

## **Part 2. Transposition of the individual Directives**

### **A. Doorstep Selling Directive (85/577)**

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#### **Executive summary**

#### **1. Transposition deficiencies**

Besides various deviations in terms of wording, some transposition deficiencies can be identified in national jurisdictions. Potentially significant examples may be:

- Exclusion of all contracts concluded before a notary public from protection under the national transposition law (e.g. GERMANY, LITHUANIA, MALTA, SPAIN);
- Start of the withdrawal period even where the trader has failed to provide (sufficient) information (e.g. CZECH REPUBLIC, ITALY, LITHUANIA, ROMANIA, SLOVENIA);
- Exclusion of contracts concluded during an excursion (e.g. LATVIA).

#### **2. Enhancement of protection**

##### **a. Extension of scope**

Some member states have extended the scope of their national doorstep selling laws, thereby broadening the protection afforded by the Directive to cover other persons or situations:

- Extension of the notion of "consumer" to, for example, certain legal persons (e.g. AUSTRIA, BELGIUM, GREECE, SPAIN);

- Inclusion of situations other than those covered by Art. 3 of Directive 85/577 or prohibiting doorstep selling of specific goods in general (e.g. AUSTRIA, BELGIUM, ESTONIA, FRANCE, GERMANY, GREECE, HUNGARY, ITALY, LATVIA, POLAND, ROMANIA). Such additional situations include, for instance:
  - contracts concluded on the trader's premises if the consumer has been enticed there;
  - Contracts concluded in public places; and
  - Contracts concluded at fairs and exhibitions.
  
- Not making use of restrictions/exemptions provided for by Directive 85/577 [*for more detail see b.*]

### **b. Use of options and exemptions**

With regard to the use made by the national legislator of the options available under Directive 85/577, the following observations can be made:

- The option granted in Art. 3 para. 1 (option to exclude contracts under 60 ECU) has been exercised by 18 member states;
  
- Art. 3 para. 2 lit. a (exemption of contracts concerning immovable property) has been exercised by at least 17 member states;
  
- Art. 3. para. 2 lit. b (exemption of contracts on goods for current consumption provided by regular roundsmen) has been exercised by at least 16 member states;
  
- Art. 3 para. 2 lit. c (exemption of contracts concluded on the basis of a trader's catalogue) has been exercised by at least 10 member states;
  
- Art. 3 para. 2 lit. d (exemption of insurance contracts) has been exercised by at least 16 member states;

- Art. 3 para. 2 lit. e (exemption of contracts for securities) has been exercised by at least 15 member states;
- The option granted in Art. 3 para. 3 (option to exclude contracts concluded during a visit requested by the consumer) has been exercised by at least 10 member states.

The following table provides a brief overview of the use of options and exemptions in the member states:

Key:

❶ = Art. 3 para. 1;

❺ = Art. 3 para. 2 lit. d;

❷ = Art. 3 para. 2 lit. a;

❻ = Art. 3 para. 2 lit. e;

❸ = Art. 3 para. 2 lit. b;

❼ = Art. 3 para. 3

❹ = Art. 3 para. 2 lit. c;

Member state	Options exercised	Member state	Options exercised	Member state	Options exercised	Member state	Options exercised
AT	❶❹❷	FR	❼	LU	---	ES	❶❷ <sup>1</sup> ❹❻
BE	❶ <sup>2</sup> ❷❸❺❻❼	DE	❶❷❹❺❻❼	MT	❶❷❸❺❷	SE	❶❷❸❼
BG	❶❷❸❹❺❻	EL	❷❸❹❺❻❼	NL	❶	UK	❶❷❸❹❺❻
CY	❷❸❹❺❻❼	HU	❼	PL	❶❷❸		
CZ	❷❸❹❺❻	IE	❶❷❸❹❺❻	PT	❶❷❸❺❻❼		
DK	❷❸❺❻	IT	❶❷❸❺❻	RO	❶❷❸❹❺❻		
EE	❶ <sup>3</sup>	LT	❶❸❺❻	SL	❶❷❸❺❻❼		
FI	❶	LV	---	SK	❺		

<sup>1</sup> SPAIN has only partially transposed Art. 3 para 2 lit. a. Though the first subparagraph is almost literally transposed, the second one has not been implemented at all (“contracts for the supply of goods and for their incorporation in immovable property or contracts for repairing immovable property shall fall within the scope of this Directive”). Doctrine expresses criticism against this lack of transposition and construes its inclusion due to the character of minimal harmonisation of the Directive.

<sup>2</sup> There is, however, no general exclusion of sales below 60 euro. Art. 87 lit. (f) of the Trade Practices Act solely excludes sales with a non-commercial, exclusively charitable aim which does not exceed 50 euro.

<sup>3</sup> The exclusion is limited to sales below 15 euro, where the sum is paid immediately.

**c. Use of minimum clause**

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

- Art. 4:
  - Additional information requirements imposed on the trader (e.g. trader's phone number);
  - Standard format for information on the right of withdrawal; and
  - Formal requirements governing the contract as a whole.
  
- Art. 5 para. 1:
  - Extension of the withdrawal period
  
- Art. 7:
  - Time limit favouring the consumer for settlement of the transaction (reimbursement of purchase price and reshipment of goods); and
  - Lien on the goods supplied in order to secure the consumer's reimbursement claim.

**d. Additional consumer protection instruments not provided for by the Directive**

Some member states have introduced or maintained consumer protection instruments, which are not contained in Directive 85/577. Potentially significant examples are:

- General ban on doorstep selling (in particular with regard to certain products);
  
- Licensing requirement for doorstep-selling; and
  
- Time restrictions on doorstep-selling late in the evening or early in the morning.

### **3. Inconsistencies or ambiguities**

Examples of inconsistencies or ambiguities in Directive 85/577 are:

- It is unclear whether a natural person in a "mixed purpose" case (i.e. where the consumer might also be acting in a professional capacity) is protected by Directive 85/577 as a "consumer".
- It is unclear whether a not-for-profit organisation can also be regarded as a "trader".
- Directive 85/577 does not contain any rules on the calculation of time periods and, furthermore, does not state whether the withdrawal period also ends when the last day is a Sunday, Saturday or a public holiday.
- Directive 85/577 may be applicable in conjunction with other consumer protection directives (e.g. Consumer Credit, Timeshare). It is unclear whether different information requirements and different particulars pertaining to the right of withdrawal might impinge on the application of Directive 85/577.

### **4. Gaps in the Directive**

The review did not reveal many gaps in the Directive. Potentially significant examples may be:

- Contracts negotiated in a doorstep-selling situation, but concluded afterwards by means of remote communication, in particular on the phone (such contracts are covered neither by the Doorstep Selling Directive nor by the Distance Selling Directive);

- The absence of a provision on the burden of proof regarding the facts and circumstances that would lead to the application of the national transposition law.

### **5. Potential barriers to (cross-border) trade**

Although business models built on cross-border doorstep selling do not seem to be very common and, therefore, not very relevant for the functioning of the internal market, different national provisions on doorstep selling may affect the internal market.<sup>4</sup> As such, some potentially significant barriers to trade might be:

- Additional information requirements;
- Formal requirements imposed on the consumer should he/she wish to exercise the right of withdrawal (because this leads to an additional information requirement);
- Obligatory standard forms for the presentation of information required;
- Strict formal requirements governing the contract as a whole;
- No standard period for the consumer to exercise the right of withdrawal;
- No standard procedure after the right of withdrawal has been exercised, with regard to
  - Reshipment costs for goods and time limits for reshipment and reimbursement of the purchase price;
  - Compensation for any depreciation in value.

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<sup>4</sup> See for example the recent ECJ case *A-Punkt-Schmuckhandel* – C-441/04.

## **6. Conclusions and recommendations**

In the course of the review, the following issues could be considered:

- Definition of "consumer" (in particular with regard to "mixed purpose" cases);
- Definition of "trader" (in particular with regard to not-for-profit organisations);
- Inclusion of contracts concluded in public places, outside business premises;
- Inclusion of contracts initially negotiated in doorstep selling situations, but ultimately concluded in a shop or via remote communication;
- Introduction of a provision on the burden of proof;
- Provisions on the formal requirements for exercising the right of withdrawal;
- Set form for uniform information on the right of withdrawal;
- Harmonisation of the withdrawal period and procedure where the right of withdrawal is exercised, including the beginning of that period and the calculation of its duration.

## **I. Legislation in the member states before transposition of the Doorstep Selling Directive**

The member states had no coherent legislation concerning consumer protection in the case of door-to-door sales before Directive 85/577 entered into force. The level of protection varied tremendously from very robust in some countries (e.g. DENMARK and SWEDEN) to practically non-existent in others (e.g. CZECH REPUBLIC, HUNGARY, POLAND, ROMANIA). Door-to-door sales had already been subject to regulations in some member states before the European Commission announced its intention to regulate door-to-door sales at the European level. For instance, door-to-door sales were generally prohibited (except for legally regulated or permitted activities) in LUXEMBOURG by the “Act on Peddling and Itinerant Trade” (1970) and in BELGIUM by the “Trade Practices Act” (1971) and the Royal Decree 82 of 28 November 1939 on Itinerant Trade Activities. The SWEDISH “Law on Door-to-Door Sales” (1971) as well as the FRENCH “Law no. 72-1137 on Canvassing and Door-to-Door Sales”<sup>5</sup> (1972) and the DUTCH “Peddling Act” (1973) all provided for a right of withdrawal.<sup>6</sup> Moreover, the NETHERLANDS introduced a registration requirement for itinerant salesmen in order to tackle improper conduct. The time frame for exercising the right of withdrawal varied from 7 to 8 days and started either with the registration of the contract (e.g. NETHERLANDS) or upon notice being given to the consumer (e.g. SWEDEN). Thereafter, DENMARK (1978), FINLAND (1978) and AUSTRIA (1979) also introduced regulations on door-to-door sales.

After Directive 85/577 came into force, DENMARK implemented it by simply amending its existing laws in 1987, whereas GERMANY (1986), PORTUGAL (1987), the UNITED KINGDOM (1987), IRELAND (1989), GREECE (1991) and SPAIN (1991) enacted new laws. The new member states, in particular, did not, for the most part, have any comparable regulation before preparing to join the EU. Thus, as in the case of CYPRUS and POLAND, only the general provisions concerning contracts and contractual liability applied. The CZECH REPUBLIC primarily adopted comparable consumer protection regulations by amending its Civil Code with Act 367/2000. The first regulatory act in the consumer protection field in LATVIA came into force in October 1992 with the “Law on the Protection of Consumer Rights”. LITHUANIA enacted the “Law on Consumer Protection” in September 2000 with a chapter on the “Sale of

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<sup>5</sup> The French law 72-1137 influenced the drawing up of Directive 85/577.

<sup>6</sup> Different wording: “Right of regret” in Sweden.

goods or provision of services away from business premises”. In SLOVAKIA, Act 108/2000 on Consumer Protection in Doorstep Selling and Distance Selling was enacted in 2000. In BULGARIA, no law on doorstep selling existed, until the first Law on Consumer Protection came into force in 1999. As the only exception, MALTA enacted the “Door-to-Door Salesmen Act” already in February 1987.

