ and SWEDEN. On the contrary, CYPRUS, PORTUGAL and the UNITED KINGDOM¹²⁹ have transposed this part as it is in Directive 97/7. POLISH law limits the exemption to leisure events, however it does not refer to “specific” circumstances, but to circumstances stipulated in the contract.¹³⁰

Furthermore BULGARIAN law is not applicable to the delivery of pharmaceutical products, food supplements and other products which support healing.

III. Consumer protection instruments

1. Information duties

a. Pre-contractual information

Article 4(1) of the Directive obliges the supplier to provide the consumer with the following information in good time prior to the conclusion of the contract:

- a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address;
- b) the main characteristics of the goods or services;
- c) the price of the goods or services including all taxes;
- d) delivery costs, where appropriate;
- e) the arrangements for payment, delivery or performance;
- f) the existence of a right of withdrawal, except in the cases referred to in Art. 6(3);

¹²⁸ 1st Additional Disposition para. 1(2) of the Law 7/1996 of January 15 on retail trade.

¹²⁹ Regulation 19(8) of the Consumer Protection Regulations 2000.

¹³⁰ Article 16(2)(2) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

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- g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;
- h) the period for which the offer or the price remains valid;
- i) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.

According to Art. 4(2), the information must be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used. Paragraph 3 additionally clarifies that in the case of telephone communications, the identity of the supplier and the commercial purpose of the call must be made explicitly clear at the beginning of any conversation with the consumer.

All member states have used the list of pre-contractual information duties provided in Art. 4 of the Directive as a model for their transposition legislation and have created a rather similar list. For the purpose of this study, the following aspects shall be pointed out:

aa. “In good time” prior to the conclusion of the contract

A certain ambiguity can be seen in the requirement that the information must be provided to the consumer “in good time” prior to the conclusion of the distance contract. The member states have incorporated this requirement into their national law with some variations of the wording (some examples on the basis of translations which may be inaccurate: BULGARIA: “the supplier shall, prior to the conclusion of the contract, provide in due time“; CYPRUS: “in time” instead of “in good time”; CZECH REPUBLIC: “sufficiently in advance”; ESTONIA: “within a reasonable period of time before a contract is concluded“; LITHUANIA: “prior to concluding the contract” LATVIA: “offers expressed to consumers” (no indication as to the point in time); POLAND: “at the latest, at the time of the proposal to conclude a contract being submitted”; ROMANIA: “prior to the conclusion of any distance contract, the supplier will provide in due time”; SLOVAKIA: “before the distance contract is concluded”; SLOVENIA: “within a reasonable time period depending on the means of communication used but before the consumer is bound by the contract or by the offer”; SPAIN: “before the beginning of the contractual process and with the necessary anticipation”). BELGIAN law is more restrictive than the Directive as the information duty must be fulfilled at the time of the offer, which is interpreted broadly including advertisements which imply the seller’s willingness to

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supply.¹³¹ As such provisions have to be interpreted and applied in accordance with the Directive, the courts responsible should not come to results which breach EC law. Nevertheless, clarifying this requirement might be considered when reviewing the Directive. A model could be the wording of the parallel article of Directive 2002/65: “in good time before the consumer is bound by any distance contract or offer” whereby – following the example of some member states - the word “reasonable” instead of “good” could be used. This would make clearer that the courts shall judge on the question of whether the period was sufficient in order to allow the consumer to reflect on the information before concluding a contract.

bb. Additional pre-contractual information obligations

Many member states have added further information to the list. The bulk of such additional pre-contractual information obligations introduced by the member states is related to the identity of the supplier. In AUSTRIA¹³², BULGARIA¹³³, CYPRUS, the CZECH REPUBLIC¹³⁴, DENMARK¹³⁵, FINLAND¹³⁶, FRANCE¹³⁷, GERMANY¹³⁸, LUXEMBOURG, MALTA¹³⁹, POLAND¹⁴⁰, SLOVAKIA¹⁴¹, SLOVENIA¹⁴², SPAIN¹⁴³ and SWEDEN¹⁴⁴, the prior information must always include the supplier’s address, whereas Art. 4(1) of Directive 97/7 only asks for the address in

¹³¹ Article 78 and Art. 2 of the TPA.

¹³² Article 5c(1)(1) of the Consumer Protection Act. See also the OGH judgment of 23 September 2003, 4 Ob 175/03v. The OGH held that a supplier who, in his prior information, only provides a PO box number and the municipality in which the company is based, and fails to give more precise geographical indicators (the street name), is in breach of § 5c(1)(1) of the Consumer Protection Act.

¹³³ Article 52(1) of the Law on Consumer Protection.

¹³⁴ § 53(4)(a) of the CC.

¹³⁵ § 11(1)(1) of the Act No. 451 of 9 June 2004 on certain consumer contracts.

¹³⁶ Chapter 6(13) of the Consumer Protection Act 20.1.1978/38.

¹³⁷ Consumer Protection Act, Art. L121-18.

¹³⁸ See also the OLG Karlsruhe judgment of 27 March 2002, 6 U 200/01, GRUR 2002, 730-731; and the OLG Munich judgment of 11 September 2003, 29 U 2681/03, NJW-RR 2003, 913-915 dealing with the requirements of how to provide such information on an internet homepage, and whether it is sufficient to provide this information below the heading “Impressum” on a special page to which users were directed via the link “contact”.

¹³⁹ Article 4(1)(a) of the Distance Selling Regulations, 2001.

¹⁴⁰ Article 9(1)(1) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

¹⁴¹ § 10 (1) lit. a of the Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling.

¹⁴² Article 43b(1) of the Consumer Protection Act – a transposition of Art. 4(1)(i) – minimum duration of the contract – is lacking.

¹⁴³ Article 40(1)(a) of the Law 7/1996 of January 15 on retail trade.

¹⁴⁴ Chapter 2 Section 6 of the Law (2005:59) on Consumer Protection in Distance Contracts and Doorstep Selling Contracts.

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the case of contracts requiring payment in advance. In FRANCE, LUXEMBOURG¹⁴⁵ and HUNGARY¹⁴⁶, suppliers also have to provide their telephone numbers. In ROMANIA the contact co-ordinates, phone/fax, e-mail and single registration code have to be supplied additionally.¹⁴⁷ The SLOVAKIAN transposition law specifies the Directive insofar as the supplier also has to inform the consumer about a trading permit (natural person) or the trade name and registered office (legal person). In the CZECH REPUBLIC, the prior information has to contain information about the supplier's identification number and the body supervising the activity of the supplier.

However, it has to be borne in mind that such additional information obligations might be a generalisation of other, more specific information obligations, such as Art. 3 of Directive 2002/65, applicable only in the case of financial services. Article 3(1)(1)(a) of this Directive expressly obliges to provide information about the geographical address at which the supplier is established; and, according to lit. d, the supplier must give information about the trade register in which it is entered and the registration number, if any. In e-commerce cases, rather similar obligations also arise from Art. 5 of Directive 2000/31 which obliges to provide – among others – information about the geographic address (para. 1(b)), an email address (para.1(c)) or (para. 1(d)) the trade register (if any) and the registration number.

Other additional information obligations relate to the right of withdrawal. In BELGIUM¹⁴⁸, FINLAND¹⁴⁹, GERMANY, ITALY,¹⁵⁰ SLOVENIA and SPAIN¹⁵¹, the consumer also has to be informed about the non-existence of the right of withdrawal. This may have been inspired by Art.(1)(3)(a) of the Directive 2002/65 which stipulates the obligation to give information about the existence or absence of a right of withdrawal. In LUXEMBOURG¹⁵² and BELGIUM¹⁵³,

¹⁴⁵ Article 3 (1)(a) of the Distance Contracts Act of 16 April 2003.

¹⁴⁶ Article 2(1)(a) of the Government Decree 17/1999 (II.5.) on Distance Contracting.

¹⁴⁷ Article 3(1) lit. a of the Ordinance on consumers' protection regarding the conclusion and performance of distance selling contracts.

¹⁴⁸ Article 78(6) of the TPA and Art. 12(6) of the LPA.

¹⁴⁹ Chapter 6 Section 13 Consumer Protection Act; see also the Consumer Complaint Board judgment of 26 October 2004, 03/36/3370. The Board held that the consumer has a right of withdrawal because the supplier did not inform the consumer about the non-existence of a right of withdrawal in case of delivery of goods that, by their nature, cannot be resold.

¹⁵⁰ Article 52(1)(f) of the Legislative Decree of 6 September 2005, No. 206 "Consumer Code".

¹⁵¹ Spain has laid down further information duties e.g. on "the circumstances and conditions upon which the seller could supply a good of similar quality and price replacing the ordered good by the consumer, whenever this possibility is foreseen" (Art. 40.1.j) and – "In case, indication on whether the seller has or is integrated into any alternative dispute resolution system". (Art. 40.1.k).

¹⁵² Article 3(1)(f) of the Distance Contracts Act of 16 April 2003.

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the supplier has to inform the consumer in advance of the conclusion of the contract if he aims to charge the cost of the return of goods to the consumer in the case of withdrawal. In ITALY, the pre-contractual information need not only include the existence of a right of withdrawal, but also the conditions and procedures for exercising it.¹⁵⁴ In SLOVENIA, the description of the right of withdrawal in accordance with Art. 43č is to be included.¹⁵⁵ In ESTONIA, the prior information has to contain - if the object is acquired or the service is used on credit - the right of the consumer to withdraw from the credit contract pursuant to the provisions of § 57 of the Estonian Law of Obligations Act.

Only a very few further additional information obligations that are not related to the supplier's identity or to the withdrawal right, could be traced. For instance, the supplier has to have informed the consumer in POLAND about the place and procedure for submitting complaints prior to the conclusion of the contract¹⁵⁶ and in ROMANIA about the deadline of the performance of duties resulting from the contract.¹⁵⁷ In POLAND, for instance, the supplier has to inform the consumer about the place and procedure for submitting complaints already prior to the conclusion of the contract.¹⁵⁸ In ESTONIA, the prior information has to contain the estimated time of entry into force of the contract.¹⁵⁹

It should be noted that several member states have regulated some e-commerce related duties in very close context to their rules on pre-contractual information duties in cases of distance selling. For instance, LATVIAN law provides some specific information duties for the supplier if the consumer uses the internet for the conclusion of the contract. These information duties are e.g. technical stages, that shall be observed in order to enter into the contract; conditions for the storage of the contractual documents (whether the contractual documents are saved) and availability of such contracts to consumers; technical means for determination and correction of input errors prior to the making of an order and languages offered for entering

¹⁵³ Article 78(7) of the Act of 14 July 1991 on Trade Practices and Consumer Information and Protection, but no similar provision exists in the Liberal Professions Act.

¹⁵⁴ Article 52(1)(g) of the Legislative Decree of 6 September 2005, No. 206 "Consumer Code".

¹⁵⁵ Article 43b(1)(6) of the Consumer Protection Act.

¹⁵⁶ Article 9(1), (10) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

¹⁵⁷ Article 3(1) lit.j of the Ordinance on consumers' protection regarding the conclusion and performance of distance selling contracts.

¹⁵⁸ Article 9(1)(10) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

¹⁵⁹ § 54(1)(3) of the Law of Obligations Act.

into the contract.¹⁶⁰ Also, in SLOVENIA, the supplier has to inform the consumer about details concerning the technical steps leading to the conclusion of the contract; a statement of whether the concluded contract will be kept at the enterprise and the method of access to it; a statement of the technical means for identifying and correcting errors prior to the placing of an order; the languages in which the contract may be concluded.¹⁶¹ This is, of course, a (partial) transposition of Art. 10 of Directive 2000/31 and not a ‘gold plating’ of Directive 97/7.

Overview: Additional Pre-contractual Information Obligations

Additional Information	Member State	Parallel EC law provisions
Supplier's address (in any event)	AT, BG, CY, CZ, DE, DK, ES, FI, FR, LU, MT, PL, RO, SE, SK, SL (16)	Art. 3(1)(1)(a) Dir. 2002/65; Art. 5(1)(b) Dir 2000/31
Supplier's telephone number	FR, HU, LU, RO (4)	None (but cf. Art. 5(1)(c) Dir. 2000/31: email address)
Trading permit (natural person) / trade name and registered office (legal person)	BG, SK (2)	None (but cf. Art. 5(1)(d) Dir. 2000/31)
Identification number	BG, CZ, HU, RO (4)	
Information about a body supervising the activity of the supplier	CZ (1)	
Non-existence of the withdrawal right	BE, DE, ES, FI, IT, SL (6)	Art. 3(1)(3)(a) Dir. 2002/65
Conditions and procedures for exercising withdrawal right	BG, IT, SL (3)	Art. 3(1)(3)(a) and (d) Dir. 2002/65

¹⁶⁰ Article 2(10) of the Cabinet Regulation No. 207 “Regulations Regarding Distance Contracts”.

¹⁶¹ Article 43b(2) of the Consumer Protection Act.

