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**Information Requirements in the
Consumer Rights Directive Proposal and
in Other Directives**

IMCO



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Information Requirements in the Consumer Rights Directive Proposal and in Other Directives

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STUDY TEAM

Dr. Frank Alleweldt (Project director)
Prof. Dr. Peter Rott (Lead author)
Prof. Dr. Christian Twigg-Flesner (Second reader)
Dr. Senda Kara

RESPONSIBLE ADMINISTRATOR

Ms Elke Ballon
Policy Department Economic and Scientific Policy
European Parliament
B-1047 Brussels
E-mail: elke.ballon@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:

poldep-esc@europarl.europa.eu

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1. INFORMATION REQUIREMENTS IN THE PROPOSED CONSUMER RIGHTS DIRECTIVE

KEY FINDINGS

- The information obligations of the proposed Consumer Rights Directive and Directives 2000/31/EC on electronic commerce, 2006/123/EC on services in the internal market, and 2005/29/EC on unfair commercial practices partly overlap without being identical.
- One information obligation that features in both the E-Commerce Directive and the Services Directive could be integrated into Article 5 of the proposed Consumer Rights Directive: Information concerning details enabling the trader to be contacted rapidly and communicated with directly and, as the case may be, by electronic means.
- The E-Commerce Directive and the Services Directive contain some information requirements specific to the objectives of these directives that are not necessary in the context of general consumer contract law.
- The Services Directive 2006/123/EC deals with a number of issues in a less comprehensive way than Article 5 of the proposed Consumer Rights Directive. It could be amended accordingly in order to avoid inconsistency.
- The Unfair Commercial Practices Directive 2005/29/EC and the proposed Consumer Rights Directive would work hand in hand. They complement each other.

1.1. Introduction

The proposed directive contains a set of information requirements that apply to all contracts for goods or services, and additional information requirements for specific distribution methods, namely off-premises contracts and distance contracts. The first group of information requirements may overlap with information requirements that are regulated in other directives. In the cases of information requirements for off-premises contracts and distance contracts the limited situational scopes of application must be taken into account.

The relationship between the proposed Consumer Rights Directive and other directives containing information obligations is addressed in Article 3 (4) of the proposal, according to which Articles 5, 7, 9, and 11 shall be without prejudice to the provisions concerning information obligations of the E-Commerce Directive 2000/31/EC and the Services Directive 2006/123/EC. This means that the provisions of the two latter directives are not precluded by the total harmonisation character of the proposed Consumer Rights Directive but apply in addition to the information obligations of Articles 5, 7, 9, and 11.¹ The relationship between the proposed Consumer Rights Directive and the Unfair Commercial Practices Directive 2005/29/EC is not addressed in Article 3. That relationship is only addressed in recital (61) with regard to the unsolicited supply of goods or services to consumers.

The basic assumption underlying this briefing paper is that that the information requirements contained in the proposed Consumer Rights Directive should be fulfilled in their respective scopes of application but that no inconsistencies with existing legislation should arise.

¹ Although it might be preferable to have the information obligations in one place in the text of EU legislation, the real burden will be on national legislatures: when transposing the directive, they may wish to consider whether all the information obligations applicable to consumer contracts ought to be consolidated in one place in national law.

Such inconsistencies might imply making amendments to the proposal as well as amendments to sector-specific existing legislation. Financial services are excluded since they are the subject of another briefing paper.

1.2. Overlaps with the E-Commerce Directive 2000/31/EC

1.2.1. The scope of application of Directive 2000/31/EC

The scope of application of Directive 2000/31/EC is described in its Article 1 (1). It applies to information society services, as defined in Article 2(a) of Directive 2000/31/EC with Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC: any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

Quite naturally, there is no overlap with the information obligations for off-premises contracts. In contrast, the general information obligations of Chapter II of the proposed Consumer Rights Directive apply, to the extent that the particular contract falls within the scope of application of Chapter II; financial services, in particular, are excluded from its scope. Moreover, electronic commerce contracts are invariably also distance contracts as defined in Article 2 (6) of the proposed Consumer Rights Directive (unless they are exempted from the rules of Chapter III related to distance contracts, according to Article 20 (1) and (3)).