## **II. Scope**

In its first three articles, Directive 85/577 regulates the conditions under which its provisions shall apply, i.e. ‘to protect the consumer in respect of contracts negotiated away from business premises’. Whereas Art. 1 describes the general scope of the Directive, Art. 2 determines the persons to whom it shall apply. Art. 3 contains exemptions from the Directive’s scope.

### **1. Persons covered under the Directive**

The Directive applies to “contracts under which a trader supplies goods or services to a consumer” (Art. 1 para. 1).

#### **a. Consumer**

In Art. 2 of Directive 85/577, a “consumer” is defined as “a natural person who (...) is acting for purposes which can be regarded as outside his trade or profession”. The member states have chosen different legislative techniques to transpose this definition. In particular, many member states have introduced a common definition of "consumer" applicable to several or all of their transposition laws for the individual consumer protection directives (for a general overview, see Part 3.A.II.). One significant variation in the field of doorstep selling is the inclusion of legal persons under the definition of "consumer", as in BELGIUM.<sup>7</sup> In SLOVAKIA, legal persons in general can be considered as "consumers" under the Slovakian Act on Consumer Protection, but they are explicitly excluded from its scope of protection with regard

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<sup>7</sup> Article 1(7) of the Act of 14 July 1991 on trade practices and consumer information and protection. Conversely, the Belgian Trade Practices Act defines consumers as persons acting exclusively for purposes outside their business or professional activity.

to Doorstep Selling.<sup>8</sup> In LATVIA,<sup>9</sup> a 2005 reform excluded legal persons from the scope. In the CZECH REPUBLIC, there is a general definition of "consumer" for all consumer contracts.<sup>10</sup> Legal persons who meet the criteria can be considered as consumers, too.

The POLISH<sup>11</sup> Civil Code uses a wider definition of "consumer", requiring that the legal act carried out by a natural person must not be directly related to his business or professional activity. On the contrary, the BELGIAN legislator requires that the person must act exclusively for purposes outside his business or trade in order to be considered as a "consumer". According to FRENCH case law, under specific conditions, associations of natural persons can also be considered as "consumers". Under SPANISH law, a "consumer" can be a natural or legal person and has to be the final recipient of the goods or services.<sup>12</sup> The law defines which persons are not final recipients, i.e. those persons aiming "to integrate them (i.e. goods or services) into production, processing or marketing processes". For instance, even trade unions can be considered as "consumers" in Spain.<sup>13</sup> In GREECE, a natural or legal person is always a "consumer" if he is the last link in the supply chain, regardless of whether the goods and services are meant for professional or business use. Similarly, a natural person who is the final recipient of the goods and services (*consommateur final privé*) is considered to be a "consumer" in LUXEMBOURG. In GERMANY, what are termed dual-use cases - where a private person uses the goods and services for private as well as business purposes - have been the subject of discussion, illustrating the fact that an exact determination and definition of the notion of a "consumer" is not possible in every single case. German courts would probably focus on the question of which purpose, private or business, is predominant.<sup>14</sup> In ITALY, as well, the prevalent use is decisive. The court should determine this by considering the circumstances of the case, e.g. the nature of the goods and/or services indicated in the contract and the nature of the agreement.<sup>15</sup>

AUSTRIAN jurisdiction has dealt with the question of whether transactions to establish a company (*Gründungsgeschäfte*) fall within the Directive's scope. The Austrian Supreme

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<sup>8</sup> Article 1 of Act No. 108/2000 on Consumer Protection in Doorstep Selling and Distance Selling.

<sup>9</sup> Amendment of Art. 1(1) of the Consumer Rights Protection Law, in force since 11 Nov 2005.

<sup>10</sup> CC sec. 52.

<sup>11</sup> CC Art. 22.

<sup>12</sup> Article 1(2) of Law 26/1984 of July 19 on Consumer Protection.

<sup>13</sup> Audiencia Provincial Teruel, judgment of 31 Oct 2002, 171/2002 "C.S.I.-C.S.I.F" v "G.T.A.P., S. L.".

<sup>14</sup> OLG Naumburg, judgment of 11 Dec 1997, NJW-RR 1998, 1351 (concerning consumer credit).

<sup>15</sup> Tribunale Bari, judgment of 31 Aug 2001, Lavopa v. Soc. Inditel S.p.A.

Court, OGH,<sup>16</sup> held that the fact that an individual subsequently loses his consumer status does not mean he forfeits the protection afforded to him as a consumer. In contrast, ITALIAN jurisdiction<sup>17</sup> held that a person concluding contracts in order to start a business cannot be considered as a consumer.

### **b. Trader**

Directive 85/577 considers a “trader” to be a natural or legal person who, “for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader”. Some member states, DENMARK, IRELAND and LATVIA, strictly follow the Directive’s definition. Nevertheless, variations exist in the majority of member states:

AT <sup>18</sup>	Cumulative conditions: the trader has to possess (and not own) a business (e.g. “leaseholder”); and the legal transaction has to form part of the professional activity <sup>19</sup> ; the person concerned is the party to the legal transaction disregarding third persons who might be involved without being party; public legal persons are always seen as traders because of a special legislative order; not-for-profit organisations can also be considered as traders.
BE <sup>20</sup>	The definition includes “all traders or craftsmen”, “not-for-profit organisations which pursue an economic activity within the framework of their statutes”, “governmental institutions that pursue a commercial, financial or industrial activity”, “legal persons in which the government holds the majority of shares and which pursue an industrial, commercial or financial activity” and “persons acting in the name or on behalf of a third party, legal persons or other, and who pursue an industrial, financial or commercial activity”.
BG <sup>21</sup>	Private and public legal person as well as natural persons acting in their commercial or professional capacity.
CY <sup>22</sup>	Only a slight variation.

<sup>16</sup> OGH judgment of 20 Oct 2004, 2 Ob 178/05y.

<sup>17</sup> Cass., judgment of 14 April 2000, 4843 Ambrogio Ciocca v. Soc. Galassia.

<sup>18</sup> Consumer Protection Act, Art. 1(1).

<sup>19</sup> According to an OGH judgment of 14 July 2005, 6 Ob 135/05d, a legal transaction concluded between suppliers falls outside the scope even if one contract party subsequently stops trading.

<sup>20</sup> Article 1(6) of the Act of 14 July 1991 on trade practices and consumer information and protection.

<sup>21</sup> Law on Consumer Protection, Additional Provision, § 13 no. (1).

<sup>22</sup> Article 2 of the Law for Consumer Contracts Concluded Away from Business Premises of 2000, L.13(I)/2000.

CZ <sup>23</sup>	Use of term “supplier”; otherwise only slight variation.
EE	Person who “sells, offers or markets in any other manner”.
FI	Private and public legal person; no mention of representative; purpose of trader’s activity must be economic.
EL <sup>24</sup>	Natural or legal persons, which also includes public or local authority undertakings and not-for-profit private organisations.
ES <sup>25</sup>	Different wording in the transposition law: “businessman” instead of “trader” and the terms “which/who supplies goods or services” are omitted; no direct transposition of the definition, but indirectly both interpretations of the notion of “trader” – <i>sensu strictu</i> and a third person acting on behalf or in the name of the trader – apply.
LT	Definitions in different regulations <sup>26</sup> ; definition in Law on Consumer Protection includes the definitions of trader and service provider; no mention of other persons like agents or intermediaries, not-for-profit legal persons or consumers starting up a business; definition in Consumer Credit also concerns agents.
MT	Definition includes commercial partnership; persons acting on behalf of the trader or under his direction are included; also includes a ‘door-to-door salesman’ <sup>27</sup> ; furthermore, the Minister responsible for consumer affairs may, after consulting the Consumer Affairs Council, declare any other category or class of persons to be a “trader”; the trader must be licensed in order to operate a doorstep-selling business.
NL <sup>28</sup>	Use of term “canvasser”; the seller's objective is also referred to in the definition “who tries to induce a private individual to enter into a contract”... “in connection with any recommendation”; also includes not-for-profit legal persons.
PL <sup>29</sup>	Translation of the Polish notion of business would be wider than “trader”, meaning a person carrying out an economic activity related to some undertaking.

<sup>23</sup> CC § 52(3).

<sup>24</sup> Article 4 lit. (d) and Art. 3 of Law 2251/1994 on Consumer Protection.

<sup>25</sup> Article 1(1)(a) and (b) of Law 26/1991 of November 21 on consumer protection in the case of contracts performed away from commercial premises.

<sup>26</sup> CC, Art. 6.350(1), sent. (1); Law of Consumer Protection, Art 2 para. (2) and (3).

<sup>27</sup> Defined as a person who offers the provision or supply of any type of goods or services by means of a doorstep contract, whether the offer is unsolicited by the person to whom it is made, or is solicited by the latter person in response to any advertisement. It, does not include vendors of foodstuffs and drinks who sell their goods from door to door.

<sup>28</sup> Doorstep Selling Law, Art. 1 para (1)(c) and para. (2).

<sup>29</sup> CC, Art. 43.

PT	Use of term “supplier”, i.e. a natural or legal person acting in his/her professional capacity; other persons acting on behalf of the contracting party are not explicitly included in the definition, but the provisions would apply to them as a general rule.
RO	Slight variation: only “anyone acting in the name of the trader”; the alternative “on behalf of a trader” is omitted. <sup>30</sup>
SE	As in other Swedish consumer protection legislation.
SK	Slightly different wording <sup>31</sup> ; licensing requirement; other persons acting for the trader are included. <sup>32</sup>
SL <sup>33</sup>	Other persons acting on behalf of the contracting party are not explicitly included in the definition, but the provisions would apply to them too.
UK <sup>34</sup>	Different wording: a person acting for the purposes of his business, including anyone acting in the name or on behalf of such a person.

## **2. Situations falling within the scope of the Directive**

The Directive’s provisions apply to “contracts under which a trader supplies goods or services to a consumer and which are concluded:

- during an excursion organised by the trader away from his business premises, or
- during a visit by a trader
  - (i) to the consumer’s home or to that of another consumer;
  - (ii) to the consumer’s place of work; where the visit does not take place at the express request of the consumer” (Art. 1 para. 1).

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<sup>30</sup> Article 2 lit. b of the Ordinance regarding consumers contracts negotiated away from business premises nr. 106/30.8.99.

<sup>31</sup> § 2(1)(b), § 2(3) of Act 634/1992 on Consumer Protection; § 2 of Act 108/2000 on Consumer Protection in Doorstep Selling and Distance Selling.

<sup>32</sup> According to Amendment 118/2006 Z.z. (entry into force on 1 April 2006). This act amended § 2 of Act 108/2000 on Consumer Protection in Doorstep Selling and Distance Selling.

<sup>33</sup> Consumer Protection Act, Art. 3(1).

<sup>34</sup> Article 2(1) of the Consumer Protection Regulations 1987 (cancellation of contracts concluded away from business premises).

