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Subject:	REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the application of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council
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EUROPEAN
COMMISSION

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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the application of Directive 2011/83/EU of the European Parliament and of the
Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC
and Directive 1999/44/EC of the European Parliament and of the Council and repealing
Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of
the Council**

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{SWD(2017) 170 final}

Report on the application of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

1. Introduction

Directive 2011/83/EU on consumer rights¹ ('the Directive' or 'the CRD') was adopted on 25 October 2011. It aims to achieve a high level of consumer protection across the EU and to contribute to the proper functioning of the internal market by harmonising certain aspects of Member States' laws, regulations and administrative provisions on contracts between consumers and traders.

The Directive had to be transposed into the national laws of the Member States by 13 December 2013, with a view to become applicable in all EU Member States from 13 June 2014.

Article 30 of the Directive requires the Commission to submit a report to the European Parliament and the Council on the application of the Directive, particularly regarding the provisions on digital content and the right of withdrawal.

The Commission has evaluated the Directive, drawing on:

- an external study on the application of the CRD;²
- an European Economic and Social Committee report³;
- various stakeholder consultations⁴; and
- other data sources.⁵

The evaluation is drawn up in a SWD that accompanies this report which presents its main findings. As the Directive was evaluated less than 3 years after the national laws transposing it were supposed to become applicable, the evidence base was relatively limited. Due to the fact that the Directive is still in the early stages of implementation, this evaluation aimed at assessing progress in its transposition and first application.

The CRD was evaluated in parallel with a broader REFIT fitness check of EU consumer and marketing law, and the results of the CRD evaluation fed into the final fitness check report⁶. Several consultation activities carried out as part of the fitness check (such as the stakeholder consultation group and the Consumer Summit) were also used to gather views and data for the CRD evaluation.

¹ OJ L 304 22.11.2011 p. 64.

² Performed by a consortium led by Risk & Policy Analysts Ltd, final report available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

³ EESC Information report: Consumer Rights Directive (evaluation) <http://www.eesc.europa.eu/?i=portal.en.int-opinions.39555>

⁴ Consultations carried out by the external consultant for the study (online survey and interviews with consumers, traders, national consumer and trade associations, enforcement authorities, ministries, European consumer centres); online public consultation (May-September 2016); meetings of the Fitness Check Stakeholder Consultation Group and of existing networks (such as European Consumer Consultative Group, Consumer Policy Network); discussions at the 2016 European Consumer Summit.

⁵ Analysis of complaint data, results of the CRD 'sweep' (coordinated screening actions by the national authorities under the coordination by the Commission, see footnote 11), mystery shopping exercise and behavioural experiments, findings of the Exploratory study into consumer issues in the sharing economy.

⁶ Final report available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

2. The Directive's aim and main provisions

The CRD repealed Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises. The CRD introduced fully harmonised rules for distance (online) and off-premises contracts for goods and services, as well as for digital content. It also amended certain provisions of Directive 93/13/EEC on unfair terms in consumer contracts and Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

Article 1 of the Directive states that its overall objective is to achieve a high level of consumer protection across the EU and to contribute to the proper functioning of the internal market by harmonising certain aspects of Member States' laws, regulations and administrative provisions concerning contracts concluded between consumers and traders.

Recital 4 of the Directive explains that this harmonisation is necessary to promote a real consumer internal market, striking the right balance between a high level of consumer protection and business competitiveness.

While the previous Directives for business-to-consumer off-premises and distance contracts provided a minimum level of harmonisation for the relevant consumer protection rules, the CRD is a full harmonisation directive. This means that, within its scope, Member States may not maintain or introduce in their national legislation provisions that are not in line with the Directive, unless the Directive provides otherwise (Article 4).

The Directive allows Member States to impose additional pre-contractual information requirements for on-premises contracts (Article 5(4)) and to make use of regulatory choices under their own national law in six areas. Member States are required to report on their use of these regulatory choices and the Commission has made their reports available on its website, in accordance with Article 29 CRD.