This corresponds to the current situation: According to Articles 5 (1) and 6 (1) of Directive 2000/31/EC, the information requirements of these articles apply in addition to other information requirements established by EU law, in particular those of the Distance Selling Directive 97/7/EC.¹

1.2.2. General information requirements in Article 5 of Directive 2000/31/EC

Article 5 of Directive 2000/31/EC regarding general information requirements covers the following items:

- (a) the name of the service provider;
- (b) the geographic address at which the service provider is established;
- (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
- (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
- (e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
- (f) as concerns the regulated professions:
 - any professional body or similar institution with which the service provider is registered,
 - the professional title and the Member State where it has been granted,
 - a reference to the applicable professional rules in the Member State of establishment and the means to access them;

¹ See also recital (11) of Directive 2000/31/EC.

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment.

Only items a) and b) are included in Article 5(b) of the proposed directive. The other items serve to identify the service provider in an otherwise anonymous internet environment and to ensure that the provider can be contacted by e-mail. They therefore serve a different purpose than the items of information to be provided under Chapter II and the rules on distance selling of the proposed Consumer Rights Directive, which are intended to make the consumer aware of the main characteristics of the goods or services, the future contracting partner and the contract. Thus, most items of information as listed in Article 5 of Directive 2000/31/EC are not essential for consumers outside the internet environment. The only rule that could be included into the catalogue of Article 5 of the proposed Consumer Rights Directive is the requirement to give the trader's e-mail address (where applicable), since e-mail has become a common means of communication also between consumers and traders who have not concluded their contracts in an online situation that comes under Directive 2000/31/EC. Here, one could use the terminology of Article 22(a) of the Services Directive 2006/123/EC (see below): "and details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means".

There is no provision corresponding to Article 7 of the proposed Consumer Rights Directive on intermediaries in the E-Commerce Directive.

As far as they overlap, Article 5 of Directive 2000/31/EC and Article 5 of the proposed Consumer Rights Directive should both be maintained since the respective scopes of application are not identical. For example, Article 5 applies to financial services whilst Article 5 of the proposed Consumer Rights Directive does not.¹

1.2.3. Article 6 of Directive 2000/31/EC on commercial communications

Article 6 relates to commercial communications, which is defined in Article 2(f) of Directive 2000/31/EC as "any form of communication designed to promote, directly or indirectly, the goods, services, or image of a company, organisation, or person pursuing a commercial, industrial, or craft activity or exercising a regulated profession". Article 6 deals with fair trading,² which is now also dealt with by the Unfair Commercial Practices Directive 2005/29/EC by regulating issues such as promotional offers and promotional competitions or games. It aims to establish transparency of such commercial communications but does not establish pre-contractual information obligations otherwise.

1.2.4. Article 10 of Directive 2000/31/EC on pre-contractual information

Article 10 (1) requires the following pre-contractual information to be given by the trader:

- (a) the different technical steps to follow to conclude the contract;
- (b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;
- (c) the technical means for identifying and correcting input errors prior to the placing of the order;
- (d) the languages offered for the conclusion of the contract.

¹ As noted above, it does mean that national legislatures might have to consider how to transpose the directive into their national laws with a view to consolidating all the information obligations in respect of consumer contracts, including those of wider application.

² See also recital (29) of Directive 2000/31/EC.

Additionally, according to Article 10 (2) Member States shall ensure that the service provider indicates any relevant codes of conduct to which the provider subscribes and information on how those codes can be consulted electronically.

Article 10 (1)(a) to (c) deals with issues that are typical to electronic contracts. There are no corresponding provisions in the proposed Article 9 on distance contracts. Language requirements have been subject to much debate and, with the exception of the Timeshare Directive,¹ they have never been integrated into EU consumer contract legislation. Thus, there is no equivalent to Article 10 (1)(d) in the proposed Consumer Rights Directive. A language provision does, however, make sense in an online environment, in particular since many providers have different language versions of their standard contracts available.

Article 10 (2) on codes of conduct overlaps with Article 9 (d) of the proposed Consumer Rights Directive on off-premises contracts and distance contracts. The latter provision is slightly broader in that it not only requires information on electronic availability but availability in general. Thus in most cases the trader who fulfils the obligation stemming from Article 9(d) will fulfil the obligations from Article 10 (2) of Directive 2000/31/EC at the same time. Nevertheless, the latter provision should be maintained since it covers certain types of contract that are exempted from the scope of application of Chapter III on off-premises contracts and distance contracts according to Article 20 of the proposed directive. One example is contracts related to certain financial services.