### **a. General application**

Generally speaking, most member states have implemented the same type of contracts and situations falling within the scope of Directive 85/577, though occasionally different wording has been used. Contrary to the provisions of Directive 85/577, contracts under LATVIAN law concluded during an excursion are not protected by the transposition law.

It is worth noting that the ECJ has clarified some details with regard to the situations covered by the Directive. Member states' national courts have to take into account this case law when applying their domestic doorstep selling laws. In its judgment *Travel VAC*, C-423/97, the ECJ held that where a contract is concluded after a trader has invited a consumer to go in person to a specified place at a certain distance from the place where the consumer lives (other than the premises where the trader usually carries out his business and not clearly identifiable as premises for sales to the public), in order to present to him the products and services he is offering, this contract must be considered to have been concluded during an excursion organised by the trader away from his business premises within the meaning of the Directive. In the same judgment, the ECJ clarified that the consumer need not prove that he was influenced or manipulated by the trader. It is sufficient that the contract is concluded in circumstances such as those described in the Directive.

Moreover, in its judgment *Crailsheimer Volksbank*, C-229/04, the ECJ held that, when a third party intervenes in the name or on behalf of a trader to negotiate or conclude a contract, the application of the Directive cannot be made subject to the condition that the trader was, or should have been, aware that the contract was concluded in a doorstep selling situation. As a result, the GERMAN courts, which had ruled differently prior to this decision, now comply with ECJ case law.

Many member states have extended the scope of their doorstep selling laws. The following types of extensions can be observed:

#### **aa. Expanding the list of doorstep situations**

Several member states have expanded the list of situations in which consumers are protected, e.g. GERMANY, where contracts concluded following a surprise or sudden approach by the

trader on public transport or in an open public space are covered. Moreover, German law does not stipulate that an ‘excursion’ is necessarily organised by the trader away from his business premises. Rather, a ‘recreational event’ organised by the businessperson or by a third party operating at least in the interest of the businessperson<sup>35</sup> is sufficient. With regard to the possibility that the trader does not organise the excursion himself, the BELGIAN legislator has also clarified that the excursion can be organised either by the trader directly or on his behalf.<sup>36</sup> The FRENCH and PORTUGUESE<sup>37</sup> doorstep selling laws also apply in cases where the consumer has been invited by the trader to somewhere other than the trader’s business premises. In ROMANIA, the transposition law is applicable to contracts concluded in transitional situations, e.g. temporary work, study, medical treatment or in public places.<sup>38</sup> In ITALY, the transposition law is applicable to contracts concluded in “transitional situations”, e.g. temporary work, study, medical treatment or in public places – provided that any possible order form is signed. Furthermore, the transposition law also applies to contracts concluded via television or audiovisual media.<sup>39</sup> In LITHUANIA, contracts concluded during a visit to an educational institution (e.g. school, university, etc.) or any other such venue fall within the scope of the national legislation enacted to transpose Directive 85/577.<sup>40</sup> Moreover, in DANISH legislation, all contracts concluded outside the trader’s business premises are protected by the national transposition law, e.g. contracts concluded on the streets, on squares, in restaurants, at railway stations or in other public places, and on the telephone.<sup>41</sup> In ESTONIA, MALTA and SPAIN, contracts negotiated away from the trader’s premises also fall within the scope of protection. In the CZECH REPUBLIC, contracts concluded with a trader outside his business premises, as well as contracts concluded with a trader without any permanent business premises, are covered.

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<sup>35</sup> According to a BGH judgment (of 28 Oct 2003, X ZR 178/02), at such a recreational event, the recreational aspect and offers of sale must intermingle in such a way that the consumer, on account of the advertising and running of the event, is made to feel at ease and relaxed and would have difficulty withdrawing from any offer aimed at concluding a contract.

<sup>36</sup> Article 86(1)(2) of the Act of 14 July 1991 on trade practices and consumer information and protection.

<sup>37</sup> The situation dealt with by the ECJ in *Travel Vac.* is explicitly covered in Portuguese legislation.

<sup>38</sup> Article 3 lit. c of the Ordinance regarding consumers contracts negotiated away from business premises 106/30.8.99.

<sup>39</sup> Article 45(1) of Legislative Decree 6/09/2005, n. 206 “Consumer Code”.

<sup>40</sup> Article 14(1) of the Law on consumer protection, CC, Art. 6.357.

<sup>41</sup> Article 3(1) of Act 451 of 9 June 2004 on certain consumer contracts.

Specific rules for contracts concluded at fairs are contained in BELGIAN<sup>42</sup> and SLOVENIAN<sup>43</sup> law. In CYPRUS,<sup>44</sup> the scope has been extended to visits by the trader to “any other location”. GREEK<sup>45</sup> law refers to “the location outside his business premises chosen by the trader”. Therefore, the scope is broader as a multitude of possible locations is included. More important is the criterion that the contract must “stem from the trader’s initiative”. On the one hand, it is restrictive, as it excludes contracts in situations initiated by the consumer. On the other hand, the question of whether a contract is concluded outside business premises is secondary to the question of whether it stemmed from the trader’s initiative. As a consequence, contracts concluded on the trader’s business premises can also fall within the scope if there is evidence of the trader’s initiative, e.g. if the consumer has been enticed onto the business premises with gifts or recreational events.

In AUSTRIA, as the scope is defined negatively,<sup>46</sup> contracts concluded on excursions can also fall within its ambit. According to an OHG judgment,<sup>47</sup> the situation must typically indicate that the consumer is in danger of being caught unaware. This is not the case if, within the context of a holiday offered at an appropriate price, there is, alongside different sightseeing trips, an organised visit to a workshop where goods manufactured there are on sale.

It may be worth considering, within the framework of the planned review, whether the limited list of situations in which the consumer is protected (Art. 1 para. 1) may be expanded following such examples as DENMARK, ESTONIA, MALTA or GERMANY. Such an expansion might amount to a general clause covering all contracts concluded away from business premises, which are not distance contracts. A more concrete expansion could be to include particular contracts concluded in public places.

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<sup>42</sup> Article 86(1)(3) of the Act of 14 July 1991 on trade practices and consumer information and protection.

<sup>43</sup> Consumer Protection Act, Art. 46(3).

<sup>44</sup> Article 3(1)(b) (iii) of the Law for Consumer Contracts Concluded Away from Business Premises of 2000, L.13(I)/2000.

<sup>45</sup> Article 3(1) of Law 2251/94 on consumer protection.

<sup>46</sup> Consumer Protection Act, Art. 3 para. 2 “conclusion of the contract not on the supplier’s business premises and equally not at a market stall or stand at a fair”.

<sup>47</sup> OGH, judgment of 10 Nov 1993, 7 Ob 599/93.

### **bb. Goods and services**

The Directive is quite unclear with regard to the kind of contracts or other transactions that are covered. In the English version, Art. 1 para 1 refers to “contracts under which a trader supplies goods or services”. The ECJ case *Bayerische Hypotheken- und Wechselbank*, C-45/96, which dealt with a guarantee, revealed a linguistic difference between two groups of language versions. For instance, the French and German versions read: « contrats conclus entre un commerçant fournissant des biens ou des services » and „Verträge, die zwischen einem Gewerbetreibenden, der Waren liefert oder Dienstleistungen erbringt, (...) geschlossen werden“. These versions seem to be broader, because they only require the trader to supply goods and services in general, whereas the English version seemingly demands that the specific contract concluded in the doorstep situation relates to the supply of goods or services. A guarantee put up by a consumer for the benefit of a bank readily falls under the German and the French version (because the bank – in general – provides services), while doubt is cast over this in the English version (because the guarantee put up by a consumer can hardly be considered as a service provided by the bank). The ECJ in *Bayerische Hypothekenbank* states that, in principle, a guarantee falls under Art. 1 of the Directive.<sup>48</sup> The problem in this case was that the guarantor was assuring repayment of a debt contracted by another person who, for his part, was acting within his commercial or professional capacity. The ECJ held that such a guarantee for a business loan does not come within the scope of the Directive.<sup>49</sup> Thus, only a guarantee for a private loan can fall under the Directive. It might be considered whether this may constitute a gap in consumer protection that should be remedied in a possible review of the Directive.

As regards guarantees, the GERMAN courts followed the abovementioned ECJ decision. In 1998, the German Supreme Court, BGH,<sup>50</sup> ruled that a guarantee does not fall under the definition of Directive 85/577 if it secures a financial liability entered into by the principal debtor acting within his official business capacity. In contrast, in AUSTRIA, the OGH,<sup>51</sup> held in a 2005 ruling that, at the time the guarantee is concluded, the creditor must be a supplier and the guarantor a consumer, even if the guarantee secures a debt of a principal debtor acting in his business capacity.

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<sup>48</sup> Cf. Para. 20 of the judgment.

<sup>49</sup> Cf. Para. 23 of the judgment.

<sup>50</sup> BGH, judgment of 14 May 1998, IX ZR 56-95.

<sup>51</sup> OGH, judgment of 20 Oct 2005, 2 Ob 178/05y.

Most member states refer in their transposition laws to goods and services without much further explanation.<sup>52</sup> However, the DUTCH legislator has clarified that not only movables are included, but also other economic rights.<sup>53</sup> In France, the Supreme Court (Cass. Civ.<sup>54</sup>) ruled that a contract containing provisions to the effect that the consumer shall rent out a place in his immovable property, so that the “supplier” may install a relay station there, falls within the scope of French doorstep selling provisions. The provisions are held to be applicable, although the supplier does not, strictly speaking, provide the consumer with goods or services. In PORTUGAL, the object of the specific contract must be goods or services.

From a consumer protection perspective, the term “goods and services” may be considered as too narrow, because, for instance, donations or subscriptions to (charitable and other) associations are not covered. However, it is perhaps doubtful whether such protection should be stipulated at the EC level.

### **cc. Offers and/or unilateral legal acts**

Art. 1 para. 3 and para. 4 of the Directive attempt to clarify that the consumer must also be able to withdraw from an offer made in a doorstep situation, irrespective of whether the offer is binding (as it usually is, e.g., under GERMAN law) or not binding (as it usually is, e.g., under ENGLISH law). These provisions are somewhat incomplete, because it goes without saying that unilateral legal acts that are binding on the consumer must also be covered. Some member states have explicitly clarified that at least offers made in a doorstep situation fall under their doorstep selling rules (e.g. BULGARIA, IRELAND, UNITED KINGDOM). Others must rely on their courts with regard to this issue. AUSTRIA has explicitly stipulated that its doorstep selling laws cover all legal transactions between a consumer and a trader and thereby do not only include all forms of bilateral contracts (except "work only" contracts), but also unilateral acts such as rescissions, withdrawals, contractual stipulations or membership of clubs.<sup>55</sup> ROMANIAN Ordinance no. 106/1999 implementing the Directive provides that it applies to contracts

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<sup>52</sup> In the United Kingdom, in the context of UTCCR 1999 (Transposition of Directive 93/13), the Court of Appeal has suggested that “goods or services” in the UTCCR should be read very widely indeed to include tenancy agreements. It is not clear if this will be followed in the context of Doorstep Selling.