Costs of the return of goods after withdrawal	BE, LU (2)	
Right of the consumer to withdraw from a related credit contract	EE (1)	
Estimated time of entry into force of the contract	BG, EE (2)	
Place and procedure for submitting complaints	BG, PL (2)	
Deadline of performance	BG, RO (2)	

b. Written Confirmation, Art. 5

Art. 5(1), sent. 1 of the Directive obliges the supplier to provide, in good time during the performance of the contract, written confirmation (or confirmation in another durable medium) of some of the information to be given prior to the contract, unless the information has already been given to the consumer in such form.

Most of the member states, such as AUSTRIA¹⁶², BELGIUM, BULGARIA, CYPRUS, FINLAND, FRANCE, HUNGARY, IRELAND¹⁶³, ITALY, LATVIA, LUXEMBOURG, MALTA¹⁶⁴, the NETHERLANDS¹⁶⁵, PORTUGAL, SWEDEN and the UNITED KINGDOM have followed the Directive rather closely when transposing this provision. ESTONIA¹⁶⁶, GERMANY, GREECE, POLAND, ROMANIA, SLOVAKIA and SLOVENIA¹⁶⁷ have widened this duty to confirm the information insofar as all information due to be given prior to the contract has to be confirmed, whereas the Directive regulates in Art. 5(1), sent. 1 such a duty only for some information. In GREECE, written confirmation during the performance of the contract is obligatory, even if the information has already been given to the consumer in such form prior to the contract.

¹⁶² § 5d(2) of the Consumer Protection Act.

¹⁶³ Regulation 5(2) of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.

¹⁶⁴ Article 5(2) Distance Selling Regulations 2001.

¹⁶⁵ CC Book 7 Art. 46c(2).

¹⁶⁶ § 55(1) of the Law of Obligations Act.

¹⁶⁷ Art 43b of the Consumer Protection Act.

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However, in the CZECH REPUBLIC, LITHUANIA and in SPAIN¹⁶⁸, there is - contrary to the Directive - no general obligation to confirm the prior information according to Art. 5(1), sent. 1.

Characteristic variations can be found with regard to the formal requirements (see below under aa.) and to the time of the confirmation (see below under bb.). Noteworthy also is that CYPRUS, GREECE and SPAIN¹⁶⁹ have introduced a requirement that the language used must be the same one that was prevalent in the offer.

aa. Formal requirements

Formal requirements	Member States
As in the Directive	AT, BE (only in the LPA), BG, CY, EE, FR, IE, LU, PT, RO, UK <i>(11)</i>
Not transposed	<i>(0)</i>
Variations	BE, CZ, DE, DK, EL, ES ¹⁷⁰ , FI, HU, IT, LT, LV, MT, NL, PL, SE, SK, SL <i>(17)</i>

Article 5(1) of the Directive states that the consumer has to receive written confirmation, or confirmation in another durable medium available and accessible to him, of some of the information laid down in Art. 4 of the Directive.¹⁷¹ The following member states have literally transposed these formal requirements: AUSTRIA, BELGIUM in the Liberal Professions Act (LPA), BULGARIA, CYPRUS, ESTONIA, FRANCE, IRELAND, LUXEMBOURG, PORTUGAL, ROMANIA and the UNITED KINGDOM. Article 79(1)(2) of the Belgian Trade Practices Act obliges the supplier to present a clause informing about the right of withdrawal with the exact text, written in bold, and on the first page of the contract.

Many member states have implemented variations with regard to the term “another durable medium available and accessible”. Such differences seem to be only deviations of the

¹⁶⁸ Article 47 of the Law 7/1996 of January 15 on retail trade.

¹⁶⁹ Article 47(2) of the Law 7/1996 of January 15 on retail trade (with regard to the information to be given according to Art. 5(1), sent. 2 of the Directive).

¹⁷⁰ Article 47(2) of the Law 7/1996 of January 15 on Retail Trade (with regard to the information to be given according to Art. 5(1), sent. 2 of the Directive).

¹⁷¹ Article 4(1)(a)-(f) of the Directive 97/7.

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wording, and not of the substance. Some examples, on the basis of the available translations, are: DENMARK (in legible form on paper or another permanent medium available and accessible to the consumer), FINLAND (in writing or electronically so that the consumer can reproduce the information unchanged), GERMANY (text form¹⁷²), HUNGARY (written information or other documents confirming the verbal information), MALTA (tangible medium¹⁷³) SLOVENIA (a suitable permanent data storage medium), SWEDEN (in a document or another readable, permanent form which is accessible to the consumer), LATVIA (written confirmation or confirmation that can be perceived and retained in another visual or audio form and is available to consumers¹⁷⁴). The Latvian law even lists examples for these other visual or audio forms, e.g. voice mail, audio text, videophone, video text, electronic mail or facsimile and other means of communication.

Some member states have increased consumer protection by not transposing the term “another durable medium available and accessible to the consumer”. They oblige the supplier to always provide confirmation of the information in written form. Such member states are the CZECH REPUBLIC¹⁷⁵, GREECE¹⁷⁶, LITHUANIA¹⁷⁷, POLAND¹⁷⁸ and SLOVAKIA¹⁷⁹. The NETHERLANDS have partially done the same by providing that the confirmation of some core information (e.g. main characteristics of the good or service, existence of right of withdrawal) must be given in writing. Only the information about other subjects (e.g. identity of the supplier, price, delivery costs and arrangements for payment, delivery or performance) can alternatively be provided in another durable medium.¹⁸⁰ In ITALY, the supplier can only use another durable medium if the consumer chooses to do so.¹⁸¹ In SPAIN, the supplier can use another durable medium unless the consumer rejects this explicitly.

¹⁷² Defined in CC § 126(b).

¹⁷³ This difference in terminology is arguably somewhat problematic since it is not clear whether electronic mail or contracts should be classified as tangible or intangible.

¹⁷⁴ Article 6(1) of the Cabinet Regulation No. 207 “Regulations Regarding Distance Contracts”.

¹⁷⁵ § 53(5) of the Act 40/1964, CC. Recently there has been a reform which seems to allow the provision of confirmation by any means of distance communication.

¹⁷⁶ Article 4(9) of the Consumer Protection Act 2251/94.

¹⁷⁷ CC Art. 6.366(6); Art. 17(6) of the Law on Consumer Protection.

¹⁷⁸ Article 9(3) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

¹⁷⁹ § 10(3) and (4) of the Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling.

¹⁸⁰ CC Book 7 Art. 46c(2).

¹⁸¹ Article 53(1) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.

bb. Time of the confirmation

Formal requirements	Member States
As in the Directive	AT, EL, IE, LU, MT, NL, PT, UK (8)
Not transposed	(0)
Variations	BE, BG, CY, CZ, DK, DE, EE, ES, FI, FR, HU, IT, LV, LT, PL, RO, SE, SK, SL (19)

Article 5(1) of the Directive further provides, with regard to the time when the conformation is due, a rule with two elements. The confirmation must be given:

- in good time during the performance of the contract.
- where goods are concerned, the latest point being at the time of delivery (not applicable when the goods are for delivery to third parties).

Member states like AUSTRIA, GREECE, IRELAND, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL or the UNITED KINGDOM have almost literally implemented this provision.

Some member states have changed the terms “in good time”. CYPRIOT law refers to “in due course”. In GERMANY, FINLAND and SWEDEN, the supplier has to provide confirmation “at once” or “as soon as possible”, at the latest by the time of the performance or delivery. SLOVENIA fixes a “reasonable period of time” for providing confirmation. Other member states have completely left out a formula like “in good time”, e.g. the CZECH REPUBLIC (“after the conclusion of the contract, but no later than before the performance”), ESTONIA¹⁸² (“at the latest during the performance”), ITALY (“before or when entering into any contract.”), LITHUANIA (“prior to performance of the contract”), BULGARIA¹⁸³ (“not later than the time of delivery of the goods or the performance of the contract”), SPAIN¹⁸⁴ (“at the time of the performance of the contract”). Also POLAND and SLOVAKIA determine the moment of the delivery of goods and the provision of services at the latest date when confirmation has to be provided.

¹⁸² § 55(1) of the Law of Obligations Act.

¹⁸³ Article 54(1) of the Law on Consumer Protection.

¹⁸⁴ Article 47(1) of the Law 7/1996 of January 15 on retail trade (with regard to the information to be given according to Art. 5(1), sent. 2 of the Directive).

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BULGARIAN law did not transpose the limitations made in Art. 5(1) of the Directive (and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him).

As the Directive fixes the latest moment only for goods and not for services, many member states seemingly felt a need to clarify such a moment for services, too. Some examples are already mentioned above; others are: FRANCE (“au plus tard au moment de la livraison”), GERMANY (“at the latest until the complete performance of the contract”), LATVIA (“but no later than at the moment of delivery of goods or provision of services”) or SLOVENIA (“no later than by the time of delivery of the goods or the start of the provision of services”). BELGIUM has developed a rather elaborate set of rules. For goods, Belgian law follows the Directive. For the provision of services, confirmation has to be given at the latest before the performance, but if the performance has begun – with the agreement of the consumer - before the end of the withdrawal period, the supplier can also confirm during the performance.¹⁸⁵ For the liberal professions, however, Belgian law provides a different rule, which is closer to the Directive.¹⁸⁶

DENMARK (“when the contract is concluded”) has regulated an earlier point of time than the Directive requires. The HUNGARIAN transposition has the same starting point (“in good time before signing the contract”), but allows also for confirmation at “the time of the conclusion of the contract at the latest”. Some member states, e.g. BELGIUM, BULGARIA, the CZECH REPUBLIC, ESTONIA, FRANCE, GERMANY, HUNGARY, ITALY and LATVIA, POLAND, ROMANIA, SLOVAKIA, SLOVENIA and SPAIN have also omitted the reference to goods for delivery to third parties.

Such differences with regard to the point in time when confirmation has to be provided may cause difficulties for suppliers who are active in cross-border trade. Nevertheless, suppliers should be able to overcome most of these difficulties by providing confirmation as early as possible.

¹⁸⁵ Article 79(2) of the Act of 14 July 1991 on Trade Practices and Consumer Information and Protection.

¹⁸⁶ Article 13 of the Act of 2 August 2002 on Misleading and Comparative Advertising, Unfair Contract Terms and Distance Marketing in Respect of Professional Services.

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cc. Information to be provided in any event, Art. 5(1), sent. 2

Furthermore, the supplier must, according to Art. 5(1), sent. 2, provide certain information in any event, namely:

- written information on the conditions and procedures for exercising the right of withdrawal;
- the geographical address of the place of business of the supplier to which the consumer may address any complaints;
- information on after-sales services and guarantees which exist; and
- the conclusion for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.

Again, most of the member states have correctly transposed this specific information duty (e.g. AUSTRIA, BELGIUM, BULGARIA, CYPRUS, the CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN, SWEDEN and the UNITED KINGDOM). Only some deviations could be observed. Additionally, in Belgium, Cyprus, ROMANIA and Spain, the supplier has to provide the consumer with a standard notice on the right of withdrawal. The GERMAN Regulation on duties to supply information in civil law¹⁸⁷ contains a standard form in its Annex, which suppliers can use in order to fulfil the obligation to inform the consumer about the existence, exercise and effects of the right of withdrawal. In Finland the information on the right of withdrawal also has to contain the fact that the consumer cannot withdraw any more if the service has begun with the consent of the consumer.¹⁸⁸

The POLISH transposition law does not include a duty to inform about after-sales services and guarantees. Other member states oblige the supplier to provide more detailed information than prescribed by the Directive. For instance, in ROMANIA, the supplier's phone/fax and e-mail address also have to be provided.¹⁸⁹ Additionally, in ESTONIA, the confirmation has to provide information about the conditions of the supplier's liability.¹⁹⁰

¹⁸⁷ BGB-Informationspflichten-Verordnung (BGB-InfoV).

¹⁸⁸ Chapter 6 Section 14(1)(1) of the Consumer Protection Act 20.1.1978/38.

¹⁸⁹ Article 4(1) lit. c of the Ordinance on consumer protection regarding the conclusion and performance of distance selling contracts.

¹⁹⁰ Article 55(2)(4) of the Law of Obligations Act.

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dd. Exception from Art. 5(1) for services performed through the use of a means of distance communication

Exception	Member States
As in the Directive	AT, BE, CY, DE, ES, FR, HU, IE, IT, LU, LV, MT, NL, PL, PT, SE, SK, SL, UK (19)
Variations	BG, DK, EE, FI, RO (5)
Not transposed	CZ, EL, LT (3)

Article 5(2) of Directive 97/7 allows for the exemption that the supplier does not have to provide confirmation for services which are performed through the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication. Nevertheless, the consumer must in all cases be able to obtain the geographical address of the place of business of the supplier to which he may address any complaints.