1.3. Overlaps with the Services Directive 2006/123/EC

1.3.1. The scope of application of Directive 2006/123/EC

Directive 2006/123/EC applies to “services” that are defined in Article 4 (1) of this Directive as “any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty” (now Article 57 TFEU). The contractual activities of service providers clearly also come under the proposed Consumer Rights Directive where services are rendered to consumers. The Services Directive contains information obligations in its Article 22 and explicitly states in Article 22 (5) that these information requirements are in addition to requirements otherwise provided for in EU law.

1.3.2. Information obligations of Article 22 of Directive 2006/123/EC

According to Article 22 (1) of the Services Directive, providers have to make the following information available to the recipient:

- (a) the name of the provider, his legal status and form, the geographic address at which he is established and details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means;
- (b) where the provider is registered in a trade or other similar public register, the name of that register and the provider's registration number, or equivalent means of identification in that register;
- (c) where the activity is subject to an authorisation scheme, the particulars of the relevant competent authority or the single point of contact;
- (d) where the provider exercises an activity which is subject to VAT, the identification number referred to in Article 22(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment;

¹ See Article 5 (1) of Directive 2008/122/EC.

(e) in the case of the regulated professions, any professional body or similar institution with which the provider is registered, the professional title and the Member State in which that title has been granted;

(f) the general conditions and clauses, if any, used by the provider;

(g) the existence of contractual clauses, if any, used by the provider concerning the law applicable to the contract and/or the competent courts;

(h) the existence of an after-sales guarantee, if any, not imposed by law;

(i) the price of the service, where a price is pre-determined by the provider for a given type of service;

(j) the main features of the service, if not already apparent from the context;

(k) the insurance or guarantees referred to in Article 23(1), and in particular the contact details of the insurer or guarantor and the territorial coverage.

In addition to this, the trader must give certain information at the recipient's request under Article 22 (3). This includes information on price calculation, where the price is not pre-determined, on professional rules, multidisciplinary activities, and partnerships, as well as on codes of conduct and dispute settlement.

A number of the requirements of Article 22 (1) are also mentioned in Article 5 of the proposed Directive, namely:

- lit. j), largely corresponding with Article 5 (1)(a) of the proposed directive;
- lit. a), largely corresponding with Article 5 (1)(b) of the proposed directive; whereby the part related to the details enabling the trader to be contacted rapidly and communicated with directly could be integrated into Article 5 (1)(b);¹
- lit. i), dealt with by Article 5 (1)(c) of the proposed directive, whereby the latter provision is far more comprehensive; and
- lit. h), covered by Article 5 (1)(f) of the proposed directive, which is however more comprehensive by not only dealing with after-sales service but also with commercial guarantees.

Two items of Article 22 (3) overlap with information requirements for off-premises contracts and distance contract, namely those on codes of conduct and on dispute settlement schemes, see Article 9(d) and (e) of the proposed directive. The requirements are however not identical and could be streamlined. Of course, Article 22 (3) of the Services Directive also applies outside the realm of off-premises and distance contracts.

In contrast, the requirements of Article 5 (1)(d) of the proposed directive concerning arrangements for payment, delivery, performance, and the complaint handling policy, if they depart from the requirements of professional diligence, or Article 5 (1)(e) concerning the right of withdrawal, Article 5 (1)(g) and (h) on the duration of the contract and finally Article 5 (1)(i) on deposits or similar to be paid by the consumer are not mentioned in Article 22 of the Services Directive.

On the other hand, a number of items mentioned in Article 22 of the Services Directive are not mentioned in Article 5 and 7 of the proposed Directive and the additional information obligations of Article 9 on off-premises contracts and distance contracts. Some of them serve to identify the service provider, and they are identical to the respective rules of the E-Commerce Directive 2000/31/EC.

¹ See *supra*, at 1.2.2.