<sup>53</sup> Doorstep Selling Law, Art. 1 para. (1) (c) and para. (3) and (4).

<sup>54</sup> Cass. Civ., judgment of 30 March 2005, Case no.04-11.831 Fouque/SFR.

<sup>55</sup> Consumer Protection Act, Art. 1(1)(1).

where an offer is made by the consumer and, as a result, he is bound by such an offer. Those member states which also apply their doorstep selling laws on contracts concluded not during, but after the doorstep situation (see next paragraph) automatically cover offers as well.

#### **dd. Contracts negotiated in a doorstep situation, but concluded subsequently**

Some member states also cover contracts concluded on business premises when the consumer has previously been influenced in a doorstep situation. This is, for instance, the case in AUSTRIA, where the transposition law also covers contracts concluded on the trader's business premises if the consumer has been enticed there. In POLAND, the scope of protection has been extended to cover contracts concluded on business premises, provided that the contractual offers were made outside these premises.<sup>56</sup> GERMAN law protects the consumer when he has been induced in a doorstep situation to conclude a contract. In France, if a contract is concluded on business premises, but the consumer has first been invited by telephone to go there, the provisions on doorstep selling apply.<sup>57</sup>

#### **ee. Visits requested by the Consumer**

With regard to the specific provisions of the Directive dealing with visits requested by the consumer, varying transposition laws can be found. For instance, some member states have not implemented the provision that contracts concluded during a visit at the express request of the consumer can be excluded from the protection. In DENMARK, FRANCE, ITALY, LATVIA and POLAND, the protective provisions also apply to visits taking place at the express request of the consumer, whereas in BELGIUM,<sup>58</sup> the CZECH REPUBLIC,<sup>59</sup> ROMANIA<sup>60</sup> and SLOVENIA, the provisions only apply to unsolicited visits. However, in BELGIUM, the acceptance of a telephone offer from the seller to visit the consumer at home does not constitute a prior

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<sup>56</sup> Article 1(3) of Act of 2 March 2000 on the protection of certain consumer rights and liability for an unsafe product.

<sup>57</sup> Cour de cassation, Chambre criminelle, 10 January 1996, *Receuil Dalloz*, 1996, *Informations Rapides*, 120.

<sup>58</sup> The protective provisions are not applicable if, and only if, the consumer explicitly solicited the visit and did so prior to the visit with the purpose of negotiating the purchase of the products or services. The burden of proof for the request rests with the seller. (CA Ghent, judgment of 3 Feb 2004, 2003/AR/960 *Mini-Flat n.v.* / Chris Vandelanoot).

<sup>59</sup> CC § 57(1), last sent.

<sup>60</sup> Article 3 lit. b of the Ordinance regarding consumers contracts negotiated away from business premises 106/30.8.99.

request made by the consumer.<sup>61</sup> A consumer who shows interest in a product or a service on offer in an advertising brochure is not the same as a consumer who requests a seller to visit him at home with a view to negotiating the purchase of that product or service.<sup>62</sup> In the UNITED KINGDOM,<sup>63</sup> unsolicited visits as well as visits which were arranged by previous unsolicited visits or by telephone fall within the scope.<sup>64</sup> In CYPRUS, the protective provisions apply to unsolicited visits and if the trader has been invited to discuss an item other than the one he is actually offering. According to AUSTRIAN<sup>65</sup> law, the consumer has no right of withdrawal if the business relationship was initiated by the consumer.<sup>66</sup> According to Austrian jurisdiction, “initiating” means that the consumer is instigating contact and demonstrating a willingness to conclude a specific consumer transaction.

In LITHUANIA,<sup>67</sup> solicited visits also fall within the scope where the consumer is provided with goods and services other than those that are requested. A similar regulation can be found in GREECE, as well as in BULGARIA. However, where the trader offers products other than those which he has been invited to discuss, the protective provisions do not apply if the consumer knows or should know that the products offered are part of the trader’s standard product range or that the products offered are linked to the products which the trader has been invited to discuss. According to PORTUGUESE law, visits requested by the consumer or the trader fall within the scope of protection if the consumer is not aware that the trader also sells the specific kind of goods or services. In Bulgarian law, consumer protection still applies in cases

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<sup>61</sup> Trade Practices Act, Art. 87(a).

<sup>62</sup> CA Brussels, judgment of 25 Feb 2005, 1999/AR/202 s.a. Euroconstruction/Mr. and Mrs. Danielswicz-Claes.

<sup>63</sup> On 7 September 2006, the UK government announced two proposals to amend the legislation on doorstep selling in the UK: firstly, the right of withdrawal will also be made available in circumstances where the visit by the trader to the consumer was solicited, i.e., agreed in advance; secondly, contracts are to provide cancellation notices more prominently and clearly indicate the circumstances when the right of withdrawal may be lost. The first amendment will require primary legislation, because this exceeds the scope of the Directive, and there is no power to adopt secondary legislation under the European Communities Act 1972 to make this change.

Details of the proposals can be found at <http://www.dti.gov.uk/files/file33819.pdf> (accessed 7 September 2006).

<sup>64</sup> Article 3(3)(a) and (b) of the Consumer Protection Regulations 1987 (Cancellation of Contracts concluded away from business premises).

<sup>65</sup> Consumer Protection Act, Art. 3(3), 1st indent.

<sup>66</sup> OGH, judgment of 8 Nov 1995, 7 Ob 594/94. According to the OGH judgment of 13 Feb 2002, 2 Ob 11/02k, this can also be the case if the consumer, after a telephone call by the trader couched in general terms, shows interest in concluding a very specific transaction. The burden of proof rests with the trader.

According to the OGH judgment of 9 Oct 1984, 4 Ob 521/84, a consumer who is not just requesting general information at a fair, but rather makes explicit his desire to enter into preliminary negotiations with the aim of concluding a specific transaction, is initiating a business contact with the supplier.

In its judgment of 14 July 1998, 4 Ob 183/98k, the OGH held that the consumer has initiated the transaction, if he takes a closer look at coats on display in a hotel foyer out of curiosity and on his own initiative. This applies even if the supplier then made the initial verbal contact and began the sales discussion.

<sup>67</sup> Law on Consumer Protection, Art. 14(3) 2nd indent.

where the consumer makes the offer to conclude the contract regardless of whether the offer is binding on the consumer or not. In MALTA, contracts concluded exclusively on the consumer's initiative are excluded from the scope of protection except for cases where the consumer only orders a catalogue, samples or similar items. Where the consumer requests the trader to visit, demonstrate a product/service or participate in an event, this is not considered to be on the consumer's initiative.<sup>68</sup> SPANISH<sup>69</sup> law contains some specifications relating to what is meant by the consumer's initiative. According to Spanish jurisdiction, the visit request must be specific and unambiguous.<sup>70</sup>

## **b. Exemptions provided for in the Doorstep Selling Directive**

### **aa. Art. 3 para. 1 (Contracts under 60 ECU)**

Art. 3(1) of Directive 85/577 provides for the option for member states to exclude contracts that do not exceed the sum of 60 ECU from the scope of their national transposition law. Member states who have not exercised this option are, for instance, CYPRUS, the CZECH REPUBLIC, DENMARK, FRANCE, GREECE, HUNGARY, LATVIA, LUXEMBOURG and SLOVAKIA. Although many member states have indeed exercised this option, they have fixed different limits varying from EUR 10 (POLAND) up to EUR 50 (BELGIUM), as set out in the chart below. In BELGIUM, additionally, the sale must be made for non-commercial and exclusively charitable purposes. In ESTONIA,<sup>71</sup> there is a limit of EUR 15 which only applies where the consumer pays the sum at the moment the contract is concluded. PORTUGUESE law is applicable to contracts under EUR 60, although some provisions (regarding contract form, content and terms and conditions) are only applicable to contracts exceeding this amount.<sup>72</sup>

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<sup>68</sup> Doorstep Contracts Act, Art. 3 lit. (a).

<sup>69</sup> Article 1(1)(b) of Law 26/1991 of November 21 on consumer protection in the case of contracts performed outside commercial premises.

<sup>70</sup> A demand for free personal information is not considered to be such a request from the consumer because it only aims to gather information. The burden of proof for the request lies with the trader. Audiencia Provincial Burgos, judgment of 26 Oct 2001, 528/2001 "Entidad técnica de distribución X. S.L." v María Cruz S. R. y Raúl A.S.

<sup>71</sup> Consumer Protection Act, Art. 46(2).

<sup>72</sup> Article 16(4) of Decree-Law 143/2001 of April 26.

	<b>Member States</b>
Not transposed	CY, CZ, DK, FR, EL, HU, LU, LV, SK ( <b>9</b> )
Exclusions	AT (EUR 15 /EUR 45), BE <sup>73</sup> (EUR 50), BG (120 Lev = EUR 60), DE (EUR 40), EE <sup>74</sup> (EUR 15), ES (EUR 48.08), FI (EUR 15), IE (£ 40 = EUR 50.79), IT (EUR 26), LT (LTL 200) MT (20 Maltese liri = EUR 46.68), NL (EUR 34), PL (EUR 10), PT (EUR 60, cf. text above), RO (equivalent to EUR 30), SE (300 SEK = EUR 32.57), SL (3000 Slovenian Tolars = EUR 12.52), UK (£ 35 = EUR 50.82) ( <b>16</b> )

### **bb. Art. 3(2)**

Equally, the member states have not consistently exercised the options to limit the scope as provided for in Art. 3 para. 2 of Directive 85/577. The general picture on the use of these options has already been set out in the Executive Summary of this chapter. It may be noted that, for instance, in GREECE, ITALY, IRELAND (exclusion of insurance and assurance contracts), PORTUGAL, POLAND, ROMANIA and the UNITED KINGDOM,<sup>75</sup> the same situations are basically exempt from protection as provided for under Directive 85/577. In contrast, LATVIAN law does not contain any restrictions in the general definition of the contract.

It is worth highlighting the following features with regard to the individual transposition laws. GERMANY, LITHUANIA, MALTA and SPAIN exclude contracts concluded before a notary public. This exclusion is broader than what is provided for in Art. 3 para. 2 lit. a (contracts related to immovable property) and may therefore infringe the Directive. In particular, the Maltese<sup>76</sup> legislator, in implementing the exemptions laid down in Art. 3 of the Directive, goes beyond the Directive's scope by excluding contracts negotiated solely in writing, contracts concluded

<sup>73</sup> The exclusion is limited to sales which do not exceed the sum of EUR 50 and are made for non-commercial and exclusively charitable purposes.

<sup>74</sup> The exclusion is limited to sales where the sum is paid immediately.

<sup>75</sup> Article 3(4)(a) of the Consumer Protection Regulations 1987 (Cancellation of Contracts concluded away from business premises); (variation: instead of referring to contracts of "securities", the UK excluded "any agreement the making or performance of which by either party constitutes a regulated activity", e.g. dealing in and arranging deals in investments, managing, safeguarding and administering investments, establishing a collective investment scheme; no application to consumer credit contracts).