The majority of the member states have transposed this exemption, e.g. AUSTRIA, BELGIUM, CYPRUS, FRANCE, GERMANY, HUNGARY, IRELAND, ITALY, LATVIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN, SWEDEN and the UNITED KINGDOM, although many of them do not use the term ‘operator of a means of communication’ defined in Art. 2(5) of the Directive.¹⁹¹ In DENMARK, the exemption only applies to services with a maximum price of DKK 75 (approx. EUR 10).¹⁹² Some member states do not refer to the term ‘operator of means of distance communication’ and use other terms, e.g. ESTONIA (“provider of telecommunication”) and FINLAND (“business whose distance communication service is being used”). These seem to be deviations only of the wording and not of the substance. BULGARIA transposed the second sentence of Art. 5(2) of the Directive in Art. 5(2) sent. 2 of the Law on Consumer Protection. The CZECH REPUBLIC, GREECE and LITHUANIA have not implemented this exception into their national law.

¹⁹¹ For more details, see above point II. 3 c. Definition of "operator of a means of communication".

¹⁹² § 12(4) and (5) of the Act on Consumer Contracts.

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c. Sanctions for breach of information duties

Most of the provisions of the Directive on sanctions for any breach of information duties are rather general and thereby leave great discretion to the member states. For instance, Art. 11(1) obliges the member states to ensure that adequate and effective means exist to ensure compliance with this Directive in the interests of consumers. Article 11(2) (now practically superfluous because of Directive 98/27 being enacted in the meantime), grants public bodies, consumer organisations and professional organisations the right to take action. A further instrument to secure compliance can be seen in the provision for voluntary supervision by self-regulatory bodies of compliance (Art. 11(4)).

The only concrete rule on sanctions for non-fulfilment of information duties in the Directive is Art. 6(1). This provision leads to a prolongation of the withdrawal period in the case that the information obligations laid down in Art. 5 have not been fulfilled, or fulfilled late. The Directive is somewhat unclear as to the point whether the maximum period in case of no confirmation at all is just three months or – more plausible – three months plus 7 working days. The period begins, in the case of goods, from the day of receipt by the consumer; in the case of services, the period starts from the day of conclusion of the contract. It is worth noting that this sanction only applies for the obligations laid down in Art. 5. Consequently, the information obligations to be fulfilled prior to the conclusion of the contract (Art. 4) are not sanctioned by this mechanism.

Moreover, the prolongation for just three months in the case that the consumer has not been informed about his withdrawal right creates incoherencies with regard to other Consumer Directives. Only the Timeshare Directive provides in Art. 5 a rather similar prolongation rule. By contrast, in the field of the Doorstep Selling Directive, the ECJ has ruled in *C-481/99-Heininger*¹⁹³ that the withdrawal period does not begin before the consumer has been informed about his right of withdrawal. Thus, the consumer has an eternal right to withdraw if the information has not been given. The Directive on Distance Selling of Financial Services is unclear on this point. In Art. 6(1) 2nd indent, this Directive provides that the withdrawal period does not begin before certain information has been given. But this Directive does not contain an explicit rule on a maximum period during which the consumer is entitled to

¹⁹³ ECJ judgment of 13 December 2001, C-481/99 - *Georg Heininger and Helga Heininger v. Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-09945.

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withdraw. If one applies the rule developed by the ECJ in the *Heininger* decision, the consumer also has an eternal right to withdraw under this Directive, as long as the necessary information is not provided.

The vague and ambiguous rules in the Directive 97/7 have lead to a broad variety of sanctions for breach of information obligations provided for by the member states. The following types of sanctions can be observed:

- Prolongation of withdrawal period along Art. 6(1);
- Injunctions (i.e. in most cases transposition of Directive 98/27);
- Right of competitors to claim for damages;
- Fines under criminal or administrative law;
- Other private law consequences.

This variety makes it rather difficult for suppliers to assess the risk of any non-fulfilment of information obligations. But it should be noted that such an uncertainty need not constitute a barrier to trade. The reason is that law-abiding traders remain totally unaffected. It may even be seen as an advantage when the sanctions for breach of information duties are difficult to predict and calculate. Those suppliers who fulfil the information obligation might benefit even more from the internal market in comparison to their competitors, who do not inform properly, thereby also coming into difficulties because of different sanction regimes in the member states.

aa. Prolongation of withdrawal period along Art. 6(1)

Article 6(1), sent. 4 of the Directive provides that if the supplier has failed to fulfil the information obligations laid down in Art. 5, the period shall be three months. The period shall begin:

- in the case of goods, from the day of receipt by the consumer;
- in the case of services, from the day of the conclusion of the contract.

Additionally, Art. 6(1), sent. 5 of Directive 97/7 provides that, if the information is supplied within the three month period, the seven working day period shall begin as from that moment.

Prolongation of withdrawal period	Member States
As in the Directive	AT, BE, DK, EE, ES, FR ¹⁹⁴ , HU, IE, LU, MT, PL, PT, SK, SL (14)
Variations	BG, CY, CZ, DE, EL, FI, IT, LT, LV, NL, RO, SE, UK (13)
Not transposed	(0)

Some member states have varied the length of the additional period. Not very substantially, but, nevertheless, in breach of the Directive are the LATVIAN, ITALIAN and the ROMANIAN transposition laws which prescribe a period of 90 calendar days instead of three months. Other member states have provided for a longer additional period. This can be observed e.g. for GERMANY¹⁹⁵, where the period is generally extended to 6 months in the case that information duties are not fulfilled. However, if the information about the withdrawal right is not given, the consumer is entitled to withdraw forever. In case this confirmation is given later, the consumer has a prolonged withdrawal period of one month. Instead of extending the withdrawal period, FINLAND¹⁹⁶ has stipulated that, if there is no confirmation at all, the contract is not binding upon the consumer. However, the consumer must inform the supplier within one year from the conclusion of the contract if he wants to claim that the contract is not binding. If the supplier provides the consumer with confirmation before he claims that the contract is not binding, the ordinary (14 days) withdrawal period begins. In case that confirmation is given, but does not fulfil all requirements, the withdrawal period is three months; if confirmation is corrected during that period, the ordinary (14 days) withdrawal period begins. In SWEDEN, the consumer has a withdrawal period of one year if the supplier fails to provide the information foreseen in Art. 5(1), sent. 2 of the Directive. When the failure concerns other information, the withdrawal period is just extended to three months. Also, GREECE has a rather elaborate system of sanctions in case of lack of confirmation. In general, the contract is avoidable, if confirmation is lacking or incorrect. The supplier can only escape the avoidance if he provides the information within a three month period. If the supplier fails to provide the information within this three month period, the consumer is entitled to avoid the contract without any time limit.

¹⁹⁴ In FRANCE, the prolongation rule is as in the Directive, Code de la Consommation, Art. L. 121-20 (although the ordinary withdrawal period is just 7 days and, therefore, too short).

¹⁹⁵ CC § 355.

¹⁹⁶ Sections 15(2) and (3), sec. 20 of the Consumer Protection Act.

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Some member states have varied the beginning of the three month period slightly. These are, e.g. LITHUANIA (start of period – also for goods – from the day of conclusion of contract), the CZECH REPUBLIC (start of period for both goods and services from the day of “receipt of contracted performance”) or CYPRUS and the UNITED KINGDOM (“the day after the day on which the contract is concluded”). The NETHERLANDS do not seem to have provided a rule on the beginning of the additional period at all. Furthermore, BULGARIA transposed Art. 6(3) of the Directive as being binding to the parties.

bb. Injunctions

It goes without saying that – originally because of Art. 11(2) of Directive 97/7, now on the basis of Directive 98/27¹⁹⁷ – compliance with information obligations can be enforced by injunction proceedings in all member states.¹⁹⁸

cc. Right of competitors to claim for damages

In some member states, e.g. AUSTRIA, BELGIUM, GERMANY, HUNGARY or ROMANIA,, competitors may also claim for damages against suppliers who breach information obligations and thereby achieve an unlawful advantage over the law-abiding market participants. For example, recently, GERMAN law has also allowed the siphoning of profits made from unfair marketing practices. However, the practical relevance of such instruments seems to be very limited until now.

dd. Fines under criminal or administrative law

Most of the member states, such as BULGARIA, DENMARK, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LATVIA, MALTA, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA

¹⁹⁷ It may be noteworthy that the scope of application of these instruments may differ. In the UNITED KINGDOM, for example, under Reg. 27 of the Consumer Protection (Distance Selling) Regulations 2000, what matters is that there has been a breach – it is irrelevant whether this harms the collective interests of consumers. It is therefore more readily available than the kind of injunction one would seek under the Enterprise Act, which implements the Injunctions Directive (amongst other things) and under which the breach has to harm the “collective interests” of consumers.

¹⁹⁸ For more detail, see Part 2.G.

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and SWEDEN, have stated administrative sanctions. Suppliers who fail to provide the information are guilty of an offence and can be sanctioned with a fine.

ee. Other private law consequences

It is difficult to assess to what extent member states foresee the consequences of the infringement of information obligations in general private law. There are not many examples where this is stated expressly in the law. For instance, in IRELAND, a contract is not enforceable against the consumer if the supplier fails to provide the prior information.¹⁹⁹ The same seems to be the case in MALTA and CYPRUS. In BELGIAN law, the omission to insert the prescribed withdrawal clause into the written document is sanctioned on the basis of Art. 79(1)(2) of the Trade Practices Act. According to this provision, the product is deemed to be delivered without the prior request of the consumer as a consequence of which, the consumer is neither required to pay the price nor send the product back to the seller. Likewise in ROMANIA where, explicitly, the provisions on inertia selling apply.²⁰⁰ Moreover, under BELGIAN law, the consumer has right of withdrawal if the information on the non-existence of the right of withdrawal is not provided. FINLAND also offers the consumer assistance by the Consumer Ombudsman in individual cases.

Besides such express regulations on other sanctions of infringement of information duties, it is more than probable in most member states the general rules on pre-contractual obligations, on breach of contract or on tort may lead to individual rights or claims of consumers such as right of avoidance from a contract or a claim for damages. This depends very much on the concrete nature of the violated information obligation, the availability of remedies under the general law of obligations, the question of whether a breach of information obligations amounts to a breach of contract under the respective system and whether such a breach leads to concrete damage or disadvantage to the consumer. The possible constellations are so manifold that general conclusions can hardly be drawn.²⁰¹ However, it has to be kept carefully in mind that information obligations heavily interfere with the general remedies under private law available in the member states. Therefore, any full harmonisation of the sanctions of non-

¹⁹⁹ Article 4(1) of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.

²⁰⁰ Article 4(1)(b) of the Ordinance on consumers' protection regarding the conclusion and performance of distance selling contracts.

²⁰¹ Cf. *Howells/Wilhelmsson*, EC Consumer Law, 182.

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fulfilment of information duties would massively intervene into member states' private laws. Under BULGARIAN law the consumer can claim for damages under the general rules of remedies for pre-contractual liability.

2. Right of withdrawal

a. Exceptions to the right of withdrawal

aa. Exception to the right of withdrawal if performance of services has begun before the end of the seven working day period (Art. 6(3) 1st indent)

Exemption (Art. 6(3) 1st indent)	Member States
As in the Directive	AT, BE, CY, CZ, DE, DK, EE, ES, FR, HU, IE, IT, LU, MT, NL, PL, PT, RO, SE, SK (20)
Not transposed	EL, LT, SL (3)
Variations	BG, FI, LV, UK (4)

Most member states have transposed the exception to the right of withdrawal if performance of services has begun before the end of the seven working day period, as stated in Art. 6(3) 1st indent of Directive 97/7. This can be observed for AUSTRIA, BELGIUM, CYPRUS, the CZECH REPUBLIC, DENMARK, ESTONIA, FRANCE, GERMANY, HUNGARY, IRELAND, ITALY, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SPAIN and SWEDEN. However, GREECE, LITHUANIA and SLOVENIA have not transposed this exception. Some countries have implemented provisions differing from the Directive. FINLAND, LATVIA and the UNITED KINGDOM have supplemented this exemption with a provision which obliges the supplier to inform the consumer that he will not be able to withdraw from the contract if performance of the service has begun. In FINLAND, this information must be given in the confirmation of the information, while in LATVIA and the UNITED KINGDOM, this is to happen prior to the conclusion of the contract. In BELGIUM, the consumer is granted a right of withdrawal if the supplier has not informed him of the absence of the right of withdrawal. BULGARIA transposed this article as being binding to the parties. Therefore, a variation to the Directive exists.

bb. Exception to the right of withdrawal in the case of goods or services, the price of which is dependent on fluctuations in the financial market (Art. 6(3) 2nd indent)

Exemption (Art. 6(3) 2 nd indent)	Member States
As in the Directive	AT, BE* (LPA), CY, CZ, DK, FI, IE, IT, LU, MT, NL, PT, RO, SE, SK, SL, UK (17)
Not transposed	EE, EL, LT (3)
Variations	BE* (TPA), BG, DE, ES, FR, HU, LV, PL (8)

* *more than once*

17 member states have transposed this exception. Only in ESTONIA, GREECE and LITHUANIA, there is no provision corresponding to Art. 6(3) 2nd indent of Directive 97/7. It cannot be assessed how these legal systems organise the unravelling of such contracts. In BELGIUM, only the Liberal Professions Act contains this exemption expressly.²⁰² The Trade Practices Act however does not apply to stocks²⁰³, so that the exemption in this Act is also partly used. GERMANY and SLOVENIA have given some examples of goods and services which fall under this exception. In LATVIA, the supplier has to inform the consumer about the absence of a right of withdrawal prior to the conclusion of the contract. FRANCE and POLAND have omitted the clause “which cannot be controlled by the supplier”. HUNGARY has implemented a clause stating that goods or services are exempted where the price cannot be “controlled” by the supplier and BULGARIA uses the expression “beyond the control of the supplier”. Such variations seem to be more a difference in the wording than in the substance. However, in Bulgaria this exception is made binding to the parties. SPANISH law does not refer to services and thereby consequently has limited the exception to goods. In the case of services the position of the consumer is therefore better as foreseen in the Directive, as he is granted a right of withdrawal.