The most used regulatory choices are⁷:

- 20 Member States do not apply the provisions of the Directive to those off-premises contracts for which the payment to be made by the consumer does not exceed 50 euros (or lower values laid down in national legislation) (Article 3(4) CRD);
- 15 Member States impose language requirements regarding the contractual information for distance and off-premises contracts, in order to ensure that such information is easily understood by the consumer (Article 6(7) CRD);
- 7 Member States opted for a simplified information regime for off-premises contracts concerning repair or maintenance works not exceeding 200€ explicitly requested by the consumer (Article 7(4) CRD);
- 16 Member States require a written confirmation of contracts concluded by telephone (Article 8(6) CRD)

⁷ For more detailed information, please see the tables published at: http://ec.europa.eu/justice/consumer-marketing/files/overview_regulatory_choices.pdf.

Compared with the previous legal minimum harmonisation framework under Directive 97/7/EC and Directive 85/577/EEC, the new provisions of the Consumer Rights Directive relate to:

- further harmonisation of pre-contractual information requirements for on-premises (Article 5(1)) and full harmonisation of those applicable to distance and off-premises contracts (Article 6(1));
- inclusion of digital content in the scope with specific provisions related to it, such as information on functionality and interoperability and right of withdrawal (Articles 5(1)(g) and (h); 6(1)(r) and (s); 9(2)(c); 14(4)(b); and 16(m));
- formal requirements for distance and off-premises contracts, e.g. 'button provision' for orders with an obligation to pay (Articles 7 and 8);
- fully harmonised period of 14 days for the right of withdrawal from distance and off-premises contracts - albeit with some exceptions (Article 16) - and clearer refund rights (Articles 9-15);
- new rules on the delivery and passing of risk (Articles 18 and 20);
- 'basic rate' requirement for consumer phone-calls to the trader in relation to contracts already concluded (Article 21);
- ban on unjustified charges for payment means (Article 19) and pre-ticked boxes (Article 22).
- exempting the consumer from the obligation to pay for any unsolicited supply or provisions of products ('inertia selling', Article 27);
- introduction of an EU-wide model withdrawal form.(Articles 6(1)(h) and 11, Annex I(B)).

3. Transposition and implementation

Article 28 of the Directive required Member States to adopt and publish national measures transposing the Directive by 13 December 2013, with a view to applying these measures from 13 June 2014.

From October 2012 to April 2014 the Commission organised five transposition workshops to assist Member States in this task⁸. Nevertheless, 17 Member States⁹ were late with their transposition and the Directive became applicable in all 28 Member States only from the end of 2014.

Member States chose different transposition techniques: some Member States transposed the CRD by incorporating it into existing laws (for example their civil codes), others adopted a new piece of legislation transposing the CRD almost verbatim, and some chose a combination of the two.

⁸ Workshops were held on 5 October 2012, 8 March 2013, 19 September 2013, 11 December 2013 and 11 April 2014.

⁹ The following Member States were late in transposing the Directive: AT, BE, BG, FI, HR, HU, ES, FR, IT, LV, LU, NL, PL, PT, RO, SK, SL.

The Commission carried out an extensive check of the transposition of the CRD in all Member States and opened, as a result thereof, 21 bilateral structured dialogues with the national authorities concerned (so called EU Pilot cases). This transposition check has revealed that most Member States had, at first, failed to transpose several definitions and key terms of the Directive in their national law. While the concerned Member States have made or proposed significant changes to their transposition laws in order to address these issues and bring their law in line with the Directive, the Commission continues its bilateral dialogue with most of them to ensure full compliance. Whilst cases of lack of or incorrect transposition clearly affect the attainment of the objectives laid down by the Directive, few data are currently available to the European Commission as to the concrete impact in practice of such delayed and/or incorrect transpositions, since all the mentioned EU Pilot cases (with the exception of one) were opened *ex officio*, and not on the basis of complaints.

In June 2014, the Commission services issued a Guidance document concerning the CRD¹⁰ (hereinafter referred to as the 'CRD Guidance') following consultations with Member States' authorities in charge of transposing and enforcing the Directive, industry and consumer stakeholders. The CRD Guidance aims to help national authorities and courts to apply the Directive in a uniform and consistent way, providing guidance on the Directive's key concepts and provisions. It also includes practical examples that show how the Directive should work.

In 2015, the Commission coordinated a 'sweep'¹¹ by 26 Member States, Norway and Iceland to check whether traders complied with pre-contractual information requirements under the CRD for products offered online.¹² While before the sweep only 37 % of websites were found to be compliant, after the sweep 88 % of websites were found to be compliant.