<sup>76</sup> Doorstep Contracts Act, Art. 3.

before a court, notary or another person who is bound to inform the parties of their rights and obligations even if they are concluded in a doorstep situation (which is – for some of these cases – hard to imagine).<sup>77</sup> Moreover, the Maltese Minister is empowered by law to make other contracts exempt from the national Doorstep Contracts Act. In Spain, Art. 3(2)(a), sent. 1 has been transposed almost literally, only excluding contracts related to immovable property, whereas the second sentence (contracts for the supply of goods for incorporation in immovable property and contracts for the repair of the latter) has not been transposed at all.

In the NETHERLANDS, contracts in the case of an ongoing relationship between the parties concerning the sale of food are exempt.<sup>78</sup> The LITHUANIAN derogation for the supply of foodstuffs, beverages or other goods intended for current consumption in the household does not require that the goods were supplied by “regular roundsmen”.<sup>79</sup> In SPAIN, the doorstep selling of foodstuffs and beverages is prohibited,<sup>80</sup> but not their delivery at the consumer’s request.

The exemption of contracts concluded on the basis of a trader’s catalogue (as per Art. 3 para. 2 lit. c of Directive 85/577) has not been transposed in BELGIUM, ITALY, LITHUANIA and HUNGARY. Hungarian<sup>81</sup> law explicitly states that the provisions on distance selling are applicable. CYPRUS has exercised this option with some variations regarding the conditions the contract has to meet in order to be excluded from the protective rules (e.g. the time limit for cancellation or return of goods – extended to at least fourteen days – and the information which must be provided in the catalogue and the contract).<sup>82</sup> The GREEK legislator has made a further exemption: the protective provisions do not apply to itinerant traders with small businesses.<sup>83</sup>

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<sup>77</sup> The Maltese legislator has presumed that these contracts would not generally stem from a doorstep situation. This exemption may be considered to be necessary because the definition of “doorstep contract” includes contracts that have been negotiated at any other place or premises other than the door-to-door salesman’s business premises .

<sup>78</sup> Doorstep Selling Law, Art. 1(3).

<sup>79</sup> Article 3(3.1) of the Order of the Minister of Economy of the Republic of Lithuania on the Approval of the Rules on the Sale of Goods and Provision of Services on Premises not Designated for this Activity, Art. 14(3) 1<sup>st</sup> indent of the Law on consumer protection, CC, Art. 6.357(3) 1<sup>st</sup> indent.

<sup>80</sup> Article 5(2)(d) of Law 26/1984 of July 19 on Consumer Protection, Art. 2(1) 1<sup>st</sup> sent., no. 6 of Law 26/1991 of November 21.

<sup>81</sup> § 1(6) of Government Decree 370/2004 (XII.26.) on Doorstep Selling.

<sup>82</sup> Article 4(c) of the Law for Consumer Contracts Concluded Away from Business Premises of 2000, L.13(I)/2000.

<sup>83</sup> Article 3(7) of Law 2251/94 on consumer protection.

### **c. Burden of proof**

The burden of proof with regard to the circumstances that would give rise to protection under the national transposition laws is not subject to the Directive's provisions. Nonetheless, this element can either increase the level of consumer protection or at least complicate the enforcement of the consumer's rights. Where the burden of proof regarding the facts necessary to trigger application of the protection law rests with the trader, consumer protection is enhanced. Where the burden of proof rests with the consumer, enforcement is more complicated. Both solutions can be found in the member states' laws. For instance, AUSTRIA, GERMANY, GREECE, POLAND AND SWEDEN place the burden of proof on the consumer, whereas, in DENMARK, MALTA and SPAIN, for example, the trader carries the burden of proof. The BELGIAN courts also tend to place the burden of proof on the trader.<sup>84</sup> There is no specific rule in PORTUGAL. In LATVIA, no particular rule on doorstep contracts can be found either, though it is considered that the Consumer Protection Act's purpose is to place the burden of proof on the trader. In BULGARIA, ROMANIA and the UNITED KINGDOM, a general rule applies: the claimant has to prove he is entitled to the legal right.

## **III. Consumer protection instruments**

### **1. Information requirements**

The member states mostly transposed the requirement to provide written notice established in Art. 4 of Directive 85/577. In some member states, the protective measures have been beefed up. In BELGIUM, GREECE, MALTA, the NETHERLANDS, PORTUGAL, ROMANIA and SPAIN, the whole contract has to be in writing. In other member states, only the information on the right of withdrawal has to be in writing, e.g. AUSTRIA, BULGARIA, the CZECH REPUBLIC,<sup>85</sup> DENMARK, FINLAND, FRANCE, HUNGARY, IRELAND, LUXEMBOURG, LITHUANIA, POLAND,

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<sup>84</sup> In a judgment of 23 March 2005 the Ghent Court of Appeal ruled that, taking into account the precise circumstances in which the contract was negotiated, the contract term stipulating the prior and express request of the consumer to negotiate the contract was sufficient proof. In the same vein, the CA Brussels ruled on 9 May 2005 that a contract negotiated away from business premises was to be considered null and void (in the absence of a withdrawal clause) if the trader could not prove that the consumer had previously requested a visit. On 14 September 2005, the CA Ghent explicitly stated that the burden of proof as to the prior and express request of the consumer rests with the trader. However, the term in the contract indicating the consumer's express request was not considered sufficient proof of such a prior and express request, as it was drafted in exceptionally small print which was difficult to decipher. Furthermore, the Court crucially added that such a clause did not, in any case, prove that the consumer's request was particularly aimed at negotiating a sales contract. This stance was confirmed by the Ghent CA in its judgment of 12 October 2005.

<sup>85</sup> Including the name and contact details of the person against whom that right may be exercised.

SLOVENIA SLOVAKIA<sup>86</sup> and SWEDEN. ESTONIAN and GERMAN<sup>87</sup> law require the information to be either in writing or otherwise available in a durable format accessible to the consumer. When a contract is entered into in SPAIN, an information note in the format approved by the Minister of Economic Affairs and Communications must be given to the consumer. Finnish law sets a general duty to provide a doorstep selling document in accordance with the model approved by the Ministry of Trade and Industry. Similar to the Finnish regulation, French legislation requires, alongside a version of the contract, delivery of a detachable withdrawal document containing the information on the right of cancellation. In addition, the contract must contain certain information.<sup>88</sup> ROMANIAN law requires that the right of cancellation has to be stipulated in big letters and very near the place for the consumer's signature of the contract. Furthermore, the trader is compelled to provide the consumer with a signed contract and has to be able to prove such a delivery before the authorities in charge.<sup>89</sup> In CYPRUS, the trader must inform the consumer about the right of withdrawal in a separate written notice and attach a standard cancellation form, which the consumer can use to exercise his right of withdrawal. In LATVIA, upon entering into a contract, the seller or service provider shall issue the consumer with a written withdrawal form identifying the specific contract involved. The consumer, in order to acknowledge the receipt of the withdrawal form, must make a note on a copy of that form.

Furthermore, in IRELAND and the UNITED KINGDOM, two written forms of information documents exist: a "cancellation notice" comprising the data set by the Directive and a "cancellation form", which is prescribed in an annex to the doorstep regulations. ITALIAN regulations state that the notice of the right of withdrawal shall be enclosed with the order form to be signed separately from any other contractual provisions and in print of the same size or larger than in the other parts of the form. A copy of the order form, containing details of the date and place of signature, has to be sent to the consumer. MALTESE law requires a

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<sup>86</sup> § 7(2)(d) of Act 108/2000 on Consumer Protection in Doorstep Selling and Distance Selling; notice must at the latest be given at the time the contract is concluded.

<sup>87</sup> In Germany, according to a judgment of the BGH (judgment of 4 July 2002, I ZR 55/00), notice pertaining to a right of withdrawal may not, in principle, contain any information other than what is prescribed by law. Only in exceptional circumstances may it contain supplementary information clarifying, though not differing from, the content of the notice.

<sup>88</sup> Code de la Consommation, Art. L. 121-23 states that a contract must be established and that it shall contain the following information: 1. the name of the provider and trader, 2. address of the provider, 3. address of the place where the contract has been concluded, 4. precise description of the goods and services, 5. conditions regarding performance of the contract, 6. total price, 7. right of withdrawal.

<sup>89</sup> Article 8(2) of the Ordinance regarding consumers contracts negotiated away from business premises nr. 106/30.8.99.

clause accompanying the contract set in clear, bold and highlighted letters, in which the right of withdrawal has to be communicated in writing. Herein, in addition to the Directive's requirements, the licence number of the door-to-door salesman has to be stated. A similar requirement to provide the licence (certificate) exists in SLOVAKIA. POLISH law is different in requiring that the consumer be informed before the contract is concluded; *inter alia*, the consumer has to be provided with a standard withdrawal form, including the name and address<sup>90</sup> of the trader. In LITHUANIA,<sup>91</sup> the trader is obliged to provide the consumer with a document specifying the identity and address of the trader and the identity (name, surname) of the person to whom the consumer may address his withdrawal. Similarly, in BULGARIA, the consumer has to be provided with the same information as in Lithuanian law, but Bulgarian law does not rule whether this information has to be included in a separate document or in the contract itself. Furthermore, the trader has to inform the consumer on how to exercise his right of withdrawal.

As to the sanctions imposed on the trader where he has failed to provide sufficient information, these range from contracts being declared partially null and void in GREECE and in SPAIN<sup>92</sup> to their being declared invalid in their totality (FRANCE, HUNGARY and the NETHERLANDS). BELGIAN law declares a contract null and void and imposes fines between EUR 250 and EUR 10,000<sup>93</sup> in addition to a cease and desist order. Damages can only be obtained through separate proceedings based on the Belgian Civil Code.

Fines or more severe sanctions in the case of infringements of protective provisions (e.g. the information requirement) under national transposition law are provided for in BELGIUM, ESTONIA, FINLAND, FRANCE, GREECE,<sup>94</sup> HUNGARY, ITALY, IRELAND, LUXEMBOURG, LATVIA, PORTUGAL, POLAND, ROMANIA, SLOVENIA and SLOVAKIA.

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<sup>90</sup> Before the transposition of Directive 85/577, Polish law did not require the provision of the address, but only the trader's office.

<sup>91</sup> Law on Consumer Protection, Art. 14(4) 4th and 5th indents; CC Art. 6.357(4) 4th and 5th indents.

<sup>92</sup> According to the judgment of the Audiencia Provincial Cantabria of 8 Mar 2004, 118/2004 "Finanzia Banco de Crédito, S. A." v Iván, the trader must inform the consumer not only of their right to withdraw from the contract, but also that the contractual formalities, to be performed by the trader are mandatory and that failure to comply with them results in the contract's being declared null and void.

The legislative text uses the term "null and void"; prevalent academic interpretation and also the Audiencia Provincial Cantabria in its judgment of 26 Feb 2003, 88/2003 "BSCH., S.A." v Ángel Juan C. M., consider that this means only partially null and void.