²⁰² Article 14(3) No. 2 of the LPA.

²⁰³ Article 1 of the TPA.

cc. Exception to the right of withdrawal in the case of goods made to the consumer's specifications etc. (Art. 6(3) 3rd indent)

Exemption (Art. 6(3) 3rd indent)	Member States
As in the Directive	AT, BE, CY, DE, ES, FR, HU, IE, IT, LU, MT, NL, PT, RO, SL, UK (<i>16</i>)
Not transposed	EE, EL, LT (<i>3</i>)
Variations	BG, CZ, DK, FI, LV, PL, SE, SK (<i>8</i>)

Once again, most member states have transposed the exception referring to all five alternatives mentioned in the Directive, i.e.:

- goods made to the consumer's specifications;
- goods clearly personalised;
- goods which, by reason of their nature, cannot be returned;
- goods which are liable to deteriorate;
- goods which expire rapidly.

Only ESTONIA, GREECE and LITHUANIA have not implemented any provisions transposing the exception to the right of withdrawal in the case of goods made to the consumer's specifications etc.

For a more detailed illustration of the variations with regard to the different alternatives stated in Art. 6(3) 3rd indent of Directive 97/7, please refer to the table below.

N^o	Alternative of exemption (Art. 6(3) 3rd indent)	A	B	B	C	C	D	D	E	E	E	F	F	H	I	I	L	L	L	M	N	P	R	P	S	S	S	U		
1	consumer's specifications	X	X	X	X	X	X	-	-	-	X	X	X	X	X	X	-	X	X	X	X	X	X	X	X	X	X	-	X	
2	clearly personalised	X	X	X	X	X	X	X	-	-	X	-	X	X	X	X	-	X	-	X	X	X	X	X	X	X	X	X	-	X
3	cannot be returned	X	X	X	X	-	X	X	-	-	X	X	X	X	X	X	-	X	X	X	X	X	X	X	X	X	X	X	X	
4	liable to deteriorate	X	X	X	X	X	X	X	-	-	X	X	X	X	X	X	-	X	X	X	X	X	X	X	X	X	X	X	X	
5	expire rapidly	X	X	X	X	X	X	X	-	-	X	X	X	X	X	X	-	X	-	X	X	-	X	X	-	X	X	X		

The table shows that some countries have not implemented all alternatives regulated in the Directive. DANISH and SWEDISH law does not mention the alternative No. 1 (consumer's specification). However, in Denmark, the parties can agree that the supplier may initiate the

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production of the good before the expiration of the withdrawal period, in which case, the right of withdrawal also expires at the same date the production of the good is initiated.²⁰⁴ FINLAND, LATVIA and SWEDEN have not transposed the alternative No. 2 (clearly personalised). The CZECH transposition law does not refer to products which, by reason of their nature, cannot be returned (No. 3). Latvian, POLISH and SLOVAKIAN law does not mention the criteria “expire rapidly” (No. 5). Latvia instead exempts products which can be “quickly utilised”, which is somewhat different to “expire rapidly” and, therefore, may be an infringement of the Directive.

FINLAND²⁰⁵ has clarified alternative No. 1 by exempting “goods manufactured to the consumer’s specifications so that they cannot be resold without incurring considerable loss or that they cannot be resold at all” and thereby perhaps slightly enhancing consumer protection. Some member states have regulated additional criteria.

The practical relevance of this exemption is illustrated by some case-law of national courts. For instance, the GERMAN Federal Court of Justice stated that the consumer’s right of withdrawal is not exempted if the product (in this case a laptop which has been constructed out of prefabricated standard units according to the consumer’s wishes²⁰⁶) can be disassembled with minor effort and without interference to its (the standard unit’s) functional capability.²⁰⁷ The court held that the exemption only covers products which are personalised in a way that they can only be sold to other consumers with a significant reduction of price. CA Brussels judged that plants, flowers, fruit trees and similar products – as a general rule - cannot be considered products that age or deteriorate easily.²⁰⁸ Consequently, the withdrawal period provided for by the Act of 14 July 1991 (Trade Practices Act) applies to these products.

Additionally, BULGARIA transposed this provision as being binding to the parties. On the other hand, the exception itself is transposed as in the Directive.

²⁰⁴ § 18(6) of the Consumer Contracts Act No. 451/2004.

²⁰⁵ Chapter 6(16)(3) of the Consumer Protection Act of 20.1.1978/38.

²⁰⁶ “Built-to-order-system”.

²⁰⁷ BGH judgment of 19 March 2003, VIII ZR 295/01, NJW 2003, 1665-1667.

²⁰⁸ CA Brussels judgment of 21 January 1999; *P. Bakker Hillegom vs. Ets. Gonthier*.

dd. Exception to the right of withdrawal with respect to audio or video recordings, or computer software (Art. 6(3) 4th indent)

Exemption (Art. 6(3) 4th indent)	Member States
As in the Directive	AT, BE, BG, CY, DE, DK, FI, FR, HU, IE, LT, MT, NL, RO, SE, SK, SL, UK (<i>18</i>)
Not transposed	EE, EL (<i>2</i>)
Variations	CZ, ES, IT, LU, LV, PL, PT (<i>7</i>)

Most member states have transposed this exemption, namely AUSTRIA, BELGIUM, BULGARIA, CYPRUS, DENMARK, FRANCE, GERMANY, HUNGARY, IRELAND, LITHUANIA, MALTA, the NETHERLANDS, ROMANIA, SLOVAKIA, SLOVENIA, SWEDEN and the UNITED KINGDOM. However, ESTONIA and GREECE have not incorporated this exemption into their laws. ITALY exempts sealed audiovisual products and software, opened by the consumer.²⁰⁹ Some variation can be observed with regard to the term “which were unsealed by the consumer”: LATVIA (“the consumer opened the packaging”²¹⁰) and POLAND (“the consumer has removed the original packaging”²¹¹) refer to the packaging, which at least comes close to the Directive. Also the CZECH transposition law (“if the consumer damages the original packing”²¹²) may perhaps be interpreted in the same sense. In PORTUGAL, the consumer may not withdraw from the contract if he or she removes a certain kind of seal (“selo de garantia de inviolabilidade”²¹³), which may just be seen as a clarification of the function of the seal referred to in the Directive.

Some member states have broadened the exemption regulated in Art. 6(3) 4th indent of the Directive 97/7. LUXEMBOURG, for example, also exempts software that has been downloaded by the consumer.²¹⁴ This is more or less the same in SPAIN, where electronic files supplied via electronic means, able to be downloaded or reproduced immediately to be used permanently,

²⁰⁹ Article 55(2)(d) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.

²¹⁰ Article 15(4) of the Cabinet Regulation No. 207 “Regulations Regarding Distance Contracts”.

²¹¹ Article 10(3)(2) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

²¹² § 53(7)(d) of the CC.

²¹³ Article 7(d) of the Decree-Law 143/2001 of April 26.

²¹⁴ Article 5(4)(d) of the Distance Contracts Act of 16 April 2003.

are exempted from the withdrawal right.²¹⁵ It could be argued that Art. 6(3) 4th indent of the Directive only allows the member states to exempt audio or video recordings and software which is sold on a physical data medium and consequently requires that a consumer who buys audio, video etc. data to be downloaded, must have a withdrawal right. If this is true, the LUXEMBOURGIAN and the SPANISH law would infringe the Directive. This may be a point for clarification by the legislator.

ee. Exception to the right of withdrawal with respect to newspapers, periodicals and magazines (Art. 6(3) 5th indent)

Exemption (Art. 6(3) 5th indent)	Member States
As in the Directive	BE, BG, CZ, DE, ES, FR, HU, IE, IT, LT, LU, LV, MT, NL, RO, SK, SL, UK (<i>18</i>)
Not transposed	DK, EE, EL (<i>3</i>)
Variations	AT, CY, FI, PL, PT, SE (<i>6</i>)

Most member states have transposed the exemption stated in Art. 6(3) 5th indent of the Directive 97/7 (cf. the table above). However, DENMARK, ESTONIA and GREECE have not transposed this exemption. Some member states have implemented provisions deviating from the Directive. In AUSTRIA, contracts for the supply of periodicals (“Verträge über periodische Druckschriften” (§ 26(1)(1)) are not exempted from the right of withdrawal. FINLAND only exempts these products if they are not offered by the way of cold calling. CYPRUS grants no right of withdrawal for the supply of newspapers and any form of periodicals. POLAND uses the term “the press”.²¹⁶ In PORTUGAL²¹⁷ and SWEDEN²¹⁸, the legislator only exempted newspapers and magazines, but not periodicals. This may be due to the fact that the two terms “magazine” and “periodical” could be seen as synonyms.

²¹⁵ Article 45 (c) of the Law 7/1996 of January 15 on Retail Trade.

²¹⁶ Article 10(3)(6) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

²¹⁷ The Portuguese version of the Directive is different from the English one, and concerns only “jornais e revistas”.

²¹⁸ The Swedish version of the Directive is different from the English one, and concerns only “tidningar och tidskrifter”.

ff. Exception to the right of withdrawal with respect to gaming and lottery services (Art. 6(3) 6th indent)

Exemption (Art. 6(3) 6th indent)	Member States
As in the Directive	AT, BE, CY, CZ, DE, DK, ES, FI, IE, IT, LT, LU, LV, MT, NL, PT, RO (17)
Not transposed	EE, EL (2)
Variations	BG, FR, HU, PL, SE, SK, SL, UK (8)

Most member states have transposed this exception stated in Art. 6(3) 6th indent of the Directive 97/7 (cf. the table above). Only ESTONIA and GREECE did not transpose the exemption of gaming and lottery services. Some variations of the wording can be observed, e.g. BULGARIA (games of hazard and lotteries), HUNGARY (exempts gaming agreements, which also includes the lottery), POLAND (games and betting), SLOVAKIA (lottery and other similar games), SLOVENIA (games of chance and lottery services) and SWEDEN (gaming or other lottery services). Also the UNITED KINGDOM adds betting to the services which are exempted. A clear difference can be stated for FRANCE, which only makes authorised lotteries exempt.

b. Formal requirements for the exercise of the right of withdrawal

The Directive does not contain an explicit provision allowing the member states to regulate formal requirements for the exercise of the withdrawal right by the consumer. But as Art. 5(1) 1st indent provides, that the consumer is informed about “the conditions and procedures for exercising the right of withdrawal”, it is generally assumed that the member states are free to regulate formal requirements. This understanding is in line with, e.g. Art. 5(1), sent. 1 of the Doorstep Selling Directive, which expressly allows the member states to lay down the rule on the procedure for the exercise of the withdrawal right.

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Nevertheless, most member states have not provided any formal requirements for exercising the right of withdrawal, e.g. the AUSTRIA, BELGIUM²¹⁹, BULGARIA, the CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, FRANCE, HUNGARY, IRELAND, LATVIA, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL²²⁰, ROMANIA, SLOVENIA, SWEDEN and SPAIN. This means that, in these countries, the consumer can withdraw by any means, including a pure oral declaration. Spain has additionally clarified that sending back the goods is to be seen as a withdrawal.

Other member states have regulated that the consumer must use a certain form of communication when he withdraws from the contract. In CYPRUS, LITHUANIA, POLAND and the UNITED KINGDOM the notice of cancellation must be given in writing. The United Kingdom clarifies that writing also includes text on another durable medium. SLOVENIA has legislated to the effect that sending back the goods also constitutes a valid withdrawal. In SLOVAKIA, the parties are free to find an agreement on the formal requirement for exercising the right of withdrawal. If there is no agreement and the contract is concluded in writing, the notice of cancellation must also be in writing. In GERMANY, the consumer has to inform the supplier about his decision to cancel the contract by a notice in ‘text form’ (which also allows text on another durable medium). Furthermore, it is possible to withdraw from the contract by sending back the goods. Similar provisions can be found in GREECE, where the consumer can exercise the right of withdrawal in written form or in another durable medium available and accessible to him.²²¹ The ITALIAN Consumer Code²²² states that the consumer has to send this notice of cancellation in a letter sent by registered mail with return receipt (“*lettera raccomandata con avviso di ricevimento*”) and it has to be signed by the person who concluded the contract or drafted the proposal. It can also be sent by telegram, telex, fax and e-mail within the period, but it must be confirmed by a letter sent by recorded delivery within the following 48 hours. The presentation of the return receipt (“*avviso di ricevimento*”), however, is not an essential condition for proving the exercise of the right of withdrawal (Art. 64(2), sent. 3 of the Italian Consumer Code).