Between spring 2014 and spring 2016, the Commission organised a Consumer Rights Awareness Campaign aimed at increasing traders' and consumers' general knowledge of EU-wide consumer rights that stem from several EU consumer law directives, including the right of withdrawal under the CRD.¹³

4. Key results of the evaluation

4.1. Effectiveness

The examination of national legislation in the Member States prior to the Directive's implementation has shown a significant degree of variation concerning rules on consumer protection related to contracts between traders and consumers. With the exception of the limited areas still open to national regulatory choices, the CRD has largely removed such

¹⁰ DG JUST Guidance document on the CRD, June 2014, available at: http://ec.europa.eu/consumers/consumer_rights/rights-contracts/directive/index_en.htm.

¹¹ The "EU sweep" is an EU-wide screening of websites. It is conducted in a form of simultaneous, coordinated checks to identify breaches of consumer law and to subsequently ensure its enforcement. See also: http://ec.europa.eu/consumers/enforcement/sweeps/index_en.htm. For more detailed information on the 2015 CRD sweep, see: http://ec.europa.eu/consumers/enforcement/sweeps/directive/index_en.htm

¹² http://ec.europa.eu/consumers/enforcement/sweeps/directive/index_en.htm.

¹³ http://ec.europa.eu/justice/newsroom/consumer-marketing/events/140317_en.htm.

differences among Member States, thus contributing to increased legal certainty for traders and consumers, especially in the cross-border context.

The comparative analysis of the legislative situation in all Member States before and after the Directive was transposed has also highlighted that consumer protection has been strengthened in most, if not all, Member States. This is likely, in line with the Directive's objectives, to boost consumers' confidence in both domestic and cross-border purchases, especially online. Analysis by Eurostat shows an increase of online cross-border purchases between 2012 and 2016.¹⁴ Furthermore, in terms of achieving greater consumer trust and empowerment, the available Eurobarometer survey data show that the percentage of consumers agreeing that, in general, retailers and service providers respect the rules and regulations of consumer law is equal to 76% in 2016, which represents an increase by 14 percentage points compared to 2006.

However, the evaluation highlighted some factors that limited the effectiveness of the CRD. These included:

- a lack of awareness among consumers and traders of the Directive's provisions;
- difficulties in interpreting some provisions such as, among others, the definition of the 'basic rate' (Article 21)¹⁵, the notion of outside the 'business premises' in off-premises contracts (Article 2(8)), the distinction between a digital content contract and a contract for paid online services, the moment from which the 14-day cooling-off period starts as regards contracts containing elements of both sales and services contracts (Article 9) and the calculation of the diminished value of goods in cases consumers exercise their right of withdrawal after having used the goods more than necessary to establish their nature, characteristics and functioning (Article 14(2));
- lack of compliance by traders; and
- issues relating to enforcement, with particular regard to low level of national enforcement actions and differences in the way in which the rules are enforced.
- the different level of penalties put in place by Member States for breaches of the Directive might also be problematic, since the maximum penalties in several Member States do not appear sufficiently 'effective, proportionate and dissuasive' (Article 24) for traders of any size.

4.2. Efficiency

There is no clear view yet of the Directive's overall impact on costs for businesses since it has not been possible to gather quantitative estimates of the costs and benefits of its implementation. In particular, stakeholders consulted in the framework of the evaluation did

¹⁴ http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals (figure 8.)

¹⁵ By its judgment of 2 March 2017 in Case C- 568/15 *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main e.V. v comtech GmbH*, the Court of Justice of the European Union has clarified that "the concept of 'basic rate' referred to in Article 21 of Directive 2011/83/EU [...] must be interpreted as meaning that call charges relating to a contract concluded with a trader to a telephone helpline operated by the trader may not exceed the cost of a call to a standard geographic landline or mobile telephone line. Provided that that limit is respected, the fact that the relevant trader makes or does not make a profit through that telephone helpline is irrelevant".