<sup>93</sup> An indexed fine between EUR 1,375 and EUR 55,000.

<sup>94</sup> Article 14(3) of Law 2251/1994.

In MALTA, the contract is rendered null and void and therefore unenforceable against the consumer. Furthermore, the licence, which any door-to-door salesman needs, can be withdrawn or suspended by the Director, who also issues them. A person who then operates as a door-to-door salesman without a licence is guilty of an offence and, on conviction, liable to a fine and/or imprisonment.<sup>95</sup>

With regard to the sanctions for an infringement of the obligation to inform the consumer of his right of withdrawal, the ECJ stated, in the cases *Schulte* and *Crailsheimer Volksbank*, that, where the consumer would have been able to avoid exposure to the risks inherent in the contract, Article 4 of the Directive requires the member states to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks by adopting suitable measures to allow them to avoid bearing any potential consequences should those risks materialise. It will have to be seen how the member states intend to comply with this requirement. The GERMAN courts which referred the issue to the ECJ now consider whether to grant the consumer a claim for damages (based on the breach of a pre-contractual obligation) in such cases.<sup>96</sup>

## **2. Right of withdrawal**

### **a. Length of withdrawal period**

As illustrated in the chart, the time limit for exercising the withdrawal right ranges from 7 calendar days to 15 calendar days in the different member states, with some opting to express that period as a number of working days.

<b>Withdrawal Period</b>	<b>Member State</b>
7 calendar days	BG, CZ, ES, FR, IE (5)
7 working days	BE, <sup>97</sup> LT, LU, RO, SK, UK (6)
8 calendar days	NL (1)
8 working days	HU (1)

<sup>95</sup> Doorstep Contracts Act, Art. 4 and Art. 5.

<sup>96</sup> See, for example, BGH judgment of 16 May 2006, XI ZR 6/04.

<sup>97</sup> Article 1(9) of the Trade Practices Act contains the following definition of working days: "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".

One week	AT (1)
10 calendar days	PL (1)
10 working days	EL, IT <sup>98</sup> (2)
14 calendar days	CY, DE <sup>99</sup> , DK, EE, FI, LV, PT, SE (8)
15 calendar days	MT, SL (2)

The longest withdrawal period (15 calendar days) can be found in MALTESE and SLOVENIAN law. In BELGIUM, LITHUANIA, LUXEMBOURG, ROMANIA, SLOVAKIA and the UNITED KINGDOM, the withdrawal period is 7 working days. The period is 7 calendar days in BULGARIA<sup>100</sup>, the CZECH REPUBLIC, FRANCE, IRELAND and SPAIN<sup>101</sup> and 8 calendar days in the NETHERLANDS. In HUNGARY, the consumer has 8 working days to withdraw from the contract. In AUSTRIA, the period is one week. According to POLISH law, the period is 10 calendar days, whereas according to GREEK and ITALIAN law, the consumer can withdraw from a contract within 10 working days.

In the CZECH REPUBLIC, where goods are not delivered, the consumer can withdraw from the contract within one month. In ITALY, if the trader does not inform the consumer about his right of withdrawal or supplies incorrect information, the period is extended to 60 days<sup>102</sup> and in ROMANIA 60 working days are added to the general period of withdrawal.<sup>103</sup> This approach to transposition has been criticised, because the consumer might not be sufficiently protected if he does not receive information about his right of withdrawal or if he receives no written notice, but only oral information. Consequently, the consumer might not be aware of the possibility to withdraw from the contract within 60 days. In BULGARIA, LITHUANIA, POLAND and SLOVENIA, the withdrawal period is extended to 3 months where there is a failure to provide (sufficient) information. In the CZECH REPUBLIC, the period is extended to one year after the conclusion of the contract. Under the ECJ's ruling in the C-481/99 – *Heininger* case, any limitation of the withdrawal period where no notice about the right of withdrawal is given

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<sup>98</sup> After entry into force of the Consumer Code; previously 7 days.

<sup>99</sup> Two weeks.

<sup>100</sup> The law on consumer protection only speaks of “7 days”, without clearly specifying whether calendar or working days are meant.

<sup>101</sup> The law on doorstep selling refers to “7 days”. According to CC, Art. 5(2), the period is deemed to be in calendar days unless it is specified otherwise in the law.

<sup>102</sup> CC, Art. 65(3).

<sup>103</sup> Article 10 of the Ordinance regarding consumer contracts negotiated away from business premises 106/30.8.99.

is in breach of Art. 4 of Directive 85/577. Therefore, the transposition provisions in BULGARIA, the CZECH REPUBLIC, LITHUANIA, POLAND, ROMANIA, SLOVENIA and ITALY infringe that article.

In CYPRUS, DENMARK, ESTONIA, FINLAND, LATVIA, PORTUGAL and SWEDEN, the withdrawal period is up to 14 calendar days. In GERMANY, the withdrawal period is generally up to two weeks, provided that information on the right of withdrawal is given to the consumer before or at the time the contract is concluded. If information on the right of withdrawal is given to the consumer after the conclusion of the contract, the consumer has one month to withdraw from the contract. If no (correct) notice of the right of withdrawal is given to the consumer, the withdrawal period does not start (i.e. there is no limitation on the right to withdraw from the contract). In the UNITED KINGDOM, if correct information is not given at the time the contract is concluded, the contract remains unenforceable against the consumer forever. This is, however, presumably subject to the doctrine of waiver/affirmation, although no case law is available.

### **b. Start of the withdrawal period**

Art. 5 of Directive 85/577 states that the consumer shall have the right to renounce the effects of his undertaking by sending notice within not less than seven days from receipt of the information about the right to withdraw. The member states have laid down rather different provisions for the beginning of the period. For instance, in AUSTRIA, BULGARIA, GERMANY and LITHUANIA, the withdrawal period starts upon receipt of the notice regarding the right of withdrawal. If the information on the right of withdrawal is not provided under Bulgarian law, the consumer can exercise his right of withdrawal within three months from the conclusion of the contract. In IRELAND,<sup>104</sup> LATVIA and the CZECH REPUBLIC,<sup>105</sup> the period starts with the conclusion of the contract. In ESTONIAN and POLISH law, the withdrawal period begins with the conclusion of the contract if the consumer receives due notice before entering into the contract; if not, the withdrawal period begins upon receipt of the notice regarding the right of withdrawal. In CYPRUS, the period starts on the day following the date of conclusion of the

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<sup>104</sup> Article 5(1) - and the Schedule containing a cancellation form - European Communities Regulations, 1989 (Cancellation of Contracts Negotiated away from Business Premises).

<sup>105</sup> CC § 57(1), sent. 1.

contract or on the day the trader performs the contract, whichever comes last. In SLOVAKIA,<sup>106</sup> the period starts upon receipt of the goods or upon conclusion of the contract. SPANISH law provides for a period that is “seven days from receipt”, which is rather unclear, because it could mean after receipt of the information or after receipt of the goods sold under the contract. Legal literature has criticised this gap, as have some courts, which have already ruled that the period begins upon receipt of the goods.<sup>107</sup> In other member states, only the date on which the contract is concluded is decisive, e.g. in BELGIUM,<sup>108</sup> FRANCE,<sup>109</sup> MALTA<sup>110</sup> and the UNITED KINGDOM (given that the information has been provided beforehand or simultaneously). DANISH law distinguishes between contracts under which the trader supplies goods and contracts under which services are provided. In the case of contracts for services, the withdrawal period begins upon conclusion of the contract. If the trader supplies goods, the withdrawal period starts upon their delivery. The same distinction is made in HUNGARY. However, where the goods are delivered after the contract is concluded, it is from this delivery that the withdrawal period starts. Similar provisions can be found in ROMANIA, SLOVENIA and SWEDEN. In Romania, the parties can contractually prolong the period of withdrawal if necessary.<sup>111</sup> According to GREEK law, the consumer can exercise his right of withdrawal within 10 days from receipt of the written contract or, as the case may be, upon subsequent receipt of the goods. It is disputed whether the later event is always decisive, especially if the delivery of goods takes place more than ten days after receipt of the contract.<sup>112</sup>

Under ITALIAN law, the withdrawal period starts with the signing of an order form containing the information on the right of withdrawal. If no order form is used, the withdrawal period

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<sup>106</sup> § 7(1)(d) of Act 108/2000 on Consumer Protection in Doorstep Selling and Distance Selling.

<sup>107</sup> SAP Madrid, 26 March 2002 Oscar M. O. v “Servicios Integrales de F., S. L.”, and the Spanish Constitutional Court judgment of 30 September 1993, *obiter dicta* (5<sup>th</sup> legal reason). Most scholars agree (VÉRGEZ, 4038; BOTANA, *Contratos*, 252; GARCÍA VICENTE, 188-189, disagrees, supporting the day of receipt of the information).

<sup>108</sup> The withdrawal period starts the day after the contract is signed (Trade Practices Act, Art. 88).

<sup>109</sup> Consumer Code, Art. L. 121-25. According to case law, the withdrawal period starts on the day after the contract is concluded (Cour de cassation, Chambre criminelle, 5 October 1987, Recueil Dalloz, 1987, Informations Rapides, 236).

<sup>110</sup> The CA explicitly ruled that the period begins from the date the contract is signed and not from when the goods are delivered to the consumer; judgment of 14 Jan 2002, 615/99SM Commonwealth Educational Society Limited vs Saviour and Bernardette Saliba.

<sup>111</sup> Article 9(2) of the Ordinance regarding consumers contracts negotiated away from business premises 106/30.8.99.

<sup>112</sup> In Greek literature, it is considered that, if the goods are delivered within ten days from receipt of the contract, the period of withdrawal will be extended by ten days. Where delivery of the goods takes place after the period of 10 days has expired (counting from receipt of the contract), it is disputed whether or not the consumer is given a new 10-day period counting from the delivery of goods.

starts upon receipt of the information itself. Additionally, in the case of contracts for the supply of goods, the withdrawal period starts upon delivery of the goods where the contract has been concluded in the trader's absence, or where the product presented or demonstrated is different from the one in the contract. In FINLAND, the withdrawal period starts when the door-to-door selling document (set form) is supplied. There is a special provision concerning the sale of tangible goods according to which the withdrawal period begins with the delivery of the goods if this delivery is later than the receipt of the document.<sup>113</sup> Under GREEK law, the withdrawal period starts with the conclusion of the contract or, if goods are handed over at a later date, with the delivery of the goods to the consumer. An equivalent rule can be found in PORTUGAL. In the NETHERLANDS, the trader is obliged to register the contract at the *Kamer van Koophandel* (Chamber of Commerce). Therefore, the withdrawal period starts on the day of registration.

### **c. Postal Rule / Dispatching Rule**

Contrary to the Distance Selling Directive, Directive 85/577 contains a provision specifying how the consumer can exercise the right of withdrawal within the time limit. Member States like AUSTRIA,<sup>114</sup> BELGIUM,<sup>115</sup> DENMARK, ESTONIA, GERMANY,<sup>116</sup> GREECE,<sup>117</sup> HUNGARY,<sup>118</sup> ITALY, LITHUANIA,<sup>119</sup> POLAND, PORTUGAL, ROMANIA, SLOVAKIA,<sup>120</sup> SLOVENIA, SPAIN<sup>121</sup> and SWEDEN have included a dispatching rule. The FRENCH provisions do not contain a dispatching rule, but as the withdrawal notice must be sent by recorded delivery, the letter can be regarded as being served at the time of posting.