²¹⁹ Although the TPA and the LPA lay down no specific requirements, the consumer needs to prove the withdrawal. To avoid all discussions the withdrawal should be proven in writing, so that the burden of proof necessitates a withdrawal in writing.

²²⁰ Article 6(5) of the Decree-Law 143/2001 of April 26 clarifies that a registered letter addressed to the supplier or person for this purpose appointed is to be seen as the exercise of the right of withdrawal. This does not seem to be an obligatory requirement.

²²¹ Article 4(10) of the Consumer Protection Act 2251/94.

²²² Article 64(2) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.

Table: formal requirements

	A	B	B	C	C	D	D	E	E	E	F	F	H	I	I	L	L	L	M	N	P	P	R	S	S	S	U
	T	E	G	Y	Z	E	K	E	L	S	I	R	U	E	T	T	U	V	T	L	L	T	O	K	L	E	K
none	X	X	X		X		X	X		X	X	X	X	X		X	X	X	X		X	X		X	X		
Written				X					X						X						X			X			X
Text form						X			X																		
Return of goods						X					X														X		
Registered letter														X													

c. Withdrawal period

aa. Length of period

The Directive provides a period of seven working days. Legal literature has remained somewhat unclear as to whether a Saturday counts as a ‘working day’. It should be noted that this issue has already been clarified long ago in the Regulation 1182/71 determining the rules applicable to periods, dates and time limits. Article 2(2) of this Regulation expressly defines ‘working days’ as all days other than public holidays, Sundays and Saturdays. Furthermore, this Regulation contains many provisions on the calculation of periods, which are also applicable for the withdrawal period to be granted by the member states under Directive 97/7. One important example may be the rule in Art. 3(4) which provides that, where the last day of the period is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day.²²³

Some member states, e.g. AUSTRIA, BELGIUM²²⁴, BULGARIA, IRELAND, LITHUANIA, LUXEMBOURG, the NETHERLANDS, SLOVAKIA, SPAIN and the UNITED KINGDOM have adopted the 7 working days period. It cannot be assessed, whether ‘working day’ has the same meaning in all these countries as defined in the Regulation mentioned above, and in

²²³ Equivalent rules can be found, for instance, in FRANCE or GERMANY.

²²⁴ The Trade Practices Act contains the following definition of working day: “all days other than Sundays and public holidays. If a period expressed in working days ends on a Saturday, the period is extended till the next working day” (Art. 1 No. 9 of the Trade Practices Act).

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particular, whether the term excludes Saturdays. But as the term must be interpreted in accordance with the Directive, there should be no infringement, unless a national court comes to a different result.

Many member states have used the minimum clause to prolong the withdrawal period. The period lasts for 8 working days in HUNGARY, 10 working days in GREECE, ITALY and ROMANIA,, 10 (calendar) days in POLAND, 14 (calendar) days in CYPRUS, the CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, LATVIA, PORTUGAL and SWEDEN, two weeks in GERMANY and even 15 (calendar) days in MALTA and SLOVENIA. In Germany, the period is actually one month if the consumer has been informed about his withdrawal right after the conclusion of the contract.²²⁵ Only the FRENCH law seems to be problematic because the consumer has a period of only seven days (“jours francs”) to withdraw from the contract. “Jour franc” is a one-day-period (0h to 24 h). The day of the event, in this case the receipt of the good in case the delivery of goods or the day of the conclusion of the contract in case of provision of services, is not included for the computation of the period. Furthermore, for the computation of the withdrawal period it is irrelevant whether the seven “jours francs” include “jours ouvrables” (working days) or “jours feriés” (Sundays and public holidays). This understanding of the notion “jour franc” is supported by the text of Art. L.120-20 para. 4 Code de la Consommation. According to this provision a Sunday or public holidays are not included in the withdrawal period, only if the period expires on such a day. Therefore, the seven “jours franc” period in France is a breach of EC law.²²⁶

Table: Withdrawal period

Withdrawal Period	Member State
7 calendar days	FR ²²⁷ (I)

²²⁵ Cf. also the Kammergericht Berlin judgment of 18 July 2006, 5 W 156/06 granting the consumer a withdrawal period of one month according to CC § 355(2)(2) in the case of Ebay auctions. The court held that in Ebay actions the supplier can inform the consumer of his right of withdrawal in text form as a rule after the conclusion of the contract because an internet homepage does not fulfil the requirements of CC § 355(2)(1) stipulating information in text form.

²²⁶ An explanation is given by *Franck*, *Les ventes à distance en droit européen : la directive de 1997 sur les contrats à distance et sa transposition en France*, published on the site of the Ministère de l'Économie, des finances et de l'industrie: http://www.minefi.gouv.fr/dgccrf/02_actualite/ateliers_conso/atelier27e.htm. It remains unclear if this is meant seriously: “Le texte communautaire prévoit alors un délai de 7 jours ouvrables, traduits en France, pays travailleur, par 7 jours francs, soit des jours d'une durée de 24 heures, durée journalière légale du travail en France, comme chacun le sait... Plus sérieusement, jours francs et jours ouvrables seraient donc équivalents. La directive est donc bien appliquée.”

²²⁷ 7 “jours francs” according to Code de la Consommation Art. L121-20.

7 working days	AT ²²⁸ , BE, BG, ES ²²⁹ , IE, LT, LU, NL, SK, UK (10)
8 working days	HU (1)
10 working days	EL, IT, RO (3)
10 calendar days	PL (1)
14 calendar days	CY, CZ, DK, EE, FI, LV, PT, SE (8)
Two weeks	DE (1) [one month if information on withdrawal right has been given after conclusion of contract]
15 calendar days	MT, SL (2)

bb. Start of period

(1.) Start of period in case of delivery of goods

Begin in case of delivery of goods (Art. 6(1), sent. 3, 2nd indent)	Member States
As in the Directive	AT, BE* (LPA), BG, CZ, DE, DK, EE, EL, ES, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SK, SL (23)
Not transposed	(0)
Variations	BE* (TPA), CY, FI, UK (4)

* *more than once*

Article 6(1), sent. 3, 1st indent of Directive 97/7 stipulates the start of the withdrawal period in the case of delivery of goods as the day of receipt of goods by the consumer. Most member states have transposed this provision, e.g. AUSTRIA, BELGIUM (LPA), BULGARIA, the CZECH REPUBLIC, DENMARK, ESTONIA, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN and SWEDEN.

²²⁸ Saturday is no working day.

²²⁹ Spanish law contemplates that “the law of the place where the good has been delivered will determine which days are deemed as working days” – Article 44(1) of the Law 7/1996 of January 15 on Retail Trade.

In BELGIUM and CYPRUS, the period begins on the day following the day of receipt of goods. In the UNITED KINGDOM, the period begins with the day on which the contract is concluded but does not end until 7 days after receipt of the goods, starting on the day after receipt.²³⁰ In FINLAND, the period begins after the receipt of confirmation or, if the goods are delivered after confirmation, with the delivery of the goods.²³¹

(2.) Start of period in case of provision of services

Start in case of provision of services (Art. 6(1), sent. 3, 2nd indent)	Member States
As in the Directive	AT, BE* (LPA), BG, DE, DK, EE, FI ²³² , FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SK, SL, UK (22)
Not transposed	ES (1)
Variations	BE* (TPA), CY, CZ, EL, RO (5)

* more than once

Article 6(1), sent. 3, 2nd indent of Directive 97/7 stipulates the start of the withdrawal period in the case of services as, “from the day of conclusion of the contract or from the day on which the obligations laid down in Article 5 were fulfilled if they are fulfilled after conclusion of the contract”. Most member states have transposed this provision (cf. the table above).

Some member states have implemented provisions varying from the Directive. In GREECE, the period begins when the consumer receives the documentation informing him that the contract is concluded. In BELGIUM and CYPRUS, the period begins on the day following the day of the conclusion of the contract if the confirmation has already been provided. CZECH law refers to the “receipt of performance” for the beginning of the withdrawal period in the case of

²³⁰ Regulation 11 Consumer Protection (Distance Selling) Regulations 2000.

²³¹ Chapter 6(15) of the Consumer Protection Act 20.1.1978/38.

²³² According to preparatory works HE 2000/79 vp, in the case of services, where there is no need to provide confirmation pursuant to CPA 5:14, the withdrawal period begins from the entry of contract.

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provision of services.²³³ In SPAIN, the final indent of the Directive's rule²³⁴ has not been transposed, whereas in ROMANIA the law refers to 90 days instead of three months.

cc. Postal rule / dispatching rule

Contrary to the Doorstep Selling Directive or the Financial Services Directive 2002/65²³⁵, which both contain an explicit dispatching rule, Directive 97/7 does not contain any provision specifying how the consumer can exercise the right of withdrawal on time. Nevertheless, some member states have implemented provisions on this. AUSTRIA²³⁶, BELGIUM²³⁷, GERMANY²³⁸, ITALY²³⁹ and SLOVENIA²⁴⁰ and have stated a dispatching rule. In CYPRUS²⁴¹, LATVIA²⁴² and the UNITED KINGDOM²⁴³, the transposition law contains a postal rule which states that the notice of withdrawal sent by post shall be deemed to have been served at the time of posting, whether it has been received or not. This point could be clarified when reviewing the Directive, also with regard to the question whether such a rule purely ensures the timeliness of the withdrawal (e.g. in Germany) or whether it even makes a withdrawal valid in the case that the declaration never reached the supplier (e.g. because the letter got lost after being dispatched) e.g. in Cyprus.

d. Effects of withdrawal

With regard to the effects of withdrawal, the Directive provides at least some basis principles in Art. 6(1) and (2):

- The consumer must be able to withdraw without any penalty.

²³³ CC § 53(6).

²³⁴ "Provided that this period does not exceed the three-month period referred to in the following subparagraph".

²³⁵ In GREECE, Art 4a(6)(c)(γ) of the Consumer Protection Act 2251/1994 (transposing the dispatching rule of Directive 2002/65) is also applied for regular distance contracts.

²³⁶ § 5e(1), sent. 2 of the Consumer Protection Act.

²³⁷ Article 80(2) of the Act of 14 July 1991 on trade practices and consumer information and protection.

²³⁸ CC § 355(1), sent. 2.

²³⁹ "The notice of withdrawal by recorded delivery letter shall be understood to have been sent in good time if delivered to a post office accepting the delivery by no later than the term provided for by the Code."cf. Art. 64(2) of the Legislative Decree of 6 September 2005, No. 206 "Consumer Code".

²⁴⁰ Article 43ž(1) of the Consumer Protection Act.

²⁴¹ Article 7(5) of the Law on the Conclusion of Consumer Distance Contracts of 2000.

²⁴² Civil Law Rrt. 1537.

²⁴³ Regulation 10(4)(b) of the Consumer Protection (Distance Selling) Regulations 2000.

- The supplier shall be obliged to reimburse the sums paid by the consumer free of charge; reimbursement must be carried out as soon as possible and in any case within 30 days.
- The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

The obligation to reimburse, free of charge, the sums already paid by the consumer has been transposed in all member states. With regard to the deadline of 30 days at the latest to reimburse the sums, some member states have adopted even stricter rules, e.g. CYPRUS, where the supplier has to reimburse the sum immediately²⁴⁴, or LITHUANIA, SLOVAKIA and SLOVENIA, where sums have to be reimbursed within 15 days.²⁴⁵ GERMANY has indirectly transposed Art. 6(2) of the Directive. The obligation to reimburse the sums paid has to be fulfilled within 30 days according to CC § 286(3) in conjunction with § 357(1), sent. 2 and 3. If the trader is late in reimbursing the sums already paid, the Slovenian and SPANISH legislators have adopted special sanctions to enforce the Directive's provisions. Spain has established the right of the consumer to claim for double the sum when it has not been paid in that period of time. Slovenian law obliges the trader to pay, in addition to the legal interest on arrears, an additional ten percent of the total value for every 30 days of delay with reimbursement.

With regard to the reciprocal obligation that the consumer has to return the goods received, some member states have specified a time limit for the return. For instance, ITALIAN law obliges the consumer to return the goods within 10 days, if they have already been delivered; SLOVENIAN law stipulates a period 15 of days (Consumer Protection Act, Art. 43d(1) and (2)). In PORTUGAL, after having exercised the right of withdrawal, the consumer must keep the goods, so that he can return them to the supplier or person for this purpose appointed, in good conditions of utilisation.²⁴⁶ The consumer is obliged to store the products received by the supplier, to keep their quality and safety during the withdrawal period in BULGARIA.²⁴⁷ Furthermore, the consumer is not obliged to pay a fine or damages. The supplier is obliged to return money paid by the consumer within 30 days.