not provide quantitative estimations on the impacts of the CRD and could not establish a direct causality link between the increase in sales and the coming into application of the CRD. Data on actual costs and benefits are also very limited due to the short time since the Directive has been transposed. The analysis has therefore been based on qualitative information. The limited available data mean it is not possible to draw definitive conclusions about the level of costs that businesses faced in ensuring compliance with the Directive. Surveyed businesses were reluctant to provide financial estimates of such costs, and there was scarce monetary evidence available. However, when it comes to qualitative assessments, some specific burdens have been reported, especially for SMEs. These mainly concern the pre-contractual information requirements particularly with regard to overlapping information requirements, and the right of withdrawal. Stakeholders reported, among others, losses associated to returned goods used to an extent more than necessary to establish their nature, characteristics and the functioning, due to traders' difficulties in assessing the diminished value of the returned goods and in reselling them. Concerns have also been reported as regards the fact that traders have to reimburse consumers without having the possibility to inspect the returned goods once the consumer has supplied evidence of having sent them back (Article 13(1)).

4.3. Coherence

Overall, the Directive is considered to be coherent with other EU legislation, and no major problems have been identified. Nevertheless, there are specific interplays between the Directive and other pieces of consumer and marketing legislation, other horizontal and sector-specific legislation (in particular the E-commerce Directive and the Services Directive), as well as new proposals, which could be further streamlined and clarified in the future. For example, certain information requirements of the 'invitation to purchase' (Article 7(4) of the Unfair Commercial Practices Directive) overlap with the pre-contractual information requirements of the CRD: they could be addressed in possible follow-up legislative actions to the REFIT Fitness Check and CRD evaluation. The outcome of the negotiations on the proposed Directive for the Supply of Digital Content should also be taken into account in any possible amendment of the CRD provisions dealing with digital content (see also below under 5).

4.4. Relevance

The evaluation concluded that the original objectives of the Directive are as valid today as when the Directive was first proposed. In particular, the objectives of ensuring a high level of consumer protection and a level playing field for businesses in online business-to-consumer contracts continue to be very relevant, especially within the framework of the Digital Single Market policy. The provisions on distance contracts are likely to become even more relevant in the future, as the number of online purchases made by consumers continues to increase.

The provisions of the CRD on information requirements were found to still be relevant, except for the requirement under Article 6(1)(c) to provide the trader's fax-number and email address where other, more modern means of communication (such as web-based forms) would also enable the consumer to efficiently contact the trader and keep proof of this on a durable medium. The evaluation also suggests that there is room to investigate how to simplify the presentation of pre-contractual information and standard terms and conditions.

Moreover, with the growing role of online platforms, there is a strong call, especially from consumer associations and some business associations, to introduce specific transparency requirements for online marketplaces. The aim would be to ensure that consumers are informed about the identity and quality ('trader' or 'consumer') of the supplier, about the differences in the level of consumer protection when contracting with a trader rather than another consumer and about the default ranking criteria when presenting offers.

4.5. EU added value

An EU approach remains the most appropriate response and is more likely to achieve the objectives set by the Directive than national approaches. In fact, the Directive has consistently reduced the regulatory fragmentation among Member States through its harmonisation approach, thereby helping to increase consumer trust in cross-border sales and to reduce traders' cost of compliance when selling cross-border as highlighted by the stakeholders consulted in the framework of the evaluation. Harmonised rules are also needed to ensure effective cross-border enforcement actions between Member States.

5. Rules on digital content

For the first time in EU consumer and marketing law, the Directive lays down specific pre-contractual information requirements for digital content and rules on the withdrawal from contracts for digital content that is not supplied on a tangible medium. These provisions are especially relevant in pursuing the objectives of the Digital Single Market strategy.

Digital content is defined as 'data which are produced and supplied in digital form' (Article 2(11) CRD). As regards the scope of application of the CRD in relation to digital content, the CRD Guidance of June 2014 states that:

'[I]n view of the distinction drawn in recital 19, contracts for online digital content are subject to the Directive even if they do not involve the payment of a price by the consumer'.¹⁶

Even though the CRD Guidance document was drawn up in cooperation with Member States and stakeholders, some interested parties consider that the application of the CRD to 'free' digital content is not absolutely clear. Whilst the Commission confirms the interpretation provided in the CRD Guidance, difficulties may indeed exist to distinguish in practice between digital content contracts and contracts concerning online services whose main object is the supply of a service rather than the digital content itself; the latter fall within the scope of the Directive as "services contract" only when supplied against payment of a price.