These are the items mentioned in Article 22(b) to (e). The requirement of professional insurance (Article 23) and information thereof in Article 22(k) find their reason in the intention of the Services Directive to enable traders to provide services cross-border, thereby ensuring that customers will be compensated in the case of damage to health and safety or to their property, where the service entails a particular risk. Finally, Article 22(f) is now dealt with, although in different wording, in Article 31 (2) of the proposed directive on the incorporation of contract terms.

While some of the differences seem to be justified by the different aims of the Services Directive 2006/123/EC and the proposed Consumer Rights Directive,¹ the inconsistencies related to issues that are regulated by both directives, such as the price, seem to be unnecessary. They can lead to a situation where a trader whose activities are within the scope of application of the Services Directive uses two different sets of information obligations, depending upon whether the activity also comes under the proposed Consumer Rights Directive or not. It should be noted that the rules of Article 5 of the proposed directive are generally more comprehensive. Thus, by fulfilling the information requirements of Article 5, service providers would also fulfil the similar information requirements of Article 22(h) to (j) of the Services Directive, and also of Article 22(a), with the exception of the details enabling the trader to be contacted rapidly and communicated with directly. Still, the streamlining of these information obligations by amending Article 22 of the Services Directive accordingly might be a good idea.

1.4. Overlaps with the Unfair Commercial Practices Directive 2005/29/EC

The Unfair Commercial Practices Directive contains information obligations in the disguise of the prohibition of misleading omissions.

1.4.1. General information requirements under Article 7 (1) of Directive 2005/29/EC

Under Article 7 (1) of the Directive, a commercial practice shall be regarded as misleading if, in its factual context taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. This provision has established an entirely new information requirement for all traders engaging in commercial communication.

As a general clause, the provision is necessarily open-worded, and the information to be provided depends on the circumstances of the individual case. It should, however, be noted that the content of "material" information is further concretised in Article 7 (4) and (5), which work with precise lists and which are dealt with hereinafter.

1.4.2. Invitation to purchase under Article 7 (4) of Directive 2005/29/EC

More specifically, Article 7 (4) states certain information requirements once the commercial communication reaches the stage of an invitation to purchase. The five items of information mentioned in Article 7 (4) are identical with the items of information envisaged in Article 5 (1)(a) to (e) of the proposed Consumer Rights Directive. Thus, no conflicts arise. Nevertheless, both provisions should be maintained since the respective scopes of application are not identical. For example, Article 7 (4) applies to financial services while Article 5 of the proposed Consumer Rights Directive does not. Also, the proposed Consumer Rights Directive clearly envisages that there will be "contract law remedies" to be determined by national law for a failure to provide information as required by Art. 5 (cf. Article 6 (2)), whereas Directive 2005/29/EC does not impose any such obligation.

¹ In particular the omission of the items of information listed in Article 22(b) to (e) and (k) of the Services Directive in Article 5 of the proposed Consumer Rights Directive.

1.4.3. The interaction of misleading omissions and consumer contract law under Article 7 (5) of Directive 2005/29/EC

A special rule concerning the relationship between mandatory information obligations stemming from EU consumer contract law and the Unfair Commercial Practices Directive is Article 7 (5), according to which a breach of an information obligation under consumer contract law also constitutes a misleading omission and therefore an unfair commercial practices, triggering the sanctions that national law provides for breaches of unfair commercial practices law. As far as the scope of application of Chapter II of the proposed directive reaches, the information obligations stated there could therefore also be enforced under the law of unfair commercial practices. The same applies to the special information requirements for off-premises contracts and distance contracts that are envisaged in the proposed Consumer Rights Directive. Conversely, as noted above, a failure to provide information as required under the Unfair Commercial Practices Directive could also produce specific “contract law remedies” determined by national law (cf. Article 6 (2)).

1.5. Other Comments

The imposition of information duties has been a hallmark of EU consumer contract legislation from its inception. Reconciling the various information obligations spread across multiple directives has been a challenge for some time. The proposed Consumer Rights Directive could go further in consolidating EU law on pre-contractual information by amending other directives accordingly. The most obvious candidate for this would be the Services Directive 2006/123/EC. This would make it easier for traders to comply with the law, thereby increasing legal certainty. Still, information obligations must be maintained in all three directives, namely in the proposed Consumer Rights Directive, the E-Commerce Directive, and the Services Directive, in order to avoid regulatory gaps that would otherwise result from the incomprehensive scopes of these directives’ application.

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