In the DUTCH<sup>122</sup> regulations on doorstep selling – and running counter to the general rule - the message is assumed to have reached the addressee when the letter is first given to him. In LATVIA, a postal rule is provided for under civil law. In IRELAND, there is a form of postal rule

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<sup>113</sup> Consumer Protection Act, Art. 6(9).

<sup>114</sup> Consumer Protection Act, § 3(4).

<sup>115</sup> Trade Practices Act, Art. 88 and Art. 89(2).

<sup>116</sup> CC, § 355(1), sent. 2.

<sup>117</sup> It is recognised in academic literature that the period is guaranteed if the notice is dispatched before the end of the period (*Karakostas*, *Dikaio Prostatias tou katanaloti*, margin no. 206).

<sup>118</sup> Only in the case of written notice, § 4(3) of Government Decree 370/2004 (XII.26.) on Doorstep Selling.

<sup>119</sup> CC, Art. 1.122(2).

<sup>120</sup> § 7(2) of Act 108/2000 on Consumer Protection in Doorstep Selling and Distance Selling.

<sup>121</sup> Article 5(1) 2nd indent of Law 26/1991.

<sup>122</sup> Doorstep Selling Law, Art. 25(4).

stipulating that the cancellation shall have effect from the date of delivery of the cancellation form by hand or the date on which it is posted. In CYPRUS<sup>123</sup> and the UNITED KINGDOM,<sup>124</sup> the transposition law contains a postal rule stating that the withdrawal notice sent by post shall be deemed to have been served at the time of posting, whether it has been received or not. A similar provision exists in FINLAND<sup>125</sup>: if the withdrawal notice is sent appropriately, it can be invoked even if it is delayed, altered or lost. This point could be clarified when reviewing the Directive, also with regard to the question of whether such a rule purely ensures the timeliness of the withdrawal (as in GERMANY) or whether it even makes a withdrawal valid should the declaration never reach the supplier (e.g. because the letter got lost after being dispatched), as in Cyprus, Finland and the United Kingdom.

In BULGARIAN and CZECH law, there is no postal or dispatching rule. In MALTA there is no dispatching rule either. The withdrawal can be exercised without any formal requirements. It is only necessary that the intention of the consumer is substantially conveyed to the trader. On the one hand, the term ‘delivery’ may be interpreted to mean that the notice only needs to be dispatched and not received. On the other hand, the requirement that the intention be conveyed to the consumer seems to imply that the door-to-door salesman must have actually received the notice.

#### **d. Formal requirements**

The formal requirements the consumer must fulfil when he exercises his right of withdrawal are not consistent in the member states’ transposition laws. The following chart shows some of the differences.

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<sup>123</sup> Article 8 of the Law for Consumer Contracts Concluded Away from Business Premises of 2000, L.13(I)/2000.

<sup>124</sup> Regulation 4(7) of the Consumer Protection Regulations 1987 (Cancellation of Contracts concluded away from business premises).

<sup>125</sup> Consumer Protection Act, Ch. 12 sec. (1)(c).

<b>Right of Withdrawal</b>	<b>Member State</b>
<b>-Formal Requirements</b>	
None	DK, <sup>126</sup> EE, <sup>127</sup> FI, HU, <sup>128</sup> NL, MT, PT, ES, SE <sup>129</sup> <b>(9)</b>
Written	AT, BG, CY, CZ <sup>130</sup> , IE, LT, LV, PL <sup>131</sup> , RO, SK <sup>132</sup> , SL, UK <b>(12)</b>
Text form	DE <b>(1)</b>
Return of goods	DE, ES, FI <b>(3)</b>
Letter sent by recorded delivery	BE, FR, EL, <sup>133</sup> IT, LU <b>(5)</b>

In several member states, the right of withdrawal can be exercised without any formal requirements, e.g. in ESTONIA, FINLAND, HUNGARY, the NETHERLANDS, MALTA,<sup>134</sup> PORTUGAL, SPAIN<sup>135</sup> and SWEDEN. In BELGIUM, FRANCE, ITALY and LUXEMBOURG, the consumer has to inform the trader via a letter sent by recorded delivery. GREEK law also requires recorded delivery, but Greek literature and case law accepts a withdrawal without formal requirements as well. This is similar in PORTUGAL. Portuguese law presumes that the notice is always considered effective if it is sent by recorded delivery, but it is considered that case law would accept another notice mechanism if it could be proven that notice has been

<sup>126</sup> Article 19 of Act 451 of 9 June 2004 on certain consumer contracts.

<sup>127</sup> Law of Obligations Act, Art. 49, 188.

<sup>128</sup> Other forms are also possible, but the dispatching rule only applies in the case of use of a written notice, § 4(3) of Government Decree 370/2004 (XII.26.) on Doorstep Selling.

<sup>129</sup> Article 4(5) of Regulation 2005:59.

<sup>130</sup> CC § 57(1), sent 1.

<sup>131</sup> As Article 3(1) of the Act requires the trader to provide the consumer with a standard form for the withdrawal notice, it appears that the consumer should make use of this standard form.

<sup>132</sup> Other party agreements possible.

<sup>133</sup> Greek literature and case law accept a withdrawal without formal requirements as well.

<sup>134</sup> As a result of the amendments under Act XXVI of 2000, a consumer who wishes to cancel a doorstep contract – in contrast to the previous legal requirements – is obliged to substantially convey his intention of cancelling the contract within the 15-day period. This cancellation notice can be communicated either verbally or by telephone or fax, or be delivered by hand or ordinary or registered mail. There is no obligation on the consumer to use the cancellation form provided by the trader. For the purposes of the law as amended, it is enough if it is clear from the communication that the consumer is cancelling the contract. According to the judgment of the CA of 10 Mar 2004, 3/2003 Saviour u Patricia Muscat vs Commonwealth Educational Society Limited, the burden of proof lies with the trader. Only as far as the withdrawal from a contract in relation to the law before the 2000 amendments is concerned, can the consumer withdraw in accordance with the procedure established by that law, i.e. by using the cancellation form provided to him by the door-to-door salesman, and by delivering that form either personally or by registered mail to the trader. Qorti tal-Magistrati, judgment of 12 June 2003, 47/1999/1 Commonwealth Educational Society vs Victor Debono.

<sup>135</sup> According to an Audiencia Provincial Asturias judgment of 15 Sept 2003, 369/2003 Laura v “Cambridge Institute 1908, S. L.”, the withdrawal is also valid if it is exercised verbally within the period of seven days, particularly when the trader has failed to comply with his/her legal duty to provide a withdrawal form or document.

given. In other member states, a written notice has to be sent to the trader, e.g. in BULGARIA, CYPRUS, the CZECH REPUBLIC, IRELAND, LATVIA,<sup>136</sup> LITHUANIA, POLAND, ROMANIA, SLOVENIA and the UNITED KINGDOM. In LATVIA, the consumer additionally has to make a note on the withdrawal form in order to confirm receipt of the form. Besides a written notice, SLOVAKIAN law provides for the possibility to mutually agree other formal requirements for exercising the right of withdrawal in the contract. According to AUSTRIAN law, the consumer can withdraw from the contract by giving written notice. He may also send the contract to the trader with a withdrawal notice. Furthermore, a verbal withdrawal notice is possible if the trader agrees to this form of withdrawal.<sup>137</sup> In POLAND, the consumer is provided with a standard withdrawal form by the trader. Therefore, it can be assumed that the consumer should make use of this form, but it remains unclear whether he can also withdraw by other means. In GERMANY, the withdrawal notice has to be sent to the trader in text form. Moreover, in Germany, FINLAND (in the case of tangible goods<sup>138</sup>) and SPAIN, it is possible to withdraw from a contract by returning the goods to the trader. DANISH law equally does not require the consumer to send a cancellation notice, but to return the goods received before the cancellation period expires.

### **e. Effects of withdrawal**

As the Directive only requires that, by exercising the right of withdrawal, the consumer is released from any obligations under the cancelled undertaking (Art. 5 para. 2), the member states have been given leeway to shape and specify their provisions. Art. 7 states explicitly that the effects of withdrawal shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received.

As the ECJ stated in its judgment *Schulte* and *Crailsheimer Volksbank*, it is up to the member states to regulate the effects of withdrawal – the transposition laws have to consider the aims of the Directive, essentially its *effet utile*.<sup>139</sup> More specific guidance has only been given by the ECJ in these judgments for the very specific case of credit contracts concluded for the financing of houses. The ECJ clarified that the Doorstep Selling Directive does not preclude:

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<sup>136</sup> Consumer Rights Protection Law, Art. 12(4).

<sup>137</sup> OGH judgment of 13 Feb 2002, 2 Ob 11/02k.

<sup>138</sup> Consumer Protection Act, Ch. 6 sec.(9).

<sup>139</sup> ECJ, C-350/03 – *Schulte*, no. 69.

- a requirement that a consumer who has exercised his right to cancel under the Directive must pay back the loan proceeds to the lender, even though, according to the scheme drawn up for the investment, the loan serves solely to finance the purchase of the immovable property and is paid directly to the vendor thereof;
- a requirement that the amount of the loan must be paid back immediately;
- national legislation requiring that, in the event of cancellation of a secured credit agreement, the consumer not only repay the amounts received under the agreement but also pay the lender interest at the market rate.

Thus, the differences between the member states are significant. For instance, AUSTRIA, the CZECH REPUBLIC, GERMANY, GREECE, LUXEMBOURG and SLOVENIA apply their general principles of the right to withdraw from a contract. The effects are – especially in AUSTRIA, the CZECH REPUBLIC,<sup>140</sup> GERMANY and GREECE – the mutual return of any contractual agreements performed by the parties, as well as the reimbursement of profits or payment of compensation where the products/services have been rendered obsolete. In Greece, the trader may not receive any payments as long as the period of withdrawal has not expired. Where a contract governs the provision of a service that has already been performed by the trader, Greek academic literature diverges on the question of whether the consumer must pay a market-linked refund in accordance with the costs he has saved, or whether the right of withdrawal can no longer be exercised.

In BELGIUM, doorstep selling contracts are not regarded as having been concluded so long as the withdrawal period has not expired. In FRANCE,<sup>141</sup> no payments may be made, no goods delivered, nor services provided before the 7-day withdrawal period has expired. According to LITHUANIAN<sup>142</sup> law, the consumer is released from the contract and the trader obliged to take back the goods delivered and to reimburse the sums paid by the consumer. In DENMARK,

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<sup>140</sup> In addition, the contract is null and void from the beginning (CC sec. 48(2)) on the grounds of unjustified enrichment (CC sec. 457).

<sup>141</sup> CC Art. L.121-26.