In principle, all CRD provisions are also applicable to contracts for the supply of digital content. Moreover, several provisions set out specific requirements in relation to digital content:

- pre-contractual information requirements on functionality and interoperability (Article 5(1)(g) and (h); Article 6(1)(r) and (s));

¹⁶ Page 64 of the CRD Guidance.

- right of withdrawal — start of withdrawal period and information requirement about loss of withdrawal right in case of download (Articles 9(2)(c) and 14(4)(b));
- exception from the right of withdrawal (Article 16(m)).

Digital content remains a key area where consumers do not feel as protected as in sales and service contracts. The findings of the evaluation suggest that the low level of effectiveness of the digital content provisions results from a lack of awareness both among traders and consumers, a lack of compliance by traders, and a low level of enforcement by national authorities. Anecdotally, traders have also pointed to some difficulties with the practical implementation and understanding of these provisions, particularly as regards the requirement to provide pre-contractual information on the right of withdrawal. Concerning awareness, the data showed that the lowest level of awareness was reported for pre-contractual information requirements on digital content and digital content withdrawal rules. The evaluation found that compliance with rules on digital content was very low; in particular, it highlighted that traders do not generally inform consumers of when they would lose their right of withdrawal.

The evaluation also found that there could be scope for re-assessing some of the CRD rules on digital content to better match them with current needs within the EU. In particular, the CRD does not currently apply to the provision of ‘free’ online services. These services include cloud storage or webmail, where the main contractual obligation of the trader is not to provide digital content but rather a service allowing the creation, processing, storing or sharing of data that is produced by the consumer. Following the Council discussions on the proposal for a Directive on Contracts for the Supply of Digital Content at the June 2016 JHA Council, the Ministers expressly invited the Commission to *‘include, in its report on the application of the CRD, an evaluation of the application of the CRD, and in particular of the pre-contractual information requirements provided for in that Directive, to all types of contracts for the supply of digital content covered by the [December 2015 proposal for a] Directive on digital content, with a view to helping assess in how far the two instruments (in particular the definitions used therein) may need to be aligned to ensure greater coherence’*.

Therefore the Commission considers that, in order to ensure that the Directive remains fully relevant and able to meet current challenges, its scope should be expanded to cover contracts for ‘free’ digital services while making sure, where appropriate, that the Directive ensures equal treatment of digital services and digital content.

6. Conclusions and way forward

The Commission will follow up the evaluation’s findings by:

- promoting consumers’ and traders’ awareness of their rights and obligations. To this end, in December 2016 the Commission launched a pilot project for training SMEs on EU consumer and marketing law. The pilot project aims at considerably increasing traders’ awareness of their obligations and the corresponding consumer rights;
- considering further guidance on the provisions which the evaluation found to be perceived as lacking clarity;

- steering the recently launched self-regulatory exercise within the REFIT stakeholder group with a view to reach a multi-stakeholder agreement on a set of key principles for a better presentation of both pre-contractual information under the CRD and standard contract terms. Such work is of course without prejudice to further legislative intervention, notably in case this self-regulatory approach proves unsatisfactory;
- further examining, subject to the outcome of an impact assessment, possible targeted amendments to the Directive regarding:
 - extending its scope to include contracts for ‘free’ digital services and thus applying the pre-contractual information requirements and the right of withdrawal to any digital services. This amendment should clarify that the Directive also covers contracts for the provision of digital content which is not provided against payment of a price;
 - simplifying some of the existing information requirements, in particular to better reflect technological/market developments, for example by allowing traders to use more modern means of communication for their exchanges with consumers, provided that such means allow the consumer to efficiently contact the trader and to keep a proof of such exchanges on a durable medium;
 - reducing the burden on traders, especially SMEs, which some stakeholders consider disproportionate. This concerns provisions on the right of withdrawal for goods used by consumers more than necessary to establish their nature, characteristics and functioning and the rules on reimbursement before the trader has received the goods back;
 - increasing the transparency of the information that online marketplaces provide consumers about the identity and quality (‘trader’ or ‘consumer’) of the supplier, about the differences in the level of consumer protection when contracting with a trader rather than another consumer, and about the default ranking criteria when presenting offers, and establishing the consequences for failing to comply with transparency requirements;
- stepping up the enforcement of the Directive across all Member States, including through common actions in the framework of the Consumer Protection Cooperation Regulation.