²⁴⁴ Article 11(1) of the Law on the Conclusion of Consumer Distance Contracts of 2000.

²⁴⁵ LITHUANIA: Art. 18(6) of the Law on Consumer Protection; CC Art. 6.367(7); SLOVAKIA: § 12(4)(b) of the Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling; SLOVENIA: Art. 43d of the Consumer Protection Act: "as soon as possible and not later than 15 days".

²⁴⁶ Article 8(2) of the Decree-Law 143/2001 of April 26.

²⁴⁷ Article 55(7) of the Law on Consumer Protection.

According to Art. 6(2) of Directive 97/7, only the costs of returning the goods can be charged to the consumer. Most member states have used this option allowing the trader to charge the costs to the consumer, some with variations. For instance, in AUSTRIA²⁴⁸ and ITALY²⁴⁹, the consumer may be obliged to pay the costs for the return of goods, if this has been agreed by the parties. The BELGIAN legislator has limited this possibility, as the consumer may not be charged for the direct cost of returning the products when (1) the product or service did not match the offer, or (2) the seller did not fulfil his information duties.²⁵⁰ The POLISH provision is unclear. However, Art. 12(3) and (4)²⁵¹, referring to cases where alternative goods or services were provided, stipulate that in such cases the costs of the return of the goods ought to be borne by the trader. One could, therefore, assume that in other cases such costs are to be borne by the consumer. In FINLAND, the supplier even has to compensate the consumer for the costs of returning the goods or other performances if goods and performances can be returned normally by post (6:17 CPA).

However, in LITHUANIA, the legislator seems not to have transposed the limitation that the only charge that may be made to the consumer is the direct cost of returning the goods. Therefore, theoretically, the consumer may be charged with additional costs, too.

Some member states have stipulated express rules on additional costs, in particular if the consumer has made use of the goods or cannot return the acquired goods in their original state. For instance, in AUSTRIA²⁵² and GERMANY, under certain conditions, the consumer has to pay compensation for the use of the good, mainly in case of depreciation in value (KSchG § 5g(1)(2)) or even in German law, according to CC § 357(1), sent. 1, § 346(1), § 347, for any benefits he has gained as well as, in some cases, benefits he has not gained but should have gained. This obligation is in turn restricted by imposing the duty on the seller to inform the consumer about this possible consequence at the latest by the time of the conclusion of the

²⁴⁸ § 5g(2) of the Consumer Protection Act.

²⁴⁹ Article 67(3) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.

²⁵⁰ Article 81 § 3 TPA. This is an exception to the rule of Art. 80 § 1 TPA. The Liberal Professions Act does not contain similar exceptions.

²⁵¹ Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

²⁵² See the OGH judgment of 27 September 2005, 1 Ob 110/05s, charging a consumer, who had used the purchase item (a monitor) for many hours and far in excess of the time one might reasonably take for a product trial, leading to wear and tear and a reduction in the item’s value, a compensation for the use of the monitor.

contract (CC § 357(3)). In HUNGARY, the consumer has to compensate the seller if he caused damage due to the improper use of the good (Art. 4(5) of the Government Decree 17/1999 on Distance Contracting). The CYPRIOT and ITALIAN legislators saddle the consumer with the obligation to take good care of the goods while in his possession (Art. 67(2) of the Consumer Code; Art. 7(6) of the Law for the Conclusion of Consumer Distance Contracts of 2000). In GREECE, the same rule applies during the period of withdrawal, whereas the consumer is obliged to take any necessary measures to keep the product in good repair.

One could perhaps say that such obligations are not imposed on the consumer “because of the exercise of his right of withdrawal” and therefore do not infringe the Directive. Nevertheless, it has been criticised that such provisions possibly do not all conform with Art. 6(2) of the Directive 97/7.²⁵³

e. Cancellation of credit agreement

Article 6(4) of Directive 97/7 calls on the member states to regulate the automatic and immediate cancellation of a credit agreement if the credit is either granted by the supplier or by a third party on the basis of an agreement between the third party and the supplier, and in case that the consumer exercises his right to withdraw from the credit financed main contract. As the Directive requires detailed provisions on that question the countries are given leeway, so that a huge variety in regard to the implementation into national law can be found.

All member states except SLOVENIA have implemented provisions transposing Art. 6(4) of the Directive 97/7. LUXEMBOURG and MALTA transposed the mentioned article literally using the copy and paste technique. Other member states like FINLAND, GREECE (referring to general civil law provision for the cancellation), LITHUANIA (“without any additional commitments on the side of the consumer”²⁵⁴), PORTUGAL (“automatically and simultaneously”) and SPAIN²⁵⁵ have implemented variations but these differences seem to be deviations of the wording, but not of the substance.

²⁵³ With regard to German law: *Wendehorst*, in: *Münchener Kommentar zum BGB*⁴, Band 2a, München 2003, § 312d Rn. 10-11.

²⁵⁴ Article 18(5) of the Law on consumer protection.

²⁵⁵ Article 44(7) of the Law 7/1996 of January 15 on retail trade.

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Whereas in most countries the credit contract is automatically cancelled when withdrawing from the distance contract, in some member states like ESTONIA²⁵⁶, LATVIA and the NETHERLANDS the consumer has to withdraw from both agreements, the distance contract and the credit agreement. In BELGIUM, two kinds of solutions can be seen, whereas the credit agreement is automatically cancelled, without any charges or damages for the consumer, in the Liberal Professions Act, the consumer has a right of withdrawal according to the Trade Practices Act.²⁵⁷

AUSTRIAN, ESTONIAN and GERMAN law requires, additionally, the credit contract to be regarded as economically linked with the distance contract. This is e.g. in ESTONIA the case if the third party used the assistance of the supplier in the preparation of or entry into the contract.²⁵⁸

HUNGARY, ITALY and the UNITED KINGDOM state a duty of the supplier to inform the creditor that the consumer has withdrawn from the distance contract.

Most other member states seem to refer to their general civil law for the reimbursement of the money already paid. Some member states have fixed the period for the reimbursement of the money already paid to the supplier or creditor. In LATVIA, the supplier has to reimburse the amount of money, together with interest, that has been paid for the goods or services up to the moment of revocation of the contract²⁵⁹ within a period of seven days. In FINLAND and IRELAND, the money has to be repaid “without delay and in any time within 30 days after being informed of the withdrawal of the distance contract”.

²⁵⁶ § 51 of the Law of Obligations Act.

²⁵⁷ Article 81(4) of the TPA read in conjunction with Art. 20 bis of the Consumer Credit Act.

²⁵⁸ § 51 of the Law of Obligations Act.

²⁵⁹ Article 31 of the Consumer Rights Protection Law.

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The Directive states that the credit agreement shall be cancelled without penalty. Most of the member states have transposed this provision, e.g. BELGIUM, ESTONIA, GREECE, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL and ROMANIA. POLISH and SLOVAKIAN law have left out the terms “without penalty”²⁶⁰, whereas BULGARIA replaced the notion by ensuring that the consumer is not liable for any damages or compensation.

In some member states, e.g. IRELAND, the consumer can be obliged to pay interest and other costs if agreed in the contract. In HUNGARY, claims regarding costs and interest from the consumer are expressly excluded.²⁶¹ However, damage related to the conclusion of the contract may be demanded. In AUSTRIA, the consumer can be made to bear the costs of an eventual necessary notarisation of signature and compensation for the discharged expenses of the supplier or third party due to the grant of credit, but solely under the condition that the parties have agreed this. Claims regarding other costs or interest are expressly excluded. In CYPRUS, if prior to the reimbursement, any period of time elapsed from the date that the renunciation notice was granted, the supplier or the consumer shall be liable to pay the interest that has accrued on the sum paid. In the UNITED KINGDOM, no charges can be put on the consumer. Nevertheless, a special rule concerning interest exists. Only if the whole or a portion of the credit is repaid, either before the expiry of one month following the cancellation of the credit agreement, or in the case of a credit repayable by instalments before the date on which the first instalment is due, shall no interest be payable on the amount repaid.

3. Performance

a. Obligation to execute the order within a maximum of 30 days

According to Art. 7(1) of Directive 97/7, the supplier is obliged to execute the order of the consumer within 30 days from the day following the day of the order, unless the parties have agreed otherwise. This provision is incomplete, because it is obvious from para. 2 of the same Article, that the supplier is by no means obliged to accept the order. Therefore, Art. 7(1) must be read in the sense that this obligation only comes into force if the contract is concluded.

²⁶⁰ Article 13(2) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

²⁶¹ Article 6(2) of the Government Decree No. 17/1999. (II.5.) on Distance Contracting.

Hence, it is a useful clarification, if, for instance, AUSTRIAN law expressly states that the obligation to perform the contract within 30 days does not arise if the supplier does not accept the offer. This will also be the case in most other member states.

The provisions of Art. 7(1) have been transposed by most of the member states, e.g. AUSTRIA, BELGIUM, BULGARIA, CYPRUS, DENMARK, ESTONIA, FRANCE, GREECE, ITALY, IRELAND, LUXEMBOURG, MALTA, PORTUGAL, ROMANIA, SLOVAKIA²⁶², SPAIN, SWEDEN and the UNITED KINGDOM.

In FINLAND, HUNGARY²⁶³, LATVIA, LITHUANIA, POLAND and SLOVENIA, the period of 30 days seemingly starts to run from the date of the conclusion of the contract. It cannot be assessed whether this is earlier than required by the Directive, because the general rules on computation of time in some of these countries might contain a rule similar to Art. 3(1), sent. 2 of the Regulation 1182/71. This rule reads that, where a period expressed in days is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question. GREECE refers to the receipt of the consumer's order by the supplier which is later than foreseen in the directive.

In GERMANY, Art. 7(1) is not transposed expressly since in German general contract law there is a regulation stipulating that the contract must be performed immediately save for unforeseen circumstances or separate agreement of the parties. Moreover, the German regulations on standard terms and conditions would prohibit setting an excessively long or inadequate period in standard terms. This is more favourable to the consumer than the provision foreseen in the Directive. DUTCH law stipulates that the supplier is in default if the contract is not performed within 30 days. The period begins on the day of the order, and not the day after the order. In the CZECH REPUBLIC, there is no period of 30 days, but the contract must be performed within an adequate period.

As in the Directive	AT, BE, BG, CY, DK, EE, EL, ES, FR, IE,
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²⁶² § 13(1) and (2) of Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling (as amended by Act No. 118/2006 Z.z. (date of coming into force 1 April 2006).

²⁶³ According to Article 7(1) of the Government Decree, the supplier is obliged to execute the order of the consumer within 30 days from the day following the day of the order, unless the parties have agreed otherwise.

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	IT, LU, MT, PT, RO, SE, SK, UK (18)
Period starts on day of conclusion of the contract	FI, HU, LT, LV, NL, PL, SL (7)
No express period of 30 days	CZ (adequate period), DE (immediately) (2)

b. Obligation of supplier to inform and refund in case of unavailability of the goods or services ordered (Art. 7 (2))

According to Art. 7(2) of Directive 97/7, in the case that the ordered goods or services cannot be delivered because they are not available, the supplier is obliged to inform the consumer and must refund any sums already paid by the consumer as soon as possible, and in any case within 30 days.

Article 7(2) has been transposed as stated in the Directive by BULGARIA, CYPRUS, ESTONIA, FRANCE, HUNGARY, IRELAND, LATVIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL, ROMANIA, SPAIN and the UNITED KINGDOM. In the United Kingdom²⁶⁴, however, a refund does not have to be paid if the contract relates to an outdoor leisure event, which by its nature cannot be rescheduled, and if the parties concur (cf. Art. 3(2) 2nd indent of the Directive). This is rather similar in Cyprus and Portugal²⁶⁵, whereas Poland has even extended this exception for other cases. In FINLAND, the period in which the supplier must provide a refund is different in cases where the parties have agreed to a later time of delivery or performance of the contract.

The SLOVAKIAN and SLOVENIAN²⁶⁶ regulations stipulate a period of 15 days for the supplier to refund the money already paid by the consumer. In CYPRUS, the supplier must refund as soon as possible but not later than 14 days.

Some member states have supplemented the transposition of this article by more detailed provisions which relate the issue to general contract law. For instance, DENMARK and SWEDEN have clarified that the consumer has the right to cancel the contract if the supplier

²⁶⁴ Regulation 19(8) of the Consumer Protection Regulations 2000.

²⁶⁵ Article 3(2)(c) of the Decree-Law 143/2001 of April 26.

²⁶⁶ “As soon as possible but not later than 15 days”, but the consumer must be informed of the situation immediately, the 15 days period is relevant only for the refund.

fails to perform the contract in time. The supplier has to inform the consumer about this right and refund the amount already paid as soon as possible and not later than 30 days. In BELGIUM, according to the adage *res perit debitori*, the consumer has the right to be refunded. The rule *res perit creditori* only applies in contracts related to the sale of species goods. However, in most cases, the consumer sales to which this section applies, concerns genus goods, so that mostly the rule *res perit debitori* applies. In FRANCE, the supplier's responsibility is excluded, if he can prove that the failure of performance is due to the consumer, a third person or force majeure.