<sup>142</sup> Law on Consumer Protection, Art. 15(4); CC, Art 6.357(9).

MALTA, PORTUGAL, POLAND and SLOVAKIA,<sup>143</sup> the consumer is equally released from the contract in the case of withdrawal. The consumer has to return any goods received and the payments have to be reimbursed. In SLOVAKIA, the goods must be returned within 7 days. The trader must then take back the goods and refund the sums paid within 15 days. In POLAND, the goods should be returned as soon as possible, but not later than 14 days. The goods have to be returned unaltered unless an alteration or change was necessary. The trader has to pay statutory interest on the consumer's payments that are to be reimbursed. In PORTUGAL, the return period is 30 calendar days, starting with the delivery of the goods. It is worth noting that, in DENMARK, the consumer is obliged to return the goods to the trader *before* the cancellation period expires in order to benefit from the right of withdrawal. In order to fulfil this requirement, it is sufficient that the consumer has delivered the goods to a courier who transports them back to the trader.<sup>144</sup> Under Danish law, the consumer is liable for reshipment costs. ITALIAN law releases the consumer from the contract. However, the consumer has to return the goods within 7 days (at his own cost), while the trader has to reimburse the purchase price within 30 days. Consequently, only the trader may exercise the *exceptio inadimpleti* (CC, Art. 1460), while, after exercising the right of withdrawal, the consumer bears any risk of deterioration until the purchase price is reimbursed (CC, Art. 1177).<sup>145</sup> In ROMANIA, in the case the consumer has not yet performed any payment and has not received the product or benefited from the service, the exercise of the withdrawal right shall exonerate the parties from any obligation. Otherwise, the only obligation of the consumer is to return the delivered products within the period of withdrawal to the trader, who has to reimburse all payments made by the consumer – including costs of reshipping - within 15 days after renunciation. According to ESTONIAN law, the trader shall reimburse the purchase price to the consumer immediately after the withdrawal, but never more than thirty days thereafter. This is in contrast to SWEDEN, where the trader is obliged to collect the goods from where they have been delivered and the consumer is entitled to the reimbursement of his money within a period of 30 days. In FINLAND, the consumer is released from any contractual obligations and the trader has to reimburse the purchase price. The consumer has to make the goods or other returnable services provided available for the trader at the place to which they have been delivered. If the trader does not collect the goods, the consumer's duty to keep the goods on

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<sup>143</sup> The contract is null and void from the beginning.

<sup>144</sup> Article 19(2) of Act 451 of 9 June 2004 on certain consumer contracts.

<sup>145</sup> A. Stoppa, *Le vendite negoziate fuori di locali commerciali*, in: C.M. Bianca, *La vendita e la permuta*, 181; M. Cartella, *La disciplina di contratti negoziati fuori di locali commerciali*, in: *Giur. Comm.*, 1992, I, 740.

behalf of the trader expires two months after withdrawal. Nevertheless, the trader and the consumer may stipulate in the contract terms that goods delivered by mail have to be returned by the consumer. In LATVIA, the consumer must return the goods to the seller at the location where the goods were received. The consumer may also return the goods to another location specified by him, provided that this does not cause any inconvenience to the trader. The trader has to reimburse all the payments made by the consumer.

Under GERMAN law, the consumer has to compensate for any depreciation in value if he is not able to return the goods or services supplied to him or if the condition of the goods has deteriorated.<sup>146</sup> The consumer has to compensate for depreciations in value even if the deterioration has only been caused by the contractual use of the goods, provided that the consumer has been advised about this duty by the trader.<sup>147</sup> The consumer can be made liable for reshipment costs under the terms of the contract if the value of the goods does not exceed EUR 40. Under LITHUANIAN law, the consumer may exercise his right of withdrawal only if the goods received from the trader have not been damaged or their appearance has not been substantially altered. This provision might inhibit the consumer in exercising his right of withdrawal. HUNGARIAN law states that, after withdrawal, the parties have to return any goods received or other contractual agreements performed. The consumer has to compensate for any depreciation in value only where he has defaulted on the contract. If the consumer is not able to return any goods received in full or if services have already been performed in full, it is not possible to withdraw from the contract. In contrast to these rather restrictive provisions, the consumer is entitled to keep the goods received in CYPRUS and SWEDEN even if he has exercised his right of withdrawal. This is subject to the trader's not requesting the goods within a period of 21 days (Cyprus) and 3 months (Sweden). In Cyprus, the consumer can treat the goods as an unconditional gift after another period of 21 days has expired. The consumer is entitled to keep the goods and deal with them as he likes if the trader has not requested their return within a total of 42 days from the day the right of withdrawal is exercised. Under SPANISH law, the consumer does not have to compensate for any depreciation in value if the goods have only been used in accordance with the terms of the contract.<sup>148</sup>

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<sup>146</sup> CC § 346(2).

<sup>147</sup> CC § 357(3) sent. 1.

<sup>148</sup> Article 2(1)(7)(c) of the Law 26/1991 of November 21 on consumer protection in the case of contracts performed outside commercial premises.

In IRELAND, the contract is rendered null and void on cancellation, so that any sum paid by the consumer to the trader is subject to provisions governing unjustified enrichment. The trader is obliged to collect the goods at a reasonable time and place, as specified by the consumer. In the NETHERLANDS, the consumer is released from all obligations. As a result, any contractual agreements performed have to be returned. BULGARIAN law only states vaguely that the consumer will be released from any obligations under the contract. Both parties have to return what they received from the contract partner, but the consumer does not owe the trader any indemnity or damages. In the UNITED KINGDOM and IRELAND, the reimbursement of the purchase price is secured by a lien, which the consumer has on the goods that have been supplied under the contract. The consumer is obliged to make the goods available for collection from his home and to take reasonable care of those goods. In Ireland,<sup>149</sup> if the trader has not returned all monies due, ownership rights for the goods pass to the consumer three months after the date on which the consumer has delivered or posted the cancellation notice.

It should be noted that such differences in national provisions in terms of the length and the beginning of the withdrawal period and the effects of withdrawal may cause a barrier to trade, because the trader, who has to inform the consumer of his withdrawal right, may have to adapt this information to comply with respective national laws. It is therefore impossible to draft a notice for cross-border use.

### **3. Other consumer protection instruments in the field of doorstep selling**

As the right of withdrawal is the only consumer protection instrument Directive 85/577 provides for, many, if not all, member states have enacted other protection instruments applicable in the field of doorstep selling. A few examples may illustrate this. SLOVAKIA, for instance, has introduced a time limit for doorstep selling activities (working days: from 8 A.M. to 7 P.M.; non-working days: from 10 A.M. to 3 P.M.),<sup>150</sup> and additionally requires the trader to be licensed. In MALTA, a licence is necessary, too. Operating as a door-to-door salesman without a licence is an offence and, on conviction, the salesman is liable to a fine and/or imprisonment. Furthermore, a person who calls at a consumer's home or place of work

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<sup>149</sup> Article 6(4) European Communities Regulations, 1989 (Cancellation of Contracts negotiated away from business premises).

<sup>150</sup> Article 5(1) of Act 108/2000 on Consumer Protection in Doorstep Selling and Distance Selling.

to negotiate a doorstep contract and refuses to leave when so requested is guilty of an offence and, on conviction, liable to a fine. In FRENCH law, a ban on doorstep selling applies to contracts related to legal consultation, the drafting of legal documents, as well as to distance learning. HUNGARIAN law prohibits the sale of the following goods in doorstep selling situations: products subject to excise duties, seeds, drugs and medication, pesticides, flammable products, hazardous waste, precious metals and stones (also jewellery), food (except for fruit and vegetables), and goods prohibited by other legislative acts.<sup>151</sup> The ECJ has frequently ruled in the course of its *Keck* case law that such provisions concerning pure selling arrangements do not infringe Art. 28 EC Treaty, as long as the provisions do not affect products from other member states more than they affect domestic products.<sup>152</sup> However, the recent example of the ECJ case, C-441/04 – *A-Punkt-Schmuckhandel*, shows that such provisions may, in practical terms, hinder cross-border business. In this case, a trader sold jewellery in a private home in Austria and thereby infringed an Austrian provision prohibiting the sale of silver jewellery in a doorstep situation. The seller, a company with headquarters in Germany, sold jewellery itinerantly in different EU countries and relied on the fact that the sale of silver jewellery in private homes was legal in, for example, GERMANY, ITALY or the UNITED KINGDOM. The upshot of this situation is that a trader cannot expand his business model throughout Europe.

In ROMANIA there are no other specific rules in Ordinance 106/1999 except for the provisions on the liability/sanctions applicable in case the provisions of the said ordinance are breached.

In BELGIUM, alongside section 11 (Doorstep Selling) of the Trade Practices Act, there are two other Acts<sup>153</sup> containing consumer protection measures in the field of doorstep selling. The scope is mainly (but not exclusively) focused on market fairs and fairground activities. The trader and his representatives must be licensed.<sup>154</sup> Furthermore, the itinerant sale of certain goods is prohibited (medicines, medical and orthopaedic devices, products normally sold by an optician, precious metals and stones (also jewellery), weapons and ammunition)<sup>155</sup> and there is a time limit on doorstep selling activities, which must be conducted between 8 a.m.

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<sup>151</sup> Article 1(1) of Government Decree 370/2004 (XII.26.) on Doorstep Selling.

<sup>152</sup> See, as a recent example, the ECJ case C-441/04 – *A-Punkt-Schmuckhandel*.

<sup>153</sup> Act of 25 June 1993 on the Practice and the Organisation of Itinerant and Fairground Activities (Itinerant Trade Act) and the Royal Decree of 24 September 2006 on the Exercise and the Organisation of Itinerant Activities.

<sup>154</sup> Itinerant Trade Act, Art. 3 and Royal Decree on Itinerant Activities, Art. 20-22.

<sup>155</sup> Royal Decree on Itinerant Activities, Art. 5.

and 8 p.m.<sup>156</sup> Under BULGARIAN law, contract terms that aim to limit or deprive the consumer of his rights are deemed null and void.

Further consumer protection instruments may become applicable as a result of other EC measures. Contracts concluded in doorstep situations may also fall under other consumer protection directives containing information requirements (e.g. Consumer Credit) or a right of withdrawal (e.g. Timeshare). In its judgment C-423/97 – *Travel VAC*, No. 23, the ECJ ruled that, in general, such directives are applicable in parallel, unless there is a provision which rules out the application of other directives. An example of such a provision can be found in Art. 13 of the Distance Selling Directive. Like most of the other directives, Directive 85/577 does not contain any such provision. It is therefore unclear to what extent the different information requirements provided for under the relevant directives, and different particulars pertaining to the right of withdrawal (if any), might impinge on the application of Directive 85/577.

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<sup>156</sup> Royal Decree on Itinerant Activities, Art. 19.

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<i>Consumer Law Compendium</i>	<i>Comparative Analysis</i> A. Doorstep Selling Directive (85/577)	<b>209</b>
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<i>Consumer Law Compendium</i>	<i>Comparative Analysis</i>	<b>210</b>
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