Other additional rules deal with the consequences of late payment by the supplier. In FRANCE and LUXEMBOURG, there is an express provision that the supplier has to pay legal interest on the sum which has to be returned, if he does not refund the sum within the 30-day period. In SLOVENIA, the supplier has to pay the legal interest of arrears and, additionally, ten percent of the total value of the received payments for every period of 30 days delay. In SPAIN, the consumer can claim double the amount of the sum he has paid to the supplier. It can be assumed that most other member states also provide for such rules on interest or other consequences of delay in their general contract law.

Many member states have only partially transposed Art. 7(2) of the Directive, because they rely on their general contract law in order to reach results which are – in some cases at least partly – in accordance with the Directive. In AUSTRIA, there is no transposition of the duty to refund as soon as possible or at least within 30 days. The obligation to inform the consumer and to refund any sums paid is also applicable, if the supplier does not accept the order of the consumer. In CZECH and GERMAN law, there is no transposition of the duty to inform that the goods are not available and no express rule with regard to the 30 days period, but it follows from general contract law that the consumer can demand the refund of sums already paid if the supplier fails to perform the contract. However, in Germany, such a right of the consumer may depend on the lapse of an “adequate” time limit to be set by the consumer.²⁶⁷ Except in very rare cases, such an adequate period will be much shorter than 30 days. After the period has elapsed, the general rule which states that an obligation must be fulfilled immediately save for unforeseen circumstances or separate agreement of the parties, is applicable. Thus, with regard to the time limit, the results reached under German law will be in accordance with

²⁶⁷ CC § 323(1).

the Directive in the utmost majority of cases. But a crucial difference which can be seen as breach of the Directive, remains. Under German law, the consumer must realise himself that the contract is not going to be performed and then must actively set the adequate time limit in order to avoid the contract and to obtain a refund of any sums paid.

The ITALIAN legislator even goes beyond the provisions of the Directive since the consumer must be informed in writing or via another durable medium. This is also applicable in the case where the promised performance is temporarily unavailable. On the other hand, the supplier has to inform the consumer of the unavailability of the goods and services ordered within 30 days, but there is no express duty to refund the money which has already been paid within 30 days. The GREEK and the LITHUANIAN legislators have not transposed Art. 7(2) of the Directive 97/7. In Greece and Lithuania, the general provisions on impossibility of performance are applicable. According to the Greek Consumer Protection Act 2251/94, Art. 4(7), any payments before the product or service is provided to the consumer are prohibited. The consumer can claim the refund of the already paid sums, if any sums have been paid nevertheless, and in the case of negligence the consumer can, additionally, rescind the contract and claim for damages.

Transposition of Art. 7(2)	Member States
As in the Directive	BE* (LPA), BG, EE, ES, FI ²⁶⁸ , FR, HU, IE, LU, LV, MT, NL, PL, PT, RO, UK ²⁶⁹ (16)
Right to cancel the contract	DK, SE (2)
Shorter period for the refund of sums paid	15 days : SL, SK; 14 days: CY (3)
Express exclusion of responsibility of the supplier for some cases	BE* (TPA), FR (2)
Express obligation to pay interest or higher amount if sum is not refunded within 30 days	ES, FR, LU, SL (4)
Not transposed	CZ, DE, EL, LT (4)
No express maximum period specified for	AT (1)

²⁶⁸ Unless a later time of delivery is agreed.

²⁶⁹ Except outdoor leisure events, cf. text above table.

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refund	
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* more than once

c. Use of option granted in Art. 7(3) of the Distance Selling Directive

For the use of the option granted in Art. 7(3) of Directive 97/7 cf. Part 2.E.IV. 1 of this report.

4. Payment by card

Payment per Card	Member States
As in the Directive	AT, BE, CY, DK, EE, EL, IE, MT, PL, RO, SK, SL, UK (13)
Not transposed	LT, LV (2)
Variations	BG, CZ, DE, ES, FI, FR, IT, NL, PT (9)
Transposition not entirely clear	LU, SE (2)

Most member states seem to have transposed the Directive's provisions on payment by card. In AUSTRIA, BELGIUM²⁷⁰, CYPRUS, DENMARK, ESTONIA, GREECE, IRELAND, MALTA, POLAND, SLOVAKIA, SLOVENIA and the UNITED KINGDOM, the consumer is entitled to cancel payment (in the scope of a distance contract) when fraudulent use of his credit card has occurred.

However, LITHUANIA and LATVIA have not transposed Art. 8 of Directive 97/7, but it cannot be excluded that the general private law rules on fraud apply. In FRANCE, there is no specific provision implementing Art. 8 of the Directive in the Code de la consommation. However, according to general private law, professionals are liable in the case of undue payments in the case of distance payments [“règlements à distance”, not only by credit card]. The liability will be based on the contract.²⁷¹

For some countries variations could be observed. For instance, ITALIAN law has clarified that the consumer has to prove that the payment was made due to the fraudulent use of a credit

²⁷⁰ Article 83novies of the TPA.

²⁷¹ Cf. Réponse ministérielle n° 38375, Journal Officiel de l'Assemblée Nationale, 8 juillet 1996, p. 36750. See also “Délibération de la Commission Nationale de l'Informatique et des Libertés n° 2003-034 » of 19 June 2003 recommending some security measures in case of payments made by credit cards.

card.²⁷² By contrast, in GERMANY²⁷³, the credit institute cannot claim the reimbursement of expenses²⁷⁴ for payments made if the credit card has been used for fraudulent purposes, whereby the credit institute has the burden of proof for the claim. In FINNISH law, the consumer is only liable for the unauthorised use of the credit card if he has given the means of identification to another person, or the passing of the means of identification into the possession of an unauthorised person is due to the negligence of the account holder and this “negligence is not slight”; or the account holder has neglected to notify the creditor without delay.²⁷⁵ AUSTRIA²⁷⁶ and SPAIN have broadened the scope of application by applying not only B2C situations but also other situations where no consumer is involved. DENMARK has clarified that violations of the provisions regarding payment by card are subject to sanctions, including injunctions, by the Consumer Ombudsman in pursuance of the Payment Act. CZECH law contains general provisions on the distance use of electronic payments means which grant the return of money in case of fraudulent use of the electronic payment means.²⁷⁷ In POLAND, the legislator states in case of “improper use of a credit card” the obligation to cancel the transaction (the cost to be borne by the trader) and an obligation to remedy any losses suffered by the consumer.²⁷⁸ According to DUTCH law, natural persons cannot be obliged to pay any amounts resulting from fraudulent use of the credit card except in case of negligence. Additionally, in PORTUGAL, the credit institute is obliged to refund any payment made within a maximum period of 60 days after the demand was made.²⁷⁹ In BULGARIA, the bank has to refund the money paid within 30 days.

In IRELAND, the failure to comply is a criminal offence according to Art. 10 of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication

²⁷² Article 56 of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”. Former Art. 8 Decreto Legislativo 22 maggio 1999, n. 185 “Attuazione della direttiva 97/7/CE relativa alla protezione dei consumatori in materia di contratti a distanza”.

²⁷³ CC § 676(h).

²⁷⁴ The claim of the credit institute against the cardholder is a claim for the reimbursement of expenses.

²⁷⁵ Chapter 7(19) of the Consumer Protection Act of 20.1.1978/38.

²⁷⁶ § 31a of the Consumer Protection Act.

²⁷⁷ § 18 of the Act on Cross-Border Payments No. 124/2002.

²⁷⁸ Article 14 of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

²⁷⁹ Article 10(3) of the Decree-Law 143/2001 of April 26.

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Regulation. The Irish regulation states furthermore that “payment card” includes credit cards, charge cards, debit cards and store cards.²⁸⁰ HUNGARY has also stated criminal law sanctions.

5. Inertia selling

Art. 9 of Directive 97/7 has been amended by Directive 2005/29, which now obliges the member states to “take the measures necessary to exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent, given the prohibition of inertia selling laid down in Directive 2005/29”. Annex I of the Directive contains a list of commercial practices which shall, in all circumstances be regarded as unfair. Annex I No. 29 prohibits inertia selling as an aggressive commercial practice. The impact of this amendment does not seem to be too far reaching as the scope of application of Art. 9 in its old version was not limited to inertia selling in the case of distance contracts but prohibited inertia selling as an unfair commercial practice.²⁸¹ Therefore, it could be considered as abolishing the provisions on inertia selling contained in Directive 97/7.

a. Prohibition of the supply of goods or services to a consumer without their being ordered

Inertia Selling (Art. 9, 1st indent)	Member States
As in the Directive	AT, BE, BG, CY, DK, EL, ES, FR, IT, LT, LU, NL, PT, RO, SE, SK (16)
Not prohibited	CZ, EE, HU, LV, PL, SL (6)
Variations	DE, FI, IE, MT, UK (5)

Most of the member states have prohibited inertia selling, e.g. AUSTRIA, BELGIUM, BULGARIA, CYPRUS, DENMARK, FRANCE, GREECE, ITALY, LITHUANIA, LUXEMBOURG, the

²⁸⁰ Regulation 10(4) of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.

²⁸¹ Grabitz-Hilf/Micklitz, A3, Fernabsatzrichtlinie, no.121 et seqq. With regard to German law *Keßler/Micklitz*: Die Richtlinie 2005/29/EG über unlautere Geschäftspraktiken im binnenmarktinternen Geschäftsverkehr zwischen Unternehmen und Verbrauchern, BB 2005, 1, 19.

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NETHERLANDS, PORTUGAL²⁸², ROMANIA, SPAIN and SWEDEN. FINLAND (“shall not be marketed”²⁸³) has not explicitly prohibited inertia selling. Nevertheless, in Finland, in the light of preparatory works (HE 79/2000 vp) this clause prohibits inertia selling.²⁸⁴

In some member states, e. g. IRELAND, MALTA and the UNITED KINGDOM, it is a criminal offence to demand payment, threaten to commence legal action, to add a person to a list of defaulters/debtors, or to threaten or actually use another debt collection procedure, in relation to payment for unsolicited goods or services, where the person making such demands etc. has no reasonable cause to believe that he is entitled to receive payment. In the CZECH REPUBLIC, ESTONIA, HUNGARY, LATVIA, POLAND and SLOVENIA, inertia selling has not been prohibited.

b. Exemption of the consumer from the provision of any consideration in cases of unsolicited supply; absence of a response shall not constitute consent.

Inertia Selling (Art. 9, 2nd indent)	Member States
As in the Directive	BE, CY, DK, EE, FI ²⁸⁵ , FR, HU, IT, LU, LV, PT, RO, SK (13)
Not transposed	(0)
Variations	AT, BG, CZ, DE, EL, ES, IE, LT, MT, NL, PL, SE, SL, UK (14)

Many member states have transposed Art. 9, 2nd indent as stated in the Directive, e.g. BELGIUM, CYPRUS, DENMARK, ESTONIA, FINLAND, FRANCE, HUNGARY, ITALY, LATVIA, LUXEMBOURG, PORTUGAL²⁸⁶, ROMANIA and SLOVAKIA.

AUSTRIA has transposed Art. 9 of Directive 97/7 in the Civil Code.²⁸⁷ This is an extension of scope because the provision is also applicable to B2B situations. POLAND has stated a

²⁸² It is not included in this prohibition the supply of free samples or commercial offers, and the sendings made with altruistic purpose by “instituições de solidariedade social”, since these goods have been produced by them (Art. 29(5)).

²⁸³ Chapter 2(2a) of the Consumer Protection Act of 20.1.1978/38.

²⁸⁴ It has also been established in legal practice that provision of unsolicited goods that require consumer action is deemed unfair marketing.

²⁸⁵ According to preparatory works, it is possible to provide, for example, unsolicited magazines offers or product offers for consumers for testing. However, there should not be any obligations to consumers related to their goods.

²⁸⁶ When the consumer decides to return unordered goods, he has the right to be reimbursed for all expenses, within 30 days (Art. 29(4)).

²⁸⁷ CC § 864(2).

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provision that the trader bears the risk of the consumer not using the services which were unsolicited and that no obligation can be imposed on the consumer.²⁸⁸ In some member states, the consumer benefits from a presumption that if the trader sent unsolicited goods, the consumer may use it as an unconditional gift and refuse all payments, e.g. in CYPRUS, LITHUANIA, MALTA, the NETHERLANDS, SLOVENIA and in the UNITED KINGDOM. In Cyprus, this is presumed when neither the seller nor any other authorised person requires the return of the good after a period of 30 days.²⁸⁹ According to BULGARIAN law the consumer is not obliged to return the goods or any payment to the supplier.²⁹⁰ In the CZECH REPUBLIC, the consumer shall neither have to return the goods to the supplier nor inform him about it.²⁹¹ In GREECE, the consumer can “do as he pleases with the goods” except there has been an obvious mistake. In this case the consumer shall, if possible, hold the goods at the disposal of the supplier for a reasonable period of time.²⁹² In SPAIN, the consumer has no duty to return the goods and can keep them free of charge, and in case of unraveling, the consumer has no duty to compensate for damages or deterioration. In AUSTRIA, the recipient has to inform the trader in this situation and send back the goods. In IRELAND, this provision has been correctly transposed for services.²⁹³ On the other hand, the recipient of unsolicited goods is required to keep the goods for a period of time to enable the sender to recover the goods.²⁹⁴ This requirement to retain the goods for six months could constitute consideration, and is absent from the provision in the Regulations on the inertia selling of services. SWEDEN has not explicitly transposed this Directive’s provision because this follows from its domestic general contractual principles.

6. Restrictions on the use of certain means of distance communication

Article 10 of Directive 97/7 states that the use of automatic calling machines and fax machines requires prior consent from the consumer.

²⁸⁸ Article 15 of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

²⁸⁹ Section 13(2) Law for the Conclusion of Consumer Distance Contracts of 2000.

²⁹⁰ Article 62(2) of the Law on Consumer Protection.

²⁹¹ § 53(9) of the CC.

²⁹² Article 4(4) of the Consumer Protection Act 2251/94.

²⁹³ Regulation 11 of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.

²⁹⁴ Section 47 of the Sale of Goods Act 1980.

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Almost all member states have transposed Art. 10 of the Directive by using the copy and paste method. These countries are: BELGIUM, CYPRUS, CZECH REPUBLIC, DENMARK, ESTONIA, FRANCE, GERMANY, HUNGARY, ITALY, LATVIA, LUXEMBOURG, the NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA, SLOVENIA, SPAIN and the UNITED KINGDOM. BULGARIA, Estonia, Denmark, ROMANIA and Slovenia have also extended the restrictions on the use of email. Poland has chosen the opt-in rule for all means of distance communications.

In IRELAND, the contract is not enforceable against the consumer if the supplier used these means of distance communication.²⁹⁵ In MALTA, the trader is liable to compensate the consumer for any inconvenience caused and resultant damages suffered.²⁹⁶ AUSTRIA has not transposed this provision expressly, but according to the legislator the same protection of the consumer is granted by the general clauses in the Civil Code²⁹⁷, the Unfair Competition Act²⁹⁸ and, furthermore, by Austrian case-law in this area. Only LITHUANIA has not transposed Art. 10 of Directive 97/7.

The GREEK and DANISH transposition law in the field of automatic calling systems gives a broader protection than Directive 97/7 because the opt-in provision regarding automatic calling systems and fax applies to *everyone* – and not just to consumers.

IV. Use of options provided in the Directive

1. Option of member states to allow the supplier to provide the consumer with goods or services of equivalent quality and price

Article 7(3) of Directive 97/7 contains an option for the member states to stipulate that the supplier can provide the consumer with goods of equivalent quality and price, if this possibility was provided before the conclusion of the contract, or in the contract. The option has been used by CYPRUS, ESTONIA, FINLAND, FRANCE, HUNGARY, ITALY, the NETHERLANDS, ROMANIA and the UNITED KINGDOM.

²⁹⁵ Regulation 12(1) Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.

²⁹⁶ Article 8 of the Distance Selling Regulations, 2001.

²⁹⁷ CC § 16.

²⁹⁸ § 1 of the Unfair Commercial Practises Act.

IRELAND and LATVIA have added that the consumer must be informed of the possibility to deliver equivalent goods or services prior to the conclusion of the contract. In POLAND, the possibility to deliver products of an equivalent price and quality, must be included into the contract. The required information must be given to the consumer in writing. PORTUGAL and GREECE have provided that the information on the costs of withdrawal must be given to the consumer in writing. However, in Greece, there is no rule stipulating that the possibility of alternative performance needs to be provided prior to the conclusion or in the contract.

In SLOVAKIA, the supplier has the right and the obligation to deliver goods or services of an equivalent quality and price if the parties agree. There is no special information duty or regulation on the costs. In SPAIN, the supplier of a good has the right to deliver a similar one. This right is not applicable for contracts on services.

BELGIUM, the CZECH REPUBLIC, DENMARK, LITHUANIA, LUXEMBOURG, MALTA and SLOVENIA have made no use of the option. AUSTRIA has not transposed the option either, but a seller's right of choice and a buyer's right of replacement exist in Austrian general contract law. Also SWEDEN has not expressly transposed this option, but the possibility to provide the consumer, in the case that he agrees, with an alternative good or service originates from the principle of private autonomy. GERMANY, too, has not expressly transposed this option. According to general rules, the parties can, of course, agree on such a right of the supplier. However, the rules on unfair terms (CC § 308(4)) define strict limits concerning the use of such clauses (right of amendment) in standard terms. In any case, pursuant to CC § 312c(1) in conjunction with BGB-InfoV, § 1(1)(6), the supplier is required to inform the consumer about the existence of any such term. In the UNITED KINGDOM²⁹⁹ and ESTONIA³⁰⁰, the supplier has to inform the consumer prior to the conclusion of the contract if he proposes, in the event of the goods or services ordered by the consumer being unavailable, to provide substitute goods or services of an equivalent quality and price.

Option transposed	BG, CY, EE, FI, FR, HU, IT, NL, RO, SK (only if parties agree), UK (<i>11</i>)
Option not transposed	BE, CZ, DK, LT, LU, MT, SL (<i>7</i>)

²⁹⁹ Regulation 7(1)(b) of the Consumer Protection (Distance Selling) Regulations 2000.

³⁰⁰ Article 54(1)(10) of the Law of Obligations Act.

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No express transposition, but general contract law with similar effect	AT, DE, SE (3)
Only for goods, not for services	ES (1)
Information must be given in writing	EL, PL, PT (3)
Possibility must be provided prior to the conclusion of the contract	IE, LV (2)

2. Option of member states to place burden of proof on the supplier

Use of Option	Member States
Yes	BE, BG, CY, DE, DK, EE, EL, ES, HU, LT (Only regarding submission of mandatory required information to the consumer), LV (only regarding financial services), LU, MT, PT, RO, SL (16)
No use	AT, CZ, FI, FR, IE, IT, NL, PL, SE, SK, UK (11)

Article 11(3)(a) of the Directive enables the member states to stipulate that the burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent can be placed on the supplier. Half of the European countries, namely BELGIUM³⁰¹, BULGARIA³⁰², CYPRUS, ESTONIA, GERMANY, GREECE, HUNGARY, LITHUANIA, LUXEMBOURG, MALTA, PORTUGAL, ROMANIA, SLOVENIA and SPAIN, have made use of this option. DENMARK has not explicitly made use of this option, since the burden of proof in accordance with general principles of Danish law was already placed with the supplier. Lithuania though has only regulated the submission of mandatory required information to the consumer. German law contains a special arrangement on the burden of proof in terms of the right of withdrawal; the supplier must prove that he has properly informed the consumer of his rights and that all the necessary criteria for the period to begin have been met. AUSTRIA, the CZECH REPUBLIC, FINLAND, FRANCE, ITALY, IRELAND³⁰³,

³⁰¹ Article 83decies(1) of the TPA.

³⁰² Article 61 of the Law on Consumer Protection.

³⁰³ In Ireland, this reverse burden of proof only operates as regards Regulation 13 (an application by the Director of Consumer Affairs or other consumer organisations for an injunction from the High Court to ensure compliance with the Regulations). In all other regards, e.g. a private action between supplier and consumer, the normal rules of evidence apply.

LATVIA, the NETHERLANDS, POLAND, SWEDEN and the UNITED KINGDOM have decided not to transpose this provision.

3. Option of member states to provide for voluntary supervision by self-regulatory bodies

Article 11(4) of Directive 97/7 grants the member states the option to provide for voluntary supervision by self-regulatory bodies. Most member states have chosen not to implement this option. They are: AUSTRIA, BELGIUM, BULGARIA, CYPRUS, DENMARK, FINLAND, FRANCE, IRELAND, ITALY, LITHUANIA, MALTA, the NETHERLANDS, POLAND, PORTUGAL, ROMANIA, SLOVENIA, SWEDEN, SPAIN and the UNITED KINGDOM. In the United Kingdom and Ireland, codes of conduct (to be approved by the Office of Fair Trading) are encouraged. Only GERMANY, ESTONIA, GREECE, HUNGARY, LATVIA and SLOVAKIA have made use of this option provided in the Directive.

Table: Use of option provided in Art. 11(4) Distance Selling Directive

Use of Option	Member States
Yes	DE, EE, EL, HU, LV, SK (6)
No use	AT, BE, BG, CY, CZ, DK, ES, FI, FR, IE, IT, LT, LU, MT, NL, PL, PT, RO, SE, SL, UK (21)

4. Option of member states to ban the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts

Use of Option	Member States
Yes	BG, DE, FI, HU, LT, PT, SK (7)
No use	BE, CY ³⁰⁴ , CZ, DK ³⁰⁵ , EE, EL, ES, FR, IE, IT, LU, LV, MT, NL, PL, RO, SE, SL, UK (19)
Transposition not	AT (1)

³⁰⁴ CYPRUS does not exercise this option. However it leaves the possibility open for the option to be exercised by other legislative acts dealing with specific products or services.

³⁰⁵ Denmark has not made use of the option, since detailed rules regarding marketing of medicinal products already exist in Danish medicinal legislation.

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entirely clear

Article 14, sent. 2 of Directive 97/7 provides the option to ban the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts. 19 countries have not made use of this option (cf. the table above). The SLOVAKIAN Act 377/2004 on Non-smoker Protection establishes a prohibition of distance selling of tobacco products.

The LITHUANIAN laws on medicines distinguish the marketing of medicines depending on their nature. DENMARK prohibited any kind of advertisements for medicinal products. In FINLAND distance selling of medicinal products is not allowed. The Medicines Act stipulates strict restrictions for postal import of medicines.³⁰⁶ In PORTUGAL, the sale of medicines (in the sense of the Decree-Law 72/91 of February 8, Art. 2(1)(a)) is restricted to pharmacies and other authorized establishments (Art. 62 of the Decree-Law 72/91 and Decree-Law 134/2005 of August 16). HUNGARY has also used the option to ban the marketing of certain goods or services by means of distance contracts.³⁰⁷ In BULGARIA distance selling of medical products, food additives, homeopathic products and other products presented to have a healing effect is prohibited. Moreover, non-compliance by both sole traders and legal persons shall be fined.³⁰⁸

In CYPRUS, the conclusion of distance contracts may be prohibited or restricted on grounds of public interest, under the provisions of the legislation in force, for specific goods or services. In BELGIUM, Art. 83 undecies of the Trade Practices Act grants the King the right to adopt specific rules for certain types of distance contracts. The Royal Decree of 11 January 1993 *Concerning the Regulation of the Division, the Packing and the Marking of Dangerous Preparations* provides an additional information duty towards the consumer in the case of distance selling of such preparations, but medicinal products in ready to use form, are expressly excluded from the scope of this Royal Decree.³⁰⁹ The distance selling of

³⁰⁶ VNA lääkevalmisteiden henkilökohtaisesta tuonnista Suomeen 1088/2002 vp.

³⁰⁷ Cf. Act XXXV of 2000 on pesticides, Decree 43/1996. (XI.29.) on products supplied by pharmacies and the Government Decree 4/1997. (I. 22.).

³⁰⁸ Article 51 and 205 of the Law on Consumer Protection.

³⁰⁹ Article 2(4) Royal Decree of 11 January 1993 *Concerning the Regulation of the Division, the Packing and the Marking of Dangerous Preparations..*

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prescription medicines is forbidden.³¹⁰ The distance selling of non-prescription medicines falls under the general regime of the TPA.

Until 1 November 2004 GERMANY prohibited the mail order of medicinal products via chemists. The ECJ stated in C-322/01 – *Doc Morris*³¹¹ that “a prohibition on the sale by mail order of medicinal products the sale of which is restricted to pharmacies in the member state concerned” is a measure having an effect equivalent to a quantitative restriction for the purposes of Article 28 EC. The ECJ ruled that this prohibition can be justified – relying on Art. 30 EC – for medicinal products subject to prescription, but not to medicinal products which are not subject to prescription in the member state concerned. GERMANY amended its Pharmacies Act (Apothekengesetz) and Medicines Act (Arzneimittelgesetz) thereby allowing the mail order purchases both of over-the-counter and prescription-only medicinal products via chemists. However, chemists that are registered in Germany do require a mail order licence. In SLOVENIA, the Medicinal Products Act states that sale of medicinal products via the internet that is accompanied with professional counselling is allowed if it is performed by someone who has a licence for such pharmaceutical activity and if quality and tracking is guaranteed.

³¹⁰ Article 3(4) of the Drugs Act of 25 March 1965.

³¹¹ ECJ judgment of 11 December 2003, C-322/01 – *Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval*.

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